The Revision Of The Uniform Commercial Code In The United States And Its Implications For Australia

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INTRODUCTION

In this article, I discuss the recent and ongoing revision in the United States of the Uniform Commercial Code in the areas of sales, secured transactions and letters of credit, and the possible impact that these revisions may have for Australian practitioners working in an international context with American trading partners.

Commercial law in America is primarily state, not federal law, and it is independently promulgated in 51 separate jurisdictions. Until the late 19th century, American commercial law was based on English common law and the law of merchants, and each state's law evolved independent of the other states' law.

Today, although commercial law is still the law of the individual states, commercial law is primarily uniform throughout the United States because of the existence and passage in the various jurisdictions of the Uniform Commercial Code ('UCC'). The UCC has been adopted in some form by all jurisdictions (Louisiana has not adopted the sales and leases provisions, but has adopted the rest of the UCC). The UCC embodies the major corpus of American commercial law.

The UCC is now 50 years old, and the commercial law in America is going through a period of fundamental and substantial change and revision. The need for the revisions is due to essential changes in business practices as well as the development of more inclusive and faster methods of communication since the adoption of the UCC in the early 1950's. Also, highly important, is the need for American commercial law to conform to the rising body of international commercial law which is necessary in our now global economy.

There are two organisations which have developed and continue to revise the UCC: The National Conference of Commissioners for Uniform State

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Laws ('NCCUSL')[1] and the American Law Institute ('ALI').[2] Once a addition or revision to the UCC is completed and approved by NCCUSL an the ALI, the Commissioners from the various states are charged with the dut of getting the uniform statute enacted by the legislature in each jurisdiction For the most part, recent uniform laws have been rapidly and uniforml

[1] The purpose of the NCCUSL is to determine what areas of private state law migh benefit from uniformity among the states, to prepare statutes or 'uniform acts' to carr that object forward, and then to have those statutes enacted in each jurisdiction rep resented in NCCUSL. NCCUSL was created in 1892, and it consists of representative ('Commissioners') from each state, the District of Columbia, Puerto Rico, and th United States Virgin Islands. The Commissioners are appointed by their respectiv states, either by the state's governor or the legislature of the state. All Commissioners ar lawyers, and they serve without compensation. The Commissioners do their wor through Drafting Committees, on which many of them serve, and through an Annua Meeting lasting eight days each summer.
The first step in the NCCUSL process is to form a study committee of Commissioners t examine a suggestion for a uniform statute. With the UCC, this step is often performe instead by the Permanent Editorial Board for the UCC ('PEB') or a body of America Law Institute ('ALI') members and Commissioners acting on behalf of the PEB, or, i some cases, by the American Bar Association or the ALI. Suggestions for a Code chang may be made by the PEB, by a Commissioner or Institute member, or by a third party such as the American Bar Association or an organisation interested in a particular are of law.
If the study group recommends that a statute be prepared, before any drafting begins then the recommendation must be approved by the Scope and Program Committee, a well as the Executive Committee of NCCUSL, and in the case of the UCC, by the ALI a well. Once the decision to prepare a proposed statute is reached, a Drafting Committe composed of six to ten Commissioners is appointed, and with the UCC, because it i produced with the ALI, one or more ALI members are also appointed to the Draftin Committee.
Each drafting committee has a Reporter. The Reporter is a legal expert in the subject o the proposed statute and serves to collect information about the subject for the edu cation and use of the members of the Drafting Committee. The Reporter presents th information with policy choices in alternative draft language. The Reporter in this pro cess does not decide what goes in the statute, but simply drafts the statute consistent wit the decisions of the members of the Drafting Committee. The Drafting Committe determines the particular policy and provisions of the proposed statute based on th work of the Reporter, on advice received from various relevant constituencies concern ing those policies and provisions, and on the experience of the members in their practic in the various states.
Under an agreement with the American Bar Association ('ABA'), each drafting com mittee has an ABA Advisor appointed to work with it. The function of the ABA Adviso is to solicit and collect input from every interested constituency in the ABA, and t convey this advice to the Drafting Committee.
The proposed statute is discussed and debated at the Annual Meetings of NCCUS during each of the two years and at least at one Annual Meeting of the Institute. In thes plenary sessions of the two organizations, the work of the Drafting Committee and th Reporter is scrutinized and judged for balance, sensibility, and style.

[2] The ALI was organized in 1923 following a study conducted by a group of prominen American judges, lawyers, and teachers known as "The Committee on the Establis ment of a Permanent Organization for the Improvement of the Law." The Committe had reported that the two chief defects in American law, its uncertainty and its co plexity, had produced a "general dissatisfaction with the administration of justice." The Committee's recommended that a lawyers' organization be formed to improve th law and its administration. This led to the creation of the ALI. The purpose of t Institute is "to promote the clarification and simplification of the law and its bett adaptation to social needs, to secure the better administration of justice, and to encou age and carry on scholarly and scientific legal work."
The founding Committee recommended that the ALI should address uncertainty in t American law through a series of restatements of the basic legal subjects that would allo

nacted with limited adjustments made only to address purely local concerns ›r fundamental differences in policy particular to that state, and the ALI. lected members are expected to participate regularly in the work of the nstitute in some significant way. Members may participate by attending ›nnual Meetings, submitting written comments on drafts circulated before ›nnual Meetings, serving as Reporters, Advisors, or Consultants on Institute ›rojects, serving in Members Consultative Groups, participating as speakers ›r lecturers in ALI-ABA programs or authors of ALI-ABA publications, or ›therwise advancing the work or objectives of the Institute or ALI-ABA. It is mportant to note that although NCCUSL is a government organisation (the ›LI is not), neither organisation, nor the combination of the two have the ›ower to create positive law. The UCC, and the subsequent revisions of it, are ›resented to the various state legislatures for adoption, and the Code only ›ecomes the law of a respective state when it is adopted by that state's legisature. It is also important to note that because the individual states have the ›ower to adopt whatever version or modifications the state pleases, there is a ›ubstantial amount of non-uniformity among the states.[3]

Beginning early in the century, several discreet uniform acts were drafted

judges and lawyers to know what the law was. Between 1923 and 1944, Restatements of the Law were written on Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. In 1952, the Institute began the drafting of the Restatements Second. These were updated editions of the original Restatements which reflected new analyses and concepts, as well as expanded use of authorities. Restatements Second also covered subjects not included in the first Restatement, such as Landlord and Tenant and the Foreign Relations Law of the United States. In 1987, a new Restatement of the Foreign Relations Law of the United States inaugurated a third series of Restatements, which also now includes Restatements of Unfair Competition and Suretyship and Guaranty. New Restatements on The Law Governing Lawyers, Property (Donative Transfers, Servitudes, and Mortgages), Trusts, and Torts are also being developed as part of Restatement Third.

Since 1923, the Institute has also drafted several Model Codes, such as the Model Penal Code, a Model Code of Evidence, and in collaboration with the NCCUSL, the Institute has drafted and promulgated the UCC. A proposed codification of the federal securities laws was published in 1980, and new examinations of aspects of federal income taxation and studies of complex litigation and corporate governance have been produced more recently. Studies of family law and transnational business insolvency are presently in development.

In addition, since 1947, the Institute has collaborated with the ABA in a national program of continuing legal education. The American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education produces books, periodicals, and audiovisual materials covering most areas of practice and offers courses of study and programs of instruction throughout the country.

As a national organisation, the Institute seeks a membership that reflects both the quality and the diverse character of the legal profession. The Institute's bylaws authorise an elected membership of 3,000. This membership consists of judges, lawyers, and law teachers from all areas of the United States as well as some foreign countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law.

[3] The fact that the legislation had to pass the legislatures of 51 jurisdictions, and also has some non-uniform amendments by some states, has not been a problem for the creation of a general uniform commercial law in the United States, as the UCC has accomplished. In terms of possible law reform in Australia, if such is desired, the reform should be much easier than in the United States, as less states will be involved. Furthermore, the commercial law in the various Australian states already has a high degree of uniformity, and this should add to the ease of a uniform revision process.

by NCCUSL to codify areas of commercial law. These acts covered negotiable instruments,[4] sales,[5] documents of title,[6] and security rights in personal property.[7] These uniform acts were widely adopted by the various states, and made substantial progress in unifying the commercial law in America.

In 1935, the ALI and NCCUSL, as the two major legal bodies involved in creating private law, entered into an agreement to jointly sponsor the drafting of legislation. In 1940, NCCUSL adopted a plan to unify all of the commercial law in one commercial code, and the ALI was invited to join in the task: an invitation which the ALI accepted. The drafting committees consisted of members of NCCUSL, official representatives from the ALI, as well as official representatives from the ABA. As with the current revision of the UCC, the meetings were open, and representatives from trade groups attended in abundance.

The UCC was completed in 1950 and approved by NCCUSL in 1951. Within a few years, the UCC was adopted in one form by all of the states. The UCC was specifically drafted to conform to actual business practices, and unlike some European Codes, is not highly abstract.

The Code is divided into the following articles: Article One: General Provisions,[8] Article Two: Sales,[9] Article Two A: Leases,[10] Article Two B: Licenses of Intangibles,[11] Article Three: Negotiable Instruments,[12] Article Four: Bank Deposits and Collections,[13] Article Four A: Payments by Electronic Transfers,[14] Article Five: Letters of Credit,[15] Article Seven: Documents of Title, Article Eight: Investment Securities,[16] and Article Nine: Secured Transactions.[17]

INTERNATIONALISATION OF AMERICAN COMMERCIAL LAW

Of interest to lawyers in Australia and other countries who are interested in the development of American commercial law, is the growing internationalization of American commercial law. Law-makers in the United States are quite aware of the necessity of tailoring commercial law to be compatible with international commerce and business practices. For this reason, the various revised sections of the UCC have taken, and the sections to be revised are

4 *Uniform Negotiable Instruments Law* 1896.
5 *Uniform Sales Act* 1906.
6 Documents of title were governed by both the *Uniform Warehouse Receipts Act* 190[illegible] and the *Uniform Bills of Lading Act* 1909.
7 *Uniform Conditional Sales Act* 1918 and the *Uniform Chattel Mortgage Act* 1926.
8 This article is presently being revised, with a completion date of 1998.
9 This article is presently being revised, with a completion date of 1999.
10 This article was drafted in 1989, with a revision due in 1999.
11 This article is due to be completed in 1998.
12 This article was last revised in 1990.
13 This article was last revised in 1990.
14 This article was promulgated in 1989.
15 This article was revised in 1995.
16 Revised in 1994.
17 Presently being revised, and due for completion in 1998.

aking, the emerging international commercial standards as possible models .nd influences.

The current development of international codes is taking place precisely vhen our domestic UCC, drafted 50 years ago, is undergoing tremendous crutiny and revision. This development is also occurring at a time when ommercial lawyers can no longer limit themselves to the domestic arena: the ncreased use of technology and new means of transport have effectively hanged our market structures from domestic to global economies.

Just as the United States went through a period of codification of the prin- iples of commercial law resulting in the development of the UCC, activities re currently under-way on the international level leading to the creation of vhat might be called an 'international UCC'. The first step in that direction vas the drafting and signing of the United Nations Convention on Contracts or the International Sale of Goods ('CISG').[18] Other conventions and uni- orm rules in the areas of financing of goods, payments systems, and transport iave contributed to that development.[19]

The emergence of an international UCC has been recognised in a number of ircles, including the United Nations. In May 1992, the United Nations Com- nission on International Trade Law ('UNCITRAL'), recognising the signifi- ant strides which have been made in the international codification of ommercial law, held an unprecedented week-long Congress entitled 'Inter- iational Commercial Law in the Twenty-First Century.' The United Nations General Assembly has reaffirmed its commitment to the progressive harmon- sation and unification of international trade law. The General Assembly leclared that reducing or removing legal obstacles to the flow of international rade, especially those affecting the developing countries, would significantly ontribute to universal economic cooperation among all States on a basis of quality, equity and common interest.

In an ideal world, the drafters of both international and domestic laws vould take the best features that both bodies of law have to offer and meld hem together into a comprehensive legislative scheme. The CISG made nany improvements over the older provisions of Article Two and these mprovements are influencing the revision of the UCC provisions on sales.[20]

[18] This Convention (referred to as the 'CISG') was drafted by UNCITRAL and issued for signature in 1980. Currently, the CISG has been ratified and entered into force in 47 nations, including Australia and the United States.

[19] United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); UNCITRAL Legal Guide on Electronic Funds Transfers (1987); UNCITRAL Model Law on International Credit Transfers (1992); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995); Convention on the Limitation Period in the International Sale of Goods (New York, 1974); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); International Countertrade Transactions (1992); United Nations Convention on the Carriage of Goods by Sea, 1978 (the 'Hamburg Rules'); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1992).

