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Summary record of the 726th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 4 July 2001, at 2 p.m.

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

Contents

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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 493)

Articles 8, 9 and 11

1. **Mr. Mazzoni** (Italy) said that, since there was a need to find language other than "a signatory shall be liable", not only with respect to the signatory in article 8 but also to the certification service provider in article 9, his delegation proposed that article 8, paragraph 2, should read: "A signatory shall be exposed to liability or to any other applicable legal consequences for its failure to satisfy the requirements of paragraph 1." That would make it clear that such conduct would lead not only to liability but also to other consequences; for example, the signatory would be prevented from denying reference of the signature to him, which was not a liability but a contractual obligation. That language might, at least in part, meet the concern of the United States delegation, and could also be used in article 9, paragraph 2. For the sake of consistency, the chapeau of article 11 could be amended to read "A relying party shall bear the applicable legal consequences of its failure to:".

2. **Mr. Markus** (Observer for Switzerland) said that the real problem lay in the use of the word "liability", which was a very technical term in some legal systems and implied not only specific legal consequences but also the conditions that had to be met in order for such consequences to take effect. For that reason, his delegation preferred the use of "shall bear the legal consequences" in article 8, paragraph 2, article 9, paragraph 2, and article 11. If a distinction had to be made between all those cases it would be made by the applicable law of the country concerned. In order to clarify that point, he proposed the use of the words "bear the legal consequences according to applicable law".

3. **Ms. Gavrilescu** (Romania), supported by **Mr. Enouga** (Cameroon), said that, in the interests of consensus, her delegation could accept the United States proposal. She could not envisage a situation in which liability would not also entail legal consequences. The formulation proposed by the representative of Italy, namely "exposed to liability or to any other applicable legal consequences", might make it difficult to determine when a given situation involved liability and when it involved legal consequences. It was therefore better to adopt the United States proposal or, if no consensus could be reached, retain the original wording.

4. **Mr. Arnott** (United Kingdom) said he appreciated the effort by the representative of Italy to make a distinction between article 11 and articles 8 and 9, but pointed out that national law would make that distinction in any event. The Commission should not introduce language in articles 8 and 9 that differed from that in article 11. His delegation was in favour of using the expression proposed by the United States representative in all three articles.

5. **Mr. Caprioli** (France) said that the wording proposed by the representative of the United States was the most neutral and also the clearest. If the Commission agreed that there was no full liability, it would then be up to the judge or legislator in a particular legal system to determine the distinction to be made between the signatory, the certification service provider and the relying party. The discussion that had taken place had shown that any differences of opinion were more of form than of substance, and that there was general support for the United States proposal.

6. **Mr. Joko Smart** (Sierra Leone) said that, in Sierra Leone's legal system, the legal consequences of an act included liability. His delegation supported the language proposed by the United States.

7. **The Chairman** said he took it that the Commission wished to adopt the United States proposal.

8. *It was so decided.*

9. **The Chairman** said that, in document A/CN.9/492, France had proposed the addition of a paragraph at the end of article 8.

10. **Mr. Caprioli** (France) said that it might be useful to make a distinction between the parties covered by articles 8, 9 and 10—the signatories and providers—and those covered by article 11—the relying parties. For the sake of consistency with article 9, his delegation proposed the addition of a new paragraph at the end of article 8, which would read: "It shall provide to the certification service provider for any party relying on the certificate reasonably accessible means

to ascertain, where relevant, from the certificate referred to in article 9 or otherwise, any limitation on its responsibility."

11. **Mr. Zanker** (Observer for Australia) said that, although the amendment proposed by France dealt with an issue which had not been covered by the Model Law, he wondered whether the amendment belonged in article 8. Perhaps the same objective could be achieved by adding the words "or the signatory" at the end of article 9, paragraph 1 (d) (iv), since that would oblige the signatory to indicate to the certification service provider any limitation on the scope or extent of its liability.

12. **Mr. Field** (United States of America) said that, while his delegation appreciated the issue raised by the representative of France, it considered that the wording of article 8, paragraph 1 (c), sufficiently covered the issue.

13. **Mr. Gauthier** (Canada) said that his delegation was not quite sure what kind of limitation on responsibility was implied in the amendment proposed by France. It would therefore reserve its comments until it received further clarification.

