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Jennifer S. Martin

Colin P. Marks

Wayne Barnes

Texas A&M University School of Law, [wbarnes@law.tamu.edu](mailto:wbarnes@law.tamu.edu)

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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 2016 dealing with domestic and international sales of goods, personal property leases, payments, letters of credit, documents of title, investment securities, and secured transactions. Along with the usual descriptions of interesting judicial decisions highlighted in the survey, there has also been legislative progress in several areas. The 2012 amendments to U.C.C. Article 4A, which address issues related to the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, have been adopted by forty-six states and the District of Columbia, and introduced in Connecticut and Oklahoma.<sup>1</sup> In 2011, the Uniform Law Commission completed a new Uniform Certificate of Title for Vessels Act that is designed to harmonize state certificate of title laws with federal laws regarding vessels, and with Article 9 to impede theft and facilitate boat financing.<sup>2</sup> This has been adopted by the states of Virginia and Connecticut, as well as the District of Columbia, but is not currently under consideration anywhere else as of the date of this survey.<sup>3</sup> Adoption of the 2003 revisions of Article 7 has now been accomplished by all fifty states and the District of Columbia, with Missouri's adoption earlier this year.<sup>4</sup>

There were also significant and instructive judicial developments in 2016. There were interesting developments under Article 2, including formation deci-

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\* Jennifer S. Martin is a professor of law at St. Thomas University School of Law in Miami Gardens, Florida. Colin P. Marks is a professor of law at St. Mary's University School of Law in San Antonio, Texas. Wayne Barnes is a professor of law at Texas A&M University School of Law in Ft. Worth, Texas. Professors Martin, Marks, and Barnes are the editors of this year's Uniform Commercial Code Survey.

1. See *UCC Article 4A Amendments (2012)*, *Legislative Tracking*, UNIF. L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%204A%20Amendments%20\(2012\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%204A%20Amendments%20(2012)) (last visited May 9, 2017).

2. The final act approved at the 2011 annual meeting of the Uniform Law Commission can be accessed at [http://www.uniformlaws.org/shared/docs/certificate\\_of\\_title\\_for\\_vessels/ucotav\\_prestylefinal\\_jul11.pdf](http://www.uniformlaws.org/shared/docs/certificate_of_title_for_vessels/ucotav_prestylefinal_jul11.pdf) (last visited May 9, 2017).

3. See *Certificate of Title for Vessels Act (2011)*, *Legislative Tracking*, UNIF. L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Certificate%20of%20Title%20for%20Vessels%20Act> (last visited May 9, 2017).

4. See *UCC Article 7 Amendments (2003)*, *Legislative Tracking*, UNIF. L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20\(2003\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20(2003)) (last visited May 9, 2017).

sions applying section 2-207(3) in a case where both the buyer's purchase order and the seller's sales order confirmation objected to the terms and conditions of the other party. When a dispute arose concerning indemnity for a failed adhesive, the court granted summary judgment to the seller, finding that because both parties objected to the terms of the other, the contract was formed under section 2-207(3) and did not include the indemnity. In another case where the writings did not agree, the court granted partial summary judgment to a buyer of wooden pallets that became moldy, finding a contract formed by conduct under section 2-207(3) and turning to the Code's supplementary terms on course of dealing to supply the terms.<sup>5</sup>

The survey of cases under the United Nations Convention on International Sales of Goods ("C.I.S.G.") covered one notable case that considered the application of the C.I.S.G. where neither party had raised its application until more than three years after the suit was filed. The United States Court of Appeals for the Second Circuit clarified the issue of waiver, holding that the C.I.S.G. is "incorporated federal law, which applies 'so long as the parties have not elected to exclude its application.'"<sup>6</sup>

The leasing survey also includes a number of interesting cases, particularly in interpreting "true lease" status. One case from the Northern District of New York Bankruptcy Court involved a lease with end-of-term options that required the lessee either to purchase the equipment for a fixed price, or return it to the lessor. In analyzing the lease under the "bright-line" test, the court ultimately concluded that the customer was economically compelled to purchase the equipment by comparing the cost to purchase the equipment to the cost of returning it. That analysis is more often described as an economic realities test, and not a nominality test.<sup>7</sup> In another case out of the Middle District of Florida, the court considered the effect of a "Terminal Rental Adjustment Clause," or TRAC clause, on a leasing agreement. All fifty states and the District of Columbia have enacted laws that provide that the mere presence of a TRAC clause does not destroy true lease status or create a sale or security interest. Despite this, the court concluded the TRAC provision effectively divested the lessor of any real residual interest in the equipment. This was an unexpected result that should be of particular concern for truck and other commercial vehicle lessors who have long thought that TRAC statutes afforded them a reliable safe harbor from a re-characterization as a sale.<sup>8</sup>

In the payments area, one of the reported decisions included in this year's survey relates to the nature of the bank's duty to exercise ordinary care in handling items of its customer. In the case, an attorney was victimized by an ostensible client that provided a counterfeit cashier's check for deposit into the client's

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5. See Jennifer S. Martin, *Sales*, 72 Bus. Law. 1061, 1066–67 (2017).

