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Thirty-fourth session

Summary record of the 727th meeting

Held at the Vienna International Centre, Vienna, on Thursday, 5 July 2001, at 9.30 a.m.

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

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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 11 (*continued*)

1. **Mr. Burman** (United States of America) said that, following the discussion of its earlier proposals contained in document A/CN.9/492/Add.2, during which the balance of responsibilities between the parties had been adjusted, his delegation had reconsidered its position on article 11. It was therefore withdrawing its proposal on that article.

Article 12

2. **Mr. Pérez** (Colombia) said that his country's concerns set forth in document A/CN.9/492 with regard to the definition of "a substantially equivalent level of reliability" had been expressed before the publication of the draft Guide to Enactment in document A/CN.9/493. The Draft Guide had since provided a satisfactory explanation of the criteria for determining such a concept. Nevertheless, since his delegation had not been present at the relevant discussions in the Working Group, he would welcome some elucidation, by the Secretariat or delegations of countries with legal systems similar to his own, of how article 12 would be applied in countries which relied on statutory law.

3. **The Chairman**, speaking in his capacity as a member of the delegation of Mexico, said that application of the article in his country would not pose any particular difficulties, primarily because, pursuant to article 4, paragraph 1, interpretation of the Model Law was required to take into account its international origin and the need to promote uniformity in its application. Consequently, rather than relying on national legal interpretations, judges would be required to refer to international case law, to the *travaux préparatoires* and the Guide to Enactment, and to the decisions reached by courts in other enacting States.

4. **Mr. Sorieul** (Secretariat) said that a delicate balance had been struck in article 12 and in the relevant sections of the Guide. Paragraph 154 of the Guide explained that the level of reliability of a foreign certificate did not need to be exactly identical with that of a domestic certificate. That meant that there could be no general standard, either for certification service providers or users, for obtaining authorization in every country in which they wished a signature to apply. It was acknowledged that reliability criteria or administrative requirements might be expressed differently from one place to another, both within a single jurisdiction and between different countries, and that it was important to refer to the functions of such criteria in order to establish equivalence. Those considerations, together with the general requirements of the Model Law, such as the principle of non-discrimination, and the provisions of article 4 concerning its international origin and the need to promote uniformity, should provide guidance for national authorities in determining equivalence.

5. **Mr. Madrid Parra** (Spain) said that he fully agreed with the analysis provided by the two previous speakers. The criterion for equivalence established by article 12 did not constitute a problem for his delegation. Moreover, it was entirely consistent with article 7 of European Union Directive 1999/93/EC and subsequent Spanish legislation on electronic signatures. The general principle set forth in article 12 would facilitate greater flexibility in the recognition of foreign certificates and encourage the development of international electronic commerce. He particularly welcomed the fact that there had been no attempt to establish a definitive standard for the reliability of certificates, but that instead criteria had been established for determining equivalence.

6. **Mr. Burman** (United States of America) said that it would be useful to preface the section of the Guide concerning article 12 with a reminder that the purpose of the Model Law was to promote international trade. Efforts to determine equivalence with a view to recognizing foreign certificates should be made not only in the context of article 4 but also with regard to the general objective of the promotion of trade.

7. **Mr. Sorieul** (Secretariat) said that every article should of course be read in the context of the main objectives of the Model Law, and that those objectives, which included fostering international trade, were already referred to in paragraph 5 of the Guide. Nonetheless, it might be wise to refer the reader of the section of the Guide concerning article 12 back to the section concerning paragraph 5.

8. **The Chairman** asked whether there were any further general comments on the draft Model Law and draft Guide to Enactment

9. **Mr. Madrid Parra** (Spain) asked whether the drafting group could find a different word to replace "derogated from" in article 5, which was potentially misleading. The real meaning of the term was clearly stated in the title of the article, "variation by agreement": enacting States could agree not to apply certain provisions, but they could not, as his delegation understood the situation, derogate from those provisions. In Spanish, the term *derogar* could apply only to a decision by the government authorities with regard to domestic legislation.

