DePaul University
UNIVERSITY LIBRARIES

DePaul Business and Commercial Law Journal

Volume 2
Issue 4 *Summer 2004: Symposium - Emerging Trends in Commercial Law: Surviving Tomorrow's Challenges*

Article 6

Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases

John Krahmer

Henry Gabriel

Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*

Mr. John Krahmer & Mr. Henry Gabriel

MR. KRAHMER: I have been given the task of discussing an exciting part of the Uniform Commercial Code ("UCC" or "the Code"), Article 1, which is the definition section. I propose to go through outline, briefly noting some of the more significant changes made in revised Article 1.

The first version of the Code celebrates its fiftieth anniversary this year. In 1954, the first version of the Code became effective in Pennsylvania, which was the only state to have actually adopted it. Simultaneously, the New York Law Revision Commission studied the then existing version of the Code, which was highly criticized. This study ultimately resulted in some significant revisions that became the 1962 draft, which was generally adopted around the country. Now, one of the big fights that went on in 1954 was the definition of the meaning of "good faith." There were two opposing camps, composed on one side of Llewellyn and Mentschikoff and the New York Law Revision Commission on the other. The Llewellyn and Mentschikoff side thought that the term good faith should include honesty in fact and observance of reasonable commercial standards. The New York Law Revision Commission, highly influenced by the New York Banking Association, disagreed, stating that the definition should include only honesty in fact, which is what ended up in Article 1. Ultimately, when Article 2 was drafted and the revisions were made in 1962, it combined both elements and defined good faith as honesty in fact and the observance of reasonable commercial standards. In 1990, Article 3 was rewritten and it used the dual element aspect of good faith. During this time period, revisions of the other Articles took place. The Article 1 definition became more and more outmoded. So the time came to revise Article 1 and to update a number of those definitions. From the historical standpoint, it became important to revise Article 1 to keep up with the other changes that had been made.

---

* This is an edited version of the transcript from the third panel at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, Emerging Trends in Commercial Law: Surviving Tomorrow's Challenges, held on April 15, 2004.

Article 1, in its revised form, has not had the same degree of success as revised Article 9, which was adopted very quickly in all fifty states. Revised Article 1, as of the present time, has been adopted by only four United States jurisdictions: Idaho, which adopted it this year, Texas and Virginia, which adopted it a year ago and the US Virgin Islands, which adopted it two years ago. Of those four, Idaho, Texas and Virginia have rejected a proposed section in revised Article 1 designated as section 1-301, dealing with the conflict of laws issue.

The first change I want to mention is the provision dealing with the scope of the article. Old Article 1 did have a scope provision, but revised Article 1 specifies that the provisions in Article 1 apply to a transaction to the extent those transactions are governed by any of the other Articles of the Code. In effect, this states that the provisions in Article 1 are only applicable if you find that a transaction is otherwise governed by the Code. If it is not otherwise governed by the Code, Article 1 has no particular authority.

Now, what does that mean in a real-life context? Let me give you a relevant case citation. In *Dresser Industry v. Paige Petroleum*,[1] the Texas Supreme Court confronted the issue of the meaning of the term "conspicuous" in a non-UCC situation. The Court concluded that it would apply the definition of conspicuous as contained in Article 1 of the UCC to this non-UCC transaction. The Court announced that it would apply the definition of Article 1 for other types of transactions whether or not the transaction was covered by a particular Article of the Code. Notice that this revision of Article 1 states that unless the provision fits into some other section of the Code, then the Article 1 definition has no special meaning. That means Texas, which has case law stating that the Court will apply the Code definition of conspicuousness to other types of transactions, will probably relitigate this issue. The underlying statute now provides a definition of conspicuous and includes a safe harbor provision. If they change the Illinois statute, then cases using the old statute are no longer good law. So that question is probably going to come up with some of these kinds of seemingly very modest, almost trivial kinds of revisions. Nevertheless, they will re-raise some issues.

Variation by agreement is referred to in a number of places in Article 2 with the phrase, "unless otherwise agreed." If this phrase is used at the very beginning of the section, then the parties are free to otherwise agree from the statutory provisions. That has been changed a little bit. The meaning of the phrase "unless otherwise agreed" stays

1. 853 S.W.2d 505 (Tex. 1993).

the same. However, Article 1 now points out that simply because a provision does not specifically say "unless otherwise agreed", a party can modify some of these other provisions. So there is going to have to be a very careful analysis of each one of the provisions in the various revised Articles 2 through 9 that will have to be tested against this question of, "is this one of those that they meant in Article 1 that could, in fact, be contractually modified?" They expanded this to say that even if it does not say "unless otherwise agreed," a party may be able to otherwise agree.

