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Summary record of the 728th meeting

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Chairman: Mr. Abascal Zamora (Mexico)

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Enactment (*continued*)

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The meeting was called to order at 2.10 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)

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

1. **Mr. Sorieul** (Secretariat) said that the draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures contained in document A/CN.9/493 was very similar to the previous version. Since the Working Group had already considered the draft in detail at its thirty-eighth session, he did not expect that many changes would need to be made. The final text of the draft Guide would reflect the Commission's deliberations.

2. **Mr. Baker** (Observer for the International Chamber of Commerce—ICC) said that, at the previous meeting, his delegation had suggested that paragraphs 135 and 159 of the draft Guide to Enactment should be amended in order to reflect changes that had been made to paragraph 69. In the second sentence of paragraph 135, the word “voluntary” should be added before the words “industry practices and trade usages”, and the words “which may assure the flexibility upon which commercial practice relies, promote open standards with a view to facilitating interoperability and support the objective of cross-border recognition (as described in article 12).” should be inserted after “trade usages”. The third sentence would read: “Example texts include those emanating from such international organizations as the International Chamber of Commerce, the regional accreditation bodies operating under the aegis of the ISO (see A/CN.9/484, para. 66), the World Wide Web Consortium (W3C), as well as the work of UNCITRAL itself (including this Model Law and the UNCITRAL Model Law on Electronic Commerce).” The rest of paragraph 135 would remain unchanged.

3. **Mr. Caprioli** (France), supported by **Ms. Proulx** (Canada) and **Mr. Olavo Baptista** (Brazil), said that the text of paragraph 135 should simply refer to paragraph 69 rather than repeat the content of that paragraph.

4. **Mr. Tatout** (France) said that the European Electronic Signature Standardization Initiative (EESSI)

should be included among the standards listed in paragraph 135.

5. **Mr. Mazzoni** (Italy) said that the language proposed by ICC did not appear to introduce any new concept and might therefore be considered to be a clarification of information already contained in the Guide.

6. **Mr. Brito da Silva Correia** (Observer for Portugal) said that his delegation supported the views expressed by the representatives of France and Canada. If the proposed text was introduced it might imply that the only standards or trade usages allowed were those referred to in the paragraph. The text as it currently stood was preferable, since it permitted all trade usages.

7. **Mr. Baker** (Observer for the International Chamber of Commerce) said that the Working Group had already considered the idea of amending the language of paragraphs 135 and 159 of the draft Guide to Enactment. A simple reference to paragraph 69 in paragraphs 135 and 159 would not be sufficient, since there would be no guarantee that the notion of standards as referred to in paragraphs 135 and 159 would be understood in the way that the Working Group had agreed that it should be understood in paragraph 69.

8. **Mr. Burman** (United States of America) said that it was his delegation's understanding that the descriptive information contained in paragraph 69 would be reflected in paragraphs 135 and 159. Since the way in which that might be done had not been discussed, perhaps the Secretariat could deal with the matter.

9. **Mr. Sorieul** (Secretariat) suggested that, in paragraph 135, the words “voluntary standards as described in paragraph 69 above,” should be inserted after the words “industry practices and trade usages”.

10. **Mr. Tatout** (France) proposed that, in paragraph 135, the words “such as the European Electronic Signature Standard Initiative (EESSI),” should be inserted after the words “industry practices and trade usages”.

11. **Mr. Burman** (United States of America) said that, while his delegation had no objection to the proposal made by the representative of France, the inclusion of a reference to EESSI, which was a

regional organization, would make it necessary to take account of other regional bodies, such as the Organization of American States. While his delegation was prepared to compile a list of references for its region for inclusion in paragraph 135 in order to avoid any implication that all initiatives were being taken in one region, it would prefer that the paragraph was not encumbered by a long list of regional references.

12. **Mr. Caprioli** (France), supported by **Ms. Gavrilesu** (Romania), said that his delegation fully understood the concerns expressed by the representative of the United States. He proposed that, instead of referring specifically to EESSI, the words “including regional initiatives,” should be inserted after the words “industry practices and trade usages” in paragraph 135.

13. **Mr. Lebedev** (Russian Federation) said that discussion on paragraph 135 should be suspended until the Secretariat redrafted the text to reflect the comments that had been made. His delegation was not in favour of the expression “voluntary industry practices”, which would be difficult to translate into other languages. He agreed that it would be useful to include in paragraph 135 a general reference to regional initiatives.

14. **Mr. Baker** (Observer for the International Chamber of Commerce) said that his delegation proposed that paragraph 159 should read:

“159. The notion of ‘recognized international standard’ should be interpreted broadly to cover both voluntary international technical and commercial standards (i.e., market-driven standards) and standards and norms adopted by governmental or intergovernmental bodies (ibid., para. 49). ‘Recognized international standard’ may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sector (or both), of a normative or interpretative nature, which are generally accepted or applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms (ibid., paras. 101-104). Voluntary international, technical and commercial standards may form the basis of product specifications, of engineering and design criteria and of consensus for research and development of future products. To assure the

flexibility upon which such commercial practice relies, to promote open standards with a view to facilitating interoperability and to support the objective of cross-border recognition, as described in article 12, States may wish to give due regard to the relationship between any specifications incorporated in or authorized by national regulations and the voluntary technical standards process.”

