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Application of the Uniform Commercial Code to Federal Government Contracts: Doing Business on Business Terms

APPLICATION OF THE UNIFORM COMMERCIAL CODE TO FEDERAL GOVERNMENT CONTRACTS: DOING BUSINESS ON BUSINESS TERMS

Although not entirely unwilling to draw upon the Uniform Commercial Code (UCC) to resolve federal government contracting disputes when federal law otherwise is silent,[1] federal courts and boards

1. To achieve uniformity in the absence of specific contrary federal precedent, the federal boards of contract appeals, *see* note 2 *infra*, often have relied upon uniform state acts, frequently having referred to the Uniform Sales Act (USA) as a source of law governing federal contracts. In F.W. Lang Co., ASBCA No. 1677, 57-1 B.C.A. ¶ 1334, the Armed Services Board of Contract Appeals stated: "The contract does not provide for any particular form of notice of defects; so the general rules applicable to the giving of notice of defects at common law and under Sec. 49 of the Uniform Sales Act may be applied as a guide." *Id.* at 4264. The panel in J.R. Simplot Co., ASBCA No. 3952, 59-1 B.C.A. ¶ 2112, agreed that the USA's provisions for notice within a reasonable time were "expressive of Federal law and . . . applicable to Government contracts." *Id.* at 9069.

The Interior Board of Contract Appeals recognized in General Electric Co., IBCA No. 451-8-64, 66-1 B.C.A. ¶ 5507, that the boards should not apply the USA automatically, noting that the Court of Claims "has both applied and refused to apply the provisions of the Uniform Sales Act depending upon whether, in the court's view, the underlying policy was consonant with established principles of law for the determination of controversies to which the Government is a party." *Id.* at 25,792 (citations omitted). This statement by the Interior Board of Contract Appeals, however, does not support the proposition that a federal rule of contract law must defeat a uniform state rule. For the assertion that the Court of Claims would not apply the USA, *General Electric Co.* relied solely upon a case where the proferred USA argument was inapplicable in itself. In Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268 (Ct. Cl. 1959), the plaintiff relied upon USA section 49 which provided: "[I]f, after acceptance of the goods, the buyer fail[s] to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." *Id.* at 270. The plaintiff raised section 49 in defense to the Government's counterclaim for overpayment. The provision was inapplicable because it failed to answer the Government's restitutionary theory of recovery. *Id.* One interpretation of *Fansteel* is that the court was referring to law which is outcome-determinative. While being determinative, federal law nonetheless may draw from appropriate state law that does not conflict with federal interests.

The various boards of contract appeals have provided the more widely enacted UCC even greater application in federal contract disputes than they did the USA. Reeves Soundcraft Corp., ASBCA Nos. 9030 & 9130, 1964 B.C.A. ¶ 4317, presents the foremost decision in which the Armed Services Board promoted the UCC. The Board agreed with an assertion of the Court of Claims that " . . . the federal contract law . . . should take account of the best in modern decision and discussion." Padbloc Co. v. United States, 161 Ct. Cl. 369, 377 (1963), *cited in* Reeves Soundcraft Corp., ASBCA Nos. 9030 & 9130, 1964 B.C.A. ¶ 4317, at 20,877. *See also* notes 57-61 *infra*.

See also Kain Cattle Co., ASBCA No. 17124, 73-1 B.C.A. ¶ 9999; Catalytic Eng'r & Mfg. Corp., ASBCA No. 15257, 72-1 B.C.A. ¶ 9342; Cross Aero Corp., ASBCA No. 14801, 71-2 B.C.A. ¶ 9075; Council Mfg. Co., ASBCA No. 14232, 71-1 B.C.A. ¶ 8731; Keco Indus., Inc., ASBCA No. 13271, 71-1 B.C.A. ¶ 8727; Cottman Mechanical Contractors, Inc., ASBCA No. 11387, 67-2 B.C.A. ¶ 6566; Stanley Aviation Corp., ASBCA No. 11430, 67-1 B.C.A. ¶ 6302;

of contract appeals[2] have been intransigent in their refusal to settle any conflicts between the Code and the federal common law of contracts[3] in favor of the Code. Based partially upon the supremacy clause of the United States Constitution[4] and partially upon general principles of stare decisis,[5] this disinclination to review even threadbare federal precedents in light of the Code's teachings primarily has been defended as having been mandated by the Supreme

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Skaggs Automotive, Inc., ASBCA No. 11274, 66-2 B.C.A. ¶ 5744; General Elec. Co., IBCA No. 451-8-64, 66-1 B.C.A. ¶ 5507; Productions Unlimited, Inc., VACAB No. 541, 66-1 B.C.A. ¶ 5444; General Elec. Co., IBCA No. 442-6-64, 65-2 B.C.A. ¶ 4974; Carpenter Steel Co., AECBA No. 5-65, 65-1 B.C.A. ¶ 4848; Federal Pac. Elec. Co., IBCA No. 334, 1964 B.C.A. ¶ 4494; Goodyear Tire & Rubber Co., ASBCA No. 9647, 1964 B.C.A. ¶ 4399; Reeves Soundcraft Corp., ASBCA Nos. 9030 & 9130, 1964 B.C.A. ¶ 4317; Noonan Const. Co., ASBCA No. 8320, 1963 B.C.A. ¶ 3638.

Moreover, the boards have agreed that the UCC is a source of federal law applicable to warranties in government contracts. *See* Haddock, *Uniform Commerical Code Warranties—Application to Government Purchases,* 1 PUB. CONT. L.J. 77 (1968).

2. The various boards represent their executive department heads in hearing and deciding contract disputes. *See generally* Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals,* 29 LAW & CONTEMP. PROB. 39, 42-57 (1964).

3. The federal common law of United States government contracts is decisional law developed since Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), aided by decisions applying the general common law that existed before Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

4. As explained by the Court in United States v. Allegheny County, 322 U.S. 174 (1944), the supremacy clause mandates application of federal law to federal contracts according to the following rationale:

> The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States *** ." Art. IV, Sec. 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. I, Sec. 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.
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> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power . . . . [This disputed contract] must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
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> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls.

322 U.S. at 182-83. The doctrine that the exercise of a constitutional function makes a contract subject to federal law also applies to subcontracts and to those further down the chain, where the federal interest is sufficient. *See* American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640, 644 (9th Cir. 1961).

