UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce

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A central goal of any project to codify a commercial law for use across multiple political states is to advance the harmonization and unification of laws. This process frequently can invoke difficult balancing issues and choices. The states often may have vastly different social cultures and legal systems which operate under different historical traditions. Alternatively, the various states may be relatively homogenous in attitudes, as is the case in the United States with respect to some issues. Their economic systems may be highly developed, such as in the West, or may be yet emerging, such as in many parts of the world. Such disparities in legal traditions, cultures, and economic development make any harmonization project[1] a complex task, most particularly so at the international level. However, only through such harmonization can the uniformity of law

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1. Numerous organizations, worldwide, are engaged in harmonization efforts. The United Nations Commission on International Trade Law (UNCITRAL) was created in 1966 by General Assembly Resolution 2205 (Dec. 17, 1966) in order to mandate harmonization and unification in international trade law. Status and listing of current UNCITRAL projects may be found at UNCITRAL's home page (last modified March 23, 1999) <http://www.un.or.at/uncitral>. Other examples include: TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, art. 100a, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) (article establishing harmonization powers); *Constitution and Bylaws of the National Conference of Commissioners on Uniform State Laws*, § 1.2, *in* HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS & PROCEEDINGS 391 (1988) [hereinafter NCCUSL HANDBOOK] (providing that NCCUSL's purpose is to promote uniformity in the law where uniformity is "desirable and practicable").

that is so crucial to support efficient and fair commercial transactions be advanced.

It is perhaps in the area of electronic commerce (e-commerce) in which the search for unification and harmonization of commercial laws will face its greatest challenge. Seeking to harmonize the laws of multiple political states in any one particular area of international business transactions is a daunting enough task, given the wide range of legal approaches that those states may have taken in an area, regardless of whether it be insolvency, the sale of goods, or payments. The advent of broad-based use of the Internet, technology described by one author as "contemptuous of political boundaries,"[2] adds an even deeper and more complex twist to the usual intricacies of cross-border harmonization projects. With the emergence of computer-based transactions, harmonizing e-commerce law at the international level not only involves balancing the international issues, but also requires that those international issues be understood and resolved while taking into account the technologies and customs of cyberspace.

Although cyberspace is now in its infancy, and cyberlaw still largely undeveloped,[3] by all indications, e-commerce not only is here to stay, but also might radically transform commercial transactions. Estimates are that consumers spent somewhere between $8-$13 billion on goods over the Internet in 1998.[4] While consumer retailing on the Internet has been the focus of the popular media, estimates are that business e-commerce vastly exceeds consumer Internet retailing. Some estimates show that $43 billion in goods were bought or sold in business-to-business e-commerce transactions last year.[5] With some

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2. Philip S. Corwin, *Electronic Authentication: The Emerging Federal Role*, 38 JURIMETRICS 261, 261 (1998).

3. Indeed, it is still an open question on whether a separate doctrinal area of "cyberlaw" even exists. *See* Julia A. Gladstone, *Survey of the Law of Cyberspace: Introduction*, 54 BUS. LAW. 345, 346-48, 345 n.2 (1998).

4. *See* Erick Schonfeld, *The Exchange Economy*, FORTUNE, Feb. 15, 1999, at 67 (estimating $8 billion); Rebecca Quick, *AOL Members Spend $80 Each Web Shopping*, WALL ST. J., Jan. 5, 1999, at B7 (estimating $13 billion). Consumer purchases online tripled in the last year. *See id.*

5. *See* Schonfeld, *supra* note 4; *see also* Mark Boslet & Joelle Tessler, *On-Line Commerce Moves Beyond Books*, WALL ST. J., July 7, 1998, 1998 WL-WSJ 3500503 (discussing estimates of Forrester Research and The Yankee Group on business-to-business e-commerce). The present demand for and growth of business e-commerce may vary from industry to industry. For example, in the electronics-distribution community the volume of on-line transactions is still quite small, although electronic data interchange is widely used, but is rapidly growing. *See* John H. Mayer, *With time, the use of e-commerce will be considered more of a standard practice than a value-added service*, ELECTRONIC BUYERS' NEWS, Jan. 25, 1999, at 134. In industries where standard products are not usually involved, highly automated Internet transactions are a less effective method for product sales. Security concerns, customer shopping habits, and attitudes toward technology provide additional obstacles to growth of business e-commerce. *See id.*

analysts predicting that $1.4 trillion in transactions will take place through the Internet by 2003, perhaps 90% of those transactions will be between businesses.[6]

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (Model Law) seeks to address head-on the goals of international harmonization of commercial laws within the challenging framework presented by cyberspace. Adopted in 1996,[7] and subsequently amended in 1998,[8] the Model Law has already begun to attract the attention of legal scholars,[9] international public lawmaking bodies,[10] and so-called "private legislatures" also involved in harmonization projects, such as the National Conference of Commissioners on Uniform State laws (NCCUSL) in the United States.[11]

The *Tulane Journal of International and Comparative Law (TJICL)* has published the Model Law, together with its accompanying Guide to Enactment, in this volume.[12] By way of introduction to the *TJICL* publication of the Model Law, it seemed appropriate to set the Model Law within the larger context of the

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6. *See* Schonfeld, *supra* note 4.

