... 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.

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....

The ubiquitous nature of Article 1 justifies attention to its revision. Part One of this paper discusses some noteworthy differences between Revised Article 1 and the version of Article 1 in force in a majority of states as recently as June 30, 2007, and still in effect (as of August 1, 2010) in eleven states and the District of Columbia. Part Two gauges how Revised Article 1 has fared thus far in the states. Part Three considers the pros and cons of each noteworthy change, suggests one or more legislative response(s) to each, and briefly analyzes some implications of each response.
I. Noteworthy Changes in Revised Article 1

There are three noteworthy differences between the current official version of Revised Article 1 and the pre-revised version still in effect in sixteen states and the District of Columbia. First, Revised Article 1 expressly narrows its own scope, so that it applies only to transactions governed by another article of the Code. Second, Revised Article 1 – together with its conforming amendments to Articles 2 and 2A – applies the same good faith standard to merchants and non-merchants. Third, Revised Article 1 extends the relevance of course of performance evidence to all agreements governed by the Code. Until mid-2008, a fourth – and the most controversial – difference was that Revised Article 1 purported to allow the parties in any non-consumer transaction to choose the law of any state to govern their transaction, without regard to any relationship between that state and either the parties or the transaction.

A. The Scope of Revised Article 1

Unlike pre-revised Article 1, which contains no explicit scope provision, Section R1-102 states that Revised Article 1 only “applies to a transaction to the extent that it is governed by another article of [the Code].” 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.

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2 See infra note 28 and accompanying text.

3 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-S35 (2004 & Supp. 2009), as can the uniform version of pre-Revised Article 1, with its official comments and annotations, 1 U.L.A. 69-352 & S36-48 (2004 & Supp. 2009).

4 U.C.C. § R1-102.
This is a departure from pre-revised Article 1, notwithstanding its drafters’ claim 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 Commercial Code.”\(^5\) Pre-revised 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.”\(^6\) The Official Comment to pre-revised Section 1-206 and numerous court decisions recognize that pre-revised Section 1-206 – and, by extension, the rest of Article 1 – applies to, \textit{inter alia}, sales of intellectual property rights,\(^7\) goodwill and other intangibles included in the sale of a going business concern,\(^8\) franchise rights,\(^9\) “chooses in action,”\(^10\) and other forms of intangible personal property not otherwise covered by the Code.\(^11\)

\(^5\) Id. § R1-102 cmt. 1; \textit{see also} Patchel & Auerbach, \textit{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”).

\(^6\) U.C.C. § 1-206(1)-(2).


If this were not the case, there would be scant need for Section 1-206. And, given the choice between construing pre-revised Section 1-206 to apply to transactions not otherwise governed by the Code and construing it to be surplusage, the Uniform Commercial Code’s chief architect advocated the former. \textit{See} Karl N. Llewellyn,
B. Good Faith Under Revised Article 1

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

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.”).

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); see, e.g., Rogers v. Ricane Enters., Inc., 930 S.W.2d 157, 175 (Tex. App. 1996) (“[T]he test for good faith, i.e., honesty in fact in the conduct or transaction, is the actual belief of the party in question, not the reasonableness of the belief.” (citing La Sara Grain Co. v. First Nat’l Bank of Mercedes, 673 S.W.2d 558, 563 (Tex. 1984)); Town & Country State Bank of Newport v. First State Bank of St. Paul, 358 N.W.2d 387, 392 (Minn. 1984) (holding that U.C.C. § 1-201(19) imposes “a subjective test, requiring honesty of intent rather than absence of circumstances which would put an ordinarily prudent holder on inquiry.” (quotation omitted)).

