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I. INTRODUCTION

EXCEPT as explicitly provided otherwise in the *Uniform Commercial Code* (*UCC* or Code),[1] where a transaction[2] bears a relationship to more than one jurisdiction, if there is an appropriate relationship[3] to the jurisdiction where the issue is raised, the law of that jurisdiction may be applied. The parties may agree, however, that the law of any jurisdiction having a reasonable relationship[4] to the transaction may govern their rights and duties.[5] These rules determine the applicable

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1. *See* UCC § 1-105(2) (2000) (referring to UCC §§ 2-402, 2A-105, 2A-106, 4-102, 4A-507, 5-116, 6-103 (if Article 6 has not been repealed), 8-110, and 9-103).

2. It is presumably a transaction governed by the *UCC*, such as a secured transaction under Article 9. Whether the law applicable to that transaction also applies to other parts of any larger, overall transaction, such as the loan agreement that precedes a secured transaction, is presently unclear. Logically, absent agreement to the contrary, one applicable law makes sense. *See* UCC § 1-105 cmt. 3 (2000). Conversely, by what justification would a provision in UCC Article 1 purport to govern legal matters beyond the *UCC*, even if only as to choice of law? The proposed Prefatory Note to proposed amended Article 1, at II. Substantive Issues A. Scope, will resolve this issue under revised Article 1. The rules in revised Article 1 apply only to transactions within the scope of the other *UCC* Articles. *See also* UCC § 1-102 (Draft 2000). This being so, to the extent the *UCC* is uniformly enacted, proposed section 1-301, which replaces current section 1-105, will be of relatively small consequence. *See, e.g.*, Corsica Coop. Ass'n v. Behlen Mfg. Co., Inc., 967 F. Supp. 382, 384 (D.S.D. 1997) ("[t]here is no true conflict. . .as both states incorporate the statute of limitations found in § 2-725").

Of course, as to the part of the transaction not subject to the *UCC* and subject to other law, an agreement for one law to apply overall might be recognized. Additionally, a court might use the *UCC* rule to determine the applicable law for the part of the transaction not subject to the *UCC*, even in the absence of agreement.

All references to proposed Article 1 are to the draft presented to the 2000 annual meeting of the National Conference of Commissioners on Uniform State Law (NCCUSL), which, along with the American Law Institute, co-sponsors the *UCC*.

3. *See* UCC § 1-105 cmts. 2 & 3 (2000). *See also In re* Am. Steel Prod., Inc., 203 B.R. 504, 506 (Bankr. S.D. Ga. 1996) (showing an example of an "appropriate relationship"); Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1033-34 (D.S.C. 1993); *Corsica*, 967 F. Supp. at 384-85; Mann v. Weyerhaeuser Co., 703 F.2d 272, 274 (8th Cir. 1983).

4. *See* UCC § 1-105 cmt. 1 (2000). For examples of "reasonable relationships," *see also* Ward Transformer Co., Inc. v. Distrigas of Mass. Corp., 779 F. Supp. 823, 824 (E.D.N.C 1991); Marine Midland Bank, N.A. v. United Mo. Bank, N.A., 643 N.Y.S.2d 528, 530 (N.Y. App. Div. 1996); Benedictine Coll., Inc. v. Century Office Prods., Inc., 853 F. Supp. 1315, 1323 (D. Kan. 1994).

5. *See* UCC § 1-105(1) (2000).

law in a transaction involving more than one jurisdiction, either interstate or international, subject to possible conflicting and controlling foreign choice of law principles or any applicable international convention or treaty. The question presented here, however, is: what is the applicable law for a *UCC* transaction that takes place entirely in one jurisdiction that has enacted the *UCC*?

The facile answer seems to be, the appropriate Article of the *UCC* as enacted in that jurisdiction.[6] Absent a contrary agreement, this answer is correct.[7] This result is roughly equivalent to the analysis, absent agreement, under section 1-105(1) for transactions that do not take place entirely within one jurisdiction. But can an agreement change the applicable law within one jurisdiction similar to the way it may change the applicable law between jurisdictions pursuant to section 1-105(1)? It is submitted that generally the answer is yes.[8] This article explores the details of that proposition.

