The Often Imitated, But Not Yet Duplicated, Revised Uniform Commercial Code Article 1[†]

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> ... Article 1 provides rules that govern all transactions covered by the UCC without regard to their nature. It contains general rules of construction for interpreting the provisions of the entire Code, definitions applicable throughout the Code, a choice of law rule that applies to the other articles to the extent they do not contain their own provisions on choice of law, and a few substantive provisions applicable throughout the entire Code. Its provisions are the coordinating mechanism that holds the Code together, providing a level of commonality across the various substantive Articles of the Code.
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> Because the provisions of Article 1 apply to the entire Code, the impact of decisions regarding what provisions it includes is greater than that for decisions regarding provisions in individual articles....[1]

The ubiquitous nature of Article 1 justifies studying proposals to revise it. Part One of this paper discusses four notable differences between Revised Article 1 and the version of Article 1 presently in force in a majority of states. Part Two gauges how Revised Article 1 has fared thus far in those states which have enacted it or are presently considering enacting it. Part Three considers the pros and cons of each notable change, suggests one or more legislative response(s) to each, and briefly analyzes some implications of each response.

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[1] Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 603-04 (2001) (footnotes omitted).

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I. Notable Changes in Revised Article 1

There are four notable differences between Revised Article 1 and the version of Article 1 presently in force in a majority of states. First, Revised Article 1 narrows its own scope, so that it applies only to transactions governed by some other article of the Code. Second, Revised Article 1 applies the same good faith standard to merchants and non-merchants. Third, Revised Article 1 purports to allow the parties in any non-consumer transaction to choose to have their transaction governed by the law of any state, without regard to any relationship (or lack thereof) between that state and either the parties or the transaction. Fourth, Revised Article 1 extends the relevance of course of performance evidence to all agreements governed by the Code.

A. The Scope of Revised Article 1

Unlike current Article 1, which contains no explicit scope provision, Section R1-102[2] states that Revised Article 1 only "applies to a transaction to the extent that it is governed by another article of [the Code]."[3] In other words, if a transaction does not fall within the scope of Article 2, 2A, 3, 4, 4A, 5, 6 (where still in force), 7, 8, or 9, it is not subject to Revised Article 1.

This is a departure from current law, notwithstanding the statement by Revised Article 1's drafters that Section R1-102 merely "makes clear what has always been the case – the rules in Article 1 apply [only] to transactions … governed by one of the other articles of the Uniform

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[2] For ease of reference, from this point forward, all citations in the text and notes to Revised Article 1 are in the form of "U.C.C. § R1-…" or "Section R1-...." All citations in the text and notes to pre-Revised Article 1 are in the form of "U.C.C. § 1-…" or "Section 1-...." The uniform version of Revised Article 1 can be found in its entirety, with official comments and annotations, in *Uniform Laws Annotated*, 1 U.L.A. 5-52 & S4-S14 (2004 & Supp. 2006), as can the uniform version of pre-Revised Article 1, with its official comments and annotations, 1 U.L.A. 69-352 & S16-20 (2004 & Supp. 2006).

[3] U.C.C. § R1-102. And, in case you weren't paying attention, Section R1-301 reiterates that *it* – which, of course, is part of Revised Article 1, and therefore covered by § R1-102 – "applies [only] to a transaction to the extent that it is governed by another article of [the UCC]." *Id.* § R1-301(b).

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Commercial Code."[4] Current Section 1-206 requires a signed writing evidencing a contract (other than a security agreement) for the sale of personal property (other than goods and investment securities) if a party wishes to enforce that contract "beyond $5,000 in amount or value of remedy."[5] Both the Official Comment to Section 1-206 and numerous court decisions recognize that Section 1-206 – and, by extension, the rest of Article 1 – applies to sales of personal property that fall outside the scope of Articles,[6] including sales of intellectual property rights,[7] goodwill and other intangibles included in the sale of a going business concern,[8] franchise rights,[9] "choses in action,"[10] and other forms of intangible personal property not otherwise covered by the Code.[11]

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[4] *Id.* § R1-102 cmt. 1; *see also* Patchel & Auerbach, *supra* note 1, at 605 (recognizing that, while current Article 1's scope "implicitly ... has always been that it only governs transactions within the scope of other articles of the UCC .... the lack of an express scope provision occasionally caused courts and commentators to express uncertainty about which transactions are governed by its substantive rules").

[5] U.C.C. § 1-206(1)-(2).

[6] *See id.* § 1-206 cmt. (stating that Section 1-206's purpose is to "fill the gap" left by statute of frauds provisions elsewhere in the Code – principally "relat[ing] to the sale of general intangibles").

If this were not the case, there would be scant need for Section 1-206. And, given the choice between construing Section 1-206 to apply to transactions not otherwise governed by the Code and construing Section 1-206 to be surplusage, the chief architect of the Uniform Commercial Code advocated the former. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950) ("If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.").

[7] *See, e.g.*, Grappo v. Alitalia Linee Aeree Italiane, S.p.A., 56 F.3d 427, 431 (2d Cir. 1995); Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154, 1163 (S.D.N.Y. 1988).

[8] *See, e.g.*, Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141, 1143 (3d Cir. 1972); Beldengreen v. Ashinsky, 528 N.Y.S.2d 744, 746-47 (N.Y. Civ. Ct. 1987).

[9] *See, e.g.*, American Buick, Inc. v. General Motors Corp., 66 S.W.3d 51, 60-61 (Mo. Ct. App. 2001).

[10] *See, e.g.*, Sel-Lab Mktg., Inc. v. Dial Corp., 48 UCC Rep. Serv. 2d 482, 485-86 (S.D.N.Y. 2002) (right of first refusal); *see also In re* Furst, 914 F. Supp. 734, 737 (D. Mass. 1996) (royalty rights).

[11] *See, e.g.*, FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 951-52 (N.Y. App. Div. 1981) (sale of chattel paper not given as collateral).

B. Good Faith Under Revised Article 1

Both current and Revised Article 1 impose a duty of good faith performance and enforcement on all parties to any agreement governed by the Code.[12] However, current Article 1 and Revised Article 1 define "good faith" differently. Current Section 1-201 defines good faith as "honesty in fact in the conduct or transaction concerned."[13] The question under current Article 1 is whether the person was subjectively truthful and behaved honestly.[14] In addition to this requirement of subjective honesty, Revised Article 1 also requires that every party "observ[e] reasonable commercial standards of fair dealing."[15] Thus, Revised Article 1 applies the same standard of good faith to non-merchants that current Articles 2 and 2A apply only to merchants.[16]

Suppose I sign a contract to purchase a home spa from Sears and that I further agree to make monthly payments for a fixed term, to maintain the spa for the duration of the payment period, and to promptly notify Sears of any non-routine maintenance needs that arise for the duration of the express warranty that is part of the sales agreement. Under Revised Article 1, not only must Sears (the merchant seller) observe reasonable commercial standards of fair dealing, so must I (the non-merchant buyer) – even though I may have no reason to know what constitutes "reasonable commercial standards of fair dealing" in the sale and servicing of home

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[12] *Compare* U.C.C. § 1-203 *with* U.C.C. § R1-304.

[13] U.C.C. § 1-201(19).

[14] *See* Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, 35 U.C.C.L.J. 47, 48-49 (2002).

