

## MEMORANDUM

TO: Members of the International Law Developments Committee, and Members of the Executive Committee of the Uniform Law Conference

FROM: Henry D. Gabriel, Chair, and D. Benjamin Beard, Reporter - Committee to Implement the United Nations E-Commerce Convention

DATE: October 28, 2009

RE: Report and Recommendation of the Committee to Implement the UN E-Commerce Convention (the "Committee")

### BACKGROUND

Members of the Committee, ABA Advisors to the Committee, and other Observers met in Minneapolis, MN on September 25-27, 2009 to continue deliberations regarding the best method for the implementation of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Convention"). The Committee, Advisors and Observers previously met in Washington DC on October 31-November 1, 2008, and again by teleconference call on April 13, 2009 to discuss the best manner for the United States to implement the Convention. Over the course of their deliberations, the Committee has considered the Convention, the Uniform Electronic Transactions Act (UETA), the federal Electronic Signatures in Global and National Commerce Act (E-Sign)(UETA and E-Sign are referred to together as "Domestic Law"), and comparisons of the three documents and other supporting materials regarding treaty implementation under United States law. Per the Committee's direction the Reporter has prepared drafts of a Letter of Submittal together with drafts of implementing legislation for consideration by the Committee. The Committee also has considered input throughout this process from members of the American Bar Association, Business Law Section, Cyberspace Law Committee in a meeting in January, 2009, as well as teleconferences in September, 2009.

The result of the deliberations preceding the summer of 2009, was a preliminary report (the "Preliminary Report") delivered to the membership of the Uniform Law Conference (the "ULC") at its annual meeting in Santa Fe, N.M. in July, 2009 (the "Annual Meeting"). The Preliminary Report recommended that the Convention be implemented as a self-executing treaty under United States law. In the alternative, the Preliminary Report recommended that the Convention be ratified as a non-self-executing treaty effected, as a matter of federal law, through an amendment to E-Sign. This alternative included a provision in the E-Sign amendment that effectuated the concept of "cooperative federalism" through a reverse preemption provision like that in existing E-Sign. That provision preserved the effect of state enactments of the UETA except to the limited extent that the UETA was inconsistent with the Convention's provisions on party autonomy.

Prior to the Annual Meeting, the ULC International Legal Developments Committee ("ILDC") considered the Preliminary Report. The ILDC was divided in its support of the

recommendations of the Committee and a significant objection was raised that the Preliminary Report did not give sufficient consideration to implementation of the Convention through “cooperative federalism.” The Executive Committee, in light of the objections of the ILDC, asked the Committee to reconsider its recommendation to implement the Convention as a self-executing treaty, and revisit the possibility of implementation through a “cooperative federalism” mechanism that would be more deferential to state law.

Ratification of the Convention is of significant importance to the United States. The Convention adopts an approach to the validation of electronic commerce that is facilitative rather than regulatory. Essentially, the Convention serves as an overlay to legal requirements for pen and ink documents in international contracts. In this way the Convention adopts an approach to validation of electronic commerce that is entirely consistent with United States law embodied in the UETA and E-Sign. Indeed, the Convention may be viewed as an extension of this approach. Like domestic United States law, the Convention serves to validate broadly the use of electronic media, leaving to the parties, and legal rules beyond the Convention, the determination of the substantive efficacy of the communication in a particular instance.

It is no coincidence that the Convention reflects this facilitative, rather than a regulatory, approach to effectuating electronic commerce. The United States delegation was comprised of individuals who had been actively involved in the development of the UETA, E-Sign and other similar laws in the United States. The United States delegation was actively involved in all phases of the development and drafting of the Convention, and worked hard to avoid imposition of a more regulatory scheme in the Convention. The Convention reflects an approach wholly consistent with the basic approach of UETA and E-Sign. Indeed, it may be viewed as a singular achievement in obtaining international acknowledgment of the benefits of the work of the ULC in promulgating the UETA.

There remains a significant concern that failure of the United States to ratify the Convention may lead to it becoming moribund. Quite literally the world is watching what the United States does in its adoption of the Convention. If the United States were to fail to ratify the Convention there is a strong likelihood that the Convention would not be adopted by other countries either. This would be particularly problematic in lesser developed parts of the world where a legal infrastructure for implementing electronic commerce does not currently exist. In many such countries the most likely response to a failure to ratify the Convention may well be to simply leave the status quo in place, i.e., without legal rules that validate electronic commerce. This would be damaging to both United States business and world commerce.

