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Twenty-ninth session

SUMMARY RECORD OF THE 592nd MEETING

Held at Headquarters, New York,
on Monday, 3 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 3.15 p.m.

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

Article 14 (continued)

1. Mr. MADRID (Spain) said that there was a lack of consistency between the third sentence of paragraph 113 of the proposed draft Guide to Enactment and article 14, paragraph 4, of the Draft Model Law. Under paragraph 4, the parties could, at their discretion, avoid the application of a given jurisdiction. In his country, there was a general rule that such procedural issues were established by law on the basis of objective facts, one such fact being the actual place where a contract was entered into or, as in the current case, the place where a data message was received or sent. While paragraph 4 established some presumptions regarding the place where the message was sent or received, the place of receipt was impossible to verify because the information was computerized. For procedural purposes then, it seemed reasonable, in public law, that a provision should also be made to prevent the parties from establishing, at their discretion, tax havens where they could habitually send and receive data messages without maintaining either a commercial or residential place of business there. Such a practice would run counter to the laws of virtually any country.

2. He therefore proposed the deletion from article 14, paragraph 4, of the words "unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message", and the insertion in paragraph 5 of the word "procedural", between the words "administrative" and "criminal". To ensure that that paragraph was consistent with the others, he would support the general proposal of the Mexican delegation. Throughout the article, any reference to discretion between the originator and the addressee should be deleted.

3. Mr. BURMAN (United States of America) said that he could not agree with the proposal of the representative of Spain. It was critical to retain for commercial parties the ability to negotiate as between themselves a rule by which they would determine when their contractual actions would be deemed to have taken place, particularly since it was very difficult to apply normal conflict and contractual rules to events taking place through computerized messages which passed over many countries and might come from quite remote stations. Paragraph 4 was a default rule that sought to provide a standard only when the parties had not otherwise agreed. While his delegation would not object to having the drafting group consider the possibility of removing the phrase "unless otherwise agreed" from paragraph 4, such action should be consistent with article 10, paragraph 1. Should the effect of a drafting change be to remove the discretion of the parties to make such an agreement between themselves, then the change would constitute an unacceptable step backwards. The Commission did not need to - nor should it attempt to - rework the rules for public law purposes. For the same reason, addition of the word "procedural" would be a most unfortunate step. His delegation had already accepted, with

great difficulty, the word "administrative" because of its excessive reach in the context of commercial law rules or commercial transactions.

4. Mr. TELL (France) said that paragraph 4 did not provide for rules on the conflict of laws or for a rule of jurisdiction, so he did not see how the representative of Spain could infer that it provided for a rule allocating competence to a specific jurisdiction. In principle, where contracts were concerned, the applicable law was the law chosen by the parties. He was not in favour of adding the word "procedural" to paragraph 5 since conflict rules and jurisdiction rules differed from country to country.

5. Mr. MADRID (Spain) said he was not proposing that the abilities of the parties to come to an agreement should be eliminated or curtailed; that situation was covered by article 10. If other delegations had any objection to deleting the beginning of article 14, paragraph 4, he would not object to its retention. However, if exceptions were made for the broader issue of administrative norms, then exceptions should also be made for the narrower issue of procedural law. Parties could not by themselves determine anything which might run counter to administrative norms, yet the paragraph as currently drafted seemed to allow them to sidestep procedural norms which were part of public law.

6. Mr. SANDOVAL LÓPEZ (Chile) endorsed the statement by the representative of Spain.

7. Mr. BURMAN (United States of America) said it was highly unlikely that a party's choice of place for commercial and contractual purposes would cause a court to consider itself bound by that choice with regard to jurisdiction. The Commission was inviting a great deal of disregard of the model law by providing a long list of very broad exclusions in paragraph 5. For the United States, the word "procedural" covered a broad range of activities and events, but no United States judicial authorities had felt that it in any way implicated choice of jurisdiction. He hoped that the Commission would not begin to add to the already excessive list of exceptional terms in paragraph 5.