[15] U.C.C. § R1-201(b)(20) ("'Good faith' … means honesty in fact and the observance of reasonable commercial standards of fair dealing.").

[16] *Compare* U.C.C. § 2-103(1)(b) ("'Good faith' *in the case of a merchant* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (emphasis added)) *and id.* § 2A-103(3) (incorporating § 2-103's good faith standard by reference) *with id.* § 1-201(19) ("'Good faith' means honesty in fact in the conduct or transaction concerned."). *See generally* Moses, *supra* note 14, at 51-52.

spas. If reasonable commercial standards of fair dealing in the performance of a contract for the sale and servicing of a home spa require that I inspect the home spa every few days, and I fail to inspect the spa for a two week period because I am on vacation, when I return home and find the spa not working as warranted, am I breaching my duty of good faith by insisting that Sears make good on its warranty? Revised Article 1's reasonable-person-with-knowledge-of-the-trade standard suggests I am in breach.[17]

C. Choice of Law Under Revised Article 1

Both current and Revised Article 1 empower the parties to agree on governing law, subject to certain limitations. Where current and Revised Article 1 part ways is that, while current Article 1 requires the parties to choose the law of a jurisdiction that is reasonably related to the transaction,[18] Revised Article 1 requires no such relationship between the transaction and the chosen jurisdiction,[19] unless one or more parties to the agreement at issue is a consumer.[20] In so doing, Revised Article 1 ignores the general tendency of states to allow parties to choose only the law of a jurisdiction bearing some relationship to the parties, to the transaction, or both, and then only if the chosen law does not conflict with some fundamental public policy of a state

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[17] *See generally* Moses, *supra* note 14, at 50-51 (reaching a similar conclusion juxtaposing the "honesty in fact" test of former U.C.C. Article 3 with the "honesty in fact and ... observance of reasonable commercial standards of fair dealing" test of current U.C.C. § 3-103(1)(d)). If I am in breach, my breach will not give Sears independent grounds to recover from me, but it may well give Sears a defense to excuse it from liability for its breach of warranty. *See* U.C.C. § R1-304 cmt. 1; *see also* Moses, *supra* note 14, at 48 n.6.

[18] *See* U.C.C. § 1-105(1) ("Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law of this state or of such other state or nation governs their rights and duties.").

[19] *See* U.C.C. § R1-301(c)(1) (allowing the parties to choose a state's law "whether or not the transaction bears a relation to the State designated").

[20] *See id.* § R1-301(e)(1).

bearing a greater relationship to the dispute than the chosen state.[21] As one leading commentator puts it, Section R1-301 is "far broader, cover[s] far more contracts, and (by sheer force of numbers of contracts implicated) [is] less deferential to the ordinarily-governing law of other jurisdictions than any widely-known conflict of laws rule[] anywhere."[22]

Returning to my earlier hypothetical, if Sears is headquartered in Illinois, I am a Nevada resident, and I purchase the home spa from a Sears store in Las Vegas, then a provision in the sales agreement subjecting all disputes to Maine law would not be binding because I am a consumer. But, if Sears purchased the spa for resale from The Wizard of Spas, located in Kansas, and had the spa shipped directly to the Nevada store, then a provision in the Sears-Wizard of Spas agreement subjecting all disputes to Maine law would be binding because neither party is a consumer.

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[21] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1969); *see, e.g.*, NEV. REV. STAT. § 104.1105(1) (2003) (requiring that the "transaction bear[] a reasonable relation" to the chosen state); Sievers v. Diversified Mortgage Investors, 603 P.2d 270, 273 (Nev. 1979) ("Under choice-of-law principles, parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract. The situs fixed by the agreement, however, must have a substantial relation with the transaction, and the agreement must not be contrary to the public policy of the forum." (citations omitted)). *See generally* Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159 (2000).

[22] William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 740 (2001). Professor Woodward elaborates:

> [R1-301] states a rule for any case subject to the Uniform Commercial Code, unless displaced by a specified provision elsewhere in the UCC. This means that all sales and leases of goods contracts will be covered, as will contracts in all the other areas covered by the Uniform Commercial Code. Thus the provision will be available for a large percentage of the staggeringly large number of commercial contracts formed in our economy every day. There are no size or value limitations. Parties to every commercial contract from the sale to a carpenter of a screwdriver to the large-scale business liquidation sale will be able to choose unrelated law to cover their transaction.

Id. at 740-41 (footnotes omitted).

D. Course of Performance Under Revised Article 1

The text of current Article 1 refers to course of performance only as one possible element of an "agreement."[23] Otherwise, course of performance is defined and operationalized in Articles 2 and 2A.[24] As a result, there has been some uncertainty what role course of performance plays in transactions governed by Article 3, 4, 4A, 5, 6, 8, or 9;[25] and, assuming it has some effect beyond Articles 2 and 2A, how course of performance fits into the hierarchy set forth in current Section 1-205.[26] Revised Article 1 resolves any uncertainty by defining course of performance and fixing its position in the hierarchy of express and implied terms of any agreement governed by the Code.[27]

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[23] U.C.C. § 1-201(3). The official comments to a few sections of current Article 1 mention course of performance; but, they generally do so in the context of discussing the meaning of "agreement," *see* U.C.C. §§ 1-102 cmt. 2 & 1-204 cmt. 2; and, like the definition of "agreement," they refer the reader seeking the meaning of "course of performance" to U.C.C. § 2-208, *see* U.C.C. §§ 1-102 cmt. 2 & 1-205 cmt. 2.

[24] *See id.* §§ 2-208 & 2A-207.

[25] *Compare, e.g.*, National Livestock Credit Corp. v. Schultz, 653 P.2d 1243 (Okla. Ct. App. 1982) (affirming the trial court's resort to course of performance evidence in resolving a dispute governed by Article 9) *with, e.g.*, Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc., 424 S.W.2d 409, 411 (Ky. 1968) ("[U.C.C. § 2-208] deals with sales only. As to secured transactions the code apparently does not contain a rule for varying the contract by performance.").

[26] *See* U.C.C. § 1-205(4); *see, e.g.*, Farmers State Bank v. Farmland Foods, 402 N.W.2d 277, 281 (Neb. 1987) ("[P]ostagreement course of performance is not governed by § 1-205(4)."). *See generally* Nicholas M. Insua, Note, *Dogma, Paradigm, and the Uniform Commercial Code:* Sons of Thunder v. Borden *Considered*, 31 RUTGERS L.J. 249, 282-83 (1999) ("In contracts for the sale of goods, section 2-208 adds 'course of performance' to the agreement confluence, falling between express terms and course of dealing in the 'lexical ordering' created by section 1-205(4)." (footnotes omitted)); David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747, 765 n.76 (1995) ("Although the definition of 'agreement' in section 1-201(3) includes usage of trade, course of dealing and course of performance, the definition of course of performance appears in section 2-208 and the concept is conspicuously absent from the interpretational priority set out in section 1- 205(4). It is therefore open to question whether course of performance was intended to be part of the definition of agreement when that term appears outside of Article 2." (citations omitted)).