In addition, the manner by which the United States implements the Convention may affect the manner by which other nations implement the Convention. The Convention, and many domestic legal regimes relating to electronic commerce, including the UETA, derived from the

1996 Model Law of Electronic Commerce (the “Model Law”) promulgated by UNCITRAL. While the Model Law served as an excellent impetus to many nations to enact legislation validating the use of electronic media in commerce, the differences among the various domestic formulations have been, in some cases, significant. One of the driving forces behind the preparation of the Convention was to create a more uniform base law for the effectuation of communications and contracts in international business that are accomplished through electronic media. The norm in the adoption of international treaties is to adopt the language of the treaty itself, to assure better that the provisions of the treaty will be construed consistently from country to country. Although a country may accede to a treaty and fulfill its international obligation through reference to consistent domestic legislation, this manner of adoption carries the risk of non-uniform constructions based on the differing language found in the Convention and various domestic laws.

At the Committee’s Meeting on September 25 and 26 in Minneapolis, the Committee reviewed, reconsidered, and discussed the pros and cons of the various options for implementation of the Convention, with particular consideration of implementation through a “cooperative federalism” model. The following is the Report of the Committee’s deliberations, and its recommendations from the Meeting. This Report, and the attachments, were circulated to the Committee for comment prior to submission to the ILDC and Executive Committee.

## EXECUTIVE SUMMARY

The Committee considered five possible approaches to implementation of the Convention, including the option to take no action. In order of preference, those methods of implementation are as follows:

1. The implementation strategy most favored is to ratify the Convention as a non-self-executing treaty, implemented through federal legislation. This approach was favored because it would preserve the language of the Convention as the operative language in international transactions and thereby further develop a uniform body of jurisprudence in this area. In addition, federal legislation would provide a better mechanism for alerting the practicing bar to the existence of this law for international transactions, than would merely ratifying the Convention as a self-executing treaty. There was a preference that the legislation be a free-standing statute rather than an amendment to the existing ESign statute. A free-standing statute will preserve better the current working balance the courts have struck between the application of E-Sign and the UETA in domestic transactions.
2. The Committee next recommends that the Convention be implemented through ratification as a self-executing treaty. This implementation method has the benefit of apparent ease of ratification and effectuation, and it also assures common language across

international borders furthering uniformity in application. It was less favored than federal legislation because it was felt that this method of implementation would be less transparent to practitioners than would implementation through a federal statute.

3. A minority of the Committee favored implementation through the mechanism referred to as “cooperative federalism.” Under a “cooperative federalism” approach the Convention would be ratified as a non-self-executing treaty and implemented through the passage of federal legislation like that contemplated in the first alternative above. However, the concept of “cooperative federalism” would be realized through the enactment of an exemption to preemption for the 1999 UETA and other state laws that are consistent with the 1999 UETA. That is, federal law in the form of the terms of the Convention would govern transactions within the scope of the Convention, except to the extent that a state had enacted the 1999 UETA or other law consistent with the 1999 UETA. The exemption to preemption would be tailored along the lines of the current exemption to preemption in ESign.

The principal concern with this method of implementation was the continued possibility for non-uniform rules being applied to international transactions. First, there was a significant concern that having different verbal formulae for rules that govern transactions under the Convention in one country or under the UETA in the United States could lead to confusion and non-uniformity in transactions related to international commerce. Of even greater concern was the possibility that other nations would take a similar approach and declare their varying forms of e-commerce legislation, derived, like UETA, from the Model Law, as consistent with, and governing in lieu of, the Convention. This would multiply the occasions for non-uniform constructions of the rules applicable to the use of electronic communications in international contracts.