8. Mr. ALLEN (United Kingdom) said that if the representative of Spain was concerned principally about tax evasion, then paragraph 5 could state that paragraph 4 was subject to the provisions of administrative criminal data-protection or tax law instead of the present wording. Then it would be left to national law to decide, for example, whether for the purposes of tax law it would be possible to contract out of paragraph 4.

9. Mr. CHOUKRI (Observer for Morocco) said that he supported the United States proposal to delete paragraph 5 because that paragraph created more problems than it solved.

10. Mr. MADRID (Spain) said he would prefer that paragraph 5 should be deleted since, in any case, article 1 provided that States could specify those areas of law in which they did not wish the Model Law to be applicable.

11. Mr. SCHNEIDER (Germany) said that, having realized that the concept of administrative law did not necessarily include tax law, his delegation endorsed

the retention of paragraph 5 together with a proviso that would make it clear that the rule applied also to tax law.

12. Mr. TELL (France) said that he did not agree with the deletion of paragraph 5. As a compromise, the words "criminal or tax or data protection" could be added after the word "administrative".

13. Mr. ANDERSEN (Observer for Denmark) suggested that, instead of discussing the particular areas of law which should be included or excluded, the Commission should consider using language similar to that of article 5, paragraph 2, and article 6, paragraph 2.

14. Mr. UCHIDA (Japan) and Mr. ZHANG Yuqing (China) supported the United States proposal to delete paragraph 5.

15. Mr. LLOYD (Australia) said that he had understood the United States delegation as advocating the retention of article 14, paragraph 5, as it stood without the need for any further amendments, a position which his delegation endorsed. The word "administrative" was broad enough, and any lack of clarity could be taken care of in the Guide to Enactment.

16. Mr. BISCHOFF (Observer for Switzerland) supported the retention of paragraphs 4 and 5 in their current formulation.

17. Ms. BAZAROVA (Russian Federation), referring to paragraph 5, said that since administrative law was confined to a very narrow area of law in her country, specific mention should be made of tax law as well. She also wished to know what was meant by the term "data-protection law".

18. The CHAIRMAN suggested that the Commission should take up the Danish proposal and include a paragraph in article 15, paragraph 5, along the lines of article 5, paragraph 2, and article 6, paragraph 2.

19. Ms. REMSU (Observer for Canada), Mr. SCHNEIDER (Germany) and Ms. BAZAROVA (Russian Federation) supported the Chairman's suggestion.

20. Mr. MADRID (Spain) said that he, too, supported the proposal. However, the Spanish text of article 5, paragraph 2, article 6, paragraph 2, and article 13, paragraph 2, must be standardized, as in the English version.

21. Ms. BAZAROVA (Russian Federation) said that there was an inconsistency between paragraphs 3 and 4 of article 14. Paragraph 3 used the broad term "information system" while paragraph 4 referred to "computerized transmission" of a data message; the word "computerized" should be deleted.

22. Mr. ANDERSEN (Observer for Denmark) supported that proposal.

23. Mr. ALLEN (United Kingdom) said that the word "computerized" had been inserted in paragraph 4 because it had been felt that the difficulty which the paragraph sought to solve would occur only in computerized transmissions.

24. Mr. CHANDLER (United States of America) said that his delegation supported the Russian proposal; although the original reason for including the more restrictive terminology was valid, the distinction that was made could raise questions in the mind of the reader. The Commission must ensure the ease of application of the Model Law.

25. Mr. TELL (France) said that if the word "computerized" was deleted, paragraph 4 would be meaningless. An explanation of the paragraph was provided in the Guide to Enactment.

26. Mr. ANDERSEN (Observer for Denmark) said he supported the Russian proposal because of the problems which arose with the definition of a "data message". The distinction made in paragraph 4 was very difficult to maintain, and it would be better to avoid referring to particular types of technology.