[20] On 11 December 1986, the United States ratified the United Nations Convention on Contracts for the International Sale of Goods which came into effect 1 January 1988. While many of its provisions mirror comparable provisions of the UCC, significant differences exist. UNCITRAL's accompanying convention, the Convention on the

Similarly, Article Four A of the UCC on Electronic Funds Transfers was a definite influence on the development of UNCITRAL Model Law on International Credit Transfers. The world is not ideal, however, and attempts to harmonise, though successful in many cases, have run into obstacles such as differences in commercial practices in the United States and elsewhere throughout the world, and differences in legal theory and perception of the appropriate policies.

REVISION OF THE UNIFORM COMMERCIAL CODE: SALES

A. American And Australian Sales Law Share Common Statutory Roots

The law for the sale of goods in the United States has a similar pedigree to the law in Australia. In Australia today, the law regulating the sale of goods is based primarily on legislation enacted by the various states and territories which is substantially identical with the British *Sale of Goods Act* 1839[21] and thus, there is a high degree of uniformity among the various jurisdictions.[22] Likewise, the current sales provisions of the UCC is a revision of the *Uniform Sales Act*, which was promulgated by NCCUSL in 1906, and was largely based on the British *Sale of Goods Act*.

Similar to the American statute, a major goal of the various Australian Sale of Goods Acts is to give the contracting parties complete freedom of choice for the terms on which they will do business, subject to certain limitations imposed by statute or public policy. Also similar to the American law, except where the Sales Acts provide otherwise, the general principles of the law of contract govern contracts for the sale of goods.[23] As with any sales code, including the UCC, the Acts provide a broad number of default provisions such as implied terms on the part of the buyer and the seller for matters on which the contract is silent, as well as the consequences of performance or non-performance of these promises where the contract does not provide for such.[24] As with the UCC, the Acts provide for the parties to contract out o

Limitation Period in the International Sale of Goods, was ratified by the United Stat and came into effect last December.

21 *Sale of Goods Act* 1954 (ACT); *Sale of Goods Act* 1923 (NSW); *Sale of Goods Act* 197 (NT); *Sale of Goods Act* 1896 (Qld); *Sale of Goods Act* 1895 (SA); *Sale of Goods Act* 189 (Tas); *Goods Act* 1958 (Vic); *Sale of Goods Act* 1895 (WA). *The Sale of Goods Act* 189 (UK) was replaced by the *Sale of Goods Act* 1979 (UK), and this in turn replaced by th new *Sale and Supply of Goods Act* 1994 (UK).

22 The law of sales in New Zealand is also based on the British *Sales of Goods Act*. New Zealand originally codified the law of sales in 1895. The present New Zealand sales co is, with amendments, the *Sale of Goods Act* 1908 (NZ).

23 The Acts expressly provide that the capacity to buy and sell goods is regulated by th general law concerning capacity to contract, and to transfer and acquire property. Questions of offer, acceptance, and formation, and whether or not there has been an effecti rescission of the contract, are also to be decided by the application of general contra principles.

24 *Ashington Piggeries Ltd* v *Christopher Hill Ltd* [1972] AC 441, 501 per Lo Diplock.

hese default provisions.[25] However, Australian sales law is not grounded wholly in the notions of late 19th century conceptions of business transactions, for unlike the United States, which has no broad based uniform consumer protection statutes operating co-jointly with the sales legislation, in Australia, one must always think in terms of other legislation which has a bearing on certain kinds of sales transactions. Most prominent legislation of this sort is the *Trade Practices Act* 1974 (Cth), and the various State and Territory *Fair Trading Acts*[26] which mirror the provisions of the *Trade Practices Act* 1974 (Cth). Other important legislation includes the *Consumer Credit Code* (Qld) designed to replace earlier credit laws[27] for certain transactions, and a variety of other state statutes concerned mainly with consumer protection. Despite this, one might rightfully question whether the basic code of sales law which was devised 100 years ago fully reflects the current practices in Australia today.[28] Certainly the opinion in the United States, where the current sales code, which was totally revised 50 years ago, and therefore modernised based on 50 years of development at that time, is widely felt to be dated and in need of yet another major revision.[29] Furthermore, it is also significant that the United Kingdom itself recently revised the original *Sale of Goods Act* 1893.[30]

[25] *Sale of Goods Act* 1954 (ACT), s 58; *Sale of Goods Act* 1923 (NSW), s 57; *Sale of Goods Act* 1972 (NT), s 57; *Sale of Goods Act* 1896 (Qld), s 56; *Sale of Goods Act* 1895 (SA), s 54; *Sale of Goods Act* 1896 (Tas), s 59; *Goods Act* 1958 (Vic), s 61; *Sale of Goods Act* 1895 (WA), s 54.

[26] *Fair Trading Act* 1992 (ACT); *Fair Trading Act* 1987 (NSW); *Consumer Affairs and Fair Trading Act* 1990 (NT); *Fair Trading Act* 1989 (Qld); *Fair Trading Act* 1987 (SA); *Fair Trading Act* 1990 (Tas); *Fair Trading Act* 1985 (Vic); *Fair Trading Act* 1987 (WA).

[27] A model code, the *Consumer Credit Code* (Qld), appended to the *Consumer Credit (Queensland) Act* 1994 (Qld) has been enacted, while legislation adopting the Code in substance has been passed in every jurisdiction: see *Consumer Credit Act* 1995 (ACT); *Consumer Credit (New South Wales) Act* 1995 (NSW); *Consumer Credit (Northern Territory) Act* 1995 (NT); *Consumer Credit (South Australia) Act* 1995 (SA); *Consumer Credit (Tasmania) Act* 1995 (Tas); *Consumer Credit (Victoria) Act* 1995 (Vic); *Consumer Credit (Western Australia) Act* 1996 (WA).

[28] Both the inability of the present sales code to meet modern commercial practices, as well as the technical complexity of the sales code have been mentioned by the Western Australian Law Reform Commission recently in its proposal for substantial overhaul of the current sales code. Law Reform Commission of Western Australia, Discussion Paper on Implied Terms in the *Sale of Goods Act* 1895 (1995); Law Reform Commission of Western Australia, Discussion Paper on Equitable Rules in Contracts for the Sale of Goods (1995).

[29] The dragging of feet in these revisions is also common. For example, the Ontario Law Reform Commission, in 1979, suggested a major update of the Ontario Sales Code along similar lines to the UCC. However, nothing has yet to come of this recommendation.

[30] On 3 January 1995, the new *Sale and Supply of Goods Act* 1994 came into effect in the United Kingdom. It is interesting to note that the Law Commission, in its report of the new Sales Code, noted that times were such that a patchwork revision of the original code was no longer warranted or possible, and that a whole new sales code was warranted.

B. The Revision Of Article Two: Sales

In August 1991, NCCUSL formed an Article Two Drafting Committee to revise the Sales articles of the UCC. The committee has been meeting regularly several times a year, and has read drafts before the full body of NCCUSL in the summers of 1995, 1996 and 1997. A final reading is due at the annual meeting of NCCUSL in the summer of 1999, and then the draft will be sent to the ALI for final approval.

1. Scope

After much tinkering with the question of scope, the Drafting Committee resorted to going back to the familiar existing language in current Article Two· 'Unless the context otherwise provides, this Article applies to transactions in goods.' At various times, the possibility of service contracts has been discussed and played with, but has ultimately been dismissed. Questions pertaining to the extent to which service contracts will be covered in Article Two are left to judicial development.

The path back to the beginning has been a long and torturous one for the Drafting Committee. In March 1993, the Drafting Committee discussed at length and recommended to the sponsors of the UCC that a 'hub and spoke' approach to the code be taken. In this format, the structure of Article Two would be wholly reworked, and the final product would consist of a core of general contractual principles along with specific code sections for sales, leases, and licences of goods, with the possibility of sections for service contracts. The Drafting Committee on licences was grafted on the sales committee, and work began. The project in that format became too unwieldy, and, at the annual NCCUSL meeting in the summer of 1995, the 'hub and spoke' version was dismantled. As a result, the licensing committee was spun off as the Article Two B committee, and the sales committee was redirected back to the sale of goods alone.

After much discussion back and forth on this issue, the Drafting Committee determined that service contracts will not be included as a substantive part of Article Two. As with the present law, it is expected that courts will use Article Two by analogy for service contracts in appropriate circumstances, particularly when the contract is a mixed contract of goods and services.

Larger questions, such as the extent to which consumers and consumer contracts will receive special treatment in the sales code, continue to plague the Drafting Committee. Definitions of 'consumer contract' and 'consumer' have been added, but it is unclear the extent to which Article Two will ultimately reflect consumer, separate from, commercial interests. There is a separate NCCUSL sub-committee which has as its mandate the question of consumer issues in both the Revised Article Two as well as the Revised Article Nine. Many industry groups have thought along the way that the Drafting Committee is too pro-consumer to the detriment of commercial interests. There may be similar sentiments by the NCCUSL body as a whole.

Although section 2–104(a)(1) states that Article Two is subject to applicable certificate of title statutes ('CTA's'), some have argued that Article Two take

precedence over conflicting state CTA's. Potential conflicts arise over when title passes, the power to transfer good title, and the rights of sellers and creditors against goods retained after sale. The position of the Drafting Committee is that a buyer in the ordinary course of business whose rights arise before the issuance of the title takes precedence under Article Two over the CTA rights.

2. Definitional Changes

In the Revised Article Two, there are small anticipated definitional changes that coincide with modern electronic business practices. For example, 'authenticate' replaces 'signed'. This is consistent with the drafting of the new Article Two B: Licensing of Intangibles, and reflects the fact that electronic commerce is here and that much contracting is done by electronic communication. The full extent to which electronic commerce will effect Article Two or Article Nine is unclear, although as the drafting process of Article Two is coming to an end, much will be left up in the air. It is probable that an entire revision of Article Seven: Documents of Title will be undertaken to reflect modern electronic practices in the area of documents of title.

At present, the Drafting Committee, with the approval of NCCUSL as a whole, proposes that the Article Two definition of good faith follows the definition in U.C.C. section 3–103(a)(4): ' "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.' This definition is in addition to, and works in conjunction with, the present and future definition of good faith in Article One. The present Article Two definition applies only to merchants. This revision will expand the definition to all persons in a sale of goods contract.

What used to be simple definitions, such as 'conspicuous', have now become much more complicated. The current proposed definition of conspicuous is 'with reference to a term, means so displayed or presented that a reasonable person against whom it is to operate would likely have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable the recipient or the recipient's computer to take it into account or react to it without review of the message by an individual.'[31] This definition takes into account modern electronic practices, but it does not resolve the latest war raging — who is to decide whether a term is conspicuous — the court or the trier of fact? The Drafting Committee of Article Two B: Licenses takes the position that this is a question for the court. The new proposed Article One: General Provisions takes a similar view. Ultimately, this is properly a question to be resolved in Article One.

[31] Revised Section 2–102(a)(7).

3. Unconscionable Conduct, Contract, or Clause

Article Two has always forbidden 'unconscionable' contracts or clauses. The Code however, has never attempted to define what unconscionability means. The Drafting Committee has issued a proposal, which is supported by a majority of NCCUSL as a whole, to extend the concept of unconscionability to include contracts 'induced by unconscionable conduct'. This extension acknowledges that some contracts, which on their face appear fair, were only entered into because of the improper conduct of one of the parties, and that this conduct could be egregious enough to be 'unconscionable'. However, this extension is not without criticism. For example, these questions go unanswered: what does 'unconscionable conduct' mean? and should it be limited to consumer contracts? A move to delete the phrase 'court finds as a matter of law' was defeated. Therefore, as with present law, the jury does not get to decide these cases. Yet, the question of allocation between the judge and jury continues to spark controversy.[32]

It is likely that ultimately the definition of unconscionability will be encompassed by Revised Article One. The proposed draft of Article One provides for unconscionable conduct.

4. Statute of Frauds

NCCUSL, at the 1996 Annual Meeting (faced with a unanimous Drafting Committee) approved the decision to abolish the statute of frauds. Support for the continuance of the statute has nearly always been based on a misunderstanding of how the statute works, and a failure to appreciate that the abolition of the statute would merely allow a party the right to prove the existence and terms of the contract. Merely meeting the requirements of the statute has never sufficed alone as additionally proving the existence and terms of the agreement.

Be that as it may, succumbing to widespread disapproval of industry, as well as the serious consideration of whether the abolition of the statute of frauds would hinder the adoption of the revisions in state legislatures, the Drafting Committee, in November 1996, agreed that some version of current section 2–201, the provision on the statute of frauds, should be restored and a draft section has now been prepared. It is generally conceded that the $500 threshold amount is too low, and it is proposed that $20 000 is a better minimum amount for the revised statute of frauds.

There are, of course, legitimate reasons to retain the statute of frauds in Article Two. Assuming that one concludes that a statute of frauds is not needed in sales contracts to filter out perjured claims (and that use of the defence often promotes fraud), it does make sense that Article Two should be consistent with Article Two A, and proposed Article Two B, which have retained the statutes of frauds. Furthermore, the presence of the statute tends

[32] The UCC has always been somewhat inconsistent here. For example, in Article One, the determination of whether a record is conspicuous is for the court, but in Article Two, the same question is for the jury.

to channel behaviour toward reducing agreements to writing. Also, the statute of frauds defence allows the resolution of contract formation issues on a summary judgment motion.