14. **Mr. Arnott** (United Kingdom) said that the proposal by the representative of Australia to add the words "or the signatory" at the end of article 9, paragraph 1 (d) (iv) presupposed that the amendment proposed by France was based on the assumption that a certificate, or at least a certification service provider, would be involved. If that was the case, the Australian solution was excellent. If, however, France was proposing a means of limiting liability under article 8, where the signatory, with or without a certification service provider, could declare a limitation on its liability, the Australian solution would not work.

15. **Mr. Caprioli** (France) said that his proposal would be applicable only in cases where there was a certification service provider and a certificate. The proposal made by the representative of Australia was constructive, and his delegation could support it. Replying to the comments of the representative of Canada, he said that the intention of his delegation's proposal had been not to limit or restrict the signature made by the signatory but to provide the signatory with an opportunity to update the certificate.

16. **Mr. Arnott** (United Kingdom), supported by **Mr. Smedinghoff** (United States of America), **Mr. Gauthier** (Canada) and **Mr. Madrid Parra** (Spain), said that his delegation was in favour of the amendment proposed by the representative of Australia.

17. **The Chairman** said that he took it that it was the wish of the Committee to adopt Australia's amendment to article 9, paragraph 1 (d) (iv).

18. *It was so decided.*

Article 9, paragraph 1 (f)

19. **Mr. Smedinghoff** (United States of America), introducing his delegation's proposed amendment to article 9, paragraph 1 (f), contained in document A/CN.9/492/Add.2, said that the issue in question was whether or not the certification service provider should be able to limit the scope of the services that it offered. That question arose because article 9, paragraph 1 (f), appeared to require the certification service provider to utilize trustworthy systems. His delegation proposed that article 9, paragraph 1 (f), should become subparagraph (vii) of article 9, paragraph 1 (d), so that, rather than requiring the provider to utilize trustworthy systems, the Model Law would require it to provide a means to enable the relying party to ascertain whether or not it provided a trustworthy system. In other words, the focus would be on an obligation of disclosure rather than on an obligation always to use a trustworthy system.

20. Many entities that were beginning to operate as certification service providers were doing so not as a principal aspect of their business but rather to facilitate other aspects of their business. His delegation was concerned that the imposition of an absolute obligation to provide a trustworthy system was nebulous, since it was not always clear whether the standards set out in article 10 had been met. His delegation proposed that the certification service provider should simply be required under article 9, paragraph 1 (d), to disclose to relying parties information that would help them to make a determination of trust, so that they could decide whether or not to use certificates issued by that particular provider.

21. **Mr. Madrid Parra** (Spain) supported the proposal made by the representative of the United States. However, it might be appropriate to add a reference to the purpose for which a trustworthy system would be required. The disadvantage of moving

the text of article 9, paragraph 1 (f), to paragraph 1 (d) would be that article 10 would become unnecessary, since the obligation of trustworthiness would be lost. He recalled that after a long debate the Commission had decided that it was important to retain article 10.

22. **Mr. Zanker** (Observer for Australia) said that his delegation could accept the proposal put forward by the United States. Adoption of the amendment would not require the elimination of article 10. However, it might be simpler to introduce the formulation used in article 9, paragraph 1 (d), into paragraph 1 (f), so that article 9, paragraph 1 (f), would read "provide reasonably accessible means which enable a relying party to ascertain, where relevant, that the certificate provider utilizes trustworthy systems, procedures and human resources in performing its services". There would then be no need to amend article 10.

23. **Mr. Arnott** (United Kingdom) said that the simplest solution would be to accept the United States proposal and retain article 10.

24. **Mr. Caprioli** (France) said that to require the certification service provider to furnish the relying party with means for determining that the provider was utilizing trustworthy systems was not the same as saying that that provider was using trustworthy means. Means could be provided in various ways: the provider could publish its certification policy, issue a declaration on its certification practice or publish an audit with voluntary accreditation by an authority designated by the State. On the other hand, the requirement that the provider utilize trustworthy systems would have stronger legal consequences, since utilization was an act that could be verified whereas, in the case of a declaration, it would have to be proved that what had been declared was not in conformity with what was being asserted. In addition, the transfer of article 9, paragraph 1 (f) to paragraph 1 (d) (vii) implied the elimination of the indicative criteria contained in article 10, and hence the basis for determining what was trustworthy. His delegation was therefore in favour of retaining article 9, paragraph 1 (f).

