

## **Business Law: Computer Information: Contract Enforceability**

The Uniform Computer Information Transaction Act (UCITA) is a uniform commercial code for computer information transactions. It was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in all fifty states in July 1999. UCITA provisions cover a wide variety of different topics related to computer information including standard software licenses, contracts for the custom development of computer programs, licenses to access online databases, website user agreements, and most internet-based information. However, UCITA only governs transactions that include an agreement to create, modify, transfer or license the above mentioned computer information. Furthermore, UCITA exclusively governs contract law and does not affect any other forms of intellectual property law.

The structure of UCITA intuitively follows basic contract principles and is divided into nine parts: (1) General Provisions; (2) Formation and Terms; (3) Construction; (4) Warranties; (5) Transfer of Interests and Rights; (6) Performance; (7) Breach of Contract; (8) Remedies; and (9) Miscellaneous Provisions. Although its provisions tend to mirror basic tenets of contract law (and the UCC), UCITA tailors these legal concepts to the modern needs of computer information technology. In drafting UCITA, the framers listed a variety of purposes including realizing the full potential of computer information transactions in cyberspace, clarifying the law governing computer information transactions, expansion of these services, and making the law uniform among the various jurisdictions.

Despite the relatively innocuous nature of UCITA, support for the law has been relatively minor. As of the date of writing, UCITA has only been adopted in Maryland and Virginia and

has been introduced in the state legislatures of but a few states: Delaware, DC, Hawaii, Illinois, New Jersey and Oklahoma. Opponents of UCITA, however, far outnumber its advocates. In fact, since its inception, UCITA has generated widespread criticism both inside and outside of the software industry.

Criticism of UCITA is aimed primarily at two issues: mass market licenses and shrink-wrap/click-wrap licenses, both of which are validated by provisions in UCITA. First, most of the criticism of UCITA is aimed at its unique stance on transactions involving computer information, including “sales” of computer software. According to the UCITA provisions, consumers who buy the software are not actually “buying” the program but rather are purchasing a license to use the program for a certain period of time. While this certainly is beneficial for producers of these programs since they do not have to give up ownership rights to their programs, this hinders consumer rights by limiting their ability to use the purchased software as they wish.

Second, UCITA endorses the use of shrink-wrap and click-wrap agreements. Such agreements are either included inside of the box in which the software is sold or appear on the screen after the installation has commenced, requiring the consumer to “click” on the “agree” button before continuing the installation. Consequently, consumers are unable to review the language of the contract prior to purchasing the software. Although UCITA gives the consumer the right to return the item at the expense of the producer should the contract terms prove disagreeable, this is a significant and dramatic break with traditional contract law which held that the language must be reviewed by both parties before a contract can be formed.

Both consumer and governmental groups have taken these criticisms quite seriously, even though many of them are overrated and unfounded. In fact, many state governments have taken them so seriously as to prevent them from even introducing the bill into the state legislature for

consideration. At present, UCITA is only being considered by six state legislatures while the attorneys general in 24 states actively oppose any attempts to pass UCITA or UCITA-like legislation (Arizona, Arkansas, California, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin). Consumer advocates also oppose UCITA for the fears stated above.

One state has actually gone beyond simple refusal to submit UCITA for consideration to the legislature and has taken affirmative steps to “poison” any attempts to adopt UCITA in the future. The state legislature of Iowa recently passed the Uniform Electronic Transactions Act, which included a provision declaring voidable the choice of UCITA as the governing law, and substituting Iowa law instead if the person against whom enforcement is sought is an Iowa resident. The effect of this so called “bomb shelter” statute is to essentially sabotage any efforts to adopt UCITA in the state of Iowa, at least until the statute sunsets in 2001.

Despite the tremendous criticism levied against UCITA, proponents of the law are also numerous. Pointing to the tremendous need for uniform laws that are able to adequately address complex questions of computer information, proponents believe UCITA is the answer to these serious inadequacies in contract law. With a uniform law in place, parties will not only be able to formulate contracts with greater assurance, but in the event of breach, a uniform law will certainly reduce the amount and costs of litigation related to computer information. Supporters also point out that UCITA merely preserves all current consumer protection laws as well as common law regarding these issues that has not yet been codified by statute. Furthermore, UCITA is also preempted by federal law and explicitly states in section 105 that its provisions are preempted by applicable federal law. Finally, supporters note that consumers and producers

alike can choose both the governing law as well as the forum in which disputes will be adjudicated, even if that law is not UCITA.

Nevertheless, even those states that have adopted UCITA as the law governing computer information have done so hesitantly. In fact, the Maryland Legislature made several significant changes to the original language of UCITA before it adopted the Act. First, regarding the consumer's ability to review the mass market license agreement, Maryland's version adds an additional provision requiring that the consumer be able to view the license both before and after assent is granted in a printed form or in a printable form. As a result of this amendment, consumers will have more rights vis-à-vis the producers and the shrink-wrap/click-wrap rights embodied in UCITA will be somewhat watered-down.

Second, regarding mass market transactions and licenses, all of these are still governed by the law of Maryland and not UCITA. Therefore, issues of "licensing" versus "purchasing" will be determined according to Maryland law rather than UCITA. Third, the Maryland version of UCITA removes the provision invalidating choice of governing law in the context of a consumer contract or a mass market license holding otherwise. The effect of this change is certainly to bolster consumers' ability to determine their choice of law regardless of the type of contract being formed. Finally, alternative dispute resolution is considered, an option not engendered in the original text of UCITA.

Virginia also made significant revisions to the text of UCITA. However, they were much less sweeping than the changes made in Maryland. For example, in place of the choice of law question discussed in Maryland, Virginia simply stated that the parties may choose the governing law, but the choice is not enforceable in a consumer contract so long as it would vary a rule that

may not be varied by agreement under Virginia law. Consequently, although Virginia altered the language of UCITA, by and large the language and core concepts remained intact.

Although Maryland and Virginia certainly adopted the core ideas of UCITA into their own statutory body of law, the majority of states are still reluctant to do so. As a result of this tremendous opposition, the adoption of UCITA in the state legislatures should prove to be contentious. Because of the number and intensity of objections, UCITA may become law in only a handful of states. UCITA has already generated more criticism than any other proposed uniform law to date. However, even if it is not immediately adopted into legislative proceedings, the concept fueling the codification of computer information law is certainly inevitable and the concepts addressed in UCITA will certainly guide future law-makers in the process of formulating new contract law for the computer information age.