The New United States Uniform Electronic Transactions Act : Substantive Provisions, Drafting History and Comparison to the UNCITRAL Model Law on Electronic Commerce

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I. – INTRODUCTION

In the summer of 1999, the *National Conference of Commissioners on Uniform State Laws* (NCCUSL) [1] promulgated the *Uniform Electronic Transactions Act*

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1 NCCUSL was created in 1892, and consists of representatives (Commissioners) from each state, the District of Columbia, Puerto Rico, and the United States Virgin Islands. NCCUSL is a natural outgrowth of the non-federal nature of most of the private law in the United States. Its purpose is to determine what areas of private state law might benefit from uniformity among the states, to prepare statutes or "uniform acts" to carry that object forward, and then to have those statutes enacted in each state. The Commissioners are appointed by their respective states, either by the state's governor or by its legislature. The work of the Conference is done through Drafting Committees, on which many of the Commissioners serve, and through an eight-day Annual Meeting each summer.

The first step in the NCCUSL process is to form a study committee of Commissioners to examine a suggestion for a uniform statute. If the study group recommends that a statute be prepared, before any drafting begins, the recommendation must be approved by the Scope & Program Committee as well as by the Executive Committee of NCCUSL. Once the decision to prepare a proposed statute is reached, a Drafting Committee composed of six to ten Commissioners is appointed.

Each Drafting Committee has a Reporter. The Reporter is a legal expert in the subject of the proposed statute and serves to collect information about the subject for the education and use of the members of the Drafting Committee. The Reporter presents the information with policy choices in alternative draft language. The Reporter does not decide what goes in the statute, but simply drafts the statute consistent with the decisions of the members of the Drafting Committee. The Drafting Committee determines the particular policy and provisions of the proposed statute based on the work of the Reporter, on advice received from various relevant constituencies concerning those policies and provisions, and on the experience of the members in their practice in the various states.

Under an agreement with the American Bar Association (ABA), each Drafting Committee has an ABA Advisor appointed to work with it. The function of the ABA Advisor is to solicit and collect input

(UETA).[2] The Act was intended to be adopted quickly by the various states in the United States, and this has been the case. As of December 2000, twenty-three states have adopted UETA,[3] and it has been introduced in the legislatures of six other states.

The UETA was drafted as a response to the need for the domestic law of the United States to conform to the present and growing amount of transactions that are done electronically. It is intended to make a major impact on commercial law in America, and in all likelihood, its significance will be substantial. Although many businesses are already operating in a non-paper electronic format, the fact that much of the law presupposes paper documents and records in these transactions places many of these transactions legally at risk.

The UETA was intended to be patterned on the UNCITRAL Model Law on Electronic Commerce, adopted on 16 December 1996.[4] During the drafting process, the Drafting Committee incorporated much of the Model Law as well as some other

from every interested constituency in the ABA, and to convey this advice to the Drafting Committee. The proposed statute is discussed and debated at the Annual Meetings of NCCUSL during at least two years before it is promulgated to the various states for adoption.

2 At the August 1996 Annual Meeting, the Scope & Program and Executive Committees of NCCUSL examined suggestions for new legislation consistent with several states' digital signature laws as well as a variety of pending international and domestic projects addressing electronic commerce. At the same time, the Conference had before it proposals from the Committee on the Law of Commerce in Cyberspace of the Business Law Section of the American Bar Association for projects dealing with electronic commerce. As a result of its review of these materials, a Drafting Committee was approved to draft an act "relating to the use of electronic communications and records in contractual transactions." Commissioner Pat Fry, Professor of Law at the University of North Dakota, was designated Chair of the Drafting Committee. Professor D. Benjamin Beard, University of Idaho College of Law, was named Reporter for the project.

Pursuant to its instructions, the new Drafting Committee and Reporter reviewed and discussed, both in draft form and in Conference calls, a number of draft memoranda dealing with the scope of the proposed Act. They were assisted in these efforts by the *Ad Hoc* Task Force on Electronic Contracting, formed by the ABA. Ultimately, the Drafting Committee concluded that the fundamental goal of the project was to draft "such revisions to general contract law as are necessary or desirable to support transaction processes utilizing existing and future electronic or computerized technologies." It further decided to base both the content of the draft and the expression of its provisions on the general principles of preservation of freedom of contract, technology-neutrality and technology-sensitivity, minimalism, and avoidance of regulation.