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.”) 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, e.g., Ledbetter v. Darwin Dobbs Co., 473 So. 2d 197, 201 (Ala. Civ. App. 1985); Hammer v. Thompson, 129 P.3d 609, 617 (Kan. Ct. App. 2006) (both recognizing that Article 2 holds merchants to a higher standard of good faith than Article 1 holds nonmerchants). See generally Moses, supra note 14, at 51-52.
Suppose I sign a contract to purchase a home spa from my local Sears store 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 reasonable commercial standards of fair dealing in the sale and servicing of home spas. If the relevant standards require that I inspect the home spa every few days and I fail to inspect the spa for two weeks 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. Course of Performance Under Revised Article 1

The text of pre-revised Article 1 refers to course of performance only as one possible element of an “agreement.”\(^{18}\) Otherwise, Articles 2 and 2A define and operationalize course of performance.\(^{19}\) As a result, there has been some uncertainty about what role course of

\(^{17}\) 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.

\(^{18}\) 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.

\(^{19}\) See id. §§ 2-208 & 2A-207.
performance plays in transactions governed by Article 3, 4, 4A, 5, 6, 8, or 9 and how course of performance fits into the hierarchy set forth in pre-revised Section 1-205. 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.

D. Choice of Law Under Revised Article 1

Both pre-revised and Revised Article 1 empower the parties to agree on governing law, subject to certain limitations. Where pre-revised and Revised Article 1 parted ways until mid-2008 was that pre-revised Article 1 requires the parties to choose the law of a jurisdiction that is reasonably related to the transaction; whereas Revised Article 1, as the ALI and NCCUSL

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20 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.”).

21 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 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)); 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).” (emphasis added and footnotes omitted)).

22 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)).

23 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.”).
originally promulgated it, required no such relationship between the transaction and the chosen jurisdiction,\(^{24}\) unless at least one party to the agreement was a consumer.\(^{25}\)

Under the original version of Revised 1-301, if Sears is headquartered and incorporated in Illinois, I reside in Nevada, and I purchase a home spa from a Sears store in Las Vegas, then a provision in the sales agreement subjecting all disputes to Maine law would not bind me because I am a consumer; but, if Sears purchased the spa for resale from The Wizard of Spas, located in Kansas, and The Wizard of Spas shipped directly to the Las Vegas Sears store, then a similar provision in the Sears-The Wizard of Spas agreement would bind both parties because neither is a consumer.

In so doing, the original version of Revised Article 1 ignored 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 bearing a greater relationship to the dispute than the chosen state.\(^{26}\) As one leading commentator put it, the original version of R1-301 was “far broader, cover[ed] far more contracts, and (by sheer force of numbers of contracts implicated) [was] less

\(^{24}\) See U.C.C. § R1-301(c)(1) (2001) (“Except as otherwise provided in this section ..., an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated.”).

\(^{25}\) See id. § R1-301(e)(1) (“If one of the parties to a transaction is a consumer,... [a]n agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State ... designated.”).

\(^{26}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1969); see, e.g., 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)). \emph{See generally} Richard K. Greenstein, \emph{Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?}, 73 TEMP. L. REV. 1159 (2000).
deferential to the ordinarily-governing law of other jurisdictions than any widely-known conflict of laws rule[] anywhere.”

In 2008, the ALI and NCCUSL promulgated a substitute Section R1-301, effectively reinstating pre-revised Section 1-105. Once again, Article 1 protects both Sears and me from a contractual provision purporting to subject any dispute to the law of Maine, a jurisdiction wholly unrelated to our transaction and to Sears’s transaction with Kansas-based The Wizard of Spas.

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27 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 cautioned that the original version of 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). Another commentator has argued that state choice-of-law rules should generally defer to the parties’ contractual choice of law. See Jack M. Graves, Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform, 36 SETON HALL L. REV. 59 (2005).

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

As of August 1, 2010, Revised Article 1 will be in effect in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, and others.

30 ALASKA STAT. ANN. §§ 45.01.111 to 45.01.310 (West Supp. 2010) (effective January 1, 2010).
31 ARIZ. REV. STAT. ANN. §§ 47-1101 to 47-1310 (Supp. 2009).

