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ARTICLE: Integrating Computer Information Transactions into Commercial Law in a Global Economy: Why UCITA is a Good Approach, but Ultimately Inadequate, and the Treaty Solution

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SUMMARY:

... This Note will argue that a comprehensive treaty should be written to simplify the issue of how to integrate computer information transactions into commercial law in a global economy. ... The comprehensiveness of UCITA's provisions, combined with its uniformity, makes it a good approach to integration. ... Finally, for the last element of the VCLT treaty definition to be met, that the agreement be "governed by international law," the parties must intend that the agreement be enforceable by international law standards. ... In deciding which provisions of UCITA, UETA, E-SIGN, the E-Agreement, and the UNCITRAL Model Law to include in the comprehensive treaty, the positive and negative impacts that the possible provisions would have on the global economy must be considered. ... Having considered the possible provisions that should be included in the treaty and their effects on the global economy, it is next necessary to explain why a treaty is an adequate solution to integration in light of the global economy. ... Also, a state could object to the reservation, even if it was not found to go against the "object and purpose" of the treaty. ...

TEXT:

Introduction

Consider for a moment the following hypothetical: A potential buyer in the United States is surfing the internet and finds an item he wishes to purchase from a seller in Italy. The transaction is conducted by means of a computer. After the buyer receives his item, he sees it does not conform to the product specifications as stated online. What is the buyer's legal recourse and how might the outcome most efficiently be determined?

The situation that this hypothetical presents is only one example of numerous legal problems that may occur from an individual or entity engaging in electronic commerce (e-commerce) transactions. During the past decade, e-commerce has grown rapidly. It has promoted economic growth, improved industry competitiveness, and stimulated investment and innovation. n1 However, the international legal system has yet to respond adequately to the growth of e-commerce. Such a response is necessary so that transactions may be conducted efficiently and a strong global business network may be developed.

The proposed Uniform Computer Information Transactions Act (UCITA) has been a major response to this issue. n2 As the name of the act suggests, UCITA is designed to govern transactions involving computer information. n3 It was originally proposed as an addition to the Uniform Commercial Code (UCC) as "Article 2B," but was later withdrawn from the UCC and sponsored independently by the National Conference of Commissioners on Uniform State Laws (NCCUSL) as a separate uniform law called "UCITA." n4 The Act is designed to remove "pure software" and "software embedded in goods" from being governed under the UCC as a "sale of goods." n5 Instead, those items are governed under UCITA and its particular provisions. All state legislatures have considered whether or not to enact UCITA; several state legislatures have passed laws adopting the Act; n6 while others have refused to do so. n7

This Note will argue that a comprehensive treaty should be written to simplify the issue of how to integrate computer information transactions into commercial law in a global economy. To argue this, first, the Note sets forth the UCITA approach to integration. Second, the Note examines the debate surrounding the UCITA approach. Third, the Note discusses the various other approaches to integration as expressed in other laws. Fourth, the Note examines the differences between UCITA and the other approaches. Following this, the Note insists that UCITA should be considered a good approach to integrating computer information transactions into commercial law. The Note then suggests why UCITA should be considered a good approach, but not an adequate solution. Seventh, the Note suggests why a treaty would simplify this issue. Following this, a proposed method to treaty construction is suggested, as well as possible key provisions that should be included. Finally, the Note explains why global uniformity in law governing computer information transactions is necessary in a global economy and considers the imperfections of the treaty solution.

I. UCITA's Approach to Integrating Computer Information Transactions into Commercial Law

As mentioned above, UCITA governs contracts relating to computer technology, Internet access, and support agreements. n8 Excluded from its coverage are the sale or lease of computer-related "hardware" (i.e. books, movies) and software embodied in goods other than a computer or a computer peripheral, unless the main purpose of the transaction is to obtain the software. n9 Below, several key provisions of UCITA are explained to provide a framework for further analysis.

One key provision allows the parties to a contract to choose what law applies to their contract. n10 As such, they have the choice of opting for UCITA to apply. n11 If the parties choose to do so, the contract would be subject to the provisions of UCITA unless preempted by federal law. n12 A second key provision in UCITA provides for several warranties for licenses, including: express warranties, implied warranties of non-infringement, implied warranties of quiet enjoyment, implied warranties of merchantability, implied warranties of fitness for a particular purpose, implied warranties of system integration, and implied warranties of data accuracy. n13 A third important provision is mass-market license (MML), which allows for a standard form contract in retail transactions. n14

The above brief snap-shot of UCITA's provisions show that the purpose behind UCITA is to provide a predictable legal framework for conducting computer information transactions. n15 However, the legal framework that UCITA provides has ignited debate.

II. The UCITA Debate

Various individuals, including legal scholars and law practitioners, have debated UCITA's approach to integration. n16 Those who criticize the Act argue that it is "premature," n17 while those who support the Act point to the "need for uniformity" in governing "intangibles of transactions involving computer information." n18 Below, these competing arguments are further examined. After this examination, this Note will insist and accept that the need for uniformity trumps the concern over the Code's prematurity.

