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# 2005 Uniform Commercial Code Survey: Introduction

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

Progress on adopting proposed revisions to the Uniform Commercial Code during the past year has been mixed. Enactment of Revised Articles 1 and 7 proceeded apace. Nine states enacted Revised Article 1 in 2005 and early 2006, making it the law in 18 jurisdictions as of May 1, 2006.<sup>1</sup> Continuing the trend established by earlier adoptions, each of the new states retained the former choice of law provision.<sup>2</sup> This non-uniform amendment has become the uniform approach. The expanded definition of good faith in Revised Article 1, the other controversial provision in that revision,<sup>3</sup> was adopted by seven of the eight states, so now only five of the 18 jurisdictions have taken the non-uniform approach of retaining the old definition.<sup>4</sup> Nine states enacted Revised Article 7 during 2005 and early 2006, bringing its total number of enactments as of May 1, 2006 to 20.<sup>5</sup>

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1. Colorado, Kentucky, New Hampshire, and West Virginia, see The National Conference of Commissioners on Uniform State Laws, *UCC Article 1, General Provisions, Bill Tracking*, available at <http://www.nccusl.org> (last visited May 15, 2006). Alabama, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, Texas, Virginia, and the U.S. Virgin Islands. See *Table of Enactments of 2001 Amendments (Revised Article 1)*, STATE UCC VARIATIONS, U.C.C. REP. SERV. (West), at xxvii (2006).

2. U.C.C. § 1-301(c) (2002) would permit the parties to choose the law of any jurisdiction, regardless of its connection with the transaction. U.C.C. § 1-105(1) (2000) required that the transaction bear a reasonable relationship to the jurisdiction before that jurisdiction's law could be chosen to govern the transaction.

3. Good faith was originally defined in Article 1 simply as "honesty in fact," U.C.C. § 1-201(19) (2000). For years, Article 2 had used a two pronged definition, "honesty in fact and the observance of reasonable commercial standards of fair dealing," U.C.C. § 2-103(b) (2001). Consistent with the revision of other articles of the UCC which had moved to the two-pronged definition, see U.C.C. §§ 3-103, 4-104(c), 4A-105(a)(6), 8-102(a)(10), 9-102(a)(43) (2002), the expanded definition was included in the 2001 revision of Article 1.

4. Alabama, Hawaii, Idaho, Nebraska, and Virginia have all chosen to retain current law on good faith, leaving the Article 1 standard in those jurisdictions the purely subjective "honesty in fact." See U.C.C. § 1-201(19) (2000).

5. Arizona, Colorado, Mississippi, New Hampshire, and West Virginia, see The National Conference of Commissioners on Uniform State Laws, *UCC Article 7, Bill Tracking*, available at <http://www.nccusl.org> (last visited May 15, 2006). Alabama, Connecticut, Delaware, Hawaii, Idaho, Maryland, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Virginia.

Revised Articles 2 and 2A, on the other hand, were not adopted by any jurisdiction. And the Amendments to Revised Articles 3 and 4<sup>6</sup> were adopted by only one jurisdiction during the past year.<sup>7</sup> For the Amendments to Articles 3 and 4, the reason for inaction may be indifference. For Articles 2 and 2A, however, active opposition has stalled the enactment process. While the National Conference of Commissioners on Uniform State Laws ("NCCUSL") still hopes to see Articles 2 and 2A become the law, achieving that goal appears to be quite a ways into the future.

Much attention in commercial law has turned to international and cross-border transactions. One of the topics to be considered at the Organization of American States Seventh Inter-American Conference on Private International Law (CIDIP-VII) will be secured transactions.<sup>8</sup> Facilitation of cross-border secured transactions is also the goal of projects undertaken by the National Law Center for Inter-American Free Trade, such as the project to enable securitization of obligations secured by mortgages or deeds of trust from the Mexican states of Sonora and Baja California<sup>9</sup> and the project to work with Guatemala in modernizing its law of secured transactions.<sup>10</sup> The Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary which has been approved by The Hague Conference on Private International Law, however, has not been ratified by the United States, despite support by the ABA.<sup>11</sup>