At the August 1997 Annual Meeting, proposals were considered by the Scope & Program Committee relating to the use of electronic technologies by governmental entities. The Scope & Program Committee and Executive Committee asked the Drafting Committee to include in the project treatment of public communications and transactions. In addition, the name of the project was changed from *The Uniform Electronic Records and Communications in Contractual Transactions Act* to the simpler *Uniform Electronic Transactions Act*. The Act was approved at the Annual Meeting of the National Conference of Commissioners on Uniform State Laws on 29 July 1999.

3 Arizona, California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah and Virginia.

4 The UNCITRAL Model Law on Electronic Commerce is reproduced in 36 *International Legal Materials* 199 (1997) (see also the *Introductory Note*, *Ibid*. at 197) as well as in *Uniform Law Review*, 1996, 716. The drafting of the UNCITRAL Model Law was attended by representatives of over fifty national and ten international organizations. A major goal of the Act was to set down internationally agreed rules before individual states did so, thereby running the risk of international disharmony in this area.

American legislation, and was also mindful of complementary and possibly contradictory provisions of the American Uniform Commercial Code.

This article discusses the substance of the UETA and its drafting history. Because the major impetus for the UETA was the UNCITRAL Model Law on Electronic Commerce, it also looks at the major differences and reasons for these differences between the UETA and the UNCITRAL Model Law.

II. – THE UNIFORM ELECTRONIC TRANSACTIONS ACT

The UETA is a concise act consisting of only twenty-one sections. The brevity of the Act is to a great extent due to the policy decision of the drafters to eschew provisions governing substantive law. The UETA is intended as a procedural act to provide a legal framework to do electronically what has in the past been done through paper media. However, it is not intended to create new substantive legal rules.[5]

The scope of the Act is broad: "Except as otherwise provided ... this Act applies to electronic records and electronic signatures that relate to any transaction." [6] This broad swath is subject to limitations in the following three categories: the American Uniform Commercial Code (UCC), because the UCC, in its present and revised forms, will independently cover electronic transactions; wills and trusts, as these documents have a tradition of solemnity that paper conveys; and the third catchall category of those areas of the law for which the individual state chooses to require paper-based transactions.[7]

During the drafting of UETA, a consistent concern expressed was that the Act would force upon parties the obligation to work within an electronic context regardless of whether they chose to do so. This fear is unfounded, as parties cannot, nor should, be forced to change their business practices. For this reason, the UETA is designed solely to facilitate electronic commerce for those parties who choose to use electronic media, but the Act does not require the use of electronic records or signatures.[8] The UETA only applies to transactions where the parties have agreed to conduct their transactions electronically.[9]

The purpose of the UETA is to create the legal recognition of electronic records, electronic signatures, and electronic contracts: "the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented

5 Section 3(d) UETA (1999).

6 Section 3(a) UETA (1999).

7 Section 3 UETA (1999).

8 Reporter's Notes to Section 5 UETA (1999).

9 Section 5(b) UETA (1999). A determination whether the parties have agreed to conduct their transactions electronically is based on the context and surrounding circumstances of the agreement as well as the parties' conduct (Section 5(b) UETA (1999)). Unless the party's conduct or the circumstances suggest otherwise, intent is not presumed to be continuing, and therefore the Act does not prohibit that party from refusing to conduct other transactions electronically (Section 5(c), UETA (1999)). Consistent with the voluntary nature of the Act, unless "otherwise provided in this Act, the effect of any provision of this Act may be varied by agreement" (Section 5(d) UETA (1999)).

or retained does not affect its legal significance."[10] Because the substantive law governing the underlying transaction may require non-electronic records or signatures, the UETA achieves its purposes by simply overriding the substantive law on these requirements.[11] For this reason, "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form,"[12] nor can a contract "be denied legal effect or validity simply because an electronic record was used in the formation of the contract."[13] Thus, if a law requires a record to be in writing or requires a signature, these requirements can be met by electronic records or electronic signatures.[14]

A corollary is that although the UETA neutralizes the effect of electronic media, the drafting history makes clear that the UETA "should not be interpreted as establishing the legal effectiveness of any given record, signature or contract."[15] The fact that the information is set out in an electronic means instead of on paper is irrelevant.[16] For example, electronic records and signatures are subject to the same proof of issues as any other evidence.[17]

