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Summary record of the 724th meeting
Held at the Vienna International Centre, Vienna, on Tuesday, 3 July 2001, at 2 p.m.

Chairman: Mr. Abascal Zamora .... (Mexico)

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Draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment (*continued*)

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The meeting was called to order at 2.05 p.m.

Draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment (*continued*) (A/CN.9/492 and Add.1-3 and A/CN.9/493)

Article 5 (continued)

1. **The Chairman** invited the Commission to continue its consideration of the proposal put forward by the observer for the International Chamber of Commerce (ICC) at the previous meeting, which involved two options: either the deletion of the final clause of article 5, which read “unless that agreement would not be valid or effective under applicable law”, or the replacement of the words “applicable law” with the words “mandatory principles of public policy”.

2. **Mr. Joko Smart** (Sierra Leone) said that his delegation was not in favour of adopting either option. The term “applicable law” should be retained since it included not only mandatory principles of public policy but also mandatory provisions of national legislation, such as the constitution and specific relevant statute law. Moreover, the existing wording of article 5 was in line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods. For the sake of consistency, his delegation preferred to keep the text unchanged.

3. **Mr. Enouga** (Cameroon) said that his delegation agreed that article 5 should be retained in its current wording. That wording was the result of arduous negotiations and struck a balance that should not be disturbed. Absolute contractual freedom did not exist in any legal system, and the courts, when settling disputes, would ascertain whether or not an agreement was contrary to public policy.

4. **Mr. Baker** (Observer for the International Chamber of Commerce—ICC) said that, in proposing the deletion of the final clause of article 5, ICC had wanted to emphasize that party autonomy was of prime concern and thus avoid sending the wrong message to the public. If the clause was to be retained, perhaps it could be amended to read “unless that agreement would be unlawful”.

5. **Mr. Alhweij** (Observer for the Libyan Arab Jamahiriya) said that his delegation supported the ICC proposal.

6. **Ms. Zhou Xiaoyan** (China) said that, while her delegation appreciated the concerns expressed by the observer for the International Chamber of Commerce, it was in favour of retaining the original text. The document under discussion was a model law, not a convention. A model law should uphold the principle of party autonomy while respecting national law. Her delegation felt that the text struck the right balance. A compromise solution might be to replace the final clause of article 5 with the words “unless that agreement would not be in accordance with mandatory provisions of the applicable law”.

7. **Mr. Burman** (United States of America) said that his delegation had no objection either to the language proposed by the delegation of China or to the new wording proposed by ICC. His delegation had not intended to comment on article 5 but had been persuaded by the arguments put forward by ICC. Given that the Model Law was intended to serve the international business community, it was important to consider how its provisions would be received by that community.

8. **Mr. Kurdi** (Observer for Saudi Arabia) said that, in the interests of clarity, his delegation supported the proposal made by ICC to replace the words “applicable law” with “mandatory principles of public policy”.

9. **Mr. Kottut** (Kenya) said that his delegation preferred to keep the text as it stood.

10. **Ms. Lahelma** (Observer for Finland) said that, while her delegation would prefer to retain article 5 as it stood, it could accept the amendment proposed by the delegation of China.

11. **Mr. Baker** (Observer for the International Chamber of Commerce) said that the language used by ICC in its proposed amendment to article 5 had been taken from the draft Guide to Enactment, paragraph 111 of which stated that article 5 “should not be misinterpreted as allowing the parties to derogate from mandatory rules, e.g. rules adopted for reasons of public policy”. Consistency between the text of article 5 and the draft Guide would reduce the likelihood of confusion.

12. **Mr. Madrid Parra** (Spain) said that his delegation was in favour of retaining the words “applicable law”. However, the drafting group might

wish to consider alternative wording for the expression "derogated from".

13. **The Chairman** said that it seemed that most delegations were in favour of leaving the text of article 5 unchanged.

14. *It was so decided.*

Article 7, paragraph 1

15. **Mr. Pérez** (Colombia), introducing his delegation's proposed amendment to article 7, paragraph 1, as contained in document A/CN.9/492, said that, in its present formulation, paragraph 1 seemed to imply that the reliability requirements for an electronic signature, as set forth in article 6, would be satisfied only in the circumstances described in article 7. That would restrict the application of the principles of technology neutrality, non-discrimination and party autonomy, which the Model Law recognized. His delegation proposed that the phrase "without prejudice to the possibility for the parties to agree on the use of any method for creating an electronic signature" should be added at the end of paragraph 1.

16. **Mr. Smedinghoff** (United States of America) said that, while the parties would be free to establish by agreement or subsequent proof in a court that a particular electronic signature met the requirements of article 6, the current wording of article 7 might be interpreted to mean that a State, or a public or private entity designated by it, could preclude a party from so doing. One solution might be to limit the applicability of article 7, paragraph 1, to article 6, paragraph 3.