27. Mr. DONG Yi (China) said that his delegation supported the Russian proposal. In article 2, the definition of "data message" covered, but was not limited to, electronic data interchange, electronic mail, telegram, telex and telecopy; if the reference in article 14, paragraph 4, was limited to "computerized transmission", loopholes would remain.

28. Mr. CHANDLER (United States of America) said that in the past the Commission had been careful to use the word "computerized" because of uncertainties as to the time of dispatch of faxes. However, the words "information system" took care of that problem. While distinction between telex, fax and electronic mail was sometimes blurred, they were all part of an information system, and proper control could be maintained.

29. Mr. LLOYD (Australia) said that the words "of a computerized transmission of a data message" should be deleted from paragraph 4.

30. Mr. CHANDLER (United States of America) supported that proposal.

31. Mr. LLOYD (Australia) said that article 14, paragraph 1, left open the possibility that there might be no dispatch date if an originator of a message had an agent send that message. He proposed that the words "or of the person who sends the data message on behalf of the originator" should be added.

32. Ms. REMSU (Canada), Mr. ALLEN (United Kingdom) and Mr. CHANDLER (United States of America) said that they supported the Australian proposal.

33. Mr. ANDERSEN (Observer for Denmark) said that his delegation also supported the proposal; although the term "originator" was defined in article 2, subparagraph (c), it was worth clarifying the meaning of article 14, paragraph 1.

34. Article 14, as orally amended, was adopted.

The meeting was suspended at 4.30 p.m. and resumed at 4.55 p.m.

Article 2

35. Mr. SORIEUL (International Trade Law Branch), introducing article 2, recalled that there were two issues to be resolved concerning subparagraph (a): firstly, whether it was appropriate to include telecopy as part of the definition of a data message; and secondly, whether a clear definition or an alternative term could be found for the word "analogous" in the second line of the English text.

36. Mr. ANDERSEN (Observer for Denmark) said that "analogous" could be a source of confusion because of its similarity to the term "analog".

37. Mr. MADRID (Spain) said that subparagraph (a) should perhaps be redrafted so that paper-based information was more clearly excluded; otherwise, there could be some confusion as to its scope. It was important to ensure that the Model Law did not affect well-established national practices in respect of rules concerning paper-based documentary evidence; the inclusion of the words "telegram, telex or telecopy" was likely to cause difficulties in that respect.

38. Mr. ANDERSEN (Observer for Denmark) suggested that the word "digital" should be added before the word "information" in the first line. It should be borne in mind that telegrams, telexes and telecopies, in digital form, could be processed by computers, and in such cases should fall within the scope of the Model Law.

39. Mr. CHANDLER (United States of America) noted that in the future, information would be transmitted in digital, analog or optical form. It would be unwise to limit the scope of the Model Law to digital information.

40. Mr. BAUM (Observer for the International Chamber of Commerce) agreed with the preceding speaker, adding that great restraint should be exercised in attempting to reinvent definitions. He, too, felt that the word "analogous" could cause confusion and suggested that it should be replaced by the word "similar".

41. Mr. PHUA (Singapore) said that his delegation did not support the proposal to add the word "digital" before the word "information", since it would preclude the application of the Model Law to analog information. Also, he agreed with the representative of Spain regarding the disadvantages of including more conventional means such as mail, telegram, telex or telecopy in the definition of "data message". That definition should be restricted to EDI, and the title of the Model Law should be reworded accordingly.

42. Mr. HOWLAND (United Kingdom) said that information generated, stored or communicated in analog form should not be excluded. He proposed that the words "in digital or analog form" should be added after the word "communicated", and that the word "analogous" should be deleted.

43. Mr. MADRID (Spain) said that to do so would preclude other forms of information which might be used in the future. To leave the Model Law open to future developments in information technology, the subparagraph should simply state: "(a) 'Data message' means information generated, stored or communicated

by electronic or similar means including, but not limited to, electronic data interchange (EDI)." That wording might still cover electronic mail, but it would avoid interfering with established national practices in respect of documentary evidence in the form of telegram, telex or telecopy.

