MESSAGE FROM THE CHAIR:
Commercial Financial Services Committee

By Robert A. Zadek
Buchalter, Nemer, Fields & Younger
San Francisco, CA

As you know, the Annual Meeting will be held on July 31 – August 3 in Toronto. Rooms are at a premium, unless you have already registered (a lot of good it does for me to tell you now). If you do not get a room you are welcome to stay with me and my fiancée, Judy. I will get some portable beds installed in our room at the Radisson.

On behalf of Steve Weise and myself, I would like to cordially invite all of you to attend our Annual Meeting Dinner, to be held in the main dining room (would you expect less?) of the Canoe Restaurant on Sunday, August 2nd. Canoe is located on the 54th floor of the Toronto Dominion Bank Tower. It is a lovely restaurant with an exceptional view of the city. The food is excellent and you will have the choice of tuna, lamb, Alberta beef, or a grilled American cheese sandwich when the waiter takes your order. No need to decide in advance! You will be getting a reservation form from the ABA.

As you know, with the help of the ABA staff, the CFS Committee has set up a List Serve. This is an e-mail list of our members maintained by the ABA. After August 31st, this will be the only method by which the CFS leadership will communicate with the membership. Thus, unless you join the list, you will become disenfranchised.

MESSAGE FROM THE CHAIR:
UNIFORM COMMERCIAL CODE COMMITTEE

By Edwin E. Smith
Bingham Dana LLP
Boston, MA

Our next meeting of the Business Law Section will soon be upon us. We will be together in Toronto from July 31-August 4 for the 1998 ABA Annual Meeting. We will be holding the meetings and programs of the UCC Committee at the Westin Harbor Castle and Radisson Plaza Hotels from August 1-3. Since hotel space is very tight, you should make your reservations now if you have not already done so.

We will continue to focus in our programs on the Revised UCC Article 9, which is expected to be finalized just before the Toronto meeting, and on the new proposed UCC Article 2B, which will commence its final year of gestation. These programs are designed to reach out to commercial law practitioners who may need an overview of the proposed Revised Article 9 changes and of the key issues driving the UCC Article 2B drafting process. The Revised Article 9 program, in deference to our meeting site, will also contain an international element. Harry Sigman has arranged for some Canadian law experts to join us for a discussion of some secured financing topics in which the Canadian secured transactions system is compared to what has emerged from the UCC Article 9 revision process.
Message from the CFS Chair, Con't..

Joining the list is quite simple. Just send the following e-mail message to: listserver@abanet.org:

subscribe bl-cfsc your e-mail address

Once the list is up and running, anyone will be able to send a message to all Committee members with just one e-mail. The list will be used to announce meetings, send agendas of subcommittee meetings and the like.

Many of you have joined. A problem is that about 75 members either (i) gave incorrect e-mail addresses (as you may know, the system does not tolerate approximate e-mail addresses, and the "seriously misleading" threshold is quite low), or (ii) changed e-mail addresses without notifying the list. As a result, I have had to delete these from the list. (I get a “bounce” for each incorrect address, which I must deal with. Since this happened with each of the two postings I made to the list, I had to deal with 150 problems. As a result I have .4 billable hours during May).

If you have never received any e-mail as a list member, if you recently changed e-mail addresses, or if you are lonely and need someone to send e-mail messages to and want to confirm that you are on the list, please verify that you are on the list by sending the following message to listserver@abanet.org: who bl-cfsc. Within a few minutes you will receive a list of all subscribers, in no particular order. Just search the list (using your e-mail system search logic) for your e-mail address. If you are not on the list, please join as described above. Those who are not on the list do not exist, and not having an existence can be a real drag. Thanks for your help in building the list. It will be invaluable in the efficient running of the Committee.

I thank Kathi Allen and Steve Weise for their supreme efforts in putting this newsletter together. And of course the ABA personnel have been, as always, quite helpful and supportive to the leadership of CFS, and we wish to thank all of them for their help.

Message from the UCC Chair, Con't..

The UCC Committee itself will meet on Saturday, August 1, from 2:30 to 4:00 p.m.

Once again, in keeping with an international theme, Stephanie Heller and Bob Wittie have arranged for a short program on the impact of the new Euro on commercial transactions.

We will have a reception for the Committee on Monday, August 3, from 4:30 to 6:00 p.m., followed by a dinner cruise with the Committee on the Law of Commerce in Cyberspace. The dinner cruise will celebrate the tenth anniversary of CLCC’s original birth within the UCC Committee itself.

We are continuing our efforts to improve our communications with the membership of the Committee. Eric Steele has been working with the Business Law Section staff on updating and upgrading our Committee web site www.abanet.org/buslaw/ucc/home.html. We expect to see there much more information about the work of the Committee over the next year. We applaud Bob Zadek for his heroic efforts to establish an e-mail listserv for the Commercial Financial Services Committee. Bob’s efforts are highlighted in his message as CFS Committee chair in this newsletter. Bob, we feel your pain, but please save a copy of the instruction kit. We hope to be there soon as well.

The Toronto events promise to be highly informative and a lot of fun. I look forward to seeing all of you there.
Article 9 Nears Completion

By Steven O. Weise
Heller Ehrman White & McAuliffe
Los Angeles, CA

The Article 9 Drafting Committee held its last full meeting in Philadelphia the weekend of March 21. The Drafting Committee approved the Draft at that meeting. Representatives of the Drafting Committee met with the NCCUSL Style Committee a few weeks later. The membership of the ALI considered the Draft at the ALI’s annual meeting on May 13. The ALI approved the Draft by acclamation and rose to give the Chair of the Drafting Committee and the Reporters a standing ovation. The Reporters are continuing to make “clean-up” changes, and submitted a revised final draft to NCCUSL in the beginning of June. NCCUSL will consider the Draft at its annual meeting in Cleveland on July 24. Assuming approval, the Reporters will complete their polishing of the Draft and it will be ready for submission to the states later this year. The Draft contains a suggestion that it have an effective date of January 1, 2001. The Drafting Committee hopes that this will promote the new Article 9 becoming effective in many states on the same day and thereby avoiding difficult transition problems. The Business Law Section will present a program on the new Article 9 at the Annual Meeting in Toronto.

UNCITRAL Draft Convention on Assignment in Receivables Financing

By E. Carolan Berkley
Ballard Spahr Andrews & Ingersoll, LLP
Philadelphia, PA

This project of the United Nations Commission on International Trade Law, Working Group on International Contract Practices, charged with preparing a uniform law on assignment in receivables financing, seeks to remove obstacles to receivables financing arising from the uncertainty in various legal systems as to the validity of cross-border assignments and as to the effect of such assignments on debtors (account debtors in UCC parlance) and other third parties. A major goal of the project is to increase the availability of lower cost credit. The drafting process is at the halfway mark and the working group is in the process of consulting with representatives of various industries that utilize receivables financing. There are conflict of law issues and priority rules that remain to be resolved.

The current draft would apply to assignments of international receivables and to the international assignments of receivables. In the latter case, an international assignment of domestic receivables would come within the scope of the convention if the assignor were located in a jurisdiction that had accepted the convention.

Much of the convention will be familiar to Article 9 lawyers. In certain respects the convention may be more comprehensive than current or revised Article 9. The working group is actively soliciting the views of interested parties regarding the scope provision. Although there is no final agreement on scope, currently the convention would apply to an assignment of a receivable “provided that the transfer is made against value, credit or related services given or promised by the assignee to the assignor or persons specified by the assignor.” Assignment includes the outright transfer of receivables as well as the creation of rights in the receivables as security.

