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Thirty-fourth session

Summary record of the 725th meeting

Held at the Vienna International Centre, Vienna, on Wednesday, 4 July 2001, at 9.30 a.m.

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

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The meeting was called to order at 9.40 a.m.

Draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment (*continued*) (A/CN.9/492 and Add.1 and 2 and A/CN.9/493)

Article 8, paragraph 1 (a) (*continued*)

1. **The Chairman** said that, at the previous meeting, the Commission had considered a proposal by the United States of America to amend article 8, paragraph 1 (a), to read: "exercise, in accordance with accepted commercial practices, reasonable care to avoid unauthorized use of its signature creation data". The United Kingdom had subsequently proposed that the words "accepted commercial practices" should be replaced by "relevant commercial practice". However, many delegations had insisted on retaining the original text. The representative of Canada had suggested that the problem could be resolved by including additional text not only in article 8, paragraph 1 (a), but also in the other paragraphs.

2. **Mr. Lee Sung-kyu** (Observer for the Republic of Korea) said that his delegation was reluctant to include any additional words before the words "reasonable care". The "reasonable care" standard would be decided by a judge, and a wise judge would take accepted commercial practices into consideration in each particular case. His delegation did not agree that it was necessary to lower the standard of care since, although a lower standard might attract more users of e-business, it would lower the liability from the point of view of the user at the other end. Some users might avoid using e-signatures precisely because of that lowered standard.

3. **Mr. Gauthier** (Canada) said that perhaps the words "in determining reasonable care, regard may be had to a relevant commercial practice, if any." could be inserted after article 8, paragraph 1 (a), or could become a subparagraph (a) (ii) of that paragraph. That was very much in line with what the Commission had done in article 10.

4. **Mr. Lebedev** (Russian Federation) said that his delegation supported the general idea put forward by the representative of the United States concerning the importance of having the draft Model Law serve as a stimulus for the broader use of new technological methods. Technological innovations, particularly those in the field of international commercial operations, initially gave rise to serious misgivings, and it was very important for users of new technologies to be sure that they were reliable.

5. With regard to the proposed amendments and the reference to practice, whether accepted or relevant, his delegation wondered how it would be possible to understand what sort of practice was being referred to. In the future, when the Model Law was actually applied, the word "practice" might well be interpreted to mean international practice and not the practice of a given State or a given sector in a given State. If the Commission decided to incorporate a reference to practice in the draft Model Law, it should ensure that such practice was interpreted not as localized practice but as international practice.

6. **Ms. Zhou Xiaoyan** (China) said that her delegation could accept either the proposal put forward by the United Kingdom or the compromise proposal made by the representative of Canada.

7. **Mr. Markus** (Observer for Switzerland) said that his delegation understood the concern expressed by the United States that it was dangerous to set standards that were too high for the user. On the other hand, he wondered whether reference to "relevant commercial practice" would have the desired results. By referring to such commercial practice, the Commission would raise rather than lower the standard. It was necessary to consider what could reasonably be expected of a person with only average commercial or technical knowledge; in that regard "reasonable care" seemed to be the correct choice of words and should be retained. If the Commission decided not to retain those words, his delegation could accept Canada's compromise proposal.

8. **Mr. Smedinghoff** (United States of America) and **Mr. Brito da Silva Correia** (Observer for Portugal) supported the proposal made by the representative of Canada.

9. **Mr. Caprioli** (France) said that his delegation remained convinced that the word "reasonable" was sufficient. Perhaps, for the sake of clarity, accepted or relevant commercial practice could be discussed in the draft Guide to Enactment.

10. **Mr. Mazzoni** (Italy) said that the remarks made by the representative of the Russian Federation were very appropriate, since the real danger was that

national standards might be used to determine what was “reasonable”, which might create the problem that article 4 sought to avoid. If the Commission wished to ensure that the standard contained in article 8, paragraph 1 (a), was the correct one, emphasis should be placed on the international character of the standard. He proposed that the text of article 8 should include the words “in determining reasonable care, regard is to be had to well-established and widely recognized international practices, if any.” That wording would ensure that judges applied international standards, and would allow for practices that had not yet evolved.

