

## **Report from Vincent De Orchis on UNCITRAL Working Group IV (47 th session, 13-17 May 2013, New York)**

I attended portions of the Workshop IV of UNCITRAL involving the proposed Model Laws concerning Electronic Documents that took place in New York in May 2013. The bottom line is that the session was productive, but obviously as it was the first read-through of the draft, it was somewhat slow and laborious.

The critical points are that:

- Many of the delegates made clear that they wanted to make sure that the Model Rules would interface properly with the Rotterdam Rules, and that there would be no conflict with the RR.
- While there was a recognition of the need for paper based and electronic based transactions to coexist, there were several countries who wanted to expand the Model Rules to areas involving solely electronic documentation, and even future electronic documentation that may not exist as of this time. As a consequence, the definition of 'electronic transferable record' was broadened and effort was made not to refer to paper based transactions so to allow for technological developments in the field. The definition was finally agreed upon to be "a record used in an electronic environment that is capable of transferring the right to performance of an obligation incorporated in the record through transfer of that record".
- There seemed to be a consensus that the electronic documents would provide a 'functional equivalent' of paper based documents procedurally, but not necessarily substantively.
- Many countries agreed that it was important that the Model Rules not interfere with the substantive rules of nations concerning electronic or paper based transferable records.
- The concept of a "signature" was kept very general, and simply recognized that the method used would identify the person and indicate the person's intention, and should be reliable' as appropriate'.
- Endorsement of an electronic transferable record (ETR) was understood to be feasible in light of the Article on signature.

- A lot of discussion was held in respect to the concept of an “original” ETR. Because the concept goes hand- in- hand with other issues, such as control and integrity, it was decided to keep working on the definition. The same result was encountered with the word “uniqueness”. The Secretariat reminded everyone that originality was an issue which had come up during the drafting of the Rotterdam Rules. Comment was made that while multiple originals may be used in the paper based world, no one could single out where the law required multiple originals. One of the problems with multiple originals would be “control” in the electronic environment. “Control” is required throughout the life of an ETR, and has the functional equivalence of possession.
- There was an indication that the concepts of “right of control” and “controlling party” used in the Rotterdam Rules should be distinguished from the discussion of on control by working group because the Rotterdam Rule concepts of “control” provided for substantive rights of the holder.
- The definition of “issuer” was restricted to the person issuing the ETR, and not to those technically involved in the process, such as a third party service provider.
- While ETR cannot be forced on anyone to use, if they are used it will require the consent of the parties involved. It was pointed out that the Rotterdam Rules allowed issuance of an ETR not only to the shipper but also the documentary shipper and the consignee. It was agreed that the consent of everyone was not necessary, but only the person who was the first holder. The consent requirement is seen as a general requirement, and it was viewed that there can be instances where consent is implied.
- The Chair brought up the fact that bills of lading can provide multiple functions, including evidence of a contract for carriage as well as transfer of title. He noted that thought would have to be given as to how these multiple functions of paper bills of lading would be handled electronically.
- Discussion was had on issuance of an ETR to a “bearer”, but it was agreed that this should only be in situations where it would be allowed for paper based transactions.

- Article 16 was explained to be an effort to avoid discrimination in using the paper based form of transaction over the electronic version, or vice versa.
- There was discussion on how to record the chain of endorsements in ETRs issued to a named person, so as to allow for recourse.
- Amendment of an ETR was understood to be subject to substantive law allowing such amendments, and the amendment would have to be effected by the holder. The duty of notification to third parties was brought up as a matter of substantive law. The Model rules will probably have some additional language to require that notification be accomplished where required by law.
- Interestingly, typographical errors were ruled out as a creature of the paper- based world.
- The Secretariat noted that it was premature to set a final form of the Model rules. The delegates are invited to Vienna the week of December 17<sup>th</sup> to continue work on the project.

The one comment that did raise a lot of attention was by the delegate from China who commented that China is considering ratification of the Rotterdam Rules, and that they want to make sure that there are no serious conflicts between the Model Law on electronic documents and the Rotterdam Rules.

Vince DeOrchis