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Draft Model Law on Electronic Transferable Records

Compilation of comments by Governments and international organizations

Addendum

Contents

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II. Compilation of comments

A. States

5. Kuwait

[Original: Arabic]
[4 April 2017]

1. It should be noted that most of the provisions contained in the draft Model Law are taken from other model laws issued by the United Nations Commission on International Trade Law (UNCITRAL), such as the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001), in addition to the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the Electronic Communications Convention). As a member of the United Nations, Kuwait has acceded to these international instruments, which have been incorporated into Kuwaiti law through, for example, the Electronic Transactions Act (Act No. 20 of 2014), the Anti-Money Laundering and Combating the Financing of Terrorism Act (Act No. 106 of 2013) and the Anti-Cybercrime Act (Act No. 63 of 2015).

2. Article 1 of the draft Model Law sets out the scope of the law. Under paragraph 3, which lists the exclusions to the law, we wish to include reference to all documents and instruments deemed by the national legislature to fall outside the scope of the Model Law, such as:

(a) Transactions and matters related to personal status, endowment and wills;

(b) Real estate title deeds and the resulting original or consequential real rights;

(c) Promissory notes and negotiable bills of exchange;

(d) Any event that the law requires to be expressed in a written document or to be documented or the making of which is subject to a specific provision in another law.

These exclusions are provided for under article 2 of the Electronic Transactions Act. This exclusion list extends to all other documents and instruments that may not be converted into or issued in electronic record format according to Kuwaiti law.

3. Article 3 on interpretations provides that, when interpreting the law, regard is to be had to the international origin of the law. It is imperative that this interpretation should not conflict with the provisions set out in the relevant domestic legislation that has already been adopted and implemented, such as the Electronic Transactions Act, in particular given that the provisions of the Act are based on international instruments to which Kuwait has already acceded. The interpretation must also not conflict with the rules of public order and morals in Kuwait as understood when interpreting the law in accordance with the general principles on which it is based.

4. As regards article 5 on information requirements, it is imperative that the law explicitly exempt all persons from liability in the event that they provide incorrect, incomplete, false or non-original information with regard to their personal electronic records or the records held by governmental security agencies or in the electronic processing systems of such agencies. The purpose of this reservation is to respect the sanctity of private life and the interests of the State, both of which are protected under Kuwaiti legislation. These exemptions are provided for in articles 23 and 32 of the Electronic Transactions Act.

5. As regards article 7 on the legal recognition of transferable electronic records, we reiterate the reservations made with regard to article 1 on the scope of the Model Law, namely that it should exclude all documents and instruments that may

not be converted into electronic records pursuant to Kuwaiti law, as provided for in article 2, paragraph d, of the Electronic Transactions Act and in all other Kuwaiti legislation pursuant to which certain documents or instruments may not be converted into electronic records.

6. As regards article 8 on the legal recognition of electronic writing in transferable electronic records and article 9 on the legal validity of electronic signatures in electronic records, subject to the relevant legal requirements, we reiterate that all documents and instruments not recognized by the Kuwaiti legislature in electronic record format must be exempt from the provisions set out in those articles and that any electronic writing or signatures on such documents or instruments may not be recognized, in accordance with the references provided in paragraph 5.

7. As regards article 10 on the conditions for the use of transferable electronic records and article 11 on control over the possession of electronic records, we request that these two articles be merged on the grounds that they both deal with the same issue, namely the conditions applicable to electronic records or documents effective at law. Merging these articles would be better legal drafting practice.

The Kuwaiti legislature has combined the content of these articles into a single article, namely article 9 of the Electronic Transactions Act on the conditions applicable to electronic records or documents effective at law.

8. Article 13 on indicating the time and place in electronic transferable records provides that consideration must be paid to any provisions of national law that require an indication to be provided of the time and place at which the electronic record in question was created, on the condition that a secure and electronically documented method is used to indicate the time and place.

No further details are provided with regard to this provision, however. Furthermore, this matter has already been elaborated in various other model laws, such as the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

The Kuwaiti national legislature has issued detailed provisions concerning the requirements regarding the need to indicate the time and place at which the transaction referred to in electronic record in question was carried out, drawing on the provisions set out in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures. Article 13 should therefore provide further details regarding the conditions under which an indication must be given of the time and date at which the legal transaction referred to in a transferrable electronic record was performed, as has been provided in similar international model laws.