5. *See* note 12 *infra* & accompanying text.

Court's refusal to apply state law to federal commercial transactions in *Clearfield Trust Co. v. United States*[6] and *United States v. Allegheny County*.[7] The Court in *Clearfield* expressed its rationale for rejecting the application of state law as follows: "The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states."[8]

Wide adoption of the Code,[9] replacing the "vagaries of the laws of the several states," calls into question the continuing validity of these justifications for refusing to apply the UCC to federal government contracts. So long as the Code is used as a source of federal law, rather than as an application of state law to a federal contract, the supremacy clause raises no bar at all. Moreover, while the doctrine of stare decisis is not to be regarded lightly, its invocation in the refusal to review federal contract law has been premised upon the rejection of state law in *Clearfield* and *Allegheny*. Excessive attention to the results reached in those two cases with insufficient

6. 318 U.S. 363 (1943). The United States sued a presenting bank which the United States had paid on a check bearing the forged endorsement of the payee. Applicable state law arguably prevented recovery by the United States because it had delayed unreasonably in giving notice of the forgery, *id.* at 366, but the Supreme Court declined to apply state law, reasoning that since the United States issued vast quantities of commercial paper in many states, diversity of state law would create uncertainty about the rights and duties of the United States. *Id.* at 366-67. The Court also based its application of federal law on the exercise of the constitutional power to issue the check. *Id.* *See* note 4 *supra*.

7. 322 U.S. 174 (1944). The contractor installed additional equipment pursuant to its contract with the United States for the production of ordnance. Under the agreement, title to the equipment was in the United States. The state of Pennsylvania subsequently included the value of the equipment among the contractor's property for the computation of state taxes. *Id.* at 177-80. The state supreme court held that, as a matter of state law, the contractor was to be assessed for taxes on the equipment and whether title was in the United States was irrelevant. Appeal of Mesta Machine Co., 347 Pa. 191, 32 A.2d 236 (1943). The Supreme Court reversed asserting that state taxation of goods to which the United States held title violated the Constitution. *See* note 4 *supra*.

8. 318 U.S. at 367. *See also* United States v. Allegheny County, 322 U.S. 174, 183 (1944): "The validity and construction of contracts, . . . their consequences on the rights and obligations of the parties, the titles or liens, which they create or permit, all present questions of federal law not controlled by the law of any State." *But see* 37 COMP. GEN. 412, 415 (1937): "In the instant case, the contract was entered into and performed in the State of Illinois and therefore the laws of that jurisdiction—insofar as they do not conflict with Federal law or statute—are for application in determining the rights of the parties."

9. Louisiana is the only state which has not enacted the Code. *See* UNIFORM COMMERCIAL CODE, Table 1 (1972 version). On Jan. 1, 1975, articles 1, 3, 4, and 5 became effective in that state, also. LA. REV. STAT. ANN. §§ 10:1-101 to 5-117 (West Supp. 1975).

attention to the uniformity rationale has led federal courts and boards of contract appeals to overlook the possibility of achieving the goals enunciated in *Clearfield* and *Allegheny* while drawing upon UCC doctrines that better reflect modern commercial dealings. Even with this illusory bar dispelled, however, difficulties remain in finding an appropriate method for establishing the Code as a source of federal law to be applied consistently to federal contracts.

The Reluctance To Draw upon State Law

Federal courts have been most disinclined to follow the teachings of the Uniform Commercial Code when they have perceived a direct conflict between the result mandated by a Code provision and that indicated by specific federal precedent. *Federal Electric Corp. v. United States*[10] presented, at least to the Court of Claims, such a conflict between the federal rule and the Code approach. Regarding itself bound by the Supreme Court's decision in *Willard, Sutherland & Co. v. United States,*[11] the court rejected the proffered UCC approach which it found to conflict with *Willard*:

> Though we might find persuasive the contemporary view of performance under protest as restated in section 1-207 of the Uniform Commercial Code and accepted by the court under the special circumstances of the *Northern Helex* case, we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court. We are reminded in this connection of the Court's recent expression of 'difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of [the Supreme] Court.' "[12]

10. 486 F.2d 1377 (Ct. Cl. 1973), *cert. denied*, 93 S. Ct. 136 (1974). After entering into a contract with the Government, the corporate contractor discovered that its calculations were mistaken and that it would suffer unanticipated losses if the Government carried out the option contract. Before the expiration of the contract period, the contractor notified the Government of its predicament and attempted to end its obligation to supply generators. The contractor stressed that if the Government required it to proceed, it would continue only under protest. The Government continued its orders and Federal Electric met them under protest. After the contract ended, the contractor filed actions with the Armed Services Board of Contract Appeals, challenging the validity of several delivery orders. The Board denied the appeals. Federal Elec. Corp., ASBCA Nos. 11726, 11918 & 12161, 68-1 B.C.A. ¶ 6834. The contractor thereafter obtained review in the Court of Claims.

11. 262 U.S. 489 (1923).

12. 486 F.2d at 1382, *citing* Northern Helex Co. v. United States, 455 F.2d 546 (Ct. Cl.

The Court of Claims therefore concluded that even if the contract had been unenforceable at execution, the contractor nevertheless was barred from contract price adjustment to the extent that it had performed the otherwise unenforceable contract;[13] that the performance was under protest was deemed irrelevant.[14]

The refusal to resort to the Uniform Commercial Code has extended even to instances when the United States expressed an intent to have the contract governed by Code provisions. *United States v. Sommerville*[15] concerned a government contract security provision which made specific reference to Code section 9-503 as a cumulative remedy.[16] Nevertheless, the court of appeals was reluc-

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1972), and *quoting* United States v. Mason, 412 U.S. 391, 396 (1973).

UNIFORM COMMERCIAL CODE § 1-207 provides in part: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved." The court rejected the contractor's argument that *Northern Helex* changed the *Willard* rule, distinguishing the 1972 case on the grounds of its special circumstances, "the processing and storing of helium, a valuable national resource, as a by-product of another chemical process." 486 F.2d at 1382.

13. *Id.* at 1381.

