



General Assembly

Distr.: Limited
23 August 2022

Original: English

**United Nations Commission on
International Trade Law**
Working Group IV (Electronic Commerce)
Sixty-fourth session
Vienna, 31 October–4 November 2022

Explanatory note to the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services

Note by the Secretariat

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I. About this note

1. At its fifty-fifth session, in 2022, UNCITRAL considered the text of the draft model law on the use and cross-border recognition of identity management and trust services and explanatory note ([A/CN.9/1112](#)), reflecting the discussions and deliberations of the Working Group up to its sixty-second session, as well as a compilation of comments submitted by States and relevant international organizations ([A/CN.9/1113](#) and addendum).
2. At that session, the Commission adopted by consensus the Model Law and approved in principle its explanatory note, requesting the secretariat to finalize it by reflecting the Commission's deliberations and decisions ([A/77/17](#), para. 149). The Commission also authorized the Working Group to review at its sixty-fourth session the parts of the explanatory note relating to the deliberations and decisions of the Commission (*ibid.*).
3. This note reproduces those parts of the Explanatory Note to the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services that needed to be updated or redrafted because of the deliberations and decisions of the Commission on the text of the Model Law for the consideration of the Working Group with a view to finalizing the Explanatory Note and publishing it, as requested by the Commission (*ibid.*). It refers to the numbering of the paragraphs of document [A/CN.9/1112](#) and may not reflect the final paragraph numbering.
4. This note does not reproduce those amendments to the Explanatory Note that have already been decided by the Commission ([A/77/17](#), paras. 146–147). Those amendments will be incorporated in the final text of the Explanatory Note together with the amendments contained in this note as approved by the Working Group.

II. Amendments to the Explanatory Note

5. Replace paragraph 15 with the following:

“Chapter II establishes the basic elements of the legal regime applicable to IdM, lists certain core obligations of IdM service providers and of subscribers, and sets rules on liability of IdM service providers. Article 5 establishes the principle of legal recognition of IdM and non-discrimination against electronic identification. Article 6 lists the core obligations of IdM service providers; in doing so, it identifies the core obligations of IdM service providers, which correspond to the basic components of IdM systems and the main steps in the IdM life cycle. Article 7 deals with the obligations of the IdM provider in case of data breach and is complemented by article 8, on the obligations of subscribers in case identity credentials are compromised. Article 9 contains a rule for functional equivalence between offline identification and identification carried out using IdM that requires the use of a reliable method. The reliability of the method is assessed with an ex-post determination based on the circumstances listed in article 10 or with an ex-ante designation according to article 11. Finally, article 12 deals with the liability of IdM service providers.”
6. Insert at the end of paragraph 35 the following:

“At that session, the Working Group also agreed that certain pending issues should be considered in informal intersessional consultations, and that the secretariat should report back to the Working Group on those consultations at its sixty-third session for further deliberations ([A/CN.9/1087](#), para. 113).

36. At its sixty-third session (New York, 4–8 April 2022), the Working Group heard a report on those consultations and discussed those pending issues ([A/CN.9/1093](#), paras. 14–44). At that session, the view was expressed that additional important issues were pending, no decision was made on any of the

pending issues, and delegations were again invited to submit comments on those issues to the Commission.

37. At its fifty-fifth session, in 2022, the Commission considered the text of the draft model law on the use and cross-border recognition of identity management and trust services and explanatory note (A/CN.9/1112), reflecting the discussions and deliberations of the Working Group up to its sixty-second session, as well as a compilation of comments submitted by States and relevant international organizations (A/CN.9/1113 and addendum).

38. The Commission established a Committee of the Whole and referred to it the consideration of the draft model law (A/77/17, para. 13). At its 1170th meeting, on 7 July 2022, the Commission considered and adopted the report of the Committee of the Whole, adopted by consensus the Model Law and approved in principle its explanatory note (A/77/17, para. 149)."

7. Insert after paragraph 85:

"86. The IdM service provider may also be a relying party if it deployed the IdM service for its own purposes (e.g., the identification of its employees). In that case, the obligations associated with each role would apply."

8. Insert after paragraph 89:

"90. The Model Law does not set forth obligations for relying parties. However, such obligations may arise from other law, including any arrangement between subscriber and relying party. One such obligation may pertain to taking reasonable steps to ascertain the reliability of the methods used in delivering the relevant service, for instance by verifying the ex-ante designation of the service. Another obligation may regard compliance with security procedures and policies and practices of the service provider.

91. The service provider may limit its liability towards the relying party for a loss arising from the use of the service if that use has exceeded the limitations on purpose or value of the transaction for which the service may be used, and the service provider has complied with its obligations to make such limitations ascertainable by the relying party (articles 12(4) and 24(4)). Thus, the relying party has an interest in verifying any limitation on purpose or value of the service and in respecting those limitations.

92. The relying party is normally a third party with respect to the relationship between the subscriber and the service provider. However, the service provider may also be a relying party if it deployed the service for its own purposes (e.g., the identification of its employees). In that case, the obligations associated with each role would apply."

9. Replace paragraph 118 with the following:

"In business practice, the functions listed in article 6 would ordinarily be governed by contract-based operating rules, especially when private sector IdM service providers are involved. Those rules, which provide guidance on how operations should be carried out, are based on policies, implemented through practices, and reflected in contractual agreements. The obligation to "have in place operational rules, policies and practices" acknowledges that business practice. Because of their legal and practical importance, letter (d) requires that operational rules, policies and practices should be easily accessible to subscribers, relying parties and other third parties. The reference to easy accessibility, which is contained also in letter (e), aims at facilitating access to information of parties, such as micro or small enterprises, that may be less familiar with technical matters. The reference to relying parties is meant to avoid any doubt regarding the applicability of letter (d) also to relying parties, which are a subset of third parties."

