



AFFECT opposes changes to UCC Article 1 Choice of Law section

When an employee clicks "I agree" upon installing software you would expect the law governing the contract would be determined by either the software licensor's or the licensee's home state. However, under proposed changes to Article 1 of the Uniform Commercial Code (UCC), that practice would change. Instead a software licensor could choose the law of any state to apply to the software license.

In the past, the UCC, which has been adopted in all states, sensibly required that a choice of law provision had to bear a "reasonable relation" to the contract. AFFECT still favors this approach and disagrees with the current recommendation to amend Article 1, section 301 to eliminate such a requirement. Small businesses, Fortune 500 companies and non-profits all have to enter into electronic contracts or other types of standard form contracts in which the licensor unilaterally determines the terms. The proposed revision would place everyone who agrees to these contracts at the mercy of those who are drafting them, provided that a court considers the software contract to be within the UCC. Many courts have so ruled and there is little reason to think that this will change any time soon.

Even though consumers are excluded from this provision, if a consumer agrees to such a contract and then uses the software in a home office, it is unclear if the consumer protection would continue to apply. If a corporation, a mom and pop business and a consumer purchase the same software and are forced to agree to the same contract, why should the small business be forced to have the least favorable law in America apply in the event of a contractual dispute?

AFFECT, whose primary concern is preventing the further adoption of the Uniform Computer Information Transactions Act (UCITA), is greatly troubled by this proposed amendment to the UCC. In effect, passage of this revision would remove any legal obstacle to the application of UCITA in states that have never passed it. Consequently, Massachusetts residents, for example, could be subject to software vendors' imposition of the law of Virginia (hence UCITA) even if the Massachusetts's citizen's own legislature has rejected UCITA. Such a change to the UCC opens the door for one state's law to supersede the other forty-nine states, destroying the relatively level playing field that currently exists and overcoming citizens' choices (through their elected representatives) of the law that should apply to them.

From a practical perspective, AFFECT opposes the removal of the "reasonable relation" language because it will make contract review a more complicated and hence more costly process. Currently, contract drafters can choose from three or four states—those states that have a "relationship" to the parties and the contract-- in a choice of law clause. With the proposed changes, a licensee would not be able to presume that "reasonable relation" and would have the impossible job of figuring out what the vendor's choice of unexpected law means to the risks she takes in her contract.

AFFECT does not believe there is a need for this modification to the UCC. To permit -- as proposed UCC Article 1 does -- two entities in the same state to choose the law of a distant state, unrelated either to them or the subject of their contract, injures not only the party that did not have the ability to draft or negotiate the contract, but also the rule of law and democratic values of the state in which both the parties reside.

AFFECT is a broad-based coalition of 60 retail and manufacturing businesses, consumers, financial services institutions, technology professionals and libraries. AFFECT has been deeply engaged in the policy debate about UCITA and has been politically active in every state where UCITA has been discussed.