7. *See Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninety Session*, U.N. GAOR, 51st Sess., Supp. No. 17, at 70 Annex 1 (1996), U.N. Doc. A/51/17, reprinted in 36 I.L.M. 197 (1997); United Nations, UNCITRAL Model Law Electronic Commerce with Guide to Enactment (last modified Mar. 23, 1999) <http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm> [hereinafter UNCITRAL Model Law].

8. *See infra* note 20.

9. *See, e.g.*, Amelia Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic law Reform*, 72 TUL. L. REV. 1931, 1963-68 (1998) (discussing Model Law and its relationship with draft Uniform Electronic Transactions Act of the NCCUSL); Richard Hill & Ian Walden, *The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions*, 13 COMPUTER L. 18 (Mar. 1996) (reviewing provisions of Model Law from European perspective).

10. Singapore became the first country to enact the Model Law in its passage of the Electronic Transactions Act on June 29, 1998. A copy of the bill in its first reading form may be downloaded from Electronic Commerce Hotbed (visited Apr. 4, 1999) <http://www.ech.ncb.gov.sg/view/ech/ETBbill.zip>. The State of Illinois has also adopted the Model Law. *See* (visited Apr. 4, 1999) <http://www.un.or.at/uncitral>. *See also Joint Statement from Australia and the United States of America on Electronic Commerce*, 34 WEEKLY COMPILATION OF PRES. DOCUMENTS, Dec. 7, 1998, at 2392 (joint statement of United States and Australia encouraging adoption of Model Law); President William J. Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, at 5 (stating the U.S. Government's position supporting principles of UNCITRAL Model Law), available at the White House's Information Infrastructure Task Force home page (visited Apr. 4, 1999) <http://www.iitf.nist.gov/eleccomm/ecomm.htm>.

11. *See* Boss, *supra* note 9, at 1956-68 (discussing influence of Model Law on United States Uniform Commercial Code and on Uniform Electronic Transactions Act).

12. *See* 7 TUL. J. INT'L & COMP. L. 237 (1999); *see also* UNCITRAL Model Law on Electronic Commerce, [1996] I.Y.B. Int'l Law Comm'n 237, U.N. Doc. A/CN.9/SER.A/1996.

growing need for harmonization and unification of commercial law and cyberlaw. This introduction to the Model Law will briefly set out the principal provisions of the Model Law and its underlying methodology. The Model Law will then be contrasted with another on-going harmonization effort: the revisions to the Uniform Commercial Code (UCC) in the United States. The problems and issues that have arisen in the United States domestic law reform effort illuminate the significant obstacles to uniformity that may exist in any harmonization project. Placed in this context of harmonization efforts generally, the Model Law suggests that the future influence on the development of a harmonized, or uniform, law of e-commerce may well come from the international rather than domestic stage. The Model Law's ultimate significance may lie, not in its modest provisions, but in that it may well be the first step toward a uniform and truly international cyberlaw.

I. A BRIEF OVERVIEW OF THE MODEL LAW

The Model Law, structurally, adopts a limited "framework" approach to regulating e-commerce.[13] Under this approach, the law is neither intended to be a comprehensive, "code-like" articulation of the rules and regulations for electronic information transmission, nor intended to govern every aspect of e-commerce.[14] Rather, the Model Law is intended to provide essential procedures and principles for those areas,[15] while offering the enacting states broad discretion to regulate beyond the Model Law in specific areas and also to tailor the Model Law to their own jurisdictions. The underlying analytical approach which guides the Model Law's substantive provisions is a "functional-equivalent approach." Under this approach, the underlying purposes and functions of traditional paper-based legal requirements are evaluated in order to assess the extent to which e-commerce techniques can meet those purposes and functions.[16] Where this is the case, the Model Law seeks to place electronic communications on par with the legal treatment accorded to traditional paper-based types of communications.

13. *See* UNCITRAL Model Law with Guide to Enactment [hereinafter "Guide to Enactment"], Pt. I.D, ¶ 13 (1996) (amended 1998).
14. *See id.* (discussing principles of framework approach).
15. *See id.*
16. *See* Guide to Enactment, Pt. I.E, ¶¶ 15-18.

