MEMORANDUM

TO: Members of the Committee to Implement the United Nations E-Commerce Convention (the "Committee"), ABA Advisors to the Committee, Observers to the Committee

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

DATE: March 18, 2010

RE: Meeting of the Committee April 9-10, 2010, Wilmington, DE

BACKGROUND

Members of the Committee, ABA Advisors to the Committee, and other Observers will meet in Wilmington, DE on April 9-10, 2010 to consider methods employing cooperative federalism for the implementation of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Convention").

The Committee submitted a report on November 9, 2009 (the "November, 2009 Report") to the Uniform Law Conference ("ULC") International Legal Developments Committee ("ILDC") and the ULC Executive Committee. In the November, 2009 Report, the Committee outlined methods of implementing the Convention both by direct federal preemption as well as through cooperative federalism. The Committee, although outlining methods of implementation by both federal preemption as well as cooperative federalism, recommended that the preferred method of implementation should be by federal preemption.

The Executive Committee, at its midyear meeting, requested the Committee to review its decision to recommend federal preemption as the preferred method of implementation and also to further study methods of implementation by cooperative federalism. This will be the subject of the Committee's April meeting in Wilmington, Delaware.

PRIOR COMMITTEE WORK

The Committee, Advisors and Observers met previously in Washington DC on October 31-November 1, 2008, and by teleconference call on April 13, 2009. In its deliberations, the Committee 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 as well as other supporting materials on treaty implementation under United States law. The Committee has also received considerable input from American Bar Association and its constituent sections.

The result of these deliberations was a preliminary report (the "Report") delivered to the membership of the ULC at its annual meeting in Santa Fe, N.M. in July, 2009 (the "Annual Meeting"). The Report recommended that the Convention be implemented as a self-executing treaty under United States law. In the alternative, the 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 also provided, in the E-Sign amendment, an exemption from federal preemption for the 1999 UETA like that in the existing E-Sign, thereby employing the concept of cooperative federalism as a method for implementation. The exemption from preemption would preserve 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 ILDC considered the Report. The ILDC narrowly supported the recommendations of the Committee, but a significant objection was raised that the 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.

The Committee met in Minneapolis, MN on September 25-27, 2009 to reconsider the method for implementation of the Convention, and the Committee gave particular attention to a method of implementation that would invoke cooperative federalism. The result of that meeting was the November, 2009 Report

This Memorandum sets out three possible methods for implementing the Convention through cooperative federalism. This Memorandum serves to frame the discussion of the Committee at the April meeting, and it is not intended to limit the thinking or direction of the Committee's deliberations in Wilmington. It articulates for the Committee the advantages and disadvantages of each implementation method. For the Committee's information, the Memorandum retains, at the end, the recommendations from the November, 2009 Report relating to federal implementation of the Convention, and the rationales supporting those implementation methods.

GENERAL OBSERVATIONS REGARDING COOPERATIVE FEDERALISM.

The promotion and preservation of state law is the principal purpose of treaty implementation through a cooperative federalism approach. To the extent possible, this is the preferred method of treaty implementation by the ULC for those treaties and conventions that cover subject areas that are traditionally governed by state law. The Committee has previously noted three possible methods of implementation by cooperative federalism.

The first method is by federal legislation that adopts the Convention as federal law but exempts from preemption existing state law to the extent that such state law is consistent with the Convention[1]. This leaves existing state law substantially intact and unchanged. Part 1 below reflects the application of this approach.

As an alternative, cooperative federalism may provide a treaty implementation method that, though federalizing an area of commercial law, does so by adoption of uniform legislation broadly adopted by the states, but shorn of non-uniform state amendments. This approach to cooperative federalism retains the substantive law enacted by most, if not all, states, and assures that individual non-uniform amendments (whether extant at the time of treaty ratification, or subsequently adopted by an individual state) will not put the United States in breach of its international obligation to implement a treaty ratified by the United States. This is the default approach taken by the Committee to Implement the United Nations Convention on Independent Guarantees and Standby Letters of Credit. Part 2 below reflects this application of cooperative federalism.

Finally, implementation of treaties through cooperative federalism can be accomplished by the promulgation of uniform state law that reflects the terms and provisions of the international treaty being ratified and implemented by the United States. Implementation would then require adoption of this uniform state law by each individual state.

