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SYMPOSIUM: THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT: THE FUTURE OF SOFTWARE LICENSING IN VIRGINIA: Remarks on **UCITA** in Practice: Attorney Views

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SUMMARY:

... I agreed to talk about the default sections, which I'm going to talk about in just a minute. ... I had a meeting earlier this week for a presentation on technology. ... And so far they don't. Now I talked to Carla [Witzel], and Carla is from Maryland, Maryland adopted it in October, and she is going to say a little bit about what an avalanche of litigation has occurred in Maryland as a result of the adoption of **UCITA** in October. ... The default rule is that Virginia law applies. ... The default rule is on a plain, ordinary termination the following things survive the termination: Obligation of confidentiality (that's probably not a surprise); obligation of nondisclosure; contractual limitations on use, if there are any; the obligation to return everything; the choice-of-law forum applies; obligation to arbitrate, if it's in the agreement; a term limiting the time for commencement of action, so a restriction on time for bringing a suit; an indemnity term; a term limiting the remedy; [and] an obligation to provide accounting. ... And what Virginia law has done is put in place a number of things that ought to scare your client to death before they set that thing off. ...

TEXT:

[*84] I agreed to talk about the default sections, which I'm going to talk about in just a minute. I learned this morning by listening to Mr. Ring, the default sections take up two-thirds of the Act. And I didn't realize that when I agreed to take up the default sections, but actually that's okay because the other thing I found during the day is that practically every other speaker you have heard has talked about default sections. Most of what I have to tell you, you've heard a little piece of already. What's different, though, is that I want to talk about it as a lawyer. Now you thought about it as an advocate. We've talked about it as an advocate. We've talked about it as a consumer. And we talked about it as a legislator, what's good or bad, what's right or wrong. And as lawyers you know that this stuff is interesting. That's not what matters. What matters is what is there. What is in the Act, and what does it mean for our clients. Now one of the things you will find when you start reading these Acts compared to what you have heard is that you will end up saying to yourself a time or two, "does it really say what I have heard?" And you need to keep asking yourself that question. Because as lawyers that's the analytical process we go through. I want to point out, as I go through briefly some of what are the most interesting default sections, what those sections are, and I want to encourage you to write the sections down and go at least read those sections.

Now one other thing that's interesting to me as the beginning point, and that is this: Do our clients care about this thing? And right now my answer to myself is, I'm not sure they do. I had a meeting **[*85]** earlier this week for a presentation on technology. There's a consulting group, a fair size integrator, and then a representative of a continuing education section of a private university in Central Virginia. And I asked that group, do you think we ought to cover **UCITA**? Because we're going right to the time when **UCITA** is becoming active. And they all said, "Nah, people don't care about **UCITA**." And there's a reason why that may be true. You may have heard Delegate May and Mr. Ring say earlier that what **UCITA** does is to try to take the business practices already in place and codify [them]. I was talking to one of the other participants earlier today, and he was confirming that same notion. **UCITA** in a lot of ways takes what people have been doing and puts it into some form that makes it more recognizable and gives us as lawyers a better way to understand it. If that's true, then it helps me understand why they care less about it than we do. Now the thing is, I tend to think that my clients ought to care about something in direct proportion to how much trouble it is for me to figure it out. So this is the Act and Official Comments. You go through this sucker two or three times, and you tend to think your clients ought to care a lot. And so far they don't. Now I talked to Carla [Witzel], and Carla is from Maryland, Maryland adopted it in October, and she is going to say a little bit about what an avalanche of litigation has occurred in Maryland as a result of the adoption of **UCITA** in October. But there [are] actually a couple of other examples of a legislation that we thought was going to cause tremendous change. One is the ADA. You probably remember when the ADA came along people thought it's going to generate an enormous activity. It didn't. Y2K is another example, and that's an interesting combination of legal and technology. But for a lot of reasons a trillion dollars of litigation didn't happen. So there's reason to think that this might be a revolution quietly, that our clients maybe care less about it than we do. But that just remains to be seen.