II. THE INS AND OUTS OF OPT OUT AND OPT IN

A. OPT OUT

UCC sections 1-102(3) and (4) state that, even without the signal "unless otherwise agreed," the effect of a *UCC* provision may generally be varied by agreement, with certain limitations.[9] The goal is flexibility. The

6. *See* UCC § 1-105 cmt. 2 (2000).

7. *See* UCC §§ 2-102, 2A-102, 3-102(a), 4-102(a), 4A-102, 5-103(a), 7-103, & 9-102 (2000). *UCC* Article 8 does not contain a scope section. *But see* UCC § 8-110 (2000). All of these provisions imply that they only apply to transactions, negotiable instruments, funds transfers, etc. that take place or are within the reach of the enacting jurisdiction. *See, e.g.,* Cairo Coop. Exch. v. First Nat'l Bank of Cunningham, 620 P.2d 805, 806, 808-10 (Kan. 1981) (A Kansas farm cooperative sued its local bank for paying checks over forged endorsements, which were contrary to restrictive endorsements. One issue was whether a separate agreement varied the proscription of the Kansas *UCC* relating to payment over a restrictive endorsement. The court stated that it is presumed that parties enter into contracts with reference to existing law, and applied the Kansas *UCC*.).

8. The drafting committee revising *UCC* Article 1 also reached this conclusion with respect to proposed section 1-302, which replaces current sections 1-102(3) - (4) and 1-204(1). The committee deleted proposed section 1-103 from its September 1999 draft, which would have allowed parties to opt in to the *UCC*. The committee stated that there was no need for opt out because proposed section 1-303 (now proposed section 1-302) already governed the ability to vary the effect of provisions of the *UCC* by agreement. This, in essence, leaves opt out to be governed by the Code, and opt in to be generally governed by other law. *But see* UCC § 3-104 cmt. 2 (2000) (stating principles consistent with those stated in section 1-102(2)(b): the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations under the writing); UCC § 8-103(c) (2000) ("[a]n interest in a partnership or limited liability company is not a security unless . . . its terms expressly provide that it is a security governed by this Article").

9. Section 1-102(3) mentions the obligations of good faith, diligence, reasonableness, and care prescribed by the *UCC*, such as in section 1-203 on good faith. Standards measuring the performance of such obligations however, can be set by agreement. In addition, Official Comment 2 to section 1-102 suggests other non-variable, or "mandatory," provisions: the meaning of definitions; provisions giving rights to third parties, such as when a security interest is unperfected; and the statute of frauds, at least to the extent of not making an oral waiver of the requirements of a statute of frauds part of the contract. *See* UCC § 1-102 cmt. 2 (2000). Section 1-102(3) also cross-references provisions in other Articles of

parties to a transaction can design their own rules to fit their own particular situation, and need not be confined to rules premised on a particular norm that does not consider unforeseen or new circumstances and practices.[10] Thus, by agreement, the parties can change the effect of the applicable, but not mandatory, statutory rules of law. Examples of these changes are limitless, but two illustrations will make the point. First, the parties may disclaim certain implied warranties if the goods are sold in circumstances where the warranties are not consistent with the bargain.[11] Second, in modern leasing practice, the parties to a lease of goods often supply their own formula for damages in the event of default, rather than rely on the statutory remedy structure.[12] When the parties do either of the above, or take similar action, they are essentially opting out of the so-called default rules of the *UCC*.

If the parties frequently opt out with respect to a particular transaction they have, in essence, written[13] a particularized Article 2, Article 2A, or other *UCC* article for their use. Thus it seems logical to conclude that the parties could do this in a single provision, rather than by a step-by-step procedure. The agreement could provide that "the parties agree that the contract law of the State of _____, as found in its statutes and decisions, shall govern their rights and duties in this transaction, rather than the provisions of *Uniform Commercial Code* Article ____ as enacted in the State of _____."[14] This represents a complete opt out.