The Arizona Senate considered a Revised Article 1 bill in 2005. See http://www.azleg.gov/legtext/47leg/1r/bills/sb1234p.pdf (last visited July 31, 2010). However, that bill never emerged from committee. See http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/47leg/1r/bills/sb1234o.asp (last visited July 31, 2010). In March 2005, 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 “would not get out of committee this session.” E-mail from Morton Scult to Keith A. Rowley, Mar. 7, 2005 (on file with the author). The Revised Article 1 bill enacted the following year replaced the uniform R1-201(b)(20) good faith definition with the pre-revised 1-201(19) version. See ARIZ. REV. STAT. ANN. § 47-1201(B)(20).

32 ARK. CODE ANN. §§ 4-1-101 to 4-1-310 (West Supp. 2009).
33 CAL. COM. CODE §§ 1101 to 1310 (West Supp. 2009).
34 COLO. REV. STAT. ANN. §§ 4-1-101 to 4-1-310 (West Supp. 2008).
35 CONN. GEN. STAT. ANN. § 42a-1-101 to 42a-1-310 (West Supp. 2008).


The Illinois passed a Revised Article 1 bill in 2005, after its author agreed to replace uniform R1-301 and R1-201(b)(20) with language consistent with pre-Revised 1-105 and 1-201(19), respectively. See http://www.ilga.gov/legislation/94/SB/PDF/09400SB1647lv.pdf (last visited July 31, 2010). However, the Illinois House took no meaningful action on SB1647 before adjourning sine die in January 2007. See http://www.ilga.gov/


As introduced, 2007 Indiana P.L. 143 (née SB 419) included uniform R1-301. See SB 419, § 5, available at http://www.in.gov/legislative/bills/2007/PDF/IN/IN0419.1.pdf (last visited July 31, 2010). SB 419 was subsequently amended to, inter alia, replace uniform R1-301 with language consistent with pre-Revised 1-105. See http://www.in.gov/legislative/bills/2007/PDF/SCR/AM041902.001.pdf (last visited July 31, 2010). The amendments also struck Section 7 of the introduced bill, which would have deleted IND. CODE ANN. § 26-1-2-103(1)(b) and had the effect of holding Article 2 merchants to an “honesty in fact” good faith standard.

42 IOWA CODE ANN. §§ 554.1101 to 554.1310 (West Supp. 2008).


43 KAN. STAT. ANN. §§ 84-1-101 to 84-1-310 (West 2008).

As introduced, 2007 Kansas P.L. 89 (née SB 183) included uniform R1-301. See SB 183, § 15 (copy on file with author). SB 183 was subsequently amended to replace uniform R1-301 with language consistent with pre-Revised 1-105. See 2007 S.J. 169-70, available at http://www.kslegislature.org/journals/2007/sj0219.pdf (last visited July 31, 2010); see also http://www.kslegislature.org/supplemental/2008/5N0183.pdf (last visited July 31, 2010). During its 2005-06 session, the Kansas legislature considered a Revised Article 1 bill including uniform R1-301. See HB 2453, available at http://www.kslegislature.org/bills/2006/2453.pdf (last visited July 31, 2010). HB 2453 was introduced on February 11, 2005, see http://www.kslegislature.org/journals/2005/hj0211.pdf (last visited July 31, 2010), and referred to committee on February 14, see http://www.kslegislature.org/journals/2005/hj0214.pdf (last visited July 31, 2010). No further action was reported before the legislature adjourned sine die.


As introduced, Mississippi SB 2419 included a choice-of-law provision resembling original R1-301. See SB 2419, § 3, available at http://billstatus.ls.state.ms.us/documents/2010/pdf/SB/2400-2499/SB2419IN.pdf (last visited July 31, 2010). SB 2419 was amended to strike the introduced version of 1-301 and replace it with language
Tennessee,\textsuperscript{61} Texas,\textsuperscript{62} Utah,\textsuperscript{63} Vermont,\textsuperscript{64} Virginia,\textsuperscript{65} West Virginia,\textsuperscript{66} and Wisconsin\textsuperscript{67}; and bills proposing its enactment are pending in Massachusetts,\textsuperscript{68} Ohio,\textsuperscript{69} and Washington.\textsuperscript{70}