The conflict of laws provision is section 1-301 of the Code. This has been very controversial. The three states that have adopted revised Article 1 have rejected the official text version of section 1-301. As revised, section 1-301 states two principal rules: (1) the commercial transaction rules, and (2) the consumer transaction rules.

In the commercial transaction setting, and this is generic, the text of section 1-301 states a general principle that the parties to a commercial transaction are free to choose the law of any state or nation to govern their transaction whether or not that transaction has any particular relationship to that state or nation. For example, a company in Illinois could contract with a company in New York and they could contract that the law of California is going to govern the transaction even though California has no other contact with the transaction. That particular provision raised some questions. On the consumer side, there is a complex protective provision in section 1-301 stating that a party must choose the law of the location where the consumer resides. In the case of sale of goods, the parties must choose the law of the location where the contract is signed or where the goods are going to be delivered. In addition, built into section 1-301 is that parties, even in a commercial transaction, could not choose the law of a state or nation that violates a fundamental policy of the forum state. The three states that considered that provision found that it went a little further than they were willing to go. Therefore, those states, in effect, retained the old version of what was then section 1-105 and have left it with a "reasonable relationship" text. Thus, the parties can choose the law of the state or nation that bears a reasonable relation to the transaction. Those states have left it essentially the same. I think we are probably seeing a movement in the direction to this kind of change in the law. However, it appears that section 1-301 is not going to be widely adopted. It would not surprise me terribly if the National Conference of Commissioners goes back and puts this revision back into the form of section 1-105. It will probably come about at some time. Maybe not within the next five or ten years, but at some

point, the concept that the parties should be free to choose the law they want to govern the transaction without any necessary relationship will carry the day.

In particular, I should mention that there is one example in the Code where the parties do have absolute freedom of choice in terms of law. That is in Article 5 dealing with letters of credit. Why is that? It is because New York has the most widely developed letter of credit law anywhere. It is not at all uncommon to find parties in letter of credit transactions choose the law of New York, even though their transaction otherwise has nothing to do with New York law. It obviously makes sense that the parties would want to choose developed law. That does not entirely exist in other Articles of the Code. Therefore, section 1-301 and the revision, have caused some questions to arise.

The concept of electronic record keeping was introduced in Article 9 with the idea that you could have a security agreement in the form of an electronic record, electronic chattel, paper and so forth. This has simply been moved over into Article 1 to apply generically to the Code as a whole. This certainly recognizes that electronic contracting is here and it is here to stay.

On the definition portion, the term "conspicuous" now has a safe harbor provision. The safe harbor provision spells out that if you do these things, including a certain size type, you are home free as far as whether or not something is conspicuous.

All of the information concerning notices, and record sending have been rewritten to accommodate electronic communications of one kind or another.

There have also been organizational changes. At least with a security interest, the concept of distinguishing has been moved to its own section. The definition of the term "present value" stayed back in the definitional sections, but the "economic reality" test has now been moved into a separate section. The obligation of good faith section has not been substantively changed, but it has been renumbered. Thus, it is basically reorganization without any real change in substance.

The definition of good faith has been changed. Those jurisdictions which allow for a separate cause of action for a violation of the duty of good faith, have noticed an expansion in that cause of action. Jurisdictions that have denied a separate cause of action for breach of good faith, such as Washington and Maine, could see an important change as to the operation of the duty of good faith.

The concepts of course of performance, course of dealing and trade usage which used to be partly in Article 1, and partly in Articles 2 and 2A, have now been combined into revised Article 1. Any state that has adopted revised Article 1 must in turn repeal those other provisions in Articles 2 and 2A.

There used to be a generic statute of frauds in Article 1 that covered transactions not included within some other Article of the Code. That has simply been eliminated. So there is now no generic statute of frauds left in the terms of Article 1.

We are not going to talk about it in any greater detail that we already have, but the official Texas version of revised section 1-301 reads a lot like old section 1-105. The revised section 1-301 attempts to explain and justify itself as to why it does what it does. My guess is that most of the states are probably going to end up with the old version of section 1-105.
Thank you.

