

## MEMORANDUM

TO: Members of the Uniform Law Conference

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

DATE: May ~~15~~27, 2010

RE: Report of the Committee to Implement the UN E-Commerce Convention

## BACKGROUND

The Committee to Implement the United Nations E-Commerce Convention (the “Committee”) first met in Washington DC on October 31-November 1, 2008, to discuss the best manner for the United States to implement the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Convention”). At its first meeting, the Committee considered the Convention, the Uniform Electronic Transactions Act (the “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 compared the Convention with existing United States law as enacted in E-Sign and by 47 States through the UETA (E-Sign and UETA being referred to herein collectively as “Domestic Law”) and identified areas where Domestic Law varied from the Convention. The Committee directed the Reporter to prepare a draft Letter of Submittal together with draft implementing legislation for consideration by the Committee. The Committee next 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.

The result of the 2008-2009 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 adopting the language of the Convention. A third alternative 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 but including a provision in the E-Sign amendment that effectuated the concept of “cooperative federalism” through a conditional preemption provision like that in existing E-Sign. Such a conditional preemption method preserves 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.

## COMMITTEE WORK IN RESPONSE TO THE ANNUAL MEETING

MINNEAPOLIS, MN - SEPTEMBER 25-27, 2010

To further its deliberations regarding the Executive Committee’s request that the Committee reconsider methods of implementing the Convention through a “cooperative federalism” model, the Committee met in Minneapolis, MN on September 25-27, 2009. The Committee gave particular attention to so-called “cooperative federalism” methods of implementation including a conditional preemption mechanism like that in the current E-Sign. The Committee reviewed, reconsidered, and discussed the pros and cons of these various options for implementation of the Convention. The result of that meeting was the Committee’s November, 2009 Report.

In the November, 2009 Report, the Committee outlined the principal methods it had considered during the September meeting for implementing the Convention. These methods of implementation included 1) “cooperative federalism” through a conditional preemption mechanism involving implementation through federal legislation adopting the text of the Convention which would yield to implementation through state law enactments of the 1999 UETA; 2) “cooperative federalism” through a declaration that the Convention was pre-implemented by virtue of the extant enactments of the UETA and other state laws that are substantively consistent with the Convention; and 3) direct federal preemption through ratification of the Convention as a self-executing treaty or through ratification as a non-self-executing treaty and enactment of federal legislation adopting the text of the Convention. The Committee outlined the pros and cons of implementation through both “cooperative federalism” and federal preemption and recommended that the preferred method of implementation was by federal preemption.

In response to the Committee's November 2009 Report, the Executive Committee, at its midyear meeting, requested the Committee to further review its decision to recommend federal preemption as the preferred method of implementation. The Executive Committee asked the Committee to review all methods of implementation that might be considered to qualify as a "cooperative federalism" mechanism. In response to this request and in preparation for the April meeting, the Reporter outlined three methods of implementation that could be characterized as implementation through "cooperative federalism." In each case, implementation would necessitate enactment of a federal statute to implement the Convention. However, in each case, the federal law would either be a federal enactment of "state" law reflected in the uniform UETA, or the federal law would defer to state law to the extent that the state law represented an enactment of law consistent with the Convention. Specifically these three methods included 1) implementation through federal adoption of the 1999 uniform version of the UETA as the law applicable to transactions otherwise subject to the Convention – this method follows the method adopted by the Committee on the Implementation of the United Nations Convention on Independent Guarantees and Standby Letters of Credit (the "Letter of Credit Convention"); 2) implementation through federal law with conditional preemption of state law to the extent that the applicable state law is not a qualifying enactment of the 1999 UETA - this method had been included in all prior discussions of the Committee and follows the existing exemption to preemption found in E-Sign; and 3) implementation through federal law with conditional preemption of state law to the extent existing state law is inconsistent with the Convention, together with the promulgation of amendments to 1999 UETA by the ULC that would make the UETA fully consistent with the Convention.