4. The Committee considered the possibility of implementing the Convention through so-called pre-implementation - that is, ratifying the Convention and declaring that the Convention was implemented in the United States as a result of the existing enactments of the UETA and E-Sign. This method of implementation was determined to be unworkable because inconsistencies between UETA/ESign and the Convention, while minimal, do exist and would require some form of federal legislation to resolve the inconsistencies. The need for such legislation was thought to negate any benefit a declaration of pre-implementation might have provided, and would not be different in substantive or procedural effect from the “cooperative federalism” method of implementation noted above. Further, it would invite other nations to declare their laws consistent with the Convention resulting in the potential for a true hodge-podge of legal approaches that would defeat the purpose of international uniformity sought to be accomplished through the Convention.
5. Finally, the Committee discussed the possibility of taking no action to ratify the Convention. This possibility was unanimously rejected as politically unfeasible and unwise

for the development of a uniform legal framework for international e-commerce.

## REPORT AND RECOMMENDATIONS

### I. Ratification of the Convention as a Non-Self-Executing Treaty and Implementation Through the Adoption of Federal Legislation

The majority of the Committee recommends that the Convention be ratified as a non-self-executing treaty and implemented through federal legislation that adopts the terms of the Convention to those transactions covered by Article 1 of the Convention. Attached to this Report as Exhibit B is a draft of such legislation. This recommendation is made for the following reasons: 1) federal legislation adopting the terms of the Convention will provide a clearer rule for determining the rules applicable to international transactions; 2) federal legislation adopting the terms of the Convention as the law that is applicable to international contracts will provide greater uniformity, and consistency in the law applicable to international contracts; and 3) federal legislation that adopts the terms of the Convention will provide the most transparent notice of the law applicable to international business contracts.

- A. Federal Legislation adopting the terms of Convention will provide a clearer rule for determining the rules applicable to international transactions.

The Scope of the Convention is narrow and well-defined. The Convention applies to business contracts entered into between parties with places of business in different countries. The Convention does not apply to contracts to which a consumer is a party, and it also excludes many sophisticated financial transactions. In addition, the proposed declaration in Exhibit A excludes from coverage matters currently excluded by Domestic Law. As a consequence, the contracts and communications to which the Convention will apply are clearly defined. Employing the scope and language of the Convention will encourage other countries to do the same, thereby adding clarity to the determination of which rules will be applicable, domestic or the Convention, in a particular transaction between international parties.

- B. Federal Legislation that adopts the terms of the Convention as the law applicable to international contracts will provide uniformity and consistency in the law applicable to international contracts.

Employing the terminology of the Convention likely will result in more uniform rules in international contracting. By adopting the terms of the Convention, the United States will set a precedent for other countries to do the same. Courts in different countries will be called upon to construe the same

language in rules governing the use of electronic media in international contracts.

To the extent that courts construe the same language, there is greater likelihood that interpretations will be more consistent. In the United States alone, employing a single set of terms embodied in the Convention will result in more consistent construction of the Convention to matters within the scope of the Convention than would be the result if courts were called upon to construe the different, albeit substantially consistent, language embodied in UETA or E-Sign.

The purpose of the Convention is to provide a uniform treatment of validating rules originally promulgated in the Model Law on Electronic Commerce in 1996. Many countries, including the United States, have enacted legislation based on the Model Law. However, many of the enactments based on the Model Law have significant differences in scope and wording. These differences are precisely the reason UNCITRAL determined to promulgate a Convention for wide adoption – to restore uniformity in this critical area of international trade.

C. Federal Legislation Adopting the Terms of the Convention Will Provide a More Transparent and Accessible Method to Alert Parties to the Existence of the Law Applicable to International Contracts.

The majority of the Committee believes that implementing the terms of the Convention through federal legislation had the salutary effect of putting domestic parties and their counsel on notice of the applicability of the Convention. Ratification as a self-executing treaty implements the terms of the Convention without any further federal legislation. While notices can be had through the federal register and the ratification process itself, members of the Committee felt that enactment of federal legislation provided a clearer and more accessible mean of alerting domestic parties to the existence, and applicability, of this law.

D. A Majority of the Committee Favored a New Federal Statute Implementing the Convention Rather than an Amendment to the Federal E-Sign Statute.

The majority of the Committee favored enactment of federal legislation apart from the existing E-Sign legislation. The Committee acknowledged that adoption of the Convention language through an amendment to E-Sign had the advantage of being associated with an existing, known statute. However, the concern was voiced that any amendment to E-Sign could upset the existing, working balance that the courts, both state and federal, have developed in their constructions of the interplay between E-Sign and UETA. The success of that

existing balance was viewed as worth preserving, and could be achieved better through implementing legislation adopting the Convention terms as a separate statute from E-Sign.

