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Twenty-ninth session

SUMMARY RECORD OF THE 586th MEETING

Held at Headquarters, New York,
on Wednesday, 29 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

1. Mr. HERRMANN (Secretary of the Commission) suggested that, pursuant to the discussion at previous meetings, the Commission might wish to make a number of drafting changes to the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423). He therefore proposed to read out the changes as formulated by the secretariat.

2. Paragraph 19 would read: "Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings." The title of section 10 would read: "Practical details concerning written submissions and evidence (e.g., method of submission, copies, numbering, references)", and paragraph 43 would read: "Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- whether the submissions will be made as paper documents or by electronic means, or both (see above, paras. 36-38);

- in case of paper-based submissions, the number of copies in which each document is to be submitted;

- a system for numbering documents and items of evidence, and a method for marking them, including by tabs;

- form for reference to documents (e.g., by the heading and the number assigned to the document or its date);

- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;

- when translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as original texts or in separate volumes".

3. Mr. ABASCAL (Mexico) said that the words "should not be sent by telefax" in the fifth line of paragraph 36 should be replaced with some less negative wording.

4. Mr. HERRMANN (Secretary of the Commission) suggested that the second sentence of that paragraph could be reworded to read: "Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain

telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile was transmitted by electronic means."

5. Mr. GRIFFITH (Australia) suggested that the heading of section 10 should be shortened to "Practical details concerning written submissions and evidence". In addition, paragraph 43 contained too much detail, and could be replaced by the sentence "Directions should be given as to the form and format of submissions, documents and evidence." However, if the Commission preferred to retain paragraph 43 in its current form, the last subparagraph, which dealt with translations, should be deleted, since that issue had been sufficiently covered in paragraph 19.

6. Mr. CHOUKRI (Observer for Morocco) supported the proposal of the representative of Australia regarding the heading of section 10.

7. Mr. HOLTZMANN (United States of America) recalled that an effort had been made to ensure that all section headings were sufficiently explicit, so that the list of matters following paragraph 19 could stand alone. His delegation therefore opposed changing the heading of section 10. Also, his delegation did not support the changes to paragraph 43 proposed by the representative of Australia; they would result in the deletion of some very useful information.

8. Mr. GRIFFITH (Australia) said that his delegation accepted the arguments put forward by the representative of the United States of America.

9. Mr. LEBEDEV (Russian Federation), supported by Mr. FERRARI (Italy) and Mr. TELL (France), said that the new language produced by the secretariat should be retained in its current form.

10. Mr. HERRMANN (Secretary of the Commission) suggested that the Commission might wish to rename the document "UNCITRAL Notes on Organizing Arbitral Proceedings".

11. The CHAIRMAN said she would take it that the Commission wished to adopt the document as amended.

12. It was so decided.

13. Mr. LEBEDEV (Russian Federation) said that the Commission had completed a very important document which would prove most useful in the field of international commercial arbitration. He requested the secretariat to explain how it would be disseminated, particularly in business circles.

14. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not have any definite plans for publication because in the current financial situation there was no certainty as to what resources would be available. However, the secretariat would make every effort to disseminate the text as widely as possible and to determine which distribution channels should be used. As soon as the document was finalized internally it would be put on the home page, which was another way of making it widely available. If possible, the Notes would be issued in the form of a booklet, possibly with the list of issues as a separate insert. There might be some advantage in having the booklet

printed in Vienna. It would be helpful if, in its formal decision adopting the Notes, the Commission requested the Secretary-General to ensure the widest possible dissemination of the Notes; that decision would then be included in the Commission's report.

The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (A/50/17; A/CN.9/421 and 426)

15. Mr. SORIEUL (International Trade Law Branch), introducing the draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426), recalled that, at its previous session, the Commission had adopted article 1 and articles 3 to 11, although some questions remained with regard to article 11. The title of the draft Guide had not been finalized, and that reflected uncertainties about the exact sphere of application of the Model Law.

16. In article 2, one of the questions to be resolved, which actually determined the sphere of application of the Model Law, was the definition of the term "data message". The Commission would have to determine whether that notion included not only automatic exchanges of data from computer to computer but also electronic mail, telegrams, telex and fax. There had been a detailed discussion at the previous session as to the types of fax uses the concept of a "data message" should cover. The Working Group had agreed that automated fax uses should be covered but had not been very specific about fax uses in general. Another question that arose was whether the concept covered writing.

