

Short report on the 48th session of the Working Group IV (Electronic Commerce) at UNCITRAL / Vienna 9–13 December 2013

Upon request from the President I have attended the above session of the Working Group IV at UNCITRAL in Vienna.

The work was conducted based on the following documents:

- A/CN.9/WG.IV/WP.123
- A/CN.9/WG.IV/WP.124
- A/CN.9/WG.IV/WP.124/Add.1
- A/CN.9/WG.IV/WP.125

As you know the preceding session was attended on behalf of CMI by Vincent DeOrchis, with whom I had an opportunity to meet in NY before the Vienna session and thereby secure the transition of Know How and positions (see the Report of last NY session: A/CN.9/WG.IV/WP.122).

I understand the interests of CMI to be to safeguard that the UNCITRAL work on the “electronic transferable record” (“ETR”) will on the one hand support the way the Rotterdam Rules have provided for an electronic alternative of transport document and the bill of lading in particular and on the other hand does not interfere with the provisions of the RR on “electronic transport records”.

My understanding was that the basic working assumption of the session was to provide for an industry-neutral and technology-neutral, generic codex for electronic transferable records not interfering with any substantive law and providing for a flexible legislation that would give support to specific legislation either on national or international level.

It is my view, after listening now one week to the discussions during the session that the discussion to a great extent is in fact adhering to this principle. Wherever I had identified a possible interface I think that the *lex specialis* provision of the RR clarifies the matter for the maritime environment, but of course I may well have overseen an aspect that needs further clarification. Also as the dynamics at such

meetings tend to go, it could well be that in any future meeting changes may be introduced which will affect my basic understanding formed.

My impression summarized above on the status quo of the work of WG IV is supported by the fact that the session is of the current view that the instrument is best cast into a format of a non-mandatory model law.

The key issues are:

- Art. 9 Signature
- Art. 10 Original: based on the basis of the functional equivalent; here there are interfaces to Art. 47 (1.) (c) RR and Art. 51 (4.) RR. It was recognized that while for paper B/L there was the mentioning of multiple originals, the RR had neither foreseen the multiplicity of the ETR-B/L, nor the notion of “original”, but rather refers to the minimum-criteria of Art. 9 RR; together with Art. 11 / 12 and 17 this central issue will build the core of the future discussions of the WG IV.
- Art. 11 Uniqueness of an ETR, based on the basis of the functional equivalent
- Art. 12 Integrity of an ETR
- Art. 13 Consent to use the ETR and more specifically the consent of a “third party” using the ETR (i.e. Consignees / banks etc.) is in my view not in conflict with Art. 8 (a) RR.
- Art. 14 issuance / issuance to “bearer”
- Art. 15 no additional information needed
- Art. 16 Possession
- Art. 17 Control (cfr. Art. 1 (21) RR, which speaks of “exclusive control”)
- Art. 18 – 21 Delivery, presentation, endorsement and transfer (with obvious effects to many aspect of the RR, i.e. Art. 47 (1.) (a) (i) RR; 57 (2) RR.
- Art. 22 amendment of ETR

- Art. 23 replacement of ETR
- Art. 24 reissuance
- Art. 25 division and consolidation of ETR
- Art. 26 termination of ETR
- Art. 27 use of ETR for security purposes
- Art. 28 retention of information / of ETR
- Art. 29 – 30 Third Party service provider
- Art. 31 non-discrimination of foreign ETR

As one can detect, many of these issues determine the electronic environment in which the RR ETR will operate. There is little duplication if any with the scope of the RR. Where similar terms are used differently or more broadly than in the RR, I have so far not detected that they will interfere into the scope of the RR.

However, at the same time, I think that the CMI and possibly its RR WG should investigate the provisions as drafted by WG IV and as they were left after the 2013 Vienna session with more care and investigate whether the CMI has a particular position on specific issues which need to be introduced into the next session in NY. This has the side effect of having increased the number of CMI representatives being involved in this exercise who could also liaise with their own governmental delegation in WG IV if need arises.

I have collected the draft reports as they were available when I had to leave the meeting (please see the scanned copies). They will be amended by the Secretariat of UNCITRAL and circulated on the UNCITRAL website.

The current schedule for the next meeting is the week of 28 April – 2 May 2014 (NY) and 10–14 November 2014 (Vienna). The full UNCITRAL commission will have its meeting on 7 – 25 July 2014 in NY.

With kind regards

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