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TO: Advisory Committee commentators on electronic commerce projects at International organizations

Review of possible future ECom projects

We are undertaking a review of private law developments in electronic commerce that may be ripe for consideration at the international level, as we approach the 21st century. We are requesting comments on possible topics listed below that have already been recommended to us, and others that you may wish to place on the table.

Comments should include the relative importance or priority of topics, why you think the topic(s) are at a stage where international focus is appropriate, the relationship with domestic US law or commerce, the relationship to developments in other countries, and any international venues (government or private sector) you believe workable. Nothing will be ruled off the table at this stage, so you will have more opportunities to contribute to this process.

The following list is drawn from recommendations already received. Except for the first item, it does not indicate support by our Office or any other agency of government at this time. It also does not include matters already in progress at the OECD, UNIDROIT, ITU, UNCITRAL, WIPO and others, including electronic registries, data security, privacy rights, message authentication and electronic signature systems, patent submission rights, etc. Some general comments follow the list.

Proposed convention on basic ground rules to enable ECom: The U.S. continues to support negotiation of a convention which would embody many provisions of the 1996 UNCITRAL Model Law on Electronic Commerce, along with several basic principles such as party autonomy, and thus achieve an enabling but otherwise minimalist approach to international rules, at least for the short term. Support has grown through bilateral contacts, although a multilateral forum has not yet emerged.

A second avenue for this effort could be proposed new provisions on ECom for the 1994 UNIDROIT Principles of International Commercial Contracts. A recent initial draft indicates that many provisions are proposed to be drawn from the UNCITRAL Model Law.

Electronic transactional and contract law:
An expansion of the UNCITRAL Model Law on ECom has been proposed, which could encompass a number of electronic contracting law issues, drawing on provisions of the new UETA, the stand-alone law that may replace draft UCC 2B, various provisions that have been proposed for revisions of other UCC Articles, as well as provisions of newer codes in other countries that support ECom.

Electronic transfer of rights to tangible goods:
Transfers of rights by computer while goods are in transit, warehoused or otherwise available today occurs largely within closed or limited access network systems and within narrowly defined sectors. It has been proposed that a wide area of trade in goods could take place if supported by an appropriate international framework for electronic bills of lading, title documents or security interest transfers. Such a system could build on the EU's Bolero experience, Canadian electronic registries, the 1991 UN convention on transport terminals, etc.

Electronic transfer of intangible rights:
Electronic letters of credit, standbys, bank guarantees and other documents may need new international understandings to assure transferability/enforceability of rights by computer. A related topic might cover electronic money, such as Mondex, E-cash, etc., taking into account the resolution of computer and systems issues in the operation of electronic funds transfer (EFT) systems.

Electronic clearance and settlement between regulated and unregulated markets in various countries could also be considered as a separate topic in this category, drawing on experience under the new UCC Article 8, as well as electronic market systems online in several countries.

Standard terms for electronic commerce:
Differing terms and usages in various jurisdictions have created problems in efforts to align new rules or practice standards. Work is underway on ECom terminology at organizations such as the ICC, along the lines of INCOTERMS (proposed "E-Terms", Guidec, etc.); at ANSI and the UNECE's work on standardized EDI message sets; and through newer private sector bodies such as the Internet Law and Policy Forum (ILPF). Some have suggested that broadening those efforts and adding other fora where appropriate may move up time schedules for implementation.

Rights in electronic data and software:
Building on the recent success at the World Intellectual Property Organization (WIPO) which revised certain international copyright standards to take into account electronic data and rights, it has been suggested that further work be sought on rights in data, software licensing and electronic contracting that are currently under consideration for the proposed new Uniform state law that will replace draft UCC Article 2B. Will completion of work by NCCUSL this summer move this topic up on the feasibility scale?

Jurisdiction and applicable law:
Many issues have arisen as well as a growing body of jurisprudence in the U.S. and some other countries over the last two years, but few internationally recognized answers exist when computer messaging and party interactions take place across territorial borders. Suggestions grow for the need for consensus on legal ground rules, and preliminary work is or will be underway at ILPF, the Hague Conference, possibly the OAS and UNCITRAL, the ABA's Cyberspace Law committee and Science & Technolgy section, as well as other bodies.