In arguing that UCITA is "premature," scholars usually compare the history of the Uniform Commercial Code (UCC) to that of the UCITA. First, scholars suggest that the UCC's success is due to its slow development n19 and the fact that it was created only after established case law and business practices existed. n20 Scholars explain that, unlike the UCC's historical development, UCITA has developed rapidly and has been created without having established case law and business practices in existence. n21 This difference, in comparison, suggests that the possible failure of UCITA's approach results from the fact that it is "painted on" to transactions before business practices have developed. Second, scholars argue that the UCC's success is due to the relatively thorough critique of the UCC and the support it

received amongst consumer and commercial groups. n22 This is then compared to the lack of support UCITA has received in order to suggest the failure of UCITA's approach. n23

Regarding the support for UCITA due to the "need for uniformity," scholars generally point to the need for clear and consistent rules governing computer information transactions to promote a global marketplace. n24 First, scholars argue that uniformity will benefit consumers by providing them with certainty as to the terms of doing business using computer information. n25 This, in turn, would foster economic growth and global expansion of the marketplace. Second, scholars insist that a consistent law in this area is necessary in order for the United States to succeed in international negotiations, which in turn would play an integral role in promoting a global marketplace. n26 For instance, a uniform law would lower negotiation costs by providing parties with "off-the-shelf terms" that they could adopt. n27 Such a law would also provide "default provisions" that may result in deals being saved that otherwise would have failed. n28 Additionally, the "crucial issues" would be identified for the parties of the negotiation and the possibility of "jurisdictional risk" would be eliminated. n29

Considering both sides of the UCITA debate, this Note sides with the supporters of UCITA, and accepts that the "need for uniformity" to promote a global marketplace trumps the concern over the Code's prematurity for the reasons articulated above. However, as suggested below, while UCITA is a good approach to addressing the concern about integrating computer information transactions into commercial law in the global economy, the possibility of a better approach exists.

III. Additional Approaches to Integration: UETA, ESIGN, UNCITRAL Model Law, and the E-Agreement

UCITA represents only one approach to commercial integration. There are several other approaches to integration as expressed in the Uniform Electronic Transactions Act (UETA), the Electronic Signatures in Global and National Commerce Act (ESIGN), the United Nations Commission on International Trade Law (UNCITRAL Model Law), and the United Nations Economic Commission for Europe: Electronic Commerce Agreement (E-Agreement). A further description of these approaches is set forth below.

UETA applies primarily to transactions involving electronic records and electronic signatures subject to UCC Articles 2 and 2A. n30 The Act covers those electronic transactions that each party agrees to conduct electronically. n31 Because the UETA rules apply to situations where no subsequent agreement between the parties is in effect, the parties to an electronic transaction that comes under UETA can vary, waive or disclaim most of its provisions. n32

ESIGN is similar to UETA. It was enacted to "facilitate" n33 the use of electronic signatures and records in E-Commerce. n34 ESIGN was developed to clarify the legal status of e-signatures. n35 However, ESIGN does not validate the use of all e-signatures or records since only transactions under Sections 1-1-7, 1-206, Article 2, and Article 2A of the UCC are subject to ESIGN. n36 Some e-records are excluded from the scope of ESIGN in order to protect consumers. n37 These may include such records as health or life insurance. n38 Also, ESIGN contains consumer protection provisions that will prevent fraud and increase consumer confidence in e-commerce. n39 The provisions require that consumers take steps to consent to conduct transactions electronically. n40 However, a contract is not automatically invalidated when consent to receive e-records is not confirmed electronically. n41 This allows for continuing business relationships to develop. n42

Another proposal, the UNCITRAL Model Law, has two chief purposes. First, it seeks "to offer national legislators a set of internationally acceptable rules as to how ... a more secure legal environment may be created for what has become known as 'electronic commerce.'" n43 Second, it is intended to "be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce." n44

While the purposes of the Model Law reflect the need for international legislation that covers electronic commerce, the Act concedes that it "is a 'framework' law that does not itself set forth all the rules and regulations that may be necessary to implement those [modern] techniques [for recording and communicating information] in an enacting State," n45 and that "the Model Law is not intended to cover every aspect of the use of electronic commerce." n46 In this way, it is recognized in the Act that the Model Law approach alone is not a sufficient solution to integration.

The E-Agreement is yet another example of an attempt to solve the integration problem. It presents the first legal framework for the Internet and sets forth a "contractual approach" to electronic commerce operations. n47 As such, it recognizes a need for "a framework of basic provisions agreed to by business entities, combined with the flexibility required to conduct day-to-day commercial transactions." n48 No particular method of communication is required for

the offer and acceptance. n49 Under the E-Agreement, the recipient is considered to have "received" the message when it is available at the electronic address that the recipient uses. n50 The receiver of the message does not need to send an acknowledgment of receipt unless the sender requests such a message. n51 However, a party must give notice to the other party of circumstances that could prevent the formation of the contract as soon as it is reasonably possible for the party to do so. n52 An offer is revocable, but an acceptance cannot be withdrawn. n53 Additionally, an offer is no longer valid twenty four hours after its receipt. n54

While, at first blush, this "contractual approach" may seem a sufficient solution to integration due to its apparent comprehensive coverage, scholars and practitioners concede that "potential problems could arise in the event that other international rules prevail over national rules." n55 Therefore, the E-Agreement presents a major barrier to integrating computer transactions internationally.

These approaches to integration show that the overall method to solving the problem of integration has presently been to develop and enact numerous laws that have limited scopes of coverage. This overall approach seems inefficient. However, before this thesis can be adequately advanced, the differences between the various approaches to integration must be understood.

IV. UCITA and the Differences Among the Various Approaches to Integration

In creating a solution to the problem of integration, it is necessary to compare the proposed solutions set forth above and to examine how each differs from UCITA. This will be done in turn, beginning with a comparison between UETA and UCITA, and then moving to a comparison between the Model Law and UCITA. Finally, the E-Agreement and UCITA will be compared.