9. As regards article 14 on determining the place of business of the creator or addressee party to the legal transactions recorded in the electronic record in question, it is imperative that commonly accepted and definitive standards be used, namely the headquarters and place of residence of the persons involved.

This was the approach taken by the Kuwaiti legislature when drawing up article 16 of the Electronic Transactions Act:

> “The electronic document or record shall be deemed sent from the place where the creator’s headquarter is located, and shall be deemed received in the place where the addressee’s headquarter is located.
>
> “If either has a headquarter, his place of residence shall be deemed his headquarter unless the creator of the electronic document or record and the addressee have agreed otherwise.
>
> “If the creator or the addressee had more than one headquarter, the headquarter more relevant to the transaction shall be deemed the place of sending or receipt.”

The draft Model Law uses the negative form to indicate what cannot be accepted as the headquarters or the place of business of the creator or addressee of the electronic record, known as definition by exclusion. The legislative method used by the Kuwaiti legislature in this regard is superior, as it provides great precision during legislative drafting. Article 13 should therefore define the place of business of the parties to an electronic record based on their precise location or place of residence, in particular given that Kuwaiti legislature has already issued precise, detailed provisions on these criteria under previous model laws.

10. Article 15 concerning the issuance of multiple originals of an electronic record should include provisions that require that, where the paper document or record had one original source based on which identical originals were made, the transferable electronic record and any identical originals thereof must comply with the requirement that they bear verified, legally recognized electronic signatures and that a certificate of authenticity for the signature must be provided by the authority authorized to issue electronic signatures.

The Electronic Transactions Act contains provisions on the need for legally recognized electronic signatures and the relevant certificates of authenticity, drawing on provisions set out in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

11. Article 16 provides for the endorsement of transferable documents and instruments on the condition that they comply with the provisions set out in articles 8 and 9. It is imperative that all transactions that cannot, under Kuwaiti law, be transferred into electronic record format be excluded from the provisions of this article, in accordance with the Electronic Transactions Act, pursuant to which transactions related to personal status, endowment, wills and real estate title deeds may not be converted into electronic records.

12. Article 17 provides that a transferable electronic document or instrument may be amended on the provision that a reliable method is used. The criteria for reliability of electronic records are set out in article 12 of the draft Model Law. In that regard, and with the aim of adhering to best drafting practice, the following wording should be inserted at the end of article 17: “provided that the amended electronic record meets the standards for reliability set out in article 12 of this Law.”

13. As regards articles 18 and 19 on replacing a transferable document or instrument with a transferable electronic record and vice versa, it is imperative to include requirements that must be met before the replacement can be made, for example:

(a) The method or format through which the electronic documents must be created, deposited, saved, submitted or issued without prejudice to the provisions on data privacy and protection;

(b) The type of electronic signature required;

(c) The method and format in which the electronic signature must be inserted into the electronic document or record;

(d) The conditions that must be met by the authentication service provider responsible for issuing certificates of authenticity for electronic signatures on electronic documents and records;

(e) The oversight processes and procedures that must be carried out to ensure the integrity, security and confidentiality of electronic documents, instruments and records.

Most of these requirements are set out in articles 26 and 27 of the Electronic Transactions Act, which draws on the provisions of international law laid down in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

14. Article 20 on non-discrimination of foreign electronic transferable records provides that the validity of all electronic transferable records issued or used abroad must be recognized.

The article should, however, provide for the principle of reciprocity, a well-known principle rooted in international law. It is illogical and inconsistent with considerations of national sovereignty as embodied in their national legislation, that States recognize the validity of foreign electronic records in their national legislation without any assurances that their own electronic records will be treated similarly in other States. Each State should understand that recognition of its electronic records is dependent on whether it treats records issued in Kuwait with reciprocity.

This reservation draws on the provisions set out in Arab domestic legislation on electronic commerce and electronic signatures, which is, in turn, based on the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures. These model laws both underscore the importance of upholding the principle of reciprocity in the context of electronic commerce and electronic signatures, in particular with regard to foreign electronic records and to certificates of authenticity for electronic signatures in such records. This principle is upheld in a number of domestic laws, for example:

- 2002 Electronic Commerce Act, Tunisia
- 2002 Electronic Commerce and Electronic Signatures Act, Emirate of Dubai
- 2006 Federal Electronic Transactions and Commerce Act, United Arab Emirates
- 2004 Electronic Signatures Act, Egypt
- 2007 Electronic Commerce Act, Kingdom of Saudi Arabia

On that basis, it is imperative that article 20 of the draft Model Law provide for the principle of reciprocity with regard to recognizing the validity of foreign electronic records. The Kuwaiti legislature has already inscribed this principle in the Electronic Transactions Act, exceptions to which are detailed in article 24 thereof concerning reciprocal treatment regarding electronic signatures on foreign certificates of authenticity.