14. *See* note 10 *supra.*

Accepting the reasoning that the contract was enforceable *ab initio,* the concurring opinion both presents a sounder rationale for the decision and avoids "ignor[ing] what we call 'the contemporary view of performance under protest.'" 486 F.2d at 1384. The majority opinion failed to mention a letter, *see* ASBCA Nos. 11726, 11918 & 12161, 68-1 B.C.A. ¶ 6834, at 31,592, which the contractor wrote before it communicated its formal reservation of rights. The unmentioned letter clearly indicated that the contractor knew the contract was valid *ab initio. Id.* at 31,596-97. Moreover, by focusing upon whether the contract was enforceable *ab initio,* the concurring opinion avoided facing the conflict which the majority found between federal precedent and UCC section 1-207, a conflict that was illusory. Code section 1-207 provides no support for the contractor on the facts of *Federal Electric* since, as the contractor's cited case of *Northern Helex* indicates, 455 F.2d at 552-53, the provision does not "create a remedy because a remedy for the seller, when the buyer breaches, already exists under the law . . . ." *Id.* at 553, *citing* UNIFORM COMMERCIAL CODE §§ 2-703, 2-704. Since the Government was not a breaching party, Federal Electric had no remedy which section 1-207 could preserve and no conflict existed.

15. 324 F.2d 712 (3d Cir.), *cert. denied,* 376 U.S. 909 (1964). The United States brought an action for conversion, seeking to recover the value of livestock that an auctioneer sold. The Farmers Home Administration (FHA) had an interest in the animals through a security agreement. *See* note 90 *infra.*

16. PA. STAT. ANN. tit. 12A, § 9-503 (1970) provides:

> (1) Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably

tant to "subject federal rights and duties to . . . the exceptional uncertainty and heterogeneity" that it assumed could arise from resort to state law.[17] The court emphasized the necessity for uniformity in federal government transactions, but failed to consider whether the UCC would provide that uniformity.[18]

Failure to analyze the uniformity requirement of *Clearfield* also affected the decision of a federal district court in *United States v. Bank of America National Trust & Savings Association*.[19] Unlike the court in *Sommerville,* however, the court in *Bank of America* did not apply federal law merely because it was available; the court explained that the reason for reliance upon federal law was the federal government's interest in protecting public moneys.[20] Defending an action against it by the Government, the presenting bank argued that UCC section 3-405(1)(c)[21] should control the case by its analogous application, since federal courts should follow the general common law in fashioning federal law.[22] The district court, however, rejected resort to the Code, reasoning that even a uniform state law

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convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

(2) If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.

Subsection (2) was added to section 9-503 in Pennsylvania and two other states. *See* MD. ANN. CODE art. 95B, § 9-503 (1964); UTAH CODE ANN. § 70A-9-503 (1968).

17. 324 F.2d at 717. The court also emphasized the federal nature of the rights and obligations of the parties arising under the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1001-1005(d), 1006, 1006(d), 1007, 1008-1012, 1014-1025, 1027-1029 (1970).

The concurring opinion regarded the majority's reliance on *Clearfield* as misplaced, arguing that the rights protected in *Sommerville* had their origin in state law. The concurrence found an express congressional purpose to apply state law from the terms of the FHA-approved agreement since it was both a financing statement and a security agreement under the Pennsylvania law. 324 F.2d at 720-21.

18. The superiority of the UCC approach to the issue was not involved because both the Code and federal decisional law supported the Government. *See* note 16 *supra.*

19. 288 F. Supp. 343 (N.D. Cal. 1968), *aff'd,* 438 F.2d 1213 (9th Cir.), *cert. denied,* 404 U.S. 864 (1971). The United States sued the Bank of America to recover moneys that it had paid the bank. A number of government checks with forged endorsements of the payee's name were presented to the bank which innocently cashed them. The Government subsequently reimbursed the bank for the sums paid out. In its suit, the Government claimed that the bank breached the expressed and implied warranties of the prior endorsements and that repayment of the money was by mutual mistake.

20. *Id.* at 348.

21. UNIFORM COMMERCIAL CODE §3-405(1)(c) provides: "An indorsement by any person in the name of named payee is effective if . . . an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest."

22. 288 F. Supp. at 345.

was inapplicable because the federal government's interest in protecting its commercial paper outweighed the interest in state and federal uniformity which utilization of the UCC would accomplish. The court accepted the Government's argument that the business-risk rationale of the UCC[23] was "not in point; public moneys need protection more than the presenting bank's assets."[24]

Considering an appeal from the district court decision, the Court of Appeals for the Ninth Circuit likewise found the widespread enactment of the UCC insufficient to overcome the court's reading of federal precedent.[25] The court instead regarded itself bound by the Supreme Court's treatment of a similar situation in *National Metropolitan Bank v. United States*[26] in 1945. The court of appeals could not "find that the Supreme Court [had] itself, since 1945, written anything which might cause us to conclude with reasonable assurance that its *Metropolitan* decision is no longer viable. This being so, we think that *Metropolitan* must now control the disposition of this appeal."[27]

The focus upon the Government's interest in its commercial paper does not save the result reached by the district and circuit courts, however, because it conflicts with previous Supreme Court pronouncements about the federal government's position in relation to private commerce. In its *Clearfield* opinion, the Supreme Court

23. UNIFORM COMMERCIAL CODE § 3-405(1)(c), Comment 4, states the "business risk" rationale: "The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance . . . ."

24. 288 F. Supp. at 348, *quoting* Brief for Plaintiff at 7. In rejecting the "business risk" rationale, the court accepted the Government's argument that the Navy was not analogous to a private industry in its selection of "employees," nor could it prevent forgeries through character investigation systems, or protect against loss through fidelity insurance.

25. United States v. Bank of America Nat'l Trust & Savings Ass'n, 438 F.2d 1213 (9th Cir. 1971).

26. 323 U.S. 454 (1945). In circumstances closely analogous to *Bank of America, see* note 19 *supra*, a civilian clerk at the paymaster's office of the Marine Corps forged pay and travel mileage vouchers in the names of certain officers. The Government issued the appropriate checks payable to the officers and delivered them to the clerk for distribution. The clerk forged the payee's endorsements, then endorsed them in his own name either to cash or deposit the checks. The Government recovered the moneys paid to National Metropolitan Bank, the last of two banks that expressly guaranteed the prior endorsements. The Supreme Court specifically held that federal, rather than local, law controlled the rights and liabilities concerning commercial paper which the Government issued. *Id.* at 456.

