

# **PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE**

## **MINUTES OF PEB MEETING held at the Four Points Sheraton 630 N. Rush St. Chicago, Illinois**

**on November 11, 2005**

Professor William Henning, Executive Director of NCCUSL, chaired the meeting in the absence of Professor Lance Liebman, the Chair of the PEB. In addition to Professor Henning, the following PEB members attended: Boris Auerbach, Amelia Boss, Patricia Fry, Stephanie Heller, Donald Rapson, Carlyle Ring, Linda Rusch, Edwin Smith, Steven Weise, and James White. Also attending were NCCUSL President Howard Swibel, emeritus PEB member Frederick Miller, ABA Liaisons Carter Klein and Sandra Rocks, ALI Associate Deputy Director Deanne Dissinger, NCCUSL Legislative Director John McCabe, NCCUSL Division Chair Dale Higer, NCCUSL Legislative Committee Chair Robert Tennesen, and PEB Research Director Neil Cohen.

**Agenda Item 1 – Call to Order:** The meeting was called to order at 1:32 p.m. CST.

**Agenda Item 2 – Welcome of New Members and Invitees:** On behalf of the PEB, Professor Henning welcomed members and other attendees who were present for the first time.

**Agenda Item 3 – Approval of Minutes of PEB Executive Subcommittee Meeting:** The minutes of the PEB Executive Subcommittee meeting held on April 25, 2005, were approved. (Those minutes are attached as Annex A.)

**Agenda Item 4 – Status of UCC Enactments:** A report on the current status of enactment of new, amended, and revised Articles of the Uniform Commercial Code was presented by Professor Henning. (The written report is attached as Annex B.) It was noted in discussion of enactments of revised Article 1 that none of the 14 enacting states have adopted the Official Text with respect to the conflict of laws issues addressed in UCC Section 1-301 (although the U.S. Virgin Islands did adopt the Official Text), and that 10 of the 15 enacting jurisdictions have enacted the definition of “good faith” found in the Official Text of the revised Article while five states have retained the definition in the former text of Article 1. It was also noted that the 2003 revisions to UCC Articles 2 and 2A have been introduced in Oklahoma and the U.S. Virgin Islands. In addition, issues with respect to remaining state enactments of Articles 3, 4, 5, and 6 were discussed.

**Agenda Item 5 – Report on Developments with Respect to Issues Raised by UCC Section 9-705; Consideration of Final Draft of PEB Report on UCC Section 9-705:** Mr. Weise and Professor Cohen presented a detailed report on issues that have been raised with respect to the application of UCC Section 9-705 as the transition period to revised Article 9 draws to a close. Issues relating to the application of Section 9-705 were first raised at the November 2004 meeting of the PEB as a result of communications from the International Association of

Commercial Administrators (IACA). After extensive analysis, it was reported at the last PEB Executive Subcommittee meeting that, while Section 9-705 generally works well, there are some interpretive difficulties with respect to application of the provision to financing statements that would have ceased to be effective shortly after the effective date of revised Article 9 but whose effectiveness was continued by the filing of a continuation statement shortly before the effective date of the revised Article. Mr. Weise and Professor Cohen recommended to the Executive Subcommittee that explication of Section 9-705 in the context of these interpretive difficulties would be an appropriate subject for a PEB Report, and submitted a draft of such a Report to the Executive Subcommittee. The Executive Subcommittee decided that the Report was advisable and asked Mr. Weise and Professor Cohen to prepare a proposed final draft for this meeting. Such a draft and an accompanying cover statement were prepared in advance of this meeting and distributed as Annexes C-1 and C-2. After receiving those Annexes, Mr. Rapson contacted Mr. Weise and Professor Cohen with some additional suggestions for the treatment of the issues raised by the draft Report. After extensive discussions with Mr. Rapson, Mr. Weise and Professor Cohen suggested a reorganization of the Report to meet Mr. Rapson's concerns. That proposed revision was discussed at the meeting, and the Report was approved by the PEB in principle, subject to development of a final draft to be distributed after the meeting for approval by e-mail voting. (After the meeting, a revised draft of the Report was distributed and was approved without objection on December 16, 2005. A copy of the final Report is attached to these minutes as Annex C-5.)