[27] U.C.C. § R1-303(a), (d) & (e). *See generally* Patchel & Auerbach, *supra* note 1, at 610 ("Although the comments to pre-revision Section 1-205 refer to course of performance, the section itself deals with only course of dealing and usage of trade. The Revision remedies this omission by adding course of performance to course of dealing and usage of trade as relevant in ascertaining the meaning of the parties' agreement and supplementing its express terms." (footnote omitted)).

II. News from the Front: Revised Article 1 in the States

As of January 1, 2007, Revised Article 1 was in effect in Alabama,[28] Arizona,[29] Arkansas,[30] California,[31] Colorado,[32] Connecticut,[33] Delaware,[34] Hawaii,[35] Idaho,[36] Kentucky,[37] Louisiana,[38] Minnesota,[39] Montana,[40] Nebraska,[41] Nevada,[42] New Hampshire,[43] New Mexico,[44]

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[28] ALA. CODE §§ 7-1-101 to 7-1-310 (2006).

[29] ARIZ. REV. STAT. ANN. §§ 47-1101 to 47-1310 (Supp. 2006).

Revised Article 1 was also introduced in Arizona in 2005, *see* SB 1234, *available at* http://www.azleg.state.az.us/legtext/47leg/1r/bills/sb1234p%2Epdf (last visited Mar. 6, 2007). That bill was referred to the Senate Commerce and Economic Development Committee on January 25, 2005. *See* http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/47leg/1r/bills/sb1234o%2Easp (last visited Mar. 6, 2007). In March, Morton Scult, a partner with Phoenix's Stinson Morrison Hecker LLP and Chair of the State Bar of Arizona Business Law Section's UCC Committee, reported that SB 1234 had been "held" because of opposition to the new good faith definition in R1-201(b)(20) and "w[ould] not get out of committee this session." E-mail from Morton Scult to Keith A. Rowley, Mar. 7, 2005 (on file with the author). Not coincidentally, it seems, the enacted version does not adopt the new good faith definition. *See infra* note 65.

[30] ARK. CODE ANN. §§ 4-1-101 to 4-1-310 (Supp. 2005).

[31] CAL. COM. CODE §§ 1101 to 1310 (West Supp. 2007).

[32] COLO. REV. STAT. §§ 4-1-101 to 4-1-310 (2006).

[33] CONN. GEN. STAT. ANN. § 42a-1-101 to 42a-1-310 (West Supp. 2006).

[34] DEL. CODE ANN. tit. 6, §§ 1-101 to 1-310 (2005).

[35] HAW. REV. STAT. ANN. §§ 490:1-101 to 490:1-310 (LexisNexis Supp. 2006).

[36] IDAHO CODE ANN. §§ 28-1-101 to 28-1-310 (Supp. 2006).

[37] KY. REV. STAT. ANN. §§ 355.1-101 to 355.1-310 (LexisNexis Supp. 2006).

[38] LA. REV. STAT. ANN. §§ 10:1-101 to 10:1-310 (Supp. 2007).

[39] MINN. STAT. ANN. §§ 336.1-101 to 336.1-310 (West Supp. 2007).

[40] MONT. CODE ANN. §§ 30-1-101 to 30-1-310 (2005).

[41] NEB. REV. STAT. ANN. U.C.C. §§ 1-101 to 1-310 (LexisNexis Supp. 2006).

[42] NEV. REV. STAT. ANN. §§ 104.1101 to 104.1310 (West Supp. 2006).

[43] N.H. REV. STAT. ANN. §§ 382-A:1-101 to 382-A:1-310 (LexisNexis Supp. 2006).

[44] N.M. STAT. ANN. §§ 55-1-101 to 55-1-310 (LexisNexis Supp. 2006).

North Carolina[45] Oklahoma,[46] Texas,[47] Virginia,[48] and West Virginia.[49] As of March 6, 2007, bills proposing its adoption were pending before the Florida,[50] Indiana,[51] Kansas,[52] Massachusetts,[53] North Dakota,[54] Rhode Island,[55] South Dakota,[56] and Utah[57] legislatures.[58]

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[45] N.C. GEN. STAT. §§ 25-1-101 to 25-1-310 (Interim Supp. 2006).

[46] OKLA. STAT. ANN., tit. 12A, §§ 1-101 to 1-310 (West Supp. 2007).

[47] TEX. BUS. & COM. CODE ANN. §§ 1.101 to 1.310 (Vernon Supp. 2006).

[48] VA. CODE ANN. §§ 8.1A-101 to 8.1A-310 (Supp. 2006).

[49] W. VA. CODE ANN. §§ 46-1-101 to 46-1-310 (LexisNexis Supp. 2006).

[50] HB 151, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0151__.doc&DocumentType=Bill&BillNumber=0151&Session=2007 (last visited Mar. 6, 2007); SB 252, *available at* http://www.flsenate.gov/data/session/2007/Senate/bills/billtext/pdf/s0252c1.pdf (last visited Mar. 6, 2007). The language of HB 151 and SB 252 are identical in all respects material to Article 1.

The Florida House and Senate each considered parallel bills to revise Article 1 during the 2006 legislative session. *See* HB 1437, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1437c1.doc&DocumentType=Bill&BillNumber=1437&Session=2006 (last visited Mar. 6, 2007); SB 2716, *available at* http://www.flsenate.gov/data/session/2006/Senate/bills/billtext/pdf/s2716.pdf (last visited Mar. 6, 2007). Each bill died in committee in their respective chambers. *See* http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33681&SessionIndex=-1&SessionId=42&BillText=&BillNumber=1437&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=0 (last visited Mar. 6, 2007); http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2006&billnum=2716 (last visited Mar. 6, 2007).

[51] SB 419, *available at* http://www.in.gov/legislative/bills/2007/PDF/SB/SB0419.2.pdf (last visited Mar. 6, 2007).

[52] SB 183, *available at* http://www.kslegislature.org/bills/2008/183.pdf (last visited Mar. 6, 2007).

The Kansas legislature considered a version of Revised Article 1 during its 2006-07 session. *See* HB 2453, *available at* http://www.kslegislature.org/bills/2006/2453.pdf (last visited Mar. 6, 2007). Kansas HB 2453 was introduced on February 11, 2005, *see* http://www.kslegislature.org/journals/2005/hj0211.pdf (last visited Mar. 6, 2007), and referred to the House Judiciary Committee on February 14, 2005, *see* http://www.kslegislature.org/journals/2005/hj0214.pdf (last visited Mar. 6, 2007). No further action was taken before the legislature adjourned sine die.

[53] HB 3731, *available at* http://www.mass.gov/legis/bills/house/184/ht03pdf/ht03731.pdf (last visited Mar. 6, 2007).

[54] HB 1035, *available at* http://www.legis.nd.gov/assembly/60-2007/bill-text/HAGJ0300.pdf (last visited Mar. 6, 2007).

The North Dakota legislature considered a version of Revised Article 1 in 2005, *see* SB 2143, *available at* http://www.legis.nd.gov/assembly/59-2005/bill-text/FANA0100.pdf (last visited Mar. 6, 2007), but the North Dakota Senate rejected it by a margin of 45-1, *see* http://www.legis.nd.gov/assembly/59-2005/bill-

A. Adoptions to Date

The versions of Revised Article 1 enacted in Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Texas, Virginia, and West Virginia all embrace the narrowed scope of the uniform version,[59] extend course of performance to all transactions governed by the Code,[60] and reject the uniform version's choice

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actions/ba2143.html (last visited Mar. 6, 2007). Citing the North Dakota Bankers Association's and North Dakota Credit Union League's opposition to SB 2143, Senate Concurrent Resolution 4032 directed the Legislative Council to study the pros and cons of adopting Revised Article 1 and to report to the next regular session of the Legislature. *See* SCR 4032, *available at* http://www.legis.nd.gov/assembly/59-2005/bill-text/FGIQ0200.pdf (last visited Mar. 6, 2007).