27. 438 F.2d at 1214.

asserted: "The United States as drawee of commercial paper stands in no different light than any other drawee."[28] The Court was yet more emphatic regarding the ordinary treatment of the federal government in *United States v. National Exchange Bank*[29]: "The United States does business on business terms . . . . [It] is not excepted from the general rule by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."[30] Furthermore, *Metropolitan* did not merit the dispositive weight accorded it by the court of appeals since when it was decided, the prevailing law would have permitted any drawer, not just the Government, to recover from the presenting bank.[31] At the time of *Bank of America,* the United States should have stood "as any other drawer" under the then prevailing law, the Code,[32] with the result that recovery should have been denied. In following the result of *Metropolitan* when the prevailing law had changed, the *Bank of America* courts misapplied the uniformity requirement of *Clearfield.*

While acknowledging the general utility of the UCC in federal contract disputes,[33] the federal boards of contract appeals have been as reluctant as the courts to apply the Code in the face of contrary federal precedent. In its denial of a request for rehearing in *Meeks Transfer Co.,*[34] the Armed Services Board of Contract Appeals ap-

28. 318 U.S. at 369.

29. 270 U.S. 527 (1926).

30. *Id.* at 534-35.

31. 288 F. Supp. at 345. Under the prevailing law at the time of *Metropolitan,* the Government's failure to discover the fraud perpetrated by its employee did not absolve the bank from liability for the amounts involved in the fraud. The Court declared that allocation of liability to be "almost unanimously accepted by state and federal courts. No persuasive reasons have been suggested to us why it should not be accepted as the general federal rule." 323 U.S. at 457. The Court's rationale should lead to the adoption of the UCC as the controlling federal law today since the states have accepted it almost unanimously.

32. *See* 13 B.C. IND & COM. L. REV. 586 (1972). "Notwithstanding the Supreme Court's inaction [denial of certiorari, 404 U.S. 864 (1971)], it is submitted that the federal appellate court in *Bank of America* should have interpreted *Metropolitan* as allowing a result based on prevailing principles of general commercial law." *Id.* at 601. *Cf.* Gorrell & Weed, *Erie Railroad: Ten Years After,* 9 OHIO L.J. 276, 296 (1948).

33. *See* note 1 *supra.*

34. ASBCA No. 11819, 68-1 B.C.A. ¶ 7063. Meeks Transfer operated an independent warehouse in which it held certain property as bailee, pursuant to a contract with the United States. A fire destroyed the warehouse and all of its contents. In the subsequent legal dispute, the bailee established its due care and proved the external origin of the fire, thereby overcoming an inference of negligence on its part. The Armed Services Board found that the ultimate burden of proof of negligence rested upon the Government as bailor. Since the bailee had

parently was the first board to address a conflict between the UCC and federal common law of contracts. In its request for reconsideration, the Government argued that the UCC should control the issue of evidentiary burdens of proof and persuasion, reasoning that the Code, having been enacted by a majority of the states, constituted the prevailing federal law of bailment.[35] The first decision of the armed services board[36] had relied upon two federal cases[37] for the rule that the ultimate burden of proof rested on the bailor; the Government apparently believed that the UCC would redistribute that burden.[38] Rejecting the request for reconsideration, the Board

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overcome the adverse inference and the Government had failed to establish negligence, the Board resolved the negligence issue in favor of the bailee. Meeks Transfer Co., ASBCA No. 11819, 67-2 B.C.A. ¶ 6567. The Government asked for reconsideration and urged the Board to apply the UCC, but the Board refused. Meeks Transfer Co., ASBCA No. 11819, 68-1 B.C.A. ¶ 7063.

35. Meeks Transfer Co., ASBCA No. 11819, 67-2 B.C.A. ¶ 6567, at 32,644.

36. Meeks Transfer Co., ASBCA No. 11819, 67-2 B.C.A. ¶ 6567. *See* note 34 *supra.*

37. Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 110-11 (1941); Orrwell v. Wilmington Iron Works, Inc., 185 F.2d 181, 183-84 (4th Cir. 1950).

38. The UCC permits the various states to provide different burdens of proof for carriers and warehousemen. Section 7-403(1)(b) intentionally leaves unresolved the rule regarding the burden of proof of negligence:

> (1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following: . . . (b) damage to or delay, loss or destruction of the goods for which the bailee is not liable [, the burden of establishing negligence in such cases is on the person entitled under the document] . . . .

UNIFORM COMMERCIAL CODE § 7-403(1)(b) (bracketed language indicates that states may differ). The official comment indicates that federal legislation and state regulatory laws often have codified the responsibilities for particular classes of bailees. The comment further provides that in the absence of a specific statutory provision, "the common law will prevail subject to the minimum standard of reasonable care prescribed by Sections 7-204 and 7-309 . . . ." UNIFORM COMMERCIAL CODE § 7-403, Comment 3. The two sections referenced specifically separate warehousemen from carriers. Section 7-204(1) leaves the ultimate burden of proof upon the bailor and explains the reasoning in *Meeks*. Section 7-204(1) states in pertinent part that a warehouseman "is not liable for damages which could not have been avoided by the exercise of such care" as a "reasonably careful man would exercise . . . ." UNIFORM COMMERCIAL CODE § 7-204(1). One commentator has clarified the duty imposed upon a warehouseman by the Code, stating: "A warehouseman not only has the duty to exercise due care but likewise he has the burden of explaining any loss or disappearance of the property bailed with him, although the warehouseman is not liable if he can show that in spite of the exercise of due care he was not able to deliver the goods to the holder of the receipt." 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 7-204:4, at 528-29 (2d ed. 1971).

There is a need to distinguish two different burdens: the burden of going forward with evidence and the ultimate burden of pursuasion. The Supreme Court demonstrated the different burdens in Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941), where the Court regarded a party as a "bailee for hire," like a warehouseman,

stated: "While we have not considered the Uniform Commercial Code as enunciative of Federal common law, we have in the past looked to this Code for guidance when there was no other Federal precedent available. Adequate legal precedent here being available, we do not come to a consideration of the provisions of the Uniform Commercial Code."[39] The decision supports the proposition that the UCC, while it may be a source of federal law,[40] is not federal law itself.

