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Uniformity in Commercial Law: Is the UCC Exportable

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UNIFORMITY IN COMMERCIAL LAW: IS THE UCC EXPORTABLE?

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I. INTRODUCTION

As it has been well received in the enacting legislatures, White and Summers judge the Uniform Commercial Code (UCC) to be "the most spectacular success story in the history of American law."[1] According to White, "[o]nly one who had been embarrassed by his earlier excesses of romanticism" would deny that compared to the lawyer in 1938, the lawyer in 1988 "would find [commercial] law more uniform, more certain, more precise and more sensible."[2] Indeed, in the United States, the UCC has predominantly governed commercial transactions for several decades now. In addition, most commercial law reform efforts in the United States have been carried out as part of an ongoing UCC revision process.[3] Furthermore, various UCC Articles have been used as a model for commercial law reform throughout the world.[4] In sum, it would not be an exaggeration to observe that at least in the common-law world, inasmuch as Chalmers' English nineteenth-century legislation[5] dominated the commercial law statutory scene well into the twentieth century,[6] it was intellectually eclipsed by Llewellyn's Code, which took over and became the most

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1. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 5 (3d ed. 1988).

2. *Id.* at 22.

3. A notable exception is federal activity, as for example in the payment area, where funds availability legislation preempts UCC Article 4 and electronic fund transfer legislation governs consumer rights in connection with consumer electronic payment systems.

4. Most notably, UCC Article 9 is the standard model for modern Canadian personal property security statutes.

5. Namely, The Bills of Exchange Act, 1882, and The Sale of Goods Act, 1893.

6. Statutes modelled on this legislation have been adopted throughout the entire British Commonwealth where they are largely in force to this very day.

important commercial law development in the second part of our century.

All this does not suggest that the Code is flawless or that the ongoing revision process is perfect. Nevertheless, even if a major intellectual project inspired and originally carried out by giants has been reduced to a battlefield among various interest groups, as many contend, the Code project remains viable and central. In short, while there is a convincing need for improvements, and perhaps even structural reforms in the revision process, there is no question that the Code is basically alive and well.

This Essay is thus premised on the view that overall, the UCC is a success story. The substantive provisions of the Code are a model for law reform. Furthermore, its widespread adoption indicates that the drafting process of the Code is a model for any project designed to achieve uniformity among various jurisdictions in any area of the law.

The question to be explored in this Essay is the exportability of a UCC project to countries outside the United States. Can or should a commercial law unification project, modelled on the UCC process, be implemented in other federal countries, and even globally, perhaps under the auspices of United Nations Commission on International Trade Law (UNCITRAL)? As discussed below, so far as the international scene is concerned, the ultimate answer is negative. With regard to federal countries, the question is more complex, and the ultimate answer may depend on local conditions. Automatic reproduction of the American process is by no means a guarantee of success.

II. LAW REFORM PROJECTS: MODERNIZATION, HARMONIZATION, AND UNIFICATION

To begin with, a distinction ought to be made, in the context of law reform, among modernization, harmonization, and unification—in the sense of achieving uniformity. Modernization is designed to render the law capable of meeting new social, economic, political, and technological conditions. Major modernization projects are often associated with a transition from an old social order into a new one. In the past, the adoption of European civil codes by Japan and Turkey fell into this category. Similarly, the current transition of East European countries to market economies may require law modernization.

However, modernization need not be linked exclusively to a societal upheaval. Ongoing transformation of socioeconomic conditions may render existing laws obsolete so as to require modernization. In the area of secured transactions, UCC Article 9 was such a modernization project. Additionally, the technological revolution in banking and payment systems precipitated the adoption of UCC Article 4A governing funds transfers. Both projects introduced major doctrinal innovations to meet changing societal needs.

Nonetheless, modernization may be on a much lower scale. Such was the case with UCC Article 3. While not revolutionizing the law of negotiable instruments, it introduced some new concepts[7] and carried out a thorough housekeeping or cleanup operation, removing much obsolescence.[8]

In principle modernization can take place for a given legal system, either as a whole or in a selected area of the law, in total isolation, and irrespective of what is happening in any other jurisdiction. Conversely, harmonization is designed to achieve compatibility among the laws of various jurisdictions with diverse legal systems. The end result of harmonization is to facilitate cross-border dealings in a framework that allows the retention of individual laws for the various jurisdictions. Harmonization thus requires an agreement as to a common set of principles, as well as an overall coordination. Particularly, harmonization requires the modernization of uniform conflict of laws rules. Furthermore, to be wholly effective, harmonization ought to be pursued in connection with laws that have been modernized.