WILMINGTON, DE – APRIL 9-10, 2010

The Committee met April 9 and 10, 2010 in Wilmington, Delaware and considered these three approaches to implementation that might broadly be considered under a "cooperative federalism" approach. The meeting in Wilmington focused on the pros and cons of these methods of implementation. After considering these approaches, the Committee concluded that the only viable method of implementation through "cooperative federalism" is through conditional preemption of state law to the extent that state law is not a qualifying enactment of the 1999 UETA. First, the Committee concluded that the idea of promulgating amendments to UETA to make state laws fully consistent with the Convention was unworkable given the timing and political realities of such an undertaking. Second, the concept of implementing the Convention through enactment, as federal law, of the uniform 1999 UETA was considered less than optimal because ~~eliminated since~~ such an enactment would ~~amount to a complete displacement of~~ state law in those transactions within the scope of the Convention ~~the arena of international business transactions~~. The Committee determined that the most effective and practicable method of preserving only through conditional preemption exempting existing enactments of consistent state law would it be feasible to preserve the applicability of state law to

electronic communications used in international contracts in a manner consistent with the Convention, was through an exception to preemption for state law enactments to the extent such enactments are consistent with the Convention. Accordingly, the Committee believes that implementation through state law with conditional preemption of existing state laws that are inconsistent with the Convention is the only best “cooperative federalism” method of implementation ~~that is possible.~~

After fully considering and debating the strengths and weaknesses of the various “cooperative federalism” implementation methods, the Committee reconsidered the question of the overall preferred method for implementation of the Convention. The Committee recognized the concerns voiced by a number of Commissioners at the 2009 ULC Annual Meeting that implementation of international conventions affecting private parties presented serious considerations regarding the appropriate balance between federal and state authority to regulate commercial transactions. In particular, the Committee acknowledged the concern that federal implementation of international conventions could result in preemption of areas of law that historically have been the province of state law and regulation. ~~The Committee acknowledged that federal implementation of international conventions affecting private parties could serve as a method for preempting areas of regulation historically preserved to the states. In light of the potential for treaty ratification to result in federalization of areas of law traditionally reserved to the states, Accordingly,~~ the Committee was cognizant of the need to justify federal enactment of the Convention ~~in light of the potential impact of federalization of state laws through treaty ratification.~~

For the reasons noted below, the Committee, by a vote of 5-2 at the conclusion of the meeting in Wilmington, ~~continues to recommend believe~~ that the E-Commerce Convention ~~should~~ be implemented through enactment of federal legislation adopting the language of the Convention. This method of implementation remains the best, most effective method for implementing the Convention as a matter of United States law.

## EXECUTIVE SUMMARY

### Method of Implementation – Committee Recommendations

The Committee recommends that the Convention be ratified as a non-self-executing treaty through enactment of implementing federal legislation adopting the language of the Convention.

A minority of the Committee recommends that the Convention be implemented through adoption of the language of the Convention as federal law subject to an exception to preemption for state law to the extent a state has enacted the 1999 uniform version of the UETA.

### **Reasons for Federal Implementation**

1. As a treaty governing solely the use of electronic communications in international business transactions, the implementation of the Convention through federal legislation does not implicate traditional notions of federalism because international relations and laws regulating international commerce have historically been within the exclusive province of the federal government.
2. The limited scope of the Convention (international business transactions between parties located in different countries) and the structure of the Convention result in minimal encroachment on state law, and best preserve the continued applicability and development of state law in domestic, consumer, and international transactions to which the Convention does not apply. [See the Summary of the Convention at p. 2-3 of the Draft Letter of Submittal attached as Exhibit A.](#)
3. The fundamental consistency of the Convention with the UETA means that the essential policies of state law reflected in the UETA will be made applicable to international contracts, and assures that the substantive legal rules for validation of electronic communications will be consistent whether the transaction occurs domestically or internationally.
4. The clear scope of the Convention together with international uniformity achieved through implementation employing the language of the Convention, will provide greater uniformity and certainty in international transactions employing electronic communications.
5. Implementation through the language of the Convention will assure United States compliance with its international obligations.
6. Implementation using the language of the Convention will strengthen international perceptions of the United States as a reliable treaty partner.
7. Implementation through federal enactment of the Convention will result in interpretation of existing international trade law instruments under uniform international guidelines and rules.

### **Reasons for Implementation Through Conditional Preemption**

1. Conditional Preemption allows the United States to implement the Convention while simultaneously deferring to consistent state law
2. For domestic attorneys, conditional preemption may be viewed as a more seamless approach to the legal rules applicable when electronic communications are employed.

**REASONS FOR FEDERAL IMPLEMENTATION.** Attached as Exhibit B is a draft federal statute to implement the Convention in this manner.