11. **Mr. Arnott** (United Kingdom) said that the Commission should take care not to qualify the simple phrase “reasonable care” in such a way as to single out one particular thing to which regard should be had, to the exclusion or derogation of others. That point should be made clear in the Guide.

12. **Ms. Mangklatanakul** (Thailand) said that her delegation believed there was no need to add anything more to the reasonable care standard that was being set in article 8, paragraph 1 (a). However, if the Commission wished to qualify “reasonable care”, the proposal by the representative of Canada would be acceptable. The proposal made by Italy was very rigid and would pose problems.

13. **Mr. Pérez** (Colombia) said that reference to accepted or relevant commercial practice would restrict the application of article 8, paragraph 1 (a). The text should be left as it stood. It would, however, be useful if the draft Guide referred to accepted or relevant commercial practice.

14. **Mr. Maradiaga** (Honduras) said that the wording of article 8, paragraph 1 (a), was perfectly clear. His delegation agreed with the representatives of France and Colombia that the use of the words “reasonable care” was sufficient.

15. **Mr. Mohan** (Singapore) said he was surprised that it should be the representatives of those very countries in which the concept of reasonable care was well developed who had proposed amendments to article 8, paragraph 1 (a). His delegation supported the delegations that were in favour of retaining the current wording of article 8, paragraph 1 (a). The concept of reasonable care introduced flexibility and would allow judges to import new commercial practices as they developed.

16. **Mr. Markus** (Observer for Switzerland) said that his delegation continued to oppose any reference to commercial practices. If it was forced to choose between the Canadian and Italian proposals, it would prefer the latter, because it referred to international commercial practice, thereby providing guarantees of uniformity.

17. **Mr. Joko Smart** (Sierra Leone) said that his delegation supported the views expressed by the delegations of Singapore, Colombia, the Republic of Korea and Thailand. Any qualification of “reasonable care” would lead to a narrow interpretation of that term, which was well known in all judicial systems.

18. **Mr. Zanker** (Observer for Australia) said that, for the reasons given by the representative of Singapore, he could not support either of the two proposals for amendment.

19. **Mr. Smedinghoff** (United States of America) said that it was precisely because of his country’s experience of the concept of reasonable care that his delegation had made its proposal. Much of United States case law had required parties under the reasonable care standard to undertake activities that had not necessarily been accepted commercial practices at the time. One particular case had ruled that the use of radio transmission technology which was not in common commercial use was nevertheless necessary to comply with the reasonable care standard. Consequently, his delegation was concerned that the right type of reasonable care standard should apply.

20. **Mr. Uchida** (Japan), supported by **Ms. Gavrilescu** (Romania), said that the text should remain unchanged, and that the factors to be taken into account when assessing the exercise of reasonable care should be explained in the Guide to Enactment.

21. **Mr. Adensamer** (Austria) also favoured leaving the text unchanged.

22. **The Chairman** said that a clear consensus had emerged that the text produced by the Working Group should be retained, but that reference to international commercial practices, if any, should be made in the Guide to Enactment.

23. *It was so agreed.*

Article 8, paragraph 1 (b)

24. **Mr. Field** (United States of America) said that his delegation was concerned that the requirements imposed on the signatory by article 8, paragraph 1 (b), would in some cases be impossible to fulfil. In what was traditionally called a closed system, signatories could trace all the relying parties and therefore had the capacity to notify them. However, in open systems, as was the case with credit cards, there could be any number of parties relying on the signature who might not be immediately traceable by the signatory. Technically, the signatory was rarely the person who had set up the system for notification of parties, and therefore had little control over it. The proposal contained in document A/CN.9/492/Add.2 was designed to take into account the fact that signatories could do only as much to notify relying parties as was made possible by the procedures available to them. Under that proposal, the subparagraph should be restated so as to read: "(b) without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if:".