Machlett Laboratories, Inc.,[41] is another of the few cases similar to *Meeks* in which a direct conflict between the Code and federal precedent has been perceived.[42] In *Machlett,* the contractor was denied an equitable adjustment in a government requirements contract, although the Government's estimates of its needs proved greater than actual orders since, subsequent to execution of the contract, the procuring activity discovered it had an excess amount of the contract items in stock. Because the Government had acted in good faith the Armed Services Board of Contract Appeals held

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rather than a "common carrier." *Id.* at 108. The opinion placed the ultimate burden of proof upon the bailor. The bailee had the burden of going forward to overcome the presumption of negligence, after the bailor made a prima facie case by establishing that the bailee failed to return the bailed property. *Id.* at 111.

39. ASBCA No. 11819, 68-1 B.C.A. ¶ 7063, at 32,644. A federal board should follow the Code when, as in *Meeks,* its language is an attempted codification of the federal rule. *See* note 38 *supra.* The conflict among federal courts regarding the issue of burden allocation further supports the application of the UCC. *Compare* Super Service Motor Freight Co. v. United States, 350 F.2d 541 (6th Cir. 1965); United States v. Cloverleaf Cold Storage Co., 286 F. Supp. 680 (N.D. Iowa 1968), *with* Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941); Gulf Wave Towing Co. v. Mitchell, 176 F. Supp. 636 (E.D. La. 1959). The conflict among the courts results in great part from differing interpretations of Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964). A similar conflict also exists among the boards of contract appeals. *Compare* Sloan's Moving & Storage Co., ASBCA No. 10187, 65-1 B.C.A. ¶ 4685; H. & R. Transfer & Storage Co., ASBCA No. 8079, 1964 B.C.A. ¶ 4315, *with* Brandon Transfer & Storage Co., ASBCA No. 12734, 69-1 B.C.A. ¶ 7643. Application of the Code in *Meeks* would have created the same result, hastened the uniformity sought by the drafters of the Code, and followed the policy of using the UCC "as a source of federal law."

40. *See* note 1 *supra.*

41. ASBCA No. 16194, 73-1 B.C.A. ¶ 9929.

42. Most boards apparently have not encountered cases which they perceived to present a conflict between the UCC and federal precedent. Noting that it found no conflict in the resolution of the issues presented in Federal Pac. Elec. Co., IBCA No. 334, 1964 B.C.A. ¶ 4494, the Interior Board of Contract Appeals asserted: "[R]ules of law that have received wide recognition among the states have frequently been adopted as persuasive guides to what the federal law should be . . . . The sales provisions of the Uniform Commercial Code . . . [have] been viewed as an appropriate source of such rules." *Id.* at 21,585.

that federal precedent prevented imposing liability on the Government.[43] Unlike Code section 2-306(1),[44] the federal rule would not permit recovery by the contractor, even though the quantities ordered were "unreasonably disproportionate"[45] to the estimates. Despite the holding of the nearly one-century-old precedent, *Brawley v. United States*,[46] the Government's interest in uniformity would not seem overly threatened by the "unreasonably disproportionate" test of section 2-306.[47]

State Law as a Source of Federal Law

The Supreme Court has emphasized that the rationale for the *Clearfield* decision primarily concerned the Government's need to have its commercial dealings subject to uniform law. In *Bank of America National Trust & Savings Association v. Parnell*[48] the Court characterized the basis for the *Clearfield* doctrine as "stated with unclouded explicitness: 'The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty.' "[49] Clearly, the crucial emphasis in the *Clearfield* decision was the need to save the federal government from encountering conflicting state laws. With the wide enact-

43. ASBCA No. 16194, 73-1 B.C.A. ¶ 9929, at 46,562-63.

44. UNIFORM COMMERCIAL CODE § 2-306(1) provides: "A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate . . . may be tendered or demanded."

45. *See* note 44 *supra*.

46. 96 U.S. 168 (1878).

47. Perusal of the contract at issue in *Machlett* provides a further basis for questioning the decision. Rather than preferring federal precedent over the UCC to reach its decision, the board could have reached the same result by relying upon the intent of the parties as expressed in the following clause which was included in the contract: "The quantities of supplies or services specified herein are estimates only, and are not purchased hereby. Except as may be otherwise provided herein, in the event the Government's requirements for supplies or services set forth in the Schedule do not result in orders in the amounts or quantities described as 'estimated' or 'maximum' in the Schedule, such event will not constitute the basis for an equitable price adjustment under this contract." ASBCA No. 16194, 73-1 B.C.A. ¶ 9929, at 46,557 (emphasis omitted). Had the case been decided pursuant to the Code, section 1-102(3) would have permitted the parties to use the language of the quoted clause to "contract out" of section 2-306(1).

48. 352 U.S. 29 (1956).

49. *Id.* at 33, *quoting* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

ment of the UCC, the possibility of conflict in substantive law practically is eliminated on those issues which the Code addresses. Even the presence of optional Code provisions[50] poses no threat to federal uniformity, since federal law utilizing the UCC generally could follow the most widely enacted option. Different state court interpretations of the Code could be a source of conflict,[51] but variant state interpretations of the Code need not create an obstacle to realizing a uniform approach. The federal courts need not defer to any one state's interpretation of the UCC; they instead can interpret the Code themselves as a "source of Federal law."[52] The bank argued for such an approach in *Bank of America*:[53] it asked not that the federal court adopt the UCC, but instead that it utilize the Code's established uniformity in fashioning federal law.

The Supreme Court itself has recognized that the use of federal common law is not always required even where adequate federal legal precedent is available. For example, although *United States v. Yazell*[54] concerned a government contract, the Court refused to apply federal law, reasoning that the federal interest did not override the desirability of leaving to state law the resolution of questions concerning the chattel mortgage at issue.[55] The crucial factor in determining the application of state law in cases in which federal court jurisdiction is not premised upon diversity of citizenship is the assessment of the importance of the federal interest.[56] *Yazell* demonstrates that the federal interest is not always so compelling that courts must apply federal law in every case in which the United States is a party and the dispute concerns a government contract. Furthermore, the mere presence of an important federal interest should not foreclose the use of state law, particularly where the state statute comports with the federal interest in uniformity and promotes a national system of commercial law.