MR. GABRIEL: Being from Louisiana, I had the privilege of drafting a statute that will never govern me.[2] However, the rest of you likely will be subject to this statute after it has been adopted by the respective states.

The revisions of the sales and leases provisions of the Uniform Commercial Code have been a long process. Some people think the revision of Article 2 of the Uniform Commercial Code ("UCC" or "the Code"), which took fourteen years, took for an unduly long time. However, it is important to keep in mind that for the original UCC, the study group began in 1938 and it was finally promulgated in 1952. Therefore, as with the revisions, it took fourteen years to draft the original code. It took another two years before any state adopted the original code, and it was another two years later before a second state adopted the code. These processes move very slowly.

When one sees the official draft of the revisions, Articles 2 and 2A have not been "revised." They have been "amended." This is a little turn of phrase. What it means to have an amendment as opposed to a revision of a uniform act entails two considerations.

First, all uniform acts go through the style committee of the Uniform Law Commission. Regardless of how the statute is drafted, the statute will be styled. The style committee updates the language of the entire statute to conform to modern statutory language and con-

2. Henry Gabriel was the reporter for the revisions of Article 2: Sales and Article 2A: Leases of the Uniform Commercial Code. Professor Gabriel is from Louisiana, and the State of Louisiana has adopted all of the articles of the Uniform Commercial Code except articles 2 and 2A.

struction, and these changes would include those sections that had not otherwise been changed. A problem that we perceived was that there would be changes to sections that were not changed for substantive reasons, but were changed just for style reasons alone, and these changes might inadvertently suggest that substantive changes were being made when that was not the case. This fear was stated by one observer as the possibility of "needless tinkering."

A second aspect of an "amendment" instead of a "revision" is the signal that unless a section has been changed, there has been no attempt for wholesale revision of the case law. Therefore, existing case law should still control unless there has been a substantive change to a specific section.

Let me give you the highlights of what we have done with Article 2 and 2A. I am going to dismiss Article 2A, which covers leases in personal property, very quickly. The amendments to Article 2A are only there to track equivalent amendments in Article 2. This was not primarily a revision of Article 2A. It was a revision of the sale of goods provisions in Article 2. The lease provisions in Article 2A are changed only to conform Article 2A to the new language or definitional changes and the new concepts in Article 2.

I would like to start with what I call the trouble areas. There are a couple of big issues with the revisions.

The first question that has been posed and will continue to be posed is whether the code is broken in the first place. There has been some resistance to the revisions on the basis that there was not a necessary reason for the revisions; that there was not enough to change to warrant revising something as sacred in American law as the Uniform Commercial Code.

A second concern is the question of what happens when some states start to adopt the revisions while other states are slower to do so. This will cause a certain level of non-uniformity of the Code. The short answer is "so what". One has to keep in mind that the Code has never been uniform and there have always been non-uniform amendments in many states. With the exception of the recent revisions to Article 9 of the uniform Commercial Code, all amendments or revisions to the Code have taken several years for adoption, and therefore this issue of a period of non-uniformity is not new, and it has never resulted in any substantial problems.

There are actually three specific areas in the revisions that have caused the most criticism. The first is the new statutory concept of a remedial promise. It is not really a new concept; it is just a new term in the statute.

Here is the problem: I buy a new car, and not only do I have the warranties for the quality of the car, but the seller also promises to repair or replace any defective parts as well as to do various specific service work. If the seller were not to do the work or repairs as promised, would that be a breach of a warranty? And if it were a breach of a warranty, then would it be governed by Article 2 and therefore subject to the statute of limitations from the time of delivery.[3] The problem is that there really is not a breach of the promise to do service work or repair work until the work is not done. To base a statute of limitations question on when the car was received, and not when the seller did not repair the car, does not make sense. Many courts realized that those promises are not really part of Article 2 and that these promises come from some other area of contract law.

On the other hand, many courts have treated these promises as part of the initial sale and have locked the buyer into the statute of limitations based on the time of delivery. To some extent, mass market sellers of consumer goods use language that encourage these findings by courts, because under the Magnuson-Moss Act,[4] the federal law mandates language in consumer contracts that refer to "warranties" for what are "remedial promises" under the revisions of Article 2.[5] Thus, many standard form contracts speak of these service obligations as warranties because the federal law mandates it. To clear up this confusion, we have introduced the new concept of "remedial promise" into article 2 solely to resolve this statute of limitations problem.

