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Sent: Monday, September 14, 2009 2:01 PM
To: Smith, Edwin E.
Cc: James J. White; James E. Byrne; Burman, Harold S; Hal Burman
Subject: UN LC Convention - September 2009 draft federal implementation act

Ed, These are my comments on the September 2009 draft federal act that was circulated to the Drafting Committee by Lucy Grelle on Friday. Please feel free to circulate my comments further.

The June 2009 draft federal act that was reported out by the Drafting Committee was acceptable. The September 2009 draft introduces a number of changes. All of the substantive changes in it are objectionable.

5(a) change. The change in 5(a) would require that an undertaking recite that it is governed "by the text of the Convention" to make the text of the convention the applicable law. It would treat a recital that "this undertaking is issued subject to the Convention..." as ineffective to invoke the convention text. (Note that Convention Article 1(2) rather assumes that the convention is effectively chosen where an undertaking "expressly states that it is subject to this Convention".) I strongly recommend that this change be rejected and that we not spend much time on it.

5(b) deletion and new alternative versions. 5(b) as it appeared in the June 2009 draft that was reported out by the Drafting Committee has been deleted. It remains the proper starting place on the topic of applicable law for undertakings that do not choose law. I strongly recommend that the original 5(b) language be restored and used as the preferred Drafting Committee version of 5(b).

Of the two new alternative versions of 5(b) in the September 2009 draft, the first should be deleted in favor of the original version. The second alternative version results from the discussion at the Annual Meeting concerning Drafting Committee consideration of alternative language that would give more emphasis to enacted versions of the UCC. Trying to refer to enacted versions of UCC 5 complicates the already inherently difficult job of drafting 5(b). It has led, understandably but unfortunately, to the inclusion of express conflict of laws rules in the September 2009 draft federal statute (rather than silence or express reference to the conflict of laws rules in Convention Article 22 or UCC 5-116(b)). I strongly recommend that it (as well as the first alternative 5(b)) be rejected in favor of original 5(b) or of a modestly revised version of 5(b).

I offer the following for consideration as a modest alternative to original 5(b). I drafted this alternative (which deletes the words "including the conflict of laws rules," and adds a new middle sentence) in light of two drafting concerns raised at the Annual Meeting. They were that 5(b) as originally drafted might result in the application to an issuer's obligation of (i) uniform Article 5 rather than the law of the country from which the undertaking was issued or (ii) UCC Article 5 as enacted in the state from which an undertaking was issued rather than the uniform version.

[5](b) Undertakings that do not Choose Applicable Law. An undertaking that does not expressly state its governing law is governed by the law as stated in Article 5 of the UCC, except that (i) Article 12(c) of the Convention, and not Section 5-106(c) or (d) of the UCC, shall govern

the duration of the undertaking and (ii) Article 18 of the Convention shall govern the issuer's right of setoff. To the extent that the conflict of laws rules of Article 22 of the Convention or Section 5-116(b) of the UCC would make applicable the law of a jurisdiction outside the United States, then the law of that jurisdiction, including any of its laws implementing the Convention, shall apply. Except as otherwise stated in this Section 5, Article 5 of the UCC is the law that implements the Convention in the United States.

New 6. The attached draft adds a new section 6 to deal with undertakings that recite that they are governed by US law and that do not also refer to a particular state's law. This is a practically insignificant but technically difficult gap to try to fill at the last minute. I don't know how 5-116 would/should treat a "US law" choice, and I would prefer not to try to answer that question in this federal act. If we must answer it, then I would favor reference to the uniform UCC, which, unfortunately, raises the question as to whether the reference should say that it includes or excludes the UCC 5-116 conflict of laws rules. I don't feel strongly about addressing "US law" undertakings, but I would prefer that we not add to our concerns and therefore suggest that this change be rejected.

Regards, Jim

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