similar to the substitute 1-301 the ALI and NCCUSL promulgated in 2008. See http://billstatus.ls.state.ms.us/documents/2010/pdf/sam/SB2419_S_Amend_02.pdf (last visited July 31, 2010). The Senate passed amended SB 2149 on February 10, see http://billstatus.ls.state.ms.us/2010/pdf/votes/senate/0370042.pdf (last visited July 31, 2010); the House did likewise on March 9, see http://billstatus.ls.state.ms.us/2010/pdf/votes/house/0640018.pdf (last visited July 31, 2010); and Governor Haley Barbour signed it into law on April 13, see http://billstatus.ls.state.ms.us/2010/pdf/history/SB/SB2419.xml (last visited July 31, 2010).

51 NEV. REV. STAT. ANN. §§ 104.1101 to 104.1310 (LexisNexis 2007).


A. Adoptions to Date


As introduced, 2007 Utah P.L. 272 (née SB 91) included uniform R1-301 and uniform R1-201(b)(20). See SB 91, § 8, available at http://www.le.state.ut.us/~2007/bills/sbillint/sb0091.pdf (last visited July 31, 2010). SB 91 was enacted only after the Senate Business and Labor Committee amended 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, see http://www.le.state.ut.us/~2007/bills/sbillint/sb0091.pdf (last visited July 31, 2010), and a floor amendment expanded the list of subject-specific choice-of-law provisions to which amended R1-301 would yield, see http://le.utah.gov/~2007/bills/sbillint/sb0091s01.pdf (last visited July 31, 2010).

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Wisconsin each embrace the narrowed scope of uniform R1-102, extend course of performance to all transactions the Code governs, and reject the original version of uniform R1-301 in favor of language retaining the essence of pre-revised Section 1-105 or tracking the substitute R1-301 the ALI and NCCUSL promulgated in 2008 – both of which require some reasonable relation between the state whose law the parties choose by agreement and the transaction the parties wish to subject to that law.

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Louisiana rejected the original version of R1-301 in favor of a provision that defers to its general statutory choice-of-law scheme except where a choice-of-law provision elsewhere in Louisiana’s version of the UCC applies. See LA. REV. STAT. ANN. § 10:1-301 (Supp. 2009).

California’s rejection of the original version of R1-301 is tempered by Section 1646.5 of the California Civil Code, allowing parties to certain types of contracts with an aggregate value of at least $250,000 – including contracts subject to revised CAL. COM. CODE § 1301(a), but excluding contracts subject to revised CAL. COM. CODE § 1301(c) –to have California law govern their transaction even if California otherwise bears no relation to the transaction. See CAL. CIV. CODE § 1646.5 (West Supp. 2009). Illinois non-UCC law has a similar provision, which has not been amended to reflect Illinois’s enactment of Revised Article 1. See 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2004). Because of the permissive language of substitute R1-301(a), it would not be surprising if an Illinois court construed 735 ILL. COMP. STAT. ANN. 105/5-5 to allow parties to non-consumer contracts within the scope of 810 ILL. COMP. STAT. ANN. 5/1-301(a) (West Supp. 2009) with an aggregate value of at least $250,000 to choose Illinois law even if Illinois otherwise bears no relation to the transaction. Florida’s similar non-UCC statute, by contrast, expressly excludes contracts in which the parties choose Florida law even though the transaction bears no reasonable relation to Florida and none of the parties reside, are incorporated, or maintain a place of business in Florida. See FLA. STAT. ANN. § 671.605 (West 2004).
The only division in the ranks of enacting states to date is over the definition of “good faith.” Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, and West Virginia have adopted uniform R1-201(b)(20) and conforming amendments to Articles 2 and 2A that, collectively, eliminate the bifurcated good faith standard in Articles 2 and 2A and hold merchants and non-merchants alike to “honesty in fact and the observance of reasonable commercial standards of fair dealing.”