[1] While the international obligation of the United States to assure national implementation of Conventions the United States has ratified necessitates that state law exempted from preemption be consistent with the Convention, with the exception of limitations on party autonomy in UETA, the result achieved by application of the provisions of the UETA will be consistent with the result achieved by application of the parallel provisions in the Convention. However, an important question regarding the extent of the exemption remains for the Committee to resolve, that is, what State law to exempt from preemption. Should the exemption extend only to enactments of the official version of the UETA, or should the exemption extend also to cover state laws that are consistent with the provisions of the official version of UETA as is the case in current E-Sign. Extension of the exemption only to the official version of UETA will limit the consistency analysis to a comparison of the parallel provisions in the UETA and the Convention. Extending the exemption to include state laws consistent with the UETA, as in current E-Sign, also will require an analysis to determine if the other state law is consistent with the UETA, before analyzing the consistency between the UETA and the Convention.

COOPERATIVE FEDERALISM IMPLEMENTATION METHODS

1. Ratification of the Convention as a Non-Self-Executing Treaty and Implementation Through the Adoption of Federal Legislation that Exempts from Federal Preemption Existing State Law that is Consistent with the Convention[2].

As noted in the November, 2009 Report, the Convention may be implemented through a cooperative federalism method employing federal legislation that includes an exemption from preemption similar to that found in current federal E-Sign. Unlike the E-Sign provision, the exemption to preemption in this case would have to retain preemption of state law that limits party autonomy guaranteed by the Convention. As to the non-waivability provisions in Sections 8 and 10 of the UETA, the Convention's preservation of party autonomy in Article 3 would prevail. Attached to this Memorandum as Exhibit A is a draft of legislation that accomplishes this outcome. This method of implementation allows the same law to be applied to both domestic and international contracts, thereby avoiding confusion for domestic practitioners as to the applicable law in an international transaction to which a business in the United States is a party. This implementation method is the most deferential to state law and the most accommodating to federalism concerns.

ADVANTAGES

A. Implementation of the Convention through deference to consistent domestic legislation provides domestic practitioners in the United States with a better understanding of the legal rules applicable to the transaction. Since the federal legislation would apply the rules of the Convention only to the extent that a state's law is inconsistent with the 1999 official UETA, and in circumstances regarding limitations on party autonomy found in the UETA, parties in the United States may be better advised since the rules under the UETA are better known to domestic practitioners. More importantly, the same rules would apply irrespective of the domestic or international character of the transaction. This provides greater certainty for parties in the United States *ex ante* a transaction.

B. Employing existing state legislation that is consistent with the Convention[3] eliminates the need for States to adopt new legislation. This will allow for greater speed and efficiency in implementing the Convention.

C. Implementation of the Convention through an exemption to preemption for existing state enactments of 1999 UETA, or other laws that are consistent with 1999 UETA, serves to

[2] See footnote 1
[3] See footnote 1

preserve the existing federalism balance in this area of commercial law that has already been reached between UETA and E-Sign under the existing exemption to preemption provision in E-Sign.

D. By maintaining essentially the same texts for domestic and international transactions, there may be a likelihood of more uniform interpretation of the law as the same texts are applicable.

DISADVANTAGES

A. The improved ability of domestic parties to understand the applicable rule is counterbalanced by the increased difficulty imposed on parties outside the United States. This implementation method requires parties to (i) determine which State's existing law applies to the transaction, and (ii) then examine the State's existing law to determine whether that state's law is consistent with the parallel term in the Convention[4]. Legal counsel 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 determination at a later date that a particular provision was inconsistent and therefore the term in the Convention would apply. While it is the position of the Committee, the Chair and the Reporter that the application of the provisions of UETA and the parallel provisions of the Convention (other than as to party autonomy) should lead to the same result, the differing text and potential judicial interpretations create uncertainty (See B below). Finally, foreign lawyers may be misled because they assume the United States has adopted the official text of the Convention. This kind of uncertainty and difficulty in determining the applicable rule could negatively impact e-commerce between international and United States parties.

B. The differences in language between domestic legislation and the substantively equivalent provision in the Convention could result in differing interpretations of ostensibly consistent provisions. Different interpretations may result because of differences between the legal rules applicable between two countries. Of perhaps greater concern would be inconsistencies resulting from differing constructions of the same text depending upon the context, domestic or international, of the transaction.

C. Application of the same text to transactions arising internationally and domestically may raise constructional difficulties because of the mandate that the interpretation of the Convention be governed by the international character of the Convention and not by domestic law. This raises the possibility of either the development of a dual set of constructions, one for domestic transactions and one for international transactions, or consistent constructions based on the domestic law that do not take the international

[4] See footnote 1

character of the Convention into consideration.