**Agenda Item 6 – Report on Proposals of IACA Regarding “Bogus Filings” under UCC**

**Article 9:** Mr. Weise reported that he had worked with IACA to assist that organization in its development of proposals for legislation dealing with so-called “bogus filings” under Article 9 of the UCC. (A current draft of those proposals was distributed in advance of the meeting as Annex C-3.) Mr. Weise noted that he, along with Professor Cohen, had served solely in an advisory role, assisting IACA in preparing proposed legislation that would not interfere with the operations and reliability of the UCC filing system, and that any proposed legislation that emerges from this process would not be endorsed by or attributed to the PEB.

**Agenda Item 7 – Status of Project to Assemble a Definitive Official Text of the UCC:** Mr. Weise and Professor Cohen reported on the status of this ongoing project. (A work plan for the project was distributed in advance of the meeting as Annex C-4.) There was general support for the project, but also recognition that the task will be arduous and may require some research assistance for Mr. Weise and Professor Cohen.

**Agenda Item 8 – Proposal for a PEB Report on Suggested Clarifications of Certain UCC**

**Provisions:** Mr. Rapson presented his proposal, which was distributed in advance of the meeting as Annex D. The proposal generated a spirited discussion. While there was general agreement that there would be value in collecting a list of “glitches” in the UCC, a variety of different views were expressed as to the advisability of a project that would go beyond assembling such a list for future correction. The discussion concluded without action being taken on the proposal. Professor Henning requested that any reports of “glitches” be sent to both Professor Cohen and Mr. Rapson.

[Agenda Item 9 was deferred until after consideration of Agenda Items 10 and 11.]

**Agenda Item 10 – Report on International Developments, Including Approval of Expenditures:**

Mr. Swibel and Professor Henning described discussions they had with Harold Burman of the U.S. State Department concerning the United Nations Convention on the Assignment of Receivables in International Trade. That Convention, which has been signed by the United States and a small number of other nations, will not go into effect until a sufficient number of nations sign and ratify it. The State Department, which believes that the Convention is a positive development that would be beneficial both domestically and internationally, is of the view that the Convention would be more likely to be adopted, both in the United States and in other nations, if its benefits were demonstrated by the application of its rules to international transactions on a regional basis. Accordingly, Mr. Burman discussed with Messrs. Swibel and Henning the development of a project by NCCUSL and parallel organizations in Canada and Mexico to explore the possibility of the three nations conforming their rules to those of the Convention for purposes of international transactions involving those nations, with the U.S. conforming legislation in the form of a uniform state law. NCCUSL has discussed this possibility with Canadian and Mexican organizations and asks now that the PEB recommend to ALI and NCCUSL (as proprietors of the UCC) that they proceed to develop such a project. After extensive discussion, the following motion was made by Mr. Auerbach and approved by consensus: “Resolved: The PEB approves in principle and recommends, subject to development of a charge, that the sponsors of the Uniform Commercial Code should proceed under their agreement to establish a committee to explore work on a joint project, with participation of representatives of Canada and Mexico, to examine the possibility of legislation that would apply the principles of the United Nations Convention on the Assignment of Receivables in International Trade to international secured transactions among those nations, and to authorize the expenditure of up to \$25,000 of the PEB’s unrestricted funds for meetings to further this joint exploration.”

**Agenda Item 11 – Report on International Developments in Secured Transactions:**

Messrs. Smith and Weise, along with Professor Cohen, reported briefly on the current status of the Cape Town Convention on Mobile Goods, the United Nations Convention on the Assignment of Receivables in International Trade, the Hague Convention on the Law Applicable to International Interests in Securities, UNCITRAL’s electronic commerce convention, and UNIDROIT’s new project concerning the substantive law of indirectly-held securities.

