THE UCC REVISION PROCESS:
LEGISLATION YOU SHOULD SEE IN THE MAKING

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If you like laws and sausage, you should never watch either one being made.¹

The Uniform Commercial Code ("UCC") is premised on the idea that commercial transactions and general prosperity are fostered by simplicity, uniformity, and certainty in applicable law.² Transaction costs are minimized if parties in different states can rely on a known body of uniform law when contracting. Settlement of disputes is eased if the likely outcome of litigation is reasonably predictable and uniform among available forums.

Although the UCC has achieved wide acceptance and considerable uniformity, it is getting old. Much of it was drafted soon after World War II,³ and revision is necessary.

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¹. Otto von Bismarck.
². See U.C.C. § 1-102 (1990 Official Text). Section 1-102(2) provides:
   Underlying purposes and policies of this Act are
   (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;
   (c) to make uniform the law among the various jurisdictions.
   Id. All references to the UCC are to the 1990 Official Text unless otherwise noted.
³. In 1940, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") voted to undertake the drafting of what was to become the Uniform Commercial Code ("UCC"). The drafting process was substantially complete by 1951, and this first edition of the UCC was ready for introduction to state legislatures in 1952. See WALTER P. ARMSTRONG, A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 56-57, 75-78 (1991) [hereinafter CENTURY OF SERVICE].

The history of this project is recounted in William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1 (1967); Soia Mentschikoff, The Uniform Commercial Code: An Experiment in Democracy in Drafting, 36 A.B.A.J. 419 (1950); and more recently, in a series of articles by the participants found in Douglas J. Whaley, Symposium, Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code, 43 OHIO ST. L.J. 533 (1982).
The need for change arises from many sources. Some of the provisions never worked as intended. There have been non-uniform attempts by individual states to remedy problems, and piecemeal quick fixes via federal legislation that do not mesh well with the balance of the UCC. Then again, even uniform language has not always been uniformly interpreted and applied. Another factor driving reform has been new technology, which has given rise to legal problems and possible solutions never contemplated by the drafters. Two examples are electronic funds transfers and computer software contracting problems. Finally, the increasingly international scope of trade and the ratification of international conventions on commercial law, such as the Convention on the International Sale of Goods ("CISG"), focus attention on UCC provisions which do not accord with existing and forthcoming rules of international commercial law.

For these reasons, the whole UCC is now undergoing a thorough updating. This revision project provides a unique opportunity to influence commercial law for years to come. Of special interest to lawyers in the Midwest is the chance to remedy existing provisions that have not worked well in the agricultural arena.

However, the study, drafting, and enactment pattern for uniform state laws differs greatly from that for non-uniform state statutes. Uniform state laws are put into final form by two national legal organizations, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), and the American Law Institute ("ALI"), before the proposals are sent to the state legislatures. The development process, of course, aims to draft a wise and workable statute, but it has another objective almost as important. That is to build a firm national consensus on two points: first, that the proposed statute is worthy of enactment; and second, that uniformity is more important than possible further refinement. Such a consensus would allow the revisions to be enacted rapidly and without local amendments.

Unfortunately, those aims were not achieved in some recent UCC projects, in part because too few people understood the process and took part in the initial drafting. Unless one is familiar with the timetable, it is easy to wait too long before getting involved. The "[i]t ain't real yet" syndrome leads busy people to pay no attention until the revised articles are introduced into the legislatures of their own


states. By then, their input either comes too late to be effective or threatens to delay needed reforms and to reduce rather than increase national uniformity of commercial law.

The current UCC revision process provides many openings for involvement, and those guiding it have learned from past mistakes. They actively seek wider participation by lawyers, academics, industry groups, and consumers. While the revision process is well underway, it is not too late for effective input on UCC articles whose amendments have not yet been finally approved by the NCCUSL and the ALI. For example, Article 2, on Sales of Goods, and Article 9, on Secured Transactions in Personal Property, are early in the drafting stage. Article 5, on Letters of Credit, and Article 8, on Investment Securities, are in the drafting stage as well, though closer to the finish line. Studies of the need for changes to Article 1, on General Provisions, and Article 7, on Documents of Title, are just beginning.

This Article aims to enable lawyers and others to participate effectively in the UCC revision process. In Part One, this Article will try to pique interest in the process by looking at the possible product, that is, by previewing some points likely to be revised in Articles 2 and 9. Part Two will introduce the principal institutional players and run through the development process as illustrated by Articles 2 and 9, with directions along the way on how to get in and play the game.

I. THE SHAPE OF THINGS TO COME?

Let’s look at the possible product. Perhaps knowing what is at stake will overcome inertia and get people involved before the initial drafting process is finished. To that end, here are some of the major changes being considered for Articles 2 and 9.

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6. See U.C.C. Arts. 3, 4 & 6 (1990); see id. Arts. 2 & 4A. Revisions are complete to Articles 3, 4 and 6 (in the latter case, the recommendation was for repeal), and two new Articles, 2A and 4A, have already been promulgated for adoption by the states. See U.C.C. Arts. 3, 4 & 6; see id. Arts. 2 & 4A.

7. A drafting committee for Article 2 was appointed by NCCUSL in August, 1991. Although no drafting committee has yet been appointed for Article 9, the Article 9 Study Committee’s final report, expected in late fall, 1992, will recommend formation of a Drafting Committee. NCCUSL and the American Law Institute (“ALI”) are expected to approve this, and if they do, a Drafting Committee will likely be appointed early in 1993. See Status of Proposed Revisions ABA Comm. UCC Update, 12 (July, 1992) [hereinafter Proposed Revision] (newsletter of the ABA Business Law Section’s UCC Committee).

8. A fourth tentative draft of revised Article 5 was released by the NCCUSL Drafting Committee in May, 1992, and was read at NCCUSL, August, 1992, Annual Meeting. Id.

9. Id.
A. SOME MODEST PROPOSALS FOR SALES OF GOODS

An initial Study Committee on Article 2 rejected such major changes as extending its scope to the vast array of contracts for services. The Study Committee also proposed not to expand consumer protection in Article 2, primarily based on its view that general agreement on that subject was unlikely and "an aggressive approach would impair the chances for approval and ultimate adoption of any revised Article 2."12

Both of those decisions may prove controversial. So may some of the affirmative recommendations which follow.

1. The perfect tender rule of section 2-601, which purports to allow the buyer to reject non-conforming goods for any reason, should be limited. At the least, the buyer's rejection should be subject to good faith. Some would go further, and deny the buyer the right to reject despite defects, unless the defects meet a substantial impairment standard, in accord with the CISG.14

2. The power of parties to a sales contract to agree on remedies should be expanded; first, by making specific performance generally available under section 2-716, and second, by eliminating a court's

10. For an explanation of the Article 2 Study Committee's composition and working methods, see infra notes 87-98 and accompanying text. The Study Committee's recommendations are not binding on a subsequent drafting committee but will surely be influential, particularly because Professor Speidel continues as the Reporter of the Article 2 project.