It should be noted that the retention of the statute of frauds is inconsistent with the CISG as well as the trend in other jurisdictions, such as the United Kingdom, to abolish it. Although the Drafting Committee appears committed to abolishing it, whether this view will ultimately prevail in the final draft as approved by NCCUSL, as a whole, and the ALI is unclear.

5. Parol Evidence Rule

The tinkering with the parol evidence rule has become somewhat of a cottage industry with the drafting process. The current proposed draft reads as follows:

> Terms on which confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of a previous agreement or contemporaneous oral agreement. However, terms in a record may be explained by any relevant evidence and may be supplemented by evidence of:
> (1) course of performance, usage of trade, or course of dealing; and
> (2) noncontradictory additional terms unless:
> (A) The terms if agreed upon by the parties would certainly have been included in the record; or
> (B) The court finds that the record was intended as a complete and exclusive statement of the terms of the agreement.[33]

Subsection (b), which has been approved by the Drafting Committee, continues to spark debate. There are several points of contention that keep arising from this section. First, is the question of whether the second sentence, which generally is agreed to reflect sound judicial practice, should be in the code. Although the major commentators, such as Wigmore, Llewellyn, and Corbin, as well as the more thoughtful judges, such as Traynor, have agreed that one should look beyond the document itself, many trial courts do not follow this practice, and these courts have resolved the question of intention from the plain meaning of language within the four corners of the record. The argument to support 'the plain meaning rule' is that it gives finality to the language of the document without having to pursue litigation on the question of integration. It also protects sellers from the statements of their sales personnel: a legitimate fear of sellers, but also a minefield for buyers.

The lack of conclusiveness of merger clauses suggested in the bracketed language of section (b) has also been a point of contention. It has been strongly argued that in commercial contracts, subject to the usual defences of fraud, mistake, and unconscionability, merger clauses should be considered conclusive on the question of intention.

[33] Revised Section 2–202.

6. Formation in General

Formation questions arise in structured and unstructured deals and may or may not involve records, standard forms or standard terms. Formation questions, such as the traditional problem of the battle of the forms, have vexed the Article Two Drafting Committee since the beginning of the revision process By November 1996, the Drafting Committee had formulated several specific sections to resolve formation problems. At that time, the draft was designed to deal with all formation questions, including contracts covered by the provision which specifically covered agreements where all or part of the terms of the agreement are contained in a standard form (the offer) to which the adhering party manifests assent (the acceptance). Built in to the draft were specific conceptualisations of standard forms as a definite and discreet formation problem. At the November 1996 meeting, the Drafting Committee voted to delete the provisions dealing with assent to standard forms, and except for consumer contracts, section 2–206(b), eliminated the distinction between a 'record' and a 'standard form' which had been built into the draft This decision was reaffirmed by the Drafting Committee in January 1997.

One important consideration is that in commercial cases, the question of whether a party has agreed to terms in a standard form is determined under the usual standards of agreement or assent. Although commercial transactions often involve the use of standard forms and standard terms, Revised Article Two provides no special rules to deal with them in commercial contracts. Thus, the risk of unfair surprise and unreasonably favorable terms is left to the unconscionability doctrine.

At present, formation questions in general are dealt with in two sections, one dealing with formation in general,[34] and another section dealing with offer and acceptance in the formation of contracts.[35] Formation issues arise in

[34] Revised Section 2–203. This section provides:
(a) A contract may be made in any manner sufficient to show agreement, including by offer and acceptance or conduct of both parties which recognizes the existence of a contract.
(b) A contract may be found if the parties intend to form a contract, even if the time that the agreement was made cannot be determined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.
(c) Even if one or more terms are left open, a contract does not fail for indefiniteness if the parties intended to form a contract and there is a reasonably certain basis for an appropriate remedy.
(d) Conspicuous language in a record which expressly conditions the intention of the proposing party to contract only upon agreement by the other party to terms proposed in the record is effective to prevent contract formation.

[35] Revised Section 2–205. This proposed section provides the following:
(a) Unless otherwise unambiguously indicated by the language or circumstances, the following rules apply:
(1) An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances. Subject to Section 2–203(d), a definite expression of acceptance in a record that also contains terms varying from the offer is an acceptance.
(2) An order or other offer to buy or acquire goods for prompt or current shipment invites acceptance by a prompt promise to ship or by a prompt or current shipment of goods. If the order or offer is construed to invite acceptance by the shipment of non-conforming goods, the non-conforming shipment is not an acceptance if the

a proposed section governing standard form consumer contracts[36] and a new revision of the battle of the forms provision.

In transactions where terms in the records of one or both parties appear to prevent agreement, the issue of formation is treated in part(b) of Revised Section 2–203 and part(a)(1) of Revised Section 2–205 rather than former provisions on the battle of the forms.[37] After it has been determined that a contract has been formed, the question of what terms in a record are included in the agreement is treated in a new section on standard forms in consumer contracts where consumer contracts are involved as well as in Revised Section 2–207.

Under basic contract law, either party can condition the formation of a contract upon agreement by the other party to terms proposed.[38] Under the proposed revision, where either the offeror or the person purporting to accept an offer expresses that condition in a record, the condition is not effective unless the language is conspicuous. Whether it is conspicuous or not may depend upon whether the language is in standard terms or boilerplate.

Revised Article Two follows the original Article Two formulation: unless the offer clearly provides otherwise, a definite acceptance creates a contract even though the acceptance contains terms in a record that vary the offer. Unlike the Restatement (Second) of Contracts[39] and Article 19 of the CISG,[40] a definite acceptance containing terms that materially vary the terms of the offer can create a contract.[41] The offeree can avoid a contract by expressly

seller reasonably notifies the buyer that the shipment is offered only as an accommodation.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

36 Revised Section 2–206. This section provides:

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, after affording the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide whether the contract should be interpreted to exclude the term.

(c) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty.

37 UCC Section 2–207(1).

38 This has always been the law in the UCC as well as the common law. See UCC Section 2–207(1)(1990 Official Text).

39 Restatement (Second) of Contracts section 59. This section, entitled Purported Acceptance Which Adds Qualifications, provides the following: 'A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.' Ibid.

40 Article 19 provides the following, in relevant part: 'A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.' CISG Art 19(1).

41 Revised Section 2–207 provides the following, in pertinent part:

If a contract is formed by offer and acceptance and the acceptance is by a record containing terms varying the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the contract includes:

stating that no contract exists unless the offeror agrees to the offeree's standard terms. Presumably, if both parties state that they will not be bound unless the other agrees to their terms, there is no contract unless there is subsequent conduct by both recognizing the existence of a contract.

7. Consumer Form Contracts[42]

The question of when a consumer who authenticates or by affirmative conduct appears to agree to a record is not bound by the terms in the record is provided for in a new provision dealing with consumer contracts contained in standard forms.[43] The broad answer provided by that section is that in a consumer contract a consumer is not bound under such circumstances when a term is not negotiated and a reasonable consumer in this type of transaction would not expect it.

To determine whether a term is negotiated, it must be found that, at a minimum, the consumer should have been aware of the term and, perhaps, have had an opportunity to review the term. At a maximum, the consumer should not be required to take it or leave it, and there must also be an opportunity to bargain over the inclusion or content of the term. This latter opportunity is, of course, rare in modern consumer contracts. These are radically different conceptualisations to the problem presented by form contracts.

If the primary purpose is to prevent unfair surprise caused by the presence of an unexpected term, then a minimum concept seems appropriate Acknowledging this, the Drafting Committee has proposed the following standard: 'any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record'.[44] If the person had knowledge of the non-negotiated term, then the term remains enforceable. The Drafting Committee decided that this is appropriately a question of law to be decided by the court on a preliminary motion by the parties.[45]

(1) terms in the records of the parties to the extent that the records agree;
(2) terms not in records to which the parties have agreed;
(3) terms supplied or incorporated under any provision of the [Act]; and
(4) terms in a record supplied by a party to which the other party has expressly agreed.

42 Other consumer provisions in Revised Article Two, in addition to this special provision on consumer form contracts, included the definition provision for a "consumer contract," a provision noting that state consumer protection laws are preserved, a provision exempting consumer contracts from the presumption that merger clauses are conclusive for purposes of the parol evidence rule, an exemption of consumer contracts the operation of a 'no oral modification' clause, a provision requiring express agreement by a consumer to a disclaimer of implied warranty, special remedies for consumers when a remedy fails of its essential purpose, remedies where agreed remedies fail intended purpose, and a bar on the reduction of the four year statute of limitation in consumer contracts.

43 Revised Section 2-206.

44 Revised Section 2-206(a). However, the exact parameters of this right are unclear, and the drafting committee has several possible alternatives in lieu of this standard.

45 Revised Section 2-206(b).

8. The Battle of the Forms

The battle of the forms is an issue of seemingly no resolution, and it has prompted the Drafting Committee to more drafts.[46]

The second version had a more simplified structure that focused on the issue of unfair surprise. Assuming that some contract was formed under the provisions governing formation, the sole question this draft attempted to answer was whether 'varying terms' became part of the contract. The original Section 2–207 was both an exception to the common law 'duty to read' principle and a particularized application in commercial cases of the unconscionability doctrine.[47] The section applies to determine if there is a contract for sale when the writings of the parties are in conflict, and if so, what terms in the writings of the parties are part of the contract. One objective of the revision process was to neutralise any strategic advantage gained where standard terms were used (although Section 2–207 was not limited to standard terms) and to reduce the risk of unfair surprise where one party apparently agreed (assented by conduct) to standard terms which had not been read or understood. The assumption is that even in commercial transactions the risk of unfair surprise requires special rules where standard terms are involved. More particularly, it assumed that commercial parties in unstructured transactions (ie no record containing all the terms of the contract) do not have a realistic opportunity, or should not be expected to review the standard terms of the other before apparently assenting by conduct.

The most recent manifestation of the battle of the forms provision provides:

(a) This section is subject to Sections 2–202 and 2–206.

(b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms varying from the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the contract includes:

(1) terms in the records of the parties to the extent that the records agree;

(2) terms not in records to which the parties have agreed;

(3) terms supplied or incorporated under any provision of this [Act]; and

(4) terms in a record supplied by a party to which the other party has expressly agreed.

(c) if a contract is formed by any manner permitted under this article and either party or both parties confirms the agreement by a record, the contract includes:

(1) terms agreed to prior to the confirmation;

(2) terms in a confirming record that do not materially vary the prior agreement and are not seasonably objected to;

[46] The drafting history of Revised Section 2–207 has the most extensive history of any proposed revised section in Article Two. Initially, two versions of Section 2–207 were drafted. The first followed Section 2–207 in the 1990 Official Text and attempted to amplify and clarify it in light of its apparent objectives, the extensive academic commentary, and the judicial decisions.

[47] See UCC section 2–207.

(3) terms in confirming records to the extent that they agree; and
(4) terms supplied or incorporated under any provision of this [Act].[48]

The section deals with two special cases where disputes over terms may arise. First, where both parties exchange records, and second, where one party uses a record to confirm a contract previously formed, and states what terms are included in, and by necessary implication excluded from, the agreement. Therefore, terms upon which the records agree in substance are included, but terms on which the records do not agree are excluded, unless they become part of a modification under the provision governing modifications.

9. Modification, Rescission, and Waiver

Several problems which have developed in the area of modification have been addressed in the revision process. First, the requirement that modifications must be in good faith has been moved from the commentary accompanying the section into the actual text. This seemingly little change avoids the argument that has been made that a modification 'does not constitute performance or enforcement' of a contract under the good faith requirement of Article One.

The revision now clarifies a point which has always been unclear in the present statute: whether the modification had to satisfy the statute of frauds or whether the contract as modified had to. The answer is that only the contract as modified must satisfy the statute of frauds, while the modification itself can be oral. Therefore, if neither the contract nor the modification are within the statute (both are below the threshold dollar amount) but the contract as modified is above the threshold amount, the statute of frauds must be satisfied. Also, if the contract is within and satisfies the statute of frauds and there is an oral modification that increases the quantity and the price so that the contract as modified is still within the statute, the statute of frauds has been satisfied for the price term but not with respect to the quantity term. Such a contract is not enforceable beyond the quantity term stated in the record.