10. **Mr. Sorieul** (Secretariat) said that article 5 had been drafted on the basis of article 6 of the Convention on Contracts for the International Sale of Goods (Vienna, 1980), as well as with regard to the corresponding article in the UNCITRAL Model Law on Electronic Commerce, and that there was a need for consistency with those texts. Since the term "derogate" had been used in the 1980 Convention, the use of any other term could give rise to problems of interpretation. That was true at least for the French and English versions, though he could not confirm immediately whether the same term had been used in Spanish.

11. **The Chairman** said he seemed to recollect that the term used in the Spanish version of the 1980 Convention was *excluir*, not *derogar*.

12. **Mr. Olavo Baptista** (Brazil) said that the issue seemed to be one of terminology, and could perhaps be explained in the Guide.

13. **The Chairman** said that the matter would be resolved in the drafting group, possibly with the incorporation of a note in the Guide. He invited the Commission to consider the draft Model Law article by article, beginning with the title.

Title

14. *The title was approved.*

Article 1

15. *Article 1 was approved.*

Article 2 (*continued*)

Article 2 (a)

16. **Mr. Markus** (Observer for Switzerland), referring to article 2 (a), said he was aware that the phrase "indicate the signatory's approval of the information contained in the data message" had been debated at length by the Working Group and that he regretted having to raise the point again. In his view, however, it made no sense to refer to approval by a signatory, because the signatory's intention when producing the message was immaterial. What mattered was whether the signatory was the originator of the message. He proposed that the phrase be deleted.

17. **Mr. Sorieul** (Secretariat) said that the phrase as it stood was the product of some ten years of discussion. The wording was almost identical to that of article 7 of the UNCITRAL Model Law on Electronic Commerce, the idea being that the signature could be used not only to identify the signatory but also to indicate the signatory's approval of the data message to which its signature was affixed. The present definition, however, contained the words "may be used", which implied that it was simply a matter of recognizing that a number of effects, including the consent of the signatory, could ensue from such an electronic signature. It would be unwise to engage in a substantive discussion of whether the act of signature implied approval of the content of the message or simply constituted a conscious and informed decision to associate one's name with certain information.

18. **Mr. Enouga** (Cameroon) said he was satisfied with the Secretariat's explanation. The words "read and approved" were usually appended to a message by the recipient, not by the originator. He therefore understood the concern expressed by the observer for Switzerland.

19. **Ms. Zhou Xiaoyan** (China) said that there were two ways of translating the concept of "approval" into Chinese, depending on whether approval took place before or after transmission of the data message. She would appreciate clarification of that point.

20. **Mr. Sorieul** (Secretariat) said it was his understanding that approval was expressed when the signature was affixed to the data message, not necessarily at the time when the electronic signature was created.

21. **Mr. Smedinghoff** (United States of America) said that the requirement for a signatory to approve a data message was also a source of concern to the United States, since under United States legislation

signatures could be used for a variety of purposes, only one of which was approval of information.

22. **Mr. Kobori** (Japan) and **Mr. Uchida** (Japan), supported by **Mr. Kurdi** (Observer for Saudi Arabia), proposed that the words "may be used", in article 2 (a), should be replaced by an expression such as "is technically capable".

23. **Mr. Smedinghoff** (United States of America) said that the amendment proposed by Japan was not an appropriate way of addressing the issue of signatory approval, since it imposed a more rigid approval requirement than the words "may be used".

24. **Mr. Gauthier** (Canada) said he shared the view expressed by the representative of the United States. An expression such as "technically capable" was inappropriate in a legislative text since it would limit the scope of the definition and make it less comprehensible.

25. With regard to the use of signatures for other purposes, the definition did not seek to exclude such purposes but to set a baseline. He cautioned against tampering with the definitions since any amendments might have unforeseen implications for the draft Model Law as a whole.