Certain legal writing requirements as well as specific delivery requirements serve a notice function, and the drafters of the UETA carefully balanced this important need with the goal of encouraging electronic media. Thus, if parties agree to conduct their transactions electronically, and there is a law that requires a person to provide, send, or deliver information in writing to another, then that requirement is met if the information is provided, sent or delivered in an electronic record, but only if that information can be retained and later retrieved by the receiver when it is received.[18] Furthermore, an electronic record may not be sent, communicated or transmitted by a system that inhibits the ability to print or download the information in the electronic record.[19] Also, if a law requires a record to be posted or displayed in a certain manner, then it must be posted or displayed in that manner.[20] In addition, if a law requires a record to be sent, communicated, or transmitted by a specific method, or to contain information that is formatted in a certain manner, the record must be sent, communicated, or transmitted by the method specified, and it must contain the information formatted in the manner specified.[21]

10 Reporter's Notes to Section 7 UETA (1999).

11 Section 104(e): "Whether an electronic record or electronic signature has legal consequences is determined by this Act."

12 Section 7(a) UETA (1999).

13 Section 7(b) UETA (1999).

14 Section 7 (c) & (d) UETA (1999).

15 Reporter's Notes to Section 7 UETA (1999).

16 *Ibid.*

17 *Ibid.*

18 Section 8(a) UETA (1999). The Reporter's Notes to this provision state that "[t]his section is " a savings provision, designed to assure that other aspects of a writing, required by law, will not be overridden by this Act." Reporter's Notes, UETA (1999).

19 Section 8(c) UETA (1999).

20 Section 8(b) UETA (1999).

21 Section 8(d) UETA (1999).

Another important issue raised by electronic transactions is attribution – *i.e.*, when and under what circumstances an electronic record or electronic signature is attributable to an individual. The UETA responds to this with a rule that if the electronic record or signature resulted from a person's action, then the record or signature will be attributed to that person.[22] The act by a person may be proved in any manner, including a showing of any security procedure that was applied, to determine the identity of the person to which the electronic record or signature was attributable.[23]

This is a modest rule, and it is not concerned with questions of intent, but only with whether a person's acts were causally connected to the creation or transmission of the electronic record or electronic signature. Such questions of intent are outside the scope of the attribution rule, and they properly go to the question of the legal significance and consequence of the electronic record or electronic signature, question that is outside the scope of the UETA. The validity and effect of an electronic record or signature is based on the parties' agreement, if any, as well as on other applicable substantive law within the context in which the electronic record or signature arose.[24]

A consistent concern throughout the drafting of the UETA was the question of when, if ever, specific rules, procedures or presumptions are needed because of the special characteristics of electronic transactions, and when can there be a reliance on the existing law governing the underlying transaction. Overall, the drafters found very few places where the existing rules of evidence, proof, contract formation, and other concerns were not adequate to govern electronic transactions.

One area where new presumptions were thought appropriate because of the specific nature of electronic transactions is the question of changes and error in electronic records that arise during the transmission of the record between parties. Two particular situations are thought to require special rules: where the parties have adopted a security procedure[25] and where the transaction occurs through an automated medium.[26]

If the parties have agreed to use a security procedure and one party has conformed, but the other has not, and the non-conforming party would have detected the change or error had that party also conformed, then the effect of the change or error is avoidable by the conforming party.[27]

22 Section 9(a) UETA (1999).

23 *Ibid.*

24 Section 9(b) UETA (1999).

25 Section 2(14) defines a "security procedure", as "a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the informational content of an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment procedures."

26 Section 2(2) defines an "automated transaction" as "a transaction conducted or performed, in whole or in part, by electronic means or electronic records in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling any obligation required by the transaction."

27 Section 10(1) UETA (1999).

In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error; and when the individual, on learning of the error, promptly notifies the other person of the error, stating that it did not intend to be bound by the electronic record or taking reasonable steps to return to the other person the consideration received.[28] Absent these two situations, the general law of mistake and error, supplemented by the parties' agreement, governs.[29]

During the drafting of the UETA, there was much discussion about the continued viability of notarization as a legal requirement. Although there was some suggestion that the UETA simply abolish the requirement of notarization as anachronistic, the Drafting Committee chose not to pursue that avenue, having considered it to be beyond the mandate of the Act. The UETA does, however, provide that where a law requires that a signature be notarized, that requirement can be met for an electronic signature if the electronic signature includes the electronic signature of a notary public with all the information that is required to be included in a notarization by other applicable law.[30] This allows a notary public to act electronically, thereby removing the stamp/seal requirements.[31] This does not eliminate any of the other requirements of notary law but simply allows the signing and information to be accomplished through an electronic medium.[32]