Although revised Article 9 will expand the scope of current Article 9, the current draft of the convention is more expansive. The working group has not decided whether all of the practices covered in scope should be included. Rather, they are included in the current draft paragraph to facilitate consultation with representatives of the practices mentioned.

(con’t. p. 4)
The current draft of Article 2 of the convention defines the term “receivable” as follows:

<table>
<thead>
<tr>
<th>(2) “Receivable” includes any right of the assignor to payment of a monetary sum arising under:</th>
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<tbody>
<tr>
<td>(a) a contract between the assignor and the debtor, whether the contract is for the sale or lease of goods, the provision of services or credit, the licensing of technology, intellectual property or information, or otherwise;</td>
</tr>
<tr>
<td>(b) a settlement agreement or a decision of a judicial or other authority;</td>
</tr>
<tr>
<td>(c) any policy of insurance or reinsurance;</td>
</tr>
<tr>
<td>(d) a deposit agreement between the assignor and a financial institution;</td>
</tr>
<tr>
<td>(e) an agreement between the assignor and a financial institution for the management of securities, commodities or other assets;</td>
</tr>
<tr>
<td>(f) an agreement for the sale or other transfer, or lending, of securities, instruments or precious metals;</td>
</tr>
<tr>
<td>(g) other contracts, the amount of payment under which is indexed or otherwise relates to interest rates, to prices of securities, commodities or other assets, or to the occurrence of other events or circumstances that are independent of the actions of the parties to the contract.</td>
</tr>
</tbody>
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(3) “Receivable” also includes any right of the assignor arising under the original contract, if any, including a right arising from a clause for the retention of title or the creation of the right in goods as security for indebtedness or other obligation.

Article 4 of the draft excludes assignments made for personal, family or household purposes (but would include receivables for such purposes), and assignments to the extent made by endorsement or delivery of a negotiable instrument or as part of a sale or change in ownership of the business out of which the assigned receivables arose. Because the convention would be a treaty adopted by the United States, some of the exceptions in Article 9 based upon the supremacy clause would not be excepted from the convention.

Like similar provisions under current Article 9, Article 12 of the convention provides that a receivable is transferred notwithstanding any agreement between the assignor and the debtor limiting the assignor’s rights to assign its receivables. Because of the scope of the convention, including the provision that receivable “includes any right of the assignor arising under the original contract,” the working group is also considering questions raised by this provision validating assignments. For instance, in the remarks to Article 9 of the convention, the working group raises the issue of whether it needs to consider if a borrower in a syndicated bank loan may preclude the lenders from assigning the loan to a competitor of the borrower.

Any personal or property rights securing payment of an assigned receivable are transferred to the assignee unless otherwise provided by law or by agreement between the assignor and the assignee. As in the transfer of the receivable itself, this provision applies even if there is an agreement between the assignor and the debtor or the person granting a right in security limiting the assignor’s rights to assign the receivable or a right securing payment of the receivable.

Article 19 of the convention provides, similarly to UCC 9-318, that the debtor may raise against the assignee all defenses or rights of setoff arising under the original contract, and until notification of the assignment, may also raise against the assignee any other right of setoff. Subject to consumer protection laws, the debtor may agree with the assignor in writing not to raise defenses against the assignee that it could raise pursuant to the foregoing provisions.
UNCITRAL, con't.

The convention includes representations and warranties that are made unless otherwise agreed between the assignor and assignee. The assignor represents, unless otherwise agreed, that the assignor has the right to assign the receivable, the assignor has not previously assigned the receivable to another assignee and the debtor does not and will not have any defenses or rights of setoff. Although these representations are typically made in a transfer or security agreement, the contractual representation regarding defenses and setoffs is often limited by knowledge or to some materiality standard. Thus, the convention provides a broader representation and warranty as a default provision than assignors may generally make in their contracts.

The working group actively seeks the input of various entities that can be affected by the convention to assist in the drafting process. Now is the opportunity to have meaningful input into a convention to facilitate international receivables financing. We will discuss the convention at the International Commercial Law subcommittee meeting in Toronto.

New Standby Rules Effective January 1, 1999

By: James E. Byrne
Institute of International Banking Law and Practice, Inc.
Montgomery Village, MD

After five years of preparation, the International Standby Practices ("ISP98") will become effective 1 January 1999. The rules, drafted especially for use in standby letters of credit, address issues which have long caused unnecessary negotiation and drafting—and at times litigation and unexpected loss. With more than US$ 700 billion outstanding in standbys (of which $450 billion is issued by non-U.S. banks for the U.S. market), the instrument dwarfs in significance the commercial letter of credit out of which it originated. “The time has arrived for separate rules for standbys,” says Professor James E. Byrne, Chair of the Business Law Section’s Letter of Credit Subcommittee. Byrne also served as Chair of the Drafting Group and Director of the Institute of International Banking Law & Practice, which has drafted the rules in cooperation with major figures in the standby letter of credit community.

The saga of the ISP’s creation explains why and how it came into existence. Since their exponential growth in the 70s, most standbys have been issued subject to the Uniform Customs and Practice for Documentary Credits (“UCP”), rules which were developed for commercial letters of credit used in connection with sales of goods. Because of the importance of correspondent banking relationships—often across borders—accepted rules of practice assume greater practical significance than rules of law.

It soon became apparent, however, that the UCP needed considerable modification to work with standbys. “Most standbys modified UCP,” noted Dan Taylor, President of the 300 member International Financial Services Association (formerly USCIB), which is the premier bank association in the field and a sponsor of the ISP. “Not only was 50% of the UCP inapplicable, but another 25% was inapposite. Even more significantly, many of the day-to-day problems with standbys were not addressed in the UCP.”

“Part of the problem,” points out Drafting Committee Vice Chair, James G. Barnes, a partner at Baker & McKenzie and immediate Past Chair of the Letter of Credit Subcommittee, “is the lack of precision in the UCP. Drawings on commercial LCs are normally not resisted. Drawings under standbys commonly occur because there is a problem in the underlying transaction. As a result, there is considerable attention to the language of the rules. The UCP were not written to withstand intense scrutiny by courts and lawyers.”

con't. p. 6
It was in the process of drafting the recently completed United Nations Convention on Independent Guarantees and Stand-by Letters of Credit that the need for standby rules came to be recognized. "In the course of discussions, it became apparent that there was little understanding of standbys or standby practice outside the U.S.,” recalls Professor Boris Kozolchyk of the National Law Center for Inter-American Free Trade, another ISP sponsor and member of the U.S. Delegation to the U.N. project. “Most delegates from outside the U.S. assumed that standbys were relatively simple default instruments requiring one or two documents and involving only one bank. The reality is quite different because standbys are used in a variety of different situations, involve direct payments of principal and interest as well as default payments, and frequently utilize correspondent banks.” The UCC Committee’s Task Force on the U.N. Convention, chaired by Dean Gerald McLaughlin, successfully concluded its work with the adoption of a resolution urging ABA endorsement of U.S. signature of the Convention by the Section Council in August 1997.

