International Identity Management Law and Policy Meeting

January 14, 2016

OIX OPEN IDENTITY EXCHANGE

AMERICAN BAR ASSOCIATION

Identity Management Legal Task Force

THE WORLD BANK
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Basic Premise

- A lot is happening on the IdM legal & legislative front!!
  - "The train has left the station!"

- These developments will have a significant impact on all participants in the identity ecosystem
  - Important to monitor
  - Important to provide input

- <u>Goal</u> -- Seek your input and ideas regarding the direction that domestic and international IdM legislative efforts should take

Introductory Topics

- Current Legal Framework Governing IdM Systems
- Recent Legal Developments
- Upcoming Legal Initiatives
- Possible Approaches to New Legislation

Current Legal Framework Governing Identity Systems Today

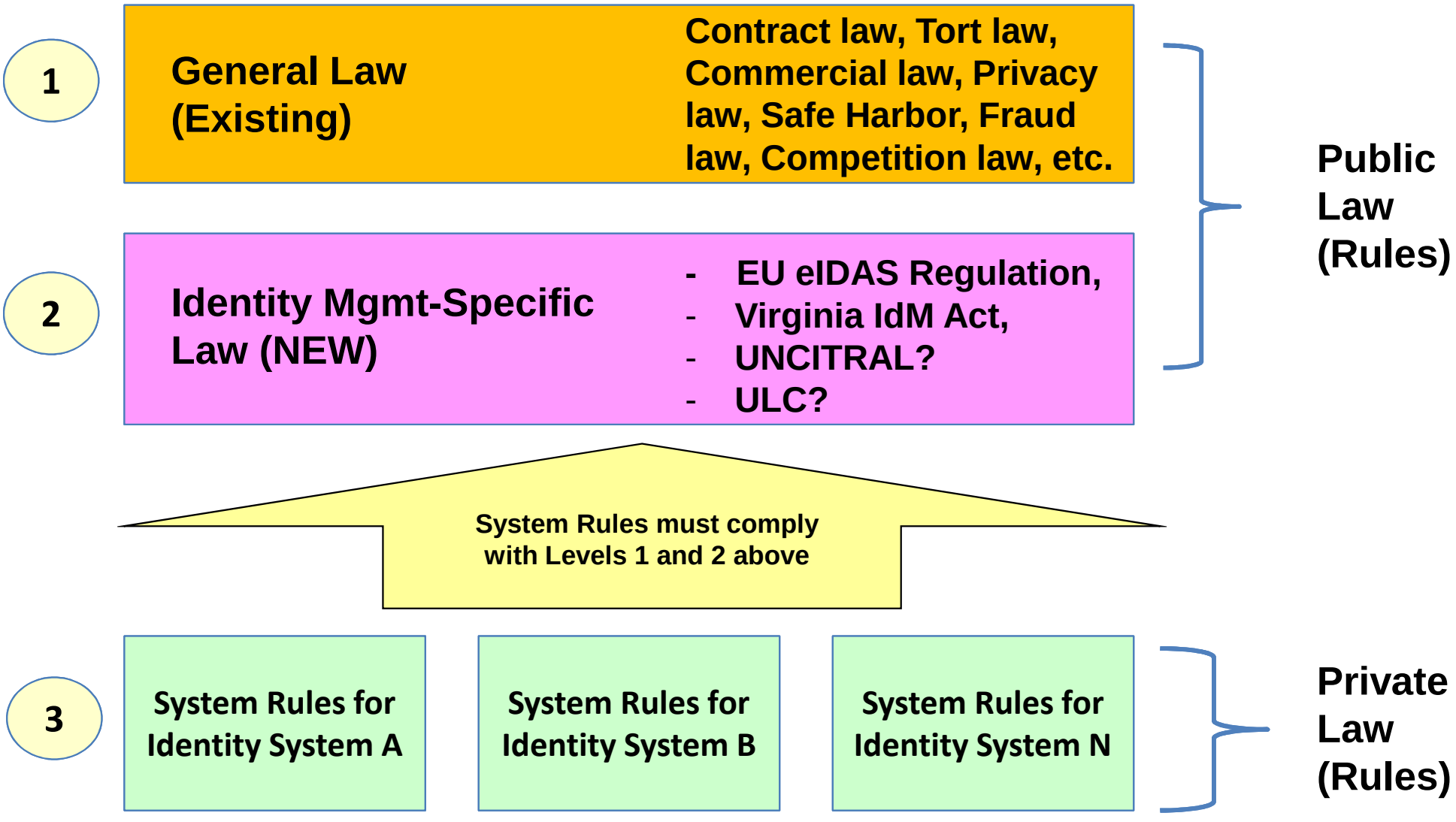
Rules, Rules, Rules -- It's All About Rules