17. **Mr. Caprioli** (France), supported by **Mr. Gauthier** (Canada), said that his delegation considered the proposed amendment to article 7, paragraph 1, to be redundant since the possibility sought by Colombia was already provided for in article 6, paragraph 1, which contained the phrase "including any relevant agreement". His delegation could not support the United States proposal, which related only to paragraph 3 of article 6, since the representative of Colombia had referred to article 6 as a whole.

18. **Mr. Zanker** (Observer for Australia), supported by **Mr. Enouga** (Cameroon), said that he shared the view expressed by the representatives of France and Canada. If the issue in question was not already sufficiently covered by article 6, it would be covered by article 5.

19. **Mr. Arnott** (United Kingdom) said that his delegation appreciated the thinking behind the Colombian proposal but felt that the point was adequately covered by article 6 and that no change to article 7 was required.

20. **Mr. Pérez** (Colombia) said that his Government's comments in document A/CN.9/492 included a proposal that international standards for electronic signatures should be determined by an international organ designated by the Commission. If that proposal was not taken up, article 7 should be amended in a way that did not restrict the parties' freedom to use signature techniques that satisfied the requirements of article 6.

21. **Mr. Joza** (Observer for the Czech Republic) said that article 7 empowered competent persons or authorities to determine which electronic signatures should be considered reliable. An electronic signature agreed upon by the parties must at least be supported by an agreement, whether verbal, written or concluded electronically. In the event of a dispute, any such signature had to pass the reliability test set out in article 6. His delegation therefore considered the proposed amendment to be unnecessary.

22. **Mr. Caprioli** (France) said that the phrase "may determine" in article 7, paragraph 1, allowed the enacting State to take steps to determine reliability but did not place it under any obligation to do so. France, for example, would leave it to the parties to determine which electronic signature they considered appropriate.

23. **Mr. Smedinghoff** (United States of America) said that the representative of Colombia had raised an important issue that might have implications in two distinct situations. In the first situation, where the parties agreed on a form of electronic signature different from those determined by the designated entity as being reliable, he wondered whether such an agreement would be enforceable. While article 6, paragraph 1, stipulated that any relevant agreement should be taken into account, that agreement might be rendered invalid under applicable law by virtue of article 5. In the second situation, where the parties used a method of signature other than those determined by the designated entity but had not entered into any agreement, he questioned whether article 7 would deny

the parties the opportunity of seeking to prove in a dispute that the method of signature used was as reliable as appropriate in the light of the circumstances.

24. **Ms. Zhou Xiaoyan** (China) said that there appeared to be inconsistency between article 7, paragraph 1, and article 6, paragraph 1, with regard to the requirements for establishing reliability of electronic signatures. The relationship between the two provisions should perhaps be examined more closely.

25. **Mr. Madrid Parra** (Spain) said that, while all delegations agreed on the need to respect the principle of party autonomy, some considered that article 5, which allowed for variation by agreement, was sufficient to meet Colombia's concerns while others felt that more explicit wording was necessary. He wished to point out to the delegations in favour of amending article 7 that several paragraphs of the draft Guide to Enactment, including paragraphs 127 and 133, stated that the Model Law did not intend to limit the application of the principle of party autonomy. To have that principle specified throughout the text of the Model Law would not be good drafting. If further clarification was considered necessary, perhaps the point could be explained more fully in the Guide.

26. **Mr. Gauthier** (Canada) agreed with the representative of Spain that no amendment to article 7 was required. The Commission was discussing a model law, not a convention. Party autonomy had been established as a guiding principle in article 5 of the draft Model Law and was referred to in several instances in the draft Guide. Article 6 described how the reliability requirements for an electronic signature would be satisfied and article 7 added that States that wished to do could designate a body, either public or private, to determine whether or not a signature satisfied those requirements. There had been no intention to override party autonomy. It would be excessive from a drafting point of view to begin every paragraph with the proviso that it was subject to article 5.

27. **Mr. Smedinghoff** (United States of America) said that the issue involved not only the question of party autonomy but also the question of whether the parties were able to prove that the electronic signature chosen by them was sufficiently reliable even though it might not be on the list of signatures selected by the designated entity.

28. **Mr. Caprioli** (France) said that his delegation endorsed the remarks of the representative of Canada. While an enacting State could choose to determine the electronic signatures that it considered most appropriate, the principle of party autonomy allowed the parties to reach an agreement regarding the use of a signature technique. There was therefore no contradiction.

29. **Mr. Zanker** (Observer for Australia) said that his delegation agreed with the statements made by the representatives of Canada and France. It could not support the United States proposal to make article 7 applicable solely to article 6, paragraph 3, since article 6, paragraph 4, stipulated that paragraph 3 did not limit the ability of any person to establish the reliability of an electronic signature or adduce evidence of its non-reliability.