One offshoot of the current round of UCC revisions has been increased attention to consumer protection, or lack of it, in the UCC, and to opportunity for consumer advocates to take part in the process. See Edward L. Rubin, Uniformity, Regulation and the Federalization of State Law: Some Lessons from the Payment System, 49 OHIO ST. L.J. 1251 (1989). Many longtime participants remain firmly opposed to any major expansion of the UCC in this direction. See Miller, 42 ALA. L. REV. at 412-16.

However, consumer advocates should get help in being heard in the process. See infra notes 112-16 and accompanying text.

13. See U.C.C. § 2-601. Section 2-601 provides in relevant part:

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

Id.


15. See U.C.C. § 2-716. Section 2-716 provides in relevant part:
section 2-718 power to refuse enforcement of liquidated damage clauses that exceed actual damages.\textsuperscript{16}

3. Section 2-201,\textsuperscript{18} the statute of frauds, may be eliminated en-

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

Id.

16. See U.C.C. § 2-718. Section 2-718 provides in relevant part:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of less, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

Id.


18. U.C.C. § 2-201. Section 2-201 provides:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not sufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
tirely, in accord with the CISG and to ease compliance in cases where contracts are formed by electronic data interchange without a traditional writing. The statute of frauds has been a much litigated defense in agricultural transactions where oral contracts prevail.

If the ultimate decision is instead to retain a statute of frauds, then the provision may be amended to delete any requirement for a written quantity term and to add reliance on the oral contract as an additional ground for enforcement.

4. The Article 2 Study Committee was unable to agree on whether more mixed contracts for sales and service should be covered by Article 2.21 The question is particularly acute in the field of custom computer software development contracts. Are these governed by Article 2 as sales of goods, so that Article 2's statute of limitations, warranties, and remedies control? Or are these contracts primarily for services, perhaps even professional services, so the UCC is inapplicable, and either general contract law or tort standards of malpractice apply? So far, the UCC and the courts provide no clear answers. There is an ongoing movement to incorporate changes into Articles 2 and 2A to cover these hybrid contracts.

B. SOME PROPOSED CHANGES TO ARTICLE 9 ON SECURED TRANSACTIONS

The Article 9 Study Committee's final report will not be finished until the fall of 1992, but the following are some important areas marked for change.

1. The courts have been unable to agree on the appropriate

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-06).

Id.

19. Speidel, 46 BUS. LAW at 1874.
21. Speidel, 46 BUS. LAW. at 1878.
23. On the composition and working methods of the Article 9 Study Committee, see infra notes 93-97 and accompanying text. The report is expected in the fall of 1992. Proposed Revisions, supra note 7, at 12 (UCC Scorecard).
remedy for a repossessing secured party's failure to give the debtor notice of resale or to resell in a commercially reasonable manner.24 Some jurisdictions have denied a deficiency altogether for one or both of these defaults, while others have adopted either the "rebuttable presumption" or "debtor's proof" rule to measure any deficiency.25

2. With regard to purchase money security interests, time periods for perfection may be lengthened.26 A recurring problem to be addressed is when those time periods should start to run if delivery is to be made in installments or to someone who is not obligated to buy until after some post-delivery trial period.27

3. Perfection of a security interest in negotiable instruments at present requires possession of the instrument, but that rule may be changed to allow perfection by filing as well.28

4. Whether and when a security interest continues in collateral after an authorized disposition will be considered.29 This has been a source of much litigation and confusion in sales by farmers of crops and livestock where the secured party arguably knew of and did not unequivocally object to prior sales of collateral by the debtor or similarly situated borrowers.

5. Article 9 may be expanded to include perfection and priority rules for a wider variety of non-UCC based liens, such as bank setoff rights, statutory liens protecting suppliers of agricultural inputs, and other liens arising from state and federal statutes, as well as the common law.30

In addition to these matters of general concern, some matters pe-


26. U.C.C. § 9-301. Section 9-301(2) provides:

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

Id. 27. Burke, 46 BUS. LAW. at 1886.

28. Id. See U.C.C. § 9-304. Section 9-304(1) provides:

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5).

Id. 29. Burke, 46 BUS. LAW. at 1887.

30. Id.
culiar to agriculture have been brought to the attention of the Study Group.

1. Difficult priority questions arise when security interests in growing crops can exist under real estate law (in favor of mortgagees, land contract sellers, and crop-share lessors) as well as under Article 9. The law in this area would be much simpler if Article 9, to the exclusion of real estate law, controlled the creation, enforcement, perfection, and priority of security interests in crops.

2. New types of agricultural collateral, particularly rights to government farm program payments, raise classification problems. A revised Article 9 could end this uncertainty.

3. Article 9 currently requires real estate descriptions in both the security agreement and financing statement to create and perfect a security interest in growing crops. The real estate description may be eliminated because it serves no important purpose, and the courts do not agree on what type of description will suffice. The requirement has become an expensive but useless trap for the unwary.

4. In the 1985 Farm Bill, Congress preempted section 9-307 of

32. Id. at 2-4.
33. Id. at 6.
34. U.C.C. § 9-203. Section 9-203(1) provides:
   (1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties unless
      (a) the collateral is in the possession of the secured party; or
      (b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, a description of the land concerned. In describing collateral, the word “proceeds” is sufficient without further description to cover proceeds of any character.
   Id. U.C.C. § 9-402(1) provides:
   (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor when the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.
   Id.
the UCC regarding buyers of farm products. Revisors of Article 9 may want to examine the fit of the federal provisions with the still operative provisions of Article 9 in this area.

5. The attempt in section 9-312(2) to provide a purchase money priority in growing crops has been a failure, given the difficulty of calculating required time periods. Key changes might include dropping those time limits and extending the special priority to all farm products, rather than just crops.

6. A number of states require financing statements for agricultural collateral to be filed in the county of the debtor's residence, rather than centrally, in the state capital. There are good reasons to eliminate this local filing, or at least to enable anyone searching the files to do so centrally, as the Nebraska compromise provides. Pressure to retain local filing may come from county offices dependent on filing fee revenues.

7. After repossessing collateral, a secured creditor must hold and protect it until after the debtor and perhaps others have been given notice of any proposed resale, unless the collateral is "of a type customarily sold in a recognized market." Feeding and otherwise


(1) A buyer in ordinary course of business (subsection (9) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

Id.


38. U.C.C. § 9-312(2). Section 9-312(2) provides:

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

Id.


40. In Nebraska, filings may be made centrally or locally, depending on the type of collateral. However, because all the locations are linked by computer, searches of all the filings may be done from any access point.