The Court of Appeals for the Second Circuit, in *United States v. Wegematic Corp.*,[57] presented an alternative to the view that federal

50. *See, e.g.*, UNIFORM COMMERCIAL CODE § 7-403(1)(b) (1972 version).

51. *See* note 38 *supra*.

52. *Cf.* SPEIDEL, SUMMERS & WHITE, COMMERCIAL TRANSACTIONS 32 (1969).

53. 288 F. Supp. at 347. *See* notes 19-32 *supra* & accompanying text.

54. 383 U.S. 341 (1966).

55. *Id.* at 352-53.

56. *See* C. WRIGHT, FEDERAL COURTS § 60 (2d ed. 1970); 7 B.C. IND. & COM. L. REV. 1021, 1024-25 (1966).

57. 360 F.2d 674 (2d Cir. 1966).

business dealings must be governed only by federal common law. Acknowledging the value of utilizing state uniform law in the federal courts, the court stated: "When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States."[58] Because the court did not find a conflict between the UCC and federal precedent,[59] the court was unconcerned with the problem the board perceived in *Meeks*.[60] Although not directly addressing the issue of potential conflict, the court nevertheless expressed strong support for the acceptance of the Code in business transactions, including those involving the federal government.[61]

Similar reasoning led the Court of Appeals for the Fifth Circuit to require the United States to stand like any other creditor in *United States v. Hext*.[62] Carefully distinguishing between the requirement that courts apply federal law and the freedom to utilize applicable uniform state law to shape federal law, the court refused to apply federal precedent mechanically. Finding neither "reason nor necessity for fashioning a specialized, esoteric body of federal law,"[63] the court applied instead the "general principles of commercial law,"[64] stressing that the old federal common law was not as representative of those principles as is "the principle fount of general commercial law governing secured transactions, . . . Article 9 of the Uniform Commercial Code."[65] *Hext* demonstrates that the courts can utilize the Code to satisfy the federal need for government contract uniformity enunciated in *Clearfield* and *Allegheny*; at the same time they can draw upon the Code's modern rules of commercial law to shape litigation.

Advantages of Drawing upon the UCC

When no commercially significant differences exist between gov-

58. *Id.* at 676.
59. *Compare* Austin Co. v. United States, 314 F.2d 518, 521 (Ct. Cl.), *cert. denied*, 375 U.S. 830 (1963), *with* UNIFORM COMMERCIAL CODE § 2-615.
60. *See* notes 34-39 *supra* & accompanying text.
61. 360 F.2d at 676.
62. 444 F.2d 804 (5th Cir. 1971).
63. *Id.* at 809.
64. *Id.*
65. *Id.* at 809-10.

ernment and private contracts, use of a separate system of law for each creates unjustifiable barriers in the smooth conduct of commercial affairs. Moreover, the Uniform Commercial Code, as an attempt to assimilate the most workable concepts of commercial law, exhibits several advantages over the patchwork of federal decisional law derived from the happenstance of adversary litigation.

Application of the Code to government contracts can remove the inconvenience and increased costs which the dual system of laws imposes on contractors. Because of the wide adoption of the UCC, contractors generally write their contracts and conduct the bulk of their business with reference to it;[66] when entering into government contracts, however, they must deal with different, sometimes conflicting, law. The burden to the legal system and to the contractors of continuing dual systems of law, entailing the use of government contracting specialists to litigate what should be ordinary business disputes, is particularly unjustified in view of Judge Friendly's observation in *Wegematic* that such contracts constitute only a small portion of the nation's business.[67]

The increasing complexity of federal government contract law[68] has produced a situation in which only the largest contractors truly appreciate the multitudinous aspects of their commitment; less sophisticated contractors often discover to their detriment that government contracting is not the process they had imagined.[69] Needless contract disputes result from a failure to appreciate the differences between public and private contract law. Contractors might not have undertaken their obligations had they known, for example, that courts would incorporate Armed Services Procurement Regulations (ASPR) clauses into form contracts.[70] The escalating volume[71]

66. *See* note 58 *supra* & accompanying text.

67. 360 F.2d at 676.

68. For comments on the complexity of government contracting, see Speidel, *What Should the Law Schools Do About Federal Government Contracts?*, 18 J. LEGAL ED. 371 (1966).

69. For the results of a survey to determine whether small businessmen receive their "fair" share of government contracts, see Schrieber, *Small Business and Government Procurement*, 29 LAW & CONTEMP. PROB. 390 (1964). The small businessman's frustration at dealing with the government contracting process is illustrated by one of the "typical" responses received in the survey: " '[T]he unfair part is all the paper work that is involved in a Government contract' . . . ." *Id.* at 396.

70. G.L. Christian & Associates v. United States, 312 F.2d 418, 424 (Ct. Cl.), *rehearing denied*, 320 F.2d 345 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

71. "Over the past 20 years, Government procurement has increased sixfold." SUMMARY OF THE REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 1 (1972).

and growing complexity of government contracting will make the problems of dual legal standards increasingly difficult for contractors. General application of the UCC, on the other hand, would reduce the peculiarities of government contracting by utilizing the rules with which contractors are familiar to settle contract disputes.[72]

Other incidental benefits could accrue from consistent resort to the Code's resolution of contract difficulties. Application of the Code in commercial paper cases similar to *Bank of America*[73] could have the salutary effect of encouraging the exercise of greater care by government employees who oversee the Government's payrolls because the Government no longer could expect preferential treatment from its courts; rather, they would hold it to the same standard of care when issuing checks as any other drawer. Moreover, the difficulty of determining when a federal financial interest overrides state interests offers another reason for federal use of the Code. Courts can invoke a general rule of applying the Code more easily than they can delineate guides to the situations in which the federal interest in protecting public moneys is paramount.[74]

Perhaps the most fundamental advantage the UCC can contribute to federal government contract law is the greater certainty and comprehensiveness of a code system of law. Learned Hand, for example, noted that the states' uniform negotiable instruments law was "a source of 'federal law' . . . more certain" than the general federal case law.[75] Furthermore, federal courts and contract appeals

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72. Commercial rules may, however, have no place in situations of unique governmental interest, such as termination for convenience, *see* Armed Services Procurement Regulation § 7-602.5. *See also* Mitchell & Tracy, *Terminations of Government Contracts: Recent Developments,* 14 WM. & MARY L. REV. 817 (1973).