One of the major sources of difficulty has been closure of a bank on the last day on which documents can be presented. The UCP rule places this risk on the beneficiary. “Most knowledgeable beneficiaries will not accept the risk that their drawing will be refused if the bank to which presentation is to be made is closed on a day when it should be open,” said Chase banker Vincent M. Maulella, a member of the Drafting Group. “As a result, they insist on different language which, in turn, can cause confusion and difficulties. The presence of neutral language which allows the last date for presentation to be extended thirty days should solve this problem for most parties.”

The ISP also clarifies procedures surrounding presentation of documents in standbys used to support demand guarantees issued by other banks often located in the Middle East (“counter standbys”). “Applicants for counter standbys would often insist that the bank was required to determine whether there had been performance on the underlying demand guarantee. The ISP rule makes it clear that standby issuers have no such responsibility,” according to Citibank’s Donald Smith. (Citibank, N.A., the Chase Manhattan Bank, and ABN AMRO were also sponsors of the ISP project.)

Among the other matters addressed by the ISP:

- Precise definitions of standby terms (e.g. “presentation,” “document,” “demand,” “drawing,” “syndication,” “participation”)
- Redundant or otherwise undesirable terms (e.g. “unconditional,” “clean,” “evergreen,” “revolving”)
- Rules and definitions for electronic presentations
- Rules regarding certification and other solemn attestations
- Rules for transfer by operation of law, transfer, and assignment of proceeds under a standby
- Default rules for types of documents (e.g. demand, legal or judicial documents, statement of default, negotiable documents)
- Rules regarding originals and copies
- Separateness of each presentation
- Safe harbor for time for examination

“On the whole, these rules are an important contribution to the field and have been welcomed by the business community,” states Gary Collyer, an officer of the Banking Commission of the ICC and Technical Adviser at Midland Bank (London). Collyer chaired an ICC Task Force that collaborated in the finalization of the rules, and whose work led to approval of the rules by the Banking Commission, an important step in their acceptance throughout the world.

With approximately ninety rules, including carefully worded definitions and default provisions, considerable effort will be required to prepare for use of the ISP. “Deciding that the ISP is an improvement over the UCP is only the first step,” cautions the Institute’s Byrne. “Banks and businesses, as well as lawyers, will need to con’t. p. 7
examine their forms and practices in light of the new rules. Reimbursement agreements will also have to be reexamined,” he notes. To aid in this process, the Institute’s website (www.iiblp.org) carries information on how to get ready, including seminars, a 200 page Commentary, and other tools. “Although the rules will not be effective until 1 January 1999, all standby users need to begin to prepare now,” warns Byrne, if the transition is to be a smooth one.” Implementing the ISP will be one of the topics discussed at the meeting of the Letter of Credit Subcommittee in Toronto on Sunday, at 1:30.

North Carolina Case Construes Article 2A

By: Stephen T. Whelan
Thacher Proffitt & Wood
New York, NY

Although it has been more than ten years since the original version was approved by NCCUSL, Article 2A of the UCC has been the subject of few reported judicial decisions. One of those decisions is Coastal Leasing Corp. v. T-Bar S Corp., 496 S.E.2d 795, 34 UCC Rep.Serv. 694 (N.C. App. 1998), in which the Court of Appeals of North Carolina applied Article 2A to uphold a liquidated damages clause over the objections of the guarantors of the defaulting lease. Article 2A was relevant because both parties had agreed that the transaction was a “true” lease, rather than a secured transaction. Although the parties entered into the lease agreement in 1992, and Article 2A did not become effective in North Carolina until October 1993, the court nonetheless applied Article 2A to resolve the dispute.

The liquidated damages clause permitted the lessor to accelerate “the entire amount of unpaid rental for the balance of the term...” and to “give Lessee credit for [the net proceeds] received by Lessor from the sale or rental of the Equipment...” The court held that this clause was a reasonable estimation of the then-anticipated damages in the event of default because it placed the lessor in the same position as it would have been had the lease been fully performed. The court emphasized the sophistication of parties to leasing transactions and the fact that many leasing transactions are predicated on the parties’ ability to agree on an appropriate formula for damages in the event of default. In particular, the court cited the Official Comments to Sections 2A-102 (2A preserves freedom of contract) and 2A-504 (parties’ “ability to liquidate damages is critical to modern leasing practice”).

The court also focused on the distinctions between sales and leasing transactions. UCC Section 2-718(1) provides not only that a liquidated damages clause must be reasonable in light of the anticipated harm caused by breach, but also that it be reasonable “in light of the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy” and that any such clause “fixing unreasonably large liquidated damages is void as a penalty.” In contrast, UCC Section 2A-504(1) only requires the liquidated damages to be reasonable. The court ruled that none of the lessor, lessee or guarantors had superior bargaining power in negotiating the terms of the liquidated damages clause, and that the amount produced by the stipulated formula represented a reasonable forecast of the probable loss at the time the contract was entered into. Hence, there was no genuine issue of material fact as to whether the liquidated damages clause was reasonable.

The court also found that no genuine issue of material fact existed as to whether the sale of the equipment was conducted in a “commercially reasonable manner.” After repossessing the equipment upon the lessee’s and guarantor’s default, the lessor conducted a public sale of the equipment. In the absence of...
other bidders at the foreclosure sale, the lessor purchased the equipment. However, the court refused to treat the lessor’s “purchase” of the equipment at the foreclosure proceedings as a “sale” within the meaning of the liquidated damages provision in the lease. Since there was no sale, the court declined to address the issue of whether the purchase at the foreclosure proceedings was commercially reasonable.

Citing UCC Section 2-106(1), the court concluded that a sale must consist of the “passing of title from the seller to the buyer for a price,” and since the lessor already had title to the equipment, and the “true” lease stated explicitly that title to the equipment remained with the lessor at all times, the court felt that the “purchase” was not a sale. The court feared that to have found otherwise would enable lessors to “purchase” repossessed equipment, without ever relinquishing title, at a below market price. The lessor could then re-market the equipment to another party but credit the lessee only for the below-market purchase price.

The lessor had credited the lessee and the guarantors with the $2,000 it had paid for the equipment at the foreclosure sale, rather than for the rentals payable under the re-lease of a portion of the equipment. In the final part of its decision, the court remanded the case for a determination of how much credit, “if any,” the guarantors were entitled to receive under the terms of the liquidated damages clause.

Although its upholding the liquidated damages clauses is well-founded, this decision is puzzling in some respects. Its “no sale” conclusion ignores UCC Section 2-706, which states that, in the context of a sale transaction, when the buyer defaults and the seller conducts a public sale, “the seller may buy” and that “every aspect of the sale ... must be commercially reasonable.” This requirement of commercial reasonableness should prevent a lessor conducting resale of leased goods from purchasing at an unreasonably low price, as the court feared. The decision also seems at variance with the lessor’s treatment of the purchase as a sale, since the lessor credited the lessee with the $2000 it paid at the auction, rather than for any amounts received from the subsequent re-lease of part of the leased goods. The appellate court also ignored two customary aspects of liquidated damages clauses: discounting to present value the remaining rentals under the defaulted lease (Cf. UCC Sections 2A-528(1) and 2A-532); and deducting from the sale proceeds an amount representing the lessor’s residual interest in the equipment (for which paragraph 13 of the lease provided). Perhaps the court felt that rough justice resulted from ignoring both of these aspects. In any event, on remand, the trial court should address all of these issues along with the calculation of damages that was referred to it.