Finally, unification or homogenization is altogether different. The effect of unification is to make substantive law one and the same for all jurisdictions, in all or selected areas. Undoubtedly, it makes cross-border dealings very smooth, in a more effective fashion than mere harmonization. In addition, as will further be explained below, a unification project is likely to involve modernization. By definition, unification bypasses harmonization. Unification thus appears to be the most effective tool for facilitating the smooth flow of cross-border dealings.

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7. *E.g.*, U.C.C. § 3-406 (1990) (creating a duty of care in preventing and reporting check forgeries).

8. *E.g.*, *id.* § 3-302 (recognizing that the payee may be a holder in due course).

Nonetheless, while the rationalization of modernization as well as of harmonization seems to be impeachable, this is not necessarily the case for unification. A homogeneous or uniform law substantially smoothens cross-border dealings. But wouldn't it be the same for language or culture? Surely a common language as well as homogeneous culture will facilitate smooth cross-border dealings, arguably no less than a uniform law. Why then stop at law unification? Stated otherwise, inasmuch as the standardization of language or culture across borders is not regarded as a legitimate pursuit, why single out law?

The point is that, to a large extent, law, very much like language or religion, is strongly culturally based. An independent legal system is not only an expression of sovereignty, but also reflects the culture of the people and may be the result of a unique local historical evolution. The uniqueness of the law in any given jurisdiction may thus mirror fundamental cultural values and historical factors applicable to the relevant society. In short, legal diversity is but a manifestation of cultural diversity. The legitimacy of the former cannot be denied without undermining that of the latter.

Furthermore, excessive uniformity may undermine the democratic process in any participating jurisdiction. Uniform laws are often drafted and agreed upon by bodies situated outside the democratically elected legislature, the latter by definition being limited to each jurisdiction individually. Uniformity backed by powerful interest groups thus lead legislatures to rubber stamp laws rather than truly enact them. In the final analysis, a unification exercise gives prominence to strong national, and even international lobby groups at the expense of local varied interests.

There are nevertheless some good reasons for uniformity. First, some areas of laws may be more amenable to homogeneity than others. For example, wire transfers are predominantly interjurisdictional. It thus looks extremely efficient to subject such transactions to a sole body of law. But even then, perhaps a well coordinated harmonization exercise will achieve a similar certainty in the law without excessively intruding on the unique content of each individual law.

A more compelling reason for achieving law uniformity is practicability. A natural byproduct of a unification exercise is modernization. Indeed, UCC Articles 9, 4A, and even 3, previously mentioned, are good examples of this effect. This added value feature of unification stems from the scale of the typical unification

exercise which draws on able people from numerous jurisdictions. Ironically, strength is also derived from the fact that the entire process is external to the democratically elected institutions of each jurisdiction. Only a meticulous, thorough, transparent, and open drafting process may generate a product saleable to the various law-enacting bodies.

No wonder then that the UCC links modernization and uniformity as two principal objectives, or underlying purposes, of the Code.[9] Bluntly stated, the drafters recognized that uniformity without modernization is a nonstarter for such an extensive project. In fact, one can go as far as to speculate, in fairness to the originators of the Code, that their principal objective might have been modernization, with the unification process being a mere tool of achieving such modernization on a national scale!

Hypothetically indeed, the law of Idaho may differ from the law of Montana on a given point, not due to cultural or political differences between these two American jurisdictions, but rather solely due to inertia, the existence of old precedents that have not been revisited, and the lack of political pressure to effect changes in technical matters that do not have natural constituencies of their own. Practically speaking, in the absence of a strong local law reform movement or institution, only a national process is likely to be a useful vehicle for rectifying such unnecessary differences.

Yet, in principle, a national process in a federal country may concentrate on harmonization rather than on unification. However, modernization is typically more effectively achieved in the context of unification rather than harmonization. This is so since modernization is an integral part of the unification exercise and is carried out as part of the drafting of the uniform law. In contrast, harmonization is a much more decentralized process that leaves much modernization work to be done in each jurisdiction. As such, in the context of harmonization, the modernization enterprise is not entirely immune from local apathy and, compared to the context of unification, is much more tenuous.

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9. The Code enumerates the underlying purposes and policies of the UCC to be: "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions." *Id.* § 1-102(2).