B. Intergovernmental organizations

2. Caribbean Court of Justice

[Original: English]
[7 April 2017]

1. Stemming from debates on the earlier UNCITRAL model laws it has been observed by several commentators that one of the greatest contributors to the legal barriers to the development of electronic commerce in international instruments relating to international trade was the difficulty in arriving at uniform definitions of the terms “writing”, “signature” and the “notion of the uniqueness or guarantee of singularity” so as to become legally viable substitutes for paper negotiable instruments and enable the transfer of rights in conditions of legal certainty.[1]

2. In this regard, the Model Law attempts to establish the functional equivalence of transfer of rights and title in an electronic environment. To that end, focus is placed on the notion of control for the transfer of rights and the formal allocation of title to reliably ensure the integrity of the transferable instrument or document.

[1] United Nations doc. A/CN.9/681/Add.1 — Possible future work on electronic commerce — Proposal of the United States of America on electronic transferable records available at: http://repository.un.org/handle/11176/138448; See also: Zvonimir Safranko — The Notion of Electronic Transferable Records, available at: http://hrcak.srce.hr/174364?lang=en.

While the Model Law has effectively addressed the main issues identified above, the following articles of the Model Law are of particular concern and will accordingly be addressed.

Article 2 — Definitions

3. The definition of the Electronic Transferable Record ("ETR") in Draft Article 2 provides that an ETR is an electric record that complies with article 10(1) of the Model Law. Draft Article 10 provides (in part) as follows:

> "1. Where the law requires a transferrable document or instrument, that requirement is met by an electronic record if…".

This definition implies the pre-existence of regulatory scheme under the substantive laws of the different jurisdictions. The fact that ETR refers to the substantive laws of the different jurisdictions could lead to varying interpretations and an uneven application of the model law. Such an occurrence would be the exact opposite of what should be achieved by the model law as an instrument of unification.[2]

Article 4 — Party Autonomy and Privity of Contract

4. Draft article 4 of the draft Model Law provides as follows:

> **Article 4. Party autonomy and privity of contract**
>
> "1. The parties may derogate from or vary by agreement the following provisions of this Law: […].
>
> 2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Draft Article 4 allows the enacting jurisdiction to derogate from the provisions of the Model Law. However, it leaves open the list of provisions that could be derogated from contained in paragraph 1. This variance in its enactment could significantly disrupt uniformity. Similar criticisms were directed at the UNCITRAL Model Law on electronic Signatures (2001) and the UNCITRAL Model Law on Electronic Commerce, (1996). It was noted that many countries around the world including the United States of America, Canada, Australia and China enacted national laws to address legal obstacles faced in electronic commerce. However, the lack of uniformity and harmonization across the enacting jurisdictions "was perceived as a barrier to trade by electronic means".[3]

5. The explanatory notes address the issue of the lack of uniformity, and emphasizes that it's for the enacting jurisdiction to assess which provisions should be derogated from to accommodate the different legal systems. Be that as it may, having a carte blanche on the provisions that can be derogated from poses a greater threat to the successful application of the Model Law. It is recommended that there should be some restrictions on the provisions that may be derogated from.

Article 11 — Control

6. Under the existing national and international laws, legal rights are attached to the physical possession of the paper document. The possession of the traditional paper bill of lading represents constructive possession of the goods, and the right to delivery of the goods is based on the physical possession of an original document. In this regard, the model law has equated "control" with "possession" thereby providing a "functional equivalence rule for the possession a transferable document

[2] UNCITRAL is the core legal body of the United Nations system in the field of trade law and its mandate is to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

[3] Wei, C. K. and Suling, J. C. (2006) "United Nations Convention on the Use of Electronic Communications in International Contracts — A New Global Standard", Singapore Academy of law Journal 18:116.

or instrument." Additionally, it rests the burden of ascertainability of factual control on a third-party electronic transferable records management systems provider.