1. As a treaty governing international transactions, the implementation of the Convention through federal legislation does not implicate traditional notions of federalism because international relations and laws regulating international commerce have historically been within the exclusive province of the federal government.

Although Congress historically has granted significant authority to states to regulate commercial matters, e.g. the Uniform Commercial Code, the federal government retains authority to regulate in the area of international trade. International commerce between foreign countries is the classic province of the federal government. Indeed, under existing federal law, E-Sign §7031 specifically provides that the Secretary of Commerce shall promote the use of electronic records and signatures in international commerce. While the Convention is a “private law” treaty in the sense that it regulates conduct by individuals, its scope of operation is *strictly* limited to electronic communications used in *international* business transactions. It therefore addresses an area of commerce that is classically within the province of federal regulation, and in which state law applies only in limited situations when the federal government has not acted.

2. The limited scope of the Convention (international business transactions between parties located in different countries) and the structure of the Convention result in a minimal encroachment on, or displacement of, state law. See the Summary of the Convention at p. 2-3 of the Draft Letter of Submittal attached as Exhibit A.

Given the scope and design of the Convention, it only displaces a country’s domestic law with respect to the validity of electronic communications used in business transactions between parties located in different countries. Accordingly, state law will continue to be the applicable law for intra-state transactions, interstate transactions to the same extent as under existing E-Sign, consumer transactions, and international transactions in which the parties exercise the right to opt-out of the Convention. More significantly, state law will continue to govern the substantive aspects of contract formation, performance, and remedies as they relate to international transactions to the same extent as state law would apply today. Consequently, federal legislation adopting the language of the Convention will not displace state law except to the extent of the limited and narrow scope of the Convention - electronic communications used in business transactions between parties located in different countries.

Implementation through enactment of federal legislation adopting the language of the Convention verbatim 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 countries – domestic law will be relatively unaffected. Indeed, in the absence of the Convention, Domestic Law, including the UETA, would apply only in those limited circumstances where the

conflict of laws rules would result in application of United States law to the contract. Furthermore, State law such as the UETA would only apply in the event it was not preempted by the federal E-Sign Act. In most cases, application of United States law to an international transaction occurs as a result of the parties' agreement as to applicable law and this result is not changed under the Convention because of its overriding policy of party autonomy.

Federal legislation that addresses the needs of international business in this narrow area relating to the validation and efficacy of electronic communications, better preserves the ability of state legislatures to adopt legislation that addresses changing needs domestically and for transactions outside the narrow scope of the Convention. By leaving the current domestic balance between UETA and E-Sign untouched, states are better able to refine existing laws in ways that state legislatures may determine to be beneficial for non-international, or consumer transactions. Implementation through a conditional preemption approach unnecessarily burdens the ability of states to make changes to domestic laws that are inconsistent with the Convention, by requiring legislatures to consider the impact of possible legislation on transactions that would be covered by the Convention. Currently such amendments can be made so long as they remain consistent with E-Sign. Given the limited scope of E-Sign, states may be permitted to legislate in ways consistent with E-Sign that otherwise might be inconsistent with the Convention. Adding a requirement that state law not only be consistent with E-Sign, but also the Convention would limit to a greater extent the ability of states to address needed changes in domestic or consumer transactions.

The least interference with state law is achieved by leaving state law as it currently exists. Conditional preemption results in dictating the terms of the applicable law that states must enact in order to avoid preemption. With federal implementation, the states remain free to legislate in all areas outside the narrow scope of the Convention.

The proposal to implement the Convention by federal adoption of the uniform provisions of the 1999 UETA provides an extreme example of one method of "faux cooperative federalism." Rather than leaving room for the operation of state law, this proposal would completely displace state law in this context.

3. The fundamental consistency of the Convention with the UETA means that the essential policies of state law reflected in the UETA will be made applicable to international contracts, and assures that the substantive legal rules for validation of electronic communications will be consistent whether the transaction occurs domestically or internationally.

Implementation of the Convention through federal legislation adopting the language of the Convention will result in a minimalist approach to validation of electronic communications in international business transactions. The Convention's minimalist approach to validation of electronic communications reflects the essential policy reflected in U.S. Domestic Law, particularly the UETA, and validates the approach adopted in the UETA. The application of this

minimalist approach through the Convention is significant because it avoids a more regulatory approach encouraged by other countries during the drafting of the Convention.