The Model Law applies to information in the form of a data message[17] that is used in the context of commercial activities.[18] The term "commercial activities" is to be interpreted in its broadest sense, and can include the following:

> . . . matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[19]

The Model Law provides that: (1) information in the form of data messages shall not be denied legal effect, validity or enforceability on that basis alone;[20] (2) any legal requirements that information be in a "writing" will be met by a data message if the information contained therein is accessible so as to be usable for subsequent reference;[21] (3) any legal requirements for "signatures" may be satisfied by data messages;[22] and (4) legal requirements for "original" documents may be met by data messages.[23] Data messages are also given equality

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17. "Data message" under the UNCITRAL Model Law "means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy." UNCITRAL Model Law art. 2(a). EDI is defined as "the electronic transfer from computer to computer of information using an agreed standard to structure the information." UNCITRAL Model Law art. 2(b).

18. *See* UNCITRAL Model Law art. 1. States have the option of limiting the scope of the Act to where the data message relates to international commerce or extending applicability to any information in a data message, irrespective of it commercial context. Art. 1 at * and ***. The Model Law is not intended to override consumer protection laws. Art. 1 at **.

19. UNCITRAL Model Law art. 1, at ****.

20. *See* UNCITRAL Model Law art. 5. Article 5 was amended in June 1998 to provide that information not contained in a data message purporting to give rise to legal effect, but rather merely referred to in such a data message (for example through hyperlink) shall not be denied legal effect, validity or enforceability solely on the ground of not being contained in the data message. *See* UNCITRAL Model Law art. 5 bis.

21. *See* UNCITRAL Model Law art. 6.

22. *See* UNCITRAL Model Law art. 7. The data message must use a "reliable" method, determined by the surrounding circumstances, both to identify the person whose "signature" is at issue and to indicate the person's approval of the information contained in the message. *See* UNCITRAL Model Law art. (1)(a)-(b).

23. *See* UNCITRAL Model Law art. 8. There must be reliable assurance, which is determined in light of the purposes for which the information was generated and of the surrounding circumstances, *see* UNCITRAL Model Law art. 8(3)(b), as to the integrity of the information from the time first generated in its final form. Where information is required to be presented, it must be capable of being displayed to the person to whom it is presented. *See* UNCITRAL Model Law art. 8(1)(a)-(b).

with respect to admissibility and evidentiary weight in legal proceedings,[24] as well as equality with respect to legal requirements for document, record, or information retention.[25]

In addition to seeking equal treatment of data messages with traditional paper-based communications where the functional-equivalent approach suggests such equalization, the Model Law also briefly addresses the legal effect of data messages in particular substantive areas. For example, the Model Law provides that offer and acceptance in contract formation may be expressed through data messages.[26] A contract may not be denied validity or enforceability solely because a data message was used for contract formation.[27] Additionally, declarations of will and other statements are not to be denied legal effect solely because expressed in a data message.[28]

Regulation of data messages is most comprehensively addressed in the area of carriage of goods.[29] Again seeking to place data messages on an equal plane with paper-based methods of information transmission, the Model Law provides that in actions related to the carriage of goods, with some limitations,[30] a data message will meet any legal provisions that require a writing or paper document.[31] Finally, the Model Law seeks to provide consistent rules for acknowledging receipt of data messages[32] and for determining the time of dispatch and receipt of data messages.[33]

The choice of the framework along with the functional-equivalent approaches result in a Model Law that avoids a lengthy and complex "codification" of rules governing e-commerce. This "pragmatic"[34] decision might seem unusual to those used to the

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24. *See* UNCITRAL Model Law art. 9.

25. *See* UNCITRAL Model Law art. 10.

26. *See* UNCITRAL Model Law art. 11. Also, the parties may expressly provide otherwise, *see id.* art. 11(1), and discretion is given to enacting states to exclude particular types of transactions from the provisions concerning contract formation. *See id.* art. 11(2).

27. *See* UNCITRAL Model Law art. 11(1).

28. *See* UNCITRAL Model Law art. 12. Again, enacting states are given leeway in excluding particular sorts of statements from this provision. *See* UNCITRAL Model Law art. 12(2).

29. *See* UNCITRAL Model Law arts. 16-17.

30. For example, UNCITRAL Model Law art. 17(3) imposes a "reliable method" standard when rights are granted or obligations acquired by a person through using a data message, when the law ordinarily requires those rights or obligations to be conveyed by a paper-based document. Reliability is assessed in light of the purposes for which the right or obligation was conveyed and in light of all the surrounding circumstances, including any relevant agreement. *See* UNCITRAL Model Law art. 17(4).

31. *See* UNCITRAL Model Law art. 17(1).

32. *See* UNCITRAL Model Law art. 14.

33. *See* UNCITRAL Model Law art. 15.