7. All that is required is that it can be reliably established that a person has control and that that person can be identified. The model law is silent on who is the person that is required to have control, whether a third-party service provider or one of the parties involved in the creation of the transfer record. The provision as drafted is sufficiently vague and allows for inconsistent interpretations among adopting countries.

C. Non-governmental organizations

1. Comité Maritime International

[Original: English]
[12 April 2017]

1. Introduction

The Comité Maritime International (CMI) is a non-governmental, not-for-profit international organization established in Antwerp in 1897 with the object of contributing, by all appropriate means and activities, to the unification of maritime law in all its aspects. To achieve its end, CMI has promoted the establishment of national associations of maritime law and cooperated with other international organizations. Because the international regime for the carriage of goods by sea is one of the most important areas of maritime law, CMI participated as an Observer in all the sessions of Working Group III (WG III) of the United Nations Commission on International Trade Law (UNCITRAL) at which the rules, which were finally adopted as the "United Nations Convention on Contracts for the International Carriage of Goods by Sea" (New York, 2008), known as the "Rotterdam Rules", were negotiated.

CMI has carefully continued to watch the development of the "Draft Model Law on Electronic Transferable Records" (Draft Model Law, currently in A/CN.9/920) since Working Group IV (WG IV) commenced a study on "electronic transferable records" in October 2011. CMI has always been conscious of the possible inconsistencies between the text of the Draft Model Law and the Rotterdam Rules' e-commerce related provisions, inter alia, those on negotiable electronic transport records.

CMI wishes to express its concern on the Draft Model Law as approved by WG IV at its 54th session (31 October-4 November 2016, Vienna), and in particular with Article 15, which allows for the issuance of multiple original electronic transferrable records. CMI is particularly interested in the issue because shipping is virtually the only industry that has the practice of issuing more than one original negotiable instruments (i.e., bills of lading) and CMI wishes to submit to the Commission relevant information regarding the custom and practice of the industry before UNCITRAL adopts the final text of the Draft Model Law.[4]

This document explains why the Rotterdam Rules do not contemplate the issuance of more than one original negotiable electronic transport record and points out a possible inconsistency between the Draft Model Law and the Rotterdam Rules. It also proposes possible alternatives to resolve the problem. Section 2 of this paper reviews the treatment of electronic transport records under the Rotterdam Rules,

[4] The Report of the 48th session of WG IV (9-13 December 2013) reads as follows: "It was also indicated that the draft provisions should facilitate the continuation of existing practices and therefore it would be prudent to include a provision on the issuance of multiple originals, ***unless the industry requested that such practice should not be permitted to continue in an electronic environment.***" (A/CN.9/797, para. 68. Emphasis added). The present submission demonstrates that CMI sees it is not only as unnecessary but also as undesirable to continue the practice of issuing multiple originals in an electronic environment.

with special attention paid to the possibility of issuing multiple originals. Section 3 identifies the policy decision on which the Rotterdam Rules rest. The possible inconsistency between the Draft Model Law and the Rotterdam Rules is addressed in Section 4. Section 5 will explain some possible solutions. CMI sincerely hopes that this submission will assist in the discussion of the Draft Model Law at the upcoming Commission Session.

2. Electronic Transport Records under the Rotterdam Rules

(1) Equal treatment of transport documents and electronic transport records under the Rotterdam Rules

Codifying the rules on electronic transport records, the Rotterdam Rules seek the full equalization of an electronic document to its paper equivalent. Article 8 of the Rotterdam Rules declares the legal basis for the approach as follows:

> "Article 8. Use and effect of electronic transport records
>
> Subject to the requirements set out in this Convention:
>
> (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
>
> (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document."

Based on the full equalization approach, the Rotterdam Rules, except for provisions that are necessary for technical reasons, such as security requirements for negotiable electronic transport records (Article 9), include parallel provisions for transport documents and electronic transport records. But there is one exception: *the issuance of multiple originals*.

(2) Issuance of more than one original: Negotiable transport documents

Article 36(2)(d) of the Rotterdam Rules requires that negotiable transport documents (such as bills of lading) should state the number of originals when more than one original negotiable transport document is issued.

Article 36(2):

> "The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include: ……
>
> (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued."