The validity of no oral modifications clauses (contrary to the formalistic common law approach that parties can always agree later to void a no oral modification clause), which is in the original version of Article Two is retained;[49] however, this provision is changed to the extent that it is not now enforceable in a consumer contract.[50] In the original Article Two provision concerning modifications, a no oral modification provision clause was valid in all transactions, with the requirement that a form containing the clause supplied by a merchant had to be separately signed by a non-merchant.[51] The Revised Article Two, having excluded consumer contracts from no oral modification clauses has consistently deleted the 'separately signed' requirement,

[48] Revised Section 2-207.
[49] Revised Section 2-209(a).
[50] Revised Section 2-209(b).
[51] UCC section 2-209(2).

thereby leaving commercial parties who are not merchants to fend for themselves.[52] Also retained from the original version of Article Two is the provision for modification by way of waiver or estoppel.[53]

10. Personal Injury and Property Damage to Property Other Than the Goods Sold

The ALI has suggested, that based on the proposed Restatement (Third) of Products Liability, which covers the traditional areas of tort damages — personal injury and property damage other than to the goods sold — the Revised Article Two should limit itself to economic harms not covered by tort law.[54] The Drafting Committee has not adopted this idea, but it is incorporated into the draft to some extent. However, the Revised Article Two, in the definition of loss includes personal injury and property loss resulting from a breach of warranty, hence there is no wholesale deferment to the law of tort.[55]

If the buyer is in privity with the seller, the rule would work as follows. Assume that a buyer purchases a component for installation into his equipment. Some time later, the buyer claims that a problem with the component caused: (1) damage to the component; (2) a shutdown of part of the factory until repairs and replacement; (3) damage to the equipment in which the component was installed; and (4) personal injury to the buyer and an employee. All of these losses are within the definition of damage in Revised Article Two, including the personal injury and the property damages.

Revised Article Two does not state when the applicable tort law pre-empts warranty law in Article Two. To the extent that the goods are defective, tort law should be available. To the extent that express or implied warranties are

52 Revised Section 2–209(b).

53 Revised Section 2–209(c).

54 This distinction in the scope of tort and contract law in products liability cases has a similar genesis in Australian law, as the *Trade Practices Act* 1974 (Cth) covers both types of causes of actions. Thus, under Section 2A of the '*Trade Practices Act*, the contract based actions of breach of warranty do not limit the recoverable damages to non-economic harms. But the new Section 5A of the *Trade Practices Act*, which provides liability for the traditional tort concept of defective products, provides for damages for personal injury and property damage to property other than the goods sold, and does not provide for economic harms. As with American tort law, Section 5A also provides for the defences of contributory negligence and the state of the art defence, whereas actions under the contract-based Section Two A, as with American contract law, do not provide for these defences.

55 Article Two provides for damages for economic losses as well as damages to person or property. Therefore, a seller who makes and breaches an implied warranty of merchantability can be liable for consequential damages to person or property resulting from the breach. This does not resolve the tension between warranty law and tort law where goods cause damage to person or property. The source of that tension arises from disagreement over whether the concept of defect in tort and the concept of merchantability in Article Two are coextensive where personal injuries are involved. For instance, if goods are merchantable under warranty law can they still be defective under tort law? If goods are not defective under tort law can they be unmerchantable under warranty law? The answer to both questions is 'yes' if the contract standard for merchantability, eg reasonable expectations, and the tort standard for defect is different. Even though the outcome under different standards will be the same in most cases, ie unmerchantable goods are frequently defective and defective goods are frequently unmerchantable, there are a few exceptions, especially where design defects are involved.

made that are broader than the tort test for defect, Article Two should apply. The Drafting Committee has been reluctant to restrict judicial flexibility in this area, particularly where contract expectations are the basis for the claim. Thus, the remote possibility exists that goods which are not defective under tort standards (ie no design or manufacturing defect) may still be unmerchantable. Because the claim for personal injury or property damage in Article Two arises from a contract, the buyer must jump through all the contract hoops, such as the requirement of notice, the question of whether there has been effective disclaimers, and the warranty statute of limitations in order to recover.

Where the buyer is not in privity, there are different and more stringent requirements to recover from the breaching seller. In fact, the remote buyer cannot recover unless the buyer meets either the requirements of the special provision on express warranties made to the public or the special provision on the extension of warranties.

11. Express Warranties

Express[56] warranties are now dealt with in two sections; one provision covering express warranties made to an immediate buyer, and another provision covering express warranties made to remote buyers. This first provision[57] states the existing general principle where an 'immediate' buyer claims a breach of express warranty by the seller, except that the phrase 'becomes part of the agreement' is substituted for 'becomes part of the basis of the bargain' The change clarifies that an express warranty is treated like any other term of the agreement and that the buyer need not initially prove reliance to include it in the agreement.

This section also clarifies that a claimed affirmation of fact, promise, description or sample becomes 'part of the agreement' if the 'immediate' buyer alleges and proves what the seller affirmed, promised or displayed to

[56] The revision committee has made no substantive changes to the implied warranty provisions in Article Two. The present law has caused no serious problems that the committee found worth addressing. The law of implied warranties is similar to, and would be familiar to, any commercial lawyer in Australia. Compare UCC Sections 2–312, 2–314, and 2–315 with the *Goods Act* 1958 (Vic), ss 17, 19(a), and 19(b).

[57] Revised Section 2–403. This section provides the following:
(a) If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the agreement unless a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement or would believe that the representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods. An obligation may be created under this section even though the seller does not use formal words, such as 'warranty' or 'guarantee'.
(b) A representation or a promise that becomes part of the agreement is an express warranty and the seller has an obligation to the immediate buyer that the goods will conform to the representation or, if a sample is involved, that the whole of the goods will conform to the sample, or that the promise will be performed. The obligation is breached if the goods do not conform to any representation at the time when the tender of delivery was completed or if the promise was not performed when due.
(c) A seller's obligation under this section may be created by representations and promises made in a medium for communication to the public, including advertising, if the immediate buyer had knowledge of them at the time of the agreement.

the buyer about the goods. In other words, reliance is assumed. This is consistent with the comments to the present section on express warranties and most of the case law. The standard is whether a reasonable person in the position of the buyer would believe that the affirmation of fact or promise became part of the agreement. Thus, if the buyer did not hear the affirmation or did not believe it in fact or relied upon another's skill and judgment, the affirmation would not be part of the agreement.

Another question addressed in this section is whether what was affirmed or said about the goods was 'puffing'.[58] In other words, was the language opinion, commendation, or a general valuation rather than an affirmation of fact or promise? If so, then there is a defence which the seller can raise in a motion for summary judgment or establish before a jury. Again, the standard is what a reasonable person would believe.[59] This provision also makes clear that an express warranty in a direct contractual relationship may be created by communications to the public, including advertising.[60]

Consistent with the existing Article Two, a warranty, express or implied, is breached if the goods do not conform when the seller tenders delivery. Article 36(1) of the CISG, however, provides that the seller is liable for any lack of conformity that exists when the risk passes to the buyer, even though the lack of conformity becomes apparent after that time. It has been suggested that the time the risk passes should be adopted by Revised Article Two, and alternative language has been put in brackets for further discussion.

Instead of a unitary provision on express warranties, the proposed Article Two now provides for a separate section on express warranties to remote purchasers.[61] Part (b) of this section deals specifically with the 'pass through'

58 The standard for puffing under American law is similar to the standard in Australia. Compare UCC Section 2–313(2) with *Makita (Australia) Pty Ltd* v *Black and Decker (Australia) Pty Ltd* (1990) 12 ATPR 41–030.

59 Revised Section 2–403(a).

60 Revised Section 2–403(c).

61 Revised Section 2–408, provides the following:
(a) In this section, 'goods' means new goods and goods that are sold as new goods.
(b) If a seller makes a representation or a promise relating to goods on or in a container, on a label, in a record, or that is packaged with or otherwise accompanies the goods and authorizes another person to deliver the container, label, or record to a remote buyer and it is so delivered, the seller has an obligation to the remote buyer and its transferee, and in the case of a remote consumer buyer, to any member of the family or household of the remote consumer buyer, that the goods will conform to the representation or that the promise will be performed, unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that any representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.
(c) If a seller makes a representation or a promise relating to the goods in a medium for communication to the public, including advertising, and a remote buyer with knowledge of the representation or promise buys or leases the goods from a person the seller has an obligation to the remote buyer and its transferee and, in the case of a remote consumer to buyer, to any member of the family or household of that consumer buyer, that the goods will conform to the representation, or that the promise will be performed, unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that the representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.
(d) An obligation may be created under this section even though the seller does not use formal words, such as 'warranty' or 'guaranty'.

warranty, including the 'warranty in the box', made by a seller (usually a manufacturer) to remote purchasers and their transferees through an authorised intermediary (usually a retailer in the chain of distribution) who is not an agent of the seller.[62] The obligation created by this section is independent of any contract between the remote purchaser and the intermediary retailer.

The seller's obligation to the remote purchaser arises when the goods are delivered to or received by the remote purchaser, whether or not the purchaser has knowledge of the terms.[63] Nevertheless, the alleged affirmations or promises do not create an obligation if a reasonable person in the position of the remote purchaser would believe that a promise was not made or the affirmation was mere puffing.

The assumption underlying this subsection is that the seller has no other warranty (or contractual) obligation to the remote purchaser. Thus, the seller should be able to define what affirmations or promises are made with the understanding that no implied warranties are created. In short, there is no need to disclaim that which does not exist.

The second part of this proposed new express warranty provision deals with warranty obligations arising from communications to the public. When a remote purchaser, who possesses knowledge of an affirmation of fact or promise made by the seller to the public, purchases the goods from a seller or lessor in the chain of distribution, the seller making the affirmation or promise has an obligation to the remote buyer if the goods fail to conform, unless the

(e) An obligation arising under this section is breached when the goods are received by the remote buyer if the goods, at the time they left the seller's control, did not conform to any representation made, or if the promise is not performed when due.
(f) The following rules apply to the remedies for breach of an obligation created under this section:
(1) A seller under subsections (b) and (c) may modify or limit the remedies available to a remote buyer for breach, but a modification or limitation is not effective unless it is communicated to the remote buyer with the representation or promise.
(2) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount;
(A) a measure of damages if the goods do not conform to a representation is the value of the goods as represented less the value of the goods as delivered; and
(B) a measure of damages for breach of a promise is the value of the promised performance less the value of any performance made.
(3) A seller in breach under this section is liable for incidental or consequential damages under Sections 2–805 and 2-806 but is not liable for consequential damages for a remote buyer's lost profits;
[(4) A remote consumer buyer that bought the goods on credit and is entitled to damages under subsection (f)(2) may, upon notifying the immediate seller, deduct damages from any part of the price still due.]
(5) An action for breach of an obligation under subsection (e) is timely if commenced within the time provided in Section 2–814.
(g) This section is subject to Section 2–409(b).

62 If the intermediary is an agent of the seller, the provision on express warranties to direct purchasers applies. The provision on express warranties to direct purchasers is also intended to apply where there is direct dealing between the seller and buyer through an intermediary or where the manufacturer makes an offer to the public and individuals accept the offer by purchasing the goods from a retailer.

63 Revised Section 2–408.

remote buyer or lessee, as a reasonable person, would believe that no promise was made or that the affirmation was puffing.[64]

The following illustrations[65] show how the two new express warranty provisions operate.

1. A seller advertises its product in trade journals, on the internet and on television. The buyer buys the goods from the seller, directly or through an agent. Whether the advertisement is an express warranty and part of the agreement is determined under the provision governing express warranties made to direct buyers.
2. A seller advertises as in Number One and the buyer purchases directly from the seller. The buyer ordered by facsimile and paid by credit card before the goods arrived. The goods arrive in a box, which contains additional warranties and terms limiting remedies. This is not a pass-through warranty under the provision governing express warranties of remote buyers, but instead, is governed by the other provisions of Article Two, which determine whether the terms in the box are part of the agreement.
3. The seller advertises as in Number One and the buyer purchasers the goods from a retailer. In the box are warranties and limitations prepared by the seller, which the retailer was authorised to deliver to the buyer. Because there is no contractual relationship between the buyer and the seller, the provision on pass-through express warranties governs the terms in the box, and the provision on express warranties to the public governs the advertising.
4. A seller advertises as in Number One and the buyer purchases from a retailer. There are no pass-through warranties. The status of the advertising is determined by the provision on express warranties to the public.

In a fundamental break from the vast majority of case law, the Revised draft provides for consequential damages suffered by a remote purchaser, subject to two exceptions: a valid exclusion clause, or the recovery of lost profits by a remote purchaser when the claim is under the provision for express warranties created by advertising to the public.

12. Risk of Loss

For questions of risk of loss, the present draft of Article Two distinguishes between those situations where one party is otherwise in breach and where there is no breach.[66] Because the risk of loss rules are based on questions of the physical proximity of goods and who is in the best position to insure the risk, questions of breach should be irrelevant. At this stage, however, the Drafting Committee has not come to a consensus on whether to continue the distinction, for risk of loss purposes, of whether a party is in breach.

[64] The standard of 'puffing' is the same in this provision as in the provision on express warranties made to direct purchasers.

[65] These illustrations are drawn from the March 1997 draft of Revised Article Two.

[66] UCC § 2–509.