[55] SB 105, *available at* http://www.rilin.state.ri.us//BillText07/SenateText07/S0105.pdf (last visited Mar. 6, 2007).

[56] SB 85, *available at* http://legis.state.sd.us/sessions/2007/bills/SB85p.pdf (last visited Mar. 6, 2007). However, as discussed below, *see infra* text accompanying notes 89-90, SB 85 appears unlikely to pass this session.

[57] SB 91, *available at* http://le.utah.gov/~2007/bills/sbillamd/sb0091s01.pdf (last visited Mar. 6, 2007).

[58] On April 15, 2005, the Illinois Senate unanimously passed SB 1647. http://www.ilga.gov/legislation/94/SB/PDF/09400SB1647lv.pdf (last visited Mar. 6, 2007); *see* http://www.ilga.gov/legislation/billstatus.asp?DocNum=1647&GAID=8&GA=94&DocTypeID=SB&LegID=19742&SessionID=50 (last visited Mar. 6, 2007). SB 1647 was read for the first time in the Illinois House on April 26, 2005 and referred to the Rules Committee, to which it was re-referred on May 13, 2005, after languishing for more than two weeks without action on the docket of the House Executive Committee. *See id.* The Rules Committee had taken no further action when the 94th General Assembly adjourned sine die. *See id.* As of March 6, 2007, no new Revised Article 1 bill had been introduced in the early days of the 95th General Assembly.

[59] *See* ALA. CODE § 7-1-102 (2006); ARIZ. REV. STAT. ANN. § 47-1102 (Supp. 2006); ARK. CODE ANN. § 4-1-102 (Supp. 2005); CAL. COM. CODE § 1102 (West Supp. 2007); COLO. REV. STAT. § 4-1-102 (2006); CONN. GEN. STAT. ANN. § 42a-1-102 (West Supp. 2006); DEL. CODE ANN. tit. 6, § 1-102 (2005); HAW. REV. STAT. ANN. § 490:1-102 (LexisNexis Supp. 2006); IDAHO CODE ANN. § 28-1-102 (Supp. 2006); KY. REV. STAT. ANN. § 355.1-102 (LexisNexis Supp. 2006); LA. REV. STAT. ANN. § 10:1-102 (Supp. 2007); MINN. STAT. ANN. § 336.1-102 (West Supp. 2007); MONT. CODE ANN. § 30-1-101(4) (2005); NEB. REV. STAT. ANN. U.C.C. § 1-102 (LexisNexis Supp. 2006); NEV. REV. STAT. ANN. § 104.1102 (West Supp. 2006); N.H. REV. STAT. ANN. § 382-A:1-102 (LexisNexis Supp. 2006); N.M. STAT. ANN. § 55-1-102 (LexisNexis Supp. 2006); N.C. GEN. STAT. § 25-1-102 (Interim Supp. 2006); OKLA. STAT. ANN., tit. 12A, § 1-102 (West Supp. 2007); TEX. BUS. & COM. CODE ANN. § 1.102 (Vernon Supp. 2006); VA. CODE ANN. § 8.1A-102 (Supp. 2006); W. VA. CODE ANN. § 46-1-102 (LexisNexis Supp. 2006).

[60] *See* ALA. CODE § 7-1-303; ARIZ. REV. STAT. ANN. § 47-1303; ARK. CODE ANN. § 4-1-303; CAL. COM. CODE § 1303; COLO. REV. STAT. § 4-1-303; CONN. GEN. STAT. ANN. § 1-303; DEL. CODE ANN. tit. 6, § 1-303; HAW. REV. STAT. ANN. § 490:1-303; IDAHO CODE ANN. § 28-1-303; KY. REV. STAT. ANN. § 355.1-303; LA. REV. STAT. ANN. § 10:1-303; MINN. STAT. ANN. § 336.1-303; MONT. CODE ANN. § 30-1-205; NEB. REV. STAT. U.C.C. § 1-303;

of law provision[61] – opting, instead, to retain the essence of former Section 1-105, which requires some reasonable relation between the state whose law the parties choose by agreement and the transaction the parties choose to subject to that law.[62] To date, only the U.S. Virgin Islands has adopted uniform R1-301.[63]

The only dissension in the ranks of states that have enacted Revised Article 1 to date is over the definition of "good faith." Arkansas, California, Colorado, Connecticut, Delaware, Kentucky, Louisiana, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North

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NEV. REV. STAT. ANN. § 104.1303; N.H. REV. STAT. ANN. § 382-A:1-303; N.M. STAT. ANN. § 55-1-303; N.C. GEN. STAT. § 25-1-303; OKLA. STAT. ANN., tit. 12A, § 1-303; TEX. BUS. & COM. CODE ANN. § 1.303; VA. CODE ANN. § 8.1A-303; W. VA. CODE ANN. § 46-1-303.

[61] *Compare* ALA. CODE § 7-1-301; ARIZ. REV. STAT. ANN. § 47-1301; ARK. CODE ANN. § 4-1-301; CAL. COM. CODE § 1301; COLO. REV. STAT. § 4-1-301; CONN. GEN. STAT. ANN. § 1-301; DEL. CODE ANN. tit. 6, § 1-301; HAW. REV. STAT. ANN. § 490:1-301; IDAHO CODE ANN. § 28-1-301; KY. REV. STAT. ANN. § 355.1-301; LA. REV. STAT. ANN. § 10:1-301; MINN. STAT. ANN. § 336.1-301; MONT. CODE ANN. § 30-1-301; NEB. REV. STAT. U.C.C. § 1-301; NEV. REV. STAT. ANN. § 104.1301; N.H. REV. STAT. ANN. § 382-A:1-301; N.M. STAT. ANN. § 55-1-301; N.C. GEN. STAT. § 25-1-301; OKLA. STAT. ANN., tit. 12A, § 1-301; TEX. BUS. & COM. CODE ANN. § 1.301; VA. CODE ANN. § 8.1A-301; W. VA. CODE ANN. § 46-1-301 *with* U.C.C. § 1-301 (2001).

The original version of New Hampshire HB 719 included uniform R1-301, HB 719, § 1 (copy on file with the author), as did 2005's ill-fated Arizona SB 1234, *see supra* note 29, and Kansas HB 2453, *see supra* note 52. HB 719 only passed after the language of uniform R1-301 was replaced by the current language, which tracks pre-Revised 1-105. Arizona enacted a version of Revised Article 1 in 2006 that replaced uniform R1-301 with language tracking pre-Revised 1-105. *See supra*. The Kansas Senate has just taken up a bill that, like its unsuccessful predecessor, includes uniform R1-301. *See infra* note 70 and accompanying text.

