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Draft Model Law on Electronic Signatures

Compilation of Comments by Governments and International Organizations

Addendum

Introduction

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all governments and to interested international organizations for comment. On 29 June 2001 the Secretariat received a note by the United States of America and a note by the International Chamber of Commerce. The texts of those notes, both of which contain comments and proposals with respect to the draft Model Law on Electronic Signatures, are reproduced below in the form in which they were communicated to the Secretariat.

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Compilation of comments

A. States

Unites States of America

We believe, as stated at the 38th session of the Working Group, taking into account considerable representation from industry and e-commerce law groups, that certain changes, at a minimum, should be made if the draft Model Law is to promote trade and avoid having a negative effect on e-commerce.

Other changes and technical corrections will be raised as appropriate. The most important changes we believe necessary are within articles 8 to 11:

(1) Articles 8 to 11 should be subject to a general limitation that the criteria and rules therein be applied as is reasonable under the circumstances of the type of transaction and the nature of the parties. The imposition of strict obligations is inappropriate if applied to a wide variety of transactions that have developed in e-commerce.

(2) Article 8 (1)(a): The terms "in accordance with accepted commercial practices" should be inserted before "reasonable care".

(3) Article 8 (1)(b) should be restated to remove an overly broad standard, rejected by commentators as infeasible, as follows:

> "(b) without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if: "

(4) Article 8 (2): Determining liability rules for one party is an exceptional position to take within the commercial law, which fails to balance the actions of other parties and will unduly burden the use of e-commmerce signatures. Article 8 (2) should thus be revised to reflect the standard used in article 11: "A signatory shall bear the legal consequenses of its failure to ...".

(5) Articles 9 and 10: These articles focus on a technology application that in commerce is used for certain purposes but may be inappropriate if applied to a wider range of e-commerce functions. Moreover, the standards set out cannot be met for most e-signatures and few services could comply. Both articles insufficiently protect the ability of service providers to limit the scope of what they offer and the extent to which they can avoid unreasonable exposure to liabilities.

(6) Article 9 (1)(f): In addition to language that should be added to assure service providers the ability to control the extent to which their services can be relied on and the limits of the services offered, article 9 (1)(f) should not be connected to article 10, since article 10 sets out standards well exceeding the resources and services offered generally by participants in this field.

(7) Article 9 (2): As with article 8, this article purports to assign liability without reference to the role of other parties, an inappropriate result for the commercial law.

Article 9 (2) should be amended as follows:

> "Subject to any reasonably accessible limitations on the scope or extent of services to be provided, as well as liability limits stipulated by the certification service provider, such a provider shall bear the legal consequences of its failure to comply with paragraph (1)."

(8) Article 10: As noted, the standards set out considerably exceed actual practices for services generally provided today. The leading sentence should thus be modified by adding "... factors, if and to the extent generally applied in commercial practice for the level of service provided, and if relied on by a relying party: "

(9) Article 11: Article 11 should be amended to provide, in accordance with commercial and transactional practices where applicable, that relying parties assume a greater responsibility for ascertaining the reliability of a signature than is now provided by this article.

B. Non-governmental organizations

International Chamber of Commerce (ICC)

The International Chamber of Commerce's delegation (ICC) to UNCITRAL has contributed its knowledge of business realities and technology expertise throughout the development of the UNCITRAL Working Group on Electronic Commerce's Draft Uniform Rules on Electronic Signatures and complementary Guide to Enactment.

ICC acknowledges its full support of the UNCITRAL process and believes that – as the World Business Organization – it can benefit the process through its unique private sector perspective. To this end, ICC wishes to address three issues regarding the current versions of the Model law and the Guide to Enactment which will be discussed during the current round of discussions by UNCITRAL.

ICC's concerns are presented forthwith in order of importance.

I. Guide to Enactment paragraphs 69, 135 and 159

ICC is primarily concerned that paragraphs 135 and 159 of the current version of the Guide to Enactment be amended to reflect changes made to paragraph 69 of the same version during the 13 March 2001 session in New York. At that session, both ICC and the Spanish delegation requested these paragraphs be amended to limit the risk of industry-led voluntary standards processes being given anything less than due regard. ICC suggests that this concept be incorporated into paragraphs 135 and 159 either directly or by reference to paragraph 69.

II. Model Law Article 5

ICC member companies from around the world have indicated substantial concern that Model Law Article 5 could, if unchanged, have a substantial negative effect on the use of electronic signatures and electronic commerce. Thus, ICC urges that Model Law Article 5 be changed by way of one of the following options (listed in order of preference):

- ***Option 1***
  Delete the final clause of Article 5 ("unless that agreement would not be valid or effective under applicable law");

- ***Option 2***
  Replace the words "applicable law" with "mandatory principles of public policy."

ICC offers the following justification for either of the above proposed changes:

- **Danger of confusion.** Many national judges may not have access to the Guide to Enactment when applying the Model Law as implemented in national law, and could construe the reference to "applicable law" to mean that any sort of statute, case law, or other legal provision, even if it is not very weighty, should override party autonomy (see below). "Applicable law" is thus in this sense potentially over-broad.

- **Clarification.** The Guide to Enactment (see para. 110) makes it clear that any limitation on party autonomy is intended to apply only to "mandatory rules, e.g., rules adopted for reasons of public policy," which term would be construed quite narrowly in most legal systems to refer to principles in which there was an overwhelming public or governmental interest. However, the text of Article 5 allows party autonomy to be overridden by "applicable law," which could refer to almost any sort of legal provision. Removing the reference to "applicable law" is thus not a change in substance, but will only realize the intent of the Working Group.

- **Elimination of superfluous language.** The limitation on party autonomy is unnecessary, since in most legal systems, mandatory rules of public policy or *ordre public* would override party autonomy in all cases (i.e., whether or not they are mentioned in the text).

- **Danger of harmful business effects.** Many uses of electronic signatures are presently dependent on full effect being given to the contractual relations between the parties. Electronic commerce could be significantly harmed if national legislators and courts were given the mistaken impression that UNCITRAL intended to limit party autonomy more than is absolutely necessary.

III. Model Law Articles 8-11

ICC is concerned that Model Law Articles 8-11 are over-broad, difficult to apply and unreflective of business reality. ICC welcomes an opportunity to further discuss the impact of these provisions in light of business realities.