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Twenty-ninth session

SUMMARY RECORD OF THE 594th MEETING

Held at Headquarters, New York,
on Tuesday, 4 June 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.

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

Article 2

1. The CHAIRMAN suggested that the Commission should resume consideration of the proposal to replace the words "generated, stored or communicated" in subparagraph (c) by "communicated or generated prior to storage, if any".

2. Mr. SCHNEIDER (Germany) said that it was necessary to distinguish between three different situations: where a message had been generated, but had not been communicated; where a message had been communicated, but had not been generated; and where a message had been generated and communicated. His delegation felt that the phrase should read "generated and communicated", since otherwise there would be problems. A person who communicated a message could be an agent or employee, in which case he could not be considered the originator. A situation where information had been generated but not communicated was also a situation in which there was no originator.

3. Ms. BOSS (United States of America) said that whether the Commission opted for the words "communicated or generated" or the words "communicated and generated", there would be instances in which the fit was less than perfect. The question of whether a person who communicated a message was the originator could only be answered by determining the purpose for which that information was needed. For the purposes of chapter III, it was appropriate to say that the person who communicated a message was indeed the originator, although in matters of admissibility, it might not be the correct conclusion. Article 2 gave a general definition of "originator" which took on meaning depending on the context. The Guide to Enactment could be very useful in showing how that definition could be used in the context of the rules in chapter II and chapter III. Her delegation felt that if there was a majority in favour of using the connective "or", that would be quite satisfactory.

4. Mr. ALLEN (United Kingdom) said that the case of an agent acting on behalf of an originator was sufficiently covered by the words "or on whose behalf".

5. It was important for the definition of the term "originator" to cover cases in which a draft had been prepared but not actually communicated. It was not necessary to distinguish between drafts and finished documents because each document created was a data message which might or might not be communicated. However, in each case there was an originator: if the document was not communicated, the originator was the person who generated it; if the document was communicated, the originator was the person who communicated it, even if he was not the same person who originally generated it.

6. Mr. VARŠO (Slovakia) said that the originator should be defined as the author of a draft message, who was protected by copyright rules. He agreed that the word "or" should be replaced by "and".

7. Mr. SORIEUL (International Trade Law Branch) said it seemed as though the Commission was near consensus on the substance of the text. He suggested that the text should be sent to the drafting group for clarification of the exact formulation.

8. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported that suggestion.

9. Mr. SCHNEIDER (Germany) said that the Commission was considering matters of policy and could not redefine them as drafting matters. His delegation could agree on the substance of the text if an explanation was added in the Guide to Enactment along the lines suggested by the representative of the United States of America.

10. The CHAIRMAN said that subparagraph (c) would be referred to the drafting group.

11. Mr. HOWLAND (United Kingdom) said that it was important to make it clear in subparagraph (d) that the addressee was the ultimate intended recipient.

12. Mr. CHOUKRI (Observer for Morocco) said that the definition of the term "addressee" was not sufficiently clear. If someone received a message, it might be from an intermediary, not the originator. It must be specified that the message was received from the addressee.

13. Ms. BOSS (United States of America) said it was important to retain the word "but" to make it absolutely clear that intermediaries were not considered to be addressees. Her delegation agreed that it was important to consider who the intended addressee, rather than the actual recipient, was. The Commission should retain the original text.

14. Article 2, subparagraph (d), was adopted.

15. Mr. HOWLAND (United Kingdom) said that the word "intermediary" was not used anywhere in the text except in the definitions in article 2, subparagraphs (c) and (d), where it appeared for the purpose of being excluded. Subparagraph (e) as currently drafted defined any agent as an intermediary, and under subparagraphs (c) and (d) they would be excluded from the coverage of the Model Law.

16. Mr. LLOYD (Australia) agreed with the representative of the United Kingdom. The current definition was too broad, and took into account agents who should not be referred to as "intermediaries".