30. **Mr. Pérez** (Colombia) said that, having listened to the remarks made by delegations and having noted the explanation in paragraph 133 of the draft Guide concerning the scope of agreements entered into by parties on the use of signature techniques, he could accept the discretionary nature of article 7, paragraph 1. Perhaps the title of article 7 could be amended to read "Determination of the reliability of a signature" in order to reflect the relationship between that article and article 6.

31. **The Chairman** said that titles of articles in UNCITRAL texts were purely indicative but the drafting group could consider Colombia's suggestion. He took it that the proposed amendment to article 7, paragraph 1, had not received sufficient support and that the text would remain unchanged.

32. *It was so decided*.

Article 10 (f)

33. **Mr. Pérez** (Colombia), introducing the proposed amendment to article 10 (f) contained in document A/CN.9/492, said that the proposal was based on his Government's experience in implementing legislation on electronic commerce. In Colombia, the task of determining whether certification authorities had the technical, financial and legal capability to discharge their mandate was performed by independent auditing bodies. It was not considered appropriate for the certification service provider itself to make a declaration as to the trustworthiness of its own systems,

procedures or human resources. His delegation proposed that the words "the certification service provider" should be replaced with the words "an independent auditing body" so that paragraph 10 (f) would read: "The existence of a declaration by the State, an accreditation body or an independent auditing body regarding compliance with or existence of the foregoing; or."

34. **Mr. Madrid Parra** (Spain) said that his delegation could agree to an additional reference in paragraph 10 (f) to an independent auditing body, since article 10 contained a non-exhaustive list of factors for assessing the trustworthiness of systems, procedures and human resources used by certification service providers. However, it could not agree to the deletion of the reference to the certification service provider, whose declarations were important in the development of electronic commerce.

35. **Mr. Gauthier** (Canada) said that his delegation supported the comments made by the representative of Spain. While the addition of a reference to an independent auditing body was acceptable, it would be regrettable to omit the reference to other bodies mentioned in paragraph 10 (f).

36. **Mr. Caprioli** (France) said that his delegation supported the view expressed by the representatives of Spain and Canada. It was important for the certification service provider to be able to make a declaration as to its compliance with requirements. Such declarations were in fact mandatory in France.

37. **Mr. Arnott** (United Kingdom) said that his delegation was also in favour of retaining the reference to the certification service provider. The ability of the certification service provider to make self-declarations was important. While his delegation could go along with the inclusion in paragraph 10 (f) of a reference to an independent auditing body, it felt that there was already provision for that in paragraph 10 (g), which referred to "any other relevant factor".

The meeting was suspended at 3.30 p.m. and resumed at 4 p.m.

38. **Mr. Kurdi** (Observer for Saudi Arabia) said that his delegation had no objection to the inclusion of a reference to an independent body in paragraph 10 (f).

39. **The Chairman** said that he took it that the Commission considered that it was not necessary to amend article 10 (f).

40. *It was so decided*.

Article 8, paragraph 1 (a)

41. **Mr. Burman** (United States of America) said that, from comments received over the past year from lawyers and industry, it had become clear that amendments to articles 8 to 11 were necessary since, if they were adopted without change, they would have negative effects on States' economies and pose obstacles to the development of electronic commerce. Without those changes to the draft Model Law, it would not be possible to secure the support of the business community that was necessary for the adoption of laws, and the end product would not do justice to the Commission's work on its Model Law on Electronic Commerce.

42. **Mr. Smedinghoff** (United States of America), referring to his delegation's proposal contained in document A/CN.9/492/Add.2, said that it had been found that the implementation of article 8, paragraph 1 (a) could lead to problems, especially where liability could be imposed for the signatory's failure to exercise reasonable care to avoid unauthorized use of its signature creation data. Such problems would arise in the context of the public key infrastructure system, where a signatory was obliged to keep its private key confidential. Signatories frequently did not have the technical skills to know what to do with the keys and often did not understand how or where those keys were stored on their computer systems. It was therefore not practical simply to impose an unqualified obligation on the signatory to exercise reasonable care to protect the key. His delegation proposed that the phrase "in accordance with accepted commercial practices" should be inserted before the words "reasonable care" in article 8, paragraph 1 (a). An obligation couched in such terms might be more acceptable to signatories and might encourage the use of electronic commerce.

43. **Mr. Arnott** (United Kingdom) said that, while not every part of the draft Model Law was suitable for every jurisdiction, the Commission had over the past two years been sensitive to movements in the market and had modified some articles accordingly. Nevertheless, some of the United States' proposals were worthy of consideration, since they represented

the final fine-tuning that could make all the difference. With regard to the proposed amendment to article 8 1 (a), his delegation did not object to the phrase "in accordance with accepted commercial practices" but believed that it might prompt users of the Model Law to question by whom such practices were accepted. He believed that the phrase "in accordance with relevant commercial practice" would be preferable to the wording proposed by the United States.