2. Ratification of the Convention as a Non-Self-Executing Treaty and Implementation Through Federal Legislation Enacting the Uniform Version of the 1999 UETA as the Applicable Law in Transactions Otherwise Governed by the Convention.

The Convention may be implemented through a cooperative federalism method employing federal legislation that adopts as the law applicable to transactions to which the Convention would otherwise apply the 1999 Uniform version of the UETA, except as to the non-waivability provisions in Sections 8 and 10. This method would federalize the uniform version of the UETA. Attached to this report as Exhibit B is a draft of such legislation. This method of implementation effectively provides that the same law (the provisions of federally adopted uniform UETA) be applied to both domestic and international contracts. Like the method outlined in 1, above, this method will tend to avoid confusion by providing essentially the same text for domestic as well as international transactions that are covered by the Convention.

ADVANTAGES

A. By federalizing the UETA, this method provides for a single, unchangeable (save by federal amendment) body of law to implement the Convention. This protects the obligation of the United States to implement the Convention by eliminating the possibility of individual state amendments to UETA or other state law that are inconsistent with the provisions of the Convention. It also reduces the consistency analysis parties must go through to determine whether the law in a particular state is consistent with the provisions of the Convention.

B. This method also eliminates the need for parties to examine the law of each state's existing UETA to determine what the law would be for a transaction to which the Convention otherwise would apply.

C. As with the first approach above, employing the uniform version of UETA as a matter of federal law eliminates the need for States to adopt new legislation. This will allow for greater speed and efficiency in implementing the Convention.

D. This implementation method provides a virtually uniform body of law at both the domestic and international level for domestic practitioners familiar with the UETA.

DISADVANTAGES

A. As with implementation method 1. above, differences in language between the uniform UETA and the substantively equivalent provision in the Convention could result in differing interpretations of ostensibly consistent provisions. Different interpretations may result because of differences between the legal rules applicable between two countries. Of perhaps greater concern would be inconsistencies resulting from differing constructions of the same text depending upon the context, domestic or international, of the transaction.

B. As with implementation method 1. above, foreign lawyers may be mislead because they assume the United States has adopted the official text of the Convention. This kind of uncertainty and difficulty in determining the applicable rule will impact e-commerce between international and United States parties negatively.

3. State legislation that amends UETA to bring UETA into conformity with the Convention in those cases where the Convention would otherwise apply (international commercial transactions). Under this method UETA would have new rules with respect to Sections 8 and 10 relating to party autonomy.

ADVANTAGES

A. This method would allow enacted state law to be applied to international transaction completely with no preemption for the two areas related to party autonomy under UETA.

DISADVANTAGES

A. This would require a lengthy period of time for full enactment. The UETA itself has three hold-out states, so getting full enactment would be problematic.

B. This method still requires a federal overlay with an exception to preemption to assure that the United States has fully implemented the Convention. As such it continues to require federal legislation.

This method of implementation is not being seriously suggested because of the need for expeditious implementation of the Convention.

Beginning on the next page, for the Committee's information, the Memorandum continues with the rationales set forth in the November, 2009 Report, for federal implementation.

FEDERALISM IMPLEMENTATION METHODS

For the information of the Committee, set forth below are the rationales for federal implementation of the Convention from the Committee's November 9, 2009 Report.

RATIONALE FOR IMPLEMENTATION OF THE CONVENTION EITHER AS A SELF EXECUTING TREATY, OR AS A NON-SELF-EXECUTING TREATY IMPLEMENTED THROUGH ADOPTION OF THE CONVENTION AS FEDERAL LEGISLATION.

Ratification as a self-executing treaty or as a non-self-executing treaty implemented through federal legislation is supported by 1) the consistency of the principles underlying the provisions of the Convention and Domestic Law, which in turn will lead to consistent results notwithstanding the differences in text; 2) the greater certainty regarding the law applicable to a particular transaction, 3) the narrow set of transactions to which the Convention applies, which results in preservation of the existing balance between federal and state law under Domestic Law, and 4) the lower risk of opening Domestic Law to unrelated amendments that may impact negatively the legal stability that has developed in the federal/state balance between the UETA and E-Sign.