34. Hill & Walden, *supra* note 9, at 21.

comprehensive and sometime policy-driven law reform projects seen in the United States. Data messages are placed on an equal level with paper documents and paper-based means of information transmission. In addition, some very basic rules for treatment of data messages in contract law, evidence, procedure, and the carriage of goods in the enacting state are established. The framework approach therefore allots maximum flexibility to enacting states to tailor the Model Law to accommodate local concerns, and results in a proposed law that addresses only those issues most basic to e-commerce. At the same time, the Model Law establishes a threshold standard of uniformity across enacting states. Issues regarding other e-commerce related subjects, such as the use of digital signatures and certification authorities are left to further model or uniform rules and are also currently being addressed by UNCITRAL.[35]

Looking to the United States, the issue of the Statute of Frauds in contracts for the sale of goods provides a useful illustration of the intersection between the Model Law and domestic state law. In many areas of American domestic contract law, there is a requirement of some sort of signed writing in order to be able to enforce the contract in court.[36] The Statute's continued vitality has come into question as its rationales have eroded and as computer technology makes outdated the "signature" and "writing" requirements of the Statute. Some scholars have suggested getting rid of the Statute of Frauds in Article

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35. In 1996, the UNCITRAL Working Group on Electronic Commerce began to examine comprehensively use of digital signatures and related technological and legal issues on signatures in e-commerce. Draft uniform rules are available at the "Proceedings" page of UNCITRAL web site (last modified Mar. 23, 1999) <http://www.un.or.at/uncitral>. The relationship between the Model Law and the proposed rules is still being examined. *See* UNCITRAL WORKING GROUP ON ELECTRONIC COMMERCE, *Draft Uniform Rules on Electronic Signatures*, A/CN.9/WG.IV/WP.79 (Nov. 23, 1998), *available at* <http://www.un.or.at/uncitral/english/sessions/wg-ec/wp-79.htm> (last modified Mar. 23, 1999). Alternatives include amending the Model Law to incorporate the final uniform rules for digital signatures, or adopting the uniform rules as a separate instrument. *See id.*

36. *See, e.g.*, U.C.C. § 2-201 (1995) (Statute of Frauds for sale of goods); JOHN J. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 710-78 (4th ed. 1998) (analyzing areas of United States law in which Statute applies). In contracts for the sale of goods, the Statute of Frauds provides that, for contracts with a price of $500 or more, the contract "is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." U.C.C. § 2-201(1) (1995). Exceptions to the Statute of Frauds are provided in cases where a merchant sends a confirmation of the contract to another merchant, and no proper and timely objection is given, *see id.* § 2-201(2), and in cases where the goods are specially manufactured, the party admits the existence of the contract in court, payment for the goods have been made, or acceptance of the goods has occurred. *See id.* § 2-201(3).

2 of the UCC entirely,[37] although it now appears that the Statute will be retained after Article 2 (Sales) of the UCC is revised, with the revisions validating the use of data messages in order to satisfy the former "writing" and "signature" requirements.[38] In the meantime, issues concerning the interpretation of the existing Statute of Frauds and the ability of data messages to satisfy the "writing" and "signature" requirements of the Statute are left to courts or individual state legislatures.[39]

The Model Law does not seek to intervene into the underlying substantive question concerning the issue of retaining the Statute of Frauds in United States sales law, even though the writing requirement sets the United States apart from international sales law.[40] Rather, through its requirements that data messages be treated equally with traditional paper-based communications, the Model Law, if enacted by a state, merely would mandate that with respect to the "writing" requirement and the "signature" requirement in any Statute of Frauds, data messages provide an acceptable equivalent. A state, under the Model Law, thereby retains maximum authority over the fundamental issues of whether to require a writing, or record, in order to have an enforceable contract. At the same time, should an enacting

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37. *See* R.J. Robertson, *Electronic Commerce on the Internet and the Statute of Frauds*, 49 S.C. L. REV. 787, 809-13 (1998) (discussing arguments in favor of repeal of statute of frauds); Sharon F. DiPaolo, Note, *The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce*, 13 J.L. & COM. 143, 145-46 (1993) (summarizing attitudes towards repeal or revision of UCC Statute of Frauds).

38. Recent discussion drafts of the revisions to article 2 retain the Statute of Frauds for contracts for a price of $5000 or more. *See, e.g.*, U.C.C. § 2-201(a) (Revised Draft Mar. 1999) (visited Apr. 6, 1999). <http://www.law.upenn.edu/library/ulc/ucc2/ucc2399.htm>. The old "writing" requirement of the Statute is proposed to be replaced by a new "record" requirement, with "records" being defined as "information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form." *See id.* § 2-102 (comment 2) (Revised Draft Mar. 1999). The concept of "authentication" will substitute for the "signature" requirement. Under the proposed definition, "authentication":

> Means to sign, or to execute or adopt a symbol or sound, or encrypt a record in whole or in part, with intent to (i) identify the party; (ii) adopt or accept a record or term; or (iii) establish the authenticity of a record or term that contains the authentication or to which a record containing the authentication refers. Unless the circumstances indicate that a party intends less than all of these effects, authentication is intended to establish the party's identity, its adoption and acceptance of the record or term, and the authenticity of the record or term as of the time of the authentication.