42. UCC § 9-504. Section 9-504 provides in relevant part:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2).

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and
caring for livestock during this period can be very expensive, and may greatly increase eventual deficiency judgments. The drafters may consider giving a uniform answer to whether livestock, crops, and certain other types of collateral fall within the recognized market exception to the notice of sale requirement.43

These are only a few of the many changes to be considered for Articles 2 and 9 in the next two or three years. The point is that anyone interested in these changes needs to learn the UCC revision process and contribute her thoughts soon — before the statute is fixed for the next twenty or more years. So, let's move on to Part Two, where we outline that process and how to participate in it.

II. THE UCC REVISION GAME AND HOW TO PLAY IT

A. WHY SHOULD WE CARE ABOUT THE PROCESS?

Understanding the Uniform Commercial Code ("UCC") revision process is important for many reasons. First, if one uniform statute will be enacted nationally, it had better be a good one. Optimum substantive provisions and coverage of issues are most likely to come from consultation with a broad array of interested and knowledgeable people.

Second, influencing the outcome requires knowledge of the process so one can provide input in the most effective and least costly way. In the UCC revision process, this means getting involved before the proposed final draft is approved at the national level, for that approval triggers stiff resistance to further change. One who wishes to shape the statute should act well before the state legislatures get the bill.

Third, timely participation shortens the inevitable disruption of statutory change. Updating an existing uniform law like the UCC necessarily defeats uniformity for a few years. Because the sponsors of the UCC continue to seek enactment at the state rather than the terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.

Id. 43. Report on Agricultural Financing, supra note 31, at 11.
federal level, forty-five different legislatures must separately consider proposed amendments. There is an inevitable time lag between the first state's enactment of a revised version and the fiftieth state's similar decision. To minimize that period of non-uniformity, consensus must be built before amendments are released for enactment — consensus broad and deep enough to get quick approval more or less on faith by state legislatures. Otherwise, it can take a decade or more to get a uniform version enacted nationwide.

Fourth, widespread lack of knowledge and trust in the process raises the danger that uniformity will be permanently reduced through a great variety of local amendments tacked on by individual legislatures. Countering this temptation requires convincing state constituencies first, that the final package embodies wise policy choices in well chosen words, and second, that uniformity among the states is more important than additional tinkering towards perfection.

If all this has convinced you to join the game, it's time to look at some of the players and the emerging rules of UCC revision.


The chief institutional players in the uniform law game, UCC division, are:

1. The National Conference of Commissioners of Uniform

44. When the UCC was first discussed, there was some sentiment for seeking enactment at the federal level, as that is obviously a quick way to get national uniformity at least as to the text of a statute. See Robert Braucher, Federal Enactment of the UCC, 16 Law & Contemp. Probs. 100 (1951); Allison Dunham, A History of the NCUSL, 30 Law & Contemp. Probs. 233 (1965) (discussing the various methods of ensuring uniformity in commercial laws).


However, the NCUSL, the initiator and co-sponsor of the UCC, is an organization of state governments, and it has a strong "states' rights" flavor. Professor Fred Miller of Oklahoma, the new Executive Director of NCUSL, recently indicated his strong preference for keeping the UCC the province of the states. See Frederick H. Miller, U.C.C. Articles 3, 4, and 4A: A Study in Process and Scope, 42 Ala. L. Rev. 405 (1991).
Law, otherwise known as the Conference or the NC-CUSL (not an acronym that rolls smoothly off the tongue).

2. The American Law Institute ("ALI").
3. The Permanent Editorial Board of the UCC ("PEB").
4. The American Bar Association ("ABA"), particularly the Business Law Section and its UCC Committee.

Here, we will sketch some important features of each organization. Next, we will give a chronological guide to their roles in the UCC revision process. Along the way, we will suggest when and how interested people could get in the game.

1. The National Conference of Commissioners of Uniform State Laws

The National Conference of Commissioners of Uniform State Laws ("NCCUSL") is an organization of state governments aimed at drafting and securing enactment of uniform state laws on a wide array of subjects. It was founded 100 years ago, in 1892, at the suggestion of the ABA.45

Clearly, the first conference had a high idea of the importance of its mission, as appears from the report of that meeting:

It is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal Constitution.46

The NCCUSL drafts two types of legislation for enactment by the states: uniform acts, which involve legal problems common to all the states and on which national uniformity is considered especially desirable; and model acts, involving common problems where uniformity is not considered essential.47 Although the more than 200 acts that the NCCUSL has produced vary in subject from alcoholism treatment to written obligations (the first and last on its current alphabetical list),48 its best known and most successful product has been the UCC, developed in cooperation with the ALI.

The NCCUSL consists of official representatives, known as commissioners, from each of the fifty states, as well as the District of Co-

46. Century of Service, supra note 3, at 11.
47. See 1990-91 NCCUSL Reference Book at 2; Dunham, 30 Law & Contemp. Probs. at 246-47.
Each commissioner must be a member of the bar. Most of the commissioners are private practitioners, but the group is leavened with a sprinkling of judges, law professors, corporate counsel, and state legislators. Some well-known former commissioners are Louis Brandeis, Woodrow Wilson, Samuel Williston, and William Rehnquist.

Each commissioner is expected to participate actively in the ongoing work of the NCCUSL at its annual meeting and through committees. When a proposed uniform statute is finally approved by NCCUSL, a commissioner must try to persuade the legislature of her own state to consider adoption. However, the commissioner is not required to express personal support for enactment.

There are just over 200 such commissioners, with each state having the right to send as many as it chooses. The usual number is four, but some states have eight or nine. Sending more rather than fewer commissioners does not officially result in greater representation because some important decisions, such as approving the final draft of a proposed act, are “votes by states,” in which each state’s entire delegation has only one vote. However, sending more commissioners probably does give a state more real power for several reasons. First, most votes are not by states, but are one person, one vote. Second, with more commissioners, the state may be represented on more committees. And of course, in any organization, those most willing to do the work may call the shots.

States may choose their commissioners as they wish, but in most states, the governor appoints interested persons for terms of three or four years. Nebraska statutes, for example, provide that the governor shall appoint three commissioners for four-year terms. Com-
commissioners are not paid, though many states, including Nebraska, reimburse their commissioners’ expenses in attending to NCCUSL business. Despite the lack of salary, the commissioners seem an active and dedicated group. Many commissioners are reappointed several times.

In addition to these regular commissioners or members of the Conference, there are several other classes of NCCUSL participants. The chief officer of each state’s legislative drafting bureau is an associate member of the Conference who may serve and vote on committees but may not participate in votes by states. There are also Life Members, elected by the NCCUSL after at least twenty years of active service as a commissioner. A Life Member may continue to participate in all NCCUSL activities, except votes by states, even if she is not reappointed as a regular commissioner.

