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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 2021 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 regarding formation of contracts and buyer’s remedies.¹ In one case, where the buyer and seller orally agreed to the purchase of “Magic: the Gathering” trading cards for \$171,415, which purchase was later confirmed in writing, the court found that the parties agreed to the essential terms and a contract was formed under section 2-204, even though the price was not initially settled because it was dependent on the cards ultimately purchased.² In this case, though, the court held the proper measure of damages was the difference between the market price of the cards and the contract price, which amounted to \$36,190, but the buyer was unable to recover consequential damages where such were not foreseeable at the time of contracting.³

The survey of cases under the United Nations Convention on International Sales of Goods (“CISG”) covered one notable case that considered whether the CISG applies to certain transactions that could be considered consumer.⁴ The court concluded that the sale of art from an art gallery based in Milan to a private investor and art collector in New York would initially seem to fall within the CISG.⁵ However, the court ultimately concluded that the CISG did not apply as the buyer, who was an experienced art collector, purchased the art in question for home

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1. See Jennifer S. Martin, *Sales*, 77 BUS. LAW. 1243 (2022).

2. See *id.* at 1247.

3. See *id.* at 1257.

4. See Candace M. Zierdt & Kristen David Adams, *CISG*, 77 BUS. LAW. 1345 (2022).

5. See *id.* at 1345–46.

and personal use.⁶ In another case, a court considered whether the validity of an arbitration clause was governed by the CISG, but concluded that questions of validity of the contract are outside the scope of the CISG.⁷

The most noteworthy leasing case decided in 2021 involved a unique application of the Graves Amendment, which provides certain protections to owners of motor vehicles who are in the business of renting or leasing vehicles who are sued under a theory of vicarious liability.⁸ Plaintiffs filed suit relating to a car accident alleging that the defendant was driving a rental car owned by Avis Budget Car Rental LLC (“Avis”) when he improperly turned, causing the accident.⁹ Plaintiffs also sued Avis, which provided defendant with a \$1 million third-party liability protection policy with the rental of the car.¹⁰ Avis moved for dismissal under the Graves Amendment but the court held that plaintiffs’ factual allegations that Avis provided liability insurance to the defendant stated a claim upon which relief could be granted because the Graves Amendment precludes only vicarious liability—not insurance liability—of the leasing entity.¹¹

In the payments area, several federal regulatory updates and developments are reported.¹² The Consumer Financial Protection Bureau (“CFPB”) published a set of Frequently Asked Questions (“FAQs”) regarding compliance with the Electronic Fund Transfer Act (“EFTA”) and Subpart A to Regulation E, which implements provisions of the EFTA related to electronic fund transfers. The FAQs are designed by the CFPB to be a “compliance aid” intended to “present the requirements of existing rules and statutes in a manner that is useful for compliance professionals, other industry stakeholders, and the public.”¹³ Another update involved a final rule published by the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Board”), and the Federal Deposit Insurance Corporation (the “FDIC”) and each, a “federal banking agency”) on November 23, 2021, which rule mandates banking organizations (and the related bank services providers, as applicable)

6. *See id.*

7. *See id.* at 1346.

8. *See* 49 U.S.C. § 30106(a) (2018) (“An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).”).

9. *See* Dominic A. Liberatore, Stephen T. Whelan & Edward K. Gross, *Leases*, 77 *BUS. LAW.* 1261 (2022).

10. *Id.* at 1267.

11. *Id.*

12. *See* Robert J. Denicola & Stephen Krebs, *Payments*, 77 *BUS. LAW.* 1273 (2022).

13. *Id.* *See also* Policy Statement on Compliance Aids, 85 *FED. REG.* 4579 (Jan. 27, 2020) (stating that “[t]he Bureau does not intend to use Compliance Aids to make decisions that bind regulated entities. Unlike the Bureau’s regulations and official interpretations, Compliance Aids are not ‘rules’ under the Administrative Procedure Act. Rather, Compliance Aids present the requirements of existing rules and statutes in a manner that is useful for compliance professionals, other industry stakeholders, and the public.”).