In comparing UCITA and UETA, several key differences are apparent. First, unlike UCITA, UETA does not apply to all contracts within its scope. n56 Second, "UETA excludes substantive e-commerce contract rules from its scope." n57 Rather, the e-commerce contract rules are contained in either the UCC or UCITA. n58 In fact, UCITA goes so far as to establish electronic contract terms, including: "the definition of 'conspicuous,' the ability of an on-screen click to create a contract, the effect of a choice of forum clause, the attachment of certain warranties to published information, the rules for performance on-line, how changes to on-going contracts are made, how contract terms are decided as between electronic agents, and the availability of remedies, etc." n59 Third, UETA's sole focus is on electronic records and electronic signatures relating to transactions subject to Articles 2 and 2A of the UCC. n60 As such, UETA only applies if the parties agree by some means to use electronic commerce as part of a transaction. n61

In comparing UCITA and E-SIGN, many of the same key differences are apparent. This is because E-SIGN was designed to mimic UETA in an effort to encourage states to adopt UETA. n62 For instance, E-SIGN's sole focus is on electronic signatures and records in e-commerce since Congress enacted it to validate and give legal effect to e-signatures. n63 However, the legality of e-signatures is not dealt with under UCITA's scope and provisions. n64

In comparing UCITA with the UNCITRAL Model Law, two major distinctions can be made. First, while the UNCITRAL seeks to develop integration in an international context, the UCITA seeks to develop integration in a domestic context. n65 Second, while the Model Law does not cover every aspect of the use of electronic commerce, the UCITA focuses on contracts involving computer information and provides for specific definitions for electronic contract terms. n66

Finally, a major distinction can be made between the E-Agreement and UCITA. While the purpose of UCITA is for states to have a neutral and predictable legal framework for computer information transactions, the purpose of the E-Agreement is to provide an international framework for the Internet and to set forth a "contractual approach" to electronic commerce operations. n67 In this sense, while UCITA's coverage is more thorough, its reach is not as extensive as that of the E-Agreement. n68

By understanding the differences between UCITA and the other approaches, one may begin to appreciate the strengths of the UCITA approach. For instance, through noting the comparisons made above, it becomes apparent that UCITA's contract terms may be considered a key strength of the Act. Due to this strength, UCITA may be regarded as a good approach to integration. However, there are additional reasons for considering UCITA a good approach.

V. Why UCITA is a Good Approach to Integration

UCITA is a good approach to integrating computer information transactions into commercial law in a global economy because the Act comprehensively addresses the concerns one faces when dealing with computer information transactions. To prove this argument, set forth below is an examination of the statutory purposes of the Act. The statutory purposes of the Act prove that UCITA is a good approach by clearly setting forth the goal of the Act and reflecting the goal in the written provisions. Following a discussion of the statutory purposes of the Act, some of the UCITA provisions are examined in light of the Act's purposes.

UCITA's statutory purposes reflect the approach UCITA takes in dealing with computer information transactions and shows why the act should be considered a good way to integrate computer information transactions into commercial law. The statutory purposes of UCITA are:

to facilitate computer or information transactions in cyberspace; clarify the law governing computer information transactions; enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and make the law relating to these transactions uniform.
n69

The goal of the statute is reflected in the provisions written; chiefly, to expand and facilitate computer information transactions through a uniform code. One such example is the "default" choice of law provision.

UCITA provides for a different "default" choice of law provision than the UCC to reflect the reality of jurisdictional problems when dealing with computer information transactions. For example, while the UCC 1-105 requires that there be a "reasonable relationship" to the transaction, UCITA states that parties may select a neutral forum where neither is familiar with the law of the other's jurisdiction. n70 Thus, the applicable law "may have no relationship" to the transaction. In this way, UCITA expressly regards the UCC's "reasonable relationship" requirement as inappropriate in a global information economy and especially in cyberspace - where physical locations are often irrelevant or unknowable. n71 Consequently, the provision promotes computer information transactions by allowing a neutral forum.

A further example of the Act's comprehensiveness are its warranty provisions, which, as listed above, are numerous and extensive. Also, UCITA requires that drafters use more direct language to disclaim warranties than is required under Article 2 of the UCC. n72

The comprehensiveness of UCITA's provisions, combined with its uniformity, makes it a good approach to integration. However, while UCITA is a good approach to solving the integration issue, it is not without weaknesses.

VI. The Weaknesses of the UCITA Approach and Its Ultimate Inadequacy

While the UCITA is a good approach to solving the integration issue, there are some weaknesses to the approach. Two such weaknesses are considered in detail below. The first is state opposition to UCITA's enactment and the second is UCITA's narrow scope of coverage.

While several state legislatures have passed laws adopting UCITA, much opposition to enactment exists. n73 For example, the New York State Legislature introduced legislation to protect New York consumers from the effects of UCITA by making "voidable any contractual provision that otherwise would require its application." n74 Due to the opposition and the varying levels of enactment of UCITA, some states govern computer information transactions under UCC provisions or significantly modified UCITA provisions and others under unmodified UCITA provisions. n75 By way of illustration, several state legislatures debated UCITA in 2000. The outcome from the debate was Virginia and Maryland adopting UCITA provisions with significant modifications, while Iowa adopted UCITA provisions with little or no modification. n76 If similar outcomes occur, the result would be much confusion. In this way, the purpose of UCITA to facilitate and promote computer information transactions would be undermined.