Another significant concern is the requirement of record retention. Translating this into the electronic context, the UETA provides that if a law requires records to be retained, then the requirement is met by retaining an electronic record of the information which accurately reflects the information set forth in the record as it was first generated in its final form as an electronic record or otherwise, and that remains accessible for later reference.[33] The two requirements are accuracy and the ability to be able to access the information at a later time.[34]

The UETA assumes parties may want to convert original writings to electronic records for retention, and it duly provides for this contingency.[35] The written records may be destroyed once they are saved as electronic records.[36] The use of third parties for record retention is anticipated as a reasonable business decision, and is therefore specifically provided for in the UETA.

28 Section 10(2) UETA (1999).
29 Section 10(3) UETA (1999).
30 Section 11 UETA (1999).
31 Reporter's Notes to Section 11 UETA (1999).
32 Reporter's Notes to Section 11 UETA (1999).
33 Section 12(a) UETA (1999).
34 Reporter's Notes to Section 12 UETA (1999).
35 *Ibid.*
36 *Ibid.*

In the anticipation of a rapid transition of paper records to electronic form, the UETA provides that if a law requires a record to be either presented or retained in its original form, or provides consequences if it is not, then that law is satisfied by an electronic record that otherwise meets the retention requirements of the UETA.[37] Consistent with this, the UETA also validates electronic records as originals when the law requires that originals should be retained.[38]

Although negotiable drafts could be seen as a subset of this rule, because drafts are governed by the law of negotiable instruments and therefore have specialized rules outside the general law of transactions, there was some question of whether the UETA would be read to cover checks. To resolve this possible ambiguity, the UETA specifically provides that when a law requires retention of a check, that requirement is met when the front and back of a check are recorded electronically and saved for future retention.[39]

Consistent with its overall policy of medium neutrality, the UETA provides that a record that is "retained as an electronic record ... satisfies a law requiring a person to retain records for evidentiary, audit, or like purposes, unless a law enacted after ... this Act specifically prohibits the use of an electronic record for a specific purpose."[40] Therefore, if there are situations where states desire to require the retention of non-electronic records, there is an affirmative duty to specify those areas. Otherwise, by default, the UETA abolishes the requirement of record retention in a non-electronic medium. Also consistent with the policy of medium neutrality, the UETA provides that, in legal proceedings, evidence of electronic records or signatures may not be excluded simply because it is an electronic record or signature or it is not an original document or in its original form.[41]

There are also specialized rules governing contract formation by automated transactions.[42] First, a contract can "be formed by the interaction of electronic agents of the parties even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms or agreements."[43] Second, a contract can be formed as the result of the interaction of an electronic agent and an individual, who is acting on his own behalf or on behalf of another individual, "including by an interaction in which the individual performs actions that it is free to refuse to perform and which it knows or has reason to know will cause the electronic agent to complete the transaction or performance."[44] Thus, the Act provides that contracts can be formed by

37 Section 12(d), UETA (1999).
38 Reporter's Notes to Section 12 UETA (1999).
39 Section 12(e) UETA (1999).
40 Section 12(f) UETA (1999).
41 Section 13 UETA (1999).
42 Section 14(b) UETA (1999).
43 Section 14(b)(1) UETA (1999).
44 Section 14(b)(2) UETA (1999).

machines.[45] The requisite intent necessary for the formation of a contract arises from the use and programming of the machine.[46]

One area that was thought to require special rules is the determination of the time and place of sending and receiving electronic records, and the UETA sets out default presumptions for these questions.[47] But the UETA rules only determine what constitutes sending and receiving, and the Act leaves to other law the legal significance of sending or receiving records.

Although subject to much discussion and debate about the scope or content, all the principles of the UETA discussed above were generally without significant opposition or question about the need for the principle or rule in some form or another. There is, however, quite some question about the need or appropriateness of the doctrine of "transferable records" that is created by the UETA.