17. Mr. TELARANTA (Finland) expressed support for the position of the United States of America.

18. Ms. BOSS (United States of America) said that the presence of a definition of "intermediary", and its exclusion from the definitions of "originator" and "addressee", were essential in order to ensure that the Model Law would not bind those who were merely providing services with respect to a particular message. The definition currently contained in subparagraph (e) might be very broad,

extending to persons who were not intermediaries in the technical sense, but it was successful in that it did not exclude from the Model Law any persons who should be covered by it. Her delegation therefore felt that it should be retained.

19. Mr. UCHIDA (Japan) agreed with the representative of the United Kingdom that the current definition was too broad.

20. Mr. PHUA (Singapore) supported the United States position. Those who felt that the current definition was too broad should produce a new draft, rather than simply proposing the deletion of the word "intermediary".

21. Mr. FARIDI ARAGHI (Islamic Republic of Iran) favoured retention of the current wording.

22. Mr. MADRID (Spain) said that the definition of "intermediary" should remain unchanged, but that it would be useful to specify in the Guide to Enactment that the word was not being used in the technical sense in which it was generally used in the field of electronic communications.

23. Mr. CHOUKRI (Observer for Morocco) agreed that the definition should remain unchanged.

24. Mr. MASUD (Observer for Pakistan) supported the point made by the representative of the United Kingdom. The current definition of "intermediary" was very broad, and would extend to types of agents which should not be included, such as employees of the originator or of the addressee.

25. Mr. BAUM (Observer for the International Chamber of Commerce) expressed support for the United States position. Considerable efforts to find improved definitions for "intermediary" or alternative terms, such as "third-party service provider", had proved unsuccessful; there was no simple solution, and he urged the Commission to retain the current text.

26. Ms. GUREYEVA (Russian Federation) supported the position of the United States of America.

27. Mr. HOWLAND (United Kingdom), supported by Mr. LLOYD (Australia) and Mr. ANDERSEN (Observer for Denmark), proposed that the current definition of "intermediary" should be replaced with the phrase "a person who, as part of his business, provides to another person services of receiving, transmitting or storing data messages".

28. Mr. SANDOVAL LÓPEZ (Chile) said that the definition should remain unchanged.

29. Mr. MADRID (Spain) strongly supported the representative of Chile. It was inappropriate to propose a drafting change, since it had not been agreed that the existing text should not be retained. Moreover, the relatively narrow definition proposed by the United Kingdom would leave a gap in the law; certain persons, such as employees of originators or of addressees, would fall outside the definitions of "originator", "addressee", and "intermediary".

30. The CHAIRMAN said that there was clearly no consensus in favour of changing the text of subparagraph (e). Accordingly, she invited the Commission to turn its attention to subparagraph (f).

31. Mr. UCHIDA (Japan) proposed that, in the second line of subparagraph (f), the words "information in" should be deleted in order to make the wording consistent with the definition of "data message" in subparagraph (a).

32. Mr. HOWLAND (United Kingdom) proposed that the subparagraph should be amended to read "'Information system' means technology for generating, transmitting, receiving, storing or otherwise processing a data message."

33. Ms. BOSS (United States of America) suggested that the proposal to use the word "technology", rather than "a system", could be left to the drafting group, which would determine whether the change had any implications for the rest of the text. Otherwise, the proposals made by the representatives of Japan and the United Kingdom were acceptable.

The meeting was suspended at 4.30 p.m. and resumed at 5.05 p.m.

34. Mr. MADRID (Spain) endorsed the amendments proposed by the representatives of Japan and the United Kingdom to subparagraph (f), which would now read "'Information system' means a system for generating, transmitting, receiving, storing or otherwise processing data messages." However, he continued to have reservations regarding the repetition of the word "system" in the definition; he hoped that the drafting group would come up with a better alternative.

35. Mr. LLOYD (Australia) supported the amendments proposed by Japan and the United Kingdom but opposed the use of "technology" to replace "system" in the definition. The term "technology" implied the capacity to do something, whereas a "system" suggested something tangible in operation.

