

A (Very Partial) Sampling of the Problems with UCC § 1-301

William J. Woodward, Jr.
Professor of Law, Temple University

There are so many reasons to oppose new UCC § 1-301 that they cannot fit into a 10 minute presentation. Most are contained in two articles I have published and I refer to them here for a fuller explanation of what follows; if you wish a reprint of either article, please let me know (Woodward@vm.temple.edu).

This complicated statute represents radical, unprecedented change that may affect millions of Code contracts daily.¹ We will not know for many years what the statute means. If the new Statute were to have a motto, it would have come from the statutory master, Grant Gilmore: “The legal mind has always preferred multiplication to division.”²

In the tradition of the 20 or so law schools who believe themselves to be in the “top ten,” I’ve summarized below 12 of the “top ten” reasons that UCC § 1-301 is a bad idea (or, rather, a conglomeration of bad ideas). I’ll summarize the problems below and make references to places where you can find a fuller explication of the point.

TWELVE TOP TEN REASONS THE NEW ARTICLE 1 CHOICE OF LAW RULE IS BAD POLICY:

10. **There is no need for this dramatic a change in the law.**³ This represents a sharp and fundamental change in the law in apparent violation of the “ain’t broke” maxim. It is not “incremental change” to bring an idea that has operated in highly specialized, negotiated contracts into the mainstream UCC where it will operate in *all* sales of goods, *all* chattel lease transactions, and *all* secured transactions. No state in the United States has this conflict of laws rule for its ordinary, run-of-the mill, transactions; all have a rule that approximates UCC § 1-105 that this new rule will replace. The hand full of

1. See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 S.M.U. Law Rev. 697, 712-13 (2001) (hereinafter *Legislative Choice*).

2. Grant Gilmore, *THE DEATH OF CONTRACT* (1974). Cf. Revised Article 9.

3. See *Legislative Choice*, 746-65.

“problem situations”⁴ could easily have addressed through minor changes in current § 1-105.

9. **The drafters have replaced a simple statute generally raising only one issue (whether the chosen law was “related”) with a provision of truly mind-boggling complexity.** The old statute and comments occupied approximately 2 pages of statute book. The new one runs about 11, better than a five-fold increase.⁵
8. **The new rule “splits” the general conflict of laws rules in each enacting State into the UCC rule (choose “any” State) and the non-UCC rule (choose only a “related” State).** This gives the parties a reason to litigate the “scope of the UCC” in cases where it does not now matter whether the UCC applies or not (because, under current law, the UCC and non-UCC contractual choice of law rules are the same).⁶ Whether this new rule applies or not will depend on the perceived “scope of the UCC,” currently one of the most frequently litigated issues in the entire UCC.
7. **“Mixed contracts” also get two rules--the new rule “to the extent” the UCC applies and the old rule “to the extent” it doesn’t.** The line between the two is another scope question that may have to be adjudicated before the litigating parties ever get to the merits. If courts follow the idea that the drafters are promoting -- that the new rule only applies to the UCC part of the transaction -- those courts will be stuck with great complexity that was non-existent before the revision. If (as may be more likely) courts apply the same unrelated chosen law to an entire “mixed” transaction, they will have gone beyond the statutory language (and the concerns of those worried about businesses escaping mandatory non-UCC regulation through the magic of a choice of law clause).

In a variation of Official Comments’ Example 1, suppose an Article 9 secured lending contract (a “mixed contract”) selects the “unrelated” law of South

4. *Legislative Choice* 715-20.

5. *Cf.* Revised UCC Article 9 which went from 106 to 243 pages, less than twice as big.

6. All states follow some variation of the rule that the law the parties choose to govern their contract must be “related” to them or their contract. *See Legislative Choice* at 745-46.

Dakota to cover “all [our] rights and obligations” under the contract. Will the § 1-301 court apply some other usury law to the transaction or, following Official Comment 9, apply South Dakota’s non-existent usury law to a usury challenge? Courts will face the dilemma outlined above in every such “mixed” case and, notwithstanding the confident air of the new rule’s supporters, we will not know the answer to this very simple kind of problem for years.

6. **There are *no* precedents that will be useful to courts in struggling through the complexity of the new rule.** All “fundamental policy” decisions to date, for example, compare the interests *in governing* of the State whose policy is at issue with the interests *in governing* of the “related” State whose law was chosen.⁷ There are, by definition, no governmental interests where the parties have chosen a State’s law that is “unrelated” to the transaction. We have no idea whatsoever how a court will compare the interests of an unchosen, but “related” (or otherwise applicable) State law with the interests of a chosen, but “unrelated” State law. Or, indeed, whether they will use a comparison analysis at all in figuring what “fundamental policy” is.
5. **Contract drafters will find it far harder to plan.** Numbers 8 through 6 above mean that predicting what law a court will apply to an issue that may come up in litigation is nearly impossible, both when drafting the contract and when litigating it. How will the eventual court split the mixed contract (and therefore the chosen law)? What will that court regard as “fundamental policy”? How will a court mold the old precedents to the new, unprecedented, problems?