The parties, however, would seldom want to fully opt out. The *UCC* was created because the general common law of contracts and property was not fully suited to govern the transactions now covered by the *UCC*. For example, a major contribution of Article 2 on sales was to make the

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the Code that are mandatory, such as sections 4A-202(f) and 4A-305(f). *See* UCC § 1-102(3) (2000).

10. *See* UCC §§ 1-102(2)(b) & cmt. 1 (2000).

11. *See* UCC §§ 2-316(2) & (3) (2000); *See e.g.,* Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869, 874 (10th Cir. 1984).

12. *See* UCC § 2A-504 cmt. (2000).

13. The term "written" is not meant to exclude the application of course of dealing, usage of trade, or course of performance, which under section 1-201(3) may be part of the agreement as well as the language used, or to fail to recognize "e-commerce" where the agreement is shown by an authenticated record instead of by a signed writing. *See, e.g.,* UNIF. ELEC. TRANSACTIONS ACT § 7 (2000); ELEC. SIGNATURES IN GLOBAL & NAT'L COMMERCE ACT, 15 U.S.C. § 7001(a) (2000). These laws do not apply to the balance of the *UCC*, except for sections 1-107 and 1-206, because the *UCC* has been updated for electronic commerce. *See, e.g.,* UCC § 9-203(b)(3)(A) (2000) ("the debtor has authenticated a security agreement"); UCC §§ 3-103(a)(6) & (9) (2000) (when a writing is considered to be essential).

14. This "choice of law" agreement might not be able to govern the rights of third parties. *See* Carlson v. Tandy Computer Leasing, 803 F.2d 391, 393-94 (8th Cir. 1986); Hong Kong & Shanghai Banking Corp., Ltd. v. HFH USA Corp., 805 F. Supp. 133, 139-40 (W.D.N.Y. 1992); *In re* Eagle Enter., Inc., 223 B.R. 290, 293 (Bankr. E.D. Pa. 1998); *but see* UCC § 3-104 cmt. 2 (2000) (such an agreement may bind a transferee of the writing if the transferee has notice of it or the agreement arises from usage of trade and the agreement does not violate other law or public policy). This agreement also may not have an impact on mandatory provisions. *But see* UCC § 5-103 cmt. 2 (2000) (except by choosing the law of a jurisdiction that has not adopted the *UCC*, it is not entirely possible to escape the *UCC*); UCC § 1-102 cmt. 2 (2000).

common law contract formation rules, like "mirror image" and the "last shot rule" in the "battle of the forms," more realistic for commercial transactions.[15] To abandon the specifically tailored rules of the *UCC* for more general, and often outdated, rules is very different from adjusting some of those specifically tailored *UCC* rules to fit a particular transaction. In some circumstances, however, there may be sense in opting out. For example, there has been much discussion regarding negotiability since the *UCC* allows an assignee of a contract to take the assignment free of defenses to payment and claims to the instrument from parties the assignee has not dealt with. Many feel that this doctrine no longer serves a purpose, at least in a consumer context.[16] Negotiability, however, comes within the rules of *UCC* Article 3.[17] If the words "payable to the order of" are left out or struck out of a promissory note,[18] Article 3 no longer applies and the normal rule that an assignee of the contract stands in the assignor's shoes applies.[19] Thus, a person who wishes to preserve the ability to raise defenses against payment, even when the instrument is in the hands of an assignee who acquired it for value, in good faith, and without notice, may want to opt out of *UCC* Article 3 and take steps to avoid a similar outcome.[20]

Nonetheless, this opt out analysis has generated some concern since it explicitly articulates the right to opt out found in *UCC* Article 1. Some fear that such an express permission could lead to malpractice liability if the opt out was not used and an unfortunate consequence occurred, even if it was unreasonable for the attorney to have researched the entirety of the law to determine if a more suitable rule existed. This argument is unpersuasive. Many believe another scenario, where opt out is used to reach a perceived bad result, poses an even greater danger. For example, in 1999, the National Conference of Commissioners on Uniform State Laws promulgated the *Uniform Computer Information Transactions Act* (*UCITA*).[21] Section 104 contains the following explicit opt-out and opt-in provisions:

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15. *See, e.g.*, UCC §§ 2-204, 2-206 & 2-207; White Consol. Indus., Inc. v. McGill Mfg. Co., Inc., 165 F.3d 1185, 1190 (8th Cir. 1999); Jom, Inc. v. Adell Plastics, Inc., 151 F.3d 15, 20-21 (1st Cir. 1998); Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 633 (R.I. 1998); *In re* Chemtoy Corp., 19 B.R. 475, 478 (Bankr. N.D. Ill. 1982).