25. **Mr. Enouga** (Cameroon) said that the proposal by the representative of the United States diluted the requirement so as to render it virtually meaningless. Consequently, the proposal should be rejected.

26. **Mr. Markus** (Observer for Switzerland) said that his delegation supported the general thrust of the United States proposal, but that it seemed to err on the side of leniency. Accordingly, the words "reasonable efforts" should be strengthened. He did not support the proposal to replace the words "any person that may reasonably be expected by the signatory to rely on …" with the words "relying parties", since the signatory could not be expected to know the identities of all relying parties.

27. **Mr. Arnott** (United Kingdom) agreed with the observer for Switzerland that the wording "any person that may reasonably be expected …" was preferable to the words "relying parties". The reference in the original text to persons who "provide services in support of the electronic signature", which had been deleted in the United States proposal, should also remain, for the certification service provider deserved to be notified if possible, particularly as he might also be the keeper of the revocation list. However, his delegation could support the proposed references to "reasonable efforts" and to "procedures made available".

28. **Mr. Baker** (Observer for the International Chamber of Commerce) said that while article 8 dealt specifically with the issue of security, the most important consideration was a well-balanced assignment of responsibilities. His delegation was in favour of adding the idea of "reasonable efforts" to the text, for the reasons given by the representative of the United States, and in the interests of consistency with other parts of article 8. However, like the observer for Switzerland and the representative of the United Kingdom, he favoured retaining the original text after the word "notify".

29. **Mr. Caprioli** (France) said that the Commission was going back over old ground. Furthermore, as the representative of Cameroon had noted, the proposal was so vague as to virtually strip the provision of any substance. The current text should be retained.

30. **Mr. Tatout** (France) said that his delegation shared the United States concern that the signatory would not necessarily be aware of the technical workings of the system he was using. However, that was no reason for diluting the responsibility of the signatory. The text should establish clearly the responsibilities of each party, including those of the signatory, because the success of electronic signatures depended on it. The development of electronic signatures and information technology security was a highly competitive market, which exacerbated the information imbalance between providers and users. It was therefore all the more important that responsibilities should be clearly defined. An emphasis on the signatory's responsibility would send a clear message that providers had a duty to keep users well informed.

The meeting was suspended at 10.40 a.m. and resumed at 11.15 a.m.

31. **Mr. Madrid Parra** (Spain) said that his delegation shared the concerns raised by the United States representative over article 8, paragraph 1 (b). Paragraph 139 of the Guide to Enactment did not fully reflect the discussions on that provision, one which could be seen as imposing an excessive responsibility on the signatory to ensure that every person relying on the signature was traced and notified when there was a risk that the signature creation data had been

compromised. However, the intention had simply been to ensure that in such cases the signatory should inform, for example, the party responsible for the certificate revocation list, and should exercise good faith in notifying any other parties that might reasonably be expected to know, such as business partners who relied on the signature. Paragraph 139 of the Guide to Enactment should emphasize those considerations. It should also refer to article 15 of the UNCITRAL Model Law on Electronic Commerce, which defined the dispatch and receipt of messages, making it clear that the requirement to notify did not necessarily imply that the third party had to receive the message, merely that the message should be dispatched. Reference to those matters in the Guide would be a more effective way of dealing with the issue than insertion in the Model Law of a potentially misleading phrase such as that proposed by the United States delegation.

32. **Mr. Joko Smart** (Sierra Leone) said that, as he understood it, the intention of article 8, paragraph 1 (b), was to impose an obligation on the signatory to notify any relying party or party providing services in support of the electronic signature without undue delay. That notification could be made through any means available under national law. In his view, the United States proposal was inconsistent with that intention, since it spoke merely of the initiation of a procedure through which a notification could be made. The text produced by the Working Group should therefore be retained.

33. **Mr. Maradiaga** (Honduras) said he was in favour of leaving article 8, paragraph 1 (b), unchanged. Subparagraphs (b) (i) and (ii) clearly specified the circumstances in which notification was required. A signatory acting in good faith who knew that the signature creation data had been compromised was duty bound to notify any person who was placed at risk as a result.