73. *See* notes 19-32 *supra* & accompanying text.

74. *Cf.* Peterfreund, *Federal Jurisdiction and Practice,* 33 N.Y.U.L. REV. 483, 487 (1958): "A 'twilight zone' between matters of federal and local interest now exists, with few guideposts along the way. . . . But only future litigation will determine what constitutes a 'federal interest, to be governed by federal law' and what is 'essentially a private transaction' to be governed by local law."

75. New York, N.H. & H.R.R. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950). Judge Hand elaborated upon the value of the uniform state statutes as follows:

> The purpose of the doctrine that the transactions of such [federal] corporations are not subject to state law, is that such agencies, being national in their scope and aim, shall not be forced to shape their transactions to conform to the varying laws of the places where they occur, or are to be carried out. Uniformity is thought to be essential to the convenient and speedy dispatch of their operations. However, the Negotiable Instruments Law has been enacted in every state

boards, being more tightly constrained by the teachings of one tribunal, the Supreme Court, have a greater potential than the courts of the 50 states for enhancing the uniformity and certainty promised by the Uniform Commercial Code. By consulting the official text of the National Conference of Commissioners on Uniform State Laws,[76] rather than the more localized versions enacted by particular states, federal courts and boards can encourage dissemination of the draftsmen's interpretations of Code provisions to further augment the uniformity of the Code's application. Since the commission seeks to have the Code reflect developing commercial practice,[77] federal tribunals should apply the most frequently enacted option when a particular Code provision contains alternatives.[78]

Judge Hand recognized that uniform state laws demonstrate greater completeness as well as more certainty than federal common law;[79] the very completeness of the Code may present an obstacle, however, because federal courts may be disinclined to apply a uniform act the comprehensiveness of which could discourage adaptation to the exigencies of federal contracting.[80] That judicial fear of Code inflexibility would be ill-founded, however, because the courts would be applying the UCC where a government contract was in the ordinary commercial setting. When the federal government is acting like a businessman, no reason exists for courts to treat it other than as a businessman.[81] Federal precedent, rather than commercial

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> of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed—more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson.

Id.

76. The Official Text is that published jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

77. The publication of a revised Article 9, for example, was a response by the Permanent Editorial Board for the Uniform Commercial Code to a large number of non-uniform amendments that had been made to the Code by various states. The revision was intended to restore uniformity as well as to incorporate the doctrinal changes suggested by scholarly commentary on the Code. *See* Wechsler, *Foreword* to UNIFORM COMMERCIAL CODE at xxxi (1972 Official Text).

78. *See* note 50 *supra* & accompanying text.

79. New York, N.H. & H.R.R. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950). *See* note 75 *supra*.

80. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 292: "A 'code' is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts."

81. *See* notes 28-30 *supra* & accompanying text.

practice, still would control a case when a court acknowledges that the Code satisfies the federal uniformity requirement, but holds that another federal interest is present which dictates a different result. The only exception to the basic rule that courts treat the federal government like any other businessman would be in cases of genuinely overriding national interest rather than mere financial interest: for example, the attainment of statutorily mandated social goals[82] or the provision of an adequate national defense. While production of military weapons systems poses an instance of potentially overriding federal interest, the parties can specify during contracting[83] that noncommercial law shall govern weapon contracts requiring special treatment. Commercial law, on the other hand, would govern ordinary items of military procurement common to the private business sector.

Methods for Removing the Clearfield *Bar*

While various legal and commercial reasons support applying the Uniform Commercial Code to federal government contracts, the means for achieving that objective are limited. Although there has been some scholarly support for the most direct route, enactment of the Code as federal law by Congress,[84] the absence of any great pressure in favor of such legislation would seem to preclude that possibility as a practical alternative. Because both the boards of contract appeals and the lower federal courts have been willing to draw upon the Code when federal precedent does not indicate a contrary result,[85] congressional enactment of the Code would seem to alter the outcome of only a small number of cases; Congress thus may be unlikely to legislate such a sweeping body of law as the Code in an area of such little present conflict.

Resort to the federal courts presently offers little prospect of achieving consistent application of the UCC. To achieve the desired result, the optimum judicial avenue would be a broad declaration

82. *See, e.g.*, Vestal, *Government Contracts: The Effect of the Philadelphia Plan on the Contractor and the Union*, 15 A.F. JAG. L. REV. 110 (1973).

83. *See* UNIFORM COMMERCIAL CODE § 1-102(3).

84. Commentators have advocated federal enactment of the Code. *See* Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 100 (1951); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 419-21 (1964).

85. *See* 20 SW. L.J. 688 (1966); *see also* note 1 *supra*.

by the Supreme Court that the uniform act applies to federal contracts. Because this route smacks of judicial legislation, a more likely alternative might be a definitive statement from the Supreme Court that the *Clearfield* and *Allegheny* decisions do not preclude looking to state law when uniform state law is available. Still more likely, but less conclusive, would be the examination of individual cases[86] to determine whether the Code should prevail over a specifically controverted federal precedent. A commercial paper case would be particularly susceptible to judicial reevaluation because the federal common law conflict with the Code already has generated criticism.[87] A lower federal court could reason that the historically legitimate need to formulate a policy strongly protective of the federal government no longer existed and that a nonfederal system of rules, reflecting uniformity and encouraging sounder business practices by the Government, is available as grounds for decision. Because cases presenting a direct conflict between federal precedent and the Code are rare, however, reliance upon a case-by-case approach to incorporate particular Code teachings into the federal law promises only slow and sporadic results.

In contrast to the limitations of attempting to achieve Code application to government contracts through legislative and judicial action, the procurement agencies themselves have the means to reach that objective by incorporating UCC provisions into standard contract forms. In *Dressler v. Wilson*,[88] a lower federal court held that heads of government departments have implied authority to prescribe reasonable terms and conditions in their contracts.[89] That implied authority, the *Sommerville* opinion notwithstanding,[90]

86. *See* S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946), in which the Supreme Court declared: "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court." *Id.* at 564.