Early drafts of the Convention did not require the carrier to include this information,[5] because most of the delegates agreed that the practice of issuing multiple original transport documents was outdated and should not be encouraged in any way. Historically, there was once a custom to issue three original bills of lading — one for the consignor, one for the consignee, and one for the carrier "following the goods" — and each had a different function.[6] It facilitated dealings in cargoes afloat at a time when communications were slow.[7] But that custom lost its rational reason long ago.[8] The practice of issuing multiple originals is not only unnecessary

[5] See, e.g., Draft Convention, A/CN.9/WG.III/WP.56, art. 38.

[6] See, e.g., KURT GRÖNFORS, TOWARDS SEA WAYBILLS AND ELECTRONIC DOCUMENTS, GOTHENBURG MARITIME LAW ASSOCIATION, 1991, pp. 12, 20-22.

[7] See, e.g., GRÖNFORS, *ibid*, G. H. TREITEL AND FRANCIS MARTIN BAILLIE REYNOLDS, CARVER ON BILLS OF LADING 4TH ED., SWEET & MAXWELL, 2017, P. 385 ET SEQ.

[8] Lord Blackburn observed more than a century ago as follows: "I have never been able to learn why merchants and ship owners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by

but also harmful because it would cause unnecessary disputes if different originals were negotiated to different persons.[9]

Although UNCITRAL Working Group III maintained its reluctance to endorse the practice,[10] it finally decided that it must address existing practices, however irrational they might be, and that a rule was necessary to protect innocent holders who might otherwise be unable to protect their own interests.[11] It should be emphasized that the reference to the issuance of more than one original in Article 36(2)(d) should not be regarded as an endorsement of such a practice by the Rotterdam Rules.

(3) Issuance of more than one original: Negotiable electronic transport records

Although the Rotterdam Rules do not explicitly prohibit a carrier from issuing more than one original electronic transport record, it is clear that they do not intend to allow such issuance. The possibility of issuing more than one original of a negotiable electronic transport record does not conform with the provisions of the Rotterdam Rules on electronic transport records. For example, Article 36(2)(d) refers only to a negotiable transport document, and not to a negotiable electronic transport record. Because the number of originals would be one of the most relevant pieces of information to include in the contract particulars if more than one negotiable electronic transport record were issued, it is obvious that the Rotterdam Rules assume that multiple negotiable electronic transport records will never be issued.

Furthermore, the provisions on the right of control and delivery of the goods would not work properly if more than one negotiable electronic transport record were issued. Article 51(3) requires the holder to present all original negotiable transport documents when it wishes to exercise the right of control. Article 51(4), corresponding to the provision for a negotiable transport record, does not include such a requirement; it simply provides that the holder should prove that he or she is the holder according to the method that Article 9(1) provides.[12] Accordingly, if more than one original electronic transport record were issued, a holder of each original would be entitled to exercise the right of control. However, besides being highly undesirable from the perspective of legal certainty, such an interpretation is not consistent with the framework devised by the Rotterdam Rules on negotiable electronic transport records. The issuance of more than one original would prevent compliance with the requirements of these and other provisions on negotiable electronic transport records.

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steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the Master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out." (*Glyn Mills Currie & Co v East and West India Dock Co*, (1882) 7 App. Cas. 591).

[9] See, Carver, supra note 4. At the CMI Colloquium on Bills of Lading in Venice 30 May-1 June, 1983, CMI adopted eight recommendations on bills of lading, which were endorsed by the CMI Assembly. The first states: "The practice of issuing bills of lading in sets of two or more originals should cease." CMI News Letter, June 1983, p. 1 It was explained that "the Colloquium could not find any real practical need for maintaining the practice — or rather malpractice — to issue bills of lading in more than one original." Ibid.

[10] See the Report of the 17th Session of Working Group III, A/CN.9/594, para. 230. ["It was noted that, while the practice of issuing multiple originals of negotiable transport documents *should be discouraged*, the suggested provision could nevertheless be useful as long as the ***undesirable practice* continued**."](emphasis added).

[11] See the Report of the 17th Session of Working Group III, A/CN.9/594, paras. 230 and 233.

[12] Article 9(1) is the corresponding provision to Article10 of the Model Law.