E. The Federal Legislation Should Include a Clear Limitation on the Scope of Preemption of Domestic Law by the Convention.

While the federal legislation will apply the terms of the Convention to matters solely within the scope of the Convention, the Committee was clear that the draft legislation include a section clearly limiting the intent of Congress regarding the scope and preemptive effect of the Convention on domestic law, in particular the UETA. The provision should make clear that Congress intends to preempt state law only to the extent of the matters governed by the Convention, and that Congress does not intend to occupy the field of electronic contracting through this legislation.

II. Ratification of the Convention as a Self-Executing Treaty.

In the event that implementing legislation was not a favored method for implementation of the Convention, a majority of the Committee favors simple ratification of the Convention as a self-executing treaty. While a self-executing treaty may not be as visible to the practicing bar as enacting legislation, self-execution does achieve all the benefits of adopting the language of the Convention as the applicable United States law. As noted above, this method provides greater incentive to other nations to adopt the language of the Convention as their applicable law. This in turn will aid in development of a uniform body of private international law applicable to international contracts.

III. Ratification of the Convention as a Non-Self-Executing Treaty and Implementation Through the Adoption of Federal Legislation Employing a “Cooperative Federalism” Model.

A minority of the Committee favors implementation of the Convention through federal legislation that includes an exemption from preemption similar to that found in current federal E-Sign legislation. Attached to this report as Exhibit C is a draft of such legislation. This method of implementation is favored by the minority because: 1) it allows the same law (consistent UETA/E-Sign) to be applied to both domestic and international contracts, avoiding confusion as to the applicable law in a transaction to which a business in the United States is a party; and 2) it is more deferential to state law and accommodating to federalism concerns. The majority of the

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Committee was concerned that: a) the potential for differing legal rules would make it difficult

for parties outside the United States to determine which rules applied in a particular case; 2) that the differences in language between domestic legislation and the same provision in the Convention could result in differing interpretations both between countries and also within the United States depending on the context, domestic or international, of the transaction; and 3) the manner of United States implementation through existing domestic legislation could lead other countries to follow suit, negatively affecting the ability to obtain greater international uniformity through the mechanism of the Convention.

A. Implementation Through Deference of Federal Legislation to Consistent Provisions in State Law will Aid Domestic Lawyers in Determining the Rules Applicable to a Particular Transaction

Implementation of the Convention through deference to consistent domestic legislation provides parties in the United States with greater certainty regarding the legal rules applicable to the transaction. Since the federal legislation would apply the rules of the Convention only in circumstances regarding limitations on party autonomy found in the UETA, parties in the United States would be better advised since the rules under the UETA are better known. More importantly, the same rules, those under the UETA, would apply irrespective of the domestic or international character of the transaction. This provides greater certainty *ex ante* a transaction.

Those members of the Committee disinclined toward this approach noted that the determination of the applicable rule by lawyers outside the United States would be made more difficult. Those lawyers would have to determine whether a particular provision of the UETA was consistent with the Convention and therefore applicable, or whether there may be a decision that a particular provision was inconsistent and therefore the term in the Convention would apply. This kind of uncertainty and difficulty in determining the applicable rule is avoided if the Convention language is made the applicable text for all international communications within the scope of the Convention.

B. Implementation Through Consistent State Law Defers to State Law in a Manner More Consistent with the Ideals of Federalism in the United States.

Those favoring the “cooperative federalism” approach to implementation believe that straight federal implementation unnecessarily detracts and burdens the federalism balance between state and federal laws in the area of commercial law. If the language of the Convention is considered a superior method for implementing private law treaties (for reasons of clarity and uniformity noted

above), some members of the committee expressed the concern that the same could be said about all private international law treaties designed to bring more uniform treatment to areas of global commercial law. Other members of the committee noted that the Convention is unique in the extent of its consistency with domestic legislation, both as a matter of policy and in effect. These members of the Committee felt that employment of the language of the Convention, in addition to the benefits noted, also served to showcase the success of the Conference in promulgating the UETA. Indeed, it was suggested that the Convention could be viewed as something of an “internationalization” of the Conference’s product – the UETA.

C. Implementation Through Consistent Domestic Legislation Could Lead other Nations to Do the Same, Damaging Uniformity in the International Context.