- All federated (multiparty) identity systems **require business, technical, and legal rules**
  - To make the system "operationally functional"
    - i.e., so that it works properly
  - To make the system "trustworthy"
    - i.e., so that people will use and rely on it
  - To make the system "legally functional"
    - i.e., so that rights and obligations are defined and enforceable
- Analogous examples –
  - Credit card systems (e.g., Visa, MasterCard, Amex, Discover)
  - Fund transfer systems (e.g., SWIFT, ACH)
- Legal rules make the business and technical rules enforceable

Where Do the Legal Rules Come From? -- Three Basic Levels of IdM Legal Rules

1. General law (public law)
   - Existing statutes, regulation, and case law
   - **Not designed to address identity issues, but will often apply**
   - E.g., contract law, tort law, privacy law, EU Data Protection Directive, EU-U.S. Safe Harbor (now invalid), commercial law, fraud law, family law, competition law, etc.
2. Identity Management-specific law (public law)
   - New statutes and/or regulations
   - **Written specifically to address online identity system issues**
   - E.g., EU eIDAS Regulation, Virginia Electronic Identity Management Act
3. Identity System rules (private law)
   - **Often called trust frameworks**, **scheme rules, or operating rules**
   - Often incorporate technical standards, business rules, best practices, etc.
   - Typically enforced by contract

Identity System Law:
Three Levels of Rules Can Govern



Identity System Law:
Three Levels of Rules Can Govern

1

General Law (Existing)

Contract law, Tort law, Commercial law, Privacy law, Safe Harbor, Fraud law, Competition law, etc.

2

Identity Mgmt-Specific Law (NEW)

- EU eIDAS Regulation,
- Virginia IdM Act,
- UNCITRAL?
- ULC?

Public Law (Rules)

System Rules must comply with Levels 1 and 2 above

3

System Rules for Identity System A

System Rules for Identity System B

System Rules for Identity System N

Private Law (Rules)

e.g., Connect.gov; GOV.UK Verify, SAFE-BioPharma; TSCP; IdenTrust; InCommon; IDEF Baseline Functional Requirements; IdV Standards ; LOA Standards

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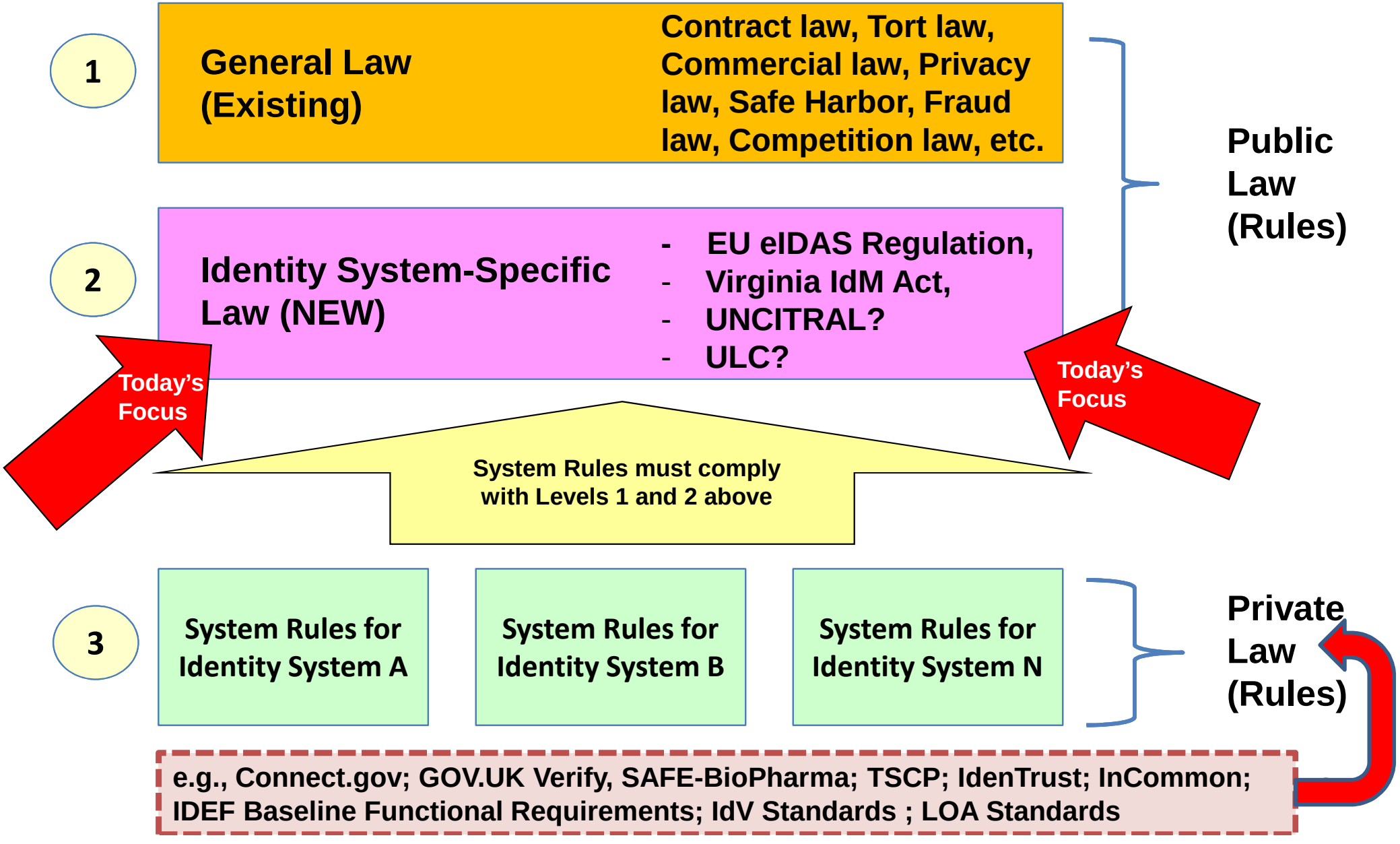
Three Levels of Rules Can Govern