While the effect that varying levels of enactment may have is an important concern, perhaps an even more important consideration is the Act's narrow scope of coverage. Specifically excluded from UCITA's coverage is the sale or lease of computer-related "hardware" (i.e. books, movies) and software embodied in goods other than a computer or a computer peripheral, unless the main purpose of the transaction is to get the software. n77 In this way, instead of providing for comprehensive coverage for various categories of technology, UCITA limits its comprehensive coverage to only certain categories. Excluding certain categories of technology from UCITA's provisions and leaving them to be

addressed in another act would result in this area of law being more complex and inefficient. Rather, it would make much more sense to provide comprehensive coverage to all categories under one global uniform law.

These weaknesses clearly show that UCITA, while a good approach, is ultimately inadequate due to its varying levels of enactment and narrow scope of coverage. As such, integration must be simplified and clarified.

VII. Simplifying and Clarifying Integration: The Treaty Solution

A better solution to facilitating computer information transactions would be a comprehensive treaty to simplify and clarify the legal issues. In order to understand why a comprehensive "treaty solution" is appropriate in this situation, it is first necessary to provide a brief explanation of a treaty and its role in international law. Second, it is necessary to provide a brief explanation of the definitional requirements that an international agreement must meet to be covered under the 1969 Vienna Convention on the Law of Treaties (VCLT), ⁿ⁷⁸ the law governing treaties.

Treaties are considered an essential source of international law. ⁿ⁷⁹ There are generally two types of treaties -- multilateral and bilateral. ⁿ⁸⁰ The former is made between three or more countries, while the latter is made between two nations. ⁿ⁸¹ Treaties have been used to codify already existing law as well as to establish rules of conduct between countries. ⁿ⁸² It is the latter usage that would be applicable in this situation; it would be a multilateral treaty.

Such a treaty is particularly appropriate to address this issue because of its international character. Computer information transactions are inherently international in scope. As exemplified in the opening hypothetical, a United States individual or corporation and a foreign individual or corporation could easily complete a transaction when doing business through the computer via the Internet. Because of the international dimensions of this issue, it would be most appropriate to have a set of rules that have been considered and accepted among all countries so that, when a legal issue arises, confusion as to whose laws apply would not exist.

When considering how to construct the treaty, however, one must be aware that, in order for a treaty to be considered an "international agreement" under the VCLT, it must meet the definition of an international agreement as set forth in the VCLT. ⁿ⁸³ Essentially, the VCLT is a "treaty on treaties." ⁿ⁸⁴ Under Article 2 of the VCLT, an international agreement is defined as one "concluded between states in written form and governed by international law." ⁿ⁸⁵ There are several elements contained in this definition; they are explained below.

The first element requires that treaties be concluded "between states." ⁿ⁸⁶ However, states are not the only entity that can enter into treaties. ⁿ⁸⁷ Such entities as international organizations and companies, as well as individuals can enter into agreements with states. ⁿ⁸⁸ The only difference is that the VCLT will not apply to those treaties. ⁿ⁸⁹

The second element requires that the agreement be "in written form." ⁿ⁹⁰ However, this requirement may be somewhat misleading. For instance, if there was an oral agreement concluded between nations, it would be enforceable. ⁿ⁹¹ The only difference would be that the treaty would not be covered under the VCLT. ⁿ⁹²

Finally, the third element and last requirement is that the agreement has to be "governed by international law." ⁿ⁹³ Usually, this element is regarded as self-proving. ⁿ⁹⁴ It is controlled by the intent of the parties; however, if there is no specific provision that the agreement would be governed by other than international law, then it will be regarded as governed by international law. ⁿ⁹⁵

Because clear advantages exist in having a treaty governed under the VCLT, when undertaking the drafting process there must be careful consideration that the agreement meets all of the elements set forth above.

VIII. Steps to Realization: Proposed Method to Treaty Construction

When considering how a multilateral treaty would be constructed, it is necessary to think of the steps necessary to draft the treaty. Drafting this treaty would require a close examination of several current proposed laws: the Convention on the International Sale of Goods (CISG), UCITA, the E-Agreement, UETA, E-SIGN, and the UNCITRAL Model Law. However, before discussing the role that the current laws should play in constructing the treaty, it is necessary to suggest how the treaty should be negotiated so that the VCLT rules would apply to the provisions.

In order for the VCLT rules to apply, it is most important to first ensure that the beginning element of the treaty definition in the VCLT is met -- that the treaty be concluded "between states." ⁿ⁹⁶ In order for this element to be met,

the treaty negotiations would have to be conducted in a way that would allow the diplomats from each of the states desiring to be a party to the agreement to discuss the possible provisions.

For the next element of the VCLT treaty definition to apply, that the treaty be "in written form," n97 the individuals representing the member states must be aware of the possible implications their oral agreements may have on drafting the treaty. For instance, the Permanent Court of International Justice has held that oral promises made by foreign ministers to other member states are binding on the state whose representative made the promise. n98 As such, it would be advisable that the representatives of the member states be aware of the comments they make, and the effect that their comments may have on the treaty making process.

Finally, for the last element of the VCLT treaty definition to be met, that the agreement be "governed by international law," n99 the parties must intend that the agreement be enforceable by international law standards. As mentioned above, this element is usually assumed to be satisfied. n100 However, if a provision was included in the treaty that required the agreement be governed by the domestic law of one of the countries, the element would not be met.