Uniform Electronic Transactions Act

By: C. Robert Beattie
Doherty, Rumble & Butler
Professional Association
Minneapolis, Minnesota

The NCCUSL Drafting Committee preparing the Uniform Electronic Transactions Act (which is intended to facilitate the use of electronic communications and signatures in contractual transactions) has concluded its first year of work and will present a draft of the Act for a first reading at the NCCUSL annual meeting in Cleveland in late July. The Drafting Committee will next meet to consider the Act on the weekend of October 9 through 11 in Rapid City, South Dakota.

The Act will be the subject of a program to be presented on the morning of August 4 at the American Bar Association Annual Meeting in Toronto.

Con't. p. 9
The program, entitled The Byte that Binds: An Update on the Uniform Electronic Transactions Act, is being chaired by Christina L. Kunz and will feature as panelists the chair of the Drafting Committee, Patricia B. Fry, the Reporter for the Drafting Committee, D. Benjamin Beard, and the ABA Business Law Section Advisor to the Drafting Committee, C. Robert Beattie.

During the course of the first year’s drafting effort, the Act has become increasingly procedural in nature but broader in scope. As presently drafted, the Act is essentially an enabling act, designed to validate the use of electronic communications and signatures in all types of transactions. The effect of electronic records and signatures is to be determined from relevant substantive law, not the Act. References to commercial and governmental transactions have been deleted from the scope provision of the Act.

The precise scope of the Act continues to be one of its most difficult aspects. A task force was formed in the spring of 1998 to review sample state laws to determine which types of documents and records or transaction types, if any, should be excluded from the scope of the Act. The task force is expected to report on the results of its effort at the October Drafting Committee meeting.

The Drafting Committee continues to wrestle with the issue of whether any heightened protection should be accorded electronic records and signatures incorporating security procedures for the purpose of verifying that an electronic signature or record is that of a specific person or for detecting changes or errors in the informational content of an electronic record. A number of participants in the drafting process have argued that strong presumptions regarding the validity of such records and signatures are necessary to promote electronic commerce. Others have expressed concern that the state of technology and current markets are too undeveloped to warrant the creation of such presumptions. At the Drafting Committee meeting held in April of 1998, the Drafting Committee voted to delete all presumptions regarding any form of electronic record or signature from the Act.

The Drafting Committee is also considering the effect properly to be accorded a signature under the Act in view of the many purposes that a signature may serve. The most recent draft of the Act provides that the effect of an electronic signature is to be determined from the context of surrounding circumstances at the time of its execution or adoption - an approach that leaves the actual effect of a signature to be determined from the document to which it is appended or other applicable law.

EDITORS’ NOTE: The following acronyms are used from time to time in articles and reports throughout this newsletter without repeated definition:

ABA – American Bar Association
ACH – Automated Clearing House
ALI – American Law Institute
UCC – Uniform Commercial Code
CFS Committee – ABA Commercial Financial Services Committee
CLCC – ABA Committee on the Law of Commerce in Cyberspace
ECP – Electronic Check Presentment
EDI – Electronic Data Interchange
EFS – Electronic Financial Services
ICC – International Chamber of Commerce
NCCUSL – National Conference of Commissioners on Uniform State Laws
SVP – Stored Value Products
UCLA – Uniform Consumer Leases Act
UNCITRAL – United Nations Commission on International Trade Law
UETA – Uniform Electronic Transactions Act
Please note the following:

Steven O. Weise's preferred email address is sweise@hewm.com.

Please be sure to keep the ABA Business Law Section advised of any changes in your name, address, telephone number, etc. As Bob Zadek notes, it is increasingly important for the ABA to have your e-mail address to facilitate the creation and use of the Section’s listservs. Contact the ABA Service Center at 800-285-2221 to make any changes.

The UCC Committee does not yet have an official ABA listserv like the CFS Committee does, but many UCC Committee members subscribe to the the UCCLAW-L listserv (sponsored by West Group, Publisher of the Uniform Commercial Code Reporting Service, with assistance from WashLawWEB). To subscribe to the list, send an e-mail message to listproc@associdr.wuacc.edu, leaving the subject line blank and including only: subscribe UCCLaw-L[your name] as the body of the message. (See the archives at http://lawlib.wuacc.edu/washlaw/listserv.htm.)

♦ ABA Business Law Section: http://www.abanet.org/buslaw

♦ ABA Joint Committee on Electronic Financial Services: http://www.abanet.org/buslaw/efss/home.html

♦ UCC Revision Drafts: http://www.law.upenn.edu/library/ulc/ulc.htm

♦ UCC Article 2B Revisions: http://www.lawlib.us.edu/ucc2b

♦ NCCUSL Meeting Schedule: www.nccusl.org/meetings.html

♦ UNCITRAL draft convention on cross-border receivables assignments: http://www.abanet.org/ftp/pub/buslaw/home.html

♦ Uniform Electronic Transactions Act Drafts: http://www.abanet.org/nccusl/home.html

NOTE:
This Newsletter is published by the Uniform Commercial Code Committee and the Commercial Financial Services Committee of the American Bar Association Section of Business Law. The views expressed are the views of the authors only, and are not necessarily those of the ABA, the Section or either Committee. Please contact Katherine S. Allen, Farris Warfield & Kanaday, PLC, Nashville, kallen01@counsel.com or Steven O. Weise, Heller Ehrman White & McAuliffe, Los Angeles, sweise@hewm.com with comments.

Brown Bag Video Programs

The ABA has videotapes available to serve as centerpieces of Brown Bag Programs. The programs are easy to produce; you can hold them for attorneys in your area or in your firm. A recent addition, from the Spring Meeting in St. Louis, is the presentation by Steve Weise and Jeff Turner on Commercial Law Developments in 1997. Contact Sue Daly, suedaly@staff.abanet.org for the guidelines for sponsoring a Brown Bag Program.
THE UCC ARTICLE 1 DRAFTING COMMITTEE NEEDS YOUR HELP!!

UCC Choice of Law

By: William J. Woodward, Jr.,
Temple University School of Law
Philadelphia, PA
ABA Section of Business Law representative to
the UCC Article 1 Drafting Committee

At the UCC Committee’s meeting in St. Louis, there was a presentation on proposed revisions to UCC Article 1. This triggered a spirited discussion of the proposed change of the provision authorizing contractual choice of law. Current law, found in UCC § 1-105, permits the parties to contractually choose law that is “reasonably related” to their underlying transaction. Proposed UCC § 1-302 would delete the “reasonable relationship” requirement and permit the parties to choose the law of any domestic jurisdiction, whether or not related to them or their transaction.

What triggered the discussion at the UCC Committee meeting was a hypothetical secured lending problem I drafted in which a lender and borrower “chose” the law of a state with very little restriction on self-help. The lender then used the chosen state’s brand of self-help in a state that closely regulated self-help and whose law arguably would have applied absent the contractual choice.

Even before the UCC Committee meeting many ink was spilled on the mutual assent features of this proposal and concerns had also been raised about its constitutionality. Serious new concerns were raised at the meeting and afterwards about the workability of such an approach for business lawyers. The concerns were:

• With at least 50 different jurisdictions to choose from in every contract, what malpractice risks would arise from a lawyer’s choosing a jurisdiction that was not optimal for the client? What additional transaction costs would this new “opportunity” insert into contracting? What are the Continuing Legal Education implications for business lawyers of the ability (and, in some instances, the resulting competitive necessity) to choose from among 50 different jurisdictions?

