Crowded Skies for E-Commerce Beyond 2018

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This program will highlight challenges from growing flows of cross-border data, including GPS systems and AI applications. The absence of clear limits for cross-border liability coupled with the entry of more international bodies into this zone presents legal and operational risks for firms engaged in e-commerce transactions and applications.
CROWDED SKIES AHEAD FOR GLOBAL E-COMMERCE

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E-Commerce worldwide increasingly involves satellite generated data and applications. Interconnected markets and fluid jurisdictional rules as well as global trends will lead increasingly to offshore law and regulations impacting North American interests and competitiveness.

The relatively insular world of e-commerce law and practice as many of us in Cyberspace know it may change as we approach 2020, altering risks in contract, tort, and liability exposure, with impacts on e-commerce financing and competitiveness in markets abroad.

Moving beyond the occasional regulatory confrontations between EU bodies and US and Canadian interests, e-commerce law and transactional practices may be impacted by collective law or standards from other regions in ways practitioners and the academy have not previously had to take into account. Current US practices involving “GPS” are used here as an example to illustrate coming cross-border issues and risks.

Disclaimer - these remarks are solely the views of the presenter and do necessarily reflect viewpoints of the State Department or any agency of the US Government.

This Outline goes beyond what can be covered in any detail by an initial presentation. It is intended as an overview and checklist in relation to transactional law and changing global trends in this sector.

ONCE UPON A TIME ....

A. Once upon a time commercial applications resulting from satellite generated data was a North American dominated commercial zone
Development of the World Web, ICANN, commercial data applications, Comsat / Intelsat

Role of Satellites, governments and subsequent commercial data development

Post 2000 - the rise of other geo-sectors in outer space orbital usages and non-military related satellite data-based commerce

B. Illustration - National Global Positioning Services ("GPS")

Initially the primary source of commercially accessible satellite generated data was US Govt (primarily military agency) developed satellite location and mapping and non-military telecommunications. USG data framework provided on a no-cost commercial access basis coupled with disclaimers for GPS data signals. US managed airwaves for e-commerce began to slide away from that monopoly in the 2000’s (Comsat / Intelsat, WWW, ICANN, etc)

Initially governments controlled 90% of space-based activity. The rise of commercial satellite operators was largely driven by the private sector, usually with separate intermediary service providers (ISP’s) which manage and revise data for “ground-based” commercial applications (like GPS)

Assumptions - USG assertions of no liability exposure for federal agencies either in contract or tort (but see infra refs to the Outer Space treaties). Satellite operators / service providers have as yet largely untested limited exposure under cascade system of disclaimers. Current absence of significant precedent under UCC or state contract or tort law, and minimal published court law (non-disclosure arbitration awards have been more common), means risk assessments, commercial finance and insurance rates are so far speculative rather than reflecting precedent drawn from commercial usage.

Results - at present limited commercial predictability of liability exposures based on above factors (also reflected in reinsurance markets). The future will likely involve conflicts of competing signal systems and cases involving inconsistent data applied in a given jurisdiction, plus cases involving signal interference either on the ground or arguably beyond jurisdictional limits (i.e. in space).

[Note: this topic does not cover liability exposures or law applicable to satellite or satellite operations financing]

C. Post 2000 GPS world - Expansion of competing “GPS” type national services coupled with liability risks from competing legal systems, inconsistent or conflicting data applications, signal interference, and limited commercial law predictability.
GPS Satellite Systems Around the World (more to come)

- United States (GPS) The United States was the first country to introduce satellite technology with the global positioning system (GPS); Govt operated
- Russia (GLONASS)
- China (BeiDou Navigation Satellite System)
- European Union (Galileo) [non-EU countries can be covered by agreement]
- India (IRNSS)
  - Japan (QZSS)
  (Others planned - mideast, subsaharan africa)

D. **Liability exposure constraints** on development, limited commercial law predictability

Rome meetings 2005 et seq on regional EU and/or global initiatives on liability containment as a key factor in financing space based GPS facilitated commerce (progress remains inconclusive).


Regional or multilateral approaches? (cf. domestic and multilateral containment schemes for nuclear energy risk exposures - possible path for 2020 and beyond?)
Will UN outer space treaties retain relevance on these issues?