By following the above guidelines, the treaty will be governed under the VCLT. The next step in construction requires a discussion about the role that each of the current proposed laws will play in constructing the treaty provisions. As the CISG is the analogue to the UCC in governing international business transactions, n101 and because UCITA began as a subpart addition to the UCC, it seems logical that it would be appropriate to begin by examining the CISG construction.

When considering the CISG construction in terms of drafting a multilateral treaty, one must look to Part I, Chapter I, Article 1 (1), which states, "this Convention applies to contracts of sale of goods between parties whose places of business are in different states: (a) when the states are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State." n102 It would be necessary to include such language in the draft, and to replace "sale of goods" with "sale of pure software" or "software embedded in goods." This provision would give the overall structure of the treaty the necessary international sphere of application.

After this initial provision, an opt out article could be placed in the treaty. This would mimic CISG Part I, Chapter I, Article 6, which reads, "the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." n103 This would allow for a particular contracting party's national law to govern the situation as long as agreement existed between the parties.

Next must come the general provisions, which would cover formation and obligations of the contracting parties, liability, and remedies. For this section, UCITA and its provisions may be considered as a starting point. Such a strategy may be complex, and UCITA-like provisions would probably have to be negotiated and discussed amongst the different member states as all nations may not wish to adopt the UCITA approach to each provision. At this point, additional consideration might also be had of the E-Agreement, UETA, ESIGN, and the UNCITRAL Model Law.

IX. Treaty Provisions: Some Possibilities

In deciding which provisions of UCITA, UETA, ESIGN, the E-Agreement, and the UNCITRAL Model Law to include in the comprehensive treaty, the positive and negative impacts that the possible provisions would have on the global economy must be considered. This will be done with each law set forth above, beginning with UCITA, in an effort to suggest the provisions that should ultimately be included in the treaty.

When looking to UCITA's provisions, the warranties that the Act sets forth stand out as a key provision that should be included in the comprehensive treaty. As mentioned previously, n104 these warranties would include: express warranties, implied warranties of non-infringement, implied warranties of quiet enjoyment, implied warranties of merchantability, implied warranties of fitness for a particular purpose, implied warranties of system integration, and implied warranties of data accuracy. n105 Because warranties result in accountability and facilitate further transactions, they are a necessary provision and would positively impact the global economy.

Examining ESIGN, the need for special consumer protection provisions to be included in the treaty is apparent. The consumer protection provisions that should be written into the comprehensive treaty should mimic those in ESIGN. As such, they would be designed to prevent fraud n106 and would have the subsequent effect of increasing consumer confidence in e-commerce. n107 The consumer protection provisions would consist of excluding certain documents, such as: notices of utility cancellation, "default, acceleration, repossession, foreclosure, or eviction, or the right to cure,

under a credit agreement secured by, or rental agreement for a primary residence of an individual," n108 health or life insurance cancellations or benefit changes, and a product recall or a "material failure of a product that risks human health and safety." n109 However, a contract should not instantly be invalidated when consent to receive e-records is not confirmed electronically. n110 Hence, the provisions would foster "continuing business relationships." n111

Examining UETA, the E-Agreement, and the UNCITRAL Model Law provisions, the need for a broader scope of application becomes apparent. UETA, which applies primarily to transactions involving electronic records and electronic signatures subject to Articles 2 and 2A of the UCC, covers those electronic transactions in which each party agrees to conduct them electronically. n112 It would make more sense to have this scope of coverage combined with UCITA's under one agreement. As such, UETA's provisions, such as its definitions and the like, should be transferred to the more comprehensive treaty.

Following this, the E-Agreement's "contractual approach" to electronic commerce should also be incorporated into the comprehensive treaty. As such, no particular method of communication would be required for the offer and acceptance. n113 Rather, the recipient would be considered to have "received" the message when it is available at the electronic address that the recipient uses. n114

Looking to the UNCITRAL Model Law, its two chief purposes should be incorporated under the comprehensive treaty. Thus, the treaty should be designed with the underlying purpose being to create a more secure legal environment for what has become known as 'electronic commerce.' Additionally, the treaty should be constructed in a way that would make it of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce. Broadening the overall reach of the Treaty will make the rules clearer and more understandable, causing transactions to be conducted more efficiently.

While the above treaty provisions would clarify and simplify the approach to integrating computer information transactions into commercial law in a global economy, through establishing a single global norm that would be followed by all contracting states, their inclusion in the treaty leaves unanswered a broader question implicit in this Note -- why global uniformity in law governing computer information transactions is necessary in a global economy.

X. Why Global Uniformity in Law Governing Computer Information Transactions is Necessary in a Global Economy

Having considered the possible provisions that should be included in the treaty and their effects on the global economy, it is next necessary to explain why a treaty is an adequate solution to integration in light of the global economy. To answer this question, an analysis of economic considerations that influence law making choices is required. Such an examination is undertaken below in relation to the proposed treaty solution. First, the Coase Theorem is set forth and examined to show why global uniformity is necessary. Following this, possible criticisms of the global uniformity approach are acknowledged and thereafter discredited.

