

MEMORANDUM

TO: Members of the Uniform Law Conference

FROM: Henry D. Gabriel, Chair, Committee to Implement UN E-Commerce Convention
(the “Convention”) and
D. Benjamin Beard, Reporter, Committee to Implement UN E-Commerce
Convention

DATE: May 29, 2009

RE: Report of the Committee to Implement the UN Convention

The Committee to Implement the UN E-Commerce Convention (formally the “United Nations Convention on the Use of Electronic Communications in International Contracts”) met in Washington DC on October 31-November 1, 2008, to discuss the best manner for the United States to implement the Convention. The Committee considered the Convention, the Uniform Electronic Transactions Act (UETA), the federal Electronic Signatures in Global and National Commerce Act (E-Sign), and comparisons of the three documents and other supporting materials on treaty implementation under United States law. The Committee directed the Reporter to prepare a draft Letter of Submittal together with draft implementing legislation for consideration by the Committee. The Committee convened via telephone conference call on Monday, April 13, 2009 to consider the draft Letter of Submittal, and discussed further the best method for implementation of the Convention by the United States. The Committee also considered input received by the Chair and Reporter from members of the American Bar Association, Business Law Section, Cyberspace Law Committee.

This report outlines the Committee’s recommended method for implementation, the rationale for that recommendation, and the steps the Committee would undertake to aid in effecting that method of implementation.

METHOD OF IMPLEMENTATION

The Committee considered three alternative methods of implementation: 1. Ratification of the Convention as a self-executing treaty; 2. Ratification of the Convention as a non-self-executing treaty with proposed federal implementing legislation; and 3. Ratification of the Convention as a non-self-executing treaty with proposed federal implementing legislation together with the preparation of conforming amendments to UETA to be offered to the States for enactment to avoid federal preemption.

The Committee recommends that the Convention be implemented as a self-executing treaty under United States Law. In the alternative, the Committee recommends that the Convention be ratified as a non-self-executing treaty together with the enactment of implementing federal legislation. The Committee recommends that the ULC **not** prepare or offer conforming amendments to UETA for enactment by the individual states.

RATIONALE FOR METHOD OF IMPLEMENTATION

The ULC Committee, in its April 13 conference call, agreed to recommend implementation of the Convention as a self-executing treaty. This is the cleanest and simplest method for implementing the Convention. In addition, this implementation strategy best preserves, to the greatest extent, the effectiveness of state law. In light of the narrow scope of the Convention – non-consumer contracts between parties in two different states¹ – domestic law will be relatively unaffected. Indeed, in the absence of the Convention, domestic law, including the UETA, would only apply in those limited circumstances where the conflict of laws rules would result in application of United States law to the contract. This would often result from the parties' agreement as to applicable law, a result that is not changed under the Convention considering its overriding policy of party autonomy that is reflected in Article 3.

Furthermore, considering the significant consistency between the Convention and domestic law, business lawyers will not be burdened to learn and understand significantly divergent applicable bodies of law regarding electronic business transactions. The Convention is in all material respects consistent with domestic U.S. law embodied in the UETA and E-Sign. The scope of the Convention is limited to business to business contracts in those circumstances where the businesses have locations in different states. The Convention specifically excludes any contract entered into for “personal, family, or household purposes,” i.e., consumer contracts. The UETA and E-Sign apply to business, commercial and governmental transactions which extend beyond purely contractual matters, and which do include transactions involving consumers.

The principal difference between the Convention and domestic law relates to the ability of parties to vary the provisions of the otherwise applicable law. The Convention provides for total party autonomy which preserves the right of the parties to derogate from or alter any of the provisions of the Convention. There are, on the other hand, provisions of UETA that are mandatory and which do not permit waiver by the parties. The non-waivability provisions in UETA relate to matters of error avoidance and some requirements for preserving and presenting information. These provisions of UETA were motivated principally by concerns for consumers acting in electronic contracting transactions. These provisions, in the context of consumer transactions, will not be pre-empted by the Convention since the Convention specifically excludes consumer transactions from its scope. By ratifying the Convention as a self-executing treaty, questions related to the consistency of domestic law with the terms of the Convention are eliminated.

Finally, ratification of the Convention as a self-executing treaty avoids all questions of the United States' obligation of good faith in implementing the Convention. The Convention has

¹ “State” is used in the Convention, and in this Report, with its international law meaning, to refer to a country.

one substantive rule in Article 11 which sets out when a broadcast advertisement may be considered an offer or simply an invitation to make an offer. While Article 11 is consistent with existing domestic law in the United States, there is a concern that changes in the law of a particular state might create a conflict with the Convention which would put the U.S. in breach of its obligation to effect the Convention. Given the narrow scope of the Convention, the Committee considers it practical to let the Convention control in this situation.

