



H.B. 287

124th General Assembly
(As Introduced)

Reps. Willamowski, DePiero, Lendrum

BILL SUMMARY

- Provides that a choice of law provision in a computer information agreement that provides that the contract is to be interpreted under the laws of the state that has enacted the Uniform Computer Information Transactions Act or a substantially similar law is voidable, and the agreement must be interpreted under Ohio law if the party against whom the enforcement of that provision is sought is an Ohio resident or has its principal place of business in Ohio.
- Provides that any provision in a computer information agreement providing that any litigation, arbitration, or dispute resolution process is to occur in a state other than Ohio is void and unenforceable as against public policy if the party to the agreement against whom enforcement is sought is an Ohio resident or has its principal place of business in Ohio.

CONTENT AND OPERATION

Choice of law provision

The bill provides that a choice of law provision in a "computer information agreement," (see "**Definition**," below) providing that the contract is to be interpreted under the laws of the state that has enacted the Uniform Computer Information Transactions Act (UCITA) (see **COMMENT 1**), as proposed by the National Conference of Commissioners on Uniform State Laws, or a substantially similar law, is voidable, and the agreement must be interpreted under the laws of Ohio, if the party against whom enforcement of the choice of law provision is sought is a resident of Ohio or has its principal place of business located in Ohio (R.C. 1306.28(A)). (See **COMMENT 2**.)

Jurisdiction over litigation or other procedure

The bill provides that any provision in a computer information agreement providing that any litigation, arbitration, or other dispute resolution process is to occur in a state other than Ohio, and the party to the agreement against whom enforcement is sought is a resident of Ohio or has its principal place of business located in Ohio, is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in a computer information agreement must take place in the county in Ohio where the party against whom enforcement is sought resides or has its principal place of business or at another location within Ohio that is mutually agreed upon by the parties to the agreement. (R.C. 1306.28(B)(1) and (2).)

Definition

For purposes of the bill, the bill defines "computer information agreement" as an agreement that would be governed by UCITA or a substantially similar law enacted by another state (R.C. 1306.28(C)). (See **COMMENT 3**.)

COMMENT

1. The following are excerpts from the Prefatory Note of UCITA:

UCITA is the first uniform contract law designed to deal specifically with the new information economy. Transactions in computer information involve different expectations, different industry practices, and different policies from transactions in goods. For example, in a sale of goods, the buyer *owns* what it buys and has exclusive rights in that subject matter (e.g., the toaster that has been purchased). In contrast, someone that acquires a copy of computer information may or may not own that copy, but in any case rarely obtains all rights associated with the information. See *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999). What rights are acquired or withheld depends on what the contract says. This point only is implicit in Article 2 for goods such as books; UCITA makes it explicit for the information economy where, unlike in the case of a book, the contract (license) is the product.

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The need for a coherent, uniform body of law has never been greater. Revolutions in telecommunications and computer technology have made geography increasingly irrelevant to modern commerce. The Internet enables small firms as well as large ones to provide products and services throughout the country and around the world. Even as online systems have altered how many information transactions are performed, however, fundamental issues associated with contracting online remain unanswered. A modern contract law must give guidance on those issues. Failure to do so does not foster but rather impedes commerce in computer information.

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The following is an excerpt from a Briefing Paper for the National Conference of State Legislatures prepared for presentation at its Spring Meeting, March 2001, by Jean Braucher, Roger Henderson Professor of Law, University of Arizona (<http://www.ncsl.org/programs/lis/CIP/CIPCOMM/braucher0301.htm>):

Overview

The Uniform Computer Information Transactions Act (UCITA) is a highly complex and controversial commercial statute covering transactions in digital products and services. Its scope includes transactions in software, electronic books and information in digital form (such as on a CD-ROM or in an electronic file), and contracts for access to Internet services and on-line databases.

UCITA is loosely based on Article 2 of the Uniform Commercial Code (UCC Article 2), dealing with sales of goods, but has significant differences. Two core differences have caused most of the controversy surrounding it. These are that UCITA:

- (1) Adopts contract rules that validate "shrinkwrap" or "clickwrap" terms held back until after customers have paid and received the product. These terms may take away from reasonable expectations, but to shop for better terms business or consumer

customers would have to engage in repeated purchases and returns. ("Shrinkwrap" refers to terms inside a box that the customer purportedly assents to by opening shrinkwrap packaging around a diskette. "Clickwrap" refers to terms that pop-up on the computer screen during installation or loading and that must be clicked on to "agree" before the customer is permitted to access a computer program or information.)

(2) Broadly legitimizes mass-market end-user license agreements (EULAs), which producers employ as a means to try to limit customers' rights to transfer and use digital products and services.

Combined, these two features allow software and internet companies to use standard forms to write their own intellectual property law, expanding their rights vis a vis those of their customers and reducing information in the public domain. Courts may find aspects of UCITA preempted by federal intellectual property law, but it will take years of litigation to sort out the issues.

The official text of UCITA, with a prefatory note and extensive comments, runs to more than 200 pages. The statute is divided into eight parts, covering the following topics:

- Part 1. General provisions (including definitions and sections dealing with scope, mixed transactions, relation to federal law and other state law, electronic contracting, choice of law and choice of forum).
- Part 2. Formation and terms.
- Part 3. Construction (including of what uses are permitted).
- Part 4. Warranties.
- Part 5. Transfer.

- Part 6. Performance (including automatic restraints to enforce use restrictions).
- Part 7. Breach.
- Part 8. Remedies (including electronic self-help).

NCCUSL/ALI Split on Project

UCITA was originally conceived as a part of the Uniform Commercial Code, which is jointly drafted by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The project was initially part of the revision of UCC Article 2 (on sales of goods) and then was broken out as a separate proposed UCC Article 2B on licenses of information products. The ALI withdrew from the project in April 1999, after two years of controversy within the organization over the two core points outlined above as well as concern about the technical soundness of the draft. This split between ALI and NCCUSL is unprecedented in the half century history of the UCC. The two organizations have both abandoned UCC drafting projects in the past, but they have never before parted ways. NCCUSL decided to proceed despite the concerns of the ALI's governing Council and its membership, renaming the project UCITA and making it a free-standing proposed uniform state law.

The states of Virginia and Maryland have enacted versions of UCITA. UCITA bills have been introduced in Arizona, District of Columbia, Illinois, Maine, New Hampshire, New Jersey, Oregon, and Texas.

2. The bill's provisions are distinct from and not related to the Uniform Electronic Transactions Act, which was adopted in Sub. H.B. 488 of the 123rd General Assembly, effective September 14, 2000, and which provides for the use of electronic records and electronic signatures by private parties.

3. UCITA defines the following relevant terms (Section 102(a)):

(4) "Agreement" means the bargain of the parties in fact as found in their language or by

implication from other circumstances, including course of performance, course of dealing, and usage of trade as provided in this [Act].

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(10) "Computer information" means information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

(11) "Computer information transaction" means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under Section 612. The term does not include a transaction merely because the parties' agreement provides that their communications about the transaction will be in the form of computer information.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-05-01	p. 623

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