So with that introduction, let's talk about some of the basic default rules, and I want to give you some code sections, and I want you to go read them. Choice law and all of these are in 59.1, so I may say 59.1 or I might not, so choice law in Virginia is in [§ 59.1-501.9]. The default rule is that Virginia law applies. Now, the default rules assumes there's nothing in the contract. The issue of whether Virginia law applies is part of the general issue about whether there are sufficient contacts, sufficient presence so that Virginia law will attach. So

you have a default ruling that it is subject to the other rules that we already are familiar with. I'm not supposed to talk too much about contract rights, but I will a little bit from time to time. The parties can and should say in the agreement what law applies. This is an area where you need to do that because, as you know, there are enormous questions about how contacts are going to be figured out. And the other party whoever that is will always argue that the case cannot be brought in Virginia.

If you have it in the contract, then that may solve it. It may not. Here's why I say that. Virginia law says if you say in your contract that Virginia law applies, it does. Now the old rule, the UCC [Uniform Commercial Code] rule, was there had to be a reasonable relationship between the parties and a contract in order for that state's law to apply. Virginia decided not to put that in. That is not part of Virginia law. The law simply says if the parties agree that Virginia law applies, it applies. Now an interesting sort of correlative to that is (in fact, I asked Connie Ring this question after his presentation), why wouldn't everybody who cares, no matter where they live or work or their business is say in the contract that Virginia law applies so that **UCITA** would apply? And [Connie Ring] said a lot would. Now once they do that, you run into conflict of law issues in their own state. So if they're in California, have no connection to Virginia whatsoever, California law might have something to say about it. The Virginia law says that they can do it. And so, put your choice of law provision in your agreement.

With regard to choice of forum, it's right behind that: [§ 59.1-501.10], there's no default rule on choice of forum. But Virginia law says you can choose a forum provided it's not done for the purpose [*** 86**] of defeating the rights of the other party. It goes on to say as long as there's a business reason for it, then most likely it will be followed, unless it's a mass market transaction. Now the rule in the mass market transaction, as modified by a little bit of legislation in the past, it not only has to be specifically stated, and in all contracts it has to be specifically stated, it has to be conspicuous. Well now, do you think a sophomore at Stanford cares that the \$ 30 piece of software conspicuously states that Virginia is the forum for a suit? So, saying it's conspicuous, that's something, but for me it doesn't do a whole lot. So look at the basic rules, and include both of those in your basic contract.

The issue of receipt is in [§ 59.1-501.2]. Basically it's in the definition rules, and we've heard a lot of discussion about this issue of receipt. And the words, you'll have fun with the words, you have to pack so much stuff into statutory language that you end up with stuff like this: receipt occurs when the notice or a record comes "into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by the recipient" ¹ . . . I won't read the rest of it. The criticism of that rule is an e-mail sent to your e-mail address is deemed received. And that's true whether you read the e-mail or not. It's true whether you have an e-mail filter system or not, whether you have any other kind of system that keeps you from getting the e-mail or looking at it. But you know it's very similar to the rule we've always had about mail. Mail is valid when sent [by regular mail] if properly addressed, or [to a] valid address. So it's not much different from the rule we've always had. It's made more complicated by the technology, but the fundamentals of the rule are not that different.

Manifest assent, you've heard a lot about that from a lot of different speakers. This is the shrinkwrap versus clickwrap, and I think we sort of described that assent requires that you see the terms of the agreement. One way or another, you have to see the terms of the agreement in order to manifest assent. And the statute says you have a reasonable opportunity to reject it after you see the terms of the agreement. What's reasonable depends on the circumstances of the case. Part of the issue there is whether after you already have it, are you going to take the trouble to reject it. And, again, that's really in the

hands of the consumer or the purchaser in [the] case of a nonconsumer transaction.

There are some statute of frauds type rules. In [§ 59.1-502.1], a contract requiring payment of \$ 5,000 or more for the duration of more than a year needs to be documented either in writing or in some form that does document it, either electronically or otherwise. So there is that kind of rule regarding those contracts. We talked about the battle of the forms, that's in [§ 59.1-502.4], and it's the usual rules with a wrinkle. The standard rule, you know, you send a contract to the other side, they make a change in it, and then send it back to you. Then, three rules [apply]. [The] first rule [is], if the change they have made materially changes the essence of the transaction of the contract, then there is no contract unless you have an agreement. Now there's a related rule that says if their change requires that you agree to it, whether or not it changes the essence of the contract, then that also applies. But the basic rule is they sent it back, if it changes the essence of the contract, there's no contract unless you agree. And there's no surprise there. [The] second rule [is], which is a little bit of a surprise, if it does not change the essence of the contract, but it makes certain changes in the contract, then you have a contract, but those changes that have been proposed are not agreed [to]. So you have to agree on those or else they're not part, they're not terms of the contract that's been agreed to. The third thing that you should watch out for, is a rule that says if the parties are merchants, then, if you are a merchant and a change in provisions comes back to you, that term will be deemed accepted unless you respond to it. Now, as I was looking at the definition of merchant, and I encourage you to look at that, there is a special rule for merchants that you need to be aware of and be careful about.