26. **Mr. Mazzoni** (Italy) said that, while he was aware of the risks involved in tampering with the definitions, he sympathized with the proposal made by the representative of Japan. Technical capability referred to the characteristics of the signature as opposed to the use that a person might wish to make of it. In his view, the words "may be used" had subjective connotations. However, in view of the desirability of closing the debate, he was prepared to accept the definition as it stood and suggested that the concerns expressed by the representative of Japan and the observer for Switzerland should be addressed in the Guide.

27. **Mr. Caprioli** (France) endorsed the views expressed by the representatives of the United States and Canada. Any reopening of the discussion of definitions would risk upsetting the balance of the draft Model Law as a whole.

28. **Mr. Maradiaga** (Honduras) said that when a signature was appended to a paper document, it implied that the signatory approved of its content. The same applied to an electronic signature. The words "may be used" could be replaced by "have been used" to eliminate any element of conditionality, but the underlying idea was, in his view, perfectly clear and he was in favour of leaving the definition as it stood.

29. **Mr. Markus** (Observer for Switzerland) said he was aware of the risks of tampering with definitions at such a late stage. However, the amendment he wished to propose was very modest. The definition mentioned two purposes for which electronic signatures could be used, namely, electronic identification and indication of the signatory's approval, implying that they were equally important. But identification was clearly the main purpose of the exercise, whereas approval was just one of a number of subsidiary purposes. One way of demonstrating the distinction might be to insert the word "may" before "indicate the signatory's approval".

30. **Mr. Sorieul** (Secretariat) said that the idea of treating the two purposes differently had been discussed during the drafting process. One major objection was that no such distinction was made in article 7 of the UNCITRAL Model Law on Electronic Commerce, which was already being implemented in many countries. Inconsistency on such a basic issue as the definition of a signature might create problems not only for those countries but also for countries that were contemplating the adoption of either or both instruments.

31. **Mr. Zanker** (Observer for Australia) said he was firmly opposed to any amendment of the definitions, including the slight modification proposed by the observer for Switzerland. A signature was affixed by hand to indicate that the signatory was associated with the document and approved of the information it contained. The two purposes were not on different planes.

32. **Mr. Smedinghoff** (United States of America) pointed out that paragraph 29 of the Guide to Enactment addressed several of the issues raised. It could perhaps be stated at the beginning of that paragraph that the definition did not imply that use of the signature to indicate the signatory's approval was mandatory, and that the words "may be used" were intended to accommodate the different ways in which signatures were used under different legal regimes.

33. **Mr. Gauthier** (Canada) said that the definition was further explained in paragraph 93 of the draft Guide to Enactment. It was very important that it

should be consistent with the definition in article 7 of the Model Law on Electronic Commerce. Any modification, however innocuous it might seem, would introduce a shift of meaning. The definition recognized that signatures could be used for a variety of purposes but singled out two as being of special relevance in the context.

34. **The Chairman** noted that the representative of Canada, who currently chaired the Working Group on Electronic Commerce, counselled against tampering with the existing text. In his capacity as former chairman of the Working Group, he would endorse those remarks.

35. **Mr. Brito da Silva Correia** (Observer for Portugal) said he was in favour of leaving the definition unchanged.

36. **Mr. Caprioli** (France) supported the Chairman's remarks.

37. **Mr. Joko Smart** (Sierra Leone) wholeheartedly supported the remarks of the representative of Canada. In the case of hand-written signatures, the signatories intrinsically accepted the signatures as their own. If a signatory used an electronic signature, it would also be assumed to have approved it. On a separate issue, he asked what was the grammatical subject of the phrase "indicate the signatory's approval".

38. **Mr. Sorieul** (Secretariat) said that the subject of the phrase was the word "data".

39. **Mr. Markus** (Observer for Switzerland) said he would withdraw his proposal. Several delegations had mentioned the possibility of inserting language in paragraph 29 of the Guide to Enactment so as to differentiate the main functions of such a signature from its less important functions. Perhaps that would be a preferable course of action.