III. THE UCC PROCESS AND THE UNIQUENESS OF COMMERCIAL LAW

A common theme of UCC proponents is that the success of the Code is attributed to its ongoing, meticulous, thorough, transparent, and open drafting process.[10] A typical example is the recent drafting of Article 4A that, practically speaking, was negotiated among all relevant interest groups, namely, banks, corporate users, and the Federal Reserve, and then drafted by experts. Under the circumstances, this process resulted in the most modernized product that could be accepted by affected parties. In fact, as the argument goes, such a process is even much more democratic than the typical parliamentary legislative process where nonexperts make uninformed determinations based on the political expediency of the moment.

All this is undeniable. Nevertheless, it is submitted that in a democratic context, uniformity could succeed only in a relatively culturally cohesive environment. Such is the case in the United States, where there is one predominant culture, including a predominant language. While the UCC, in section 1-103, takes into account variations under supplementary general principles,[11] these variants themselves are quite harmonized. Indeed, one cannot overlook the strong common-law background of all adopting American jurisdictions. To underscore the point, Louisiana, the only American state without a common-law legal system, has predominantly stayed out. To reiterate, while it may bear some civil law traces, particularly at its inception,[12] the UCC is a common-law project, created in a common-law environment, and for common-law jurisdictions. This is not to mention its open drafting process being so embedded in American culture and tradition. As such, the UCC is not universal.

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10. *See* Thomas C. Baxter, Jr., *The UCC Thrives in the Law of Commercial Payment*, 28 LOY. L.A. L. REV. 113 (1994); Donald J. Rapson, *Who Is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249 (1994); William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993).

11. Section 1-103 of the UCC, dealing with supplementary general principles of law applicable, reads in full as follows: "Unless displaced by the particular provisions of [the UCC], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103.

12. *See* Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625, 625 (1993).

Unlike the United States, Canada is a federal country predominantly characterized by biculturalism and bilingualism,[13] including dual provincial legal systems. Uniformity, UCC style, is not a realistic option. As a result, commercial law in Canada, as compared to that in the United States, is much more federalized.[14] In addition, rather than unification, greater harmonization efforts have been underway for some time.[15]

Finally, the argument linking the overwhelming success of the UCC to its drafting process is not entirely separate from the argument based on cultural cohesiveness. A successful drafting process such as that which produced the UCC, would be unthinkable in an environment other than one characterized by such cultural cohesiveness. In fact, the drafting process of the Code is strongly dominated by values derived from American culture, such as due process, transparency, openness, and, I dare say, the exclusion of the weak and underprivileged.

A common theme of UCC proponents is the uniqueness of commercial law as an appropriate, if not ideal, field for achieving law uniformity. Underlying this theme is the view that modern commercial law is a true heir to the medieval law merchant. It is argued that commercial law is designed to serve the universal interests of the mercantile community regardless of specific local conditions. Local variations in commercial law create unnecessary barriers for the operation of smooth interjurisdictional commerce and thus ought to be eliminated by homogenization.

Under this view, "commercial law" is to be contrasted with "consumer law," which tends to reflect varied local conditions and is less amenable to unification.[16] In addition, commercial law is said to be the antithesis of the "general law" or "private law," which may truly be anchored in local tradition, culture, and history. Thus, the argument continues, the success of the UCC can be explained by the avoidance of consumer issues in conjunction with the recognition of

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13. Obviously, this is in addition to native cultures, and while recognizing the multicultural character of society, particularly that of the contemporary Anglophone one. Nevertheless, so far as *dominant* culture and language are concerned, Canada is characterized by Anglo-French dualism.

14. For example, unlike in the United States, the law governing negotiable instruments in Canada is federal.

15. The most recent example is in the area of secured transactions, in which Quebec has introduced Article 9 concepts into its own civil code.

16. Warren, *supra* note 10, at 812.

the effect of supplementary general principles of law, as seen in UCC section 1-103.

While accurate in principle, this argument is nevertheless overly simplistic. True, it explains the greater amenability of commercial law to law unification, as well as the greater desirability of uniformity in commercial law. However, this argument does not demonstrate that uniformity can be achieved in commercial law notwithstanding the lack of cultural cohesiveness, contrary to the principal thesis of this Essay.

Nor is this argument flawless. First, the distinction between commercial and consumer laws is not sharply defined. Consumers are the end receivers in the flow of commerce and their rights are actually affected by the UCC.[17] True, it is universally conceded that consumers' voices are not heard loud enough in the UCC drafting process,[18] and that unification of consumer law outside the UCC has not been all that successful.[19] Nevertheless, it is submitted that this is a reflection of the American political system, where nationwide consumer and labor groups are not prominent and are sidestepped in the national arena by business groups whose views tend to dominate the agenda.