A couple of rules on number of users. You've heard a lot of talk about exclusiveness and [*87] limitations on use. Again, if you have a contract that provides the limitations on use that applies, [and] if you don't say how many users can be made available, then the rule is that there will be a reasonable number taking into account the commercial circumstances. That's an interesting rule. But again, if you want to restrict use, you better restrict use. Because otherwise somebody's going to have to figure out what "commercial circumstances" are, and you have to deal with that. Duration contract, [under § 59.1-503.8], the default rule is, what a surprise, a reasonable time given in light of the circumstances, and a contract can be terminated in the future. The rule about termination is in [§ 59.1-506.16]. You should look at because it requires reasonable notice for termination if it is an access contract, and you've heard a little discussion about an access contract to an [application service provider]. Access contracts can be terminated immediately. Other contracts, you have to give reasonable notice to terminate. They can't necessarily be automatically terminated. There's an interesting default rule on termination in [§ 59.1-506.16] that describes the terms of the contract that survive termination. And this is what happens when you try to apply the new sort of the new technology to the old rules. The default rule is on a plain, ordinary termination the following things survive the termination: Obligation of confidentiality (that's probably not a surprise); obligation of nondisclosure; contractual limitations on use, if there are any; the obligation to return everything; the choice-of-law forum applies; obligation to arbitrate, if it's in the agreement; a term limiting the time for commencement of action, so a restriction on time for bringing a suit; an indemnity term; a term limiting the remedy; [and] an obligation to provide accounting. So take a look at the terms that apply even in the event [of] the termination of the agreement.

Breach of contract rules are interesting and potentially a trap for the unwary, that's in § 59.1-507.1. Breach and remedy together: for every breach of contract, you're entitled to damages for breach. However, you're not entitled to terminate a contract for every breach. In order to terminate the contract, the default rule is that the breach has to be a substantial failure of an essential element of the agreement. Now that might be the rule now, but it just

seems to be that goes a little bit beyond what I would have thought the normal rule is. It's a pretty serious requirement in order to terminate the contract on account of breach. The other rule that you should be aware of, if there is a breach then the party that is harmed has to give notice of their objection to the breach within a reasonable period of time or they waive the remedies of the breach. You know, we are accustomed to our contracts, so this can be changed by contracts. We're accustomed to contracts that say that the remedies apply whether or not you make any statement of that under the default rules. That's not the case. If the client has a remedy, they have to assert it.

The self-help rules, the panel before didn't get to talk too much about that, actually I don't get to talk much about it either. The basic self-help rule, we have always been familiar with this, you can have self help as long as it's not a breach of peace, or there's no foreseeable risk of personal injury or physical damage to other parties. And that rule is still going to apply here. What we talk about are those time bombs, that the thing that you can put in someone else's system that can shut it down. And what Virginia law has done is put in place a number of things that ought to scare your client to death before they set that thing off. There's a 45-day notice. There's a provision that makes them liable if there's something called substantial harm to public safety or great harm to the public interest substantially affecting third persons. There's a set of rules that make it risky to set those bombs off. And, of course, as you may have heard earlier there's also rules in the mass market transaction that you can't do that in any case. So read the rules, that are in [59.1-508.15] about self help carefully. And while it's tempting for your client to have one of those and to set off, it may have a lot of risk to it that you want to be careful about.

The changes by the General Assembly this time around were covered along the way. The best [*88] outline of those changes is one that followed Delegate May's presentation. Between that and the way you've heard about the changes, I think you pretty much picked up what's been changed. By in large I think they are enormous improvements on the Act. Fundamental work on the Act continues. Those changes helped the self help by making it clear that [there is] a lot of flexibility for the Consumer Protection Division to provide rules and regulations to protect mass market transactions and consumers. And so, in that regard, for your clients you have to look at not only the law, but what rules and administrative regulations are promulgated over time. Thank you.

FOOTNOTES:

n1 VA. CODE § 59.1-501.2(a)(52)(ii) (Michie 2001).