Key Recent Legal Developments
(at Level 2)

Level 2 – Identity System-Specific Law (1)

EU – eIDAS Regulation (July 2014)

- Adopted July 16, 2014; applies to all EU member states
- Applies to public sector only
- The Regulation addresses --
  - Levels of Assurance standards
  - Mutual recognition of identity credentials in cross-border transactions
  - Duty to notify of breach
  - IdP liability
  - Privacy
  - Interoperability framework

European Commission

EU – eIDAS Regulation – Levels of Assurance

- Defines three levels of assurance (LOA)
  - **Low** – a limited degree of confidence in the asserted identity
  - **Substantial** – a substantial degree of confidence in the identity
  - **High** – a higher degree of confidence in the asserted identity than LOA substantial
- Appears to generally correspond to NIST levels 2, 3, and 4

EU – eIDAS Regulation
-- Levels of Assurance

- September 8, 2015 **Implementing Act** specifies minimum technical specifications and procedures for LOAs in following areas –
  - Enrollment
    - Application and registration
    - Identity proofing and verification
  - Credential management
    - Credential characteristics and design
    - Credential issuance, delivery & activation
    - Credential suspension, revocation, and reactivation
    - Credential renewal & replacement
  - Authentication
  - Management and organization
    - Published notices and user information
    - Data security management
    - Record keeping
    - Facilities and staff
    - Technical controls
    - Compliance and audit

EU – eIDAS Regulation – Mutual Recognition

- Applies to cross-border online public sector identity transactions
- Requires mutual recognition of identity credentials in cross border public sector transactions
- **If** a public sector body in one EU member state requires identity credentials of LOA "substantial" or "high" (3 or 4) for online access to a service provided by that public sector body -
  - **Then**, it <u>must accept</u> identity credentials at an equivalent or higher LOA issued in another member state under an eID scheme included on a <u>list published by the EU</u> Commission

EU – eIDAS Regulation – Qualification for Mutual Recognition

- Member state may “notify” the Commission of an identification scheme (i.e., get on the Commission’s approved list) where –
  - Credentials are issued by the notifying state or by private sector party “recognized” by the state
  - Credentials can be used to access at least one public sector service in the notifying member state;
  - The ID scheme and credentials meet LOA requirements of the implementing act
  - The member state ensures that identifying data uniquely representing a person is attributed to that person in accordance with the implementing act (identification)
  - The party issuing the credential ensures that the credential is attributed to the person so identified in accordance with the implementing act (credential issuance)
  - The member state ensures availability of authentication online so that RPs can confirm the credential data