The NCCUSL has a very small full-time staff at its Chicago headquarters, and only one of those employees, the Legislative Director, is a lawyer. For more than forty years, the NCCUSL’s part-time Executive Director was Professor William Pierce of the University of Michigan. In August of 1992, Professor Pierce became Director Emeritus, and Professor Fred Miller of the University of Oklahoma was named Executive Director.

The NCCUSL’s Executive Committee of eleven commissioners runs the show between annual meetings. There also is a standing committee of five on Scope and Program, charged with recommending new projects, including UCC revisions, to the Executive Committee.

The NCCUSL’s principal asset is the willingness of its member commissioners to donate their time and expertise; it is not otherwise a wealthy organization. The NCCUSL is supported mainly by annual appropriations from the states, and the ABA makes an annual donation. The NCCUSL does not have enough money to pay for extensive research, so it sometimes seeks grants to support particular

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Id. Nebraska’s three current commissioners are Judge C. Arlen Beam of the United States Court of Appeals for the Eighth Circuit, former Nebraska Supreme Court Chief Justice Norman Krivosha, and Dean Harvey S. Perlman of the University of Nebraska School of Law, all of Lincoln. 1990-91 NCCUSL Reference Book at 27-28.

58. NCCUSL Const. art. 2, § 2.2; 1990-91 NCCUSL Reference Book at 83. Currently, Nebraska’s associate member is Joanne M. Pepperl of the Office of the Revisor of Statutes. Id. at 27.

59. NCCUSL Const. art. 2, § 2.3; 1990-91 NCCUSL Reference Book at 83-84. There are about 70 Life Members. Nebraska’s Life Members are Henry M. Grether Jr., Fred T. Hanson, and Daniel Stubbs. Id. at 27-28, 39.

60. Telephone interview with Edith O. Davies, Executive Secretary, NCCUSL (Aug. 10, 1992).

61. NCCUSL Const. art. 3; 1990-91 NCCUSL Reference Book at 85-86.

62. Id. at 3.
efforts and, as in the case of the UCC, allies itself with other wealthier organizations to achieve its goals.63

2. The American Law Institute

The American Law Institute ("ALI") is not a governmental body like NCCUSL, but rather a private nonprofit corporation founded in 1923 with funding from the Carnegie Foundation.64 Its stated purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."65

The ALI wrote and continues to produce the Restatements of many areas of the law. Among its recent projects are a planned Third Restatement of Products Liability and a Restatement of the Principles of Corporate Governance. The ALI also joined with the ABA to form ALI-ABA, through which the ALI conducts a well-known and ambitious program of continuing legal education.

Soon after the NCCUSL first decided to develop a commercial code, it sought the participation of the ALI to get input from the ALI's wider membership, as well as to put the ALI's great prestige and better financing behind the project.66 Since 1944, the NCCUSL and the ALI have been co-sponsors of the UCC, and have worked together to preserve and update it. The NCCUSL consults with the ALI during study and drafting phases, but the NCCUSL alone directs the enactment effort in the state legislatures once a final draft has been approved.67

The ALI is much larger and wealthier than the NCCUSL. The ALI has about 2500 members, elected for life upon recommendation by other members.68 In addition, the ALI has numerous ex officio

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63. The Uniform Commercial Project was supported by a three-year grant from the Falk Fund, beginning in 1944. The Fund later gave an endowment to support the Permanent Editorial Board of the UCC. See CENTURY OF SERVICE, supra note 3, at 65; see also Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code ¶ B.4 (July 31, 1986), reprinted in A.L.I. ANN. REP. 165, 168 (1992) [hereinafter 1986 ALI-NCCUSL Agreement] (noting that money is available from the Falk Fund).


68. A.L.I. BYLAWS art. II, §§ 1-2, 6, at 63-64.
members, including the Justices of the United States Supreme Court, Chief Judges of the United States Courts of Appeals, Chief Justices of state supreme courts, the United States Attorney General and Solicitor General, the presidents of national and state bar associations, and the deans of all AALS-member law schools.69

ALI's 1991 total revenues were $4,700,000, generated by sales of publications, contributions, investment income, and dues. Its general endowment funds that year exceeded five million dollars, a figure which excludes several smaller special purpose endowments.70

The ALI's policy decisions are made by its Council, composed of fifty-three members elected to staggered nine-year terms, and its Executive Committee, composed of the officers and ten other members of the Council.71

The ALI's Director is Professor Geoffrey C. Hazard, Jr., of Yale Law School. The Director is charged with oversight of all projects undertaken by the ALI, and hires reporters, consultants, and researchers with the approval of the Council or Executive Committee. When the UCC is involved, reporters are selected after consultation with the NCCUSL.72

3. The Permanent Editorial Board of the UCC

The Permanent Editorial Board of the UCC ("PEB") is a child of this marriage between NCCUSL and ALI. During the original UCC project, an editorial board was set up to organize the many parts of the job. That early group was the forerunner of today's PEB, which is charged with maintaining the uniformity of the UCC among the states by writing commentary, discouraging local amendments, and recommending official amendments to the NCCUSL and ALI when necessary.73

In the past, the PEB had considerable power to initiate UCC amendments on its own, but because it was so small and its drafting processes not public, affected industries sometimes feared they would be regulated without representation. Thus, some PEB drafts met with little success. In 1986, the ALI and NCCUSL entered into a new agreement regarding the PEB, increasing their control over its activities. At present, the PEB may study the need for amendments or additions to the UCC, and recommend action to the parent groups, but

72. See 1986 ALI-NCCUSL Agreement, supra note 63, ¶ A.1, at 61.
73. See id. at 165-66 (Introduction). The early history of the PEB is recounted in Soia Mentschikoff, Reflections of a Drafter, 43 Ohio St. L.J. 337 (1982).
it may proceed no further until the Executive Committees of both the ALI and NCCUSL approve. The PEB is entitled to be consulted, but may not veto, UCC projects initiated and drafted within the ALI and NCCUSL.\footnote{See 1986 ALI-NCCUSL Agreement, supra note 63. The background of this reduction in the PEB's power is discussed in Homer Kripke, \textit{Some Dissonant Notes About Article 2A}, 39 ALA. L. REV. 791, 793-94 (1988); Frederick H. Miller, \textit{U.C.C. Articles 3, 4, and 4A: A Study in Process and Scope}, 42 ALA. L. REV. 405 (1992).}

Under the 1986 agreement, the PEB's twelve members are its chair, the ALI Director; the NCCUSL's Executive Director; and ten more members chosen annually, five each by the ALI Council and the NCCUSL Executive Committee. The ABA appoints one or more non-voting representatives to meet with the PEB, and other groups are occasionally invited to do the same so the PEB can benefit from their expertise.\footnote{Id. (introduction). \textit{See Amelia H. Boss, Report of the UCC Committee Prepared for the Annual Meeting of the Council, American Bar Association, Section of Business Law} (June 26, 1992) (a copy of which is in the author's files).}

