Making Sense of the Developing IdM Legal Turmoil:

-- The Safe Harbor Ruling
-- Recent EU and US IdM Legislation
-- Upcoming New Laws That May Change Everything

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Basic Premise

- A lot is happening on the IdM legal front!!
- These developments will have a significant impact on participants in the identity ecosystem
  - Important to monitor
  - Important to provide input
- This session will provide an overview of legal IdM developments and try to put them in perspective

Agenda

- Legal Framework Governing Identity Systems Today
- Key Recent Legal Developments (decisions & legislation)
- Key Upcoming Legal Initiatives
- Possible Approaches to New Legislation

Overview:
Legal Framework Governing Identity Systems Today

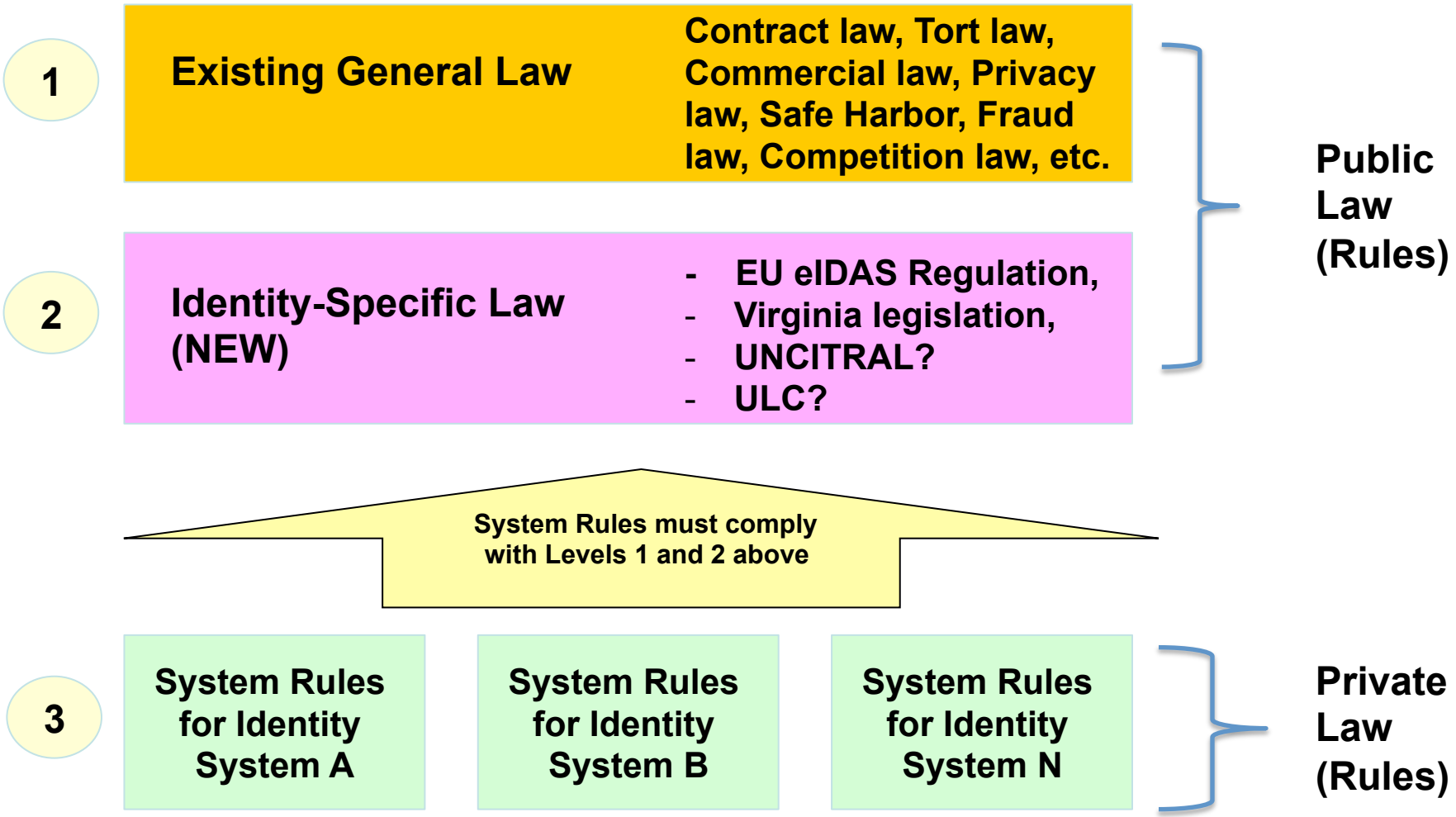
Rules, Rules, Rules -- It's All About Rules

- 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"
  - To make the system "legally functional"
- All federated identity systems are **subject to legal rules – some good, some not so good**
  - Tort law (e.g., fraud and negligence)
  - Privacy law (e.g., EU Data Protection Directive)
  - Liability rules
  - Consumer protection law
  - Antitrust law
  - Etc.