A transferable record is defined as an electronic record that would be a note under the law of negotiable instruments or a document under the law of negotiable documents if the electronic record were in writing, and if the issuer of the electronic record has expressly agreed that the electronic record is subject to this Act.[48] The second requirement, that the issuer agree to be bound by the UETA, assures that an obligor on a paper note or document will not be confronted with the conversion of that note or document to electronic form without the issuer's express agreement.[49]

With a transferable record, obligors have the same rights and defenses as equivalent obligors under equivalent transferable records and writing under the laws of negotiable instruments and negotiable documents.[50]

The concept of a transferable record was proposed in the first draft of the UETA for consideration by the Drafting Committee,[51] and it was adopted in the Drafting Committee meeting after a long and spirited debate. The major proponents of transferable records point out that electronic instruments and documents of title allow more efficient transfer and easier storage and access. The major arguments against the transferable record are: it infringes on the existing and clear law of negotiable instruments and documents; the development of the concept creates a new substantive right beyond the mandate of the UETA; and, there is not a sufficient basis for "control" to allow a clear demarcation of who has rights in the transferable record.

45 Reporter's Notes to Section 14 UETA (1999).

46 *Ibid.*

47 Section 15 UETA (1999).

48 Section 16(a) (1)-(2) UETA (1999). A "transferable record" is not the equivalent of an electronic negotiable instrument, because transferable records only cover two party promissory notes, it does not include three party drafts.

49 Reporter's Notes to Section 16 UETA (1999).

50 Section 16(e) UETA (1999).

51 The concept was taken from the Oklahoma Bankers Association Technology Committee Digital Writing and Signature Statute. For an explanation of the need for transferable records, see James A. NEWELL & Michael GORDON, "Electronic Commerce and Negotiable Instruments", 31 *Idaho Law Review* 819 (1995).

This last point, the question of control, is essential to the concept of transferable records. Because possession is an essential element of "holder" status with negotiable instruments and negotiable documents, and possession is obviously a meaningless term in terms of electronic records, the UETA creates the same rights of a holder in the party exercising control of a transferable record as the party would have as a holder of a negotiable document or negotiable instrument.[52] As these requirements would be meaningless with transferable records, the requirements of delivery, possession and endorsement are not required to obtain or exercise any of the rights of a transferable record. [53]

The UETA does not establish the technological standards for the creation and preservation of transferable records. That is left up to the party and to developing computer records technology. The UETA simply provides the legal vehicle if the parties can develop the minimal standards necessary to create, transfer and validate the transferable records.[54]

The UETA also covers governmental [55] electronic records and signatures. The provisions relating to government records are opt-in provisions, and the respective governmental agency (or if the state so decides, a designated state officer) will determine the extent to which it will create and retain electronic records and convert its written records into electronic records.[56] The respective agencies (or designated state officer) also have the discretion to determine the extent to which they will accept and send electronic records.[57] In addition, to the extent that a governmental agency uses electronic records, that agency (or designated state official) may specify the system that is established for the purpose of creating, generating, sending, communicating, receiving, and storing electronic records, and if an electronic signature must accompany the electronic record, then also the type of electronic signature that is required.[58] Finally, to the extent that governmental agencies move to electronic records, they must encourage interoperability.[59]

III. – THE HISTORY OF THE UNIFORM ELECTRONIC TRANSACTIONS ACT : HOW AND WHY IT DIFFERS FROM THE MODELS ON WHICH IT IS BASED

In 1996, the UNCITRAL Model Law on Electronic Commerce was promulgated by the United Nations Commission on International Trade Law.[60] By that time, it was clear that electronic commerce and electronic contracting were a part of the business fabric

52 Section 16(d) UETA (1999).

53 Section 16(d) UETA (1999).

54 Section 16 (b) & (c) UETA (1999).

55 The UETA only applies to state and local governmental organizations, as the UETA is a state statute. The Act would have no application to federal agencies, as federal agencies are not under the jurisdiction of state statutes.