[62] *See* ALA. CODE § 7-1-105 (2002); ARIZ. REV. STAT. ANN. § 47-1105 (2005); ARK. CODE ANN. § 4-1-105 (2001); CAL. COM. CODE § 1105 (West 2002); COLO. REV. STAT. § 4-1-105 (2005); CONN. GEN. STAT. ANN. § 42a-1-105 (West 2002); DEL. CODE ANN. tit. 6, § 1-105 (1999 & Supp. 2004); HAW. REV. STAT. ANN. § 490:1-105 (LexisNexis 2002); IDAHO CODE ANN. § 28-1-105 (2001); KY. REV. STAT. ANN. § 355.1-105 (LexisNexis 2002); LA. REV. STAT. ANN. § 10:1-105 (2003); MINN. STAT. ANN. § 336.1-105 (West 2002); MONT. CODE ANN. § 30-1-105 (2003); NEB. REV. STAT. ANN. U.C.C. § 1-105 (LexisNexis 2000); NEV. REV. STAT. § 104.1105 (2004); N.H. REV. STAT. ANN. § 382-A:1-105 (LexisNexis Supp. 2006); N.M. STAT. ANN. § 55-1-105 (LexisNexis 2004); N.C. GEN. STAT. § 25-1-105 (2005); OKLA. STAT. ANN., tit. 12A, § 1-105 (West 2004); TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon 1994); VA. CODE ANN. § 8.1-105 (2001); W. VA. CODE § 46-1-105 (2001). *See generally* Keith A. Rowley, *The Often Imitated, But Not Yet Duplicated, Revised Uniform Commercial Code Article 1*, 38 U.C.C.L.J. 195, 199-201 (2006).

[63] *See* V.I. CODE ANN. tit. 11A, § 1-301 (2003).

Carolina, Oklahoma, Texas, and West Virginia have adopted uniform R1-201(b)(20),[64] which eliminates the bifurcated good faith standard in Articles 2 and 2A and holds merchants and non-merchants alike to "honesty in fact and the observance of reasonable commercial standards of fair dealing." Alabama, Arizona, Hawaii, Idaho, Nebraska, and Virginia have retained the bifurcated good faith standard by retaining the pre-R1 "honesty in fact in the conduct or transaction concerned" definition in Article 1 and leaving 2-103(1)(b) & 2A-103(3) unchanged.[65]

B. Pending Legislation

The proposed revisions of Revised Article 1 currently before the Florida, Indiana, Kansas, Massachusetts, North Dakota, Rhode Island, South Dakota, and Utah legislatures each embrace the narrowed scope of the uniform version[66] and extend course of performance to all transactions governed by the Code.[67]

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[64] *See* ARK. CODE ANN. § 4-1-201(b)(20) (Supp. 2005); CAL. COM. CODE § 1201(b)(20) (West Supp. 2007); COLO. REV. STAT. § 4-1-201(b)(19) (2006); CONN. GEN. STAT. ANN. § 42a-1-201(b)(20) (West Supp. 2006); DEL. CODE ANN. tit. 6, § 1-201(b)(20) (2005); KY. REV. STAT. ANN. § 355.1-201(2)(t) (LexisNexis Supp. 2006); LA. REV. STAT. ANN. § 10:1-201(b)(20) (Supp. 2007); MINN. STAT. ANN. § 336.1-201(b)(20) (Supp. 2007); MONT. CODE ANN. § 30-1-201(2)(u) (2005); NEV. REV. STAT. § 104.1201(2)(t) (West Supp. 2006); N.H. REV. STAT. ANN. § 382-A:1-201(b)(20) (LexisNexis Supp. 2006); N.M. STAT. ANN. § 55-1-201(b)(20) (LexisNexis Supp. 2006); N.C. GEN. STAT. § 25-1-201(b)(20) (Interim Supp. 2006); OKLA. STAT. ANN., tit. 12A, § 1-201(b)(20) (West Supp. 2007); TEX. BUS. & COM. CODE ANN. § 1.201(b)(20) (Vernon Supp. 2006); W. VA. CODE ANN. § 46-1-201(b)(20) (LexisNexis Supp. 2006).

[65] *See* ALA. CODE § 7-1-201(b)(20) (2006); ARIZ. REV. STAT. ANN. § 47-1201(B)(20) (Supp. 2006); HAW. REV. STAT. ANN. § 490:1-201(b)(20) (LexisNexis Supp. 2006); IDAHO CODE ANN. § 28-1-201(b)(20) (Supp. 2006); NEB. REV. STAT. ANN. U.C.C. § 1-201(b)(20) (LexisNexis Supp. 2006); VA. CODE ANN. § 8.1A-201(b)(20) (Supp. 2006).

[66] *See* HB 151 & SB 252, *supra* note 50, § 1 (to be codified at FLA. STAT. § 671.101(2) if enacted); SB 419, *supra* note 51, § 1 (to be codified at IND. CODE § 26-1-1-101(2) if enacted); SB 183, *supra* note 52, § 2 (to be codified at KAN. STAT. ANN. § 84-1-102 if enacted); HB 3731, *supra* note 58, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-102 if enacted); HB 1035, *supra* note 54, § 6 (to be codified at N.D. CENT. CODE § 41-01-02 if enacted); SB 105, *supra* note 55, § 2 (to be codified at R.I. GEN. LAWS § 6A-1-102 if enacted); SB 85, *supra* note 56, § 2 (to be codified at S.D. CODIFIED LAWS § 57A-1-102 if enacted); SB 91, *supra* note 57, § 8 (to be codified at UTAH CODE § 70A-1a-102 if enacted).

[67] *See* HB 151 & SB 252, *supra* note 50, § 9 (to be recodified at FLA. STAT. § 671.205 if enacted); SB 419, *supra* note 51, § 4 (to be recodified at IND. CODE § 26-1-1-205 if enacted); SB 183, *supra* note 52, § 17 (to be codified at KAN. STAT. ANN. § 84-1-303 if enacted); HB 3731, *supra* note 58, § 2 (to be codified at MASS. GEN.

Florida HB 151 and SB 252, Indiana SB 419, Kansas SB 183, Massachusetts HB 3731, North Dakota HB 1035, Rhode Island SB 105, and Utah SB 91 reject uniform R1-301 in favor of a choice of law provision that generally resembles pre-Revised 1-105.[68] As introduced, Indiana SB 419, Kansas SB 183, and Utah SB 91 included uniform R1-301. All three were amended by the responsible committee in their originating chambers to reject uniform R1-301 in favor of a choice of law provision that generally resembles pre-Revised 1-105.[69] Only South Dakota SB 85 currently includes uniform R1-301[70] – although the responsible legislative committee has all but killed SB 85.[71]

The proposed revisions of Article 1 currently pending in Florida, Kansas, Massachusetts, North Dakota, Rhode Island, and South Dakota choose uniform R1-201(b)(20)'s unitary good

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LAWS ch. 106, § 1-303 if enacted); HB 1035, *supra* note 54, § 6 (to be codified at N.D. CENT. CODE § 41-01-17 if enacted); SB 105, *supra* note 55, § 4 (to be codified at R.I. GEN. LAWS § 6A-1-303 if enacted); SB 85, *supra* note 56, § 17 (to be codified at S.D. CODIFIED LAWS § 57A-1-303 if enacted); SB 91, *supra* note 57, § 24 (to be codified at UTAH CODE § 70A-1a-303 if enacted).