16. *See, e.g.*, James S. Rogers, *The Myth of Negotiability*, 31 B.C. L. REV. 265 (1990); Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375, 375 (1971).

17. *See* UCC §§ 3-302, 3-305 & 3-306 (2000); Indus. Nat'l Bank v. Leo's Used Car Exch., Inc., 291 N.E.2d 603, 605 (Mass. 1973); Citizens Nat'l Bank of Englewood v. Fort Lee Sav. & Loan Ass'n, 213 A.2d 315, 319 (N.J. Super. Ct. Law Div. 1965); *but see* Unico v. Owen, 232 A.2d 405, 418 (N.J. 1967). Today the doctrine may be overruled in consumer transactions by special consumer rules. *See, e.g.*, 16 C.F.R 433.2 (2000). However, similar considerations leading to different consumer rules may exist in some commercial transactions. *See, e.g.*, Mutual Fin. Co. v. Martin, 63 So. 2d 649, 652-53 (Fla. 1953).

18. *See* UCC §§ 3-102(a) & 3-104(a)(1) (2000).

19. *See* RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981).

20. *See, e.g.*, UCC § 9-404(a) (2000) (an enforceable agreement not to assert defenses or claims against an assignee).

21. UNIF. COMPUTER INFO. TRANSACTIONS ACT (1999) [hereinafter UCITA].

> The parties may agree that this Act, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this Act does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this Act, or is subject matter within this Act under Section 103(b), or is subject matter excluded by Section 103(d)(1) or (2).[22]

This provision was designed to deal with the "mixed transactions" often encountered in this area of business. For example, a transaction might involve both computer software and hardware and, depending on the predominant interest of the transaction, the parties might desire to have the law applicable to the interest also govern the whole transaction.[23] Some argue that, because *UCITA*'s licensee protections are too limited, the ability for a seller/licensor to opt in to *UCITA* for the whole transaction, and thus opt out of the otherwise applicable Article 2 law for the hardware, is improper because it puts the buyer/licensee, and perhaps others, at greater risk.[24] An explicit opt-out provision in the *UCC* would

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22. UCITA § 104 (1999).

23. *See, e.g.,* Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 670 F.2d 1304 (3rd Cir. 1982). This issue is not limited to this context. It has commonly arisen, for example, in sales of goods where services are part of the transaction. *See, e.g.,* Ward v. Puregro Co., 913 P.2d 582, 584 (Idaho 1996).

24. That is to say, otherwise applicable Article 2 would be opted out of for the hardware. To what extent Article 2 would have been applied to the transaction, absent the type of agreement under discussion, depends on the predominant purpose of the transaction, and on what test the court would apply to the mixed transaction. Under section 103(b) of *UCITA*, Article 2 would have applied since the predominant purpose test is rejected. *See e.g., Ward*, 913 P.2d at 584 (showing an example of the predominant essence test). The result may be the same under Article 2. Further, the degree of risk would depend on the issue involved. *UCITA* often follows the provisions of Article 2, and may even be more protective. This difference exists because the Article 2 rule is not suitable for a transaction comprised of computer information rather than goods. This highlights a serious problem with the predominant purpose test –it subjects part of a transaction to possibly inappropriate law.

An example that illustrates this concern is found under the most common alternative to UCC section 2-318 — a provision that extends warranty to those not in privity in connection with a sale of goods. Under this alternative, the seller's warranty extends to any natural person who is in the family or household of the buyer or who is a guest in the house if it is reasonable to expect that person to use, consume, or be affected by the goods and who is injured in person by breach of the warranty. Whether a disclaimer or limitation on the remedy for breach is effective against such a person is not addressed in Article 2 explicitly and, although the Official Comment states that the disclaimer or limitation is effective, the case law is not always in accord.