• In a situation such as that raised in the hypothetical problem, could a business lawyer assure a client that a given state’s regulatory law or “mandatory rules” (such as case law and statutes governing self-help) could be avoided by the expedient of choosing a different state’s law within the underlying contract? Will such predictability problems (which exist under current law) increase or decrease under an expanded choice model?

My impression from the UCC Committee Meeting is that the reaction was more negative than positive, and I plan to report that perception to the Drafting Committee. Obviously, a more informed idea of business lawyers’ attitudes will be very useful to the Drafting Committee as it continues to struggle with this.

Below is a short form for you to record your views and fax them back to me. Please complete and add comments as you see fit (separate sheets are welcome).

So I can know when the survey is “over,” if you want your views to be heard, please let me have them no later than July 30. Thanks.

Editor’s Note: Please contact Professor Woodward if you want copies of (1) the Problem discussed above (together with possible answers under the proposed statute); (2) proposed §1-302 and notes from the last Drafting Committee meeting at which it was discussed (which explain the rationale for moving to this different approach); or (3) a short bibliography regarding the debate among conflicts scholars as to whether choice of law has constitutional implications.)
UCC CHOICE OF LAW SURVEY

1. Is uncertainty in choice of law by contract currently a concern for you or your clients?

2. Does the uncertainty (if any) have to do with the current necessity in UCC §1-105 that the transaction or parties bear a “reasonable relationship” to the selected law or with something else? Please explain (briefly).

3. Will uncertainty (if it exists) be substantially reduced by deleting the “reasonable relationship” test?

4. Will expanding the available choices of jurisdictions from which to select law create contracting costs that do not now exist? If so, will this be a serious problem?

5. Do you perceive your risks of malpractice going up under the expanded choice model? If so, is this a serious problem?

6. Is uncertainty generated by the “appropriate relationship” test in current § 1-105(1) when parties have failed to reach an enforceable agreement on choice of law?

7. Do you perceive constitutional or similar limitations on party autonomy to choose law by contract? If so, explain (briefly).

8. On balance, should the Drafting Committee continue to pursue unlimited choice as a solution to perceived uncertainty?

9. What else (if anything) should the Drafting Committee focus on in improving the rules governing choice of law by contract?

Fax a completed form to: Professor Bill Woodward  Fax:  (215) 204-1185 Tel:  (215) 204-8984
The Spring Meeting of the Business Law Section gave the Subcommittee an opportunity to share with the membership of the UCC Committee some of the significant issues being addressed in Subcommittee deliberations. Moderated by Vice Chair, Fred Miller, the subcommittee program, entitled “Revised Article 1 – Sleeper or Silent Stalker,” directed attention to the impact of several proposed and considered changes to the general provisions of Article 1. Program participants and their topics were Bill Woodward (Choice of Law), Ann Louisein (Opt In / Opt Out), Amy Boss (Electronic Contracting), Fred Miller (Unconscionability), Meg Milroy (Revised Article 1 and Client Counseling).

At its Spring Subcommittee meeting, the Subcommittee continued its deliberations on choice of law and unconscionability. With the helpful review by Reporter Neil Cohen of the Drafting Committee’s proposal of Section 1-302, Choice of Law, and 1-303, Variation By Agreement, the Subcommittee concluded that the effect of these two sections could be achieved with a less cumbersome, straightforward provision recognizing and authorizing party autonomy in nonconsumer, commercial transactions. [See Bill Woodward’s survey on pages 11-12 of this Newsletter.]

On the issue of unconscionability, the Subcommittee debated the benefits and disadvantages of including an express provision on unconscionability, a comment to current Section 1-103 on unconscionability, or the including the term “unconscionability” in the laundry list of Section 1-103. Professor Corrine Cooper offered to submit a draft comment on unconscionability for consideration.

The August Subcommittee meeting promises to be as stimulating as the Spring meeting when the Subcommittee turns its attention to two issues: (1) the role of Revised Article 1 and the Constitutional Limitations on Allocating Factual Determinations to the Judge, and (2) Supplementation of the Code, a discussion of the history and future of UCC Section 1-103. New members and visitors are welcomed! Mark your calendars and plan to attend the Saturday, August 1 meeting from 1:00 p.m. to 2:15 p.m.

SUBCOMMITTEE ON INFORMATION LICENSING

By: Donald A. Cohn, Chair
E.I. duPont deNemours & Company
Wilmington, DE

Proposed UCC Article 2B-Information Licensing will be presented to NCCUSL at its annual meeting at the end of July 1999 for a final reading. The proposed Article contains many innovative provisions to address software licensing, database access contracts and other forms of information licensing. It will fundamentally influence the commercial aspects of information licensing in the United States. The article validates shrink wrap licenses, provides new and important consumer protections, includes new concepts such as “mass market licenses” and has new contract formation, warranty, and electronic commerce provisions. The ABA and our Subcommittee have been actively engaged in the creation of this new Article. The Subcommittee will co-sponsor an Article 2B panel discussion at the Annual Meeting in Toronto with the IP, Science
and Technology, and Law and Practice Management Sections. We will provide a comprehensive overview of the proposed new Article and an in-depth analysis of some controversial issues. The presentation is currently scheduled for Sunday, August 2 from 2:30 PM to 4:30 PM. We believe that it will be a “must attend” session at the Annual Meeting.

SUBCOMMITTEE ON PAYMENTS

Stephanie A. Heller, Chair
Federal Reserve Bank of New York
New York, NY

Paul S. Turner, Vice Chair
Los Angeles, CA

At the Annual Meeting in Toronto, during the Subcommittee meeting on August 1, 1998, a panel discussion will be presented entitled “Taking Stock and Breaking Barriers: Cross-Border ACH and EDI.” The development of cross-border ACH and the large scale use of electronic data interchange have been viewed by many in the payments community as the next big advancement in retail funds transfers. The panel will discuss the current state of cross-border ACH, including the US-Canadian NACHA pilot, and will consider legal issues surrounding the use of cross-border ACH and EDI.

During the second half of the Subcommittee meeting, John Kimball, counsel to the Federal Reserve System’s Retail Payments Product Office, will lead a discussion on the legal obstacles hindering the growth of electronic check presentment. The goal of this working session is to generate ways that the legal community, including the Subcommittee, can help to remove legal barriers in this area. Ideas generated at this session will be shared with the Retail Payments Product Office and its ECP Banking Industry Advisory Group.

The Subcommittee will also consider adding a new project on intangible negotiable instruments to its 1998 agenda. Technology is emerging that would support wide-spread use of electronic checks. Some in the payments community have suggested amending Articles 3 and 4 so as to govern these intangible negotiable instruments. The Subcommittee will consider whether to write a report on the legal issues that are raised by such instruments.

Finally, I want to remind everyone that the Task Force on Stored Value Cards, which is sponsored by this Subcommittee, will be meeting in Toronto on August 3, 1998 from 3:00 p.m. – 4:00 p.m. The Task Force will allot the first part of the meeting to a round table discussion of stored value product developments. The remainder of the meeting will be spent discussing some of the issues raised in the draft Non-Depository Providers of Financial Services Act. Some time will also be spent discussing a request that the Task Force provide meaningful guidance to NCCUSL with respect to the treatment of stored value under escheat laws.

If there are any members of the Subcommittee on Payments or the UCC Committee who have new projects or issues that they wish the Subcommittee to entertain, please contact Stephanie Heller (212-720-8198 or stephanie.heller@ny.frb.org) or Paul S. Turner (312-472-5802 or paulsturner@earthlink.net).