1. The Convention is consistent with Domestic Law.

The results reached under the Convention would be, in all material respects consistent with the result reached under parallel provisions of Domestic Law embodied in the UETA and E-Sign. The consistency of the principles underlying the provisions of the Convention with the principles underlying the provisions of Domestic Law means that the substance of the law applicable to a particular contract or transaction will not differ in any material respect.

Notwithstanding this essential consistency, there are differences between the provisions of the Convention and Domestic Law that preclude declaring Domestic Law as a pre-ratification mode of implementation. 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, preserving 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-waivable provisions in UETA relate to matters of error avoidance (Section 10) and some requirements for preserving and presenting information (Section 8). These provisions of UETA were included as protections for consumers acting in electronic transactions. In the context of consumer transactions, these protections will not be preempted by the Convention since the Convention specifically excludes consumer transactions from its scope. Ratification of the Convention as a self-executing treaty will not result in different outcomes than would result under Domestic Law in transactions to which both the Convention and Domestic Law would otherwise apply.

2. A self-executing treaty will provide greater certainty about which law is applicable to a particular transaction.

Currently, under Domestic Law, the exemption to preemption provision in E-Sign creates some question about whether a less than pristine enactment of the 1999 UETA will be preempted, and if so to what extent. This results in incentives for parties to assure that they satisfy the strictest standards as exist between UETA and E-Sign. The fundamental consistency, outside the consumer area, between UETA and E-Sign has minimized concern regarding which law will control since the outcome will be the same under either. This balance could be disturbed by cooperative federalism by adding new uncertainties.

The question of which law would apply to a given transaction is minimized with a self-executing treaty since the clear scope provision of the Convention will provide greater certainty to determine the applicability of the Convention. This will allow for greater certainty as to the applicable legal standards for international contracts than if the parties were required to proceed through a choice of law determination involving the Convention, E-Sign, and the UETA. In light of the need for certainty in business law, this is a strong point favoring a clear delineation between the law applicable in international transactions and the law otherwise applicable under convoluted choice of law and preemption rules that must be considered under current Domestic Law.

Furthermore, the inherent differences in language between an international convention and domestic legislation opens yet another avenue for uncertainty. Although courts would be admonished to construe Domestic Law consistently with the Convention, this may result in domestic interpretations of the Convention deviating from international norms, further confusing the appropriate rules and standards to be applied.

Finally, questions related to the consistency of Domestic Law with the terms of the Convention are eliminated if the Convention is ratified as a self-executing treaty. Areas governed by both the Convention and Domestic Law may be construed differently or a state may amend its law to be inconsistent with the Convention. These developments would potentially place the United States in a position of non-compliance with its obligation to effectuate the Convention.

3. The Scope of the Convention is narrow and leaves most electronic contracting to Domestic Law.

The scope of the Convention is limited to business to business contracts in those circumstances where the businesses have locations in different states.[5] 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 narrow scope of the Convention (non-consumer contracts involving parties located in different countries) means that any displacement of Domestic Law (UETA or E-Sign) will be limited. Indeed, as a result of the narrow scope of the Convention, ceding those transactions to coverage by the Convention may well serve to preserve better the existing balance in Domestic Law that recognizes in most cases the applicability of state law.

Concerns that the Convention may harm consumers are unfounded. First, the Convention specifically excludes consumer transactions from its scope. Secondly, the proposed Declarations include a specific exclusion for consumer transactions. The UETA and E-Sign will continue to apply to all consumer transactions, and to domestic transactions.

It should be recognized that the Convention is unique in the extent of its consistency with Domestic Legislation, both as a matter of policy and in effect. Indeed, giving broad effect to the terms of the Convention, in addition to the benefits noted, also serves to showcase the success of the ULC in promulgating the UETA. The Convention may be viewed as something of an “internationalization” of the ULC’s product – the UETA.

4. Revising existing legislation may result in unintended consequences.

In order to effect the Convention as a non-self-executing treaty, legislation will be required. While the draft E-Sign amendment being proposed is limited in its scope, the very act of amending E-Sign (or UETA) may have the consequence of generating additional amendments and changes that would not impact the Convention. Specifically, there may be significant pressure to bolster consumer protections under E-Sign. Over 9 years, the balance struck by the courts in enforcing E-Sign and UETA has been a remarkably even and balanced approach. There are few cases addressing these statutes and the courts have interpreted the statutes well and consistently. In short, the existing scope, application and balance of Domestic Law is working and the risk of upsetting this balance may not be worth taking.

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