**Agenda Item 9 – Report on Possible NCCUSL Project Concerning Federal Tax Liens:**

Mr. Smith reported on this project, which was the subject of a memorandum distributed in advance of the meeting as Annex E. As discussed, this project would have two aspects – recommendation of amendments to the Federal Tax Lien Act and the preparation and promulgation of amendments to NCCUSL’s Uniform Federal Lien Registration Act. The PEB expressed general support for the project.

**Agenda Item 12 – Report on NCCUSL’s Consideration of Joseph Sommer’s Proposal for Project on Bank Deposits:**

Mr. Auerbach reported as to NCCUSL’s consideration of Mr. Sommer’s proposal for a project on the law of bank deposits, and indicated that NCCUSL has formed a Study Committee to examine the need for a national model or uniform act on bank deposits.

**Added Agenda Item – ALI’s Principles of the Law of Software Contracts:** Mr. Auerbach, who is the NCCUSL Liaison to this project, attended a recent project meeting and reported about the project to the PEB. He noted that, in his view, inasmuch as the scope of this project could relate to matters that, in some states, are within the scope of the UCC, the PEB should be kept apprised of the progress of this project and suggested that he should make periodic reports to the PEB about it.

**Agenda Item 13 – Status of Possible Amendments to UCC Articles 3 and 4 in Light of Check 21:** Professor Henning referred back to a report prepared for the PEB last year by Professor Sarah Jane Hughes, in which she noted a number of possible situations in which amendments to the UCC might be considered in light of the enactment of the federal “Check 21” Act. After some discussion, there was general agreement that, while the PEB should continue to examine the effects of Check 21 on UCC matters, no action should be taken at this time.

**Agenda Item 14 – Report on Status of Federal Reserve Board’s Proposal Regarding Remotely-Created Checks:** Ms. Heller reported on this matter, indicating that the final regulations were likely to be promulgated in a matter of weeks. (The Federal Reserve Board adopted the final regulations on November 21, 2005, and a copy of the regulations was circulated to the PEB via e-mail, along with a short cover note from Professor Cohen.)

**Agenda Item 15 – Report on Recent Decision Concerning Enforceability of Bank Account Agreements That Shorten the Period in Which a Customer Must Notify the Bank of a Check Improperly Charged to the Account:** Professor Cohen reported concerning the recent decision of the New York Court of Appeals in the *Regatos* case and discussed his proposal (distributed in advance of the meeting as Annex F) that the PEB consider the impact of this decision on the common practice in bank-customer agreements of shortening the period of time in which a customer must notify the bank of any improperly paid checks. The PEB decided not to pursue this matter.

**Agenda Item 16 – Status of Expanded Comment for UCC Sections 9-406 and 9-408:** These provisions in Article 9, which override many contractual and legal restrictions that would otherwise limit the ability of certain types of property to serve as collateral, have been the subject of much discussion and some confusion, especially with regard to their application to ownership interests in various non-corporate business enterprises. Mr. Henning noted that an expanded comment to these sections could be helpful. Mr. Weise indicated that, in his view, there was no urgent need for such a comment. Mr. Smith, though, expressed the view that clarification in the form of a PEB Commentary would be desirable. After discussion, the PEB agreed that Messrs. Weise and Smith will prepare a draft PEB Commentary on this issue for consideration at a future meeting.

**Agenda Item 17 – Financial Report and Budget:** Ms. Dissinger distributed the PEB financial report and budget (which is also attached to these minutes as Annex G). 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, 2005, as planned. The transfer was previously authorized conditionally by the PEB and the Executive Committees of ALI and NCCUSL.

**Agenda Item 18 – Next Meeting:** Scheduling the next meeting was deferred until a later date.

**Agenda Item 19 – Other Business:** No other business was discussed.

**Agenda Item 20 – Adjournment:** The meeting was adjourned at 5:07 p.m. CST.

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

*January 12, 2006*