44. **Mr. Madrid Parra** (Spain) said that, while his delegation shared the views expressed by the United States delegation regarding the Commission's role in promoting electronic commerce, it did not consider that the proposed amendment was necessary for the Spanish legal system. However, Spain would have no objection to the amendment if other delegations felt that it was useful. His delegation appreciated the United Kingdom's misgivings about the use of the word "accepted" and proposed that a term such as "customary" might help to avoid confusion.

45. **Ms. Mangklatanakul** (Thailand) said that her delegation was not opposed to the United States proposal unless the additional text had the effect of placing signatories under the obligation to prove compliance with accepted commercial practices in addition to the obligation to prove to the courts that they had acted with reasonable care. Further clarification from the United States delegation would be appreciated.

46. **Mr. Baker** (Observer for the International Chamber of Commerce) said that ICC, which represented businesses in over 140 countries, fully supported the general statement made by the United States concerning articles 8 to 11 and hoped that the Commission would remain committed to ensuring that the provisions of the Model Law duly reflected the concerns of the international business community. With regard to article 8, paragraph 1 (a), ICC supported both the United States proposal and the United Kingdom's proposed amendment.

47. **Mr. Joza** (Observer for the Czech Republic) said that his delegation would also welcome clarification concerning the expression "accepted commercial practices", since the protection of signature creation data was related more closely to internal security practices than to commercial practices. If the United States amendment was adopted, it might be necessary to include an explanation in the draft Guide to Enactment.

48. **Mr. Caprioli** (France) said that his delegation could not support either the proposal made by the United States or the amendment proposed by the United Kingdom. The electronic signature market was an emerging market in which there was currently no established commercial practice. Accepted practices and relevant practice were vague terms that were best avoided.

49. **Mr. Brito da Silva Correia** (Observer for Portugal) said that his delegation endorsed the remarks made by the representative of France. A signatory would understand what the notion of reasonable care meant in practice in relation to protection of the private key but would have difficulty understanding what constituted accepted commercial practices. The United States proposal raised more problems than it solved.

50. **Mr. Smedinghoff** (United States of America), referring to the comments made by the representative of Thailand, said that the proposed amendment was intended to ease the burden on the signatory, especially in a technology-oriented market where what might appear as reasonable care to protect signature creation data from unauthorized use might involve a situation where the signatory did not have the technical capability to implement the protective mechanism. While his delegation acknowledged that there were currently no established commercial practices with respect to electronic signatures, it questioned how, without the yardstick of actual practice, an obligation to exercise reasonable care could be imposed on signatories. The United Kingdom's proposal to replace the word "accepted" with the word "relevant" could help solve the problem.

51. **Mr. Zanker** (Observer for Australia) said that, since there were as yet no accepted commercial practices in the burgeoning industry of electronic signatures, his delegation could not agree to the application of a standard of reasonable care that had no meaning. The observer for the Czech Republic had currently pointed out that the matter had more to do with internal security practices than with commercial practices. All that article 8 required of a signatory that had generated signature creation data, whether alone or with the assistance of a certification authority or by agreement with another party to a commercial

transaction, was that it undertook to keep such data confidential.

52. **Mr. Gauthier** (Canada) said that his delegation did not share the pessimism expressed by the United States delegation concerning articles 8 to 11, and did not believe that the term “reasonable care” would cause any difficulty from a common-law or civil-law point of view. If it was felt that additional language was necessary in article 8, paragraph 1 (a), the United Kingdom’s proposal pointed in the right direction. Perhaps the problem could be solved by the addition of a paragraph or sentence which read: “In determining reasonable care, regard may be had to a relevant commercial practice, if any.” Another solution might be to deal with the matter in the draft Guide to Enactment.

53. **Mr. Baker** (Observer for the International Chamber of Commerce) said that, while ICC had difficulty in recognizing the existence of accepted commercial practices, it found it easier to accept that there were relevant commercial practices. The Canadian proposal was acceptable to ICC.

54. **Mr. Caprioli** (France) said that the text proposed by the United States delegation would not produce the desired effect but would add to the confusion in a market where technical information about the systems employed was, both for security and for economic reasons, not accessible to all to the same degree. While users should not necessarily be expected to possess technical knowledge, they should be expected to be aware of the extent of their responsibility. The electronic signature market was a competitive market where both highly secure storage systems and commercially cheaper but less secure hard-disk storage systems were available. If, for example, a signatory’s private key was stored on a hard-disk system and the server was compromised because it was insufficiently protected, it would be difficult for a judge to assess the standard of reasonable care by reference to commercial practice.

The meeting rose at 5.05 p.m.