40. *Article 2 (a) was approved without amendment.*

The meeting was suspended at 10.50 a.m. and resumed at 11.25 a.m.

Article 2 (b) (*continued*)

41. **The Chairman** reminded the Commission that article 2 (b) had been dealt with fully at the 723rd meeting, during the discussion of the United Kingdom's proposal contained in document A/CN.9/492/Add.1.

42. *Article 2 (b) was approved.*

Article 2 (c)

43. **Mr. Madrid Parra** (Spain) pointed out that the definition of the term "data message" in subparagraph (c) was the only definition in article 2 that had been taken word for word from the UNCITRAL Model Law on Electronic Commerce. However, owing to an error, the Spanish versions differed. He requested the Secretariat to bring the texts into line.

44. *Article 2 (c) was approved.*

Article 2 (d)

45. **Mr. Madrid Parra** (Spain) noted a lack of alignment between the English, French and Spanish texts. The wording of the Spanish version could be interpreted as a restriction of the broad concept of representation which figured in the English and French texts. The Spanish version "*en nombre propio o de la persona a la que representa*" should be amended to read "*por cuenta propia, o de la persona a la que representa*".

46. **The Chairman** said that the problem to which the representative of Spain had drawn attention would be dealt with by the drafting group.

47. **Mr. Mazzoni** (Italy) asked whether the definition of the term "signatory" would raise doubts as to who, in article 8, paragraph 2, as amended, would bear the legal consequences for failure to satisfy the requirements of article 8, paragraph 1. Would the represented party or the representing party bear the consequences?

48. **Mr. Sorieul** (Secretariat) said that the Secretariat's interpretation would be that article 8, paragraph 2, merely referred to the applicable law. It was thus for the applicable law to decide who should bear the legal consequences.

49. **Ms. Piaggi de Vanossi** (Observer for Argentina) supported that interpretation. When article 8, paragraph 2, applied to a signatory acting on its own behalf, the problem would not arise. When it applied to a signatory acting on behalf of a represented party, then it seemed clear that the national law should apply.

50. **Mr. Field** (United States of America) said that the representative of Italy had raised a valid point. Article 8, paragraph 2, should make it clear that in such circumstances it was not the signatory that should bear

the legal consequences of a failure to satisfy the requirements of paragraph 1, but the party represented by the signatory. For example, if an employee of a company was the signatory, then the company should bear the legal consequences.

51. **Mr. Joko Smart** (Sierra Leone) said that he fully supported the point of view expressed by the observer for Argentina. The question of agency was clearly outside the scope of the Model Law.

52. **Mr. Field** (United States of America) said that, having reflected on the comment made by the representative of Sierra Leone, his delegation was withdrawing its proposal to revisit the wording of article 8, paragraph 2.

53. *Article 2 (d) was approved.*

Article 2 (e)

54. **Mr. Joza** (Observer for the Czech Republic) said that article 8, paragraph 1 (b), referred to "any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature", while article 12, paragraph 1 (b), used the word "issuer". In the light of the broad definition in article 2 (e), was that distinction needed? Furthermore, paragraph 139 of the Guide to Enactment drew a distinction between certification service providers and certificate revocation service providers. Clarification might be required as to whether certificate revocation service providers were covered by the definition in article 2 (e).

55. **Mr. Sorieul** (Secretariat) said he believed that the reference to "issuer" in article 12, paragraph 1 (b), could be maintained without contradicting the definition in article 2 (e). On the other hand, it might perhaps be advisable to amend the wording of article 8, paragraph 1 (b), to read "services related to the electronic signature", to bring it into line with the definition in article 2 (e). In his view, the concept of certificate revocation service providers must be considered as a subset of certification service providers. That could be indicated more clearly in paragraph 139 of the Guide.

56. *Article 2 (e) was approved.*

Article 2 (f)

57. **Mr. Madrid Parra** (Spain) said that, in its current form, the definition of "relying party" could apply to the signatory and to the certification service provider. The Guide to Enactment should make it clear that the relying party must be a third party.