25. **Mr. Olavo Baptista** (Brazil) said that the amendment proposed by the United States would bring about an imbalance in the relations between the certification service provider and the user by making the user responsible for ascertaining whether or not trustworthy systems were being utilized, whereas that was the provider's obligation. The adoption of the amendment could have serious consequences, since it might make the Model Law more favourable to the provider than to other parties. National consumer protection laws could then bar the international use of the provider's services. If the Commission wished to promote the international use of such signatures, the law should strike a better balance between the obligations of users and the obligations of providers.

26. **Mr. Baker** (Observer for the International Chamber of Commerce—ICC) said that a simpler solution might be to remove the reference to article 9, paragraph 1 (f), in the opening sentence of article 10, so that that sentence would read "For the purposes of determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:". The proposal to move article 9, paragraph 1 (f), to paragraph 1 (d) made sense from an organizational perspective, and ICC could support it.

27. **Mr. Joza** (Observer for the Czech Republic) said his delegation had some problems with the United States proposal, since changing the obligation of trustworthiness to an obligation to provide relying parties with relevant information under article 9 (1) (d) would diminish the importance of article 10.

28. **Mr. Field** (United States of America) said that his delegation was not proposing the deletion of article 10. The proposed amendment worked well with article 10, since its basic requirement was one of disclosure.

29. **Mr. Pérez** (Colombia), referring to the comments made by the representative of Spain, said that, under Colombian law, trustworthiness was a necessary obligation for the certification service provider. That meant that, before it could begin operations, a potential provider had to receive authorization from the State, and the provider's trustworthiness was established by an independent auditor. Since the United States proposal could create an imbalance in relations between providers and users, his delegation preferred to retain the text of article 9 as it stood.

30. **Mr. Markus** (Observer for Switzerland) said that the amendment proposed by the United States would considerably change the rules of conduct for providers. The transfer of article 9, paragraph 1 (f), to paragraph 1 (d), would mean that the provider would

not be obliged to utilize trustworthy systems but simply to inform the user as to whether or not the system that it used could be expected to be trustworthy. If that was the aim of the United States amendment, his delegation could not support it.

31. **Ms. Mangklatanakul** (Thailand) said that the United States proposal would create an imbalance between the conduct required of providers and that required of users, and would weaken the thrust of article 10. Her delegation preferred to retain the text as it stood.

32. **Mr. Gauthier** (Canada), supported by **Ms. Chadha** (India), said his delegation was not in favour of the United States proposal for the reasons advanced by previous speakers. Article 10 as it stood was not a standard in itself but rather provided guidelines for ascertaining trustworthiness. The United States proposal represented a fundamental shift in the policies developed by the Working Group, since it would make the relying party responsible for determining trustworthiness, and would exonerate the provider from that obligation.

33. **Ms. Xiaoyan Zhou** (China) said that the removal of paragraph 1 (f) in article 9 would greatly reduce the obligation of the service provider, and thus affect the security of the transaction. There would then be no need for article 10, since the relying party, and not the service provider, would be responsible for determining trustworthiness.

34. **Mr. Adensamer** (Austria) said that his delegation could not support the United States proposal, since the service provider should, in addition to its obligation to utilize trustworthy systems, also be obliged to furnish information about those systems.

35. **Mr. Field** (United States of America) said that his delegation was willing to make a compromise that might meet the concerns raised by some delegations. He proposed that article 9, paragraph 1 (f), should be amended to read "utilize systems, procedures and human resources in performing its services that are suitably trustworthy for the purposes for which the certificate is intended to be used". That new wording would preserve the relevance of article 10.

The meeting was suspended at 3.25 p.m. and resumed at 4 p.m.

Article 8, paragraph 1 (b)

36. **Mr. Gauthier** (Canada) said that the Working Group had proposed that article 8, paragraph 1 (b), should read "without undue delay, use reasonable efforts to notify, such as by using means made available by the certification service provider pursuant to article 9, to any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:".

37. **Mr. Madrid Parra** (Spain) said that his delegation had serious difficulties with the concept of "reasonable efforts", which would be difficult to incorporate into Spain's legal system. A situation might arise in which a signatory had made reasonable efforts to communicate the fact that the signature creation data had been compromised but, despite such efforts, the third party had not received that information. The third party would then have to bear the burden of the damage while the signatory would be discharged, since it had used "reasonable efforts".