Indeed, it is hard to establish a clear demarcation line between national "commercial" matters and local "consumer" ones. For example, the Canadian constitutional approach defines "interest" as a national concern, subject to exclusive federal legislative power, while "property and civil rights" are local matters to be dealt with by the provinces. In this framework who has the legislative power in relation to unconscionable transactions due to exorbitant interest rates?[20]

Second, the universal nature of the old "law merchant," as contrasted with the local nature of the "general law," historically did not preclude diverse codification of law merchant subjects in common- and civil-law jurisdictions. Thus, the English Bills and Exchange Act

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17. Consider, for example, in connection with Articles 3 and 4 situations involving check truncation, stop-payment orders, and the duty to verify the accuracy of bank statements.

18. This point was made most forcefully by Professor Edward Rubin. *See* Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

19. For a discussion of the dismal acceptance by jurisdictions of the Uniform Consumer Credit Code (UCCC), see Warren, *supra* note 10, at 812 & n.5.

20. *See* Ontario (A.G.) v. Barfried Enters., 1963 S.C.R. 570, 578 (Can.) (recognizing the effectiveness of provincial legislation in the absence of an explicit federal statute to the contrary).

differs in several respects from the Geneva conventions on bills, notes, and checks.[21] The former was enacted in the common-law tradition, and codified the "universal law of bills and notes" as applied by English courts. The latter reflects the consensus in civil-law countries. Thus, one universal law has two versions, each coming from a different perspective, and reflecting the local conditions, culture, and ensuing legal system.

In Canada the distinction between "commercial law" and "private law" allowed Quebec to retain its civil private law system though it was made to accept an Anglicized commercial law. The distinction between these two branches of law subsequently facilitated the adoption of a federal Anglicized Bills of Exchange Act, applicable throughout all Canada including in Quebec, while allowing Quebec to retain its own unique private law system. However, this was the result of conquest and not of a true consensual agreement. The tension between local private law of French origin and federal banking and commercial paper law of English origin characterizes the law applicable to Quebec to this very day. Furthermore, some of the uniformity purported to be achieved by federal "English" commercial law relating to bills and notes has been undermined by the "French" interpretation of Quebec courts.[22]

Overall, the Quebec experience demonstrates that a "mixed" legal system is viable; undoubtedly it makes life more interesting, at least to legal scholars. I suspect that the Louisiana experience in the United States is not much different. For our purposes, however, it is important to note the relativity or subjective nature of universality—an Anglicized commercial law—is not a natural part of the Quebec civil legal system; it would not have been adopted voluntarily.

A unification project—even in the commercial law area—is fitting only for jurisdictions with a substantial degree of cultural cohesiveness, including legal homogeneity. Indeed, in the United States, against the background of many preexisting commercial law stat-

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21. *See* 1 DENIS V. COWEN & LEONARD GERING, COWEN, THE LAW OF NEGOTIABLE INSTRUMENTS IN SOUTH AFRICA 124-31 (5th ed. 1985) (enumerating the differences).

22. For a recent account, see Jean Leclair, *La Constitution par l'histoire: portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre*, 33 CAHIERS DE DROIT [C. DE D.] 535 (1992), as well as Jean Leclair, *L'interaction entre le droit privé fédéral et le droit civil québécois en matière d'effets de commerce: perspective constitutionnelle*, 40 MCGILL L.J. 691 (1995).

utes,[23] the UCC was more of an exercise in law "modernization" than in law "unification."[24]

IV. THE UCC LESSON FOR INTERNATIONAL UNIFICATION

Accordingly, I have strong reservations with respect to commercial law unification projects undertaken globally, such as that by UNCITRAL. In turn, these reservations may also prove applicable in the context of the North American Free Trade Agreement. First, since such projects are designed to bridge gaps among inherently different legal systems emanating from diverse cultural backgrounds, their chance of success is quite slim. Second, in practice, such projects cannot involve a rigorous, transparent, and open drafting process, similar to that of the UCC, without which universal acceptability is unlikely to occur.

Obviously, this is not to suggest that the UCC drafting process is perfect. As already indicated, the rigor of the process and its openness exclude those who do not have the resources to persist.[25] Accordingly, the UCC drafting process has allegedly become a battlefield among interest groups sidestepping any public interest leadership.[26] Nonetheless, such weaknesses are not incurable. First, the UCC adversarial drafting process can be improved by funding the active participation of consumer and other nonbusiness grass roots organizations. Second, an impartial leadership of either civil servants—perhaps a very unAmerican idea—or academics—as in the original Code[27]—ought to be allowed to develop. However, in the

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23. Including statutes covering negotiable instruments, sale of goods, warehouse receipts, bills of lading, stock transfer and trust receipts. *See, e.g.*, ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 21-22 (1977).

