

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE

MINUTES OF PEB MEETING

**held at the Embassy Suites Hotel, Philadelphia
on November 11, 2006**

Lance Liebman, Chair of the PEB, called the meeting to order at 10:00 a.m. (ET) on November 11, 2006. In addition to Professor Liebman, the following PEB members attended: Boris Auerbach, Amelia Boss, Stephanie Heller, William Henning, Donald Rapson, Linda Rusch, Edwin Smith, Steven Weise, and James White. Also attending were ABA Liaison Carter Klein, emeritus PEB member Fred Miller, NCCUSL President Howard Swibel, NCCUSL Vice President Michael Houghton, ALI Deputy Director Elena Cappella, ALI Associate Deputy Director Deanne Dissinger, and PEB Research Director Neil Cohen. PEB members Patricia Brumfield Fry and Carlyle Ring were unable to attend.

Agenda Item 1 – Approval of minutes of PEB Executive Subcommittee meeting held on May 1, 2006: The minutes of the PEB Executive Subcommittee meeting held via teleconference on May 1, 2006, were approved. (Those minutes are attached as Annex A.)

Agenda Item 2 – Status of UCC enactments: Professor Henning led a brief discussion on this matter based on a written report that was distributed in advance (and which is attached as Annex B).

Agenda Item 3 – Consideration of draft of PEB Commentary on the impact of UCC Sections 9-406 and 9-408 on anti-assignment provisions relating to interests in unincorporated business organizations: Mr. Smith, who prepared the draft Commentary (attached as Annex C), led a discussion concerning its status. The draft was distributed in advance, and prior to the meeting Mr. Smith received helpful comments from Messrs. Rapson and Weise and Professor Cohen. Mr. Smith also reported about conversations with Daniel Kleinberger, the reporter for NCCUSL's Uniform Limited Liability Company Act. Professor Kleinberger had raised some concerns about whether the vocabulary of the draft Commentary would communicate its conclusions well to those whose primary expertise is the law of business organizations, and also raised some additional issues. After Mr. Smith further consults with Professor Kleinberger and revises the draft, the draft Commentary will be circulated to the PEB members for approval. The approved draft will be made publicly available for comment.

Agenda Item 4 – Discussion of issues raised by *In re Commercial Money Center, Inc.*: Professor Cohen introduced the discussion of this case and its implications. (The case and related materials were previously distributed as Annexes D-1—D-6.) After extensive discussion of the issues raised by the case and of the various proposals received by the PEB, it was decided that the PEB should continue to discuss the implications and also consider issuing a PEB Commentary to address both characterization issues and priority issues resulting from transactions in which the payment stream associated with chattel paper is sold separately from the rights with respect to the underlying goods. Professor Cohen will coordinate the preparation of a draft Commentary.

Agenda Item 5 – Proposal for PEB examination of the effect of UCC Section 9-318 on the Article 9 priority rules: Mr. Rapson discussed his proposals (previously distributed as Annexes E-1—E-5) to consider an amendment to UCC Section 9-318 in the context of sales of payment rights. After extensive discussion, it was agreed to attempt to address this issue in a PEB Commentary. Professor Cohen will coordinate the preparation of a draft Commentary.

Agenda Item 6 – Report on the Committee to Harmonize North American Law with Regard to the Assignment of Receivables in International Trade Convention: Mr. Smith led discussion of this item, reporting on the progress of the project. In particular, it was noted that the focus of the committee has shifted from exploration of the possibility of harmonizing U.S., Canadian, and Mexican law in accordance with the principles of the Convention to the possible ratification of the Convention by the United States and the drafting of declarations of the United States that would accompany that ratification. Mr. Swibel expressed gratitude to the PEB for fostering this project. The PEB recommended for approval (a) a project to draft the declarations that would accompany ratification of the Convention in the United States, with the drafting to be done by the existing committee, and (b) the expenditure of any remainder of the \$25,000 of the PEB funds previously approved for meetings of the committee to cover meeting and other expenses for the drafting project.