38. **The Chairman** said that, since he heard no other objection to the text proposed by the Working Group, he took it that the Commission wished to adopt the amendment to article 8, paragraph 1 (b). The comments made by Spain would be reflected in the Commission's report.

39. *It was so decided.*

Article 9, paragraph 1 (f) (*continued*)

40. **The Chairman** invited the Commission to comment on the compromise proposal made earlier by the United States regarding article 9, paragraph 1 (f).

41. **Mr. Kobori** (Japan) said that the opening phrase of article 9 made it clear that the scope of article 9 was more limited than that of article 6. That opening phrase should sufficiently meet the concerns raised by the representative of the United States.

42. **Mr. Caprioli** (France) said that his delegation could not support the compromise proposal put forward by the United States. The signature was the responsibility of the certification service provider and had nothing to do with the trustworthiness of the system. The text of article 9, paragraph 1 (f) should be retained as it stood.

43. **Mr. Stocchi** (Italy) said that, having heard the arguments put forward by the representatives of Japan

and France, his delegation had decided not to support the amendment proposed by the representative of the United States.

44. **Mr. Arnott** (United Kingdom) said that, while he appreciated the concerns raised by the representatives of Japan and France, he supported the text proposed by the United States, which in practice would be entirely satisfactory.

45. **Mr. Gauthier** (Canada) said that his delegation was in favour of the text as it stood. Paragraph 144 of the draft Guide to Enactment amply dealt with the matter raised by the representative of the United States.

46. **Mr. Joza** (Observer for the Czech Republic) said that the United States proposal clarified article 10 (g), which was directly related to article 9, paragraph 1 (b). Although article 10 did not define trustworthiness, it included important aspects of it, including sufficiency.

47. **Mr. Baker** (Observer for the International Chamber of Commerce) said that his delegation supported the amendment proposed by the representative of the United States.

48. **Mr. Maradiaga** (Honduras) said that his delegation was in favour of the text submitted by the Secretariat.

49. **The Chairman** said that he took it that the Commission wished to retain the text of article 9, paragraph 1 (f), as it stood.

50. *It was so decided.*

Article 9, paragraph 2

51. **Mr. Smedinghoff** (United States of America) said that the text of article 9, paragraph 2, should be made consistent with the amendment that had been made to article 8, paragraph 2, which replaced “shall be liable” with “shall bear the legal consequences of”. An introductory clause that recognized the limitations on liability set forth in article 9, paragraph 1 (d) (ii) and (iv), should also be added. His delegation therefore proposed that article 9, paragraph 2, should read: “Subject to any limitations ascertainable under paragraph 1 (d), the certification service provider shall bear the legal consequences of its failure to comply with paragraph 1.”

52. **Mr. Mazzoni** (Italy), supported by **Mr. Enouga** (Cameroon) and **Mr. Kobori** (Japan), said that liability should not be stated expressly in article 9, paragraph 2, since it would be governed entirely by applicable national law. For the sake of consistency, no reference to limitations on liability should be included in paragraph 2.

53. **Mr. Gauthier** (Canada) said that his delegation could accept the United States proposal to align article 9, paragraph 2, with article 8, paragraph 2. However, there was no need to refer explicitly at the beginning of the paragraph to “limitations ascertainable under paragraph 1 (d)”.

54. **Mr. Caprioli** (France) said that article 9, paragraph 2, should be worded along the same lines as article 8, paragraph 2. It was not necessary to refer to the limitations on purpose or value or on the scope or extent of liability, since European Union legislation already provided for such limitations.

55. **Mr. Madrid Parra** (Spain) said that the encouragement of international electronic commerce should not necessarily entail the elimination of all references to the term “liability”, since that could have negative effects. While national legal systems would determine legal consequences, the text of the Model Law should nevertheless indicate that some form of liability existed. The reference to liability under article 9, paragraph 2, should therefore be retained.

56. **Mr. Joko Smart** (Sierra Leone) said that his delegation supported the views of the representatives of Canada and France regarding the United States proposal. There was no need to depart from the language that had been approved for article 8, paragraph 2.