Under section 409 of *UCITA*, a warranty to a consumer extends only to each individual consumer in the licensee's immediate family or household if the use was reasonably expected by the licensor and a disclaimer or modification of a warranty or remedy effective against the licensee is also made effective, by the statute, against third persons. Thus the class of persons protected is narrower under *UCITA* than under UCC section 2-318. The ability to control liability is perhaps greater under *UCITA*, but *UCITA* also covers a broader range of injuries.

Another example that does not involve the issue of whether third party rights can be impacted is an enforceable agreement to opt out of Article 9 that could have advantages to the secured seller in reducing debtor rights. But, absent an explicit provision for opt out, how likely is someone to think of or rely on this? Therein lies the objection to former proposed section 1-103; some believed that clarity would encourage conduct that could

control if *UCITA* were not enacted, and would reinforce the *UCITA* provision if both statutes were enacted.

One safeguard against this situation is to limit a general opt out to a mixed transaction, which is the most justifiable case for opt out. Another possible safeguard is to make explicit what is implicit — that one cannot opt out of the mandatory *UCC* provisions that would govern in the absence of opt out.[25]

Since the *UCITA* provision is a good example of how to employ safeguards,[26] it arguably represents a better policy approach than current proposed UCC section 1-302. UCITA section 104(2) alters what otherwise would be the result under the freedom-of-contract rule; in short, an opt out agreement under *UCITA* is treated differently than an agreement to vary a provision of *UCITA*. This makes sense because the law that is opted into has its own protections, and a minimalist approach reduces chances of conflict and other confusion. An example of this complexity, albeit one that would exist under even the minimalist approach, is how an opt out of *UCITA* would nonetheless leave the obligations of honesty in fact and good faith in performance or enforcement in every contract that would be a mass-market transaction under *UCITA*.[27] For example, if the applicable law after opt out were general contract law, in Oklahoma a statute would set the standard of good faith as essentially one of honesty.[28] Under Oklahoma law, the *UCITA* definition would control, but this may not be as clear under the law of other jurisdictions. This clarity in Oklahoma puts great pressure on determining what a mass-market transaction is and the duties within the transaction.

B. OPT IN

As the previous discussion shows, opt out and opt in are essentially two sides of the same coin. Nonetheless, there is some benefit in focusing on each individually.

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produce unknown or unforeseen adverse results, and it was thus better to let so-called sleeping dogs lie.

It is conceivable that more dramatic examples could be found, but it must be kept in mind that perhaps an unarticulated premise in this particular discussion is that *UCITA* is being compared to the draft of proposed revised *UCC* Article 2, and, since that project is not completed, such a comparison is questionable.

25. *See* UCITA § 104 (1999). In the context of the *UCC*, for example, an explicit ability to opt out of Article 9 should not be used to free a secured party from a variety of debtor protection provisions. *See* UCC § 9-602 (2000); *see also* UCC § 5-103 cmt. 2 (2000) (discussing the current analysis under the *UCC*); UCC § 5-116 cmt. 3 (2000). For a further discussion, see *supra* text accompanying note 15.

26. *See* UCITA § 104(2) (1999). This section preserves the *UCITA* provisions on consumer defenses to electronic errors, limitations on electronic self-help, and, in a mass-market transaction, the provisions on unconscionability, fundamental public policy, and good faith. *But see* UCITA § 113 (1999) (the provisions in section 104(2) are not all the mandatory provisions in *UCITA* under § 113). *See also* UCITA § 104(3) (1999) (conspicuousness of agreement is required in a mass-market transaction).

27. *See* UCITA §§ 104(2)(B), 113(b), 102(a)(32) & (45) (1999).

28. *See* OKLA. STAT. tit. 25, § 9 (1987).