13. Perfect Tender Rule

Although discussed at great length, the 'perfect tender rule'[67] remains the basis for a seller's breach in Revised Article Two. Thus, Article Two will not adopt the general common law concept of 'substantial performance' or 'material breach'.[68]

14. Reasonable Use After Revocation of Acceptance

The revisions now clarify a concept which had been developed in much of the case law. If a buyer reasonably continues to use goods after revoking acceptance, then the buyer is responsible for the reasonable value of the use.[69]

15. Cure

The Drafting Committee has taken the position that under proper circumstances, the seller has the right to cure not only after rejection (the current law),[70] but also after revocation of acceptance. The present Article Two is silent on the issue, and cases have been inconsistent.

16. Consequential Damages

Reserving the traditional standard of foreseeability in consequential damages,[71] the Drafting Committee has added the limitation that, except for personal injuries, consequential damages cannot be disproportionate to the risk assume by the party.[72] Therefore, although damages may be foreseeable in a literal sense, if such damages greatly outweigh the reasonable level of risk in the contract, then they are not recoverable.

17. Seller's Remedies

Article Two provides the following alternative measurements of damages for a seller: the difference between the contract price and the resale price,[73] and the difference between the contract price and the market price at the time and place of tender.[74] The present code is silent on the question of whether a seller, who properly resells goods, can elect to get the contract price-market price measure of damages when that measurement would yield the seller more damages. The Revision takes the position that the seller should be precluded from this higher measurement.[75] The Revision holds intact the 'lost

[67] Revised Section 2-703.

[68] Under the CISG, the buyer has no right to reject non-conforming goods. However, if such non-conformity results in a fundamental breach of the contract, the buyer may avoid the contract, CISG Art 25, demand substitute goods, CISG Art 46(2), or fix an additional time for performance by the seller, CISG Art 47(1).

[69] Revised Section 2-704(b)(2).

[70] Revised Section 2-709.

[71] Revised Section 2-806(a)(1).

[72] Revised Section 2-806(b).

[73] UCC Section 2-706(1); Revised Section 2-819(a).

[74] UCC Section 2-708(1); Revised Section 821(a).

[75] Revised Section 2-803(c).

profits' formulation for those circumstances where that measurement is appropriate.

LETTERS OF CREDIT

In recent years, letters of credit have become the most common method of payment in international, as well as domestic, commercial transactions. By common agreement, most letters of credit are governed by the Uniform Customs and Practice for Documentary Credits ('UCP 500') and thus, Australian contracting parties will likely be familiar with and use the UCP as a payment mechanism. However, some American contracting parties are opting (and in the case of domestic transactions, as a default provision) for the UCC Article Five provisions as the governing law in letter of credit transactions. Therefore, an examination of the major distinctions between the UCC and the UCP should be of interest to the Australian practitioner engaged in transactions with American trading partners which call for payment or guarantee by letter of credit.

A. The New Article 5

As with the rest of the UCC, Article Five has recently gone through the revision process. In August 1989, an Article 5 Drafting Committee was appointed to respond to significant changes in the commercial practices involving letters of credit, including expanded use in a variety of settings and the consequent increase in litigation. The revision was completed in 1994. After approval in August 1994 by NCCUSL, the final draft was approved with amendment by the ALI in May 1995. In August 1995, the amended final draft received approval from NCCUSL, making Revised Article 5 available for enactment by state legislatures. It is presently being widely adopted in its revised form by the states.

Revised Article 5 contains several important new provisions. It authorizes the use of electronic technology in letter of credit transactions.[76] In addition, deferred payment letters of credit are permitted.[77] Under a deferred payment letter of credit, the letter of credit may be honored before the beneficiary receives payment because the issuer incurs an unconditional obligation to make payment at some future date.

Revised Article Five continues to use the subjective definition of good faith: "honesty in fact in the conduct or transaction concerned."[78] The drafters refused to use the broader definition, which adds the objective requirement of "observance of reasonable commercial standards of fair

[76] UCC § 5-102(C)(14). The commentary following this Section makes clear that various forms of electronic media may suffice as "documents" in letter of credit transactions. UCC § 5-102(a)(14) Official Comment 2.
[77] UCC § 5-102(B)(8).
[78] UCC § 5-102(A)(7).

dealing" as found in Article Two: Sales and Article Three: Negotiable Instruments.

Although strict compliance with the terms of the letter has always been one of two hallmark principles of letters of credit (the other being, the principle of independence of the letter from the underlying obligation), there had been in recent years the trend by many courts to adopt a policy of substantial, or at least not strict, compliance.[79] Revised Article Five specifically rejects the line of cases adopting substantial compliance, and reaffirms the requirement of strict compliance to the terms of the letter.[80]

A controversial provision in Revised Article Five is contained in Revised Section 5–111(e), which provides that "reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article." The mandatory provision is the result of a debate between the ALI and NCCUSL. After approval of the final draft by NCCUSL in August 1994, the ALI Council passed a resolution urging NCCUSL to provide for consequential damages. The Drafting Committee opposed such a change. After meetings and much correspondence, the ALI offered a compromise, suggesting that they would drop their request for consequential damages if the Drafting Committee would make attorney's fees mandatory. This amendment was approved by NCCUSL in August 1995. The only reason for mandatory attorney's fees is to provide a deterrent mechanism. It is unclear whether it would operate as such, and how operates where there is no clear 'prevailing party'. For example, where there are multiple issues with each party prevailing on some but not others a truly "prevailing" party may not exist.

B. Article 5 and the UCP Compared

Whilst the Article 5 revisions were taking place, there were two major efforts concerning letters of credit underway on the international level. The first effort was the revision of the Uniform Customs and Practices for Documentary Credits, promulgated by the International Chamber of Commerce in January 1994, and known as UCP 500.[81] The second effort concerned the drafting by UNCITRAL of the Convention of International Guaranty Letters and Standby Letters of Credit.[82] Attempts to harmonize these efforts with the revisions of the UCC, while necessary, were not completely effective, given

[79] *Banco Espanol de Credito* v *State Street Bank and Trust Co* 385 F2d 230 (1st Cir 1967), *Flagship Cruise Ltd* v *New England Merchant National Bank of Boston*, 569 F2d 699 (1st Cir 1978).

[80] UCC § 5–108(a).

[81] The Uniform Customs and Practice for Documentary Credits was first published by the International Chamber of Commerce ("ICC") in 1933. The ICC produced revised versions in 1951, 1962, 1974, and 1983. The most recent revision was adopted by the ICC Executive Board in April 1993. That version was first published as ICC Publication No 500 in May 1993 and became effective January 1, 1994.

[82] This Convention was adopted by UNCITRAL on December 11, 1995. However, thus far, it has only been ratified by one state: Belarus. Five ratifications are necessary before it comes into effect. Its lack of reception suggests that it will have little influence on international commercial law, and it was not significantly considered in the revision of Article Five.

the differences between international and domestic practices. However, some major goals in this regard were achieved, particularly the exclusion of non-documentary conditions from the draft and the maintenance of strong principles of independence of the letter of credit from the underlying transaction to preserve the certainty of payment.

The UCP had the greatest impact on the revision of Article Five. The UCP 500 is the governing set of rules used in most international letters of credit and in many domestic letters of credit. Last revised in 1993, the UCP 500 addresses new developments in the transport industry and new technological applications. The UCP 500 also simplifies and modernizes the rules applicable to credits.

Having recognized the need for United States law to be in harmony with international rules and practices, Revised Article 5 of the UCC indicates a clear recognition of the UCP as the source for many of the formal requirements and details of letters of credit. Revised Article 5, which was formally promulgated by the ALI and NCCUSL in August 1995[83] is generally consistent with the UCP 500, and the differences should not create significant problems.

The Revised Article Five Drafting Committee realised the provincial nature of the implied warranty provisions in former Article 5, realising that if the issuer or applicant needed warranties from the beneficiary, then such warranties could be written into the letter of credit. Consequently, the Revised Article Five deletes the old provisions on implied warranties, thereby bringing it into conformity with the UCP.[84] This change should aid in future foreign credit negotiations. More specifically, the new UCC letter of credit provisions expressly acknowledge that if the letter of credit incorporates the UCP, then the UCP will be binding.[85] Furthermore, the UCC acknowledges that UCP preempts the UCC if the UCP is incorporated into the letter of credit.[86]

Consistent with the UCP 500, Revised Article Five also provides for two-party letters of credit.[87] Unlike the typical three-party letter of credit which involves an applicant, an issuer, and a beneficiary, a two-party letter of credit is a credit issued not on behalf of an applicant but rather on behalf of the issuing bank itself. These credits might be issued by a bank to support the bank's own obligations or on behalf of one of its divisions.

A significant change from the former Article 5 is the abolition of the statute of fraud requirements which previously required that the letter of credit be in writing to be enforceable.[88] By declining to specify any particular medium by which the letter of credit must be established or communicated, Revised Article Five recognizes that many letter of credit transactions are now con-

[83] When the parties in a jurisdiction governed by the UCC are silent on the issue, the UCP 500 may apply because of trade custom or past dealings between the parties.
[84] UCC § 5-110.
[85] UCC § 5-116(c).
[86] Ibid.
[87] UCC § 5-102(a)(10).
[88] UCC § 5-104. This section no longer requires a writing as did the former version of Section 5-104.

ducted by electronic means. This is consistent with the UCP, which also acknowledges that a letter of credit does not have to be in any particular form or contain any particular phrasing.[89]

The specificity of expiration dates is an area in which that the drafters of Article Five deviated from the guidance of the UCP. The UCP 500 requires the letter of credit to stipulate a specified expiration date for presentation of documents as well as a place for presentation of documents.[90] Consistent with the former version of Article Five, the Revised UCC Section 5–106 provides for a one-year expiration date where none is stated and for a five-year limitation on perpetual letters of credit.[91]

Where the UCP 500 contains several detailed articles that deal with the different types of documents, the form they should take, and the requirements for acceptance, Revised Article Five retains its previous broad unitary definition of document to include, 'a draft or other demand, document of title, investment security, certificate, invoice or other record, statement, or representation of fact, law or opinion . . .'[92] Revised Article Five changes the prior law of Article Five, and is now in conformity with the UCP regarding the presumption of irrevocability of letter of credit absent some express contrary intent.[93]

Following the lead of the UCP, Revised Article Five now provides and requires examination and notice of any discrepancies within a 'reasonable time' not to exceed the seventh business day after presentation of the documents'.[94] The corresponding UCP provision provides that the issuing bank has a "reasonable time, not to exceed seven banking days following the receipt of the documents" to examine the documents and to notify the beneficiary that the documents are not in compliance with the terms and conditions of the credit.[95] Revised Article Five now provides that the issuer is precluded from asserting any discrepancy not stated in its notice, except for fraud, forgery, or expiration.[96] This requirement is new to Article 5 and is taken from a similar provision in the UCP 500 that is intended to promote certainty and finality.

The standards for fraud and forgery in Revised Article Five are consistent with the prior Article Five, as well as the case law. The fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. The fraud must also be "material."[97] The standard for injunctive relief remains high. In addition, Revised Article 5 for the first time,

[89] Also recognizing the use of electronic means in letter of credit transactions, the UCP 500 states that an 'authenticated teletransmission' will be the operative credit unless it states 'full details to follow' (or words of similar effect) or states that mail confirmation is to be the operative credit. UCP 500 art 42(a) (1993).

[90] UCP art 42(a) (1993).

[91] UCC § 5–106(c), (d).

[92] UCC § 5–103.

[93] UCC § 5–106(b).

[94] UCC § 5–108(d).

[95] Although the outside limit of that time is measured in business days under the UCC and in banking days under the UCP, the difference will rarely be significant.

[96] UCC § 5–108(c).

[97] UCC § 5–109(a).

establishes standards that a court must apply in determining whether to enjoin the issuer from honoring the draft.[98] Factors which the court must consider include the prohibition of an injunction by another law, the adverse effect of an injunction on the beneficiary, and the availability of a remedy for fraud or forgery against the responsible party. In contrast, the UCP 500 does not contain a fraud provision. The difference is probably due to the fact that the Article 5 provisions developed through American case law. The lack of a fraud provision in the UCP was based on the desire to defer to local law on fraud issues, recognizing that the laws of the various jurisdictions that adopt the UCP lack uniformity.

Unlike the UCP 500, which does not set out remedies for the beneficiary or applicant, Revised Article Five, as with the prior version, continues to provide specific relief for beneficiaries and applicants.[99] In addition, Revised Article Five now provides for the right to specific performance.[100] If an issuer wrongfully dishonors or repudiates, the beneficiary may recover the amount of the letter of credit with interest or the beneficiary may obtain specific performance. In either case, the claimant may also recover incidental but not consequential damages.[101] This limitation is based on the assumption that the cost of letters of credit would increase if consequential and punitive damages were allowed.