15. **Mr. Mazzoni** (Italy), supported by **Mr. Gauthier** (Canada), **Mr. Tatout** (France) and **Mr. Zanker** (Observer for Australia), said that his delegation did not see the connection between the final sentence of the new text proposed by ICC and the recognition of foreign certificates. He had understood that the additional text would be a general statement designed to promote international interoperability rather than means for interpreting article 12.

16. **Mr. Baker** (Observer for the International Chamber of Commerce) said the reference to article 12 in his delegation’s amendment to paragraph 159 had been intended to clarify the requirement in article 12, paragraph 4, that regard should be had to recognized international standards in determining whether a certificate or an electronic signature offered a substantially equivalent level of reliability. Although that reference was not vital, ICC believed that the language describing standards was essential if paragraph 159 was to reflect the change made to paragraph 69.

17. **Mr. Madrid Parra** (Spain) said that, for the sake of consistency, paragraph 159 should contain a reference to paragraph 135 if that paragraph was to contain a reference to paragraph 159. The Commission should request the Secretariat to ensure that any paragraphs in the draft Guide that referred to particular articles should contain a broader explanation of the content of those articles, especially in cases where the articles were very concise. In addition, it would be easier for users if chapter II of the Guide, which contained article-by-article remarks, was cross-referenced with the information contained in chapter I.

18. **Mr. Sorieul** (Secretariat) said that the Secretariat was in no position to begin rewriting the Guide. Even without explicit instructions from the Commission, the Secretariat intended to update the Guide in order to reflect discussions that had taken place at the thirty-fourth session, and make the necessary cross-

references between paragraphs. At the current stage, it was up to the Commission to inform the Secretariat of any changes that it wished to make to specific paragraphs.

19. **The Chairman** said that he took it that the Commission wished to retain paragraph 159 as it stood and to include the comments made by the representative of ICC in the Commission's report.

20. *It was so decided.*

The meeting was suspended at 3.15 p.m. and resumed at 3.50 p.m.

21. **Mr. Linares Gil** (Spain), supported by **Mr. Pérez** (Colombia), **Mr. Caprioli** (France) and **Mr. Maradiaga** (Honduras), said that paragraph 54 of the Guide should contain a reference to the current situation with respect to the use of digital signatures. His delegation proposed that a new sentence should be added after the second sentence of paragraph 54, which would read: "The public key of the certification provider can be contained in a certificate issued by itself, and known as a root certificate." The last sentence of paragraph 54 should be amended to read: "Under the laws of some States, a way of building trust in the digital signature of the certification service provider might be to publish certain data of the root certificate, such as the fingerprint, in an official bulletin." That would not change the substance of the paragraph, but would give an indication of the practice currently followed in some countries.

22. **Mr. Lebedev** (Russian Federation) said that his delegation was in favour of the proposal made by the representative of Spain. He proposed that the new third sentence of paragraph 54 should be amended to indicate that there was currently a trend towards the use of root certificates.

23. **Mr. Burman** (United States of America) said that his delegation would have no objection to the proposal by Spain to include a reference to the root certificate. However, it could not accept the Russian Federation's proposal that paragraph 54 should indicate that there was a trend towards the use of root certificates. Although such a trend might be observable in some regions, the United States was moving away from vertical concepts of root certification in favour of two-party certification systems, which worked more efficiently and cost a great deal less.

24. **Ms. Proulx** (Canada) said that, while her delegation was satisfied with the text of paragraph 54 as it stood, it was not opposed to the inclusion of examples. However, elsewhere in the Guide, reference was made only to certificates in general, and it would be inconsistent to move from the general to the specific in paragraph 54. Her delegation was in favour of retaining the reference to the public key in the last sentence, and simply adding the words proposed by the representative of Spain to the existing text.

25. **Mr. Caprioli** (France) said that the amendments proposed by Spain would be of great assistance to users and user markets.

26. **Mr. Burman** (United States of America) said that the Commission's task was to draft legal standards, not to engage in discussions of how certain systems might work in practice. While root certification might work well technologically, it was not correct to say that it was cost-efficient and was widely used in many countries.

27. **Mr. Lebedev** (Russian Federation) said that the purpose of his delegation's proposal had been to make clear that the proposal by Spain was not universally accepted but referred rather to only one of a number of emerging trends. Perhaps the Guide could state that several alternative approaches existed.

28. **The Chairman** suggested that the Commission should adopt in principle the proposal made by the representative of Spain, subject to the clarifications made by the representatives of the Russian Federation and Canada. The Secretariat would make the necessary adjustments to the text of paragraph 54.