44. Mr. ANDERSEN (Observer for Denmark) said it was not possible to have a Model Law that covered every present and future aspect of communications. He therefore proposed retaining the definition of data message as drafted, using the word "similar" to replace "analogous". The various views of the Commission regarding the definition of the term "data message" should be included in paragraphs 45 and 46 of the Guide to Enactment with a note explaining that the Model Law had been drafted taking into account existing technology, but that in the future, other communication technologies would also be covered. Definitions in the Model Law should be drafted in a way that allowed for some degree of interpretation, particularly by judges.

45. Mr. SORIEUL (International Trade Law Branch) said that EDI, as defined in article 2, subparagraph (b), referred to a narrow technique of transferring information between computers and did not cover all uses of electronic data, such as electronic mail. In future, communications would include EDI as well as other, less restrictive technologies, such as electronic mail and the Internet. Thus, it was of greater importance at present to lay down rules that applied to those technologies and not only to the relatively sophisticated EDI form of exchanges. If the current definition of EDI did not include electronic mail, the Model Law would be useless in the future.

46. Mr. CHANDLER (United States of America) agreed that an overly restrictive definition of EDI would destroy any usefulness of the Model Law. A definition of the term "data message" should include electronic mail, which was used to forward EDI messages, as well as such methods as "FDI", the fax transmission of information that was subsequently transferred into an EDI system. While EDI was central to the transfer of information, all the EDI-related communications attachments should also be covered under the Model Law if it was to be useful in the future.

47. Ms. GUREYEVA (Russian Federation) proposed replacing the phrase "electronic, optical or analogous means" in subparagraph (a), with the term "automated means" to broaden the definition of the term "data message".

48. Mr. ALLEN (United Kingdom) shared the views of previous speakers who favoured a broad and flexible definition of the term "data message". However, the definition should not be so nebulous that the term became incomprehensible. He proposed replacing the phrase "electronic, optical or analogous means" with "an information system", rather than "automated means", since EDI was not completely automated and involved human agency. In subparagraph (f), which defined the term "information system", the words "a system" should be replaced by the expression "information technology".

49. Mr. MASUD (Observer for Pakistan) said that the term "data message" emphasized both the information and the means of communication and thus the question of how the data message was generated or stored was not relevant. He

suggested that the terms "generated" and "stored" should be deleted from the definition in subparagraph (a).

50. Mr. MADRID (Spain), endorsing the comments of previous speakers, suggested that the Model Law should include a definition of "electronic mail" in article 2 in order to make the Model Law as broad, yet complete as possible. If the Model Law was too narrow, it would become useless; however, if incorrectly drafted or ambiguous, it would open itself to misuse.

51. Mr. SANDOVAL LÓPEZ (Chile) favoured retaining the definition of "data message" in article 2, subparagraph (a), as originally drafted, since that definition was not limited to EDI alone.

52. Mr. PHUA (Singapore) supported the United Kingdom proposal to replace the phrase "electronic, optical or analogous means" with "an information system" in subparagraph (a) and to amend subparagraph (f) to read "information system means information technology". He agreed that the final words of subparagraph (f), "in a data message", should be deleted to avoid circular reasoning. The United Kingdom proposal provided a definition for "data message" that would facilitate the use of technology without undoing all of the legal forms that dealt with traditional methods of communication.

53. Mr. LLOYD (Australia) rejected both the United Kingdom proposal, and the term "automated means" because neither took into account non-physical materials. He supported the proposal of the observer for Denmark and the suggestion to include a definition of "electronic mail" in article 2. He opposed the deletion of the words "generated" or "stored".

54. Mr. TELL (France) supported the suggestion by the observer for Denmark to retain the text as drafted, but favoured "analogous" as the more appropriate term.

55. Mr. SCHNEIDER (Germany) endorsed the Danish suggestion to retain the definition of "data message" as originally drafted in subparagraph (a) and rejected the United Kingdom proposal, which resulted in circular reasoning.

The meeting rose at 6 p.m.