The significant consistency between the operative provisions of the Convention and Domestic Law, particularly the UETA, means that business lawyers will not be burdened by significantly divergent applicable bodies of law regarding the use of electronic communications in electronic business transactions. The Convention, in all material respects, is consistent with domestic U.S. law embodied in the UETA and E-Sign. This consistency results from the fact that both the Convention and the UETA are derived from the 1996 United Nations Model Law on Electronic Commerce (the “Model Law”). Further, this fundamental consistency leads to results that are consonant with the reasonable expectations of the parties to a transaction, whether domestic or international. The <sup>[B2]</sup> substantive consistency in the operative provisions of the Convention and Domestic Law, combined with the narrow, well-defined scope of the Convention, will provide parties and their counsel with greater certainty as to the particular rules applicable in a given transaction while still providing consistency in the effectuation of electronic communications.

4. The clear scope of the Convention together with international uniformity and consistency achieved through implementation employing the language of the Convention will provide greater uniformity and certainty in international transactions employing electronic communications.

Deference to Implementation of the Convention through state enactments of the UETA will negatively affect uniformity of the law applicable to the validation of electronic communications used in international transactions. Notwithstanding the substantive consistency between the principal provisions of the Convention and the main provisions of the UETA, the UETA has been adopted by only 47 states and in most cases there are non-uniform amendments in the various state enactments of the UETA which will be preempted. Further, there are provisions in the UETA that restrict party autonomy in ways that are inconsistent with the Convention, and as to those provisions, federal legislation will be necessary to preempt those inconsistencies (even the existence of possible preemption under E-Sign has not caused the states to avoid non-uniform amendments – it is unlikely that an exemption from preemption regarding the Convention will have any greater effect <sup>[B3]</sup>). Finally, differences in the text of the Convention and state enactments of the UETA may lead to inconsistent interpretations or constructions of substantively similar rules, resulting in applications of state law to an international transaction that are in fact inconsistent with the Convention.

Another consideration, if the United States seeks to implement the Convention through state enactments of the UETA, is that other nations may choose to implement the Convention through their various domestic laws that, like the UETA, are derived from the Model Law on Electronic Commerce and ~~may~~ therefore may or may not be substantively consistent with the Convention and in any event employ different language for similar rules. The resulting mosaic of differing laws and texts, ~~though~~ even if substantively consistent, will lead to serious non-uniformity.

Indeed, ~~the principal impetus for an important consideration in~~ the preparation of the Convention by the United Nations was to address the non-uniformity of the various enactments of the Convention's predecessor, the Model Law on Electronic Commerce. While the UETA and numerous other laws enacted in other countries derive from, and are substantively consistent with, the Model Law and the Convention, the lack of uniformity resulting from different texts was perceived to be a problem.

The differences in language inevitably will lead to differing interpretations by courts that construe the various verbal formulations for the substantively similar provision. The differences in language, compounded by varying interpretations, will result in non-uniformity around the world in this critical area of commerce. The non-uniformity among various domestic legislative enactments is exacerbated by a conditional preemption method of implementation in the United States. In addition to the variety of verbal formulae in various countries, the variations among state enactments compounds the difficulty. By employing the language of the Convention, countries will provide a uniform baseline for interpretations in this area of commerce.

As important as uniform construction is the ability of parties to easily determine the source of law to be applied in a particular transaction where parties may be located in several countries and several different states within the United States. Unlike the Letter of Credit Convention which, most often, will be invoked *ex-ante* a transaction by sophisticated parties seeking assurance as to the applicable law to be applied to the particular transaction, the Convention, almost invariably, will be consulted *after* electronic communications have been used in a transaction. Attorneys dealing with questions arising after the communications have been employed will be forced to try and answer numerous indeterminate questions about where the transaction occurred, what law is applicable, whether that law is consistent with the Convention and therefore controls, or whether the law is inconsistent with the Convention and is therefore preempted. Such uncertainty defeats the expectation derived from international conventions that a single source of language will apply and be uniformly construed.

Business parties will engage in communicating electronically and only if there is a problem will counsel be brought in to determine the efficacy of those communications. At that point it is critical that the parties be able to identify the applicable source of rules with a minimum of difficulty. In recognition of the nature of the transactions to which the Convention will most often apply, the ability to determine with minimal difficulty the source of applicable legal rules is critical.

5. Implementation through the language of the Convention will assure United States compliance with its international obligations.