To make that point, opt in, in contrast to opt out, can be desirable in many contexts, and there already are several illustrations of this in the present *UCC*. For example, section 8-103(c) states that an interest in a partnership or limited liability company is not a security, and thus is not governed by Article 8, unless it is an investment company security or is dealt in or traded on securities exchanges or in securities markets, but if its terms expressly provide that it is a security and elect to be governed by Article 8, then that election is effective.[29] The Official Comment to section 2A-102 provides that the parties to a transaction creating a lease of personal property other than goods, or a bailment of personal property, may provide by agreement that Article 2A applies. Likewise, Official Comment 2 to section 3-104 provides that the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations under the writing.[30] Such guidance might be useful in New York, which has not yet enacted revised *UCC* Articles 3 and 4. In New York, the law may still be that a promissory note with a variable interest rate is not a negotiable instrument,[31] and thus might be governed by the common law, even though that law was superseded as inappropriate in many respects by specialized negotiable instruments law. Finally, opt in may be attractive for mixed transactions as well as transactions searching for more cogent law. For example, a seller who will install the product might wish Article 2 to cover both the sale and service aspects, presumably with an appropriate disclaimer of warranty at least as to the quality of the service.[32]

Opt in, almost by definition, has a greater problem than opt out in determining to what extent it is legally permitted since the otherwise governing law is often vague on this issue. What is a mandatory, as opposed to default, rule is not clear. To illustrate, Oklahoma has many statutes on guarantees and suretyship,[33] which unfortunately reflect a much earlier era in the law. A person drafting a guaranty for a modern transaction may desire to have it governed by some of the more up-to-date discharge rules and other *UCC* provisions.[34] It is equally possible, in a contract not governed by Article 2A, that the seller might want to opt out of the stricter Oklahoma statutes on liquidated damages[35] and opt into the more modern and clearer provision of Article 2A.[36] Yet it is unclear whether

29. *See supra* text accompanying note 8.

30. *See id.*

31. *See, e.g.*, Taylor v. Roeder, 360 S.E.2d 191, 194 (Va. 1987). *But see* Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 797 (Tex. 1992).

32. *See* UCC §§ 1-102(2)(b) & cmt. (2000).

33. *See* OKLA. STAT. tit. 15, §§ 321-344 (guaranty) & 371-385 (suretyship) (1993).

34. *See* UCC § 3-605 (2000). *See also* PEB Commentary No. 11 (Feb. 10, 1994). It would even be theoretically possible not to limit the opt in to another statute, but to opt into, for example, the modern *Restatement (Third) of the Law Third, Suretyship*. *See* UCC § 1-301, reporter's note, note a (Draft 2000).

35. *See* OKLA. STAT. tit. 15, §§ 214 & 215 (1987).

36. *See* UCC § 2A-504 (2000).

the Oklahoma statutes in title 15 are mandatory, or whether, like the provisions of the *UCC* generally, their effect can be varied by agreement.[37] Even an explicit opt-in provision, like UCITA section 104(1), cannot solve this difficulty.[38] Only the law being opted out of can solve this by clearly stating which of its provisions are mandatory. Even the *UCC* is often not that clear.[39]

This problem may not be critical since most laws, at least in the private law/commercial law area, are not mandatory. Moreover, little downside is perceived in an attempt to opt in since, if the opt in is held to be valid, the goal was achieved. If the opt in is held to be invalid, while some mandatory provision might not have been complied with because it was believed the agreement rendered it inapplicable, the consequence would seldom be serious. A perceived possible serious consequence for non-compliance would signal that the provision was non-variable in the first place, and an attempt to vary its effect by agreement should not be made. In this context, little seems lost by the decision of the drafting committee to delete its once proposed section 1-103, except perhaps a small amount of certainty due to an explicit authorization.[40]

III. CONCLUSION

The draft of proposed revised Article 1 seems to correctly address the question of whether the parties may change the applicable law in an intrastate transaction by agreement in the context of the *UCC*. It will leave opt out to the general freedom-of-contract rules and limitations found in the *UCC*.[41] This decision protects what is necessary and, while it leaves some doubt about an ability to opt out in one simple provision, encourages the parties to selectively opt out provision by provision. This selection process forces the parties to concentrate on the consequences of any such agreement, something that may not occur, or not occur as well, in a