36. Mr. ZHANG Yuqing (China) agreed with the representative of Australia that "technology" referred to know-how rather than to equipment. It was more accurate to say that messages were entered into an "information system" than into a "technology". He endorsed the amendments proposed by the United Kingdom and Japan.

37. Mr. CHANDLER (United States of America), supported by Ms. REMSU (Observer for Canada), endorsed the view of the representative of Australia and other speakers who believed that the term "technology" should not be used in the definition of an "information system" in subparagraph (f). "Technological system" or "technological infrastructure" might be possible solutions; however, the drafting group would ultimately be responsible either for finding a formula that all agreed to or for deciding to retain the existing language.

38. Mr. TELL (France) said he believed it would be wrong to repeat the word "system" in the definition in subparagraph (f) and hoped the drafting group would come up with a better solution.

39. The CHAIRMAN said that the consensus was to adopt the Japanese proposal to delete the words "information in" and to add the words "or otherwise processing

data messages" at the end of subparagraph (f), as proposed by the representative of the United Kingdom. Furthermore, most delegations agreed that the term "technology" would not be an appropriate replacement for "system".

40. Article 2, as amended, was adopted.

Article "x"

41. Mr. SORIEUL (International Trade Law Branch) introduced draft article "x", on contracts of carriage involving data messages, which was contained in the annex to document A/CN.9/421. The article in question was not intended to provide answers to all questions that might arise in the area of maritime law and electronic data transmission. Rather, article "x" sought to analyse the functions fulfilled by maritime transport documents which were to be replaced by one or several data messages and to determine the conditions data messages should meet so that they had the same legal validity as paper documents. Paragraph 1 of article "x" provided a description of the functions fulfilled by negotiable and non-negotiable paper documents, and the subsequent paragraphs referred to the legal conditions that must be fulfilled by contracts of carriage.

42. Mr. CHANDLER (United States of America) said that draft article "x" represented an interesting proposal in support of electronic bills of lading and provided rules that could be adapted to various types of bills of lading or contracts of carriage. If the article was adopted, the Model Law would provide assurances that the use of electronic documents would be recognized and permitted.

43. Currently, only a few EDI messages were being used for ocean transport. While existing rules prepared by organizations such as the Comité maritime international (CMI) could provide detailed guidance on the use of electronic messages to create bills of lading, they could not provide a legal basis for such bills since the rules were voluntary. When a country required that a bill of lading should be on paper and bear certain seals, CMI rules could not bypass that requirement, even if the parties agreed to it. All such rules needed legal underpinnings, which the Model Law would provide. His delegation strongly supported adoption of article "x" and believed it should be renamed article "A" and placed at the beginning of a section on particular use rules. He proposed that the Model Law should be divided into two sections, one in which general use rules would appear as articles with numbers, and a second section on particular use rules, which would appear as articles with letters, the first of which would be article "A", i.e. the existing article "x".

44. Mr. HOWLAND (United Kingdom) endorsed the views of the representative of the United States of America and said that his delegation strongly supported the adoption of article "x" and agreed to it being renamed article A. The article in question did much to remove legal impediments in the field of transport contracts by means of electronic communication and was a useful facilitating measure.

45. Mr. MAZZONI (Italy) supported the statements of the United States of America and the United Kingdom.

46. Mr. PHUA (Singapore), noting that the concepts contained in article "x" mirrored many of those contained in the Model Law, asked how article "x" extended the concepts found in the Model Law.

47. Mr. TELL (France) said that the provisions set out in paragraph 1 (f) of article "x" were the most important since they made that article applicable under negotiable terms. It was therefore respect for legal security which would guide the subsequent position of his delegation. He could not endorse the text unless it unambiguously set forth the applicability to that article of the minimum guarantees contained in articles 6 and 7 of the Model Law.