4. \textit{The American Bar Association}

The American Bar Association ("ABA"), especially the UCC Committee of the Business Law Section, plays a mostly unofficial but extremely important role in UCC monitoring and revision. The UCC Committee, an active group of 675 self-selected members, often conducts research on problems with existing provisions, especially those generated by new technology. It publishes frequent newsletters and a lengthy annual survey of UCC case law developments. From time to time, it suggests the need to amend the UCC to the NCCUSL, the ALI, and the PEB. Its members serve as advisors to study and drafting committees set up by those groups, and help those committees identify other organizations and individuals with relevant expertise.\footnote{\textit{See Alvin C. Harrell et al., Update on UCC-Other Law Conflicts}, 45 CONSUMER FIN. L.Q. REP. 335, 335-56 (1991).} Recently, it established a subcommittee to promote enactment of UCC revisions and to monitor non-uniform amendments.\footnote{\textit{CENTURY OF SERVICE}, supra note 3, at 54-56, 90-91, 106.}

Other groups within the ABA also play important roles in the process. Once a UCC drafting committee's final product has been approved by the ALI and the NCCUSL, their practice has been to submit the draft for approval to the ABA's Council and House of Delegates.\footnote{\textit{See infra notes 103-04 and accompanying text (discussing the hotline project). \textit{See also} Alvin C. Harrell et al., \textit{Update on UCC-Other Law Conflicts}, 45 CONSUMER FIN. L.Q. REP. 335, 335-56 (1991).}
C. How The Game Is Played

Now, let's run through the UCC revision process, using Articles 2 and 9 to illustrate how the game is played. The process is constantly being refined, so it differs a little for each project. However, there are four necessary phases:

1. Initial study and approval of project,
2. Drafting and review,
3. Official approval by sponsors, and
4. Seeking enactment by the states.

1. Initial Study and Project Approval

The first step, of course, is for someone to notice that the UCC needs amending and to convince the NCCUSL and ALI to act. Often, problems with existing provisions first catch the attention of the ABA's UCC Committee, and that group may undertake a preliminary study. The UCC Committee is open to ABA Business Section members, and provides an excellent way to stay abreast of UCC developments.

Anyone may suggest to the NCCUSL or ALI that the UCC needs to be amended, but usually the ABA or PEB does the job. Within the NCCUSL, the proposal first will go to the Committee on Scope and Program, which then recommends to the NCCUSL's Executive Committee whether to pursue it. Within the ALI, the topic will be proposed to the Council or Executive Committee. The PEB also will be consulted if it did not initiate the request.79

Until recently, initial research on the need for change was less formal. A new, fairly elaborate procedure has been used with Articles 2 and 9. The NCCUSL and ALI had the PEB appoint formal Study Committees to research the need for change as well as the direction changes should take. These Study Committees were not, however, charged with drafting the text of needed changes, and their reports do not bind any subsequent Drafting Committees.80

Let’s look at the study groups’ composition and working methods. Although it is too late to take part in this phase of the Articles 2 and 9 revisions, the Study Committees’ reports are valuable starting points for anyone who hopes to take part in the follow-up drafting process. Also, similar procedures may be used for the remaining UCC

79. 1986 ALI-NCCUSL Agreement, supra note 63, ¶ A.1, at 167.
articles in this and future cycles of revision, so knowledge of the process should help there too.

i. The Article 2 Study Committee

The Article 2 group, formed in March of 1988, included Professor Richard Speidel of Northwestern University School of Law as Project Director, plus six more commercial law professors and two other lawyers deeply involved in the law of sales as corporate counsel. The committee first identified ten study topics and assigned them for research and written reports to the members. They invited submissions from others as well. The written reports were then discussed at five public committee meetings of two or three days each.

In March, 1990, the Article 2 group published a 300-page Preliminary Report. This was distributed for comment to all state and local bar associations, some commercial law professors, and a few other groups. In addition, a summary of the report was published in the UCC Reporting Service, and presentations were made at a number of national legal meetings. Also, in November, 1990, the Preliminary Report was discussed with a forty-four-member ALI Consultative Group, made up of ALI member experts on sales law.

The Study Committee then reviewed some forty written responses to the Preliminary Report and decided to stand fast on some recommendations but retreated from others. On March 5, 1991, the Committee released its final report, unanimously recommending that Article 2 be revised and that a Drafting Committee be appointed.

ii. The Article 9 Study Group

The study process for Article 9 is not quite complete at this writing. In early 1990, the PEB formed a Study Committee of sixteen, chaired by William Burke, a practitioner in Los Angeles involved in all aspects of the UCC revision process as a NCCUSL commissioner, a PEB member, and an ALI Council member. The reporters for the
Article 9 study are Professors Steve Harris of Illinois and Charles Mooney of Pennsylvania. The group's brief first report, filed in April, 1991, emphasized the care taken in selecting committee members to ensure a diversity of views, professional experience, geography, and institutional affiliation.\footnote{Burke, Harris \& Mooney, 46 Bus. Law. at 1884-85.}

The Article 9 Study Group also tapped the expertise of many more people by using twelve outside advisory groups to prepare written reports and to participate in committee discussions on issues related to specialized collateral or financing patterns. The advisory groups in turn invited comments from experts in their fields, and discussed their work at national ABA meetings and in many other forums. They have prepared a valuable set of studies on their areas, some of which have been published.\footnote{E.g., Steven C. Turner et al., Agricultural Liens and the U.C.C.: A Report on Present Status and Proposals for Change, 44 Okla. L. Rev. 9 (1991); Peter A. Alces \& Robert M. Lloyd, An Agenda for Reform of the Article 9 Filing System, 44 Okla. L. Rev. 99 (1991).}

The Article 9 Study Committee's reporting procedure differs from that for Article 2. As outlined above, the Article 2 group released a lengthy Preliminary Report after two years of work for an extended period of public comment, and then released a brief Executive Summary noting changes the committee had made in response to comments. The Article 9 Committee's first full-length report, on the other hand, will be its final one, due out in the fall of 1992.\footnote{The report will be reviewed in October, 1992, by the ALI Members' Consultative group, in December by the ALI Council, and thereafter by NCCUSL's Scope and Program and Executive Committees. The report will recommend appointment of a drafting committee, and formation of that committee is expected in early 1993. Although it is too late to influence the content of the report, William Burke, the project director, has assured the author that there will be plenty of opportunities for input during the drafting phase. Because the practice has been to appoint the chairman and reporters from Study Committees to the same posts on the follow-up Drafting Committees, we can hold him to his word.}

The lack of a long period for public comment on the Article 9 Study report may be mitigated by the extensive input already received from the advisory groups, as well as by chances for input during the later drafting phase.