10. Insert after paragraph 119 the following:

“120. Letter (d) and letter (e) identify the respective target classes of users, which is useful to raise the level of compliance of IdM service providers with these provisions. Since under the Model Law, IdM service providers are not liable to third parties (i.e., parties that are neither service providers nor subscribers) that are not relying parties, letter (e) does not apply to third parties that are not relying parties, while letter (d) applies to all third parties.”
11. Replace paragraph 134 with the following:

“The method used to fulfil the rule in article 9 must be reliable both when the reliability is assessed ex-post and when it is evaluated in the context of ex-ante designation. For that reason, article 9 refers respectively to article 10, paragraph 1, and to article 10, paragraph 4. However, the standard of reliability is not absolute but relative to the specific purpose.”
12. Replace paragraphs 142 and 143 with the following:

“142. Subparagraph 1(b) contains a clause aimed at preventing repudiation of the IdM service and at curbing frivolous litigation. Repudiation occurs when a subject declares not having performed an action. With respect to IdM services, the risk is that, after having achieved identification of a party in fact, that party could bring a legal challenge with respect to the reliability of the method in abstract and could, through that challenge, invalidate the identification in fact.

143. For the mechanism contained in subparagraph 1(b) to operate, the method must have in fact fulfilled the identification function, i.e., associate the person seeking identification with the identity credentials. The Model Law requires the use of reliable methods, and subparagraph 1(b) should not be misconstrued to tolerate the use of unreliable methods, or to validate the use of those methods. Rather, it acknowledges that, from a technical perspective, function (in the case of article 9, identification) and reliability are two discrete attributes.

144. Subparagraph 1(b) builds on article 9(3)(b)(ii) ECC by adding two elements. The first is that a method used to achieve identification in fact is deemed to be reliable. The second is that the determination that the method has fulfilled the identification function must be made by an adjudicative body, which could be a court, an administrative tribunal, an arbitral panel or any other entity in charge of settling disputes. The words “by or before” accommodate all options available under national law with respect to fact-finding, which could be carried out by the adjudicative body itself or by the parties.”
13. Replace paragraph 187 with the following:

“The requirement for a paper-based signature is satisfied if a reliable method is used to identify the signatory of the data message and to indicate the signatory’s intention in respect of the signed data message both when the reliability is assessed ex-post (article 22 (1)) and when it is evaluated in the context of ex-ante designation (article 22(4)). The reference to the use of the method “in respect of information contained in the data message” applies to both identification of the person and indication of the person’s intention.”
14. Replace paragraph 191 with the following:

“The assurance of the origin of the data message may be achieved by establishing its provenance, which, in turn, requires identification of the legal person originating the data message. The reliable method used for the identification of the legal person affixing the seal is the same used for identifying a signatory, and UNCITRAL provisions on electronic signatures have usually been enacted as applicable to both natural and legal persons.”

15. Replace paragraph 198 with the following:

“Article 19 deals with electronic archiving services, which provide legal certainty on the validity of retained electronic records. The reliable method used for electronic archiving shall assure the integrity of the archived electronic records as well as to the date and time of the archiving. Moreover, the information archived should be accessible according to the requirement for functional equivalence with the paper-based notion of ‘writing’ (article 6(1) MLEC).”

16. Replace paragraphs 210–211 with the following:

“210. In line with the approach taken with respect to IdM services (article 10), article 22 requires the use of reliable methods in the delivery of trust services both when the reliability is assessed ex-post and when it is evaluated in the context of ex-ante designation. Article 22 contains a non-exhaustive list of circumstances that may be relevant to determine the reliability of the method used according to the ex-post approach. The list is inspired by lists contained in article 10 MLES and in article 12 MLETR.

211. Similar to the notion of reliable method used for IdM services (see para. 141 above), the notion of reliable method used in trust services is relative and varies according to the purpose pursued. The relative nature of reliability is reflected in subparagraph 1(a), namely in the words “as reliable as appropriate”, which, according to a well-established UNCITRAL usage, aim to better reflect the various uses of trust services, as well as in the reference to “the purpose for which the trust service is being used”. Subparagraph 1(b) aims at preventing repudiation of trust services that have achieved their function in fact, thus curbing frivolous litigation (see paras. 152–154 above).

225. The provisions of the Model Law do not purport to modify previous UNCITRAL texts or to offer an interpretation of their provisions. In that regard, the relationship between subparagraph 1(b), especially in relation to article 16, on the one hand, and article 9(3)(b) ECC, on the other hand, should be seen as of complementarity given the different level of detail. Moreover, the provisions of the Model Law relate to trust services, which provide assurance of data quality, while the provision of the ECC is a functional equivalence rule to satisfy form requirements.”

17. Change the title of article 25 to “Cross-border recognition of identity management”.

18. Replace paragraph 224 with the following:

“224. Levels of assurance defined in different jurisdictions may or may not match exactly given that agreed definitions of specific levels of assurance may be available in certain regions, but not yet at the global level.

225. Subparagraph 1(a) applies when agreed definitions of specific levels of assurance are available. In that case, the method used shall offer ‘at least an equivalent level of assurance’ to prevent the use of methods that offer a level of assurance lower than the one required in the recognizing jurisdiction.

226. To promote cross-border recognition when agreed definitions of specific levels of assurance are not available, subparagraph 1(b) refers to the notion of ‘substantially equivalent or higher level of assurance’, which includes levels of assurance that are substantially the same, but not identical, or higher than the one required in the recognizing jurisdiction. Hence, the notion of ‘substantially equivalent’ should not be interpreted as demanding compliance with strict technical requirements, which may result in obstacles to mutual recognition and, ultimately, to trade. This notion may become less relevant once globally agreed definitions of levels of assurance are available.”