Even a cursory read shows that the statute creates many other brand new opportunities for litigation: “consumer” - non-consumer; “international - domestic”; more “protective of consumers” or not; which State’s “protective” rules will kick in for mobile consumers (Official Comment 3, 4th paragraph); statutory ‘fundamental policy’ versus a State’s preexisting law on the subject; and, of course, to *what extent* the UCC might apply. Is it even remotely possible that, relative to predecessor UCC § 1-105, the revision “make[s] it possible for [parties] to foretell with accuracy what will be their rights and liabilities under the contract.”⁸

7. *Legislative Choice* 766-68.

8. Section 1-301, Official Comment 6.

4. **There will be greater malpractice exposure.** What consequences to inserting into a client's forms (or negotiated contract) a choice of law clause that turns out to be a) only partly enforceable; b) something other than the "best" law for the client; or c) one that customers may avoid by litigating in a State without the new choice of law rule? Perhaps the statute will give rise to the malpractice defense "the law is too complicated" but judicial recognition of the defense is another matter.
3. **Uniform enactment is unlikely.** The American Bankers Association has opposed the consumer subsection (and others) and we might anticipate further opposition to one or another of the limiting provisions by other business interests. The post ALI-meeting changes to Official Text and Comments designed to limit the operation of the Section and its consumer provision have only added fuel to the bankers' concern that "The Revisions make it very difficult - if not impossible -- for parties to various agreements to foretell with accuracy what their rights and liabilities will be." We can expect various interests to attempt to strip away some of this complexity in the enactment process; it is the "important limitations" (Official Comment 2) that give the provision its complexity. The NCCUSL has not been particularly successful in opposing non-uniform amendments, particularly those that adversely affect consumers.

Other States may view the provision as a way for NCCUSL to impose UCITA without the necessity of State enactment and resist enactment altogether on that basis (see below).

Non-uniform enactment will give new meaning to "forum shopping" because the applicable rules and the outcome of litigation will depend more directly than at present on whether one party or the other can begin the litigation in a "friendly" forum for litigation (an enacting State or a non-enacting State—we can't tell until we have a dispute).⁹

2. **The provision may well be unconstitutional in allowing / encouraging States to project their governing power further than any long-arm**

9. *Legislative Choice* 776-80.

statutes currently do.¹⁰ a) Virginia decides to rewrite UCC § 2-718 to explicitly permit penalty clauses (or narrow the scope of Article 2, or delete the Statute of Frauds); b) Virginia (or Pennsylvania or Delaware or Mississippi) businesses (or their lawyers) see this development as an opportunity and put penalty clauses plus “the parties choose the law of Virginia to govern this contract” into their form contracts; and c) Bingo! the Virginia legislature has made a new rule for all of us non-consumers that do business with the form-drafters.

The claim that “agreement” makes this permissible or relieves States from charges of legislative imperialism depends on whether there is *true* agreement, not manufactured agreement (“manifested assent”) to choice of law terms. As an empirical fact (as distinguished from a legal conclusion), it will be a rare case indeed where *both* parties actually understood the risk-shifting implications of a choice-of-unrelated-law clause. In the many form contracts involving big businesses and small customers, the customers do not “do this to themselves;” the form drafters do it to them.

1. **The provision is a back door for UCITA.** If an enacting State perceives a software transaction to be within the scope of the UCC (as many now do) and the contract has a choice of law clause pointing to a UCITA State’s (*e.g.*, Virginia) law, UCC § 1-301 makes that chosen law (UCITA) applicable to the dispute even if the forum State rejected UCITA. Of course, one could argue that applying UCITA to the dispute violates the forum’s “fundamental policy,” but, according to Official Comment 6, that requires a policy “that is so substantial that it justifies overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally.”¹¹ The intent is that *very* few otherwise-applicable mandatory rules will meet this standard. Unless the local legislature rejected UCITA with a vengeance, a non-UCITA court applying its new § 1-301 would be required to apply UCITA to the transaction.

1. **The provision makes policy discussions of many UCC rules truly**

10. See Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?*, 73 Temple L. Rev. 1159 (2001).

11. This example is fully explained in William J. Woodward, Jr., *UCITA’s Imperialism*, Journal of Licensing (forthcoming February 2002).

“**academic exercises.**” Lawyers and academics most recently fought hard about the proposed scope of UCC Article 2, a proposed Article 2 provision on specific performance by agreement, and the precise wording of the proposed liquidated damages provision in Article 2. On any such mandatory rules, it will merely take one State’s non-uniform enactment plus the choice of that State’s law in businesses’ form contracts to convert these heated policy debates into genuine ivory tower exercises. Indeed, we might call a 49 State uniform enactment a “success” in some sense, but we will not be able to tell whether that *almost* uniform rule is even the *dominant* (51%) rule without empirically examining the choice of law clauses in a large, statistically valid sample of form contracts. If just one state permits specific performance by agreement, businesses in all States can probably get the rule in their own courts under UCC § 1-301 by simply choosing the deviant state’s law, the ALI and NCCUSL notwithstanding.¹² It has long been an open secret that the UCC is anything but “uniform” and, therefore, this new choice of law provision will likely *always* matter.

1. **The provision guarantees *much* more work for lawyers.** No explanation needed (except, perhaps, to the clients).¹³

12. See *Legislative Choice* 768-77.

13. Cf. Gilmore, *supra* note 1.