Id. § 2-102 (1) (Revised Draft Mar. 1999).

39. *See* Robertson, *supra* note 37, at 797-809 (discussing judicial precedent that might govern "writing" and "signature" issues), 815-35 (discussing state legislative initiatives); *see also* DiPaolo, *supra* note 37, at 146-55 (raising arguments on whether EDI can satisfy Statute of Frauds requirements).

40. The Convention on the International Sale of Goods, for example, does not have a statute of frauds.

state determine that data messages do not provide an adequate equivalent for a paper-based "writing" in particular circumstances, the Model Law allows exclusion of those sorts of situations.[41]

The Model Law, through the framework approach, thus modifies United States domestic law in only a very limited degree and thereby gives broad deference to individual state attitudes on issues of fundamental policy. Functional equivalence as an underlying methodology toward drafting additionally ensures that significant domestic policies will not be contravened, but perhaps be even advanced by the Model Law, if enacted or adopted. Indeed, this effect was intentional. In the UNCITRAL deliberations leading to the Model Law, public policy concerns, as opposed to international harmonization goals, did not play a significant role.[42]

This underlying methodology establishes a unique paradigm for harmonization projects. Perhaps it is the Model Law's simplicity and underlying legislative methodology that might explain why, from early indications, the Model Law has been and will continue to be well-received by the international legal community.[43] A useful contrast to the Model Law's methodology is the experience of the on-going revisions to the UCC in the United States by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In that effort, an alternative methodology is emerging for domestic law reform efforts. In this case, however, the domestic experience to attain uniformity of the commercial laws of the individual states has often been met with conflict.

II. THE UNIFORM LAWS PROCESS IN THE UNITED STATES

In the United States, the formal and institutionalized quest for uniformity of the laws of the individual states has passed its 100-year anniversary. The principal player in the area is the NCCUSL, founded in 1892. The NCCUSL is a "private" legislature comprised of "commissioners" from all areas of the legal profession, including legal scholars, representatives from the states, lawyers, state legislators, and judges. Founded with the express purpose of making the laws of the states uniform, the NCCUSL is involved in myriad

41. *See* UNCITRAL Model Law arts. 6(3), 7(3); Guide to Enactment, Pt. II.1, ¶ 51.

42. *See* Harold S. Burman, *Building on the CISG: International Commercial Law Development and Trends for the 2000's*, 17 J. L. & COM. 355, 358 (1998) (stating "Public policies were not a significant part of the three-year deliberations, although at issue was whether any international attempt at standards should be made until a decade or more of national laws and conflicting decisions would emerge.").

43. *See supra* notes 7-11 and accompanying text.

law-reform efforts through promulgating uniform[44] and model[45] acts. Although involved in a wide array of doctrinal areas, the NCCUSL's most well-known uniform act is the UCC, a joint project of the NCCUSL and the American Law Institute (ALI). The UCC has been enacted in some form[46]—often without significant amendments—in every state. The original UCC—the work of luminaries such as Karl Llewellyn and Grant Gilmore—has subsequently been broadened by the inclusion of additional articles.[47] The NCCUSL now is well into a substantial revision and expansion project[48] that not only will result in a complete overhaul of the original UCC, but also will move the UCC toward accommodating modern commercial practices, including e-commerce and electronic data transmission.[49]

Yet, in the course of these efforts many concerns have been raised concerning the revision process and the legislative methodology adopted by the NCCUSL and ALI. The controversy arose most vociferously after the 1990 revisions to Article 3 (Negotiable Instruments) and Article 4 (Bank Deposits and Collections) of the UCC. Some commentators on the process that resulted in those revisions have argued that the uniform state laws legislative process does not adequately take into account the interests

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44. The NCCUSL's "Uniform Acts," generally, seek to address issues and problems that arise specifically because of the lack of uniformity in laws of the states. Uniform acts seek to harmonize the states' laws to enhance interstate transactions or economic or social development, and thereby also to reduce pressures for federal preemption in areas where uniformity is considered important. *See Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts*, *in* NCCUSL HANDBOOK, *supra* note 1, at 431, 433.

45. The NCCUSL's "Model Acts" address issues that do not invoke interstate transactions or relations, but rather address legal issues common to many or all states. *See id.*

46. The U.C.C. now consists of numerous articles, governing everything from Sales (article 2) to Secured Transactions (article 9). In a number of cases, some states have not enacted a particular Article. Louisiana, for example, has not enacted article 2 (Sales). In addition, states at times enact their own amendments to particular provisions in articles. To the extent this occurs, non-uniformity will occur.

47. For example, U.C.C. art. 2A (adopted in 1987) governs personal property leases and U.C.C. art. 4A (adopted in 1989) governs certain types of electronic funds transfers.