As with original Article 5, the UCP 500 does not specifically address subrogation because subrogation rights are presumed to be available by contract. However, because the courts have not agreed on their availability, Revised Article 5 provides subrogation rights for an issuer who honors a letter of credit.[102] These after-honor subrogation rights provide equitable relief based on the underlying transaction. However, the honor must occur before the use of subrogation law because of the 'independence' principle. To illustrate, if the issuer pays the beneficiary, the issuer is subrogated to the rights of the beneficiary and the applicant to the same extent as if the issuer were a secondary obligor of the underlying obligations. These rights of subrogation also extend to an applicant who reimburses and a nominated party who pays or gives value.

Unlike the UCP 500, Revised Article 5 provides a statute of limitations.[103] This provision is new and establishes that an action to enforce a right or obligation arising under Article 5 must be commenced within one year from the expiration date of the letter of credit or after the cause of action accrues, whichever occurs later.

[98] UCC § 5-109(b).
[99] UCC § 5-111.
[100] UCC § 5-111(a).
[101] Ibid.
[102] UCC § 5-117(a).
[103] UCC § 5-115.

SECURED FINANCING

The newest project to be undertaken is the revision of Article Nine of the UCC. Article Nine governs secured financing of personal property. This is an area of North American law which has held quite some interest in Australia[104] as well as New Zealand. Although it would appear that a unified security rights system that was consistent throughout the various states and territories of Australia would be attractive from the perspective of financiers, the major interests groups, such as banks, appear to have lost interest in pursuing a system similar to Article Nine. Without broad support, such legislation is unlikely at this time. Presently, however, the Ministry of Commerce in New Zealand is looking into the adoption of a unified Article Nine type system.[105] As recognized by every study that has looked to Article Nine as a possible model, the great advantage of a unified system of personal property security rights is that it eliminates confusion and costs associated with various discrete and separate security rights laws. It therefore continues to be a model to be studied in Australia and elsewhere.

However, Article Nine is not perfect, and as time and experience had shown, it was generally agreed in the United States for several years that Article Nine was in need of a serious overhaul,[106] and it is presently being revised. An Article Nine Study Group, which was constituted by the ALI in 1990, completed its intensive review of the operation of Article Nine with the publication of its final report in December 1992. That study concluded with the recommendation that the revision of Article Nine be undertaken. The Executive Committee of NCCUSL acted affirmatively upon that recommendation in the winter of 1993, and a Drafting Committee was established to undertake the revision process. The committee has begun to meet regularly.

On the international level, secured financing has not reached the level of sophistication which it has in the United States. Nonetheless, there are currently two international conventions in the area awaiting ratification by the United States: the UNIDROIT[107] Convention on International Financial

[104] In 1993, the Australian Law Reform Commission published its report and recommendation for the adoption of a unified security rights regime for personal property Australian Law Reform Commission Report No. 64 (1993). In the report, the Law Reform Commission recommended the adoption of a regime similar to Article Nine with modifications necessary to make the system compatible with Australian law. Recommendations in Australia for the reform of personal property securities law have been made since the early seventies, starting with the Molomby Report recommending that all security interests in personal property should be treated in the same manner by a unified system. Committee of the Law Council of Australia, Report of Fair Consumer Credit Laws to the Attorney-General of Victoria (1972).

[105] The New Zealand Law Commission issued a report in 1989 that suggested the advantages of adopting a security rights system based on Article Nine of the UCC. Report No 8 (1989). In August 1996, the New Zealand Ministry of Commerce distributed a position paper expressing the government's continued interest in this project, and it is likely that appropriate legislation will be forthcoming in New Zealand.

[106] This was also recognized by the Australian Law Reform Commission.

[107] 'UNIDROIT' refers to the International Institute for the Unification of Private Law

easing[108] and the UNIDROIT Convention on International Factoring.[109] In ddition, the possibility exists that UNIDROIT will undertake an additional roject involving security interests in mobile goods.

The strongest reason to revise Article Nine is to improve the system for iling financing statements. This system provides public notice of the security nterests held by secured creditors. The existing law was designed for a manial, paper-based filing system. Modern electronic filing technology replaces nany of the assumptions in the present law of secured transactions. It is likely hat Revised Article Nine will use many innovations to reduce the burdens on iling offices, and on the costs and time involved in using these public records. These innovations include electronic filing, reducing the need for multiple ilings, and standard filing forms. The proposed revisions go considerably eyond filing improvements, however, and the general thrust of the proposed evisions is to facilitate secured lending by improving the position of secured arties in the event of default by borrowers.

\. Scope

The revision of Article Nine is likely to have a greatly expanded scope.[110] For xample, it is likely to encompass security interests in deposit accounts as original collateral, not just as proceeds of other collateral. It also will likely nclude security interests and sales[111] of payment intangibles[112] for the payment of money.[113] Revised Article Nine will also apply to the perfection and riority of agricultural liens. In addition, the greatly expanded definition of account'[114] will also widen the net of Article Nine.

Where true consignments have always posed a problem in Article Nine, and ave required the working through of several convoluted provisions both in Article Nine and the sales provisions in Article Two, the revisions will

08 The UNIDROIT Convention on International Financial Leasing was completed in 1988 in Ottawa, Canada.

09 The UNIDROIT Convention on International Factoring was also completed in Ottawa, Canada in 1988.

10 In earlier drafts, the extended scope was much wider than the current proposal. For example, at one time, it had been proposed that Article Nine encompass rights in life insurance and tort claims. The Drafting Committee has now backed down from this.

11 The present version of Article Nine provides that the sale of accounts and chattel paper (as well as a true security interest in accounts and chattel paper) is within the scope of Article Nine, but does not provide for the sale of general intangibles as within the scope. See UCC § 9-102.

12 A payment intangible is defined as 'a general intangible under which the account debtor's principal obligation is to pay money'. Revised Section 9-103(c).

13 Current Article Nine includes sales of accounts and chattel paper, but not sales of payment intangibles.

14 The present definition of account is 'any right to payment for goods sold or leased of for services rendered which are not evidenced by an instrument or chattel paper, whether or not it has been earned by performance'. UCC § 9-106. The proposed definition of an account is 'a right to payment, whether or not earned by performance, for property other than money that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, for a policy of insurance issued or to be issued, for a security obligation incurred or to be incurred, for energy provided or to be provided . . . or for the use or hire of a vessel under a charter . . .' Revised Section 9-103(a).

incorporate consignments into Article Nine as a true security interest, and thereby greatly ease the placement of consignments into the priority structure.

Revised Article Nine will also govern 'investment property' which was previously governed by independent sections in Article Eight: Investment Securities.[115] This change reflects the sound judgment that all secured transactions provisions should be in one article, and not scattered throughout the code.

The draft also includes within the scope of Article Nine most sales of 'payment intangibles', defined as general intangibles under which an account debtor's principal obligation is to pay money.[116] The draft continues the drafting convention found in current Article Nine, which provides that the sale of accounts, chattel paper, or payment intangibles creates a 'security interest.'[117] In addition, the draft expands the scope of Article Nine to include commercial tort claims.[118] However, the draft continues to exclude tort claims for bodily injury or other non-business tort claims of a natural person, as well as tort claims that are not generally assignable under other law. Furthermore, a security agreement must describe commercial tort claims with specificity.[119] An after-acquired property clause does not reach after-acquired commercial tort claims.

The draft narrows the exclusion of transfers by governmental entities. It excludes only transfers covered by another statute (other than a statute generally applicable to security interests), to the extent the statute governs the creation, perfection, priority, or enforcement of security interests. The draft also brings non-possessory statutory agricultural liens within the scope of Article Nine.

The draft also includes other non-agricultural statutory liens within the scope of Article Nine.[120] These other statutory liens are subject to Article Nines perfection (filing) rules, but the priority rules address only the relative priorities between a statutory lien and a security interest. Other priority contests are left to other law.

The draft provides that 'true' consignments — bailments for the purpose of sale by the bailee — are security interests covered by Article Nine, with certain exceptions.[121] Currently, many consignments are subject to the filing requirements of Article Nine by operation of Section 9–326 and are governed by the priority rules in Section 9–114.

In addition, the draft also addresses obligations explicitly, such as guaranties and letters of credit, which support payment or performance of collateral such as accounts, chattel paper, and payment intangibles.[122]

115 Revised Section 9–108.
116 Revised Section 9–103(c).
117 Revised Section 9–112(a).
118 Revised Section 9–112(c)(15)(A).
119 Revised Section 9–111(e).
120 Revised Section 9–112(a)(2). For a definition of 'statutory lien' see Revised Section 9 102(a)(47).
121 Revised Section 9–112(a)(4).
122 Revised Section 9–112(a)(3).

Finally, the draft enables a security interest to attach to general intangibles, including a contract, permit, license, or franchise, notwithstanding a contractual or statutory prohibition against or limitation on assignment.[123] Also, the draft explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest.[124]

B. Good Faith

The draft contains a new definition of 'good faith' that includes not only 'honesty in fact' but also 'the observance of reasonable commercial standards of fair dealing'.[125] The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.[126]

C. Choice Of Law

The draft changes the choice-of-law rule governing perfection (ie where to file) for most collateral to the law of the jurisdiction where the debtor is located.[127] Under current law, the jurisdiction of the debtor's location governs only accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.[128]

As a general matter, the draft follows current law, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). However, there are three exceptions. Firstly, a 'registered entity', such as a corporation or limited liability company, is located in the jurisdiction under whose law the debtor is organized, eg a corporate debtor's State of incorporation. Second, an individual debtor (ie human being) is located at his or her principal residence. Third, the United States and its governmental entities are located in the District of Columbia.

If, using the foregoing rules, a debtor is located in a jurisdiction whose laws do not require public notice as a condition of perfection of a security interest, then the entity is deemed to be located in the District of Columbia. Thus, to the extent that Revised Article Nine applies to non-United States debtors, perfection could be accomplished in many cases by a domestic filing.

For tangible collateral such as goods and instruments, the law applicable to priority and the effect of perfection or non-perfection remains the law of the jurisdiction where the collateral is located, as under current law. For intangible collateral, such as accounts, the applicable law will be that of the jurisdiction in which the debtor is located.

The draft includes several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. It also provides special rules

123 Revised Section 9–406.
124 Revised Section 9–406(d).
125 Revised Section 9–102(23).
126 See Revised Section 2–102(19); UCC § 5–102(7).
127 Revised Section 9–301(1).
128 UCC § 9–103.

for deposit accounts similar to those for investment property under current law.

D. Duties Of Secured Party

The draft provides for expanded duties of secured parties. For example, the draft imposes upon a secured party with control over a deposit account investment property, or a letter of credit the duty to release control when there is no secured obligation and no commitment to give value.[129] Furthermore under the draft, a secured party that has notified account debtors to make payments to it must release the account debtors from that obligation when there is no secured obligation and no commitment to give value.[130] The draft also expands a secured party's duties to provide the debtor with information concerning the collateral and the obligations it secures.[131]

E. Perfection

With certain exceptions, the draft provides that a security interest in a deposit account or a letter of credit may be perfected only by the secured party's acquiring 'control' over the deposit account or letter of credit. A secured party has 'control' of a deposit account when, with the consent of the debtor, the secured party obtains the depositary institution's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositary institution.[132] 'Control' of a letter of credit occurs when the issuer and nominated party consent to an assignment of proceeds or the letter of credit is transferred to the secured party.[133]

The draft expands the types of collateral in which a security interest may be perfected by filing to include instruments.[134] In addition, under the draft agricultural liens, other statutory liens, and security interests in commercial tort claims are perfected by filing.[135]

1. Sales of payment intangibles: Automatic perfection

Current Article Nine covers the outright sale of accounts and chattel paper.[136] The Drafting Committee recognizes that sales of most other types of receivables likewise are financing transactions to which Article Nine should apply. Accordingly, the draft expands the definition of 'account' to include many types of receivables currently classified by Article Nine as 'general intangibles'. It thereby subjects to Article Nine's filing system sales of more types of receivables than does current law. Certain sales of payment intangibles –

[129] Revised Section 9–208(a)(1)-(4).
[130] Revised Section 9–208A.
[131] Revised Section 9–209.
[132] Revised Section 9–109(a).
[133] Revised Section 9–110.
[134] Revised Section 9–310.
[135] Revised Section 9–309.
[136] Revised Section 9–112(a)(3).