37. *See* Reid v. Auxier, 690 P.2d 1057, 1061 (Okla. Ct. App. 1984) (holding a liquidated damage proviso void where it was neither impracticable nor extremely difficult to determine damages); McClain v. Cont'l Supply Co., 168 P. 815, 818 (Okla. 1917) (holding a stipulation regarding the amount of attorney's fee valid); Forster-Davis Motor Corp. v. Abrams, 53 P.2d 569, 571 (Okla. 1936) (holding the promise to pay another's debt must be in writing); Penner v. Int'l Harvester Co. of Am., 41 P.2d 843, 844 (Okla. 1935). Notice of acceptance of guaranty required by 15 OKLA. STAT. § 326 may be waived.

38. *UCITA* section 104(1) states that an agreement that *UCITA* governs a transaction does not alter an otherwise applicable statute, rule, or procedure that may not be varied by agreement or that may be varied only in a manner specified by the otherwise applicable statute, rule, or procedure. In a mass-market transaction, after opt in, the agreement cannot alter a law applicable to a copy of information in printed form (for example, Article 2's application to a book, magazine, or newspaper).

39. *See, e.g.*, Memorandum from Paul Turner to the Payments Subcommittee of the UCC Committee of the Business Law Section of the American Bar Association for the ABA Annual Meeting in Atlanta, Georgia (August 8, 1999) (exploring the extent of prohibitions on variance by contract in *UCC* Article 4A).

40. *See supra* text accompanying notes 8 & 38. An even smaller downside in leaving opt in to freedom of contract may lie in a lack of clarity as to whether the opt-in agreement can alter a specified procedure for varying the effect of a provision.

41. Presently, section 1-102(3) restricts the ability to vary the effect of their provisions.

single, general opt-out provision. There are fewer, less compelling, reasons for general opt out. The safeguards that would exist if a *UCITA*-type approach were drafted[42] can be important, but are largely unnecessary and difficult to draft due to the uncertainty regarding which provisions are considered mandatory, let alone "fundamentally mandatory" for the purpose of a minimalist approach.[43]

On the other hand, opt in, where there are often reasonable or compelling reasons to do so, could be encouraged by an express provision, such as that found in the *UCC*.[44] Opt in is still possible, however, in the absence of such a provision. This could make the difference where there is doubt. Such an opt-in provision, however, would not be without difficulty or risk. It would seem a limitation on its use in mixed transactions, as in *UCITA*, could be unwise in many instances, but a lack of limitations could lead to instances of abuse.

Moreover, while the risk of unintended consequences exists in both opting in and opting out, any decision to opt out is more likely to be focused and occur after the attorney has reviewed the applicable laws and has concluded that the chosen law is better. In opt in, it is much more likely to be a wholesale choice, even though prompted by a reaction to one or more specific unfavorable provisions in the other law, and is more likely to occur without adequate consideration of its possible consequences. This problem flags the need for an attorney, who is familiar with the law to be abandoned, to carefully consider the matter, but that will be a very difficult task.[45]

Given this analysis, on balance the approach of proposed section 1-302, as supplemented by the more explicit provisions of the *UCC*,[46] seems acceptable.

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42. *See supra* text accompanying note 24.

43. *See supra* text accompanying note 27.

44. *See supra* text accompanying notes 25 & 26.

45. For example, it may be clear enough that consumer protection statutes are mandatory and cannot be varied by agreement. But this focus may be too narrow given the broad range of special statutes designed to protect other classes, such as farmers, small businesses, artisans, etc. *Compare* UCC § 2-102 (2000). Presumably, the legislature would not desire any such protections to be left behind; yet, whether that would occur might be unclear and be further open to question because of provisions saving such laws in the *UCC*. *See, e.g.*, UCC §§ 2A-104(1)(c), 3-302(g), 9-404(d), & 9-406(h) (2000).

46. *See, e.g.*, UCC § 8-103(c) (no inconsistency is perceived); UCC § 8-102(c) (proposed section 1-302 supplements the Article 8 provision that might preserve protections in the partnership or limited liability company statutes that could conflict with a provision of Article 8 where otherwise the interpretation might be controlled by Article 8).