For the same reasons, Article 47(1) would also fail to operate properly if multiple original negotiable electronic transport records were issued. It provides that, when the goods are delivered at the place of delivery, it is sufficient to present one of the multiple original negotiable transport documents and, once the goods are delivered upon the presentation, the remaining documents become void (Article 47(1)(c)). There is no corresponding reference to negotiable electronic transport records in Article 47(1). The holder of a negotiable electronic transport record is required to show only that it is a holder, pursuant to the method used for the record (Article 47(1)(a)(ii)). No provision clarifies what would happen to the remaining original records if goods were delivered in accordance with the above procedure.[13]

3. Why do the Rotterdam Rules not provide for the Issuance of Multiple Original Electronic Transport Records?

As is explained in Section 2, it is arguable that the Rotterdam Rules implicitly do not allow the issuance of more than one original negotiable electronic transport record while they, reluctantly, allow for negotiable transport documents. Although the travaux préparatoires are not explicit in this regard, the context in which the Rotterdam Rules were negotiated explains why they do not provide the same rule for negotiable electronic transport records as they do for negotiable electronic transport documents.[14] Because there is no custom or practice for carriers to issue electronic transport records in multiple originals, it was thought neither necessary nor desirable to develop or to encourage such a practice in the electronic environment which was outdated and undesirable even for paper documents. The issuance of multiple original bills of lading may barely be explained on the grounds that merchants could avoid the risk of possible loss by sending separate originals. That explanation, which is unconvincing even for paper documents, would never apply to negotiable electronic transport records. Although the e-commerce provisions of the Rotterdam Rules were intensively discussed in Working Group III, no voice was heard from industry in support of enabling the issuance of multiple original negotiable electronic transport records.

The situation has not changed. Although the explanatory note to the Draft Model Law states, "It has been reported that the *practice of issuing multiple originals exists* also in the electronic environment" (emphasis added),[15] CMI is not aware of any such practice in the shipping industry.

The explanatory note also cites Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP") in support of the commercial practice of or demand for issuing multiple electronic originals.[16] That reference is, to say the least, misleading. Article e8 of eUCP, titled "Originals and Copies", provides: "Any requirement of the UCP or an eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record." The commentary to that article by the International Chamber of Commerce (ICC)[17] notes that "In the

[13] Article 9(1)(d) requires that the procedures for the use of a negotiable electronic transport record should provide "the manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to ... article 47(1)(a)(ii) and (c), the electronic transport record has ceased to have any effect or validity." It is not clear how the provision would apply if multiple original negotiable transport records were issued.

[14] See, for example, MICHAEL F. STURLEY, TOMOTAKA FUJITA AND GERTJAN VAN DER ZIEL, ROTTERDAM RULES: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, SWEET & MAXWELL, 2010, p. 217, footnote 110.

[15] A/CN.9/920, para. 131.

[16] A/CN.9/920, para. 131 states "An example of legal provisions recognizing that practice may be found in article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation."

[17] JAMES E. BYRNE AND DAN TAYLOR, ICC GUIDE TO THE EUCP: UNDERSTANDING THE ELECTRONIC SUPPLEMENT TO THE UCP 500 (ICC PUBLICATION, NO. 639), 2002, P. 122. The commentary was cited in the Note by Secretariat prepared for the 51st session of Working Group IV in 2015 (see para. 12 of A/CN.9/WGIV/WP.130/Add.1).

world of eCommerce, the concept of originality is anachronistic and virtually without meaning." The commentary continues that "*The concept of the full set of bills of lading, is similarly anachronistic in the world of electronic commerce*" and that any requirement for the presentation of the full sets of bills of lading would be satisfied by the presentment of the required electronic record under eUCP, unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted. (emphasis added) The reference to multiple originals in eUCP indicates the industry's reluctance (or even its aversion) to the use of multiple original bills of lading in the electronic environment rather than supporting or requiring the development of such a practice.

The relevant provisions of the Rotterdam Rules are based on a policy decision that the issuance of multiple originals is not desirable even for negotiable transport documents and that there is no reason to allow such practice for negotiable electronic transport records. The policy decision is clearly incompatible with Article 15 of the current Draft Model Law, which allows the issuance of multiple negotiable electronic transport records. CMI is not aware of any custom or practice of industry that justifies a change to the policy decision underlying the Rotterdam Rules.

4. The Possible Inconsistency between the Current Draft Model Law and the Rotterdam Rules

Even if it were accepted that the Draft Model Law is based on a different policy decision than the Rotterdam Rules and should allow the issuance of multiple original electronic transferrable records, the current text seems problematic for the following reason.