48. *See* Boss, *supra* note 9, at 1935-36 n.10. The project includes substantial revisions to U.C.C. art. 2 on the sale of goods and art. 9 on personal property secured transactions, and the addition of a proposed new article 2B, which will cover licensing and intangibles. The most recent drafts of these revisions are available at the official NCCUSL web site (visited Apr. 6, 1999) <http://www.law.upenn.edu/library/ulc/ulc.htm>.

49. In addition to the UCC revision and expansion project, the NCCUSL is currently involved in drafting a Uniform Electronic Transactions Act (UETA). The most recent draft of the UETA is also available at NCCUSL's official website (visited Apr. 6, 1999) <http://www.law.upenn.edu/library/ulc/ulc.htm>. The UETA is, in part, the NCCUSL's proposed counterpart to the Model Law, and gives legal recognition to electronic signatures, electronic records, and electronic contracts. *See* UETA § 106 (Proposed Draft Mar. 19, 1999) available at <http://www.law.upenn.edu/library/ulc.htm#ueccta> (visited Apr. 6. 1999). For a discussion of the mutual influence of the Model Law and the UETA project, *see generally* Boss, *supra* note 9.

of consumers and is unduly influenced by business interests as well.[50] Because of this perceived bias against consumers and influence by business groups, consumer advocates called for institutional reform, or even abolishment, of the NCCUSL and embarked upon a campaign to prevent enactment of the revised versions of Articles 3 and 4 in the state legislatures.[51] In some cases, the opposition from consumer interest groups was sufficient to cause delay in enacting the revisions and resulted in non-uniform amendments to the UCC.[52] While nearly every jurisdiction eventually enacted the revised versions of Articles 3 and 4, the state of New York remained the last holdout in enacting the revisions.[53]

This debate on the UCC revision process has had many valuable aspects that merit consideration not only by the NCCUSL but also other entities engaged in harmonization projects. The consumer and public choice critiques of the UCC drafting process have provoked a fruitful dialogue on the role of the uniform laws process in securing consumer rights,[54] on substantive consumer protection issues invoked by other ongoing UCC projects,[55] and on the ways in which private legislatures such as the NCCUSL or ALI may be affected by political

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50. *See generally* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Edward Rubin, *Efficiency, Equity, and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993) [hereinafter Rubin, *Thinking Like a Lawyer*]. An in-depth discussion of the debate concerning the treatment of consumers in articles 3 and 4 of the U.C.C., and the process-based arguments in this debate, can be found in A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 679-83 (1996).

51. *See* Patchel, *supra* note 50, at 156-62 (arguing for changes to drafting process and suggesting NCCUSL reconsider its role in lawmaking process); *see also* Rubin, *Thinking Like a Lawyer*, *supra* note 50, at 782-85 (suggesting that NCCUSL revise structure or be abolished, and recounting letter writing campaign against Articles 3 and 4 targeted at state legislatures).

52. *See* Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 727-28 (1998) (discussing delays in state enactment of UCC Articles due to consumer protection issues); Overby, *supra* note 50, at 646, 646 n.8.

53. *See* Miller, *supra* note 52, at 727-28.

54. *See e.g.* Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will articles 2, 2B & 9 Be Fair to Consumers?* 75 Wash. U. L.Q. 69 (1997). This volume also contains numerous articles devoted to the subject of consumer protection and the U.C.C. Other examples include: Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Practices?*, 38 WM. & MARY L. REV. 1465 (1997) (developing theoretical framework for evaluating when UCC should accommodate consumer concerns).

55. *See generally* Mary Jo Howard Dively & Donald A. Cohn, *Treatment of Consumers Under Proposed U.C.C. Article 2B Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 315 (1997); Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B, and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997); Fred H. Miller, *UCC Proposals Concerning Consumer Transactions (Article 2 and 9)*, SC36 ALI-ABA 185 (1997).

influences previously thought to be phenomena of public legislatures.[56] At the same time, the UCC experience illuminates the intersections and conflicts that may exist between often policy-driven issues such as consumer protection and the need for inter-jurisdictional uniformity. Finally, the UCC revision process and the surrounding debate have shown how legislative processes may be structured so as to secure maximum harmonization and uniformity of state law, to accommodate interests that run widely across ideological spectrums, and to resist undue political pressures.

The end result of the domestic debate may well provide a greater understanding and appreciation of the role of private entities in harmonizing commercial law. And yet, the experience in the United States with the UCC revisions has had some substantial costs, which merit equal consideration. Some consumer advocates seem, at times, to have placed greater weight, universally, to perceived issues of consumer justice rather than to interstate uniformity of the basic UCC,[57] as a general political strategy. Such an attitude, at its most extreme, threatens to undermine the successful, largely uniform enactment of the UCC by state legislatures. For example, if the experience of revised Articles 3 and 4 is to be repeated in other revision and expansion projects now underway, the pressures placed on the NCCUSL and ALI from both business and consumer interests may result in substantial delays in the drafting process. To the extent UCC drafting groups are perceived to have been unduly influenced by special interest groups, the opposing side has incentives to manipulate the state legislative process to alter provisions resulting from such perceived influence. This brings with it the potential for increasing and substantial non-uniformity, added enactment costs, and even further delays in widespread enactment. All of these factors weigh in favor of federal preemption of the field.