Agenda Item 7 – Report on the U.N. Convention on Independent Guarantees and Stand-By Letters of Credit in the United States and Canada: Mr. Swibel reported concerning his discussions with the State Department with respect to this Convention, and proposed that the PEB consider possible joint work with representatives from Canada (where letters of credit are not governed by a statute analogous to UCC Article 5) with the aim of effectuating the aims of the Convention in forms that will work both in the U.S. context and the Canadian context. (Materials concerning the Canadian efforts in this regard were previously distributed as Annexes F-1—F-3.) After discussion, the PEB recommended for approval (a) the establishment of a joint committee, composed of representatives from the U.S., Canada, and Mexico, to explore possible ratification of the Convention by the NAFTA countries, including consultation to assist the Canadians in preparing a letter-of-credit uniform law consistent with UCC Article 5, and (b) the expenditure of the remainder (if any) of the funds allocated for the work on the international receivables project, plus an additional \$10,000 of PEB unrestricted funds, for meetings of the joint committee.

Agenda Item 8 – Report on the U.N. Convention on the Use of Electronic Communications in International Contracts: Professor Boss reported on this new Convention, information about which was previously distributed as Annexes G-1 and G-2. There was discussion about the possible effects of the Convention on transactions now governed by domestic U.S. law and the possibility of reflecting the existence of the Convention in Official Comments to the UCC. No action was requested or taken with respect to this agenda item.

Agenda Item 9 – Report on discussions with IRS officials regarding possible revisions to the Federal Tax Lien Act and the Uniform Federal Lien Registration Act to bring them into conformity with revised UCC Article 9: Professor Henning reported on this matter. There are two outstanding issues – the disconnect between federal tax-lien law and Article 9 as to which state is the locus of filings and the *Spearing Tool* doctrine that tax-lien filings are not subject to the debtor name rules of Article 9. Because both issues arise from federal law, it appears that revisions to the state Uniform Federal Lien Registration Act would not suffice.

Professor Henning noted that he has had discussions with IRS officials and believes they are sympathetic to the need for harmonization but have concerns as to whether the IRS has sufficient information about taxpayers to file its tax lien notices in the location and method mandated by Article 9. It was suggested that IACA and the professional UCC search firms could be useful resources in determining whether IRS could gain access to the information necessary to enable it to function under a regime similar to Article 9.

Agenda Item 10 – Report on status of project to assemble a definitive official text of the UCC: Mr. Weise and Professor Cohen reported that no additional work has been done on this project since last fall. Mr. Rapson suggested that the work for this project should not be the burden of Mr. Weise and Professor Cohen and that others should be found to complete the project.

Agenda Item 11 – Report on compilation of glitches in UCC Article 9: Mr. Rapson reported that he has added his collection of “glitches” (attached as Annex H) to the compilation.

Agenda Item 12 – Report on status of volunteers to work with IACA on their request for assistance: Professor Henning reported that IACA is grateful for the past assistance provided by PEB members with respect to matters related to the Article 9 filing system. IACA now has some additional projects on which assistance would be appreciated; Professor Henning will circulate information about those projects. In conjunction with this discussion, Professor Henning reported about studies by Carl Ernst regarding the high prevalence of Article 9 filings that do not comply with statutory standards.

Agenda Item 13 – Financial report: Ms. Cappella led the discussion of the PEB financial report and budget (distributed at the meeting and attached as Annex I). She indicated that the transfer of \$50,000 from the unrestricted fund balance to each of the cosponsoring organizations would be made after December 1, 2006, as planned. The transfer was previously authorized conditionally by the PEB and the Executive Committees of ALI and NCCUSL.

Agenda Item 14 – Other business: (a) A question was raised as to whether PEB meetings should be open to all interested parties. After discussion, no action was taken to open meetings. It was noted that actions such as PEB Commentaries are not finalized until after publicity and a comment period. (b) Mr. Swibel raised the possibility of PEB consideration of Judge Posner’s decision in *Wachovia*. No action was taken on this proposal. (c) Mr. Auerbach, who is the NCCUSL Liaison to ALI’s Principles of Software Contracts project, reported about that project to the PEB.

Agenda Item 15 – Next meeting: The PEB Executive Subcommittee will meet by telephone in the spring. Scheduling of the next meeting of the full PEB was deferred until a later date.

The meeting was adjourned at approximately 12:45 (ET).

These minutes were prepared by Neil Cohen (assisted by Deanne Dissinger), and were reviewed and approved for distribution by Lance Liebman. The Annexes are attached to the minutes maintained on file in the offices of ALI and NCCUSL.

January 23, 2007