[68] *See* SB 419, *supra* note 51, § 5 (to be codified at IND. CODE § 26-1-1-301 if enacted); HB 3731, *supra* note 58, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-301 if enacted); HB 1035, *supra* note 54, § 6 (to be codified at N.D. CENT. CODE § 41-01-15 if enacted); SB 105, *supra* note 55, § 4 (to be codified at R.I. GEN. LAWS § 6A-1-301 if enacted); SB 91, *supra* note 57, § 22 (to be codified at UTAH CODE § 70A-1a-301 if enacted).

Both Florida HB 151 and SB 252 are structured as amendments to Florida's existing Article 1. Neither bill strikes current FLA. STAT. ANN. § 671.105 (West 2004); nor does either bill include any language from "uniform" R1-301. The logical inference is that the bills propose to leave pre-Revised 1-105 well enough alone. Douglas A. Bates, an attorney with Berger Singerman in Miami and a member of the Bankruptcy/UCC Committee of the Florida Bar's Business Law Section who has been involved in both this year's and last year's efforts to get Revised Article 1 enacted in Florida, has confirmed that the drafters intended to leave pre-Revised 1-105 intact. E-mail from Douglas A. Bates to Keith A. Rowley, dated Jan. 31, 2007 (on file with the author).

[69] *See infra* subpart II.C.

[70] *See* SB 183, *supra* note 52, § 15 (to be codified at KAN. STAT. ANN. § 84-1-301 if enacted); SB 85, *supra* note 56, § 15 (to be codified at S.D. CODIFIED LAWS § 57A-1-301 if enacted).

[71] *See infra* text accompanying notes 89-90. This after reliable sources indicated that the bill's authors had agreed to pull uniform R1-301 and replace it with language tracking pre-Revised 1-1-05. *See* E-mail from Ann Weber to Keith A. Rowley, dated Jan. 30, 2007 (on file with the author).

faith standard.[72] Indiana SB 419, Rhode Island SB 105, and Utah SB 91 retain the bifurcated good faith standard of pre-Revised 1-201(19), 2-103(1)(b) & 2A-103(3).[73]

C. Prospects for Additional Adoptions

As of March 6, legislators in seven states had introduced versions of Revised Article 1. Those bills, plus one that has languished in the Massachusetts legislature for nearly two years, appear likely to make Revised Article 1 the law in a majority of states by January 1, 2008.

Senator Dave Aronberg pre-filed Florida SB 252 on December 14, 2006. On February 6, the Senate Commerce Committee unanimously approved SB 252, as amended in ways that do not affect Article 1.[74] SB 252 is now before the Senate Judiciary Committee, which has scheduled a hearing for March 8.[75] Representative Jack Seiler filed HB 151 on January 5. On January 29, HB 151 was referred to the House Safety & Security Council, which referred it to

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[72] *See* HB 151 & SB 252, *supra* note 50, § 5 (to be codified at FLA. STAT. § 671.201(20) if enacted); SB 183, *supra* note 52, § 9 (to be codified at KAN. STAT. ANN. § 84-1-201(b)(20) if enacted); HB 3731, *supra* note 58, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-201(b)(20) if enacted); HB 1035, *supra* note 54, § 6 (to be codified at N.D. CENT. CODE § 41-01-09(2)(t) if enacted); SB 85, *supra* note 56, § 9 (to be codified at S.D. CODIFIED LAWS § 57A-1-201(b)(20) if enacted).

[73] *See* SB 419, *supra* note 51, § 3 (to be codified at IND. CODE §§ 26-1-1-201(19) if enacted); SB 105, *supra* note 55, § 2 (to be codified at R.I. GEN. LAWS § 6A-1-201(b)(20) if enacted); SB 91, *supra* note 57, § 16 (to be codified at UTAH CODE § 70A-1a-201(2)(t) if enacted).

Ill-fated Illinois SB 1647, *see supra* note 58, likewise retained the bifurcated standard of pre-Revised §§ 1-201(19) and 2-103(1)(b).

As introduced, Indiana SB 419 retained pre-Revised Article 1's "honesty in fact in the conduct or transaction concerned" definition and deleted the "observance of reasonable commercial standards of fair dealing" standard for merchants from current Article 2. *See* http://www.in.gov/legislative/bills/2007/PDF/IN/IN0419.1.pdf, §§ 3 & 7 (to be codified at IND. CODE §§ 26-1-1-201(19) & 26-1-2-103(1)(b) if enacted) (last visited Mar. 6, 2007).

[74] *See* http://www.flsenate.gov/cgi-bin/view_page.pl?Tab=session&Submenu=1&FT=D&File=session/2007/Senate/bills/votes_com/html/SSB0252.CM.html (last visited Mar. 6, 2007); compare SB 252, *supra* note 50 *with* http://www.flsenate.gov/data/session/2007/Senate/bills/billtext/pdf/s0252.pdf (last visited Mar. 6, 2007).

[75] *See* http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=0252&Chamber=Senate&Year=2007&Title=%2D%3EBill%2520Info%3AS%25200252%2D%3ESession%25202007 (last visited Mar. 6, 2007).

the House Constitution and Civil Law Committee on February 8. On February 21, the Constitution and Civil Law Committee reported HB 151 favorably with three technical amendments relating to provisions in the bill that are not part of Revised Article 1.[76] The bill is now before the Safety and Security Council.[77]

On January 11, 2007, Senator Vi Simpson introduced Indiana SB 419, which was promptly referred to the Senate Insurance and Financial Institutions Committee. On February 1, the Committee unanimously voted to recommend SB 419 subject to amendments, *inter alia*, replacing uniform R1-301 with language consistent with pre-Revised 1-105.[78] SB 419 passed the Senate on February 13 by a vote of 45-1 and is now before the House Committee on Financial Institutions.[79]

Kansas SB 183 was introduced January 25, 2007. On February 19, the Senate Judiciary Committee favorably recommended SB 183, as amended to, *inter alia*, replace uniform R1-301 with language consistent with pre-Revised 1-105.[80] The Senate passed amended SB 183 on

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[76] *See* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0151a.CCL.doc&DocumentType=Analysis&BillNumber=0151&Session=2007 (last visited Mar. 6, 2007).

[77] *See* http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=34461&SessionIndex=-1&SessionId=54&BillText=&BillNumber=&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=1 (last visited Mar. 6, 2007).

[78] *See* http://www.in.gov/legislative/bills/2007/PDF/Srollcal/5749.PDF.pdf (last visited Mar. 6, 2007); http://www.in.gov/legislative/bills/2007/PDF/SCRP/AM041902.001.pdf (last visited Mar. 6, 2007). The amendments also strike Section 7 of the introduced bill, which would have deleted IND. CODE § 26-1-2-103(1)(b) and had the effect of holding Article 2 merchants to an "honesty in fact" good faith standard. *See supra* note 73.

[79] *See* http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2007&request=getActions&doctype=SB&docno=0419 (last visited Mar. 6, 2007).

[80] *See* 2007 S.J. 169-70, *available at* http://www.kslegislature.org/journals/2007/sj0219.pdf (last visited Mar. 6, 2007).