EU – eIDAS Regulation – Security Breach

- If an identity scheme or authentication capability is breached or compromised member state must –
  - Notify EU Commission and other member states, and
  - Suspend or revoke authentication or compromised parts

EU – eIDAS Regulation – Liability

- Member state is liable for -
  - Failure to ensure that attribute data uniquely representing a person is attributed to that person in accordance with specifications in implementing acts
  - Failure to ensure availability of online authentication
- Party issuing credential is liable for -
  - Failure to ensure that the credential is attributed to proper person in accordance with specifications in implementing acts
- Party operating the authentication procedure is liable for -
  - Failure to ensure the correct operation of the authentication procedure
- All rules cover damages to any person, whether caused intentionally or negligently

EU – eIDAS Regulation – Privacy

- Must comply with the EU Data Protection Directive
- No other special privacy requirements

EU – eIDAS Regulation – Interoperability Framework

- Established by Implementing Act on September 8, 2015
- Criteria -
  - Technology neutral
  - Follow EU and international standards
  - Facilitate privacy by design
  - Ensure compliance with EU Data Protection Directive
- Framework addresses –
  - Minimum technical requirements for assurance levels
  - Mapping of national assurance levels to framework
  - Minimum technical requirements for interoperability
  - Minimum requirements for set of data uniquely representing a person
  - Rules of procedure
  - Security standards
  - Dispute resolution

Level 2 – Identity System-Specific Law (2)

VA – Electronic Identity Management Act

- Enacted March 2015; Effective July 1, 2015
- Applies to public and private sector
- The Act addresses --
  - IdM standards,
  - IdP liability,
  - Trustmarks and IdP warranties, and
  - Use of credentials to comply with security requirements

Commonwealth of Virginia

VA – Electronic Identity Management Act – IdM Standards

- Establishes 7-member VA **Identity Management Standards Advisory Council**
  - "to advise the Secretary of Technology on the adoption of identity management standards"
  - Seven members; 2 government, plus 5 representatives of the business community
- Secretary of Technology shall approve VA **Identity Management Standards** in three areas –
  - Technical standards regarding verification and authentication of identity;
  - Minimum specifications that should be included in an identity trust framework; and
  - Standards concerning reliance by third parties on identity credentials

VA – Electronic Identity Management Act – Identity Provider (IdP) Liability

- IdP or identity trust framework operator <u>SHALL be liable</u> –
  - For issuance of an identity credential or trustmark that is NOT in compliance with the VA identity management standards
  - For noncompliance with any contract or identity trust framework
- IdP or identity trust framework operator <u>SHALL NOT be liable</u> –
  - For issuance of an identity credential or trustmark that IS in compliance with -
    - the VA identity management standards, and
    - any applicable contract or identity trust framework, **as long as there is no gross negligence or willful misconduct** for misuse of any identity credential by any person

VA – Electronic Identity Management Act – Trustmarks and IdP Warranties

- Trustmark –
  - Machine-readable seal or logo
  - Provided by an identity trust framework operator to an IdP
  - To signify that IdP complies with the requirements of an identity trust framework
- Use of a trustmark is a warranty by IdP that is has complied with the rules of the identity trust framework.
- Any other implied warranties are excluded.

VA – Electronic Identity Management Act – Comply with Security Requirements

- Use of identity credentials satisfies any requirement for a "commercially reasonable security or attribution procedure" in --
  - UCC Article 4A (governing EFT transactions)
  - UETA (governing electronic transactions)
  - UCITA (governing computer information transactions)

- **Rule applies only if** the credential complies with:
  - The VA identity management standards
  - The terms of any applicable contract, and
  - The applicable identity trust framework

Other – Non-Binding

IDESG – IDEF Baseline Functional Requirements

- Released October 15, 2015
- **Not a law or regulation**
- The Requirements provide normative rules for implementing the four NSTIC Principles –
  - Interoperability
  - Privacy
  - Security
  - Usability
- Could be voluntarily incorporated as private law (contract) at Level 3

Other –

UN/CEFACT - Transboundary Recommendation

- **UN/CEFACT** = United Nations Centre for Trade Facilitation and Electronic Business
  - Part of the United Nations Economic Commission for Europe (UNECE)
  - Serves as the focal point for trade facilitation recommendations and electronic business standards, covering both commercial and government business processes that can foster growth in international trade and related services
- Draft "**Recommendation for ensuring legally significant trusted trans-boundary electronic interaction**"
- Seeks to establish an **International Coordination Council** to provide international regulation of a **Common Trust Infrastructure** composed of nationally regulated trust services (presumably including IdM systems) to help ensure the legal significance of transboundary electronic interaction