Another important development in 2005 focused on the law of secured transactions in the sovereign nations within the United States. NCCUSL has made a somewhat simplified and tailored version of U.C.C. Article 9 available for American Indian tribes and nations that desire to adopt such laws. Known as the Model Tribal Secured Transactions Act ("MSTA"),<sup>12</sup> the act is a product of NCCUSL's Committee on Liaison with American Indian Tribes and Nations. The major differences between the Model Act and Article 9 of the U.C.C. are the omission of certain detailed provisions from Article 9 relating to transactions determined to be unlikely to be important to the enacting groups, and the addition to the Model Act of a few necessary provisions from other bodies of commercial law, such as U.C.C. Article 1, along with including more general references to the law of negotiable instruments and other bodies of commercial law. The Model Act's scope and choice of law provisions have been adjusted in light of the uncertainties of

See *Table of Enactments of 2003 Amendments (Revised Article 7)*, STATE UCC VARIATIONS, U.C.C. REP. SERV. (West), at xxix (2006).

6. From their promulgation in 2002 until this past year, only Minnesota has adopted the amended sections to Articles 3 and 4. See *Table of Enactments of 2002 Amendments (Amendments to Revised Articles 3 and 4)*, STATE UCC VARIATIONS, U.C.C. REP. SERV. (West), at xxviii (2006).

7. Kentucky, see The National Conference of Commissioners on Uniform State Laws, *UCC Articles 3 and 4, Bill Tracking*, available at <http://www.nccusl.org> (last visited May 15, 2006).

8. See Sandra M. Rocks & Kate A. Sawyer, *International Commercial Law: 2005 Developments*, 61 BUS. LAW. 1633 (2006).

9. *Id.* at 1640.

10. *Id.* at 1642.

11. *Id.* at 1642.

12. The text of the act is available at the NCCUSL website, [http://www.nccusl.org/Update/Docs/MTSTA/MTSTA\\_Mar06\\_Final.doc](http://www.nccusl.org/Update/Docs/MTSTA/MTSTA_Mar06_Final.doc) (last visited May 1, 2006).

the tribes' and nations' jurisdictional reach.<sup>13</sup> Certain complex provisions of Article 9 have been simplified (in particular U.C.C. sections 9-406 and 9-408's overrides of anti-assignment clauses have been recast in a much more accessible form in MTSTA section 9-404), while others are left unchanged. So far, more than a dozen tribes and nations are already at some stage of reviewing or adapting the act for adoption.<sup>14</sup> It appears that the Crow Tribe is poised to become the first to enact it.<sup>15</sup>

On the judicial front, 2005 produced some cases that made important, if small, steps in clarifying uncertain commercial law issues. For example, in *Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*,<sup>16</sup> the court read the prohibition on a drawer of a check bringing a conversion action<sup>17</sup> strictly to prohibit recovery, even though the drawer was a victim of breach of fiduciary duty and the defendant had reason to know of the breach under U.C.C. section 3-307. As another example, a small, but important, step was made by the federal District Court for the Southern District of New York when it limited a plaintiff's ability to use maritime attachment law to circumvent the policies of Article 4A against attaching wire transfers while they are being processed through intermediary banks.<sup>18</sup>

And, of course, there were cases in which the resolution of commercial disputes reflected either judicial misunderstanding of the principles of commercial law, or missed opportunities of attorneys to more carefully make their case, or both. One of the most important roles of the surveys that follow is to help educate the bench and bar so that the number of such cases will decline.

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13. See, e.g., MTSTA §§ 9-104 (not applicable to property not transferable under federal law), 9-117 (ability of parties to choose applicable law) (2005).

14. Information provided to the authors by Professor Carl S. Bjerre, National Conference Reporter for the Model Tribal Secured Transactions Act.

15. *Id.*

16. 106 P3d 483, 56 U.C.C. Rep. Serv. 2d (West) 586 (Kan. 2005). This case is discussed in detail in Stephen C. Veltri, *et al.*, *Payments: 2005 Developments*, 61 Bus. Law. 1571, 1585 (2006).

17. UCC § 3-420(a) (2002).

18. See Veltri, *supra* note 16, at 1590, discussing *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 384 F. Supp. 2d 726 (S.D.N.Y. 2005), *vacated*, 2006 WL 2129336 (2d Cir. July 31, 2006).