48. In general terms, the proposed text should also provide security guarantees that were comparable to the written ones regarding the authenticity of the title. In that regard, he proposed the addition of a paragraph to article "x" which would read "The provisions of articles 6 and 7 are applicable to the present article or to article 'x'".

49. Mr. MADRID (Spain) said that the concerns raised by the representatives of France and Singapore highlighted the need for the Commission to clarify both the substance and form of article "x". The existence of article "x" should not lead to the erroneous conclusion that the Model Law would not be applicable to that area without that article. It was not necessary to state that article 6 or article 7 was applicable: the Model Law was general in nature and was applied in a general way. Article "x" was a clarification put forward by the Commission. For the purposes of uniformity, the Commission was promoting the opportunity for a uniform application of the Model Law in the specific area of the contract of carriage of goods. His delegation, supported article "x", but agreed with the representative of Singapore on the need for further clarification. Such explanations could be included in the Guide in order to avoid misinterpretations.

50. Concerning the format of the article, while other model laws might have a tradition of using lettered articles, his delegation was not familiar with that practice. The Working Group should find some other formula, or else the secretariat's formula of a general Part I and a specific Part II could be used. In the Working Group, some delegations had been reluctant to consider the question of annexes because they felt that annexes had a subordinate ranking. In his country, the provisions of an annex had the same binding force as provisions appearing in the body of a document.

51. Mr. Won Kyong KIM (Observer for the Republic of Korea) said that in the absence of a specific decision on the position of article "x" no proper deliberations could be held about its contents.

52. Mr. CHANDLER (United States of America) said that the concern of the representative of France could easily be accommodated by inserting the words "subject to the general provisions" at the beginning of article "x", paragraph (1). That would ensure that articles 6, 7 and any others applied to article "x" as a whole. With regard to the Singaporean delegation's concern about duplication of wording, such duplication had occurred in a number of paragraphs because of a particular need in transport documents to explain things fully, thus minimizing the chances of overlooking certain details. He

understood, however, that notwithstanding the duplications, the general provisions always applied.

53. Mr. MASUD (Observer for Pakistan) said that, except for a very general provision that would facilitate the use of EDI wherever it was permitted by individual legal regimes, the Commission would be going beyond its mandate to include things that were intended to override the various legal regimes involved in the carriage of goods.

54. Mr. ZHANG Yuqing (China) agreed with the observer for the Republic of Korea concerning the importance of the position of article "x". The Commission was intending to adopt a model law involving general provisions on EDI which called into question the Model Law's scope of application. Of the articles already discussed, only article 13 was similar to article "x"; otherwise, the entire Model Law dealt with procedural issues. The basic provisions should be applied to specific commercial activities. Article "x", however, dealt with the specific application of the Model Law to contracts of carriage.

55. Since his delegation had every confidence in the future development of EDI, it wondered whether a complete model law thereon could be drafted at present. Various annexes could be attached to the Model Law, such as an annex on the formation of contracts and another on carriage of goods. It could be noted that the Commission had the obligation, in accordance with the development of international trade, to formulate additional annexes. That would make the provisions of the first part complete, and the use of annexes would have the advantage of being open-ended so that adjustments could be made for future developments. The provisions of the annexes should have the same force as the provisions of the Model Law itself.

56. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that his organization supported the Model Law generally and also article "x". However, he shared some of the Chinese delegation's concerns about potential problems in connection with the implementation of either the Model Law or article "x". Article "x" was merely an example of how the Model Law's provisions could be implemented in respect of a specific set of documents, namely transport documents. Redundant drafting was very prudent, since it protected against fraud and the like and gave assurances to the business community that both the Model Law and its annex would be implemented in a businesslike manner. For those reasons, he supported both the general provisions of the Model Law and article "x". In order to satisfy some of the qualms expressed by some delegations regarding the placement of article "x" within the Model Law, the drafting group might consider including a disclaimer to the effect that nothing contained in article "x" could be deemed to alter, amend, repeal or detract from the general provisions of the Model Law.

The meeting rose at 6.05 p.m.