6. See Kristen David Adams & Candace M. Zierdt, *United Nations Convention on International Sales of Goods*, 72 Bus. Law. 1165, 1165 (2017) (quoting *BP Oil Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003)) (internal quotations omitted).

7. See Edward K. Gross, Dominic A. Liberatore & Stephen T. Whelan, *Leases*, 72 Bus. Law. 1079, 1079–81 (2017).

8. *Id.* at 1081–82.

trust account. The bank gave provisional credit for the item, and the attorney then immediately wired the funds out at the client's request. Subsequently, however, the bank charged the item back when the item was discovered to be counterfeit. The attorney argued that his bank had failed to exercise ordinary care as required by Article 4, by not discovering false routing numbers, investigating the check's origin, or providing more obvious notice of its right to charge back unpaid items. The court, however, refused to find the bank negligent, noting that banks do not insure the legitimacy of items deposited, and further that the right of chargeback is an express right granted by Article 4.<sup>9</sup>

There were several decisions concerning letters of credit in 2016. One case dealt with a claim by an applicant that the issuer wrongfully honored the letter of credit because of deficient presentation to the issuer by the beneficiary. The letter of credit in question required that the beneficiary present copies of all unpaid "commercial invoices" along with an accompanying declaration that such invoices were ten days past due. An invoice was presented that included the description: "Market Loss incurred on order cancellation by [buyer/applicant]." The court rejected the applicant's complaint for wrongful dishonor, noting that the issuer bank was not required to ascertain whether the seller/beneficiary was entitled to invoice for such market loss.<sup>10</sup>

This year saw only a small amount of case law addressing Article 7, including one case that addressed an attempted waiver of liability by a warehouse against any responsibility for physical loss or damage to stored goods. The goods in question consisted of artwork stored in a warehouse, which was damaged in Superstorm Sandy when the artwork was not kept off the floor. The court allowed an action to proceed for failure to exercise ordinary care, noting that Article 7 does not authorize complete and total disclaimers of warehouse liability.<sup>11</sup>

The most significant development in securities law was by far the United States ratifying the Hague Securities Convention (the "Convention") in December 2016,<sup>12</sup> which became effective as a matter of U.S. law under its own terms on April 1, 2017.<sup>13</sup> The Convention will unify choice of law rules across borders. This year's survey reviews the Convention's major points of parallel and departure from the U.C.C. rules.<sup>14</sup>

While the amendments to Article 9 targeted specific commercial law issues, there were judicial decisions on others that continue to challenge lenders.

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9. See Carter Klein & Jessie Cheng, *Payments*, 72 BUS. LAW. 1097, 1112 (2017).

10. See James G. Barnes & James E. Byrne, *Letters of Credit*, 72 BUS. LAW. 1119, 1120–21 (2017).

11. See Anthony B. Schutz, *Documents of Title*, 72 BUS. LAW. 1129, 1131 (2017).

12. See Press Release, Hague Conference on Private Int'l Law, USA Ratifies the 2006 Hague Securities Convention, Triggering Its Entry Into Force on 1 April 2017 (Dec. 15, 2016), <https://www.hcch.net/en/news-archive/details/?varevent=531> (announcing that on December 15, 2016, the United States ratified the Convention); see also SEN. EXEC. REP. 114–15, at 7 (2016) (setting forth a resolution that the Senate advises and consents to ratification).

13. See Hague Securities Convention art. 19(1), July 5, 2006, 46 I.L.M. 649 ("This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification . . ."). The United States was the third ratifying nation, the first two being Switzerland and Mauritius.

14. See Carl S. Bjerre, *Investment Securities*, 72 BUS. LAW. 1133, 1133–37 (2017).

Among the cases dealing with secured transactions, there were two that were very distressing. In one, a federal circuit court of appeals incorrectly concluded that a security interest in existing and after-acquired general intangibles did not attach to the settlement of a commercial tort claim. In so doing, the court erroneously applied a rule relating to commercial tort claims to the payment intangible created by the settlement.<sup>15</sup> In the other case, a judgment creditor had a marshal levy on funds credited to a deposit account subject to a perfected security interest. The court erroneously granted the judgment creditor priority, even though the marshal had not yet released the funds, after concluding that the judgment creditor did not act in collusion with the debtor to violate the secured party's rights.<sup>16</sup>

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15. See Steve Weise & Stephen Sepinuck, *Personal Property Secured Transactions*, 72 *Bus. Law.* 1143, 1145-46 (2017).

16. *Id.* at 1153-54.