Implementation of the Convention through legislation adopting the language of the Convention avoids all questions of the United States' obligation of good faith in implementing the Convention. The actions of state legislatures in addressing domestic and consumer needs will be irrelevant to transactions within the narrow scope of the Convention. Furthermore, constructions of the Convention will be based on the text of the Convention applied in the

international context of the transaction as required by Article 5 of the Convention. Since the language of the Convention will apply to all electronic communications within the scope of the Convention, constructions and interpretations of Domestic Law through which the Convention would be implemented under a conditional preemption approach but that are inconsistent with the Convention, will be avoided.

6. Implementation using the language of the Convention will strengthen international perceptions of the United States as a reliable treaty partner.

As noted earlier, many countries have enacted legislation based upon the Model Law. The lack of uniformity in these enactments was a principal reason for the preparation of the Convention. Implementing the Convention through existing state enactments of the UETA would not only lead to other nations possibly seeking implementation through their own legislation, but would cause other countries to question the commitment of the United States to the wide adoption of the Convention. Given that ~~the~~ an important reason for the Convention was to restore uniformity lost in the myriad enactments of legislation substantively consistent with, but verbally different from, the Model Law, implementation by the United States through a conditional preemption method that applied the United States' particular version of the Model Law would not be consistent with the United States position regarding the need for the Convention, and would undermine the credibility of the United States in urging other nations to ratify the Convention.

7. Implementation through federal enactment of the Convention will result in interpretation of existing international trade law instruments under uniform international guidelines and rules.

The Convention applies to international trade agreements and treaties, as well as to electronic communications used by business parties. Implementing the Convention through conditional preemption and the application of state law would result in international treaty obligations of the United States being construed under individual state law. It is incongruous to consider federal treaty obligations being construed under the laws of the individual states.

## **REASONS FOR IMPLEMENTATION THROUGH CONDITIONAL PREEMPTION**

Although a majority of the Committee recommends that the Convention be implemented through federal legislation adopting the language of the Convention, a minority of the Committee recommends implementation through conditional preemption.

1. Conditional Preemption allows the United States to implement the Convention while simultaneously deferring to consistent state law.

Implementation through federal legislation adopting the language of the Convention, but providing for an exemption from preemption to the extent a state has enacted the 1999 version of the UETA is a possible method for implementing the Convention. The legislation will also need to preempt those provisions of state law that restrict party autonomy and therefore are inconsistent with the Convention. The fundamental consistency between the provisions of the UETA and the Convention make this a possible alternative to federal enactment of the Convention. Through conditional preemption, state law is preserved as the law applicable to all electronic communications whether employed in a domestic or international transaction. While this does create difficulties in determining which state's law applies to a particular transaction crossing several borders, and raises issues of interpretation of state enactments of the UETA in a manner consistent with the Convention, it does allow state law to prevail as the law through which the Convention is implemented.

2. For domestic attorneys, conditional preemption may be viewed as a more seamless approach to the legal rules applicable when electronic communications are employed.

Implementation of the Convention through an exemption to preemption for consistent state law enactments of the UETA will provide a seamless body of legal rules that will apply irrespective of the context of the transaction. United States lawyers will be able to apply the same legal rules, i.e., consistent UETA, to all transactions employing electronic communications. This aids the development of law in the United States by avoiding different bodies of law for similar transactions solely by virtue of the domestic or international context of the transaction. Consequently, domestic uniformity is furthered by application of the same rules regardless of the context of the transaction.

## EXECUTION

The Committee's work to assist in the implementation of the Convention included 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.

2. In the event that it is determined to implement the Convention either a) as a non-self-executing treaty with federal implementing legislation or b) as a non-self-executing treaty with federal implementing legislation employing an exemption to preemption for consistent state law, implementing federal legislation will be necessary. Attached as Exhibit B is a draft of federal implementing legislation adopting the text of the Convention as the law applicable to electronic communications within the scope of the Convention. Attached as Exhibit C is a draft of federal implementing legislation adopting the text of the Convention as the law applicable to electronic communications within the scope of the Convention, and providing an exemption to preemption for state law to the extent state law is an enactment of the 1999 UETA.
3. 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 affects and relates to existing Domestic Law.

## CONCLUSION

The Committee concludes by stating that the Committee has fulfilled the task assigned to it by the ULC, namely to consider and report on the best method for implementing the United Nations Convention on the Use of Electronic Communications in International Contracts. The Committee respectfully offers this Report to the ULC for its approval.