Within what limits should we support any or all of these efforts, or should we seek to expand the venues? Are current trends toward party autonomy and non-nexus choice of law appropriate? Should economic and transactional results be the litmus test, as they are in current negotiations on commercial law treaty regimes? There may need to be different jurisdictional and applicable law pointers for specific commercial and trade sectors, personal and consumer rights enforcement, regulatory or other governmental oversight functions, etc.

Virtual magistrates and on-line dispute settlement systems:
While various proposals for on-line methods of dispute resolution have been advanced, none have so far gained wide usage. It has been suggested that, in the absence of domestic and cross-border agreements as to enforceability, procedural standards, and possibly party-based jurisdiction, progress may continue to be slow in this area, which could become an important factor in extensions of internet and on-line commercial systems. Application of existing conventions, regulations or court decisions regarding arbitration, consumer rights, or related areas of the law are largely uncertain. Might promotion of work on this topic advance the likelihood of some resolution early in the 21st century?

Omnibus protocol to amend existing multilateral and bilateral treaty regimes: A number of treaty and convention regimes negotiated in prior years did not contemplate electronic communications or computer technologies, and their application may be problematic unless agreed understandings of existing terms or amendments to various provisions are entered into. It has been suggested that we encourage one or more international bodies to examine existing treaties, and prepare omnibus protocols. States that ratify or adopt such protocols would change their treaty relations with other states that have so acted.

General comments:

International developments on the electronic commerce (Ecom) front are at a crossroads, and raise problems which may blur the line between public and private law. The economics of and globalization of commerce and telecommunications, and the opening up of ECom trade and services between countries and distant parties previously limited in their ability to engage in direct commerce, are pushing the need for new legal standards and new concepts of jurisdiction. The concept of physical "territory" as the basis either for regulation or application of law is itself proving to be difficult to apply in some cases. Existing "direct effects" theories for extraterritorial application of national laws may also no longer work.

In recent years, public law initiatives in this field have rested on expansion of trade, including liberalization of trade in services; deregulation of telecommunications; U.S. proposed restraints on taxation of cross-border internet commerce, as well as avoidance of over-regulation, to allow market forces to determine future commercial and technological patterns; and benign acceptance up to this point of cross-border company operations, such as credit card systems, without agreement as to underlying territorial legal differences. Gaps, at least for now, have however grown between the EU and the US, on the intersection of electronic commerce and data rights, consumer protection, security standards, message authentication, cryptology export, and national security and law enforcement. These gaps are generating standoffs in international bodies such as the OECD, making consensus on common standards difficult. In turn, if these gaps remain, substantial progress on ECom at organizations such as the WTO and UNCITRAL may prove difficult.

Multilateral negotiations on private law unification, for example, produced significant progress at UNCITRAL on international electronic funds transfers in 1992 and the now widely used UN Model Law on Electronic Commerce in 1996. As the unresolved problems in the public law arena however now begin to merge with private law issues, progress on the private law front has bogged down, as has been seen at the OECD and UNCITRAL with regard to work on electronic and digital signature systems.

As with the OECD, the biggest divide at UNCITRAL is between the "free market" states, including the U.S., who seek laws that leave wide room for market forces to drive commerce in a computer age, versus some EU, Asian and other states, who seek to substantially regulate this new commercial arena. Efforts to promote regulation in turn are often premised on acceptance of a particular technology, a development that the U.S. also opposes.

All of the above test the limits of private law unification in newly developing electronic practices. Older paradigms, such as sales of goods involved in the 1980 UN "Vienna" Convention (CISG), the negotiation of the 1995 UN Convention on independent guarantees and standby letters of credit, and others sought to harmonize existing legal standards and established commercial practices. To facilitate the coming age of computer commerce, new standards and new default principals of commercial law may at times be needed many years -- maybe decades -- before the older paradigm could produce them.

At the same time, the effort to anticipate the market and its legal needs has its own hazards, such as that experienced in efforts to find consensus on electronic signature and message authentication systems. Given the laws of unintended consequences, untimely development of rules can restrict market development and work against new technological applications. It also appears unlikely for most areas of ECom that there will be the alternative of "instant customary law", in which new technology applications have produced consensus around standards without delay, such as has occurred for some aspects of international space law. The path forward therefore may require a new vision.

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