I would not have thought the introduction of the term and concept of remedial promises into the code would be very controversial. In fact, I thought this clarification would be welcome because we would have courts uniformly understanding the nature of these promises and how they fit in with the Code. Nevertheless, there has been a lot of criticism of remedial promises being injected into the code.

Another concept that has received much criticism is the new Article 2, section 2-313B. There are new sections 2-313A[6] and 2-313B.[7] The reason these are enumerated with a large A and a B is because sections 2-314 and 2-315 have already been taken. These new sections create two warranty-like obligations in revised Article 2. If I make what would have been an express warranty under original article 2,

3. U.C.C. § 2-725.

4. 15 U.S.C. §§ 2301-2312.

5. 15 U.S.C. § 2302.

6. Revised U.C.C. Section 2-313A provides specifically for the obligation to the remote purchaser created by record packaged with or accompanying goods.

7. Revised U.C.C. Section 2-313B provides for obligations to the remote purchaser created by communication to the public.

the law is the same. However, article 2 deals with transactions between buyers and seller, and therefore it presupposes that the parties are in privity. Yet, often the manufacturer of goods, when the manufacturer makes a promise about the goods, is really making the promise to someone down the distribution chain. For example, when a car manufacturer advertises on television, the manufacturer is not directing the advertisement of its product to the dealers, but are directing it to the ultimate purchasers.

The question is could these non-privy promises flow through to the parties further down the distribution chain. The case law has always been unclear, and the answer has depended upon a combination of factors such as the type of damages that the buyer received as well as whether the promise was an express or an implied one.

These questions have been addressed in these new statutory provisions. Thus, if a seller makes what would otherwise be an express warranty that is contained in the packaging of he goods, the promises in that material is covered under section 2-313A.[8] That has not been very controversial.

Similarly, under new section 2-313B, if where an upstream seller makes what would otherwise be an express warranty in advertising or another similar communication, the seller is responsible for those promises to a downstream buyer who could reasonably be expected to rely on the promise.[9] This provision has been the subject of much criticism, and as Article 2 works its way through the legislatures this section is likely to spark a lot of debate.

Now, I have always considered this criticism as a bit harsh. I assume that if a seller does not want to be bound by promises about a product, there is a very easy way to eliminate that possibility. Do not make promises in the first place. So it has always seemed to me sort of a strong criticism or an unfocused, unfounded criticism when people say we do not want to be bound by what we promise. But this is an area of concern and one that I think may continue to cause problems with the revisions.

The other area in the revisions that has been subject to concern is the question of scope. When the final drafting committee began its work in 1999, the work was primarily done in a year. Then it took three more years to finish it because we spent three years debating the scope of Article 2.

---

8. Rev. U.C.C. § 2-313A(3).

9. Rev. U.C.C. § 2-313B(3).

This debate is a political debate. It is not one of substance. Article 2 deals with transactions in goods, and the fight was what is a "good."[10] The question is whether a given industry's products are covered by Article 2. I produced 141 drafts of the scope of Article 2. I am happy to say that the first one that I produced was the one that was adopted, and it still covers transactions in goods.

The core debate was how to deal with software. The scope provision has not been changed, but we did change the definition of goods to explicitly exclude information.[11] The assumption is that software is by definition information. Therefore, in a pure information contract, you are governed by some other law than Article 2, such as the Uniform Computer Information Transactions Act. If the transaction is the sale of goods without software, Article 2 applies to the transaction.[12]

The question is the middle ground. It is one thing to discuss a pure software transaction. It is another thing to discuss transactions of pure tangible goods. However, your refrigerator, your toaster, most of the wrist watches you have on, are tangible goods with some software built in. What do we do with those mixed transactions? The answer is that we leave it to the courts. I personally believe this is the soundest decision. If after having put as many minds to work as hard as we did on the problem, and the fact that no one could come to a workable solution, maybe the answer is to ask the courts to do what the courts are pretty good at doing. Work on it on a case-by-case basis to determine whether this transaction is within Article 2, outside of Article 2 or partially within Article 2 and partially outside. That is how we resolved the scope issue. Hopefully this will be seen as a workable solution.