LETTER OF CREDIT SUBCOMMITTEE

By: James E. Byrne, Chair
Institute of International Banking
Law and Practice, Inc.,
Montgomery Village, MD

Business Law Section Endorses U.N. Convention & U.S. Signature. Based on a Report of the Letter of Credit Subcommittee and the UCC Committee, the Council of the Business Law Section has forwarded to the
House of Delegates a recommendation that the ABA endorse adoption by the U.S. for the U.S. Convention on Independent Guarantees and Stand-by Letters of Credit. The Convention was formally adopted by the General Assembly of the United Nations in December of 1995. The Report notes that the Convention will be of great assistance to United States parties doing business involving letters of credit and independent guarantees in countries that have yet to develop a body of law governing such transactions. The report analyzes the Convention article by article and concludes that the Convention is compatible with Revised UCC Article 5, UCP 500, and the new formulation of rules for standby letters of credit (the “ISP”). Moreover, the Convention fully supports party autonomy in the modification of most of its provisions.

To date, four countries have signed the convention including, on December 11, 1997, the United States. U.S. signature of the Convention is seen as a vital step towards widespread adoption throughout the rest of the world.

A copy of the report can be obtained from LC Subcommittee Chair Professor James Byrne at jbyrne@iiblp.org or (telefax) 301-926-1265.

International Standby Practices Undergo Review. The International Standby Practices (ISP), which have been reissued in a Fall 1997 Draft, are in the final stage of revision. Thus far, the process and comments indicate that they will receive widespread support, and even applause, from the letter of credit community. Comments have been solicited worldwide, and responses have been received from such organizations as the U.S. Council on International Banking, the International Chamber of Commerce, the Singapore Bankers Association, the British Bankers Association, and various other individuals from around the world. Meetings of the drafting group have been held in seven countries and throughout the US.

The November, December, and January 1998 issues of Documentary Credit World contain the text of the ISP and extensive commentaries on it. For more information on the ISP, or a copy of the rules, contact the Institute for International Banking Law & Practice, Inc, (301) 869-9840 or visit the Institute’s website at www.iiblp.org.

Implementation of the ISP will be discussed at the Subcommittee Meeting in Toronto on Sunday at 1:30 p.m.

Decision Reached in Banca Del Sempione Case. Banca Del Sempione v. Provident Bank of Maryland is still in the news four years after the seminal appellate decision by the 4th Circuit, which held that an issuer could not interpose its routing of an amendment directly to the beneficiary to deny the effectiveness of the amendment for lack of the conformer’s consent. Remanded for trial, the issue was the significance of a series of letters between the issuer and the beneficiary in which the issuer had stated that the credit would be “automatically reavailable to you upon your receipt of our tested telex.”

The trial court found for the beneficiary, concluding that the letter from the issuer constituted an amendment and that it operated to reinstate the sum without need for further action. The court also ruled that the second beneficiary took free of the defense of fraud which might be asserted against the first beneficiary. This decision, in turn, has now been appealed and, once again, the US Council on International Banking has submitted an amicus brief. The issues are whether a second beneficiary is a mere assignee and the effect of first beneficiary fraud.

SUBCOMMITTEE ON INVESTMENT SECURITIES

Robert A. Wittie, Chair
Kirkpatrick & Lockhart LLP
Washington D.C.

In keeping with our being in Toronto, the summer meeting of the Investment Securities Subcommittee will feature a special presentation...
on the Harmonization of Article 8 and Canadian Law. Richard Smith, who is a member of NCCUSL’s Committee on Liaison with the Uniform Law Conference of Canada, will moderate a distinguished panel comprised of leading participants in the harmonization effort. Panelists will include: Prof. James Rogers, who served as Reporter for the 1994 Revisions to Article 8; Randall Guynn, who authored a seminal article on the need for international harmonization of the laws governing securities holding and transfer systems for the IBA Capital Markets Forum; Thomas Marley, who is Vice President - Legal for The Canadian Depository for Securities, Ltd.; and Bradley Crawford QC, who has been the principal draftsman of the Uniform Law Conference of Canada’s revisions of the Canadian commercial law governing investment securities. We look forward to your joining us.

At our last meeting, the Subcommittee discussed some of the key changes affecting security interests in investment property, as well as changes to Article 8 itself, that are included in the draft revisions to Article 9. The Article 9 revision will be presented for final approval at NCCUSL’s annual meeting in late July, so that we should know the final results of this effort by the time of the Toronto meeting.

The Subcommittee is organizing a task force to prepare model language for legal opinions covering security interests in security entitlements and securities accounts. If you are interested in participating, please contact Bob Wittie at 202-778-9066 or at wittiera@kl.com.

**SUBCOMMITTEE ON RELATION TO OTHER LAW AND SCOPE SUBCOMMITTEE**

Meredith Jackson, Co-Chair
Wilson, Sonsini, Goodrich & Rosati, P.C.
Palo Alto, CA

Robert A. Feldman, Co-Chair
Computer Sciences Corporation
Falls Church, VA

We are pleased to announce the merger of the Subcommittee on Relation to Other Law with and into the Scope Subcommittee, with the Scope Subcommittee as the surviving entity. We expect to achieve significant benefits by this merger. Bob Feldman, former chair of the pre-merger Scope Subcommittee, and Meredith Jackson, former chair of the Subcommittee on Relation to Other Law, now serve as co-chairs of the combined Subcommittee.

The new improved Scope Subcommittee is considering the effects of corruption of the UCC by importation of other law through Section 1-103. We are looking at the cases to determine just how scary non-UCC law can be. Jennifer Kercher is researching this issue and will report to the Subcommittee in gory detail. This report is not for the squeamish.

We will also be discussing topics for future meetings and welcome additional suggestions.

**CFS SUBCOMMITTEE REPORTS**

**AIRCRAFT FINANCING SUBCOMMITTEE**

William C. Boston, Chair
William C. Boston & Associates
Oklahoma City, OK

The membership of the Aircraft Financing Subcommittee continues to increase. Over the past several years the membership has increased from less than forty (40) members to two hundred fifty-eight (258) members. At the 1998 Spring Meeting in St. Louis, Subcommittee members and other speakers addressed a number of ious topics, including Western Pacific Bankruptcy Proceedings; Exit Bank Financing and Other Government Support for Aircraft

At the Annual Meeting in Toronto, the meetings on July 31 and August 1 will provide an opportunity for Subcommittee members and other lawyers to address various topics, including Current Problems of Lenders and Lessors in Bankruptcy Proceedings; Negotiating, Documenting, and Enforcing Cross Border Aircraft Transactions; Financing Aircraft Engines – Owning vs. Leasing and Power-by-the Hour Agreements; Operating Leases – Default and Repossession; Documentation; Special Problems Under the Laws of Germany and Belgium; Issues Related to the Convention on the International Recognition of Rights in Aircraft and the Proposed UNIDROIT Convention; U.S. Income Tax Issues; Appointment of a Task Force in Regard to Problems Relating to U.S. Aircraft Registry. The speakers and moderators for the meeting of the Subcommittee in Toronto, Canada will be as follows: William C. Boston, Chair, James H. Hancock, Vice Chair, James D. Tussing, William J. Rochelle, Ill, John K. Olson, Jon Y. Arnason, Donald H. Bunker, M. Reginia M.A. Lynch, Thomas A. Zimmer, Richard F. Klein, Dean N. Gerber, Robert R. Fafinski, Jr., Dard F. Stagg, John I. Karesh, David V. Biesemeyer, Kevin P. Hartney, Steven A. Rossum, John P. Howitt, William R. Wyatt, John F. Todd, Beverly K. Goulet, Joseph M. Stefano, Kevin P. Jordan, Robert P. Simbro, Donald G. Gray, Jay T. Jenkins, Patrick J. Brennan, G. Dino DeLuca, Brenda Nichols, Jeanett Pinard, Philip V. Jackmauh, Laura M. Safran, David M. Kirstein, P. Nikolai Ehlers, Gregoire Jakhian, Michale C. Mulitz, F. Scott Wilson, W. Gregory Voss, Thatcher A. Stone, David L. Lloyd, Jr., Harold S. Burman, James F. Hayden, Mark L. Regante and Jonathan H. Bogaard.