24. *See supra* notes 7-8 and accompanying text (discussing some modernization aspects of the UCC).

25. As well, since many drafting meetings, in order to secure maximum participation, took place on weekends, some potential participants may have been excluded for religious reasons.

26. *See* Corrine Cooper, *The Madonnas Play Tug of War with the Whores or Who is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993); Rubin, *supra* note 18; *see also* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993) (evaluating the drafting process in search of a strategy that effectively represents consumer interests).

27. There is no magic objectivity attached to the academia. Academics acting as consultants identify with the interest groups they represent. The point is that legal experts, mainly academics with no obvious attachments to clients or interest groups, may be hired to serve impartially.

final analysis, the weaknesses of the UCC drafting process are inherent in the entire political process in the United States, becoming a culturally based aspect of any law reform exercise. It is unlikely that such weaknesses will be completely resolved in connection with the UCC drafting process.[28]

While thus imperfect, the UCC drafting process is nevertheless a model for an interjurisdictional unification project. It is against this yardstick that the UNCITRAL drafting process can be assessed. Delegates appointed by respective governments meet periodically. They consult experts and publicize their proceedings. Nonetheless, the involvement of the academic community and the legal profession as a whole, other than as delegates and hired consultants, is minimal. Also the involvement of all relevant interest groups is, to say the least, far from being comprehensive.

All this should not be read as a criticism of the well intending UNCITRAL participants. Obviously, the extensive scope, or the sheer size, of the global arena, not to mention the extent of cultural gaps and legal diversity, preclude the introduction of a UCC drafting model. Furthermore, any consensus achieved in the UNCITRAL drafting process becomes hardly saleable to the various constituencies, namely to individual enacting states.

In this context the experience of UNCITRAL work in the payment area is quite telling. Gigantic efforts in the areas of international bills and notes and credit transfers resulted in extremely well-drafted documents, but these documents were met with dismal acceptance rates among the states. Thus, the Bills and Notes Convention[29] is a brilliant amalgamation of civil and common-law principles.[30] Unfortunately, the convention failed to satisfy a critical mass of adopting countries. On its part, the United States had a heavy influence[31] on the Credit Transfer Model Law,[32] resulting in

28. Each final product put together by a drafting committee must be acceptable to the various enacting jurisdictions. There is always the risk that a statute prepared by a well-composed committee will fail to be acceptable in the political arena, due to domination by the same interest groups, which were neutralized in the drafting process.

29. *Report of the United Nations Commission on International Trade Law*, U.N. GAOR 6th Comm., 43d Sess., U.N. Doc. A/43/820 (1988).

30. For some aspects, see, for example, Bradley Crawford, *The Definition of "Holder" and "Protected Holder" in the UNCITRAL Convention on International Bills and Notes*, 4 BANKING & FIN. L. REV. 267 (1990).

31. *See generally* Bradley Crawford, *International Credit Transfers: The Influence of Article 4A on the Model Law*, 19 CAN. BUS. L.J. 166 (1991).

disdainful reception by some in Europe.[33] In sum, the Americans who are happy with the final product do not really need this Model Law, since it heavily bears the mark of UCC Article 4A. On their part, Europeans are far from being enthusiastic.

V. CONCLUSION

All this is not to suggest that international efforts for commercial law reform ought to be abandoned. Rather, the focus of such efforts could be revisited. New international projects should evolve around the modernization and harmonization of commercial law but not its unification. Indeed, technology and socioeconomic conditions do not remain constant. In our contemporary world, more and more countries are making the move to market-oriented economies. Additionally, because the scope of international trade is constantly increasing, the case for ongoing global commercial law reform cannot be overstated. Nevertheless, no reform will be successful without taking into account global cultural diversity and the variety of contemporary living legal systems. In the final analysis, the need for uniformity cannot override the importance of preserving cultural distinctiveness. While UCC concepts and principles ought not to be overlooked in any commercial law reform, whether domestic or international, globally implementing a UCC-type project is neither desirable nor workable.

32. *See Report of the United Nations Commission on International Trade Law*, G.A. Res., U.N. GAOR, 47th Sess., Supp. No. 49, at 3, U.N. Doc. A/47/34 (1992). The U.N. General Assembly encouraged its member states to consider enacting the Model Law as national legislation.

33. *See, e.g.*, Michel Vasseur, *The Main Articles of UNCITRAL's Model Law Governing International Credit Transfers and Their Influence on the EC Commission's Work Concerning Transfrontier Payments*, 1993 INT'L BUS. L.J. 155, 194-95.