87. *See* note 32 *supra*.

88. 155 F. Supp. 373 (D.D.C. 1957).

89. *Id.* at 375.

90. *See* notes 15-18 *supra*. The *Sommerville* opinion may not be the bar to invoking the Code that its assertive language regarding the primacy of federal law might indicate. First, the controverted Farmers Home Administration (FHA) security agreement attempted to make a specific state statute determinative, 324 F.2d at 714, rather than drawing generally upon the Code as a source of federal law in the manner advocated by this Comment. Moreover, the litigation before the *Sommerville* court was not between the two parties to the security agreement, but between the FHA as lender and a third party auctioneer who sold the borrower's goods at the direction of the borrower without knowing of the security agreement covering the goods. *Id.* Rather than preventing the Government from entering into an enforceable contract invoking the UCC, the *Sommerville* opinion thus may be interpreted

should be sufficiently broad to include the power to declare the Code, or any other uniform state act, to be the applicable federal law for a contract. While numerous statutes require the inclusion of certain provisions in government contracts,[91] no statutory bar prohibits procuring authorities from voluntary incorporation of the UCC.[92] Although procuring agencies may have hesitated to include the Code because they believe that *Clearfield* and *Allegheny* bar resort to any state law to determine rights in a federal contract,[93] closer attention to the rationale of those cases demonstrates that the bar is illusory; the uniformity attainable by use of the UCC would further, rather than frustrate, the policy of those cases.

Inclusion of Code provisions in government contracts or incorporation of the Code by reference as applicable law offers several advantages to the Government. Litigation in the procurement process could be lessened by avoiding the uncertainties inherent in causing supplier to function under a dual system of law. Although no evidence has been found to prove that private contractors are dissuaded from competing for government contracts by the prospect of being bound by an unfamiliar set of federal precedents, it seems

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only as a refusal to estop the Government from the pursuit of federal law remedies against a third party who had no knowledge of, therefore no reliance upon, the agreement between the Government and the borrower to use state law.

91. For discussion of the incorporation of statutes into the Armed Services Procurement Regulations, see J. PAUL, UNITED STATES GOVERNMENT CONTRACTS & SUBCONTRACTS, 18-40 (1964). *See also* note 82 *supra*.

92. Department of Defense Instruction 5126.3, December 20, 1961, 1 GOV'T CONT. REP. ¶ 825.50 (A), provides that the Armed Services Procurement Regulation (ASPR) Committee's approval of matters other than those of major policy, "shall be considered as having the final approval of the Military Departments and of the Defense Supply Agency without further review by them, and upon approval by the Assistant Secretary of Defense (Installations and Logistics), or his authorized representative, regulations or directives developed by the Committee will be published without further consideration."

The Federal Procurement Regulation (FPR) Committee civilian counterpart is the Interagency Procurement Policy Committee. *See* 41 C.F.R. § 1-1.010 (1974): "For the purpose of advising and assisting the General Services Administration in its Government-wide program for the development of uniform procurement policies and procedures, an Interagency Procurement Policy Committee, chaired by GSA, has been established." The expressed aims of the ASPR and the FPR to achieve uniformity, however, focus upon administrative uniformity within the procurement agencies and not the uniformity of applicable law.

93. In a letter stating the Treasury Department's position concerning a conflict between a UCC provision and federal common law, a representative of the office of the General Counsel stated: "[T]his Department has no basis on which to adopt the Uniform Commercial Code change with regard to an employer's liability in a padded payroll situation when the Federal Courts have not applied the change." Letter from Mr. Wolf Haber, Assistant General Counsel, Department of the Treasury to Mr. Donald D. Harmata, Sept. 25, 1974.

reasonable to believe that the peculiarities of government contracting tend to narrow the field of bidders to those who are willing to develop not just the skills of an efficient manufacturer of goods, but also the legal expertise required for dealing with the procurement agencies on their own uncommon terms.[94] Another potential advantage of applying the Code is the possible refinement of government payroll and inventory procedures once the defenses afforded by the specific holdings of *Clearfield*[95] and *Machlett*[96] are removed. Incorporation of the Code as applicable law entails no necessary loss of flexibility, since it is entirely consistent with the philosophy of the Code for parties to contract out of specific provisions when such is their intent;[97] agencies could benefit, however, from the predictability of using the Code as a standard reference to resolve questions not provided for specifically by contract. The virtue of predictability is enhanced under the Code by the determined effort of its draftsmen to reflect the most commercially reasonable solution to contractual disputes. Although procurement agencies might lose the advantage of some particularly favorable precedents, the fact that the Government itself occasionally has attempted to rely upon the Code[98] should demonstrate that what is commercially reasonable is not necessarily adverse to the interest of a procurement agency.

Conclusion

With the almost unanimous adoption of the Uniform Commercial Code, there now exists a comprehensive body of commercial law that could satisfy the uniformity requirements enunciated in *Clearfield* and *Allegheny* in a manner more predictable and more reflective of modern business practice than that afforded by the existing federal common law of contracts. A broadly worded Supreme Court endorsement of the Code as a source of federal law for federal government contracts would remove the obstacles to UCC application that now are perceived to exist as a result of the supremacy clause, the doctrine of stare decisis, and especially the *Clearfield*

94. Procurement policy favors broadening the range of potential competitors for government contracts, especially to include small businessmen. *See* Schrieber, *supra* note 69.

95. *See* note 6 *supra*.

96. *See* notes 41-47 *supra* & accompanying text.

97. *See* UNIFORM COMMERCIAL CODE § 1-102(3).

98. *See* notes 16, 38 *supra* & accompanying text.

doctrine. Absent such a declaration by the Court, consistent application of the Code to federal contracts most likely could be achieved by the slow case-by-case overruling of federal precedent by the Supreme Court or, more quickly, by referencing the Code as applicable law in the contracts written by procurement agencies. Some identifiable transactions do justify according the government special treatment in the public interest. When a procurement agency is engaged in commerce as a businessman, however, there is no need to govern its dealings by a distinct system of law; it then should do "business on business terms."[99]

99. United States v. National Exchange Bank, 270 U.S. 527, 534 (1926).