Mississippi SB 2149, introduced in 2010, likewise included a choice-of-law provision resembling original R1-301. See supra note 48. After its principal sponsor amended it to strike the introduced version of 1-301 and replace it with language similar to the substitute 1-301, the ALI and NCCUSL promulgated in 2008, the amended bill unanimously passed both chambers of the Mississippi Legislature, received the governor’s signature, and took effect on July 1, 2010. See id.

As of July 31, 2010, only the U.S. Virgin Islands has adopted uniform R1-301. See V.I. CODE ANN. tit. 11A, § 1-301 (2003). In response to this nearly-unanimous rejection of uniform R1-301, NCCUSL and the ALI promulgated a substitute version that, as so many states have already done while enacting most of Revised Article 1, retains the essence of former Section 1-105. See U.C.C. § 1-301 (2008), reprinted at 1 U.L.A. 20 (Supp. 2009).


Louisiana, of course, has not adopted UCC Articles 2 and 2A. Nonetheless, its enactment of the R1-201(b)(20) “good faith” definition requires all parties to all contracts subject to R1-304 to act honestly and to observe reasonable commercial standards of fair dealing.

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Arizona, Hawaii, Idaho, Illinois, Nebraska, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin have opted to retain the pre-R1 “honesty in fact in the conduct or transaction concerned” definition and leaving 2-103(1)(b) & 2A-103(3) unchanged.75

B. Pending Legislation

The bills pending in Massachusetts, Ohio, and Washington embrace the narrowed scope of uniform R1-102,76 extend course of performance to all transactions the Code governs,77 and incorporate uniform R1-201(b)(20)’s unitary good faith standard.78

The Massachusetts and Ohio bills reject the original version of R1-301 in favor of a choice-of-law provision along the lines of substitute R1-301;79 whereas the Washington bill, ignoring the enacting states’ unanimous judgment and the ALI’s and NCCUSL’s guidance, Indiana’s original enactment of Revised Article 1 retained the bifurcated “good faith” standard. See IND. CODE ANN. § 26-1-1-201(19) (West Supp. 2008). However, P.L. 135-2009, adopting the 2002 amendments to Articles 3 and 4, also amended Indiana’s Article 1 definition of “good faith” to require “honesty in fact and the observance of reasonable commercial standards of fair dealing,” see 2009 Ind. Acts 1329, 1332 (effective July 1, 2010), available at http://www.in.gov/legislative/pdf/acts_2009.pdf (last visited July 31, 2010), further tilting the balance in favor of the uniform R1-201(b)(20) “good faith” definition.

75 See ALA. CODE § 7-1-201(b)(20) (2006); ARIZ. REV. STAT. ANN. § 47-1201(B)(20) (Supp. 2009); HAW. REV. STAT. ANN. § 490:1-201(b) (West 2008); IDAHO CODE ANN. § 28-1-201(b)(20) (West 2006); 810 ILL. COMP. STAT. ANN. 5/1-201(b)(20) (West Supp. 2009); NEB. REV. STAT. ANN. U.C.C. § 1-201(b)(20) (LexisNexis Supp. 2008); R.I. GEN. LAWS ANN. § 6A-1-201(b)(20) (West Supp. 2009); TENN. CODE ANN. § 47-1-201(b)(20) (West Supp. 2009); UTAH CODE ANN. § 70A-1a-201(2)(t) (West Supp. 2008); VA. CODE ANN. § 8.1A-201(b)(20) (West Supp. 2008); 2009 Wis. Legis. Serv. Act 320, § 8 (West) (to be codified at WIS. STAT. § 401.201(2)(k)).

76 See HB 89, supra note 68, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-102 if enacted); HB 490, supra note 69 (to be codified at OHIO REV. CODE § 1301.102 if enacted); SB 5155, supra note 70, § 2 (to be codified at WASH. REV. CODE § 62A.1-102 if enacted).

77 See HB 89, supra note 68, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-303 if enacted); HB 490, supra note 69 (to be codified at OHIO REV. CODE § 1301.303 if enacted); SB 5155, supra note 70, § 16 (to be codified at WASH. REV. CODE § 62A.1-303 if enacted).