Post 2015 - AI and real time data analytics - possible smoothing out some of the above commercial and law risks? Or an added risk factor with even less predictability?

E. **Who’s out there affecting this? International organization involvement**

Cyberspacers and others should at least minimally track (and engage where needed) International organization activities in e-commerce and space law which North American or NAFTA interests. Reality check on the “US as a remote Island” paradigm.
INTERNATIONAL TELECOMMUNICATIONS UNION (ITU) (Geneva)

Regulation of and allocation of permissible orbital positions, radio frequencies, signal non-interference etc; issues about allocation methodology. Controversial issues over suggested internet traffic rules & digital divide; Recent extension into prototype “on the ground” commercial law rules;

[UNCITRAL (UN COMMISSION ON INTERNATIONAL TRADE LAW) ONGOING
IdM (Identity management) - ITU draft rules on the table.
Uncitral clearly affects our interests but not these space based data issues directly.

UNITED NATIONS COMMISSION ON PEACEFUL USES OF OUTER SPACE (UNCOPUOS) (Vienna)

Outer Space Treaty of 1967, plus the Liability Convention = countries party to the treaty absorb certain liabilities (e.g. that of the launching state(s)) and effects on US transacting parties. Rejection by most states of the “Moon treaty” set practical political limits on the reach of such treaties. Limited private sector coverage. See Unidroit below.

Possible harbinger of the future?

UNIDROIT (Rome) - Satellite secured finance law 2012 protocol to the Cape Town Convention (based on UCC Article 9 secured finance). First multilateral treaty to provide basis for secured financing rights in outer space. Private law cf. to public law treaty format. Path of the future? While over 60 countries are party to the Cape Town Convention and the aircraft protocol, few have yet joined the satellite protocol.

Practice tip: the first two treaty groups above (ITU and UNCOPUOS) are “public international law” bodies - and enforcement and disputes involving their treaties lie between government parties (there are some exceptions like the “Investor-State treaties”). Unidroit and Uncitral are “international private law” bodies - like the well known UN Vienna convention on international sales of goods (CISG), enforcement is intended to be directly between transacting parties in any manner otherwise available without special leave of any government (i.e. like common commercial disputes).

“No free lunch” doctrine?

Recent emphasis by US Exec Branch on bilateralism vs. multilateralism in other areas of trade and commerce — potential effect upon cross-border e-commerce law? US at the table or absent from it? (Minimal participation counts as absent in terms of results)
ABA? Role of NGOs varies depending on the organization. NGOs are much more enabled to be active in private law bodies.

F. Post 2000 non-GPS potential collective action effect on North American cross-border interests

Examples of other cross-border commerce “systems” not dependent on satellite generated data but which may when and if activated or enacted though collective actions of other countries affect North American interests include:

UNESCAP (UN Economic Commission for Asia-Pacific and UNECE (Economic Commission for Europe) developing treaty systems to bind participating states to structured ID, trust and other services which would potentially disadvantage non-member states.

UNCITRAL (UN Commission on International Trade Law) draft project on IdM and Trust services rules

World Bank, WCO (World Customs Organization) and others: SW (“Single Window”) import-export managed electronic channels between participating countries

ITU (International Telecom Union) proposed model e-commerce related provisions

G. NEXT STEPS? Sit back and watch the show? Prepare practice checklists?

Recommend ABA follow-up through Cyberspace and other Sections?
(Review ABA resolutions e.g. ABA R&R on e-commerce provisions for trade and related agreements; consider upgrading level of ABA presence as NGO?)

Harmonization of existing laws to fend off widely disparate legal effects, so commercial predictability improved? OR promote strictly result-based commercial cyberspace laws?

CF. CISG (“Vienna” UN sales of goods treaty effecting harmonization between common and civil law) and Unidroit Cape Town treaty and protocols (tracking US UCC Article 9 on secured finance)

Recommend ULC (NCCUSL) consideration of the above?

( Uncitral UN 1996 E-commerce model law, followed by UETA (Uniform Electronic Transaction Act) and the subsequent federal E-Sign Act, the latter in turn deferring to uniform state law)