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Recommended Citation

Jennifer S. Martin, Colin P. Marks & Wayne Barnes, *The Uniform Commercial Code Survey: Introduction*, 76 *Bus. L.* 1295 (2021).

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The Uniform Commercial Code Survey: Introduction

By Jennifer S. Martin, Colin P. Marks, and Wayne Barnes*

The survey that follows highlights the most important developments of 2020 dealing with domestic and international sales of goods, personal property leases, payments, letters of credit, documents of title, investment securities, and secured transactions.

There were interesting developments under Article 2 of the Uniform Commercial Code (“U.C.C.”), including cases that implicated Article 2’s provisions governing additional terms in a seller’s acceptance and express warranties. The Vermont Supreme Court reversed the trial court’s denial of attorneys’ fees in one case, concluding that where the buyer had not objected, the burden of proof would be on the buyer to show materiality and the trial court had not made findings of fact as to whether the seller’s additional attorneys’ fees provision was material.¹ In another case, the buyer of a used tractor was able to bring claims for breach of express warranties based on statements in the signed purchase order that the tractor would have “500 to 600” hours of use, when the tractor tendered by the seller had 886 hours on it. The court rejected the seller’s argument that its statements regarding hours were “sales talk,” where the parties understood the buyer only desired to purchase a low-hours tractor and was induced to place the deposit based on the statements. Moreover, the court awarded damages that included lost profits on reduced crop yield where the buyer was unable to secure a replacement low-hours tractor.²

The survey of cases under the United Nations Convention on International Sales of Goods (“CISG”) covered one notable case that considered whether the CISG preempts tort claims where a buyer asserts both tort and contract claims. The court held that the CISG preempted the buyer’s fraud and misrepresentation claims, but not its claim for tortious interference.³ The court explained that while

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1. See Jennifer S. Martin, *Sales*, 76 BUS. LAW. 1299, 1302–1303 (2021).

2. See *id.* at 1306.

3. See Kristen Davis & Candace Zierdt, *CISG*, 76 BUS. LAW. 1407, 1407–1408 (2021).

the CISG preempts state contract law, it has no application to claims arising in tort.⁴

Perhaps the most noteworthy equipment leasing case decided in 2020 involved the commercial law characterization of a purported lease in the context of a U.S. Bankruptcy Court proceeding. The bankruptcy trustee in a chapter 7 bankruptcy case asserted that certain aircraft leases were disguised secured transactions rather than true leases under the U.C.C.; however, the parties had an agreement that English law would govern the transaction.⁵ The court ultimately decided to honor the parties' agreement to apply English law, which generally prohibits recharacterization of a transaction, and thus the lease was not recharacterized despite facts that may have led to a different result under a U.C.C. analysis.⁶

In the payments area, several federal regulatory updates are reported. One update involved issuing an interim final rule amending Regulation D, which update involves removing the prior monthly six-transaction limit on certain "convenient" transfers and withdrawals from a depository institution that customers were allowed to make from a savings deposit account.⁷ Another update involved a final rule amending the Consumer Financial Protection Bureau's ("CFPB's") Remittance Rule, which is the CFPB rule that implements the Electronic Funds Transfer Act ("EFTA") protections for remittance transfers. The final rule reduces the number of institutions required to comply with the Remittance Rule, and also changes certain exceptions to some Remittance Rule disclosure requirements.⁸ Also reported is: (1) new guidance from the Office of the Comptroller of the Currency ("OCC") on participation in certain payment systems, such as check image exchange, automated clearinghouse ("ACH"), wire transfer, and faster payment systems; and (2) OCC interpretative letters regarding cryptocurrency and stablecoins.⁹ Several courts dismissed U.C.C. section 4A-207 wire transfer claims on the grounds that the beneficiary's bank did not have actual knowledge of a discrepancy between the beneficiary's name and account number when it processed the payment order using the account number.¹⁰ An opinion from the U.S. Court of Appeals for the Third Circuit upheld summary judgment in favor of a bank as against a plaintiff asserting Article 3 liability for unauthorized electronic ACH debits from his account, reaffirming the principle that Articles 3 and 4 of the U.C.C. were intended to apply to "traditional written instruments" and that "neither Article controls electronic transactions."¹¹

There were several decisions concerning letters of credit during the survey period. One decision under U.C.C. Article 5 denied a request for an order to enjoin

4. *See id.*

5. *See* Dominic A. Liberatore, Stephen T. Whelan & Edward K. Gross, *Leases*, 76 *BUS. LAW.* 1315, 1318–19 (2021).

6. *See id.*

7. *See* Stephen Krebs & Robert J. Denicola, *Payments*, 76 *BUS. LAW.* 1335, 1335–36 (2021).

8. *Id.* at 1336.

9. *Id.*

10. *Id.* at 1342–43.

11. *Id.* at 1348–1349.

certain letter-of-credit beneficiaries from drawing on a \$5 million letter of credit, citing the requirements of U.C.C. section 5-109(b) and determining that no fraud was involved but rather a mere contractual dispute; hence, the court found that any interference with the presentation and honor process would be inappropriate under Article 5.¹²

This year saw only a very small amount of case law addressing Article 7, including one case involving a customer's assertion of conversion and other tort claims against a warehouse, after the warehouse notified the customer of its section 7-209 warehouse lien to secure charges incurred. The court concluded that the tort claims must fall because of the warehouse's lien, as such liens are possessory in nature.¹³ The court also concluded that notwithstanding the lack of a warehouse receipt or an express written contract between the warehouse and the customer, a bailment by implication was deemed to have arisen; further, the customer's delivery of the goods was some evidence of a storage agreement.¹⁴

The Investment Securities portion of this year's Uniform Commercial Code Survey is devoted to a recent decision out of the Southern District of New York. The case involved the enforceability of bonds issued in 2017 by the Bolivarian Republic of Venezuela and the opinion devotes careful attention to parts of U.C.C. Article 8's important choice-of-law provisions. The court recognized that the choice-of-law question would be dispositive, because the plaintiffs' entire case rested on whether the Notes and its governing documents were invalid under Venezuelan law.¹⁵ Ultimately the court ruled that New York law applied, a decision that the survey author critiques.¹⁶

The most notable developments during 2020 involving secured transactions were two new commentaries issued by the Permanent Editorial Board. The first, Commentary No. 21,¹⁷ makes clear that the term "assignment," as used in Article 9—and specifically in Part 4 of Article 9—refers to both an outright transfer of ownership and a transfer of an interest to secure an obligation.¹⁸ As such, a lender that obtains a security interest in accounts is, like a buyer of accounts within the scope of Article 9, an "assignee" of the accounts.¹⁹ The second, Commentary No. 22,²⁰ explains that because a transferee of collateral who does not act in good faith takes subject to the debtor's rights, under U.C.C. section 9-617(c), the debtor retains whatever rights the debtor had in the collateral before the disposition, including the right to redeem the collateral.²¹

12. See James G. Barnes and Carter Klein, *Letters of Credit*, 76 BUS. LAW. 1355, 1358–59 (2021).

13. See Anthony B. Schutz, *Documents of Title*, 76 BUS. LAW. 1367, 1367 (2021).

14. *Id.*

15. See Carl Bjerre, *Investment Securities*, 76 BUS. LAW. 1371 (2021).

16. *Id.*

17. PEB Commentary No. 21 (Mar. 11, 2020).

18. See Stephen Sepinuck, *Personal Property Secured Transactions*, 76 BUS. LAW. 1383, 1383–84 (2021).

19. *Id.*

20. PEB Commentary No. 22 (Aug. 24, 2020).

21. See Sepinuck, *supra* note 18.