\section*{iii. Using the Study Committee Reports}

Copies of the Study Reports are available from the ALI.\footnote{The address is: The American Law Institute, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104, and the telephone number is 1-800-CLE-NEWS.} Reading and responding in writing to these reports is one way to influence UCC revisions. Responses need not (and to be most effective probably should not) be lengthy or address the full range of issues. Each
person or group may simply write a brief letter to the committee chair or reporters commenting on any aspect. Even if the committee does not incorporate a suggested change into its final report, all responses are passed on to a drafting committee for review.90

The Study Committees worked for three years each. Their final reports are detailed enough to shorten substantially the time needed to draft recommended amendments. The Study Committee procedure also provides additional opportunities for interested people to become involved at a very early stage. That should improve the product, by considering from the outset a wide range of problems and possible solutions. It also should aid in building the consensus needed for rapid enactment of eventual amendments.

The final reports of each Study Committee get extensive review. For example, the Study Reports are submitted to and discussed with the ALI Member’s Consultative Group assigned to the project, and then with the ALI’s Council and the PEB. On the NCCUSL side, the recommendations are examined by the Scope and Program and Executive Committees. Although both the PEB and Scope and Program Committee make a recommendation, neither has a veto, and the NCCUSL Executive Committee and the ALI Council make the final decision. Assuming they decide to go ahead with revision, the project moves into the second phase of the process, the actual drafting of amendments.

2. Putting Pen to Paper — The Drafting Stage

Once the decision is made to revise a UCC article, the ALI and NCCUSL appoint a Drafting Committee of eight to ten people. Under a standing agreement between them, a majority of the committee must be NCCUSL commissioners.91 In addition, the ALI and NCCUSL will jointly hire one or two reporters to do the actual drafting for the committee. The reporters are usually, but not always, law professors and need not be NCCUSL or ALI members. If reporters were used on the same project’s Study Committee, then they would normally be retained for the Drafting Committee as well.

Drafting Committees, like Study Committees, are deliberately

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90. Mr. Burke is a partner in the Los Angeles office of Shearman & Sterling, and he has requested that comments be sent to:
William M. Burke, Esq.
725 South Figueroa Street, 21st Floor
Los Angeles, California  90017.

My own experience with comments sent to Mr. Burke has been very pleasant. He responded to my letter with a phone call the next day, and was willing to discuss at length many questions about the UCC revision process.

91. See 1986 ALI-NCCUSL Agreement, supra note 63, ¶ A.1, at 167.
structured to allow access and actual participation by interested non-members. For example, at least one ABA liaison is assigned to each Drafting Committee. The liaison's job is to update relevant ABA committees on the drafting progress, get their reactions to committee drafts, and to communicate those views to the Drafting Committee. In addition, the Drafting Committee will invite other interested organizations to send advisors to its meetings. Meeting dates and agendas are published in ABA newsletters, and sent to anyone who asks to be on the mailing list.

The Article 2 Drafting Committee, appointed in Fall, 1991, is chaired by Mr. Lawrence Bugge, past NCCUSL President. Professor Richard Speidel of Northwestern, principal draftsman for the Article 2 Study Committee, serves as Reporter for the Drafting Committee. The ALI representatives are Professors Amelia Boss of Temple (who also served on the Study Committee) and Robert Scott of Virginia. Among the eight other committee members are two law professors and three Life Members of NCCUSL.

The Article 2 Drafting Committee will work with the NCCUSL Study Committee on a Proposed Computer Software Contracts Act. This group has prepared an extensive series of studies on computer software contracting problems. The NCCUSL directed the two groups to see whether many of these problems can be answered within the more general revisions to Article 2, or whether this area requires a separate UCC article or even a free-standing uniform act.

The Drafting Committee meets several times a year, in public sessions of two or three days each, to discuss suggestions received in the mail and from the advisors and others present, to make policy decisions to guide the reporter, and to review any partial, tentative drafts the reporter has completed before the meeting.

To have an impact on drafting decisions, one should first read the relevant Study Committee report. Then, write to the Drafting Committee asking to be put on their mailing list to get meeting notices and partial drafts. If possible, attend in person the meetings at which the committee will consider your particular concerns. You also can write to the reporter, committee members, ABA advisors, or

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92. The ABA liaison to the Article 2 Drafting Committee is David J. Frisch, a former chairman of the ABA's UCC Committee. He can be reached at (402) 477-2119.

93. The members of the NCCUSL-ALI Drafting Committee for UCC Article 2 are Mr. Lawrence J. Bugge, the Chairman; Mr. Boris Auerbach; Professor Gerald Bepko (Indiana); Professor Amelia Boss (Temple)(ALI Representative); Mr. John Chanin; Mr. Bruce A. Coggeshall; Professor Patricia Brumfield Fry (North Dakota); Mr. Peter F. Langrock; Professor Robert E. Scott (Virginia) (ALI Representative); Mr. Byron D. Sher; and Ms. Patricia Sommer. Professor Richard E. Speidel (Northwestern) is the Reporter. 1992 A.L.I. ANN. REP. at 172.

94. See supra note 13.
other advisors. Again, brevity is desired, and a short, pointed letter likely will be read. A law review article, even if it can be published and called to the committee's attention before they have passed on to other topics, "may be one of 25 others and it may not be read."95

Besides the current emphasis on wide participation, another safeguard in the process is ongoing review by the parent institutions. The ALI Members' Consultative Groups created for the Articles 2 and 9 projects work with the Drafting Committees as well as the Study Committees. Each Drafting Committee also has its own NCCUSL Review Committee, usually three commissioners, whose job it is to keep abreast of drafting progress, and to comment in writing to the drafting committee on each draft. When a sizeable portion of a draft or reasonably complete draft has been finished, the Review Committee examines it to see whether it fulfills the initial assignment from the Executive Committee and whether the draft is ready for submission to the NCCUSL's Committee of the Whole at the next annual meeting. The Review Committee also will list the major policy decisions made by the Drafting Committee so that they may be reported to and debated by the Committee of the Whole at the annual meeting.96

3. Official Approval

After many meetings, partial drafts, and redrafts to answer criticism from advisors, the PEB, and the Review Committee — a process that can take several years — the proposed final draft is ready for submission to the NCCUSL, the ALI, and the ABA at their annual meetings. The effect of ALI and NCCUSL approval is to raise the draft's status from mere proposal to part of the Official Text of the UCC. ABA approval is sought to make adoption by the states more likely. The PEB has the right to get drafts in time for meaningful comment before final approval, but its opinions are not binding on either the ALI or NCCUSL.97

The text will get the most exacting scrutiny by the NCCUSL, usually in two successive annual meetings. Before the first annual meeting at which an act is considered, the draft will be copied and sent to the commissioners. Then, at the meeting, the Conference convenes as a Committee of the Whole, and the Review Committee


96. See 1990-91 NCCUSL REFERENCE BOOK at 86, 95-96. The Review Committees were set up in 1972 to reduce the need for stylistic and other minor changes during the section-by-section review at the annual meetings. CENTURY OF SERVICE, supra note 3, at 101-02.