56 Section 17 UETA (1999).

57 Section 18 UETA (1999).

58 Section 18(b) UETA (1999).

59 Section 19 UETA (1999).

60 Legislation based on the UNCITRAL Model Law of Electronic Commerce has been adopted in Colombia, the Republic of Korea, Singapore, and within the United States by the State of Illinois.

of the world, and therefore business law, which should be a basis for business development, needed to be updated to bring the legal rules into line with the reality as well as the future of business practices. Soon after this, the National Conference of Commissioners on Uniform State Laws (NCCUSL) [61] was asked to look at possible uniform legislation for the domestic law of the United States along the same lines of the UNCITRAL Model Law on Electronic Commerce. [62]

NCCUSL was no stranger to the study of electronic business practices in the commercial realm. It drafted, and has the responsibility of revising, the Uniform Commercial Code in the United States, and the Uniform Commercial Code embodies the major corpus of American commercial law. [63] The Uniform Commercial Code was drafted in the 1940s and was promulgated in 1951. Since the early 1990s it has been going through major revisions, and this was instigated primarily to bring the commercial law in conformity with modern electronic business practices. Thus, the request that NCCUSL proceed with a domestic law similar to the UNCITRAL Model Law on Electronic Commerce was consistent with the recent and current work going on in NCCUSL at the time the request was made.

From the very beginning, the major issue in drafting the UETA was the question of scope. Once the parameters of the Act were set out, the drafting of the individual provisions was remarkably easy. This was due in large part to the general consensus among participants in the process about how problems were best legislated once the scope of the project was determined.

By the time a Drafting Committee was formed and the first draft of the UETA was ready for discussion, [64] in addition to the UNCITRAL Model Law, the committee also had the Illinois Electronic Writings and Signature Act [65] as well as the Oklahoma Bankers Association Technology Committee Digital Writing and Signature Statute. [66]

61 See *supra* note 1.

62 See *supra* note 2.

63 Commercial law in America is primarily state, not federal law, and it is independently promulgated in fifty-one separate jurisdictions. Until the late nineteenth century, American commercial law was based on English common law and the law of merchants, and each state's law evolved independently of the other states' law. Today, although commercial law is still the law of the individual states, it is primarily uniform throughout the United States because of the existence and passage in the various jurisdictions of the Uniform Commercial Code, which has been adopted in some form by all American jurisdictions (Louisiana has not adopted the sales and leases provisions, but has adopted the rest of the Code). The Code (official text, 2000) is divided into the following articles: Article 1: *General Provisions*, Article 2: *Sales*, Article 2A: *Leases*, Article 3: *Negotiable Instruments*, Article 4: *Bank Deposits and Collections*, Article 4A: *Fund Transfers*, Article 5: *Letters of Credit*, Repealer of Article 6: *Bulk* Transfers and [Revised] Article 6: *Bulk Sales,* Article 7: *Warehouse Receipts, Bills of Lading and Other Documents of Title*, Article 8: *Investment Securities*, and Article 9: *Secured Transactions; Sales of Accounts and Chattel Paper*.

64 The first draft was released in April 1997.

65 *The Illinois Electronic Writings and Signature Act*, 4 November 1996 Draft.

66 *The Oklahoma Bankers Association Technology Committee, Digital Writing and Signature Statute*, Second Discussion Draft, 17 June 1996.

The scope of the project as approved by NCCUSL was more modest than these Model Laws. The UETA committee was asked "to draft such revisions *to general contract law* as are necessary or desirable to support transaction processes utilizing existing and future electronic or computerized technologies." *(emphasis supplied)*. The model provisions considered by the Drafting Committee, however, all encompassed far more than electronic processes involved in *contractual transactions.* The Illinois and Oklahoma Models each covered all writings and signatures, while the UNCITRAL Model covered "any kind of information in the form of a data message [a record] used in the context of commercial activities." In addition, there was substantial interest by the American Bar Association for legislation not only covering electronic records and signatures, but electronic notaries as well. Moreover, the Oklahoma Bankers Association Technology Committee Digital Writing and Signature Statute suggested the possibility of "transferable records" as part of the UETA.[67]

Thus, the first question was whether to expand the scope of the UETA to follow these broader models and concerns or to draft legislation consistent with the more modest mandate originally planned by NCCUSL. The broadest approach was suggested by the Illinois and Oklahoma Models, which covered "all writings and signatures." [68] The expansive coverage of these Acts, coupled with the requisite "search and replace" burden on every state statute presently enacted, prompted a view that such an approach would generate significant opposition among members of the Bar and in legislatures, and seriously jeopardize the enactability of the Act. On the other hand, many believed that limiting the scope of the Act to purely contractual transactions would impair the usefulness of the statute and create potential ambiguity about its application to certain records. Therefore the decision was made to take an intermediate approach modeled on the UNCITRAL Model Law.

