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# The Uniform Commercial Code Survey: Introduction

By Robyn L. Meadows, Russell A. Hakes, and Stephen L. Sepinuck\*

In the following pages are surveys discussing recent case law developments, as well as legislative and regulatory developments, under the Uniform Commercial Code (U.C.C. or the “Code”), followed by a survey of recent actions of international bodies in the area of international commercial law.<sup>1</sup> While the promulgating organizations have been finalizing the current round of revisions to various articles of the U.C.C., the courts have continued to construe both earlier versions and newly enacted versions of the Code. The U.C.C. survey articles primarily focus on these noteworthy judicial decisions from the past year involving the various Articles of the U.C.C.

The *Survey of International Commercial Law Developments During 2003*<sup>2</sup> reviews the developing law in an important area for all commercial lawyers. International commerce continues to grow each year,<sup>3</sup> and formerly “domestic” commercial lawyers now find themselves routinely faced with international issues.<sup>4</sup> The international survey exposes the attorney who does not specialize in international

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1. For the purposes of the survey articles, unless otherwise noted, references to the U.C.C. Articles are to the 2001 official text, except for Article 1 for which the 2000 official text is used. This convention is adopted to insure reference to the version of each Article currently in force in the overwhelming majority of states at the time of publication. References to subsequently revised versions of any Article of the U.C.C. are noted.

2. Sandra M. Rocks and Kate A. Sawyer, *Survey of International Commercial Law Developments During 2003*, 59 Bus. Law. 1663 (2004).

3. According to the Foreign Trade Statistics issued by the United States Census Bureau, the United States imported \$118.9 billion and exported \$65.8 billion worth of goods in April 2004. United States Census Bureau, *U.S. International Trade in Goods and Services Highlights*, available at <http://www.census.gov/indicator/www/ustrade.html> (last visited July 28, 2004). See also Ronald F. Lipp, *The Crisis in International Trade: Remarks at the 20th Annual McGeorge International Law Symposium*, 15 TRANSNAT'L Law. 31, 32 (2002) (noting that the percentage of the U.S. Gross Domestic Product accounted for by international commerce more than doubled from 1980 to 2001, rising from thirteen percent to twenty-nine percent).

4. See Henry D. Gabriel, *The Inapplicability of United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 2000 (1998) (noting that commercial lawyers can no longer afford to limit their practice to domestic commercial law given the growing global economy).

law to the continuing law to the continuing efforts of international bodies to modernize and harmonize legal issues in the international commercial arena.<sup>5</sup>

E-commerce law continues to grow in importance as reflected in the revisions to various articles to the U.C.C. that have abandoned the terms tied to the written word in favor of those that recognize the continued expansion of electronic contracting.<sup>6</sup> As this area continues to expand, courts will be faced more often with interpreting contracts under the U.C.C. in this new electronic age.<sup>7</sup>

Last year brought a development in payments law that will have far-reaching implications. The United States Congress enacted the Check Clearing for the 21st Century Act which becomes effective on October 28, 2004.<sup>8</sup> The Board of Governors of the Federal Reserve System has already published proposed regulations pursuant to authority granted by Congress.<sup>9</sup> The Act enables banks to make wider use of electronic check processing without dramatically restructuring current check collection practices. It accomplishes this by permitting any bank to convert a check into an electronic image and forward that image for collection. A subsequent bank in the collection chain can reconvert the electronic information into a "substitute check," a paper reproduction consisting of an image of the front and back of the original check. This development should speed up the collection of checks and reduce the physical sorting of checks and some transportation costs.

States have recently begun adopting revised Article 1, promulgated by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001. Interestingly, one of the most controversial topics during the drafting process, the "choice of laws" provision, granting

5. Rocks and Sawyer, *supra* note 2, at 1663-74.

6. For example, revised Article 9, the governing law since July 2001 in most states, substituted the requirement of a security agreement in a "record" for one in "writing" in section 9-203, recognizes electronic chattel paper in section 9-102(a)(31), and paves the way for electronic filing of financing statements in part 5. See U.C.C. §§ 9-102, 9-501 to 9-527 (2001). Revised Article 1 also includes a definition of record. U.C.C. § 1-201(b)(31) (2001) (defining record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"). Most notably, revised Article 1 specifically provides that it is intended to supersede the federal Electronic Signatures in Global and National Commerce Act as permitted by the Act. See U.C.C. § 1-108 (2001) and its Official Comments. Article 7, the last of the U.C.C. Articles to be revised, was amended to facilitate the increased use of electronic documents of title. Prefatory Note, U.C.C. Art. 7 (2003). The importance of electronic commerce is also apparent on the global level. See Rocks and Sawyer, *supra* note 2, at 1665-66 (discussing the actions of the UNICTRAL Working Group on Electronic Commerce).

7. See, e.g., *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295, 49 U.C.C. Rep. Serv. 2d (West) 413, 418 (7th Cir. 2002) (finding e-mail communication was sufficient to meet statute of frauds requirement for contract modification and parties' term prohibiting oral modifications of contract). See also Robyn L. Meadows et al., *Sales*, 59 Bus. Law. 1557, 1560-62 (2004) (discussing *Cloud* case and the various acts addressing e-signatures).

8. Pub. L. No. 108-100, 117 Stat. 1177 (codified at 12 U.S.C. §§ 5001-5018). The Check Clearing for the 21st Century Act is discussed in the Payments Survey. Stephen C. Veltri et al., *Payments*, 59 Bus. Law. 1591, 1591-94 (2004).