57. **Ms. Zhou Xiaoyan** (China) said that her delegation supported the views expressed by the representatives of Canada, France and Sierra Leone that the wording of article 9, paragraph 2, should be aligned with that of article 8, paragraph 2. The introductory clause suggested by the representative of the United States was unnecessary.

58. **Mr. Markus** (Observer for Switzerland) said that the language of article 9, paragraph 2, should be consistent with that of article 8, paragraph 2. Limitations on liability should be set by national law. Article 5, which dealt with variation by agreement, would sufficiently cover limitations on liability in so far as they were in keeping with applicable national law.

59. **Mr. Baker** (Observer for the International Chamber of Commerce) said that his delegation supported the first part of the proposal made by the representative of the United States. While a reference in article 9, paragraph 2, to the limitations set out in paragraph 9, paragraph 1 (d), might be useful, it was not absolutely necessary. His delegation could accept the amendment to the United States proposal that had been made by the representative of Canada and supported by France and China.

60. **Mr. Pérez** (Colombia) said that his delegation supported the views expressed by the representative of Spain. It was important to protect the user of certification services, and the Model Law should send a clear message that the party that owned the technology was liable. Sufficient guarantees should be put in place to ensure that the technology continued to operate properly and did not become obsolete with the passage of time.

61. **The Chairman** said that he took it that the Commission was in favour of aligning the wording of article 9, paragraph 2, with that of article 8, paragraph 2.

62. *It was so decided.*

63. **Mr. Lebedev** (Russian Federation) said that it would be useful to countries that would subsequently be adopting national legislation on the basis of the Model Law if the Commission explained in its report that the amendments to article 8, paragraph 2, and article 9, paragraph 2, had been made in order to indicate that the question of legal consequences would be determined by national legislation.

64. **The Chairman** said that such an explanation would be included not only in the report but also in the draft Guide to Enactment.

Article 10

65. **Mr. Smedinghoff** (United States of America) said that article 10 should be amended in order to address the concern that that article did not necessarily recognize that certification service providers might offer different levels of service, and that different levels of reliability might be necessary for a legally binding signature, depending on the particular circumstances. It would also be helpful if article 10 referred to general commercial practice. His delegation proposed that the words “if and to the extent generally applied in commercial practice for the level of service provided” should be added after the word “factors” in the first sentence of article 10.

66. **Mr. Mazzoni** (Italy), supported by **Mr. Arnott** (United Kingdom), **Mr. Tatout** (France), **Mr. Mohan** (Singapore) and **Mr. Brito da Silva Correia** (Observer for Portugal), said that the amendment proposed by the representative of the United States was redundant, since the words “regard may be had” would sufficiently deal with the concerns raised by the United States.

67. **Mr. Burman** (United States of America) said that, while members of the Commission might agree that the words “regard may be had” could cover a wide variety of circumstances, it was important to know how the user community would interpret those words. Although his delegation could accept the text of article 10 as it stood, it believed that the proposed amendment would provide greater certainty to the business community.

68. **Mr. Sorieul** (Secretariat) said that the last sentence of paragraph 147 of the draft Guide to Enactment, which read “That list is intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what is expected of the certificate in the context in which it is created.”, adequately addressed the concerns raised by the representative of the United States.

69. **Mr. Mazzoni** (Italy) said that, if the United States insisted on including in article 10 language that gave assurances to the business community, reference to the level of service provided could be included in a new subparagraph (g), which would be inserted between subparagraph (f) and current subparagraph (g).

70. **Mr. Burman** (United States of America) said that his delegation could accept the proposal made by the representative of Italy.

71. **Mr. Joza** (Observer for the Czech Republic) said that his delegation wished to know how the phrase “generally applied in commercial practice” related to financial and human resources. The United States proposal could create many problems for smaller electronic commerce markets.

72. **Mr. Baker** (Observer for the International Chamber of Commerce) said that the more than 140 members of ICC considered that their concerns were

not sufficiently dealt with in certain provisions of the Model Law. His delegation therefore supported the amendment proposed by the representative of the United States.

73. **Mr. Alhweij** (Observer for the Libyan Arab Jamahiriya) said that the text of article 10 should remain as it stood.

74. **The Chairman** said that he took it that the Commission wished to retain article 10 as it stood. The concerns expressed by the United States would be reflected in the draft Guide to Enactment.

75. *It was so decided.*

The meeting rose at 5 p.m.