ırimarily bank loan participation transactions — should not be subject to the ırticle Nine filing rules. These transactions fall in a residual category of ollateral, 'payment intangibles' (general intangibles under which the account iebtor's principal obligation is the payment of money), the sale of which is xempt from the filing requirements of Article Nine.[137]

?. *Possessory security interests*

;everal provisions of the draft address aspects of security interests when the ecured party or a third party is in possession of the collateral. In particular, he draft resolves a number of uncertainties under current law. The draft ırovides that a security interest in collateral, which is in the possession of a hird party, is perfected when the third party acknowledges that it holds for he secured party's benefit.[138] However, the draft also provides that a third ıarty need not give such an acknowledgment and that its acknowledgment loes not impose any duties on it, unless it agrees otherwise.[139] The draft also larifies the circumstances under which a security interest in goods covered by ı certificate of title may be perfected by the secured party's taking ıossession.[140]

3. *Automatic perfection*

n a separate section, the draft lists the types of security interests as to which ıo public-notice step is required for perfection (eg purchase money security nterests in consumer goods other than automobiles). The draft also provides hat a perfected security interest in collateral supported by a 'support obligation' (such as an account supported by a guaranty) is also a perfected ecurity interest in the support obligation. Furthermore, a perfected security nterest in an obligation secured by a real property mortgage is also a perfected ecurity interest in the mortgage.[141]

?. Description Of The Collateral

Revised Article Nine provides that a financing statement can have a supergeneric description of the collateral, eg 'all of my assets'.[142] The Drafting Committee has not provided for this in the requirement of the description of he collateral in the security agreement.

[137] See Revised Section 9-309.
[138] Revised Section 9-311(e).
[139] Revised Section 9-311(d), (e)(2).
[140] Revised Section 9-311(b); Revised Section 9-314(c).
[141] Revised Section 9-308(d), (f).
[142] Revised Section 9-311(b). The existing law requires a description by item or by type. UCC § 9-115(3).

G. Proceeds

The draft expands the definition of 'proceeds' of collateral to includ additional rights and property that arise out of collateral, including distributions on account of collateral and claims arising out of the loss or non-conformity of, defects in, or damage to collateral. The term also include collections on account of 'support obligations', such as guarantees.

H. Filing

Revised Article Nine provides that all filings are to be made in the jurisdictio at the 'location of the debtor'.[143] This replaces the present rule that provide that filing is to be made at the location of the collateral. Furthermore, Revise Article Nine does not provide for local filing, as does the present law, bu contemplates one central filing system in each state.[144] Other changes in th filing system are set forth in the following subsections:

1. Medium-Neutrality

The draft is 'medium-neutral'; that is, it makes clear that parties may file an otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

2. Financing Statement Formal Requisites

The draft provides that a super-generic description (eg, 'all assets' or 'all personal property') in a financing statement is a sufficient indication of th collateral (note, however, that the draft retains the requirement that a securit agreement contain a description of collateral that reasonably identifies it). I also contains provisions clarifying when a debtor's name is correct and whe an incorrect name is insufficient.[145] To facilitate electronic filing, the draf does not require that the debtor's signature appear on a financing statement Instead, it prohibits the filing of unauthorized financing statements an imposes liability upon those who violate the prohibition.[146]

3. 'Open Drawer'

The draft incorporates what has become known as the 'open drawe approach. This convention encompasses several aspects of filing office operations. Firstly, the filing office may not reject a financing statement or othe record for a reason other than one of the few set forth in the draft.[147] Secon the filing office is obliged to link all subsequent records (eg amendment adding collateral, assignments, etc) to the initial financing statement to whic they relate.[148] Third, the filing office may delete a financing statement an

143 Revised Section 9-501(a)(2).
144 Revised Section 9-501(a)(1).
145 Revised Section 9-503.
146 See Revised Section 9-508(a); Revised Section 9-624(d).
147 Revised Section 9-521; Revised Section 9-515(b).
148 Revised Section 9-520(a).

·lated records from the files only upon lapse (ie five years after the filing ate), and then only if a continuation statement has not been filed.[149] Thus, a nancing statement and related records would be discovered by a search of ıe files even after the filing of a termination statement. This approach helps iminate filing office discretion and also eases problems associated with ıultiple secured parties and multiple partial assignments.

Correction of Records: Missing Secured Parties and Fraudulent Filings

ı some areas of the United States, serious problems have arisen from fraudu-·nt financing statements that are filed against public officials and other rominent persons. To deter fraudulent filings of all kinds, the draft adds a :quirement that the filing office communicate to each debtor and secured arty named on a financing statement the information contained in the nancing statement and in each related record.[150] The draft also affords a ıatutory method by which a debtor who believes that a filed record is inac-urate or was wrongfully filed may indicate that fact in the files without ffecting the efficacy, if any, of the challenged record.[151]

In addition, the draft permits the debtor to file a request for termination of financing statement.[152] If a secured party fails to object to a debtor's filed equest for termination within a specified period following the filing office's ommunication of the request to the secured party, the financing statement ·ill terminate.[153] Although this last provision remains controversial within nd outside the Drafting Committee, it represents the Drafting Committee's ttempt to address both the problem of fraudulent filings and the problem of ecured parties that simply disappear through mergers or liquidations.

·. Filing Office Operations

'he draft mandates performance standards for filing offices and requires fil-ıg offices to sell filing data to the public.[154] It provides as well for the romulgation of administrative rules to deal with details best left out of the tatute.[155]

Financing Statement

ınticipating the move to a broad based electronic filing system, structural hanges in the requirements of the financing statement are to be made. For xample, the requirement of the debtor's signature is being abolished.

49 Revised Section 9–522; Revised Section 9–516(a), (d).
50 Revised Section 9–520(a)(6).
51 Revised Section 9–519(a), (d).
52 Revised Section 9–519(b).
53 Revised Section 9–519(i).
54 Revised Section 9–523(e).
55 Revised Section 9–528.

J. Priorities

The draft includes several new priority rules. These new rules are set forth in Part Three of Article Nine.

1. Deposit Accounts

The draft's rules applicable to deposit accounts are similar to those incorporated in Article Nine for investment property in conjunction with the recently-revised Article Eight.[156] If a secured party has control over a deposit account, its security interest is senior to a security interest perfected in another manner (eg as cash proceeds). Security interests perfected by control generally rank equally, but as between a depositary institutions security interest and one held by another secured party, the depositary institution's security interest is senior. A corresponding rule makes a depositary institution's right of setoff generally senior to a security interest held by another secured party.

2. Letters of Credit

The draft includes priority rules for security interests in letters of credit that are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (ie as a support obligation for the collateral in which a security interest is perfected). Security interests in letters of credit perfected by control generally rank equally, but one held by a transferee beneficiary has priority over other security interests.

3. Purchase Money Security Interests

The draft substantially rewrites the definition of purchase money security interest ('PMSI'). It makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the 'dual status' rule applied by some courts under current law. It provides an even broader definition of a PMSI in inventory, yielding a result that complies with private agreements entered into in response to the uncertainty of current law. The draft also revises the PMSI priority rules, but generally without material change in substance. The draft clarifies the priority rules for competing PMSIs in the same collateral and the draft treats consignments as if they were purchase money security interests in inventory.[157]

4. Chattel Paper and Instruments

The draft continues to afford priority to certain purchasers of chattel paper or instruments who take possession of the collateral. For chattel paper, the draft maintains the distinction between priority over a security interest in chattel paper claimed merely as proceeds of a competing security interest and

[156] Revised Section 9-325.
[157] Revised Section 9-322.

›riority over a security interest in chattel paper claimed other than merely as ›roceeds.[158] With respect to the former, a purchaser of chattel paper that takes ›ossession in the ordinary course of its business takes priority over a com›eting security interest unless the chattel paper indicates that it has been ssigned to an identified secured party. With respect to the latter, a purchaser ›f chattel paper that takes possession in the ordinary course of its business akes priority over a competing security interest if the purchaser, in good aith, in the ordinary course of the purchaser's business, and without knowldge that the purchase violates the rights of the secured party, gives new value ›nd takes possession of the chattel paper. The Drafting Committee agrees that ‹rticle Nine should continue to afford priority to purchasers of instruments vho take possession; however, the committee has not reached agreement as to he substance of the rule.

;. *Miscellaneous*

Ihe draft also includes the following developments:

akes (1) revised priority rules for security interests in goods covered by a certificate of title;[159]

(2) clarifications of selected good-faith-purchase issues;[160]

(3) a special priority rule under which a senior security interest in receivables

akes priority in a check constituting proceeds of the receivables even if the junior secured party is a holder in due course of the check;[161]

(4) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise 'clog' the payments system;[162]

(5) a provision enabling most transferees of money to take free of a security interest;[163]

(6) new priority rules to deal with the 'double debtor' problem arising when a debtor creates a security interest in collateral acquired subject to a security interest created by another person;[164]

(7) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by

he original debtor's after-acquired property agreement; and (8) substantially rewritten and refined priority rules dealing with accessions and commingled goods.[165]

58 Revised Section 9-322(b).
59 Revised Section 9-334.
60 Revised Section 9-322(b)(2); Revised Section 9-327(b).
61 Revised Section 9-328(c).
62 Revised Section 9-329(b).
63 Revised Section 9-329(a).
64 Revised Section 9-319A.
65 Revised Section 9-332; Revised Section 9-333.

K. Default And Enforcement

The default and enforcement provisions of Article Nine have been extensively revised. Some of the draft provisions described below are affected by or subject to special draft consumer-protection provisions discussed in the next section.

1. Debtor, Secondary Obligor, and Waiver

The draft clarifies the identity of persons who have rights and persons to whom a secured party owes duties under the remedies provisions. Under the draft the rights and duties are enjoyed by and run to the 'debtor', defined to mean any person with a non-lien property interest in collateral, and to any 'secondary obligor'. The latter is a new term defined to include one who is secondarily obligated on the secured obligation, eg a guarantor. However, the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or a secondary obligor. A non-debtor obligor, whether primary or secondary, may effectively waive its rights and the secured party's duties to the extent and in the manner provided by other law, eg the law of suretyship.

2. Rights of Collection and Enforcement of Collateral

The draft explains in some depth the rights of a secured party that seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary institution holding a security interest in a deposit account maintained with the institution.

3. Disposition of Collateral: Warranties of Title

The draft imposes on a secured party that disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law. Furthermore, it provides rules for the exclusion or modification of those warranties.[166]

4. Disposition of Collateral: Notification and Effects

The draft also requires a secured party to give notification of a disposition of collateral to other secured parties and lien holders who have filed financing statements against the debtor which cover the collateral.[167] (That duty was previously eliminated by the 1972 revisions to Article Nine.) However, the draft relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the search is unreasonably delayed.[168] The draft specifies the contents of a sufficient notification of disposition and provides that a notification sent ten days or more before the

[166] Revised Section 9-610(a).
[167] Revised Section 9-611(b).
[168] Revised Section 9-611(c).

earliest time for disposition is sent within a reasonable time.[169] The draft also clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.[170]

5. Transfer of Record or Legal Title

The draft contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under Part Six: Default.[171] This rule applies regardless of the circumstances under which the transfer of title occurs.

6. Strict Foreclosure

The draft permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured.[172] This right of strict foreclosure extends to intangible as well as tangible property. The draft also clarifies the effects of an acceptance of collateral on the rights of junior claimants. The draft rejects the approach taken by some courts, deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations, such as in the case of a secured party's unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition is commercially reasonable.[173]

7. Effect of Noncompliance: 'Rebuttable Presumption' Test

The draft adopts the 'rebuttable presumption' test for the failure of a secured party to proceed in accordance with certain provisions of Part Six: Default.[174] Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with the default provisions of Article Nine, eg in a commercially reasonable manner. The draft rejects the 'absolute bar' test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

8. 'Low-price' Dispositions: Calculation of Deficiency and Surplus

The draft provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, an affiliate of the secured party, or a secondary obligor are 'unreasonably low'.[175] Instead of calculating

[169] Revised Section 9-612.
[170] Revised Section 9-615.
[171] Revised Section 9-617(c).
[172] Revised Section 9-618(b).
[173] Revised Section 9-626.
[174] Revised Section 9-625 (Alternative B)(1).
[175] Revised Section 9-625 (Alternative B)(2).

a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) is calculated based on the proceeds that would have been received in a disposition to an unrelated person.

L. Enforcement

The revision Committee has made several proposals to bring the enforcement provisions of Article Nine in line with current practice, as well as to rationalize some procedures and rights that are consistent with efficient rendering of claims. For example, there are proposed rules with specific guidance for notice to the debtor and other secured parties about impending disposition of collateral. The secured party can accept collateral in partial satisfaction of the debt,[176] as well as accept collateral as satisfaction of the debt even if the secured party does not have possession of the collateral.[177] The Drafting Committee also proposes a statutory rule, consistent with the majority of cases, that in non-consumer transactions, in the case of a deficiency judgment, there is a rebuttable presumption that the secured creditor acted commercially reasonable in the sale or other disposition of the collateral.

M. Consumer Issues

Article Nine gives the secured creditor tremendous leverage over the debtor and all of the other creditors of the debtor, in that the ranking secured creditor has a claim exclusive to, and privileged over, all the other creditors. This raises a variety of issues in the consumer context, and the concern is significant enough that the Executive Committee of NCCUSL appointed a subcommittee to study and advise the Drafting Committee on consumer issues.

Because of the grave fear of overbearing and unfair bargaining in consumer secured transactions, the Drafting Committee has defined a consumer secured transaction.[178] This will also probably be limited to a specific dollar amount. The full extent of the protection afforded consumer secured debtors has yet to be worked out.