58. **Mr. Sorieul** (Secretariat) said that the omission of any reference to third parties had been intentional. The reasoning behind that decision was explained in paragraph 150 of the Guide to Enactment.

59. *Article 2 (f) was approved.*

60. *Article 2 as a whole was approved.*

Article 3

61. *Article 3 was approved.*

Article 4

62. *Article 4 was approved.*

Article 5 (*continued*)

63. *Article 5 was approved.*

Article 6

64. *Article 6 was approved.*

Article 7 (*continued*)

65. *Article 7 was approved.*

Article 8 (*continued*)

66. *Subject to the Commission's earlier deliberations, article 8 was approved.*

Article 9 (*continued*)

67. **Mr. Caprioli** (France) said that, the previous day, the representative of Australia had suggested that France should transpose its proposal on article 8 to article 9. However, his delegation had later realized that article 9, paragraph 1 (d) (ii), could be understood as comprising its proposed amendment. If the observer for Australia agreed, his delegation was prepared to withdraw its proposal.

68. **Mr. Sorieul** (Secretariat) said that the simplest solution would be to retain articles 8 and 9 as they stood.

69. **Mr. Zanker** (Observer for Australia) and **Mr. Field** (United States of America) expressed their

support for the Secretariat's proposal that articles 8 and 9 should not be amended.

70. *Subject to the Commission's earlier deliberations, article 9 was approved.*

Article 10

71. *Article 10 was approved.*

Article 11 (*continued*)

72. **Mr. Madrid Parra** (Spain) said that the title of article 11 was significantly different in the English, French and Spanish versions. While the English text referred only to "the relying party", the French text referred to the party relying on the certificate and the party relying on the signature, and the Spanish text referred only to the party relying on the certificate. It was therefore necessary to align the title in all languages.

73. **The Chairman** said that the suggestion by the representative of Spain would be noted.

74. *On that understanding, article 11 was approved.*

Article 12

75. **Mr. Kuner** (Observer for the International Chamber of Commerce) said that, in paragraph 5, the phrase "certain types of electronic signatures" was too narrow and should be amended to read "certain electronic signatures", which would be more in line with the term used in paragraph 160 of the draft Guide to Enactment.

76. **Mr. Madrid Parra** (Spain) said that word "types" had been included in paragraph 5 in order to take into account different types, models or categories of signature. For example, in some countries, there might be standard types of signatures or certificates that did not exist in other countries.

77. **Mr. Zanker** (Observer for Australia) said that his delegation was not in favour of the proposed amendment.

78. **Mr. Enouga** (Cameroon) said that perhaps reference to article 5 would solve the issue raised by the observer for the International Chamber of Commerce, since that article provided for derogations from the Model Law.

79. **The Chairman** said it appeared that the proposal by the observer for the International Chamber of Commerce had no support.

80. **Mr. Uchida** (Japan), supported by **Mr. Mazzoni** (Italy) and **Mr. Kuner** (Observer for the International Chamber of Commerce), proposed that paragraph 3 should be deleted in order to make the Model Law more understandable and attractive. His delegation could not imagine a situation in which the place where an electronic signature was created would have any legal meaning.

81. **Mr. Burman** (United States of America), supported by **Mr. Caprioli** (France), said that his delegation did not support the proposal for deletion made by the representative of Japan. The existence of the type of language contained in paragraph 3 had elicited support for the Model Law from the user business community, which was a very important factor.

82. **The Chairman** said that the proposal made by the representative of Japan appeared not to have gained much support.

83. *Article 12 was approved.*

Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures

84. **Mr. Baker** (Observer for the International Chamber of Commerce) said that, pursuant to its suggestion in document A/CN.9/492/Add.2, paragraphs 135 and 159 of the draft Guide should be amended in order to reflect the changes that had been made to paragraph 69. His delegation was in the process of drafting proposals for amendments to those paragraphs.

The meeting rose at 12.25 p.m