

MEMORANDUM

TO: Drafting Committee for Electronic Communications in
Contractual Transactions

FROM: D. Benjamin Beard, Reporter

DATE: April 10, 1997

RE: Preliminary Issues

Enclosed with this memorandum is a draft Table of Contents for the Uniform Electronic Communications in Contractual Transactions Act (the "Act"), together with selected model provisions. The provisions have been drawn principally from the following sources: 1. The United Nations Commission on International Trade Law, Model Law on Electronic Commerce (the "Uncitral Model"); 2. The Illinois Electronic Writings and Signature Act, November 4, 1996 Draft (the "Illinois Model"); 3. The Oklahoma Bankers Association Technology Committee, Digital Writing and Signature Statute, Second Discussion Draft, June 17, 1996 (the "Oklahoma Model"); 4) Uniform Commercial Code Article 2B - Licenses, January 20, 1997 Draft ("Article 2B Draft"); and 5) The Uniform Commercial Code Official Text - 1995 (the "UCC").

In putting together the model provisions, I have identified the following as the principal issues on which I would most appreciate guidance from the Committee.

1. SCOPE OF THE ACT

The primary issue on which I need guidance from the Drafting Committee at our May meeting relates to the Scope of the project. The Drafting Committee's memorandum of January 3, 1997 to the Conference Scope and Program Committee as approved by the Scope and Program and the Executive Committees (the "Scope Memo") states

"The fundamental idea of this project is 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)

A. Writings and Signatures. The attached model provisions all encompass far more than electronic processes involved in contractual transactions. The Illinois Model and Oklahoma Model each covers all writings and signatures, while the Uncitral Model covers "any kind of information in the form of a data message [a record] used in the context of commercial activities." As an example of broader coverage, the Oklahoma Model provides

III. Writing. A. Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a record satisfies that rule of law.

Similarly, Section 201 of the Illinois Model provides

Section 201. Legal Recognition of Electronic Records.
Information [documents] shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of an electronic record.

Section 202 of the Illinois Model is to similar effect as the Oklahoma Model. In each of these cases, the model provides for exceptions to the applicability of the general rule stated.

B. Signatures. With regard to signatures the issues relating to the confirmation and assurance of both the identity of the signer and the integrity of the content will have to be addressed. Aside from these issues inherent in the electronic process, the same Scope issues as with Writings present themselves, i.e., will signatures in all contexts be covered, or does the Committee want to limit to a contractual universe (broadly or narrowly defined).

C. Contractual Breadth. The approach followed by the Oklahoma Model and the Illinois Model has the distinct problem that a global review of all laws in the jurisdiction will be required to determine those provisions which should not be affected. Even the seemingly more limited Uncitral Model has an enormous breadth. In a footnote, the Uncitral Model provides that

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting;

engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road. (emphasis supplied)

In light of the breadth of even the Uncitral Model, the model provisions provided to the Committee at this time have been limited by the definitions of "contractual transaction," which is new, and the modification of the definition of "rule of law" by limiting its applicability to rules relating to contractual transactions. These limitations seem appropriate given the "fundamental idea" of the project to deal with general contract law in the electronic environment.

Beyond these limitations, the question remains whether, even in the context of contractual transactions, there are other areas of contract law which should not be covered by the Act. For example, should the Scope of the Act exclude areas such as banking, insurance, or business organizational documentation?

D. Specificity of Provisions. Once the universe of application of the Act is established, the question becomes what level of specificity of provision is desired by the Committee. For example, the general validation and effectuation of "writings" and "signatures" seems to be a given. However, the question then becomes to what extent does the Committee wish to get into substantive rules affecting these transactions. As you will see in the models presented, Part 4 provides models of sections addressing specific contract rules. Is this level of specificity desired by the Committee?

E. Transferable Records. Another Scope issue relates to the area of assignable contracts bordering on negotiability. Among the provisions enclosed herewith is a section derived from the Oklahoma Model which deals with "transferable records." Without directly dealing with Article 3 of the Uniform Commercial Code, the provision allows for the future use of developing technology by validating records, including electronic records, where the indicia of, and protections afforded by, possession of a written record can be demonstrated.

F. Public Documents and Filings. Part 5 of the enclosed Table of Contents suggests the inclusion of provisions relating to Required and Permissive Filings with Public Authorities. Should the Act cover this area, and if so, to what extent, i.e., a broad enabling provision, or more specific provisions?

2. STATEMENT OF PURPOSES OF THE ACT

In the attached provisions you will find a preliminary draft of a statement of purpose for the Act. As with Section 1-102 of the UCC, I believe such a statement can be invaluable to Courts by providing a basis for applying the statute in the face of changing circumstances, thereby prolonging the relevant life of the statute. The ability to cite statutory support for a particular application of the Act to a new circumstance, not extant at the time of the enactment of a statute, greatly decreases the likelihood of necessary revisions to keep up with changing circumstances. This is particularly apposite to the rapidly developing technology which is the impetus for this drafting project.

Although the rules of the Style Committee discourage the use of Statements of Purpose in Uniform Acts, I raise the issue for the consideration of the Drafting Committee. It seems that this project may be a candidate for an exception to the general rule.

The foregoing issue summary is clearly preliminary. As the Committee reviews the attached models and receives input from interested parties, other issues will undoubtedly arise. However, in anticipation of preparing the First Draft of the Act for the Committee's consideration at the end of the summer, the foregoing issues are those on which I would appreciate guidance most at this time.

3. A NOTE ABOUT THE ATTACHED MODEL PROVISIONS

The Model sections have been provided principally as examples, but also in some cases for comparative purposes. With respect to certain of the provisions, a note is included to clarify changes to the models or highlight issues for the Committee's consideration. You will notice that, particularly as to Part 4 (which is drawn from the Uncitral Model), the defined terms do not track those provided in the definition section. To clarify, in Part 4, the term "record" is inserted in brackets where those provisions use the term "data message." As a general proposition, the terms "electronic record," "electronic message," and "data message" are interchangeable in the models.

Also enclosed for your information is an example of a very minimalist model--The Massachusetts Electronic Records and Signatures Act, February 7, 1997 Draft. In discussions with Ray Campbell and Dan Greenwood, the preparers of this draft, this proposal is intended as a bridge to a more comprehensive statute they hope will come out of this Drafting Committee. Messrs.

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Campbell and Greenwood also authorized me to share with the committee a sample of the statutory review conducted by their office to discover which Massachusetts statutes would be affected by their act. Attached to the Massachusetts proposed Act are three pages (out of 32 given to me) identifying the types of statutes which will need to be considered. The 32 pages given to me represent approximately one-half of all the citations of "signed," "signing," and "signature" appearing in the Massachusetts General Laws. Their office is currently working on a similar compilation relating to "written" and "writing." In addition, other terms, such as "document," "indenture," and similar words, will require analysis because of the possibility that the requirement of a "writing" or "signature" may be implicit in a statutory reference.

It must be emphasized that the models are presented to the Drafting Committee largely in their original forms for information and comparative purposes only; the purpose is to provide the Committee with examples of the scope of topics addressed in other drafting efforts. I intend to use these models as a starting point in preparing the first draft of the Act, except as the Committee advises otherwise.