97. See 1986 NCCUSL-ALI Agreement, supra note 63, at 167.
assigned to the project states its general position on the act, as well as advising the membership of the major policy decisions embodied in the draft. Next, the whole act is read word for word. After each section is read, there is opportunity for discussion and adoption of substantive amendments. That same night, the draft may be retyped and copied to reflect both Committee of the Whole and Drafting Committee amendments, and the process continues.

The NCCUSL constitution requires that, after completion of this tedious section-by-section review, the act be held over until the next annual meeting. At that time, a final vote to approve will be taken, with the Commissioners voting by states.

On the ALI side, the Drafting Committee's proposals would go first to the Council, and then to the full membership. Consideration here is not always section-by-section, but some changes may be made.

If the ALI and NCCUSL approve versions that are not identical, then the differences are usually resolved by the Drafting Committee, with supervision from the Executive Committees of the two groups. If the versions differ in significant aspects, however, then it could be necessary to resubmit a reconciled version to the membership of each body as a whole.98

After the UCC co-sponsors have both approved a draft, the practice in recent years has been to submit it as well to the ABA House of Delegates. ABA approval is not a mere rubber stamp, though the practice of using an ABA liaison during the drafting process makes eventual House of Delegates approval more likely. In the past, if the ABA refused to approve a uniform act, enactment proved very difficult.99

One who waits until a draft is about to be submitted for final approval to suggest substantive changes faces an uphill battle. At that time, the best procedure would be to write down one's suggestions and reasons, and communicate them before the ALI and NCCUSL annual meetings to the Drafting and NCCUSL Review Committees. If one objects to major portions or to the act as a whole, then communication with these two groups may not be enough. In that case, sending one's reasons to the NCCUSL Executive Committee, the ALI Council, and the ABA Council and House of Delegates is more likely.

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98. Id. If the two groups could not agree on a single version, or if one group simply refused to approve any action at all on a subject that the other had finally approved, then the 1986 ALI-NCCUSL Agreement would permit either group to go it alone and to try to get its version enacted as an amendment to the UCC or as a stand-alone act outside the UCC.

99. CENTURY OF SERVICE, supra note 3, at 91. ABA approval is not a frequent conclusion and lack of it seriously damages a uniform act's chances of enactment among the states. Id. at 103, 105, 120-21.
to get consideration. If opponents can find enough allies to threaten enactment prospects, then the act may be amended or even withdrawn until some compromise is reached.

4. Selling the Product to the States

After the UCC revisions have been officially approved by the sponsors, we come to a final and crucial stage of the whole process, getting the state legislatures to enact the amendments. At the state level, the UCC revisions may meet only apathy and delay because of the press of other business. Or the problem may be vigorous opposition, with any shortcomings of the earlier development and consensus building processes looming large. Many people who did not participate in the study and drafting phases now will scrutinize the results, and may oppose passage entirely or agree to support it only if it is modified in important ways. Others who participated earlier, but failed to achieve their ends, may continue to push for changes. Here, too, the inevitable conflict between the need for uniformity and the possibility of further improvement comes to the fore. The sponsors, on the other hand, can be expected to try to hold the line against most further changes.

The ALI leaves getting the UCC revisions enacted to the NCUSL's expertise, although the ALI frequently sponsors continuing education programs on newly approved UCC revisions. At the national level, the NCCUSL employs an attorney to serve as Legislative Director, and also has a standing Legislative Committee. The NCCUSL provides written commentary summarizing the proposed legislation, as well as names of speakers who could testify before legislative committees. In addition, the Drafting Committee is usually reappointed as a Stand-By Committee, remaining on duty to answer substantive queries and problems that arise during the first year or two of enactment efforts, even drafting additional amendments if serious objections threaten the enactment effort.

At the state level, each state's NCCUSL commissioners are called into action. Every commissioner has an obligation to try to get the act on the state legislature's agenda, which requires finding legislators to introduce the bill and then to shepherd it through committee and floor debates. Although a commissioner is not duty-bound to express personal support for the legislation, usually the commissioners energetically support passage by working to build a consensus at the state level.

Several trouble spots have appeared in the enactment phase over

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100. The only person to have held the post so far is John McCabe, former Dean of the University of Montana Law School. Id. at 103.
the years. First, even when no major opposition exists, enactment has been much too slow. For example, fifteen years after some earlier UCC revisions had been made, some states still had not adopted the changes. Clearly, this end of the process needs to be accelerated. Second, sometimes there is major opposition or at least requests for long delay, particularly from those who did not participate in the earlier development phases. Academics and consumer groups in particular have sometimes been faulted for this belated entry. Third, state bar committees or legislators who review the act may undervalue uniformity and recommend enactment only with numerous local amendments.

The NCCUSL, with substantial aid from the ABA, is addressing each of these trouble spots in the current round of revisions. To speed up enactment, the NCCUSL has “targeted” the UCC amendments. That makes getting these bills before the state legislatures each individual commissioner's first priority, even if other proposed uniform legislation languishes. Targeting seems to have produced better results. For example, Article 8 was last amended in 1977, but only three states had adopted the changes by 1980, and four jurisdictions still had not adopted them by mid-1992. In contrast, new Article 4A was officially approved in 1989, and already has been adopted in thirty-nine states, with bills pending in several others.

A second trouble spot is opposition or requests for delay from groups that did not fully participate at earlier stages. Although no legislation that affects so many people and transactions can hope to escape all opposition, both NCCUSL and the ALI have attempted to reduce it by encouraging broader participation in study and drafting activities. The NCCUSL's incoming Executive Director, Professor Fred Miller, would dispute the quotation at the outset of this Article, at least as to legislation. (His views on sausage have not, I think, been published). He stresses the importance of getting industry advisors, academics, and other interested people to attend Study and Drafting Committee meetings in person, rather than just sending their written comments. Of course, their expertise can educate the committee and lead to a more workable statute, whether it comes in the mail or face to face.

Involving people in the actual give-and-take of drafting has an advantage, according to Professor Miller, that letters do not. If people come to talk with, listen to, and watch the committee, then they

102. See UCC Scorecard, in UCC COMMITTEE UPDATE (July 1992).
know that their views were aired and that they were represented in the decisions. Even if their suggestions are not adopted, this level of participation may help them understand why that had to be so and why certain compromises were needed. This goes far toward forming the consensus needed for speedy and uniform enactment.  