34. **Mr. Joza** (Observer for the Czech Republic) said he was inclined to support the proposal by the United Kingdom to combine some aspects of the United States proposal and of the existing text. But article 8, paragraph 1 (b), was not to be understood solely as an obligation but also as a necessity for a signatory who wished to avoid incurring liability. It might prove impossible for a signatory to notify "any person" that might reasonably be expected to rely on a signature produced by compromised signature creation data. But that was not so in the case of a certification service provider. In such a relationship, the signatory was under a strict obligation to notify unauthorized use if it wished to avoid incurring liability.

35. **Mr. Zanker** (Observer for Australia) said that he had not been convinced by the case made for amendment of article 8, paragraph 1 (b). Electronic signatures would presumably be used by persons who entered into contracts or dealt with customers or others on a reasonably frequent basis. A fully automated business that maintained a database of persons with whom regular transactions were conducted should have no great difficulty in notifying those persons if the signature creation data became corrupt or unreliable. The authentication provider should, of course, be notified immediately. He was in favour of leaving the text unchanged.

36. **Mr. Gauthier** (Canada) said his delegation found the text proposed by the Working Group entirely acceptable and the proposed amendment using the words "to initiate any procedures made available" basically unacceptable. Any policy debate would tend to focus on whether paragraph 1 (b) should be couched in terms of a result-oriented or a means-oriented obligation. That seemed to be the issue underlying the amendments currently on the table. If it was decided to amend the text, the most acceptable change, in his view, would consist in toning down the opening phrase so as to read "without undue delay, use reasonable efforts to notify any person".

37. **Mr. Mazzoni** (Italy) said he broadly shared the view expressed by the representative of Canada that the existing text was acceptable. Canada's suggested amendment would also be acceptable, provided that the words "reasonable efforts" were replaced by "best efforts".

38. **Ms. Mangklatanakul** (Thailand) said she supported the United States proposal, with the amendment thereto suggested by the representative of the United Kingdom. The reference to "procedures made available" should be retained, as it would help the signatory to identify what steps should be taken to notify the relevant parties.

39. **Mr. Kottut** (Kenya) said that the text as it stood was acceptable, but set a very high standard of notification for the signatory which in some circumstances it might not be possible to meet. On the other

hand, the wording of the United States proposal was extremely weak and failed to state clearly the signatory's obligation to notify where the signature creation data had been compromised. He was therefore inclined to support the amendment suggested by the representative of Canada

40. **Mr. Alhweij** (Observer for the Libyan Arab Jamahiriya) said he was in favour of retaining the original wording of article 8, paragraph 1 (b).

41. **Mr. Brito da Silva Correia** (Observer for Portugal) expressed a preference for the text proposed by the Working Group and endorsed the points made by the representatives of France and Canada. On the one hand, the wording "without undue delay" was sufficiently flexible to meet practical needs; on the other, it was important to express a result-oriented obligation to notify.

42. **Mr. Markus** (Observer for Switzerland) suggested a compromise that would combine several different proposed amendments. The proposal by the representative of Canada as modified by the representative of Italy met his concern that the wording of the United States proposal was too vague. At the same time, the reference in the United States proposal to "procedures made available to the signatory" could be incorporated in the original text. It was the certification service provider's duty to place such procedures at the disposal of the signatory, who might be unfamiliar with electronic procedures.

43. **Mr. Arndt** (Observer for Poland) expressed support for the proposal by the observer for Switzerland.

44. **Mr. Pérez** (Colombia) endorsed the proposal by the observer for Switzerland, which retained the spirit of the original version of article 8, paragraph 1 (b), but improved its overall balance.

45. **Mr. Arnott** (United Kingdom) also expressed support for the proposal by the observer for Switzerland. However, he preferred the wording "reasonable efforts" to "best efforts", because compliance with the latter requirement would be somewhat burdensome.