An interesting fact is that the rest of the world does not necessarily make the division between goods and information we make. The Germans, for example, simply consider mass marketed software as goods. The Danish take the position that software is a good as well. To the Danish, it is a virtual good. The traditional division is that software, if not considered goods, is considered services, and the law in many parts of the world have taken the position that software, to the extent that it is not categorized as goods, can be categorized as

10. Rev. U.C.C. § 2-103(k) provides: "Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, or choses in action.

11. Rev. U.C.C. § 2-103(k).

12. Rev. U.C.C. § 2-103(k).

services. I think it is fair to say that it is pretty much of an American position to treat software as information. We need to appreciate our insularity on this subject.

I have always thought Article 2 was and is fairly balanced. It does not privilege buyers over sellers or vice versa. But in the debates during the revisions, there was often a tension based on an assumption that the whole world is somehow divided up into sellers, which were all big, corporate sellers, and then there were consumer buyers. There appeared to be in the debates no middle ground assumed; no small sellers or commercial buyers. Thus, this tension and polarity exists as if we are not all consumers in one way or another. Consumer issues were always raised in the process as if somehow we were drafting a uniform consumer code and not a Uniform Commercial Code. I think this tension took up much of the energy that could have been usefully used otherwise.

Nevertheless, the revisions provide much needed clarification on some consumer interests. First, revised Article 2 specifically provides that any rule of law, any statute, any court ruling, or any administrative ruling that governs consumer issues is not displaced by Article 2.[13] This relationship was not always clear prior to the revisions. Of course, we have to keep in mind, as lawyers, whenever you enact a new statute, be it an amendment or revision of an old statute; there is an argument that the newer statute, to the extent that it might contradict an older statute, would displace it. Legislative intent would suggest that the newer law is the governing law in the case of a conflict. To dispel this possibility, revised Article 2 specifically provides that it does not displace any consumer protections whatsoever.[14]

Another area that is not specific to Article 2, but has to be kept in mind, is the world of electronic contracting. There is this big flurry in all of our statutes to provide for electronic contracting. Amazon.com sold a couple billion dollars worth of books and made a phenomenal amount of money selling books over the internet without a clue whether they had the legal authority to do it or not. They did not know whether it violated the statute of frauds. They did not care because they simply factored in the small amount of legal risk that could be there and said it is better to make money. So we have now moved into the area of E-contracting, and our statutes are trying to catch up with business models. But it is important to keep in mind that all of these state statutes, such as the Uniform Commercial Code, are gov-

13. Rev. U.C.C. § 2-102.

14. Rev. U.C.C. § 2-102 provides, in part: "nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."

erned by Electronic Signatures in Global and National Commerce Act ("E-sign"),[15] and as a federal statute, it preempts state law. E-sign has built into it a tremendous amount of consumer protections.[16] Moreover, that part of the federal statute is not waivable by the states.[17] Thus, when we finished up the revisions of Article 2, we understood that the federal law was going to impose a good number of consumer protections in addition to what was contained in the state law.

There are other small changes that provide for new consumer protections. One of the questions under original Article 2, in the case of the seller's right to cure, was whether the seller could cure not only if the buyer rejected the goods, but also if the buyer revoked acceptance.[18] The cases had never come to any conclusion. The revisions now provide, in appropriate circumstances, that a seller can cure if there has been a revocation of acceptance.[19] However, this is not the case in a consumer contract. The assumption is that, in a consumer contract, if I have received the goods, and they are so defective that I really cannot use them, the seller should not have a second bite of the apple in trying to deliver conforming goods.

There are other changes that primarily help consumers but help other buyers as well. The prior law required a notice of the breach. If the buyer did not notify the seller of a breach, the buyer lost all remedies under the code.[20] Nobody could ever figure out why we had that Draconian law. It has now been revised so that, to the extent that the buyer does not notify the seller of a breach, the buyer is barred from remedies only to the extent that the seller is actually harmed.[21] This is primarily to help buyers who probably would not have any idea that they had to call up the seller and complain before they sued the seller for the fact that the television blew up.

Article 2 has a magnificent new package of electronic contracting provisions. In addition, the Uniform Electronic Transactions Act has now been adopted in forty-three states[22] and probably will be adopted in four or five more this year. Those states that do not provide for the

15. Pub. L No. 106-229, 114 Stat. 464 (2000) (codified as 15 U.S.C. §§ 7001-7006, 7021, 7031).

16. For example, affirmative consent, limitations on particular types of notice that may not be provided by electronic mail, and clear and conspicuous notice requirements, to name just a few.