supervised by such agencies to provide notifications of the occurrence of various computer–security incidents.¹⁴ Also reported are proposed amendments to Regulation J (12 C.F.R. part 210), which add new subpart C providing rules regulating transfers utilizing the Federal Reserve’s new FedNow® Service.¹⁵ Several courts decided section 4A-207 wire transfer claims where plaintiffs claimed loss from the bank’s processing of a payment order in the face of a discrepancy between the beneficiary’s name and account number. Such cases are often dismissed because the banks lack actual knowledge of such discrepancy, including two from this reporting period.¹⁶ In a federal opinion from the Northern District of California, however, the court held that plaintiff’s claim of wrongful payment adequately alleged that the defendant bank had such knowledge of the discrepancy, where the bank’s own internal systems in fact identified the owner of the beneficiary’s account as a different entity than the beneficiary identified by name in the payment order.¹⁷

There were a number of decisions concerning letters of credit during the survey period.¹⁸ Several of them construed the Article 5 defenses and limitations pertaining to wrongful dishonor claims as inapplicable so as to allow beneficiaries to proceed under contractual and other common law theories of recovery. Such cases unfortunately depart from the purpose and goals of Article 5 and the treatment of letters of credit as “idiosyncratic form[s] of undertaking.” Moreover, they disregard the firmly established rule that where the U.C.C. specifically provides an obligation and remedy for breach, it often is designed to supersede common law theories.¹⁹

This year saw only a very small amount of case law addressing Article 7, including one case involving a claim against an alleged warehouse for failing to protect stored equipment under section 7-204.²⁰ The claim was leveled against an equipment seller who agreed to store the items when the buyer could not take immediate delivery. When the items went unclaimed, the seller eventually enforced an alleged lien and sold the items, whereupon the buyer made claims based on the seller’s alleged status as a “warehouse” under Article 7. The court found that the seller did not meet the definition of warehouse, as the seller was not in the “business of storing goods for hire” as required by section 7-102(a)(13).²¹ The court remarked that “storing goods that you sell does not convert your business into a warehouse.”²² The plaintiff’s claims were thereby dismissed, although the court granted leave to amend.

The Investment Securities portion of this year’s Uniform Commercial Code Survey is devoted to a recent bankruptcy decision out of the Western District

14. Krebs & Denicola, *supra* note 8, at 1276–77.

15. *Id.* at 1277–78.

16. *Id.* at 1279.

17. *Id.*

18. See James G. Barnes & Carter Klein, *Letters of Credit*, 77 BUS. LAW. 1295 (2022).

19. *Id.* at 1296–97.

20. See Anthony B. Schutz, *Documents of Title*, 77 BUS. LAW. 1313, 1313–14 (2022).

21. *Id.*

22. *Id.*

of Louisiana. The case involved the registered owner of certificated stock first pledging it as collateral to one lender, then falsely submitting an affidavit claiming that he had lost the stock certificate, and then pledging the replacement certificate as collateral to a second lender.²³ After a default, the second lender sought a remedy against the registered owner and the first lender intervened.²⁴ Relying on sections 8-210 and 8-405(b), the court held that the first lender was entitled to a remedy from the issuer as the first lender was a protected purchaser.²⁵

Notable cases took up issues involving enforcement of a security interest under Article 9.²⁶ In one case, the court considered whether a debtor had defaulted, ultimately determining that the agreement authorized the lender to determine “in its sole discretion and judgment” whether a material adverse effect had occurred, and such a term was enforceable.²⁷ In another case, the court held repossession agents breached the peace by entering the debtor’s unlocked vehicle, locking the door, and refusing to withdraw despite the debtor telling them to get off his property without taking the vehicle.²⁸ One court ruled that a debtor stated a cause of action under § 1983 against a repossession company and a police officer for aiding the repossession of the debtor’s truck without a court order by allegedly arriving with the repossessioner, arranging for a backup officer to be present, ignoring the debtor’s demands that he and the repossessioner leave his property, telling the debtor that the debtor had to allow the repossession to proceed, and physically imposing himself between debtor and the truck.²⁹

23. See Carl S. Bjerre, *Investment Securities*, 77 BUS. LAW. 1315, 1315–22 (2022).

24. *Id.*

25. *Id.*

26. See Stephen L. Sepinuck, *Personal Property Secured Transactions*, 77 BUS. LAW. 1323 (2022).

27. *Id.* at 1336.

28. *Id.* at 1337.

29. *Id.* at 1338.