February 21.[81] SB 183 is presently before the House Judiciary Committee, which has scheduled a March 8 hearing.[82]

In early 2005, Representative Paul Loscocco introduced what would become Massachusetts HB 3731.[83] The bill was referred to the Joint Committee on Economic Development and Emerging Technologies, which held a public hearing on October 26, 2005. On March 23, 2006, the Massachusetts House extended the committee's deadline to report on the bill to June 23. On July 6, the Senate and House extended the reporting date to July 31. On August 17, the House voted to extend the reporting date to January 2, 2007.[84] No further action was been reported.

The North Dakota House unanimously approved HB 1035 on January 11, 2007[85] –eight days after its introduction. After cooling its heels for a month, HB 1035 was introduced in the North Dakota Senate on February 13 and referred to the Judiciary Committee, which reported the bill favorably on March 2.[86] The full Senate unanimously approved HB 1035 on March 5.[87]

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[81] *See* 2007 S.J. 180, *available at* http://www.kslegislature.org/journals/2007/sj0221.pdf (last visited Mar. 6, 2007).

[82] *See* http://www.kslegislature.org/legsrv-billtrack/searchBills.do;jsessionid=1C1C98377FAD495F1B917C6ADC581963 (last visited Mar. 6, 2007).

[83] A prior effort in Massachusetts to enact a version of Revised Article 1 that included uniform R1-301 proved unsuccessful. *See* H.B. 91 (copy on file with the author) (formerly available at http://www.mass.gov/legis/bills/house/ ht00091.htm (last visited Nov. 5, 2004)). Ed Smith, a prominent commercial lawyer with Boston's Bingham McCutchen LLP, and one of Massachusetts's NCCUSL Commissioners, reported that the inclusion of uniform § R1-301 in H.B. 91 "was objected to by the bar, the bankers and the insurers. We have offered to go back to the old 1-105 version, but it is doubtful that the bill will move before the current legislative session expires. It has been 'out for study' which is pretty much of a graveyard." E-mail from Edwin E. Smith to Keith A. Rowley, Aug. 6, 2004 (on file with the author).

[84] *See* http://www.mass.gov/legis/184history/h03731.htm (last visited Mar. 6, 2007).

[85] *See* 2007 H.J. 112, available at http://www.legis.nd.gov/assembly/60-2007/journals/hr07.pdf#Page112 (last visited Mar. 6, 2007)

[86] *See* http://www.legis.nd.gov/assembly/60-2007/bill-actions/ba1035.html (last visited Mar. 6, 2007).

Senator William Walaska introduced Rhode Island SB 105 on January 24, 2007. The bill was promptly referred to the Senate Corporations Committee.[88] No further action has been reported.

Senators Dave Knudson and Scott Heidepriem, with six House co-sponsors, introduced South Dakota SB 85 on January 18, 2007. On February 2, the Senate Judiciary Committee unanimously voted to defer consideration of SB 85 until 2008, so that the South Dakota Bar Association's Business Law Committee could review and comment on it.[89] Despite the Committee's decision to defer consideration, another senator may ask that the bill be considered this session; therefore, it is not technically dead.[90]

Senator Lyle Hillyard introduced Utah SB 91 on January 15, 2007. The bill was promptly referred to the Senate Business and Labor Committee, which unanimously approved the bill only after amending it to strike uniform R1-301 and R1-201(b)(20) and replace them with language consistent with pre-Revised 1-105 and 1-201(19), respectively.[91] Following a floor amendment,[92] the Utah Senate passed Substitute SB 91 without opposition on February 13.

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[87] *See* 2007 S.J. 669, available at http://www.legis.nd.gov/assembly/60-2007/journals/sr41.pdf#Page699 (last visited Mar. 6, 2007).

[88] *See* http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=BillStatus&WCE=ifrmBillStatus&WCU (last visited Mar. 6, 2007).

[89] *See* http://legis.state.sd.us/sessions/2007/cmminute/minSJU02021000.htm#13531 (last visited Mar. 6, 2007); http://legis.state.sd.us/sessions/2007/Audio.aspx?MeetingDate=02/02/2007&CommitteeCode=SJU&BillNumber=85 (last visited Mar. 6, 2007).

[90] *See* E-mail from Sen. Scott Heidepriem to Keith A. Rowley, dated Feb. 7, 2007 (on file with the author) ("[A] motion to defer until a non-existent day allows debate on whether to kill it or not. The feeling on this bill was that it had not yet been vetted by the appropriate state bar committee.").

[91] *Compare* http://le.utah.gov/~2007/bills/sbillint/sb0091s01.pdf (last visited Mar. 6, 2007) *with* http://www.le.state.ut.us/~2007/bills/sbillint/sb0091.pdf (last visited Mar. 6, 2007).

[92] *Compare* http://le.utah.gov/~2007/bills/sbillamd/sb0091s01.pdf (last visited Mar. 6, 2007) *with* http://le.utah.gov/~2007/bills/sbillint/sb0091s01.pdf (last visited Mar. 6, 2007).

On February 28, the Utah House passed the bill without opposition, returned it to the Senate, where the President of the Senate signed the bill and submitted it for enrollment.[93] As of March 6, 2007, SB 91 was still awaiting enrollment.[94]

III. What's a State to Do?

Everything else being constant, uniformity is good for commercial law and, in turn, for commerce, because the predictability fostered by uniformity reduces transaction costs and "levels the playing field" across jurisdictions. However, everything else rarely is constant, and uniformity may bear costs as well as benefits.

A. Course of Performance

The decision to explicitly import course of performance into Revised Article 1 appears sound and carries with it no apparent cost. A widely-recognized principle of contract law counsels courts to look to the parties' course of performance of a contract – sometimes referred to as the parties' "practical construction" of the contract – when interpreting or construing that contract.[95] It is not surprising, therefore, that every state that has enacted Revised Article 1 to date has enacted Revised Section 1-303 as drafted.[96] A legislature enacting Revised Article 1 should enact Section R1-303 as drafted. Doing so will foster uniformity.

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[93] *See* http://le.utah.gov/~2007/status/sbillsta/sb0091s01.htm (last visited Mar. 6, 2007).

[94] *See id.*; *see also* http://governor.utah.gov/cgi-win/billact.exe (last visited Mar. 6, 2007).

[95] *See, e.g.*, Moore v. Prindle, 394 P.2d 352, 354 (Nev. 1964) ("In determining which contract is in effect the practical construction and interpretation of the parties as evidenced by their conduct is always persuasive, if not conclusive." (citing Reno Club v. Young Inv. Co., 182 P.2d 1011 (Nev. 1947), and Flyge v. Flynn, 166 P.2d 539 (Nev. 1946)); *accord* Wiley v. Cook, 583 P.2d 1076, 1078 n.2 (Nev. 1978). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1979); Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73, 147-49 (1999).

[96] *See supra* note 60 and accompanying text.

B. Choice of Law

The decision to allow parties to choose the law of some jurisdiction wholly unrelated to them or their transaction is contrary to the prevailing rules regarding contractual choice of law[97] and is sufficiently problematic that none of the states that have enacted Revised Article 1 has enacted uniform R1-301.[98] A legislature enacting Revised Article 1 should *not* enact Section R1-301(a)-(e) as drafted. Not enacting Section R1-301(a)-(e) will foster uniformity across jurisdictions and consistent treatment of choice-of-law clauses in contracts governed by the law of a particular jurisdiction.