17. There had been agreement on much of article 1, but it remained to be determined whether the sphere of application should cover domestic and international uses of modern means of communication or should be limited to the commercial area. The footnote to article 1 was based on the broad definition of the term "commercial" contained in the UNCITRAL Model Law on International Commercial Arbitration. Although the Model Law was limited to the commercial field, there were elements which made it possible to extract general rules applicable to all uses of modern means of communication in the commercial field and also in civil law and possibly administrative law.

18. Chapter II contained central provisions of the Model Law and sought to determine the functional equivalent of concepts such as "writing", "signature" and "original", as well as the legal validity of data messages. Those provisions would replace binding provisions which already existed in national laws concerning the form of certain legal transactions. Articles 5 to 7 were concentric articles, moving from simpler to more complex, and from less binding to more binding. Article 5 was not concerned with the authenticity of the content of a writing or with identification of its author but aimed to define a functional equivalent of a piece of paper. In article 6, one found rules on the functional equivalent of a signature; the functional equivalent of a signed writing was therefore a writing or electronic message that met the conditions of articles 5 and 6. Article 7 laid down more autonomous rules on the presentation of the content of the document between the time of its creation and the time it acquired legal force. Articles 8 and 9 were also binding in nature.

19. Chapter III contained provisions which were not binding and were of the type often found in contracts establishing the links between EDI users and communications agents. Article 10, a general provision, established the principle of party autonomy. Article 11 was concerned with the conditions in which the author of a data message could be legally bound by the content of a document emanating from a computer. The Commission had not been able to reach consensus on paragraph 6, which therefore remained in square brackets. It might be preferable for the Commission to start with articles 12 to 14 at the current session and then revert to the question of the sphere of application, raised in article 2.

20. Before taking up article 2, the Commission might wish to consider the text of draft article "x", annexed to the report of the Working Group on Electronic Data Interchange on the work of its thirtieth session (A/CN.9/421). Draft article "x", the text of which had been drawn up in collaboration with the Comité maritime international (CMI), would create the functional equivalent of bills of lading in maritime transport. The text would be added to the draft Model Law as article 15.

21. Article "x" would apply to maritime transport documents, not only negotiable documents but also non-negotiable sea way-bills, so that it would be possible to extend its application to all types of transport documents. The objective of the article was to settle all questions regarding the negotiability and transferability of rights. Article "x" was therefore a specific provision of transport law.

22. The Working Group proposed that draft article "x" should be placed in a separate part - Part II - of the Model Law, so that a division would be made in the text between general and specific provisions. The question then arose as to whether other specific provisions were needed; if so, the Commission could instruct the Working Group to propose provisions in respect of other negotiable documents. However, the Commission would then have to take a position on when the Model Law should be completed. If the text was to be completed at the current session, the Commission would have to decide about possible future additions to the Model Law.

23. The draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (A/CN.9/426), served as an explanatory note to the Model Law and constituted a possible source of law. Once the Commission had completed its review and adoption of the Model Law, it was the intention of the secretariat to finalize the Guide, taking into account the deliberations and decisions of the Commission. It was to be hoped that the Guide would be adopted at the same time as the Model Law so that both texts could be published concurrently. Accordingly, the Commission should provide the secretariat with any modifications to be incorporated into the final version of the Guide.

24. The question of future work on the topic of EDI was covered in chapter IV of the Working Group's report (A/CN.9/421). The Working Group, with the help of CMI, had identified questions which went far beyond the uses of EDI and electronic communications to issues of maritime law. Article "x" was concerned with the functional equivalent of bills of lading but made no mention of other

issues that could affect the rights and obligations of parties to various types of maritime transport contracts. The view had been expressed that the Commission should take up issues of maritime law and formulate more general rules on the rights and obligations of the parties concerned.

25. The Working Group had considered other possible topics for future work in the field of EDI. It had felt that the question of possible standards for digital signatures should not be taken up by the Commission because it was a technical rather than a legal matter. On issues of registries, if there was to be a system of certification and authentication of electronic communications, one of the technical solutions was to ensure uniformity of rights transferred and integrity of information transmitted through a certification authority which would have the status of a third party in relation to the parties concerned. The simplest method was to have a registry which would receive information and register the transfer of rights and would be able to provide information on the holders of registered rights. That issue needed to be considered in more detail in collaboration with the International Institute for the Unification of Private Law (UNIDROIT), which was working on the question of the registration of certain types of mobile equipment.