The Committee believes that ratification as a self-executing treaty will have the narrowest impact on the current balance between state and federal law considering the limited scope of the Convention, and the essential consistency of the Convention with domestic law.

In the event that the Conference does not agree with the Committee's recommendation that the Convention should be ratified as a self-executing treaty, the Committee alternatively recommends that the Convention be ratified as a non-self-executing treaty and that federal implementing legislation be prepared and provided to Congress for enactment. Through such implementing legislation the balance between state and federal law can be maintained. The legislation would incorporate the terms of the Convention making the Convention terms apply to those transactions within the Convention's scope. This will preserve the current balance between E-Sign and UETA as exists under the existing E-Sign legislation. The only exceptions to the preservation of UETA relate to those provisions of UETA that restrict party autonomy. The result of enacting implementing legislation in this way is effectively the same as ratification of the Convention as a self-executing treaty. That is, the provisions of the Convention will apply to those transactions within the scope of the Convention and all other transactions will be governed by domestic law under the current balance between E-Sign and the UETA.

A third possible method of implementation would require adoption by all fifty states of amendments to the UETA that conform the UETA to the Convention's provisions on party autonomy. The Committee recommends that the Conference **not** adopt this method for the implementation of the Convention.

The UETA has been adopted by 46 states, the District of Columbia, and the U.S. Virgin Islands, in substantially uniform form. Any amendments offered to the states for enactment would lead to potential for greater non-uniformity of UETA among the states. Given the current functioning balance between E-Sign and UETA, the Committee does not believe that the benefits of such amendments in preserving this balance would outweigh the risks, and resulting detrimental effects, of non-uniformity that would result from these amendments.

The Committee's recommendation for ratification of the Convention as a self-executing treaty, with a possible alternative to ratify as a non-self-executing treaty with proposed federal implementing legislation, is supported by Harold Burman, the observer to the Committee from the U.S. State Department. This recommendation comports with the sense of the attorneys attending the Winter Working meeting of the Cyberspace Law Committee of the Business Law Section of the American Bar Association. It is considered the simplest and most straight-forward method for accomplishing the goal of United States ratification of this important Convention.

EXECUTION

The Committee's work to assist in the implementation of the Convention consists of the preparation of several documents by the Committee. Drafts of the following documents are attached to this Report:

1. Exhibit A is a Draft Letter to the U.S. Senate Foreign Relations Committee seeking advice and consent of the U.S. Senate.

This letter includes a draft of a proposed United States "declaration" limiting the scope of the Convention to conform to the scope of E-Sign and UETA. The Draft Letter also sets forth proposed draft "understandings" that would accompany ratification of the Convention. These understandings will assist in properly interpreting certain provisions of the Convention to produce results and constructions of the Convention that are consistent with domestic law. The Reporter prepared a draft of such letter that was considered in the April 13 conference call. The attached draft has been revised by the Reporter consistent with the comments received during that call.

2. In the event that it is determined to implement the Convention as a non-self-executing treaty with federal implementing legislation, it will be necessary to prepare A) implementing federal legislation, together with B) a letter to Congress to accompany the draft implementing legislation.

Attached as Exhibit B is a draft letter to Congress forwarding a draft of federal implementing legislation. This draft was prepared in accordance with comments received in the April 13 teleconference meeting of the Committee.

3. Section by Section Summary of the Convention.

Attached as Exhibit C is a section by section summary of the Convention. This summary will be available to accompany the letters to Congress to assist the reader in understanding how the Convention conforms to existing domestic law. The attached draft summary reflects the comments and suggestions received on April 13.

4. Conforming amendments to UETA

It is the recommendation of the Committee that amendments to the UETA **not** be offered to states for enactment to assure conformity with the Convention. However, attached as Exhibit D are draft amendments to UETA in the event it is the decision of the Conference to prepare such amendments for presentation to the States for enactment.

REQUESTS

The Committee requests that the Conference approve the Committee's recommendation that the Convention be implemented as a self-executing treaty. The Committee requests further direction from the Conference in the event it determines that an alternative approach to implementation should be adopted.

The Committee also requests that the Conference authorize the Committee to continue its work for the purposes of finalizing its product during the Fall 2009.