A starting point in analysis is a discussion of the Coase Theorem, which establishes the theoretical argument for uniform laws. n115 The Coase Theorem states that "if rights are fully specified and transaction costs are zero, parties to a dispute will bargain to the same efficient outcome regardless of the initial assignment of rights." n116 Applying the Coase Theorem to this context, the uniform law movement and the need for global uniformity is tied to the ability or the failure of states and countries to cooperate efficiently to avoid negative externalities. n117 Global uniformity should be supported if the current state-by-state and country-by-country regulatory method creates negative externalities and the bargaining costs to correct the externalities are too high. n118

While states and countries have a potential to be "maximizing participants in cooperative solutions," the potential is not always realized since barriers to cooperation may be too high. n119 The inability of states and countries to create cooperative solutions should result in global intervention. n120 In the context of laws governing computer information transactions, the debate surrounding the adoption of UCITA in state legislatures has created the negative externalities as described above. n121 Furthermore, among the countries that have laws governing computer information transactions, the provisions are conflicting on key issues. n122 In this way, negative externalities result not only in the domestic sphere, but also the international sphere. The solution to eliminating the negative externalities problem is the adoption of a global uniform law in the form of an international treaty. In so doing, efficiency in both the legal system and business system would result.

Some scholars and practitioners would criticize the argument for global uniformity. n123 In criticizing such an argument, they advance the concept that law is not an autonomous discipline, but rather is political. n124 They also

theorize and accept that politics consists of embedded power relations. n125 Therefore, law and law-making are products of these embedded power relations through politics. In making these assumptions, the market is viewed as not empowering. The global uniformity approach would be heavily criticized as holding out false hope through accepting the assumptions of the market economy as implied in the Coase Theorem. Rather, these individuals would suggest that the framework and structure must be changed. Consequently, underlying factors would be revealed so as to unmask and create a new structure.

While such criticism may seem convincing, the inherent logic behind the approach is not persuasive. By completely discounting the market view of the economy, the criticism ignores the basic truth that markets must have rules to function and to overcome uncertainties. n126 Adopting a global uniform law through a treaty would provide the necessary "rules of the game" for the e-commerce market, and would simultaneously eliminate the current uncertainties due to conflicting laws. However, the treaty approach is not a perfect solution.

XI. The Treaty Solution: Why it is the Better Approach, but not as Perfect as it Seems

While global uniformity must be established through a treaty to deal with this issue, when negotiating and drafting a multilateral treaty there are situations that may arise that could result in the treaty-making process unraveling, or the treaty itself becoming somewhat more complicated. A consideration of these possible situations as set forth below is necessary in order to understand why the comprehensive treaty proposed may not be as perfect a solution as it first seems. Also, some possible solutions to these issues are discussed.

In the first situation, a state may attempt to change the legal effect of the treaty by making a "reservation" to the agreement. n127 For many multilateral treaties, such as the CISG, member states (or states parties) are permitted to make reservations as long as they are not contrary to the object and purpose of the Convention. n128 Thus, if a country in this situation wished to make a reservation against a specific provision, as long as the reservation was not contrary to the "object and purpose" of the Convention (here, facilitating computer information transactions), the reservation would be allowed and the result would be a more complicated treaty. However, if the reservation went against the "object and purpose" of the Convention, the reservation would not be allowed. This result could lead to a possible unraveling of the treaty-making process.

While reservations are a concern, a possible solution could be to bar the possibility of a reservation by declaring the treaty a "package deal." n129 Also, a state could object to the reservation, even if it was not found to go against the "object and purpose" of the treaty. n130 However, the reality still exists that reservations can lead to a multilateral treaty being overly complicated or unable to survive the treaty-making process.

A second consideration requires remembering that a treaty is always subject to interpretation. Treaty interpretation may play a role in the eventual application of the provisions because a word could be considered ambiguous and the interpretation of that word may lead to varying applications of the rule. n131 This could create more difficulties, as it would undermine the goal of facilitating computer information transactions and having a uniform law.

A possible solution to this issue would be to draft the treaty to be as clear and unambiguous as possible. This would require careful consideration of each provision placed in the treaty, as well as comprehensive discussion on the issues surrounding each proposed treaty provision.

Conclusion

While the treaty solution has promise, it is not without its own faults. However, the faults of the treaty are outweighed by the more important need for a simplified global norm. This is because having such a norm would allow for considerations particular to computer information transactions to be implemented.

For example, referring to the hypothetical posed at the beginning of this Note, if there were a global uniform law, the fact that the transaction was international in scope would not pose any difficulties when contemplating what laws apply to the transaction. Rather, one need only have recourse to the global uniform law and consider its provisions in relation to the transaction. In this way, a comprehensive treaty providing for the differences inherent in conducting business through computer information transactions would increase the number and efficiency of business transactions done worldwide and stimulate the global economy.

FOOTNOTES:

n1 Lionel M. Schooler, *From the Editor: Technology: The March of Progress?*, 39 HOUS. LAW. 8, 8 (Nov./Dec. 2001); *see also* Raymond T. Nimmer, *UCITA: A Commercial Contract for the Information Age*, 39 HOUS. LAW. 18, 19 (Nov./Dec. 2001).

n2 Unif Computer Information Transaction Act (2001), *available at* <http://www.law.upenn.edu/bl/ulc/ucita/ucita01.htm>.

n3 Alvin C. Harrell, Note, *UCITA: Opportunity or Obstruction?*, 25 OKLA. CITY U. L. REV. 333, 333 (2000).

n4 *Id.* at 334-35.

n5 *Id.* at 336.

n6 Mathew J. Smith, Comment, *An Overview of the Uniform Computer Information Transactions Act: Warranties, Self-Help, and Contract Formation Why UCITA Should Be Renamed "The Licensors' Protection Act"*, 25 S. ILL. U. L.J. 389, 393 (2001).

