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Introduction to Symposium on Revised Article

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INTRODUCTION TO SYMPOSIUM ON REVISED ARTICLE 1

*Sarah Howard Jenkins**

FOR a period exceeding four years, the American Bar Association Subcommittee on UCC Article 1 debated and considered potential recommendations for revisions, additions, or modifications to UCC Article 1. When, in the Subcommittee's view, modification to or revision of other articles were deemed essential to implement the Code purposes and policies of simplification and clarification of commercial law as stated in Section 1-102, or to facilitate uniformity of enactment, memoranda were submitted by Subcommittee members and sought from other commercial law scholars or practitioners to broaden participation in the revision process and to assist the Subcommittee in its deliberations. The articles contained in this symposium on Revised Article 1 reflect only a few of the issues considered by the Subcommittee during its process. Regrettably, many of the thoughtful pieces are omitted from this volume. Some of the articles raise issues at this juncture, the conclusion of the process, to impact final deliberations by the sponsoring bodies, some re-join an issue in the hopes of triggering thoughtful debate as individual legislative bodies contemplate enactment of the promulgated version, or to lay a foundation for future revisions.

Juxtaposed the Subcommittee's ongoing deliberations, the Article 1 Drafting Committee, with its independent process, maintained a rigorous schedule with broad purview over the continued evolution of the UCC. The Committee's process is described in an essay by Professor Kathleen Patchel, National Conference Associate Reporter to the Drafting Committee, and Boris Auerbach, Chair of the Article 1 Drafting Committee, aptly entitled: *The Article 1 Revision Process*.

The ALI will act on Revised Article 1 in May and its co-sponsor, the National Conference of Commissioners on Uniform State Laws, is scheduled to act at its July-August meeting. At this concluding hour, debate continues. In his article, *Language and Formalities in Commercial Con-*

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tracts: A Defense of Custom and Conduct, Professor David V. Snyder argues persuasively for the retention of trade usage, course of dealings, and course of performance as elements of an agreement under the UCC. Professor James J. White, in an objective assessment of existing approaches for determining whether the exercise of reserved discretion exceeds the limitations of good faith, strongly suggests that trade usage as a tool for construing the contractual obligation of good faith is of limited utility. In his essay entitled, *Good Faith and the Cooperative Antagonist*, Professor White suggests that useful trade practice is nonexistent in most cases or, if existent, is unknown to most lawyers and judges or difficult to discover and prove.

Professors Robyn L. Meadows and Sarah Howard Jenkins, while agreeing in their articles, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code* and *Preemption & Supplementation Under Revised 1-103: The Role of Common Law & Equity in the New U.C.C.*, that Section 1-103 of current Article 1 is perhaps the most significant provision of the UCC, they disagree on the proper role to be accorded supplemental principles of common law and equity. Professor William J. Woodward, Jr. questions the wisdom of the proposed revision of current Section 1-105 given the resulting impact on the rights of individual states to craft laws and exercise their judicial and legislative police powers to meet the needs of its citizenry if the pending alteration of the historical limitations on party selection of the law applicable to their agreement is approved and enacted. Professor Woodward's article, *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, is a thorough and extensive assessment of the complexities of the proposed changes to the Code's choice of law rule. In contrast to Professor Woodward's concern for choice of law issues in interstate transactions, Professor Fred H. Miller urges reconsideration of the proposed restrictions on the ability of parties to vary Code provisions by agreement in his article entitled: *Intrastate Choice of Applicable Law in the UCC*. Professor Miller considers the benefits of and potential limitations on wholesale opting-out of the applicable UCC Article or opting-into the UCC by agreement.

Finally, three authors address harmonization issues. Professor Bryan D. Hull in his article, *Harmonization of Rules Governing Assignments of Right to Payment*, applauds the harmonizing effect of Revised Article 9 rules and conforming amendments to current Articles 2 and 2A principles governing assignments. However, he raises for future consideration, first, the disharmony between UCITA and the UCC, encouraging harmonization of the two with respect to common concepts unless unique policy considerations dictate otherwise, and, second, the need to address assignments outside of the scope of Article 9, recommending harmonization of these rules as well. Paul S. Turner calls for harmonization of the definition of consequential damages. In *Consequential Damages: Hadley v. Baxendale Under the Uniform Commercial Code*, Mr. Turner asks what is

meant by the term “consequential damages,” what damages are included or excluded by the term, and whether conflicts in definition and scope of the concept among the articles should be resolved. Finally, Professor Margaret L. Moses, highlights the important issue of harmony between the federal and state constitutional requirements of preserving the right to trial by jury and provisions of the UCC which allocate to the judge an issue that historically may have been allocated to the jury.

Despite its length as the shortest article and its function of stating the general provisions of the UCC, the revision of Article 1 is a significant undertaking. This symposium addressing some of the issues raised during the revision process insures that the revised article’s unveiling is greeted with more than a whimper in the continuing evolution of the UCC.