46. **Mr. Field** (United States of America) said he could support the compromise proposed by the observer for Switzerland.

47. **Mr. Madrid Parra** (Spain) said that any alleviation of the risk incurred by the signatory would result in a proportionately greater risk for third parties who relied on the signature, thereby reducing the incentive for them to accept electronic signatures. If the signatory made a reasonable effort and yet failed to notify a regular customer of the fact that data had been compromised, the customer might suffer damage as a result. It was important to strike a fair balance in the allocation of risk.

48. **Mr. Caprioli** (France) said that, while recognizing that it raised problems of interpretation for some delegations, he was still in favour of leaving the text of paragraph 1 (b) unchanged. The main point was the dichotomy that existed between, on the one hand, the relying parties and, on the other, the certification service provider. He proposed replacing the words "use reasonable efforts to notify" by a notion of "due care" to notify ("*de manière diligente*"). That clarified the relationship between the contracting parties, who relied on the signatures and must be notified, and the certification service provider, whose task it was to compile a list of certificates that had been revoked. In the absence of notification, the service provider was relieved of that obligation, which was the counterpart of the obligation incurred by the signatory.

49. **Mr. Baker** (Observer for the International Chamber of Commerce) expressed support for the compromise proposed by the observer for Switzerland, preferably as amended by the representative of the United Kingdom.

50. **Ms. Zhou Xiaoyan** (China) endorsed the point made by the representative of Spain regarding the possible adverse impact on the relying party of any reduction in the risk incurred by the signatory, which would undermine confidence in electronic commerce. The rights and duties of the different parties should be evenly balanced. She supported the amendment proposed by the representative of France.

51. **The Chairman** suggested that the representatives of the United States, Canada, France and Italy, the observer for Switzerland and any other interested parties should meet for informal consultations to produce a joint text of article 8, paragraph 1 (b), for consideration by the Commission at its next meeting.

52. *It was so decided.*

Article 8, paragraph 2

53. **Mr. Smedinghoff** (United States of America) said that the issue his delegation addressed in document A/CN.9/492/Add.2, that of liability, pertained also to article 9, paragraph 2, and was among the most important matters that the meeting would have to discuss. It had also been the most frequent subject of concern raised by industry groups and businesses.

54. The Model Law must not inhibit entities from engaging in electronic commerce, and must not improperly allocate risk between the parties. The current language of article 8, paragraph 2, did not offer the flexibility that was required if electronic commerce was to flourish. In particular, the words "shall be liable" went too far in allocating risk and determining liability. That wording ignored the fact that some legal systems provided for the comparative fault of the parties rather than the absolute liability of just one party. There were also variations between national laws. For example, it appeared that in Australia credit card holders were liable for improper use of their credit cards, while in the United States and other countries such liability did not necessarily arise. Furthermore, the wording ignored the possibility that failure to perform obligations might not result in damage.

55. The current text of the draft Model Law contained two different standards for risk allocation and liability. In draft articles 8 and 9, referring respectively to the signatory and the certified service provider, the text read "shall be liable for its failure", while in draft article 11, in respect of the relying party, it read "shall bear the legal consequences of its failure". The wording of article 8, paragraph 2, should be revised so as to reflect the standard used in article 11, leaving it to the courts and the law itself to impose different degrees of liability in different circumstances. The text would thus read: "A signatory shall bear the legal consequences of its failure to ...".

56. **Mr. Sorieul** (Secretariat) said that at its previous session the Working Group had discussed the matter raised by the representative of the United States at some length, and had noted that the wording of articles 8 and 9 might be interpreted as creating a regime of absolute liability for the signatory and the certification service provider—something that had never been the intention of the Working Group. The proposal put forward by the United States delegation appeared to be consistent with the wishes of the Working Group.