The aspect of federal preemption poses a substantial challenge to the NCCUSL most particularly in the area of legal regulation of e-commerce. The uniform state laws mechanism in the United States is only one means for creating uniformity among the states. The federal government, which can create uniform positive law in interstate

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56. *See, e.g.*, Edward J. Janger, *Predicting When the Uniform Laws Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) (analysis of uniform laws process from regulatory capture perspective); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (in-depth analysis of political influences in private legislatures and lawmaking processes); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) (critique of Article 9 Study Group processes).

57. *See, e.g.*, Patchel, *supra* note 50, at 159-60; Rubin, *Thinking Like a Lawyer*, *supra* note 50, at 783-87.

commerce simply by legislating in the area, in every case is an alternative mechanism by which to create interstate uniformity. The deficiencies of the UCC revision process exposed by the criticism of the revisions to Articles 3 and 4, raise particular federalism concerns in the rapidly changing environment of e-commerce.[58] The lengthy and politicized process that preceded the eventual enactment of the revisions by the state legislatures illuminates the costs often associated with seeking uniformity through uniform state laws rather than federal enactment. Given the importance of uniformity and speed in legislating in the area of e-commerce, and given the rapidly changing technological environment of the Internet, these deficiencies have caused some commentators to consider whether the federal government, rather than the NCCUSL, ought to be the principal player in regulating e-commerce.[59]

The NCCUSL and ALI appear to be responding to these pressures effectively and responsibly.[60] An interesting contrast, though, can be made between what has now become a very complex approach toward revising the UCC and the framework approach of the Model Law. Each methodology, obviously, is responsive to and well suited to the contexts in which they must operate. The NCCUSL addresses a relatively economically integrated country with a homogenous legal environment. Moreover, with the UCC it is revising and developing a law that has attained substantial acceptance for nearly a half a century by state legislatures. The NCCUSL's highly intensive methodology is thus politically feasible and, albeit costly, likely to produce a proposed uniform act of sufficient quality and comprehensiveness to be highly attractive to states considering enactment. By contrast, international bodies such as the UNCITRAL must work across widely disparate political units that frequently operate within vastly different legal, economic, and social cultures. The framework approach, with its limited intrusion into domestic state policy matters, works well across this environment to ensure positive reaction from legislatures considering enactment.

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58. *See* Corwin, *supra* note 2, at 262.

59. *See id.* Philip Corwin raises the following rationales for federal intervention in the area of Internet commerce: (1) Internet commerce is inherently interstate and thus reserved for federal rather than state control; (2) a wide inconsistency has arisen among the states already which create uncertainty, increase costs, and inhibit growth of e-commerce; (3) the slowness and uncertainty inherent in the NCCUSL drafting process, specifically the Uniform Electronic Transactions Act; and (4) the need for national standards in completing international agreements regarding electronic authentication. *Id.*

60. *See generally* Miller, *supra* note 52 ("insider" account of current process, with observations on process debate and NCCUSL response).

In the area of e-commerce specifically, the differing methodologies of the NCCUSL and UNCITRAL toward harmonization raise a provocative question concerning whether the law of cyberspace will be uniform, and if so from whence that law shall issue. The Internet and e-commerce have brought an international dimension to harmonization processes on a scale perhaps not previously seen. Accommodating this added dimension within the NCCUSL's already intensive legislative methodology adds a new complexity to the uniform state laws process. In addition, the international nature of the issues evoked by e-commerce suggests that, perhaps, an international rather than domestic solution may follow those issues. The next section briefly speculates on the possibility of a uniform cyberlaw, and the role that the now parallel harmonization projects of the NCCUSL and UNCITRAL may play in reaching that point.

III. WILL CYBERLAW BE UNIFORM?

As Professor Amelia Boss has pointed out, the area of e-commerce law is unique because it involves an attempt to create a unified legal system where no pre-existing body of law existed before.[61] It is also significant that, given the cross-border nature of e-commerce, the previously well-defined lines between the domestic and the international are blurred when analyzing that possible system. If the success of a model or uniform law is measured by enactment, many such laws can be unsuccessful, as the experience of the NCCUSL has shown.[62] As harmonization projects move from the purely domestic or local arena toward a unified system that conjoins the domestic with the international, success not only will be an important consideration, paradoxically, also more difficult to attain given the multiplication of issues that occurs in international harmonization projects.[63] The experience of the NCCUSL suggests that the choices with respect to the underlying process are not insignificant, but rather a crucial decision integrally related to eventual success of a proposed uniform law.