9. Regulation CC, 69 Fed. Reg. 1470 (proposed January 8, 2004) (to be codified at 12 C.F.R. pt. 229).

commercial parties freedom to select any state's governing law,<sup>10</sup> was not adopted by any of the first six states to enact revised Article 1.<sup>11</sup> A topic of perhaps more importance to many contract litigants given the relatively uniform nature of the substantive governing law due to the widespread enactment of the U.C.C., the effectiveness of a "choice of forum" clause, was not included in revised Article 1, probably wisely given the strong rejection of revised Article 1's "choice of laws" provision.<sup>12</sup>

Another significant change that has met resistance in some states is the proposed change in revised Article 1 to the definition of "good faith." The new standard would require both objective and subjective good faith for all parties except for transactions under Article 5 (Letters of Credit).<sup>13</sup> More than half of the first states to enact revised Article 1 have rejected this standard, retaining instead the subjective standard of honesty found in current Article 1.<sup>14</sup> In these states, this lower standard does not affect transactions under Code articles that have directly incorporated the higher standard of good faith in their provisions.<sup>15</sup> Other more

10. Revised Article 1 provides, in section 1-301, that an agreement by the contracting parties with respect to which state's law governs is effective "whether or not the transaction bears a relation to the State designated[.]" U.C.C. § 1-301(c)(1) (2001). This provision does not apply to any transaction involving a consumer. U.C.C. § 1-301(e)(1) (2001). Compare this provision with the original "choice of laws" provision in Article 1, which only permitted parties to choose the law of a jurisdiction that bore a reasonable relationship to the transaction. U.C.C. § 1-105 (2000). For a thorough discussion of this provision and potential difficulties arising from its enactment, see William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697 (2001).

11. The following states rejected the proposed change to the "choice of laws" provision, retaining the requirement of a reasonable relationship between the designated state and the transaction: Alabama (2004 Ala. Acts 2004-524); Minnesota (2004 Minn. Sess. Law Serv. Ch. 162 (West)); Virginia (VA. CODE ANN. § 8.1A-301 (Michie Supp. 2003)); Texas (TEX. BUS. & COM. CODE ANN. § 1.301 (Vernon Supp. 2004)); Idaho (2004 Idaho Sess. Laws Ch. 43); Hawaii (2004 Haw. Sess. Laws 162); Delaware (S. 326, 2003 Leg., 142d Sess. (Del. 2004)). The only U.S. jurisdiction to adopt the revised "choice of law" rule as of summer 2004 is the U.S. Virgin Islands. 11A VI. CODE ANN § 1-301 (2002).

12. See Prefatory Note, U.C.C. Art. 1 (2001) (explaining the drafter's decision that a rule governing "choice of forum" clauses was not appropriate for inclusion in the U.C.C.).

13. In the uniform version of revised Article 1, the standard for good faith is "except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(b)(20) (2001). This definition was first used for merchants only in Article 2. See U.C.C. § 2-103(1)(b) (2001). It was later included in revisions to Articles 3 and 9. See U.C.C. § 3-103(a)(4) (2001); U.C.C. § 9-102(a)(43) (2001). Compare with the provision on good faith in the previous version of Article 1. U.C.C. § 1-201(19) (2000) (defining good faith as "honesty in fact").

14. See Alabama (2004 Ala. Acts 2004-524); Virginia (VA. CODE ANN. § 8.1A-201(20) (Michie Supp. 2003)); Idaho (2004 Idaho Sess. Laws Ch. 43); Hawaii (2004 Haw. Sess. Laws 162) (maintaining the subjective good faith standard in Article 1). But see Minnesota (2004 Minn. Sess. Law Serv. Ch. 162 (West)); Texas (TEX. BUS. & COM. CODE ANN § 1.201(20) (Vernon Supp. 2004)); Delaware (S. 326, 2003 Leg., 142d Sess. (Del. 2004)) (adopting the uniform standard).

15. Articles 3, 4, and 9 use the higher standard of good faith for all transactions within the scope of these articles. See U.C.C. § 3-103(a)(4) (2001) (defining good faith for Article 3 purposes as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); U.C.C. § 9-102(43) (2001) (adopting same definition of good faith for purposes of Article 9); U.C.C. § 4-104(c) (2001) (applying Article 3 definition of good faith to Article 4).

recently promulgated revisions, Articles 3 and 4, amended in 2002, and Article 7, revised in 2003, have begun to be enacted with little or no variance from the uniform version.<sup>16</sup> Enactment by the state legislatures of revised Article 2, however, one of the more controversial revisions of late, has not commenced at the same pace.<sup>17</sup>

16. Minnesota was the first and only state to adopt the amendments to Articles 3 and 4 by summer 2004. See NCCUSL, *A Few Facts About the Amendments to Articles 3 and 4 of the UCC*, available at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucca3.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucca3.asp) (last visited July 28, 2004). The following states have enacted revised Article 7: Minnesota, Connecticut, Virginia, Maryland, Idaho, Alabama, Hawaii, and Delaware. See NCCUSL, *UCC Article 7*, available at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc7.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc7.asp) (last visited Aug. 4, 2004).

17. As of August 2004, the 2003 amendments to Article 2 have not been enacted, or even introduced in the legislature, in any state. See NCCUSL, *UCC Article 2/2A*, available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=95> (last visited Aug. 4, 2004).