n7 *Id.*

n8 Frederick E. Schuman, III, *A Law for Contracting in the 21st Century: The UCITA is a Statute Whose Time Has Come*, 8 MICH. B. J. 60, 60 (Sept. 2001); *see also* Carlyle C. Ring and Ray Nimmer, *Series of Papers on UCITA Issues*, at <http://www.ucitaonline.com/docs/ring.pdf>.

n9 *Id.*

n10 *See* Nimmer, *supra* note 1, at 19.

n11 *Id.*

n12 *Id.*

n13 *See* Nimmer, *supra* note 1, at 22-23.

n14 *Id.* at 21.

n15 Brian McDonald, *V. Business Law B. Computer Information a) Contract Enforceability: The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 461 (2001).

n16 Thomas J. Murphy, Note, *It's Just Another Little Bit of History Repeating: UCITA in the Evolving Age of Information*, 30 *GOLDEN GATE U. L. REV.* 559, 560-61 (2000).

n17 *Id.*

n18 Carlyle C. Ring, Jr., *Uniform Rules for Internet Information Transactions: An Overview of Proposed UCITA*, 38 *DUQ. L. REV.* 319, 320 (2000).

n19 Murphy, *supra* note 16, at 569.

n20 *Id.* at 573-74.

n21 *Id.*

n22 *Id.* at 574.

n23 *Id.*

n24 Ring, *supra* note 18, at 322.

n25 *Id.*

n26 *Id.*

n27 Rochelle Cooper Dreyfuss, *UCITA in the International Marketplace: Are we About to Export Bad Innovation Policy?*, 26 *BROOK. J. INT'L. L.* 49, 50 (2000).

n28 *Id.*

n29 *Id.*

n30 Francesco G. Mazzotta, *A Guide to E-commerce: Some Legal Issues Posed by E-commerce for American Businesses Engaged in Domestic and International Transactions*, 24 *SUFFOLK TRANSNAT'L. L. REV.* 249, 253 (2001).

n31 *Id.*

n32 *Id. at 253-54.*

n33 Electronic Signatures in Global and National Commerce Act, Pub. L. NO. 106-229, 114 Stat. 464 (2000).

n34 Chandel Hall, *Technology: Its Impact on Your Practice*, 48 *LA. B. J.* 452, 452 (Apr. 2001).

n35 *Id.*; see also Barbara Novak, *Legal Practice Tips*, 62 *OR. ST. B. BULL.* 39, 39 (Dec. 2001); see also Stephanie Lillie, Note, *Will ESIGN Force States to Adopt UETA?*, 42 *JURIMETRICS J.* 21, 21 (2001). An explanation of an e-signature as set forth by Barbara Novak is included below:

Similar to the use of an "X" to denote one's signature on a writing, an electronic signature might not spell the signer's name; it might not even be a visual representation. UETA Section 2(8), and the federal E-Sign Section 106(5), define an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Imagine using your favorite birdsong as your signature.

The official comments to UETA are slightly more mundane, and suggest that one's voice on an answering machine, one's name as part of an e-mail or the firm name on a facsimile might all be signatures if used with the intent to use or adopt the sound, symbol or process for the purpose of signing the related record. A mouse "click" could also be an electronic signature, as in a purchase online, when the customer might see a box to click on to confirm and/or send the order.

UETA notes that whether a particular document is "signed" is a question of fact based on the intent of the person who supposedly signed the document. In fact, a "signature" as we have traditionally thought of it, is not necessary to sign a contract. Any electronic act that a person intends to use in order to close a transaction or execute a contract can be a signature.

Under the electronic transactions acts, contracts could even be made without any human involvement at all. For example, if company A authorizes its computer to automatically accept offers to purchase shares of company B stock whenever B's computer transmits an offer to sell at \$ X, the A computer and the B computer could make contracts between A and B that were legally enforceable even though no human at A or B was online at the time the contract was made. A computer that can execute contracts on behalf of its owner is referred to in UETA as an electronic agent. Barbara Novak, *Legal Practice Tips*, 62 *OR. ST. B. BULL.* 39, 39-40 (Dec. 2001).

n36 Lillie, *supra* note 35, at 23.

n37 *Id.*

n38 *Id. at 25.*

n39 *Id.*; see also Novak, *supra* note 35, at 40.

n40 Lillie, *supra* note 35, at 24.

n41 *Id. at 25.*

n42 *Id.*

n43 Mazzotta, *supra* note 30, at 257.

n44 *Id.*

n45 *Id.*

n46 *Id.*

n47 *Id.* at 255.

n48 *Id.*

n49 U.N. Center for Trade Facilitation and Electronic Business, U.N. Model Electronic Commerce Agreement, U.N. Doc. ECE/TRADE/257 ch. 1 2.1, ch. 2 2.1 (2000).

n50 Electronic Commerce Agreement, *supra* note 49, at ch.12.3.1.

n51 *Id.* at ch. 1 2.3.2.

n52 *Id.*

n53 *Id.* at ch. 1 2.4.

n54 *Id.* at ch. 1 3.2.2.

n55 Mazzotta, *supra* note 30, at 256.

n56 Mazzotta, *supra* note 30, at 254.

n57 *Id.*

n58 *Id.*

n59 *Id.*

n60 *Id.* at 253.

n61 Mazzotta, *supra* note 30, at 253.

n62 Lillie, *supra* note 35, at 22.

n63 *Id.* at 23.

n64 *Id.* at 22.

n65 Mazzotta, *supra* note 30, at 257.

n66 *Id.*

n67 Mazzotta, *supra* note 30, at 255.