78 See HB 89, supra note 68, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-201(b)(20) if enacted); HB 490, supra note 69 (to be codified at OHIO REV. CODE § 1301.201(B)(20) if enacted); SB 5155, supra note 70, § 8 (to be codified at WASH. REV. CODE § 62A.1-201(20) if enacted).

79 See HB 89, supra note 68, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-301 if enacted); HB 490, supra note 69 (to be codified at OHIO REV. CODE § 1301.301 if enacted).
incorporates the now-superseded version of R1-301 allowing unfettered choice of law in contracts to which no party is a consumer.\textsuperscript{80}

C. Prospects for Additional Adoptions

Massachusetts HB 89,\textsuperscript{81} a fifth attempt to enact Revised Article 1 in the Commonwealth,\textsuperscript{82} was assigned to the Joint Committee on Economic Development and Emerging Technologies on January 20, 2009. Nearly sixteen months later, on May 13, 2010, the committee reported favorably on HB 89. On June 14, the House Committee on Steering, Policy, and Scheduling ordered a second reading.\textsuperscript{83} HB 89 had its second reading on June 15.\textsuperscript{84} As of July 22, the last day for which a House Journal is available, HB 89 still awaited a third reading.

On April 14, 2010, Representatives Stephen Dyer and William P. Coley, II introduced Ohio HB 490.\textsuperscript{85} On May 27, the House Financial Institutions, Real Estate, and Securities

\textsuperscript{80} See SB 5155, supra note 70, § 14 (to be codified at WASH. REV. CODE § 62A.1-301 if enacted).

\textsuperscript{81} See http://www.mass.gov/legis/bills/house/186/ht00pdf/ht00089.pdf (last visited July 31, 2010).

\textsuperscript{82} In early 2005, Representative Paul Loscocco introduced what would become Massachusetts HB 3731. http://www.mass.gov/legis/bills/house/184/ht03pdf/ht03731.pdf (last visited July 31, 2010). 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 extended the reporting date to January 2, 2007. See http://www.mass.gov/legis/184history/h03731.htm (last visited July 31, 2010). On January 11, 2007, Representative Paul Loscocco introduced Massachusetts HB 3924, which succeeded the previously unsuccessful HB 3731. On October 15, HB 4302 superseded HB 3924. See http://www.mass.gov/legis/185history/h03924.htm (last visited July 31, 2010). HB 4302 stalled in the House as did its predecessors. A 2003 effort to enact a version of Revised Article 1 including the original uniform version of R1-301 was also unsuccessful. See HB 91 (copy on file with the author).

\textsuperscript{83} See http://www.mass.gov/legis/186history/h00089.htm (last visited July 31, 2010).


Committee favorably reported a substitute version of HB 490.\textsuperscript{86} (None of the differences between the introduced and committee substitute versions involve key components of Revised Article 1.) The House accepted the committee’s report and ordered substitute HB 490 engrossed and calendared.\textsuperscript{87} No further action has been reported as of July 31.

Senators Adam Kline and Phil Rockefeller introduced Washington SB 5155 on January 15, 2009. It was promptly referred to the Senate Judiciary Committee. At the initial public hearing the following week, those testifying in favor of and in opposition to the bill unanimously opposed the original version of R1-301.\textsuperscript{88} Informed sources in Washington are convinced that the bill will not proceed without replacing original R1-301 with the substitute the ALI and NCCUSL approved in 2008. The Washington Legislature adjourned sine die on April 26, 2009 without taking further action on SB 5155. The bill was reintroduced by resolution, and “retained in [its] present status”\textsuperscript{89} with no change to the bill’s text, for the 2010 Regular Session and 1st Special Session – each of which adjourned sine die with no further action reported on SB 5155.


\textsuperscript{87} See id. at 2716.


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 – assuming it is even achievable – may bear costs, as well as benefits. So, what should the fourteen states that have yet to enact a version of Revised Article 1 do?