Taking this approach, the first draft of the UETA defined the scope of the Act as "records generated, stored, processed, communicated, or used for any purpose in any commercial ... transaction." [69] Included in this draft, consistent with the UNCITRAL Model Law,[70] was the coverage of electronic signatures. Therefore, without having fleshed out the specifics of the various provisions, the decision was made early on to replicate a domestic statute along the lines of the UNCITRAL Model Law – an understandable decision given the fact that the UNCITRAL Model Law was the major impetus for the UETA.

Because the UNCITRAL Model Law was the impetus for the UETA, the two are similar in many respects. Thus, for example, both set out the basic principle that

67 *Ibid.*

68 By the time the UETA was begun, forty of the fifty states had already enacted some form of digital signature legislation. Recent major national legislation of Digital Signature Acts have been enacted in Malaysia, Italy and Germany.

69 UETA Section 104 (August 1997 draft). The Reporter's Notes on the definition of "commercial" referred to the very broad definition of this term in the UNCITRAL Model Law.

70 UNCITRAL Model Law on Electronic Commerce, Art. 7.

electronic records and signatures should be given the same status as paper-based records and signatures;[71] both require that the information contained in electronic records be accessible at a later time;[72] both provide for electronic signatures;[73] and both contain procedures for dealing with attribution.[74]

There are, however, three discrete areas of consideration that were strongly suggested by interests groups and are, in fact, included in the UETA, that were outside the scope of the UNCITRAL Model Law. First, there is the question of notarization and the scope of transferable records expressly to cover electronic promissory notes. In addition, and quite importantly, because of a widespread sense that this was desired, in the summer of 1997, NCCUSL expanded the scope of the UETA to include governmental transactions.

The interest by government agencies to be included in the UETA arose for the same reason that non-governmental commercial interests were desirous of legislation – many governmental agencies were ready to move into electronic filings and records, but because the myriad of state administrative units are diffuse and do not tend to have any centralized organizational structure to represent their different interests, there was no mechanism for a concerted effort by the agencies to get statutory approval. It was therefore natural for many government agencies to request inclusion in the UETA.

This request emphasized strongly that the nature of the UETA is as an enabling act to allow the use of electronic records and signatures in areas where this was desirable, but in which there were legal impediments. The decision to include governmental records was based on the recognition that the needs and desires by government entities to move toward electronic records are indistinguishable from those motivating private commercial parties. This expansion into government activities was a natural progression of the UETA because of its broad focus on "transactions". As the UNCITRAL Model Act is solely concerned with the development of trade and commerce in the private sector, government records are quite correctly not within its sphere.

The question of notaries[75] is another area that the UETA expanded beyond the UNCITRAL Model Law. The final version is fairly innocuous – it simply provides that if a signature is required to be notarized, an electronic signature meets this requirement if the electronic signature is accompanied by the electronic signature of a notary with whatever information is required by the notary law.[76] This provision, which presupposes the existence of, but does not create any mechanism for, electronic notaries, is the result of a long debate on the question and role of notaries.

71 Section 7 UETA (1999); UNCITRAL Model Law on Electronic Commerce, Art. 5 (1996).

72 Section 12 UETA (1999); UNCITRAL Model Law on Electronic Commerce, Art. 10 (1996).

73 Section 7 UETA (1999); UNCITRAL Model Law on Electronic Commerce, Art. 7 (1996).

74 Section 9 UETA (1999); UNCITRAL Model Law on Electronic Commerce, Art. 13 (1996).

75 Unlike Civil Law jurisdictions, the function of notaries in the United States is primarily the attestation and verification of signatures.

76 Section 11 UETA (1999).

There was substantial sentiment for the abolition of the notaries requirement, the thought being that notarization no longer served any useful function. This view ultimately did not prevail because the Drafting Committee thought it was beyond its mandate to abolish the profession of notaries, and in addition, the committee did not believe it should make the ultimate policy decision whether there is any utility left to notarization.