Key Upcoming Legal Initiatives

(Why We're Here Today)

UNCITRAL

- **UNCITRAL = United Nations Commission on International Trade Law**
- Established by the UN General Assembly in 1966
  - 60 member states elected by the UN General Assembly
  - All other member states invited to participate
- Core legal body of the United Nations system in the field of international trade law – Specializes in commercial law reform worldwide
- Focus – modernization and harmonization of rules on international business
- Develops – International Conventions (treaties); Model laws (for domestic enactment); Legislative guides; Contractual rules; and Legal guides

UNCITRAL – Project to Develop Legal Framework for IdM (1)

- July 2015 Proposal that UNCITRAL undertake a project to address digital identity management
- Submitted by
  - Austria, Belgium, France, Italy, and Poland
  - American Bar Association Identity Management Legal Task Force
- Goal – to provide "basic legal framework covering identity management transactions, including appropriate provisions designed to facilitate international cross-border interoperability"
- UNCITRAL agreed that the project could move forward

UNCITRAL – Project to Develop Legal Framework for IdM (2)

- Proposal identified possible topics to address, including:
  - Legal barriers
  - Trustworthiness
  - Data security
  - Liability allocation
  - Legal effect of identity authentication
  - Cross border issues
- Potential colloquium in Spring 2016
- Formal start probably Fall 2016

Uniform Law Commission

- The Uniform Law Commission (ULC) is a non-profit unincorporated association, comprised of state commissions on uniform laws from each of the 50 states, plus DC, PR, and VI.
- Established in 1892, the ULC provides U.S. states with non-partisan, well-drafted uniform legislation that brings clarity and stability to critical areas of state statutory law.
- Best known for development of --
  - Uniform Commercial Code (UCC), now adopted in all 50 states
  - Uniform Electronic Transactions Act (UETA), now adopted in 47 states
- Drafting committee meetings open to the public

Uniform Law Commission – Project to Develop U.S. Domestic Law Governing IdM

- Proposal for a Study Committee for a Uniform Act on Identity Management in Electronic Commerce
  - Submitted Summer 2015
- Appointment of a Study Committee is the first step toward establishing a committee to draft a Uniform Act on Identity Management for adoption by the 50 U.S. States
- Currently under consideration
  - Decision expected in early 2016

The Challenge Going Forward: Possible Approaches to New Legislation

What Is the Goal?

Potential IdM Legislative Goals Include . . .

- Encourage and incentivize deployment of identity systems
- Facilitate both commercial and government use of credentials
- Fix problems with existing law
  - Particularly issues that private system rules cannot resolve
- Promote trust in identity systems
- Facilitate legal recognition of identity and authentication
- Facilitate identity system and credential interoperability
- Harmonize international legal approaches
- Regulate identity systems
- Enforce use of uniform standards
- Etc.

Some Potential Principles for Identity-Specific Law

- Technology neutrality
  - No technology-specific requirements
  - Parties use any available approach to achieve requirements
- Identity system neutrality
  - Accommodate many different identity systems models
  - Recognize that there is no one-size-fits-all approach
- Adaptability
  - Accommodate future changes in technology, standards, and business models
- Party autonomy
  - Allow variation by contract
  - e.g., system rules, trust frameworks, etc.

Possible Issues That Identity-Specific Law Might Address

- Legal barriers, ambiguities, and uncertainties in existing public law
  - Liability
  - Reliance
  - Third party rights
  - Privacy of personal data
  - Legal effect of authenticated identity
  - Transfer of personal information
- Trustworthiness
  - Levels of assurance
  - Data security
  - Certification, audits, etc.
  - Presumptions
- Interoperability of identity credentials
  - Cross-system
  - Cross-border (legal interoperability)

IdM Legislation - Threat or Opportunity?

- Will it enable and facilitate – or inhibit – development of a sustainable and interoperable identity ecosystem?
- How will it affect marketplace development by the private sector?
- Do we need to encourage experimentation and innovation, or regulate to ensure uniformity and curb abuses?
- How far should Level 2 identity-specific law go?
  - What issues should it address?
  - Which issues should be left to the parties to contractually define in Level 3 System Rules?
  - How prescriptive should it be?

Closing Thoughts

- Pay attention to what is happening
- Participate in the process; provide input
- It will affect your organization

Questions?

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