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.90 It is not surprising, therefore, that every state that has enacted Revised Article 1 to date has enacted Revised Section 1-303.91 A legislature enacting Revised Article 1 should enact Section R1-303 as drafted. Doing so will foster uniformity.

B. Choice of Law

Allowing 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 law92 and was


91 See supra note 72 and accompanying text.

92 See supra notes 26-27 and accompanying text.
sufficiently problematic that none of the thirty states that had enacted Revised Article 1 by March 1, 2008 had enacted the original version of uniform R1-301, prompting NCCUSL and ALI to promulgate a substitute R1-301.93 Enacting the substitute R1-301, which retains the essence of pre-revised 1-105 and is consistent with the choice of law provisions enacted by 38 of the 39 enacting states,94 will foster uniformity across jurisdictions and consistent treatment with a jurisdiction of choice-of-law clauses in contracts the UCC governs and those it does not govern.

C. Scope

The decision to narrow Article 1’s scope – notwithstanding the protestations of its drafters that they did not do so95 – is not costless, although the benefits of uniformity may outweigh those costs. Revised Article 1 excludes from its scope sales of intangible or immovable personal property not governed by another article of the Code, which are within the scope of pre-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.96 Thus, in most states, parties to contracts excluded by Revised Article 1 appear to be

93 See supra note 28.
94 Louisiana’s R1-301 is idiosyncratic, see supra note 73 – though no more so than its pre-revised 1-105.
95 See supra note 5 and accompanying text.
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 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 1.98 Enacting Section R1-102 as written and retaining a renumbered Section 1-206 is not

97 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. ANN. §§ 111.210 & 111.220 (LexisNexis 2004) (requiring a subscribed writing evidencing any agreement to sell or lease any interest in real property for more than one year, 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).

98 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, 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 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. 2009); see also, e.g., R.I. GEN. LAWS ANN. § 9-1-4(7) (West Supp. 2009) (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
an option because, in light of Section R1-102, a statute of frauds in Revised Article 1 would not apply to any transactions. 99

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 real 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

($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.”).

99 Nonetheless, this appears to be what Indiana’s 2007 enactment of Revised Article 1 did. As enacted and codified, P.L. 143-2007 did not replace existing Article 1 in its entirety; rather, it deleted certain specified provisions, amended others, and added yet others. P.L. 143-2007 narrowed the scope of Article 1, see IND. CODE ANN. § 26-1-1-101(2) (West Supp. 2008), but neither deleted nor amended Section 26-1-1-206, see IND. CODE ANN. § 26-1-1-206 (West 2003 & Supp. 2008). Indiana P.L. 135-2009, see supra note 75, amended Indiana’s Revised Article 1 definition of “good faith” effective July 1, 2010; but, it did not address the apparent inconsistency between IND. CODE ANN. § 26-1-1-101(2) and IND. CODE ANN. § 26-1-1-206. By contrast, Florida’s Revised Article 1 enactment also took the form of selective amendments; however, it expressly repealed former Section 1-206 effective January 1, 2008. See FLA. STAT. ANN. § 671.206 (West Supp. 2009).
that holds merchants and others assumed to have knowledge of commercially reasonable practices to a higher good faith standard than it does non-merchants and others assumed not to have knowledge of commercially reasonable practices.\textsuperscript{100} While the balance among enacting states has tipped markedly toward Revised Section 1-201(b)(20) in the last few years, enough states have declined to adopt the uniform definition that it is difficult to claim that either adopting Revised Section 1-201(b)(20) or retaining pre-Revised Section 1-201(19) will promote interstate uniformity.\textsuperscript{101}

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 uniform Section R1-201(b)(20) 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 does not wish to erode the good faith protection afforded non-merchants in transactions governed by its current U.C.C., then it could reject the unitary good faith standard of uniform 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. 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. To date, eleven states have done the former; none have done the latter.

\textsuperscript{100} See supra note 16.

\textsuperscript{101} See supra text accompanying notes 74 and 75.