CREDITORS’ RIGHTS SUBCOMMITTEE

William Knight Zewadski, Chair
Tenam, Kemker, Scharf, Barkin, Frye, O’Neill & Mullis, P.A.
Tampa, FL

At the 1998 Spring Meeting of the ABA’s Section of Business Law in St. Louis April 1-5, 1998, the Creditors’ Rights Subcommittee, the Bankruptcy Litigation Subcommittee of the Corporate and Business Litigation Committee, and the Latin American Law Subcommittee of the International Business Law Committee presented a joint program covering several topics. Lawrence E. Oscar of Hahn, Loeser & Parks in Cleveland presented issues involved in insurance premium financing in bankruptcy. William Knight Zewadski, Chair of the Creditors’ Rights Subcommittee, of Trenam, Kemker, Scharf, Barkin, Frye, O’Neill & Mullis, P.A. in Tampa, presented some thoughts on the ALI’s forthcoming Restatement of the Law Governing Lawyers, specifically concerning the Institute’s announced plan to avoid discussing in that work how the principles of conflicts of law apply to the bankruptcy practice.

The plans for the 1998 Annual Meeting in Toronto include a joint meeting of the Creditors’ Rights Subcommittee and the Bankruptcy Litigation Subcommittee of the Corporate and Business Litigation Committee on Sunday,
August 2, 1998, from 7:30 to 9:00 a.m. John Olson of Stearns, Weaver, Tampa, will comment on injunctions relating to international asset pursuit, and others will discuss issues regarding international asset planning.

The same two Subcommittees will meet at the 1998 National Conference of Bankruptcy Judges in October to present a joint program on Saturday, October 24, 1998, from 7:15 to 8:45 a.m. Chief Bankruptcy Judge Maguire from Dallas will speak on bankruptcy issues involving creditors.

Both should prove to be very interesting programs. Consult your ABA materials for the locations of the presentations.

INTELLECTUAL PROPERTY FINANCING SUBCOMMITTEE

Peter S. Munoz, Co-Chair
Jackson Tufts Cole & Black LLP
San Francisco, CA

James Schulwolf, Co-Chair
Pepe & Hazard, LLP
Hartford, Connecticut

The Intellectual Property Financing Subcommittee held its kick-off meeting in St. Louis on April 4, 1998. The meeting included presentations on a variety of topics:

Ben Carmicino of Freidman Siegelbaum, New York City, addressed the due diligence required in financing software developers.

Larry Engel of Brobeck Phleger & Harrison LLP, San Francisco; Ruthanne Hammett of Thompson Coburn, St. Louis; and Chris Rockers of Husch & Eppenberger, Kansas City, covered current developments in the area of intellectual property financing. In particular the discussions of In re Avalon Software, Inc. and Quality King Distributors v. L’anza Research International Inc. were enlightening.

The next meeting of the Subcommittee is scheduled for Saturday, August 1, 1998, 10:00 a.m. – 12:00 noon at the ABA Annual Meeting in Toronto, Canada (Pier 4 Room, Convention Level, Westin Hotel). The primary focus of that meeting will be (i) the impact of bankruptcy on intellectual property financing and “cyber-assets” and (ii) perfecting security interests in intellectual property in Canada. The scheduled speakers will be: (i) on the bankruptcy issues, Warren Agin of Boston, Massachusetts; Thomas Gaa of Murray & Murray, Palo Alto, California; and (ii) on Canadian intellectual property law, Ron Marshall and Marc Mercier, both of Fraser & Beatty, Toronto, Canada; Pierre Cote of McMaster Meighan, Montreal, Canada. We invite you to join us in Toronto.

LOAN WORKOUTS SUBCOMMITTEE

Lawrence Peitzman, Chair
Orrick, Herrington & Sutcliffe LLP
Los Angeles, California

William Wright, Vice Chair
Buchalter, Nemer, Fields & Younger, PC
San Francisco, California

The Loan Workouts Subcommittee had its first meeting in conjunction with the ABA Spring Meeting in St. Louis. The Subcommittee’s first meeting featured a presentation by Thomas J. Weber of Coudert Brothers, New York, and Howard J. Weg of Orrick, Herrington & Sutcliffe LLP, Los Angeles, on the topic: “How to Bankruptcy-Proof a Workout Agreement.” The meeting was attended by over 150 lawyers.

The presentation began with a discussion by Mr. Weg of prepetition agreements not to seek bankruptcy relief. Reviewing the case law on the subject, Mr. Weg concluded that no court has enforced a prepetition covenant that prohibits the filing of a bankruptcy petition. On the other hand, he pointed out, at least a few
courts have enforced provisions that restrict the debtor’s choice of venue for a bankruptcy filing.

Mr. Weg also reviewed the case law involving prohibitions on re-filing by debtors contained in bankruptcy court orders and plans. On this point, he concluded that the majority of courts would enforce such prohibitions. Mr. Weg next turned to the matter of involuntary petitions and suggested that, as part of a workout, institutional lenders might require the debtor to obtain agreements from its partners and trade creditors not to file an involuntary bankruptcy petition against the debtor. At least some courts have enforced such agreements and dismissed involuntary petitions filed in violation of them.

As an alternative to (probably unenforceable) contractual prohibitions on bankruptcy filings, Mr. Weg reviewed a number of devices employed by creditors in efforts to achieve the same effect. One such device involves requiring the debtor to amend its articles of incorporation and by-laws to require that at least one director designated by the creditor sit on the debtor’s board and that the filing of a bankruptcy petition require approval by every one of the directors. Mr. Weg pointed out that there were risks in this approach both to the creditor and to its designated director. He noted that, in *In re Kingston Square Associates*, 214 B.R. 713 (Bankr. S.D.N.Y. 1997), the bankruptcy court had suggested that an “independent” director could well have liability if the director was more concerned about the interests of the creditor than the interests of the debtor on whose board he served. Mr. Weg also reviewed the possibility that a creditor could require that its debtor establish a bankruptcy-ineligible entity, such as a business trust, to be the borrower in a contemplated transaction or workout.