17. E-Sign § 101 (2000).

18. U.C.C. § 2-508.

19. Rev. U.C.C. § 2-508.

20. U.C.C. § 2-607(3)(a).

21. Rev U.C.C. § 2-607(3)(a)(which provides that a limitation exists only in situations where the seller has been prejudiced by the lack of timely or sufficient notice of breach).

22. For information on the status of UETA's passage in the states, *see* <http://www.uetaonine.com.>

Uniform Electronic Transactions Act by state law are subject to E-sign, which is the federal legislation which provides that if a state have not adopted the Uniform Electronic Transactions Act, then the federal legislation will provide primarily for the same.[23] Now, the state and federal legislation can be boiled down to a handful of principals. They are in effect, that if you do something electronically that would otherwise be required by law to be done by paper, it is okay to do this electronically. In addition, if the law requires a signature, an electronic signature will suffice. In other words, these laws provide for medium neutrality.[24] We do not really care how you do it. These provisions do not create any substantive new rules of law. They simply say an electronic record is the same as a piece of paper. But then these laws, other than Article 2, do not elaborate what the legal effect of that would be. Article 2's provisions, the Uniform Electronic Transactions Act provisions, and E-sign's provisions with some very insignificant differences, all provide this.[25] Thus although revised Article 2 provides for electronic contracting, in many respects, I think these provisions are unnecessary because we have other law that provides for the same thing.

The statute of frauds is the venerable English statute that has been abolished in England for many years for being superfluous and irrelevant. It is also a statute that is truly misunderstood by the majority of lawyers in the world. And yet, we have retained the statute of frauds with a couple of minor changes. The five-hundred dollar limit that everyone learned in law school, which originally was ten pounds sterling when the statute was adopted in the 17th century, has now been raised to five-thousand dollars. The five–hundred dollar limit was actually in the Uniform Sales Act which goes back to 1905. Since the five hundred dollar amount had not dealt with inflation for the last one-hundred years, we decided to inflate it by a factor of ten. Maybe we got it right. I suspect we did not. I think if we studied the numbers, which we never did, it probably should be twenty-five thousand dollars.

There was one issue in which we had an incredibly spirited discussion that went through two annual meetings of the American Law Institute and which was ignored by everybody but the law professors because only the law professors cared. As you remember, section 2-201 says that if there is a quantity term in the writing, then the contract is limited to the amount stated in the quantity term. Now, what

23. E-Sign §§ 101 & 102 (2000).
24. E-Sign § 101.
25. UETA § 7, Comment 1; E-Sign § 101; Rev U.C.C. § 2-204 (general formation).

the statute does not say is that you have to have a quantity term.[26] For purposes of the statute of frauds, Article 2 has never required that the writing that proves the existence of the contract has to state a quantity term. However, the original comments state this requirement of a quantity term, and the comments have always stated that.[27] The debate that went on for several years was whether to remove that line from the comments or not. The line is still in the comments.[28] So according to the comments but not the law,[29] Article 2 requires a quantity term to meet the purposes of the statute of frauds

There are significant changes in the parole evidence rule.[30] As you are aware, when we talk about as the parole evidence rule, we are often speaking of two separate rules. What the terms are in the agreement is the true parole evidence rule. The second question is, once the terms are determined, what do they mean? This question of interpretation is separate from the question of what terms are in the agreement. Original Article 2 conflated these two questions for purposes of course of dealing, course of performance and usage of trade, which are the three categories of evidence in addition to the express terms that are used to interpret what a contract means.[31] Thus, the terms of the original agreement must have been determined to be vague or ambiguous before course of dealing, course of performance and usage of trade could be introduced into the agreement at all. Thus, there was confusion between the question of what is in the contract, and what the contract means. We have corrected that. For purposes of interpreting a contract, parties can always introduce evidence in the course of performance, course of dealing and usage of trade to explain express terms without having to convince the court beforehand that the express terms were unclear in the first place.[32] This is a useful clarification.

My favorite revision is Article 2-207, *i.e.* the battle of the forms. Now, as you all know, old Article 2-207 was based on an arbitrary

---

26. U.C.C. § 2-201(which allows for the omission of a term without providing for a price term limitation) and Rev. U.C.C. § 2-201 (the terms and provision were carried over with minor style changes).