Under current law, a consumer security interest is defined by the use of the collateral, and not the type of collateral. This is inconsistent with other consumer statutes as well as many federal statutes. The committee is considering changing the definition of consumer transaction to be based on the type of good normally used by consumers, and thereby avoid the problem in the

[176] Revised Section 9–618(b). The current law is unclear on this point. See UCC § 9–504.

[177] See Revised Section 9–618(b). The current law allows retention of the collateral in satisfaction of the debt only when the secured party has possession of the collateral. See UCC § 9–504.

[178] ' "Consumer secured transaction" means a transaction in which an individual incurs an obligation primarily for personal, family, or household purposes', a security interest secures the obligation, and the collateral is held or acquired primarily for personal, family, or household purposes. Revised Section 9–102(a)(13).

current law in which a secured party does not know whether a given transaction is a consumer transaction or not.[179]

The draft includes several new and revised provisions applicable only to consumer transactions. Many, but not all, of these provisions deal with the enforcement of a security interest. In formulating these provisions, the Drafting Committee and the Reporters relied to a considerable extent on the work of a Subcommittee on Consumer Transactions. This subcommittee, which was established in 1995, made recommendations that the Drafting Committee considered at its June 1996, November 1996, and March 1997 meetings. A summary of the principal provisions follows. Many of these provisions remain highly controversial.

1. Definition of 'Consumer Secured Transaction' and 'Consumer Goods Secured Transaction'

Nearly all the consumer-protection rules apply to 'consumer goods secured transactions'. These are transactions in which an individual incurs an obligation primarily for personal, family, or household purposes and a security interest in consumer goods secures the obligation. A few provisions apply more broadly to 'consumer secured transactions'. These are transactions in which an individual incurs an obligation primarily for personal, family, or household purposes and the obligation is secured by collateral held or acquired primarily for personal, family, or household purposes.

2. Description of Investment Property

The draft provides that, in consumer secured transactions, a security agreement must describe a security entitlement, securities account, or commodity account with specificity. A description by type alone (eg 'all my security entitlements') is insufficient. If a specific securities account is described, after-acquired securities entitlements with respect to the account are covered.

3. Allocations of Payments for Determination of Purchase Money Status

The draft contains alternative allocation rules for purposes of determining the portion of purchase money and non-purchase money obligations included in consolidated obligations.[180] If a State has a non-Article Nine allocation formula, that formula applies. If a State lacks an otherwise applicable allocation formula, payments are applied to the obligations in the order in which they were incurred.

[179] Because the law provides for automatic perfection on purchase money security interests in consumer goods, large retail merchants routinely do not file to perfect purchases which normally would be considered consumer goods. This places them at risk of being unperfected in many routine financed sales.

[180] Revised Section 9-104.

4. Notification of Disposition of Collateral

The draft contains a safe-harbor form of notification, in 'plain English', for consumer goods secured transactions.[181]

5. Notification of Calculation of Deficiency

The draft requires a secured party to provide a debtor with a notification of how it calculated a deficiency at or before the time it first undertakes to collect the deficiency in a consumer goods secured transaction.[182]

6. Acceptance of Collateral in Satisfaction of Obligation; 'Strict Foreclosure'

Strict foreclosure in a consumer goods secured transaction is conditioned on the debtor's having been dispossessed of the collateral. Partial strict foreclosure is not permitted, however, when a disposition is mandatory (ie after the debtor has paid sixty percent or more of the secured debt).

7. Reinstatement of Secured Obligation Without Acceleration

For payment defaults, the draft provides a one-time right of reinstatement of an accelerated obligation if a debtor has paid sixty percent or more of the secured debt and if the debtor cures the default.[183]

8. Noncompliance: Absolute Bar versus Rebuttable Presumption

The draft provides for application of the absolute bar rule for a secured party's non-compliance with Part Six: Default as an alternative to the rebuttable presumption rule.[184] Each State would be expected to select one or the other during the ratification process.

9. Noncompliance: Minimum Damages; Good Faith Error Defense; Limits on Damages in Class Actions

The draft provides for the imposition of minimum damages in the event of a secured party's noncompliance with Part 6: Default in a consumer goods secured transaction.[185] No damages can be recovered in the case of unintentional, good faith errors, such as clerical and calculation errors. The draft limits the statutory minimum damages in a class action to the lesser of $500000 or one percent of the secured party's net worth.

[181] Revised Section 9–611(b).
[182] Revised Section 9–614.
[183] Revised Section 9–622(a).
[184] Revised Section 9–625(Alternative A).
[185] Revised Section 9–624(b).

OTHER REVISION PROJECTS

In addition to the sales, letters of credit, and secured transactions provisions, the other Articles of the UCC have also undergone recent revisions. In addition, discreet new areas of commercial law are being added to the UCC. As with all of the new articles of the UCC, modern commercial practices and emerging international legal regimes have been the primary influences on the revised articles.

A. Payment Systems

On the domestic and international levels, payments systems have been divided into two areas: paper based payment systems such as checks and notes, and electronic payment systems such as electronic funds transfers. In 1990, a revised Article 3: Negotiable Instruments and amended Article 4: Bank Deposits-Collections, both of the UCC, were approved. On the international level, at the same time the American revisions were proceeding, UNCITRAL drafted a Convention on International Bills of Exchange and International Promissory Notes which was adopted by UNCITRAL on June 29, 1990. To a great extent, those two efforts were compatible. Although the UNCITRAL Conventions had to accommodate divergent laws of other countries in such important areas as forgery, warranty transfers, and the cutting off of claims and defenses, the results, while not identical to United States law under Article 3, are at least harmonious.[186]

Article Four A: Funds Transfers was approved in 1989 to govern a form of payment mechanism that was the product of technological changes that led to the growth of significant payments systems that fell outside existing statutory structures. UNCITRAL gave its final approval in 1992 to its Model Law on International Credit Transfers, which includes electronic funds transfers. The Model Law does not contemplate completely separate rules for electronic funds transfers. Earlier drafts included provisions which were quite different from those in Article Four A and which were criticized as being incompatible with high volume systems. The final law eliminated or modified many of the rules that were deemed incompatible with high volume systems. Thus, the Model Law is more harmonious with domestic United States law.

Most recently, NCCUSL has formed a Drafting Committee on Electronic Commerce. It is expected that the recently adopted UNCITRAL Model Law of Electronic Commerce will have a major influence on the promulgation of the American Act.

[186] Although much effort went into, and a lot of hope came out of this Convention, only two states ratified it (Guinea and Mexico), which is eight less than necessary for the Convention to come into effect. Therefore, the influence of this Convention on international transactions is likely to be minimal.

B. Leases

Article Two A: Leases, was added to the UCC in 1987 to support commercial transactions in personal property leasing, which had long existed but emerged as a major industry in the 1980's. In 1994, a committee was formed to revise Article Two A consistent with the Revised Article Two and new Article Two B.

Article Two A has no specific international counterpart. There is a UNIDROIT Convention on International Financial Leasing, but the coverage of that Convention is confined to a tri-partite leasing transaction which, in most cases, would be characterized as a secured transaction under the UCC.

C. Suretyship

A non-Code project, but one in an area closely related to the practice of commercial law, is the project of the American Law Institute to draft a Restatement of the Law of Suretyship. This project will update the Restatement of Security, and will lend uniformity to the body of law governing guarantors and sureties.

D. Investment Securities

Responding to the need to have the law of investment securities respond to modern corporate practice, particularly the issuance and registration of securities outside traditional certificates, Article Eight: Investment Securities was revised in 1994.

E. General Definitions

The UCC, as a true code, is held together by a basic set of general principles and definitions encompassed in Article One. Responding to the major changes in all of the other Articles of the UCC, a Drafting Committee was formed by both NCCUSL and the ALI in 1996 to consider the necessary revision to Article One in light of the other new and revised Articles. A first draft has been produced, and the committee hopes to have a final product by 1998.

F. Software Licensing

The question whether to include computer software within the scope of Article Two was one of the major reasons that led the revision of that article. However, by 1995, it was clear that the policies behind article two and software licensing contracts were not always compatible. As such, the Executive Committee of NCCUSL made the decision to separate licenses into a separate Article — now designated as Article Two B. Since the summer of 1995, a Drafting Committee has been formed, and it has met regularly and produced several drafts. The final product is due in 1997.

THE FEDERAL DIMENSION

A pervasive concern with the revisions has been the extent to which the revisions would be coordinated with those developments on the federal level that strongly contributed to the need to revise the UCC. Federal legislation in the United States covering areas such as federal tax liens, as well as the wholly federal nature of bankruptcy laws, has created a growing federal presence in American commercial law. Additional federal statutory provisions have begun to supplement and even supplant the provisions of the UCC. For example, federal statutes have reordered priorities among unpaid sellers of livestock, perishable agricultural commodities and other persons in the chain of distribution, and restricted the sale of goods by foreclosing secured parties if the goods were produced in violation of labor standards.

In addition to statutory enactments, federal regulation may further affect the application of the UCC Regulations of the Federal Trade Commission, for example, effectively have outlawed non-purchase money security interests in consumer goods. It has been suggested that the entire field of check collection should be abandoned to federal authority. The warranty provisions of Article Two have been overshadowed in the consumer context by federal regulations. Regulations of the Federal Trade Commission have overridden the holder-in-due course rules of Article 3 in the consumer credit sales. International conventions, such as the CISG, which upon ratification by the United States become part of federal law, also have the effect of overriding state law.

There are many reasons to explain this growing federal presence in the commercial field. It may be due in part to the non-responsiveness of the uniform law drafting process to the pressures and concerns that have arisen surrounding a particular UCC rule. It may be due in part to the traditional tension that exists between federal and state law-making bodies, as each vies for jurisdiction over a given area. Or it may be due, in part, to the presence of interest groups who, unhappy with the result in one forum, seek relief in another.

Whatever the cause of this growing federal presence, there is a need to improve the coordination between state and federal commercial law developments in the United States. The problem, however, is how to improve state-federal coordination. NCCUSL is the logical entity to undertake such representation from the state perspective. NCCUSL is one of the primary sponsors of the UCC and also is the primary sponsor of most of the uniform legislation proposed nationwide. As the original sponsor of the UCC and the entity overseeing its revision, NCCUSL should be able to work with legislators and drafting bodies on the federal level to coordinate their activities.

However, there may not be a corresponding entity on the federal level. Unlike many countries, the United States does not have a National Law Revision Commission. Who, then, is the primary sponsor of much of the federal commercial legislation in the United States? Varying interest groups, working through their representatives in Congress without any coordination

at the national level, much less coordination between federal and state lawmakers, cannot do the job. Moreover, no single congressional committee, staff person, agency, or executive staff person has responsibility for coordinating the resulting legislation with state commercial law.

These problems do not have a similar corollary in Australia, for Australia does not have a body similar to NCCUSL. For this reason, the major question in Australia is not one of state and federal coordination, but of state coordination. It may be appropriate in Australia, also, to begin at the federal level. Such an approach might well have been appropriate in the United States for efficiency reasons, but is not likely given the strong tradition and constitutional impediments to creating a national law governing private legal rights.

THE FUTURE

There are common themes that bring all of the UCC revision projects together. First, there is the need for American commercial law to conform to the rising body of international commercial law which is necessary in our now global economy. All of the revision projects have very consciously taken the new international commercial regimes into account, and thereby, will hopefully make the law of commercial transactions more transparent and global In addition, many of these projects are responses to, or are being heavily influenced by, changes in technology. For example, the 1994 revisions to Article Eight which governs investment securities, were in part a response to the elimination of paper and the use of noncertificated securities in the marketplace. Similarly, Article Four A, and the revisions to Articles Three and Four 4, had their genesis in the introduction and use of automation in the check collection system and the use of electronic technologies outside the check system for the movement of money. As more and more commercial information is being moved electronically, rather than in a paper form, many of the traditional concepts and requirements of commercial law must be scrutinized and revised to take account of these technological advances.

New or increased risks inherent in new methods of communication and information processing must be dealt with and existing solutions to old problems reevaluated to determine whether they continue to be valid when technological advances modify commercial practices. Requirements such as the writing requirement embodied in the statute of frauds or other such formalistic requirements need to be reevaluated. Concepts such as 'documents' and 'signatures' and 'notice' need to be expanded to encompass electronic capabilities, or alternatively, the requirements of documents and signatures need to be revised or eliminated. Each individual project has, to some extent to take these technological advances into account. In each of these drafting projects, there is the desire to accommodate expanding commercial practices.

A tremendous amount of thought and energy has gone into and is going into the current commercial law revisions in the United States. Having taken into consideration the most current commercial practices as well as the evolving international commercial conventions, the revised American commercial law provisions may well warrant serious consideration as a model for other jurisdictions in law revision: possibly both as a model of concepts to emulate as well concepts to avoid.