57. **Mr. Mazzoni** (Italy) said that the relying party could not have an obligation and could only suffer the consequences of the risk assumed, whereas the signatory and certification service provider were under an obligation to take certain measures. Provided the text maintained that important distinction, his delegation was not averse to the idea of finding some alternative language for articles 8 and 9 that would soften the phrase "shall be liable". However, to reproduce the wording of draft article 11 would convey the wrong message.

58. **Mr. Gauthier** (Canada) said that his delegation could accept the amendment proposed by the representative of the United States, in so far as it would clarify the Commission's intention. In his delegation's view, the proposed change in wording in no way modified the substance of the provision.

59. **Mr. Madrid Parra** (Spain) fully supported the position of the representative of Italy: there was a fundamental difference between the signatory and the certification service provider on the one hand and the relying party on the other, and the Model Law must reflect that difference. The signatory was bound by a contract and the certification service provider made public declarations and received payment, so that both incurred liability. The relying party, on the other hand, assumed risks only to the extent that it placed excessive trust in the certification service provider or the signatory.

60. **The Chairman**, speaking in his capacity as a member of the Commission, noted that the Model Law would automatically establish liability, as determined by the national legislation. In the United States and other common-law countries, that would give rise to strict liability. In the Mexican legal system, however, there were many cases in which liability would not be absolute. If the Model Law referred to liability in such absolute terms, those cases would be excluded.

61. **Mr. Lee Sung-kyu** (Observer for the Republic of Korea) said that his delegation fully supported the amendment proposed by the United States delegation.

62. **Mr. Baker** (Observer for the International Chamber of Commerce) said that while it might be necessary to draw a distinction between signatory, service provider and relying party, the key point was to avoid confusing the concepts of liability. He was confident that the confusion could be eliminated while

maintaining that distinction. He supported the United States proposal to amend paragraph 2, on the understanding that it might be necessary to identify and communicate the distinction to which the Italian delegation had drawn attention.

63. **Mr. Zanker** (Observer for Australia) supported the United States proposal. There was no need to draw a distinction between signatories, certification service providers and relying parties for the purpose in question. They could all potentially be actors in a situation where data was corrupted, and could all face liability or legal consequences stemming from such an incident.

64. **Mr. Caprioli** (France) endorsed the views expressed by the representatives of Spain and Italy concerning the need to distinguish between signatories, certification service providers and relying parties. The current wording, which established that distinction, should be maintained. The text merely referred to the question of liability, and it would be for national legislation to determine the extent of that liability.

65. **Mr. Sorieul** (Secretariat) said that the Working Group had attempted, to no avail, to establish a regime of liability which recognized all the distinctions that could be drawn between the three parties. It had therefore decided to refer to the applicable local law. That reference was explicit and clear in article 11, but the current wording of articles 8 and 9 could be interpreted as imposing a change in local law that would establish a strict or absolute liability on the part of the signatory or the certification service provider. That had not been the intention of the Working Group, and it could adversely affect the acceptability of the Model Law. The Commission should try to clarify the text so as to eliminate the risk of its being misinterpreted in that way. The intention was not to do away with the distinction between the various parties' degree of liability, which was of course governed by the local law.

66. **Mr. Arnott** (United Kingdom) expressed concern about the phrase, "shall be liable". In his country, there was a danger that the phrase could be interpreted as implying strict liability. While that was apparently not at all the intention, the comments of practitioners considering electronic commerce indicated that they considered that wording frighteningly strong. The proposal put forward by the delegation of the United States was thus worthy of firm support. As for the distinction between the three parties, national law would in any event take care of such distinctions. However, it might be possible to amend draft article 11 so as to reflect that distinction.

67. **Mr. Lebedev** (Russian Federation) said that the crux of the matter was not so much the wording of the provision, but rather the underlying substance. If the Commission wished to establish strict liability, it should do so. On the other hand, if it considered that issues of liability should be decided on the basis of national law, then the matter of the wording would be mainly cosmetic in nature. The Commission must decide on its stance in that regard. In his view, liability should be governed by local law. As adopted, the provision should reflect the views of the Commission, not just of the Working Group.

The meeting rose at 12.30 p.m.