This decision contrasts sharply with the approach taken by the UNCITRAL Model Law. The Model Law assumes a "functional equivalent" standard, based on an analysis of the purposes and functions of the paper-based requirement of proof of originality and attribution of electronic records and signatures.[77] From this, the question is how these purposes and functions can be replicated in the electronic media.[78] For purposes of notarization of documents, if the electronic record meets the requirements of originality and integrity under Article 8 of the Model Law, then it should be given the full legal significance it would have been afforded had it been a properly notarized paper document.[79] In effect, the Model Law assumes away the necessity of notarized documents.[80]

The third major deviation of the UETA from the UNCITRAL Model Law is the express inclusion in the UETA of "transferable records" that cover electronic promissory notes.[81] A transferable record is the electronic equivalent of a promissory note or a negotiable document. In contrast, the Model Law expressly provides for the existence and use of electronic negotiable documents,[82] but does not expressly acknowledge electronic promissory notes. Presumably under its "functional equivalent" standard,[83] the Model Law assumes the possibility of electronic negotiable instruments.[84] However, given the various international differences in negotiable instruments law, as well as the sense of certainty that paper-based negotiable instruments afford, whether the Model Law will be read liberally and broadly to allow electronic promissory notes is most uncertain. The UETA does not leave this question in doubt.

IV. – CONCLUSION

The Uniform Electronic Transactions Act neither attempts to nor succeeds in setting out all the rules that are necessary to effectuate electronic commerce. What the Act does achieve is a legal mechanism to allow electronic commerce, which is still in its embryonic stage, to develop further while more specialized rules can be developed

77 UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, para. 15.

78 *Ibid*.

79 *Ibid*. at para. 63.

80 Whether all jurisdictions will read Article 8 this broadly and dispense with the formalities of notarized documents in electronic commerce where they were previously required is yet to be seen.

81 Section 16 UETA (1999).

82 UNCITRAL Model Law on Electronic Commerce, Art. 17 (1996).

83 UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, para. 15.

84 *Ibid*. at para. 63. For a discussion of how a "functional equivalent" of negotiability can be met by the common law of contracts, see David FRISCH & Henry GABRIEL, "Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment", 31 *Idaho Law Review* 747 (1995).

and adopted in specific areas of commerce. Certainly, for example, the future will quickly bring us domestic and international laws governing the electronic sale and securitization of goods, electronic negotiable instruments, documents of title and letters of credit. Each of these areas already have sporadic legal coverage for electronic transactions. But until the law catches up with these specialized areas of commercial practice, the UETA enables commercial practices in the United States to continue to grow in the electronic medium.

LA NOUVELLE LOI UNIFORME DES ETATS-UNIS SUR LES OPERATIONS ELECTRONIQUES : CONTENU, HISTORIQUE ET COMPARAISON AVEC LA LOI MODELE DE LA CNUDCI SUR LE COMMERCE ELECTRONIQUE *(Résumé)*

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La nouvelle Loi uniforme des Etats-Unis sur les opérations électroniques ("UETA") promulguée en 1999 ne vise pas à constituer une réglementation exhaustive pour le commerce électronique: il s'agit d'un simple mécanisme permettant le développement avec toutes les garanties de sécurité des opérations réalisées par la voie électronique alors que, sauf exceptions résultant de mises à jour récentes mais fragmentaires, l'ensemble des textes juridiques étaient fondés sur le principe du support papier pour les documents. La loi ne contient aucune disposition sur le fond du droit. Si son champ d'application est étendu, il exclut cependant les règles du Code de commerce uniforme (qui contiendra des dispositions spécifiques), celles qui régissent les testaments et les trusts, et les matières qui font l'objet de dispositions prévoyant expressément des documents sur papier.

La Loi type de la CNUDCI sur le commerce électronique de 1996 a constitué un modèle essentiel lors de la préparation de la UETA, et ces deux textes ont de nombreuses règles en commun. Ainsi la valeur identique reconnue aux données et signatures indépendamment qu'elles sont électroniques ou sur papier (principe de la neutralité du support); la validité des documents (y compris comme "original") et des signatures électroniques – notamment aux fins de conclusion des contrats; les conditions quant à l'accessibilité et à la possibilité d'attribution; les effets des erreurs de transmission.

En revanche, la UETA a un champ plus large que celui de la Loi type de la CNUDCI: dans le domaine des effets de commerce, l'UETA fait une avancée importante (quoique mise en cause par certains comme allant au-delà d'énoncer de simples règles techniques) en prévoyant la possibilité de transmettre par la voie électronique les billets à ordre, en opérant une transposition des concepts de remise, possession et endossement à celui de "contrôle". Enfin, à la différence de la loi type qui vise spécifiquement l'environnement commercial, il prévoit expressément qu'il peut s'appliquer dans le contexte des opérations notariales et pour les opérations de l'administration et des autorités publiques.