27. 2-201 Comment 1, which provides that"[t]he only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated."

28. Rev. U.C.C. § 2-201 Comment 1.

29. Of course, the Comments to the Uniform Commercial Code are not considered binding and are not adopted; however, they are considered in numerous court decisions.

30. U.C.C. § 2-202.

31. U.C.C. § 2-202(a).

32. By adding an additional provision. Rev. U.C.C. § 2-202(2) which provides: "Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous."

common law principle that was rarely applied anyway. This common law principle was based on the idea was that whichever party got the last piece of paper in won on that parties terms even if the other party had submitted conflicting terms. The problem with this rule was, that when it was applied, it arbitrarily chose one party's terms over the other party's terms. The nice thing about the rule, though, was that it was easy to apply, because all that had to be done was figure out which piece of paper was the last one sent.

That rule did not satisfy the original drafters of Article 2, so they came up with original Article 2-207, which, as you all understand, is totally incomprehensible. Original Comment 3[33] contradicts Original Comment 6.[34] Both comments contradict the express language of part 2 of the article.[35] There are, as you remember, other problems. In addition, part 1 of original Article 2-207 deals with contract formation, while the rest of the section deals with contract interpretation.[36] Those are two wholly separate issues, and when they are jammed into one section, the confusion builds. Although original Article 2-207 was equally as arbitrary as the common law rule it was meant to replace, it lacked the simplicity of the common law rule. One had to love it. It is a ridiculous statute.

Revised Article 2-207 changes all of this. First, all of the formation of contract aspects of section 2-207 have been moved to the section on formation.[37] The new rule provides that the terms that are the same on the parties' records, terms that they otherwise agreed to, or terms that would be given by default by the UCC, are part of the contract. Everything else is knocked out.[38] This is the right result. For otherwise, if one party provides a term, and the other party provides a conflicting term, the parties have not agreed to either term. The new rule is a total knock-out doctrine. Those terms that are agreed upon are part of the contract. Those terms not agreed upon are not in the contract.

There are several important changes to the remedies provisions as well. Original section 2-708(2), the lost profits provision, provided that the seller had to reduce the damages by the amount the seller received

33. Comment 3 enumerates that additional terms become part of the agreement unless the term is material. U.C.C. § 2-207 Comment 3.

34. Comment 6, in confusing contrast to Comment 3, allows for the inclusion of additional terms provided the term is implicitly assented to if the term is fair and commercially reasonable. U.C.C. § 2-207 Comment 6.

35. Construing additional terms as 'proposals.' U.C.C. § 2-207.

36. U.C.C. § 2-207.

37. Rev U.C.C. § 2-206(3) (moving 2-207(1)).

38. U.C.C. § 2-207.

from a resale. Under this provision, the seller would never receive any damages. It was a contradictory statement universally ignored by the courts, and we took that out.

The measurement of the buyer's damages in the absence of a cover was measured as the difference between the contract price and the market price when the buyer learned of the breach, and not when the goods should have been tendered. This raised two problems. One was the factual question of proving when the buyer learned of the breach. The second problem is that the time when the buyer learned of the breach did not reflect the true bargain, as the buyer was entitled to the difference in the contract price and the value of the goods at the time and place the goods should have been delivered.

This has been corrected, and the point of measurement for the buyer's damages is now at the time and place tender should have occurred. Sellers are now expressly entitled to consequential damages. Many courts had provided for this, but these damages are now expressly in the statute under Article 2-710.[39] This however, is subject to the exception of consumer contracts. Sellers cannot get consequential damages against a consumer, although I have never figured out the hypothetical where that would occur anyway. Also, in an expansion of the common law rule, but reflecting modern commercial practices, except in a consumer contract, parties can freely contract for specific performance.

As to one last point, original Article 2 had one single four year statute of limitations.[40] This did not in anyway meet the requirements of the Code, and the new statute of limitations section is now have the longest section in the Code, and it provides for eight different time periods depending on the situation.[41]

And with that, I thank you.

---

39. Rev. U.C.C. § 2-725 provides:

(1) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

(2) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

(3) In a consumer contract, a seller may not recover consequential damages from a consumer.

40. U.C.C. § 2-725(1).

41. Rev. U.C.C. § 2-725.