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

- 1. Public law – Existing law
  - Existing statutes, regulation, and case law
  - **Not written to address identity issues**
  - E.g., contract law, tort law, privacy law, EU Data Protection Directive, EU-U.S. Safe Harbor, commercial law, personal injury law, family law, competition law, etc.
- 2. Public law – New identity-specific law
  - New statutes and/or regulations
  - **Written specifically to address online identity management**
  - E.g., EU eIDAS Regulation, Virginia Electronic Identity Management Act
- 3. Private law – Contracts
  - Often called **system rules, trust frameworks**, or **scheme rules**

Identity System Law: Three Levels of Rules Can Govern



Key Recent Developments

Level 1 - Existing General Law
EU – Safe Harbor Ruling (Oct 6, 2015)

- Oct. 6 -- A setback for IdM?
  - ECJ ruling in Schrems case effectively declares US-EU Safe Harbor invalid
  - "With the fall of the Safe Harbor, it is likely that an entire ecosystem may be collapsing and we are at the dawn of a new era."
- The problem that Safe Harbor originally solved -
  - Transfers of personal data from EU to another country is prohibited unless laws of receiving country provide "adequate protection" for EU personal data (US law does not, so transfer to U.S. generally prohibited)
  - Options for lawful transfers to the U.S. included –
    - Safe Harbor, Model Contracts, Binding Corporate Rules, and Informed Consent (where allowable)
  - Now all options (except consent) may be taken off the table?

And It Gets Worse

- Oct 15 -- the EU Article 29 Working Party imposed a January 31 deadline to commence enforcement
- Oct 19 -- Israel revoked safe harbor authority for data transfers to the U.S.
- Oct 22 -- Switzerland revoked safe harbor authority for data transfers to the U.S.
- Will Argentina, Canada, and Uruguay follow suit?
- DPA Responses --
  - Oct 26 -- German DPAs took position that model contracts and binding corporate rules not viable alternatives
  - Oct 30 – UK Information Commissioner advice: “Don’t panic!”
- Current status -
  - At best, legal uncertainty
  - At worse, prohibition of most transfers

Impact on IdM

- Personal information is at the heart of IdM
- Identity proofing of EU persons by U.S. companies
- Identity transactions involving EU persons and
  - U.S. IdPs
  - U.S. relying parties, or
  - U.S. hubs
- Note – transfers to other countries where privacy laws not deemed adequate by the EU are also problematic

Possible Data Transfer Solutions

- Safe Harbor – Version 2.0
  - Yet to be finalized
  - Oct. 29 - U.S. Commerce Secretary – “A solution is within hand . . We could have an agreement shortly” “The solution . . . is Safe Harbor 2.0, which is totally doable.”
- Model contracts
  - Questionable after Schrems decision
  - Likely not practical for federated IdM in any event
- Binding corporate rules
  - Questionable after Schrems decision
  - Likely not practical for federated IdM in any event
- Informed Consent
  - May be difficult to obtain in enforceable manner
- EU data centers
  - But still a problem for cross-border IdM transactions

Level 2 - Identity-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

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 –
  - Enrolment
    - 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 must accept identity credentials at an equivalent or higher LOA issued in another member state under an eID scheme included on a list published by the EU 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-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 SHALL be liable –
  - 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 SHALL NOT be liable –
  - 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

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 experts meeting in May 2016
- Formal start probably Fall 2016

Uniform Law Commission

Uniform Law Commission
The National Conference of Commissioners on Uniform State Laws

- 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.

How to Achieve the Goal? Possible Approaches Include . . .

- Remove barriers created by existing Level 1 law
- Fix problems with existing Level 1 law
  - E.g., issues that Level 3 private system rules cannot resolve
- Provide gap-fillers (for issues not addressed at Level 3)
- Define requirements for legal recognition of identity and authentication
- Facilitate identity system interoperability
  - Both cross-system and cross-border
- Regulate Level 3 private law system rules
- 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 business

Questions?

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