26. With regard to the question of incorporation by reference, the Working Group had agreed on three conditions to be met when establishing legal norms for the incorporation of reference clauses in data messages. If time permitted, it was recommended that the Commission should discuss, at its current session, the possibility of including in the Model Law a general reference to incorporation by reference.

27. Other areas in which it was recommended that the Commission should conduct future work included a set of rules, or a code of conduct, covering the rights and obligations of information service providers, and a review of existing international conventions. The Working Party on Facilitation of International Trade Procedures of the Economic Commission for Europe (WP.4) was currently reviewing all international conventions applicable to international trade in order to identify those provisions that hindered the use of EDI. The Working Group had encouraged further collaboration between the Commission and WP.4 in that area.

28. Mr. HOLTZMANN (United States of America) said that if the Commission expected to have sufficient time to consider future work as well as major issues in the Guide, then it ought to consider only previously unresolved matters and not seek to reopen the discussion of any other issues on which it had already taken action. Secondly, with regard to the Guide, the secretariat was correct to seek guidance from the Commission on major issues. However, his delegation understood that the Commission would not have sufficient time to do so with great particularity and assumed that it would authorize the secretariat to finalize the Guide in accordance with the Commission's deliberations.

29. Mr. SORIEUL (International Trade Law Branch) said that the final version of articles 1 and 3 to 11 of the draft Model Law had been adopted by the Commission the previous year, at which time it had indicated that priority at its twenty-ninth session should be given to concluding work on the draft Model Law and Guide. In order to achieve that goal, the Commission should consider first and

foremost articles 2, 12 to 14 and article "x", raising as few questions as possible regarding previously discussed matters. However, in order to ensure that the final version of the Model Law and Guide were harmonious, some adjustments of the text, both in wording and in substance, might be necessary.

30. Mr. ABASCAL (Mexico) agreed with the representatives of the United States of America and the secretariat but warned that the rule to refrain from raising previously settled issues should not be interpreted too strictly. It was quite possible that decisions regarding article "x" would affect other provisions that had been adopted earlier, and it was vital that no discrepancies should arise that would be detrimental to the quality of the Model Law.

Article 12

31. Mr. PHUA (Singapore) said that current EDI technology allowed for two forms of acknowledgement of receipt: acknowledgement that was automatically generated without the intervention of the addressee and acknowledgement that required the intervention of the addressee. Article 12 as currently drafted was not entirely clear as to which form of acknowledgement of receipt was contemplated.

32. Mr. SORIEUL (International Trade Law Branch) said that the text of article 12 as currently drafted did not distinguish between the technical forms of acknowledgement of receipt.

33. Mr. CHOUKRI (Observer for Morocco) said that the reference in paragraph 4 to a "reasonable time" was too vague. Either it should be deleted or the Commission should specify the exact amount of time referred to, for example, "within a week" or "within a month's time".

34. Mr. ABASCAL (Mexico), referring to the question raised by the representative of Singapore, said that an automatically generated acknowledgement of receipt might not correspond to the acknowledgement requested by the originator.

35. Mr. MADRID (Spain) said it should be borne in mind that an acknowledgement of receipt was also a data message. The text of paragraph 2 not only raised that issue, as noted by the representative of Mexico, but also resolved it by providing that unless the acknowledgement conformed strictly to the originator's requirements, it could not be deemed valid.

36. Mr. BURMAN (United States of America) endorsed the Mexican representative's comments with regard to article 12, paragraph 2. It might be appropriate to amend the paragraph to read "Where the originator has not requested that the acknowledgement contain particular information, ...".

37. Mr. ABASCAL (Mexico) agreed with the representative of Spain that there might be undesirable consequences for the addressee if the acknowledgement of receipt was not in a particular form. An addressee whose equipment automatically generated an acknowledgement of receipt might believe that he had complied with the originator's request for acknowledgement and take action on that basis, whereas the acknowledgement might be deemed to be invalid. While the United States proposal was of interest, it did not address the issue raised

by the representative of Singapore, since the intention behind paragraph 2 was not to require that the acknowledgement should contain particular information, but that it should be in a particular form.