The majority of the Committee expressed concerns that the manner by which the United States implements the Convention may affect the manner by which other nations implement the Convention. The Convention, and many domestic legal regimes relating to electronic commerce, including the UETA, derived from the 1996 Model Law of Electronic Commerce (the “Model Law”) promulgated by UNCITRAL. While the Model Law served as an excellent impetus to many nations to enact legislation validating the use of electronic media in commerce, the differences among the various domestic formulations have been, in some cases, significant. One of the driving forces behind the preparation of the Convention was to create a more uniform base law for the effectuation of communications and contracts in international business that are accomplished through electronic media. The norm in the adoption of international treaties is to adopt the language of the treaty itself, to assure better that the provisions of the treaty will be construed consistently from country to country. Although a country may accede to a treaty, and fulfill its international obligation, through reference to consistent domestic legislation, this manner of adoption carries the risk of greater non-uniform constructions based on the differing language found in the Convention and domestic law. Although the Convention is fundamentally consistent with existing Domestic Law, the same may be said by other countries, and such a method of implementation would not achieve the desired uniformity the Convention was intended to provide.

#### IV. Ratification of the Convention as a Non-Self-Executing Treaty and Implementation Through a Declaration that the Convention Was Pre-implemented Through Extant Domestic Legislation.

It was suggested that the Convention could be ratified and implemented through the concept of pre-implementation. That is, that the Convention was already implemented through existing Domestic Legislation. This method was dismissed because the extent of consistency between the Convention and Domestic Legislation is not complete. E-Sign does not address matters governed by the Convention, eg. error correction. In such a case, the UETA would apply, and the UETA provision on error correction is non-waivable and therefore is inconsistent with the provision preserving party autonomy under the Convention. This is one of the exceptions to the applicability of the UETA under the “cooperative federalism” model reflected in Exhibit C. Since, federal legislation would be required to address the inconsistencies between the Convention and UETA, the notion of effecting the Convention through pre-implementation was considered no different than the method employing “cooperative federalism.”

#### V. Taking No Action to Ratify the Convention

One option discussed early was to take no action to ratify the Convention. No member of the Committee supported this approach. The ABA advisors to the Committee pointed to the August, 2009 resolution of the American Bar Association House of Delegates supporting prompt ratification of the Convention. In addition, for all the reasons noted earlier, it was concluded that failure to ratify would result in serious adverse political consequences, and likely result in the Convention becoming moribund. From the perspective of the Conference it was felt that participation with the State Department in the drafting and formulation of private law treaties that impact Conference projects and products was highly beneficial in assuring that the views and policies reflected in those Conference products are reflected in this country’s formulation of international policy. As noted before there was also the view that active engagement by the Conference in these matters raised the profile of the Conference and gave real voice to the States’ concerns in these areas of international law.

In conclusion, the Committee recommends that the Convention be ratified by the United States. The recommended methods for implementation of the Convention under United States Law are, in order of preference, as follows:

1. Implementation through enactment of federal legislation adopting the Convention as United States Law.
2. Implementation through enactment of federal legislation, as an amendment to existing E-Sign, adopting the Convention as United States Law.
3. Implementation through ratification of the Convention as a self-executing treaty.
4. Implementation through enactment of federal legislation adopting the Convention as

United States Law but providing an exemption to preemption that preserves state enactments of the UETA, and enactments of statutes consistent with the UETA, as the law applicable to communications governed by the Convention.

Revised drafts of the following documents are attached to this Report:

1. Exhibit A is a revised Draft Letter to the U.S. Senate Foreign Relations Committee seeking advice and consent of the U.S. Senate. This letter includes drafts of proposed United States “declarations” and “understandings” that would accompany ratification of the Convention.
2. In the event that it is determined to implement the Convention as a non-self-executing treaty with federal implementing legislation, the Committee requested that separate draft legislation be prepared A) implementing the Convention as federal law, and B) implementing the Convention as federal law with an exemption to preemption to effectuate the “cooperative federalism” approach. In each case it will also require 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. Attached as Exhibit C is a draft letter to Congress forwarding a draft of federal implementing legislation that includes an exemption to preemption provision for the 1999 UETA.
3. Section by Section Summary of the Convention.

Attached as Exhibit D 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.