Mr. Weber then discussed the case law regarding contractual provisions purporting to stipulate to relief from the automatic stay in advance of a bankruptcy filing. Mr. Weber first analyzed the cases (mainly emanating from the Middle District of Florida and the Northern District of Georgia) enforcing such contractual provisions. He concluded that these cases had certain factual patterns in common: they were single-asset cases; prior to bankruptcy, the debtor had benefited from a long period of forbearance by the secured creditor; the waiver of the automatic stay was obtained after default; and, in the opinion of the court, the debtor’s primary, if not sole motivation, was simply to forestall foreclosure and there was no prospect of a successful reorganization. Citing *In re Club Tower L.P.*, 138 B.R. 307 (Bankr.N.D.Ga. 1991), Mr. Weber noted that some judges even found a public policy basis for upholding prepetition waivers of the automatic stay: “[E]nforcing prepetition settlement agreements furthers the legitimate public policy of encouraging out of court restructurings and settlements.” *Id.* at 312.

Mr. Weber followed this with a discussion of the contrary case law. These cases frequently involved businesses more complex than those involved in the single-asset cases where a waiver of the automatic stay was enforced. In addition, these cases generally focused on the fact that the automatic stay was not solely for the protection of the debtor, but was also for the protection of creditors, and, therefore, could not be waived unilaterally by the debtor. See, e.g., *In re Sky Group International, Inc.*, 108 B.R. 86, 89 (Bankr. W.D.Pa. 1989).

In drafting stay waiver provisions, Mr. Weber suggested, lawyers should keep in mind the fact that courts seem to take into consideration the following factors, among others: the nature of the debtor’s business (single-asset or not); the chapter of the Bankruptcy Code; evidence, if any of “bad faith” on the part of the debtor; the relative sophistication of the parties; the duration of any prepetition forbearance; the nature of the collateral; consideration received by the debtor in exchange for the waiver; the degree of creditor reliance on the waiver; and the prospects for a successful reorganization.

Messrs. Weber and Weg were unable to discuss all the issues raised in the excellent
materials they and their colleagues (Mary L. Johnson of Coudert; David B. Shemano and Craig B. Cooper of Orrick) prepared for the presentation. It is anticipated that these additional issues (including a series of issues relating to executory contracts) will be the subject of a presentation at a future Committee or Subcommittee meeting.

Anyone who has suggestions for other topics or Subcommittee projects or who is interested in joining the Subcommittee, should contact either the chair of the Loan Workouts Subcommittee, Larry Peitzman, Chair (213-629-2020 or lpeitzman@orrick.com) or vice-chair Bill Wright (415-227-0900 or wwright@buchalter.com).

REAL ESTATE FINANCING SUBCOMMITTEE

Thomas A. Snow, Chair
Carlton Fields
Tampa, Florida

The Real Estate Financing Subcommittee held a very successful Spring Meeting in St. Louis on April 4, 1998. Our featured speaker was Sam Kirschner, Esq., of Daiwa Securities America, Inc. Sam works for Daiwa exclusively in the conduit mortgage loan field and presented a discussion entitled "Bankruptcy Remote Entities, Non-Consolidation Opinions and Other Issues in Conduit Mortgage Lending." In addition to the legal issues apparent from the title of his presentation, Sam provided tremendous insight into the economics of conduit lending and securitization, including the economic impact (via interest rate) of the borrower’s compliance with various conduit mortgage loan standards, such as the quality of the borrower’s bankruptcy remote entity and legal opinions.

Following Mr. Kirschner’s presentation, the Subcommittee discussed topics for future meetings and the potential for establishing an ABA list serve e-mail group for the Subcommittee.

Should any Subcommittee members have topics that warrant discussion at future Subcommittee meetings, please contact Tom Snow at (813) 229-4201.

SECURED LENDING SUBCOMMITTEE

Jeffrey S. Turner, Chair
Brobeck, Phleger & Harrison L.L.P.
Los Angeles, CA

Meredith S. Jackson, Vice Chair
Wilson, Sonsini, Goodrich & Rosati, P.C.
Palo Alto, CA

The Secured Lending Subcommittee of the CFS Committee met jointly with the Secured Transactions Subcommittee of the UCC Committee in St. Louis on April 3, 1998. Professor Fred Miller led a discussion of issues relating to the reconciliation of Articles 3 and 9 with respect to rights of holders in due course of negotiable instruments and secured parties with security interests in those instruments. Marsha Simms made a presentation concerning lending to business trusts. Jeff Turner discussed federal intellectual property law preemption issues relevant to secured lending to debtors whose collateral includes intellectual property content, from software to shampoo labels.

The two Subcommittees again will meet jointly in Toronto at 9 A.M. on Sunday, August 2. Meredith Jackson and Jeff Turner will make a presentation on "The Ten Most Controversial (Non-Consumer) Provisions of New Article 9" and speakers to be announced will discuss "How Canada’s PPSA Differs from Article 9.”

The Secured Lending Subcommittee always welcomes suggestions and input, including proposals for topics or speakers. Input may be directed to jturner@brobeck.com and/or mjackson@wsgr.com We hope to see you in Toronto.
UCC SCORECARD -- REVISIONS

ARTICLE 1 - GENERAL PROVISIONS

Latest Draft: September, 1997
Status: Drafting Committee's next meeting not scheduled.
UCC Committee Contact: Sarah Howard Jenkins (501) 324-9937 or Fred Miller (405) 325-4699.

ARTICLE 2 – SALES

Latest Draft: May 1998
UCC Committee Contact: David J. Frisch (302) 477-2119.

ARTICLE 2A – LEASES

UCC Committee Contact: Steve Whelan (212) 912-7654.

ARTICLE 2B – LICENSES

UCC Committee Contact: Donald A. Cohn (302) 773-3521.

ARTICLE 5 - LETTERS OF CREDIT

Latest Revision 1995. Revised Article 5 is being presented to the states for adoption, and has been adopted by at least 36 states.
UCC Committee Contact: James G. Barnes (312) 861-2854.

ARTICLE 7 - DOCUMENTS OF TITLE

Latest Draft: No draft.
Status: In 1996, Article 7 Task Force presented its report to the PEB Committee, which voted to recommend to NCCUSL appointment of a Drafting Committee to start work on a revision.
UCC Committee Contact: Drew L. Kershen (405) 325-4784.

ARTICLE 8 - INVESTMENT SECURITIES

Latest Revision 1995: Revised Article 8 is now being presented to the states for adoption, and has been adopted by at least 46 states.
UCC Committee Contact: Sandra M. Rocks (212) 225-2780.

ARTICLE 9 – SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER

Latest Draft: July 1998, NCCUSL Annual Meeting
UCC Committee Contact: Steven O. Weise (213) 244-7831.

UNIFORM ELECTRONIC TRANSACTIONS ACT

Latest Draft: First draft anticipated July 1998 for 1998 NCCUSL annual meeting
Status: Drafting Committee’s next meeting October, 1998
UCC Committee Contact: C. Robert Beattie
## UCC SCORECARD

### 50 State Survey of Adoptions of Revised Official Text of the UCC

**AS OF June 1, 1998**

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1. South Dakota has adopted only 1987 Official Text without the 1990 Amendments.
2. States which have repealed Article 6 are identified by indicating "Repeal" next to the state name; states adopting the revisions suggested in Alternative B to the 1989 Official Text are identified by indicating "Revise" next to the state name.

Intro = Legislation introduced (bill number given where possible).
Died = Died in committee or on adjournment.

Please note that the Enactment Date does not necessarily reflect the effective date. Please refer to the applicable statute for the relevant effective date. The bold portions of this chart indicate new developments since the last Scorecard.

Our thanks to John McCabe and Katie Robinson at the National Conference of Commissioners on Uniform State Laws for their help in compiling the information above. These revisions are based on the information available as of June 1, 1998.