38. The concept implied by article 12, paragraph 2, was similar to that embodied in the United Nations Convention on Contracts for the International Sale of Goods, whereby specific conduct on the part of the party receiving a contract offer could be construed as constituting acceptance of the offer. The paragraph was also intended to give the addressee the widest possible choice of means of acknowledging receipt of a data message - for instance, by telephone, facsimile, and so on. The problem could best be solved by amending the paragraph to state that, even where the originator had requested that the acknowledgement should be in a particular form, if the addressee's equipment automatically generated a response, that should be deemed to constitute acknowledge of receipt.

39. Mr. ALLEN (United Kingdom) agreed with the representative of Spain that if the originator was not satisfied with an automatic form of acknowledgement, then the solution was to stipulate a particular kind of acknowledgement. He also concurred with the Mexican representative's view that the paragraph should not refer to a particular kind of information.

40. The CHAIRMAN said her understanding of article 12, paragraph 2, was that, where the originator had requested that the acknowledgement should be in a particular form, only an acknowledgement which was in the form requested could be deemed to be valid.

41. Mr. PHUA (Singapore) said that the United States and United Kingdom proposals did not address the concern which he had raised. If the addressee's equipment automatically generated an acknowledgement, then paragraph 2 would not be relevant. Paragraph 4 would, however, be relevant, because the originator would then have to rely on the amount of time that had elapsed in order to know whether or not the data message had been received. He proposed that the following sentence should be inserted at the end of paragraph 1: "This article does not apply where an acknowledgement of receipt is generated automatically, without intervention by the addressee."

42. Mr. MADRID (Spain) suggested that the concerns expressed by the representatives of Mexico, the United States of America and the United Kingdom could be met by amending article 12, paragraph 2, to read "Where the originator has not requested that the acknowledgement contain a particular kind of information or be sent by a particular means, ...". It should be borne in mind that article 12 applied only where no prior agreement existed between the parties. Accordingly, it was up to the originator to decide whether or not to request an acknowledgement of receipt. If an acknowledgement of receipt was requested, then the originator was entitled to stipulate that it should be in a particular form, in order to preserve the validity of the original data message. For that reason, his delegation could not accept the proposal just made by the representative of Singapore, which would preclude the application of paragraph 2.

43. Mr. CHANDLER (United States of America) endorsed the comments by the representative of Spain and suggested that, if the Commission had reached a consensus on amending paragraph 2 along the lines proposed, the matter could be referred to the drafting group. His delegation also concurred with the Spanish delegation's view that amending paragraph 1 as suggested by the representative of Singapore could constitute a major step backward in the light of current developments in electronic commerce. There was a growing number of ad hoc contractual practices in which pre-set arrangements triggered inventory dispatch and other contractual actions. In view of those developments, his delegation had recently introduced a draft text which referred to the concept of an electronic agent and was, in part, intended to cover arrangements of that type.

44. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that, as a practical matter, his organization could not support the Singaporean proposal, since the recipient could, if he so wished, deactivate the acknowledgement feature on his computer.

45. Mr. BISCHOFF (Observer for Switzerland) recalled that the intention underlying article 12 had been to confirm the automatic receipt of a data message. Such confirmation was always linked to a particular form; he therefore believed that the applicability of the draft article should be limited to a particular form of acknowledgement.

46. Mr. SCHNEIDER (Germany) said that the representative of Singapore had raised a substantive issue, not merely a drafting problem. Draft article 12 had to be read in conjunction with draft article 14, which dealt with the circumstances under which a data message was deemed to have been received. A situation might arise in which an automatic acknowledgement was generated even though a data message had not been received, a problem which paragraph 2 of article 12 did not address.

47. Mr. ALLEN (United Kingdom) said that the situation referred to by the previous speaker was part of a wider issue, involving cases where an acknowledgement of receipt was given, but not by the addressee. That issue could be addressed in paragraph 5 of article 12, by stipulating that that paragraph applied where the originator received an addressee's acknowledgement of receipt. The question then arose as to whether the acknowledgement had actually been given by the addressee; however, in his delegation's view, that question was dealt with adequately in article 11.

48. Mr. PHUA (Singapore) thanked the representative of Germany for having summarized his delegation's concerns so succinctly. While his delegation did not wish to inhibit the use of automatic acknowledgement of receipt, it believed that the wording of article 12 was too broad and did not specify whether the provision referred to acknowledgement of receipt by the addressee or by the system. Nevertheless, his delegation could accept the solution proposed by the representative of the United Kingdom.

The meeting rose at 6 p.m.