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61. *See* Boss, *supra* note 9, at 1943.

62. *See* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform Laws*, 25 J. LEGAL STUD. 131 (1996) (applying economic analysis to discuss the success of the enactment of NCCUSL laws).

63. *See supra* notes 1-2 and accompanying text.

Presently the international and national projects are proceeding concurrently, and with mutual influence upon one another.[64] Given the important relationship between legislative design and success, the differing methodologies of the Model Law and of the domestic UCC revision process can inform each other, through dialogue that illuminates some tensions that may arise in the future as a uniform law of e-commerce develops. For example, the experience of the NCCUSL, domestically, is instructive for those involved in international harmonization efforts. The debate that has surrounded the revisions to the UCC suggests that aggressive treatment of political issues such as consumer rights may often hinder the enactment, and thus ultimate success of model or uniform laws. The goal of interstate uniformity perhaps always lies in tension with resolution of significant policy or substantive justice concerns. In addition, the UCC revision process indicates that comprehensiveness of coverage not only requires time, but also may conflict with the eventual success of the law absent an intensive and participatory drafting process. Translated into the international harmonization context, which works across widely different legal cultures while recognizing the need for swiftness, these concerns indicate that comprehensiveness would be a significant barrier to uniformity.

At the other side of the dialogue between domestic and international harmonization projects, the Model Law's positive reception ought to inform the NCCUSL's domestic efforts. If the UCC revision process is dominated by internal, domestic political pressures, such that political issues or substantive justice issues such as consumer rights impede substantially the success of the UCC, the influence of the UCC from an international perspective quite possibly could be diminished. In the wake of the Model Law, the NCCUSL process no longer must proceed solely in the shadow of federal preemption in areas of e-commerce, but now arguably also must be responsive to international lawmaking bodies. To the extent the domestic uniform laws process is unwarrantedly subverted or hindered, to the point that largely uniform enactment is impeded, the potential exists that United States domestic law will be marginalized from the emerging international law of e-commerce. With this may come the possibility that international and federal bodies, rather than local domestic ones, could play the predominant role in harmonization through proposed legislation such as the Model Law.

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64. *See* Boss, *supra* note 9, at 1932 (discussing mutual influence of national and international developments in e-commerce).

Such increasing internationalization of the uniform laws process may be an inevitable by-product of globalization. Nonetheless, the UNCITRAL Model Law, in spite of its substantive modesty, poses a significant challenge to any perceived preeminence of the NCCUSL in the area of uniform laws, even in the domestic arena. It is not necessarily the case that the international and domestic harmonization projects in the area of e-commerce always will proceed mutually and concurrently. On matters of commercial regulation, the need for harmonized and largely uniform laws regulating e-commerce will grow. That UNCITRAL has already emerged as the leader in setting the initial standards in the area of e-commerce, suggests that cyberlaw will increasingly be formulated within the international legal community, with entities like the NCCUSL following, rather than leading, in the global harmonization projects of the future.

The existing dialogue between the international and the domestic harmonization strategies provides a useful context within which to evaluate the Model Law's framework methodology, as a harmonization strategy. By acting speedily and incrementally, the Model Law both provides needed guidance to countries on the basic treatment of data messages, while leaving those countries with maximum flexibility to regulate in areas of public policy of local concern. This limited intervention ensures that reception of the Model Law will not be delayed or undermined by political considerations. The Model Law's framework approach to regulating e-commerce in these ways most effectively secures the possibility of widespread acceptance of the Model Law. The Model Law thus could be a significant step toward harmonization.

New technology and the Internet have made permeable traditional geographic boundaries of states once thought completely sovereign and independent. The radical nature of the new technological world makes it not surprising to hear some argue, equally radically, that cyberspace should be free and unencumbered by the constrictions of any legal regulation.[65] However, the need for unified and harmonized approaches to commercial law issues renders utopian ideas impracticable in the area of e-commerce. Only through harmonized legal approaches to contracting and other business matters will the unchangeable and very conventional need of business transactors for certainty in the law be met. The UNCITRAL Model

65. *See* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 476-78 (1997) (discussing a libertarian paradigm of cyberspace).

Law is a necessary and limited first step toward harmonizing the regulations that affect e-commerce throughout the world. By proceeding quickly and incrementally, the UNCITRAL has ensured, to the maximum extent possible, open reception of the Model Law, and should such reception continue, advanced the uniformity necessary for commercial transactions to proceed efficiently. In the area of commerce, future efforts of the UNCITRAL and of domestic harmonizing bodies such as the NCCUSL will tell whether, and in what form, the complexities seen in the UCC revision project may make their way into the international arena. Such efforts will also reveal whether the Model Law is the harbinger of a truly international harmonization movement that ultimately will set the agenda for a uniform law of e-commerce.