n68 *Id.*

n69 Michael L. Rustad, *Uniform Computer Information Transaction Act: Article Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 549 (1999).

n70 Mazzotta, *supra* note 30, at 264.

n71 This statement is subject to debate. For example, as scholars Bruce Kobayashi and Larry Ribstein note:

The analysis of the costs and benefits of contractual choice does not support UCITA's limitations on contractual choice of law. The only reason the Reporter's Notes give for the deviation from "freedom of contract" is that firms should not be able to evade mandatory consumer laws. In dropping the "reasonable relationship" requirement for commercial contracts, the Reporter's Notes state that in a "global information economy, limitations of that type are inappropriate and arbitrary," and concede that the limits of contractual choice of law for consumer transactions will impose "significant costs on Internet commerce." Given the analysis of market and other constraints on contractual choice of law, it is far from clear that any consumer benefits of this restriction outweigh the costs to consumers, sellers and others. Bruce Kobayashi and Larry Ribstein, *Uniformity, Choice of Law And Software Sales*, 8 *GEO. MASON L. REV.* 261, 301 (1999).

n72 Raymond T. Nimmer, *Understanding Electronic Contracting: UCITA, E-Signature, Federal, State and Foreign Regulations 2001*, in PRACTICING LAW INSTITUTE -- SERIES OF PAPERS -ON UCITA ISSUES 15, 25 (2001).

n73 Smith, *supra* note 6, at 413.

n74 SB 5251 (NY 2001).

n75 Cathy E. Cretsinger and Peter S. Menell, *Annual Review of Law and Technology*, 16 *BERKELEY TECH. L. J.* 1, 8 (2001).

n76 *Id.*

n77 Ring, *supra* note 18.

n78 Vienna Convention on the Law of Treaties May 23, 1969, *available at* <http://www.tufts.edu/departments/fletcher/multi/texts/BH538.txt>.

n79 DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 25 (Foundation Press 2001).

n80 *Id. at 26.*

n81 *Id.*

n82 *Id. at 25.*

n83 *See supra* note 78, at Part I, art. 2, 1(a).

n84 BEDERMAN, *supra* note 79, at 26.

n85 *See supra* note 78, at Part I, art. 2, 1(a).

n86 *Id.*

n87 *Id.*

n88 BEDERMAN, *supra* note 79, at 27.

n89 *Id.*

n90 *See supra* note 78, at Part I, art. 2, 1(a).

n91 BEDERMAN, *supra* note 79, at 27.

n92 *Id.*

n93 *See supra* note 78, at Part I, art. 2, 1(a).

n94 BEDERMAN, *supra* note 79, at 27.

n95 *Id.*

n96 *See supra* note 78, at Part I, art. 2, 1(a).

n97 *See supra* note 78, at Part I, art. 2, 1(a).

n98 Legal Status of Eastern Greenland Case (Den. v. Nor.), 1933 P.C.I.J. Ser. A/B, No. 53.

n99 *See supra* note 78, at Part I, art. 2, 1(a).

n100 BEDERMAN, *supra* note 79, at 27.

n101 John C. Duncan, Jr., *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the Sale of Goods in Revising the UCC, 2000 BYU.L. REV. 1363, 1372-73 (2000).*

n102 Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, *available at* <http://www.cisg.law.pace.edu>.

n103 *Id.*

n104 Nimmer, *supra* note 1, at 22-23.

n105 *Id.*

n106 Lillie, *supra* note 35, at 24-25.

n107 *Id.*

n108 Lillie, *supra* note 35, at 24.

n109 *Id.*

n110 *Id.* at 25.

n111 *Id.*

n112 Mazzotta, *supra* note 30, at 253.

n113 U.N. Ctr. for Trade Facilitation and Elec. Bus., *supra* note 49, at ch. 1 2.1, ch. 2 2.1.

n114 U.N. Ctr. For Trade Facilitation and Elec. Bus., *supra* note 48, at ch. 1 2.3.1.

n115 Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 *AM. BUS. L. J.* 41, 46-47 (2000).

n116 NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW* 67 (1997).

n117 Razook, *supra* note 115, at 46-47.

n118 *Id.*

n119 *Id.* at 48.

n120 *Id.*

n121 Cretsinger and Menell, *supra* note 75, at 8.

n122 Symposium, *Responding to the Legal Obstacles to Electronic Commerce in Latin America: General Questionnaire*, 17 *ARIZ. J. INT'L & COMP. L.* 23, 49-72 (2000) (describing various proposed legislation relating to e-commerce in Latin American countries and whether the proposed legislation is sufficient).

n123 MECURO & MEDEMA, *supra* note 116, at 161-62 (expressing the Critical Legal Studies school of thought. This school of thought accepts many Marxist economic theories. There are "two Marxisms" within this school of thought: the "Critical Marxist-indeterminacy" contour and the "Scientific Marxist-deterministic" contour. Both strands view law as "simply one aspect of the larger social structure, with the political dimension

of the law serving to structure mass consciousness and contribute to the reproduction of the social and political structures of society.").

n124 MECURO & MEDEMA, *supra* note 116, at 165.

n125 *Id.*

n126 Andrea M. Corcoran, *The Uses of New Capital Markets: Electronic Commerce and the Rules of the Game in an International Marketplace*, 49 *AM. U. L. REV.* 581, 587-89 (2000).

n127 *Id.* at 31.

n128 *Id.* at 32.

n129 Corcoran, *supra* note 126, at 32.

n130 *Id.*

n131 Corcoran, *supra* note 126, at 33.