C. Scope

The decision to narrow Article 1's scope – notwithstanding the protestations of its drafters that they did not do so[99] – is not costless, although the benefits of uniformity may outweigh those costs. Sales of intangible or immovable personal property not governed by another article of the Code, which are within the scope of the version of Article 1 currently in force in thirty states and the District of Columbia, are excluded from the scope of Revised Article 1; therefore, parties to these sales will, *inter alia*, lose the protection of the Code's duty of good faith and fair dealing and of the default statute of frauds in pre-Revised Section 1-206.

Most states' courts recognize an implied duty of good faith and fair dealing in all contracts.[100] Thus, in most states, parties to contracts excluded by Revised Article 1 appear to be

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[97] *See supra* notes 21-22 and accompanying text.

[98] *See supra* note 61 and accompanying text.

[99] *See supra* note 4 and accompanying text.

[100] *Compare, e.g.*, Pemberton v. Farmers Ins. Exch., 858 P.2d 380, 382 (Nev. 1993); R.J. Gaydos Ins. Agency, Inc. v. National Consumer Ins. Co., 773 A.2d 1132, 1148 (N.J. 2001); Uptown Heights Assocs. v. Seafirst Corp., 891 P.2d 639, 643 (Or. 1995); Wallace v. National Bank of Commerce, 938 S.W.2d 684, 686 (Tenn. 1996);

protected from bad faith and unfair dealing without Section 1-203. On the other hand, most states lack another statute of frauds that will fill the gap left by the loss of Section 1-206. Some may see that as a good thing. If a legislature does not, it appears to have four options: (1) do not enact Revised Article 1; (2) enact Revised Article 1, but without the new scope provision, Section R1-102; (3) enact Revised Article 1, but with an expanded scope provision that would encompass all sales of personal property not governed by another Article of the Code; or (4) enact Revised Article 1 and either amend an existing non-Code statute of frauds[101] to include sales of personal property not governed by the revised Code or enact a stand-alone statute of frauds covering sales of personal property not governed by the Code in the wake of Revised Article 1.[102] Enacting Section R1-102 as written and retaining a renumbered Section 1-206 is not

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Rawson v. Conover, 20 P.3d 876, 885 (Utah 2001) (all recognizing a common law duty) *with, e.g.*, Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225 (Tex. 2002) (refusing to recognize a common law duty in the absence of a "special relationship" between the parties or an express agreement imposing the duty). *See generally* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 95, § 205.

[101] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-101(4) (2003) (barring any action "[u]pon a contract to sell or a sale of ... choses in action of the value of five hundred dollars or more" unless "the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized"); NEV. REV. STAT. § 111.220 (requiring a subscribed writing evidencing any agreement not to be fully performed within one year, any promise to answer for another's debt, any promise or agreement made upon consideration of marriage, any promise or commitment by a person engaged in the business of lending money to lend $100,000 or more, and any promise or commitment to pay a fee of $1,000 or more for obtaining a loan of money or extension of credit). N.R.S. § 111.220 bears a close resemblance to portions of *Restatement (Second) of Contracts* § 110(1), *supra* note 95, as does N.R.S. § 111.210, requiring a subscribed writing for the sale or lease of any interest in real property for more than one year, NEV. REV. STAT. § 111.210.

[102] For example, the legislation that resulted in California's enactment of Revised Article 1 added a new section 1624.5 to the California Civil Code, effective January 1, 2007, which reads, in part:

> (a) Except in the cases described in subdivision (b), a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars ($5,000) in amount or value of remedy unless there is some record … that indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed, including by way of electronic signature, … by the party against whom enforcement is sought or by his or her authorized agent.
>
> (b) Subdivision (a) does not apply to contracts governed by the Commercial Code, including contracts for the sale of goods (Section 2201 of the Commercial Code), contracts for the

an option because, in light of Section R1-102, a statute of frauds in Revised Article 1 would not apply to any transactions.[103]

Thus far, the states that have enacted Revised Article 1 have not addressed the effects of its narrowed scope provision, and nothing I have read or heard suggests that any state has declined to enact Revised Article 1 because of Section R1-102's effects. Enacting Section R1-102 as written will foster uniformity. That said, a legislature enacting Revised Article 1 without Section R1-102, or with an amended Section R1-102 that broadens the scope of Revised Article 1 to include transactions that are within the implied scope of current Article 1, should have a negligible impact on commerce, as the net effect would be to keep the scope of Revised Article 1 the same as that of current Article 1. Enacting or amending a non-UCC statute of frauds to require a signed writing evidencing a contract for the sale of personal property not governed by Article 2 or 8 should, likewise, have a negligible impact on commerce, as the net effect would be to require a signed writing only in cases in which current law already does so.

D. Good Faith

The only disagreement among the states that have enacted Revised Article 1 thus far is whether to enact Revised Article 1's unitary good faith standard or retain a bifurcated standard,

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> sale of securities (Section 8113 of the Commercial Code), and security agreements (Sections 9201 and 9203 of the Commercial Code).

CAL. CIV. CODE § 1624.5 (West Supp. 2007); *see also, e.g.*, SB 105, *supra* note 55, § 1 (to be codified at R.I. GEN. LAWS § 9-1-4(7) if enacted) (providing that "No action shall be brought … [e]xcept in cases to which the Uniform Commercial Code (Title 6A) applies, … to charge any person upon any contract for the sale of personal property beyond five thousand dollars ($5,000) in an amount or value or remedy, unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized.").

[103] Nonetheless, this appears to be what Indiana SB 419 does. As introduced, SB 419 does not purport to replace existing Article 1 in its entirety. Rather, it deletes certain specified provisions, amends others, and adds yet

holding merchants and others assumed to have knowledge of commercially reasonable practices to a different good faith standard than it does non-merchants and others assumed not to have knowledge of commercially reasonable practices.[104] At this point in time, enough states have adopted the uniform version, and enough have declined to do so, that it is difficult to claim that either action will promote interstate uniformity.

Assuming that pre-Revised Section 1-201(19) affords non-merchants at least as much protection in U.C.C. transactions as a state's common law duty of good faith and fair dealing would afford them in a non-U.C.C. transaction, the key question seems to be whether enacting Section R1-201(b)(20) as written would afford non-merchants less protection than a state's common law duty of good faith and fair dealing. If so, and assuming further that a legislature contemplating the adoption of Revised Article 1 does not wish to erode the good faith protection currently afforded non-merchants in transactions governed by its Uniform Commercial Code, then it could reject the unitary good faith standard of Section R1-201(b)(20), and leave pre-Revised Section 1-201(19) and Sections 2-103(1)(b) and 2A-103(3) in place to retain the current merchant/non-merchant distinction.[105] Alternatively, a legislature could alter the language of Section R1-201(b)(20), so that the unitary standard would apply "except as otherwise provided in Articles 2, 2A, and 5," and leave Sections 2-103(1)(b) and 2A-103(3) in place to retain the current merchant/non-merchant distinction.

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others. The present version of SB 419 narrows the scope of Article 1, *see* SB 419, *supra* note 51, § 1 (to be codified at IND. CODE § 26-1-1-101(2) if enacted), but neither deletes nor amends current Section 26-1-1-206.

[104] *See supra* note 16.

[105] *See supra* note 65.