29. *It was so decided.*

30. **Mr. Burman** (United States of America) said that the inclusion in paragraph 54 of a specific reference to root certification would imply that the Commission supported that approach. For the sake of balance, the Guide should clearly state that there had been considerable objections in some countries to the use of root certificates on a number of grounds, including social cost and the extent of governmental regulation.

31. **The Chairman** said that the Secretariat had taken note of the comments made by the representative of the United States and would ensure that the wording of paragraphs 54 was sufficiently balanced.

32. **Mr. Linares Gil** (Spain) drew attention to the second sentence of subparagraph 3 of paragraph 62, which read: “Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key”. In some cases, at least in the technology used by government services in Spain, the hash result was in fact derived from the message and was unique only to the message, not to the private key. His delegation therefore proposed that the second sentence of subparagraph 3 should be reworded to indicate that the word “unique” applied only to the signed message. That would help to avoid confusion when the Guide was applied in different States.

33. **Mr. Kobori** (Japan), **Mr. Caprioli** (France) and **Mr. Burman** (United States of America) supported the amendment proposed by Spain.

34. **The Chairman** said that he took it that the Commission wished to adopt the amendment proposed by the representative of Spain.

35. *It was so decided.*

36. **Mr. Markus** (Observer for Switzerland) said that paragraph 29 listed a number of traditional, or core, functions of a signature, one of which was to associate a person with the content of a document. It then went on to list various additional functions, one of which was the intent of a party to be bound by the content of a signed contract. Paragraph 93 stated that the intent to sign was no more than the smallest common denominator to the various approaches to “signature” found in the various legal systems. Since, in paragraph 29, intent to sign was considered to be only an additional, but not mandatory, function of a signature, his delegation believed that it should not be dealt with in paragraph 93 as the smallest common denominator to the various approaches to “signature”. Since intent to sign was purely subjective, reference to it should be deleted from paragraph 93 and replaced by the core function referred to in paragraph 29, namely, to associate a person with the content of a document.

37. **The Chairman** said that, if there were no objections, the Secretariat would take the proposal made by the observer for Switzerland into account and make the necessary changes.

38. *It was so decided.*

39. **Mr. Linares Gil** (Spain) said that his delegation had some difficulty in understanding the last sentence

of paragraph 121, which stated that, where several employees shared the use of a corporate signature-creation data, that data must be capable of identifying one user unambiguously in the context of each electronic signature. It was not clear who that one user might be, since the signatory would not necessarily also be the user; if the user was one of the employees authorized to use the same data, he wished to know how the data could identify the individual user. His delegation also requested clarification on the meaning of “signature dynamics” in paragraph 82.

40. **Mr. Burman** (United States of America) said the problem to which the representative of Spain had referred was not the fault of the Guide, which correctly reflected the content of the Model Law. During the drafting process, some members of the Commission had expressed concern that many provisions of the Model Law were geared to an older application of digital technology and did not anticipate future developments. Article 6, paragraph 3, dealt with a very narrow area of practice, and more recent applications, particularly the new XHTML computer technology and signature applications, would probably not meet the standards it defined. That was the consequence of identifying criteria too early in the technology process.

41. **Mr. Sekolec** (Secretariat) suggested that perhaps the concern of the representative of Spain would be met if, in the last sentence of paragraph 121, the words “must be capable of identifying one user” were replaced by the words “must be capable of identifying one person”. That would bring it into alignment with article 6, paragraph 3, and would make the necessary distinction between one user and multiple users.

42. **Mr. Zanker** (Observer for Australia) supported the suggestion made by the Secretariat. Perhaps the word “person” or “signatory” could be substituted for the word “user” in paragraph 121.

43. **The Chairman** suggested that the Secretariat should redraft the last sentence of paragraph 121, taking into account the concerns that had been raised.

44. *It was so decided.*

45. **Mr. Burman** (United States of America), replying to the question raised by the representative of Spain, said that “signature dynamics” referred to a very complex British technology which, under appropriate circumstances, had a high rate of recognition of a manual signature. That technology, which was

marketed under various corporate names, was very widely used, and he was sure that there would be a term for it in Spain.

46. **The Chairman** suggested that the Secretariat should try to find the correct Spanish term for “signature dynamics”, or it could put the English term in quotation marks or brackets in the Spanish text.

47. *It was so decided.*

48. **Mr. Kobori** (Japan) said that the beginning of the first sentence of paragraph 153 should reflect the wording used in paragraph 31 of document A/CN.9/483, which dealt with the same issue. His delegation therefore proposed that the words “The purpose of paragraph (2) is to provide the general criterion ...” should be amended to read “The purpose of paragraph (2) is not to place foreign suppliers of certification services in a better position than domestic ones but to provide the general criterion ...”.

49. **The Chairman** said that, if he heard no objection, he would request the Secretariat to ensure that comments of the representative of Japan were reflected in the final version of the Guide.

50. *It was so decided.*

51. *The Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures, as amended, was adopted.*

The meeting rose at 4.45 p.m.