Recently, the ABA also became more directly involved in aiding enactment of UCC revisions. The ABA's UCC Committee has a Subcommittee on Relation to Other Law. Among that group's endeavors is one they formally call their "State UCC Liaison Project" and informally call "the Hotline." The Hotline aims to create or strengthen groups within the states who are interested in the UCC, and to improve two-way communication between them and those working on UCC revisions at the national level. It attempts to get the state groups involved in studies and drafting, so their input can improve the proposed legislation. Later, the Hotline seeks their help in the enactment phase. In each state, one or more volunteers acts as liaison, contacting others several times a year with updates on UCC revisions at the national level, and helping them to participate as much as they wish.

Two groups who have been criticized for waiting until the enactment phase to express their views on UCC projects are consumer advocates and academics. With regard to the consumers, the fault may not have been entirely their own, at least in the past. Study and drafting procedures have not always been as open as for Articles 2 and 9. For example, one critic of the Article 3 and Article 4 revisions claims:

... [N]either the ALI nor NCCUSL had any mechanism for including consumer organizations. ... Instead they retained the structure and selection that had evolved half a century ago, a structure which had drawn criticism ... when the Code was first promulgated.

In addition, UCC revisors often have expressed the view that most consumer protection provisions are incompatible with the underlying philosophy of the UCC, with its emphasis on freedom of contract and flexibility. Professor Miller defends the exclusion of consumer protection from Articles 3 and 4 as follows:

104. In Nebraska, the Hotline liaison is Steven Turner of Omaha.
105. For example, Professor Miller comments on the academic community's failure to contribute to the Article 2A revisions until the project was nearly complete in his Mercer Law Review article. See Miller, 43 MERCER L. REV. at 817 n.86.
The UCC is not a regulatory statute. Consumer provisions are regulatory in nature, cannot be made subject to variation by agreement, and require sanctions for violation to induce compliance. Precluding changes generates rigidity. Sanctions produce a quest for certainty that is inappropriate in the UCC, which needs flexibility to accommodate changing practices, procedures and technology.107

Another objection frequently voiced by NCCUSL-ALI insiders is that consumer protection provisions are still too controversial and varied at the state level to be a proper subject for a uniform state law. Certainly, the dismal enactment record of the NCCUSL's one major experiment with consumer protection — the Uniform Consumer Credit Code — lends some support to their view.108

Nevertheless, more attention has been paid recently to consumer advocates within the UCC revision process, if only because their muscle in some state legislatures threatened enactment efforts. William Burke, chair of the Article 9 Study Committee, invited the Consumer's Union and the National Consumer Law Center to his group's meetings. Within the ABA's Business Law Section, a Task Force on Consumer Issues in the UCC was recently created. The Business Law Section's UCC and Consumer Financial Services Committees devoted time at each of their last two national meetings to joint sessions on consumer issues.109 It is hoped that these initiatives will lead to a better accommodation of commercial and consumer law in a revised UCC.

The problem of belated criticism from academia also is being tackled. The ABA's UCC Committee is working with the American Association of Law Schools ("AALS") to reform the professors. For example, the AALS Commercial and Consumer Law Section sent all its members applications to join the ABA's UCC Committee. When many law school faculty showed interest in greater involvement in the UCC revision process, Dean Thomas Crandall of the University of Toledo, the Section Chair, sent their names and areas of interest to the NCCUSL so that they could be named to Study and Drafting committees, or at least put on the mailing lists to receive committee reports and meetings schedules. This initiative, it is hoped, will allow their critical input to be "included as the product is prepared, rather than being used as a basis for nonuniform amendment of or objection

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108. The Uniform Commercial Credit Code (Official Text 1974).
A third trouble spot in the enactment phase is the possibility of local non-uniform amendments. Often, these are suggested by a state bar committee assigned to review the Act and advise the state bar whether to support or oppose the legislation. Such committees, in conscientiously addressing their function as they see it, may reevaluate the fundamental policy choices of the Act, readdress many of the substantive issues, come up with their own major or minor variations, and then recommend the act only if it is so amended. If the state legislature follows that lead, but the NCCUSL-ALI approved Official Text is not modified by the NCCUSL Standby Committee, then a serious snag in the process may develop.

There also is some controversy over the proper use of these committees. Professor Miller would ask them to forego the desire for further improvement, to defer to the goal of uniformity. He suggests they will be busy enough if they confine themselves to explaining how the act would change local law and to selecting among any optional provisions of the uniform act.

If they insist on substantive review and "improvement," then Professor Miller would have them take their suggested changes to the Stand-by Committee, and if it rejects them, to accept the Official Text. Only if several years' experience under that version of the act showed real problems would he encourage them again to suggest changes to the PEB and perhaps to adopt a non-uniform solution until the Official Text can be revised.

Others would not limit state bar review so narrowly, especially because the study and drafting processes do not always follow the broad participatory pattern on which Professor Miller bases his argument, and some drafts have escaped the in-depth review now built into the process. In such cases, there might be more room for improvement than he recognizes. As one such committee wrote,

110. Miller, 43 MERCER L. REV. at 817 n.86.
111. For example, the project that eventually became Article 2A began as an ABA study in the early 1980s. NCCUSL then took up the project, but at first conceived it as a free-standing uniform act, not part of the UCC. The NCCUSL drafting committee was not very successful in getting full participation from important industry groups, which arguably led to a less than excellent draft.

Further, the usual careful multi-level review by ALI and the PEB were short-circuited. NCCUSL did not decide to aim for UCC inclusion until late in the game, and asked ALI and the PEB to look at Article 2A only after NCCUSL had committed itself by final approval of the act. As one commentator has noted:

It was not until afterwards that it was brought to the PEB as an article of the UCC, and then to the Council and membership of the ALI for approval. Under these circumstances, these groups successively approved the draft with no more than a day of deliberation by each.

Homer Kripke, Some Dissonant Notes About Article 2A, 39 ALA. L. REV. 791, 793
Neither the desire for uniformity nor a concern for the drafting process . . . should outweigh a determination to achieve the highest quality product attainable—at least at the outset . . . when the proposed statute has not yet been adopted in any state.”

The conflict between the desire for uniformity and the possibility of improvement will continue. Perhaps a better accommodation can be reached here as well through the cure prescribed above, more participation at the early stages of the act’s development. If state bar associations would appoint their review committees early — no later than the time the first few partial drafts are reported out by the relevant Drafting Committee — then the state-level review could proceed in tandem with drafting at the national level. State concerns could be taken to the drafters before they are committed to a finished product. The ABA’s Hotline could be used to facilitate the exchange of information.

In conclusion, this is an exciting time for commercial lawyers, a time to improve and update “the most spectacular success story in the history of American law.” But if the revision process is to function smoothly, then we must overcome that “[i]t ain’t real yet”
syndrome and get more knowledgeable people involved long before the enactment phase. Only this involvement will create the two preconditions to successful UCC revision. First, it will lead to a well-drafted statute based on thorough research, one worthy of passage across the country. Second, it will create the consensus needed to ensure rapid enactment of the finished product "as is," so that uniformity is maintained.