An electronic transport record under the Rotterdam Rules may, if not always,[18] fall within the definition of an "electronic transferable record" in Article 2 of the Draft Model Law.

One may argue that negotiable electronic transport records under the Rotterdam Rules are "electronic transferable records existing only in electronic form" (See footnote 1 to Article 3 of the Draft Model Law) to which the Draft Model Law does not apply. Unfortunately, that is far from clear. As is noted above in Section 2(1), because the Rotterdam Rules adopt a full equalization approach to transport documents and electronic transport records and electronic transport records are equivalent to transport documents under the Rotterdam Rules, it may be questioned whether electronic transport records under the Rotterdam Rules exist only in electronic form.

If an electronic transport record under the Rotterdam Rules is an "electronic transferable record" under the Draft Model Law, and if a Contracting State to the Rotterdam Rules enacts domestic legislation on electronic transferable records based on the Draft Model Law, which allows the issuance of multiple electronic transferable records, it would cause an inconsistency with the provisions of the Rotterdam Rules.

One may argue that this is not problematic, on the theory that in many jurisdictions the provisions of the Rotterdam Rules would supersede the national legislation of the Contracting States to the extent there are conflicts. Nevertheless, it would be most advisable for UNCITRAL to avoid outright inconsistency between its recent texts, even if the conflict could be resolved by the superiority of a convention over national legislation.

[18] Since the conditions for the reliability of the system are provided in different wording (compare Article 9 of the Rotterdam Rules with Articles 10 and 12 of the Draft Model Law), it is, at least in theory, possible that negotiable electronic transport records under the Rotterdam Rules will not constitute electronic transferable records under the Model Law and vice versa.

5. Possible Solutions

CMI suggests two alternative ways to solve the problem.

(1) Alternative 1: Delete Article 15 of the Draft Model Law

The simplest solution is to delete Article 15, so that the Draft Model Law does not authorize the issuance of multiple electronic transferable records as the electronic equivalent of multiple original documents or instruments. As far as negotiable transport documents (e.g., bills of lading) are concerned, the situation has not changed since the Rotterdam Rules were adopted in 2008: there is no custom or practice from the industry to issue multiple original negotiable electronic transport records. We see no practice or custom of multiple issuance of transferable or negotiable documents or instruments in the area other than the contract for the carriage of goods although some laws refer to the possibility of the issuance of multiple originals.[19]

If the Commission preserves its previously expressed reluctance to endorse the practice of issuing multiple bills of lading and does not wish to replicate that practice in the electronic environment, this is the most preferred option.

One might argue that multiple issuance is useful to create rights for different persons for different purposes; say, one for transfer and the other for security. But that result can be achieved more easily either by providing access to an electronic transferable record for a qualified purpose (e.g., exercising a security interest) or by attributing specific rights to different persons on the basis of the contents of the record.

(2) Alternative 2: Add references in footnote 1 to Article 1(3)

Article 1(3) of the Draft Model Law provides "This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [....]." The footnote to the provision currently refers to "(a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931); and (c) electronic transferable records existing only in electronic form." UNCITRAL may wish to add an explicit reference to the Rotterdam Rules in the same footnote. Alternatively, it is also possible to make a reference in a more generic form, such as "electronic transferable records that are governed by international conventions [or national law]."

UNCITRAL may also wish to add another footnote along the following lines to Article 15: "The enacting jurisdiction may/must consider the possibility that the issuance of multiple electronic transferrable records that embody the contract for carriage of goods wholly or partly by sea might give rise to inconsistencies in the operation of relevant provisions of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea."

6. Conclusion

When it approved the Rotterdam Rules in 2008, UNCITRAL relied on an important policy decision: the issuance of more than one original negotiable electronic transport record should not be allowed (see, Section 3). CMI firmly believes that there is no reason for UNCITRAL to change that policy decision. This would lead to the deletion of Article 15 of the Draft Model Law (see, Section 5(1)).

[19] See Article 64 of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and Article 49 of the Convention Providing a Uniform Law for Cheques (Geneva, 1931).

If UNCITRAL wishes to adopt a new policy and to allow the issuance of transferable record in multiple originals, it would be best to avoid a possible conflict with the provisions of the Rotterdam Rules. (See, Section 4) This would require explicit reference to the Rotterdam Rules in footnote 1 to Article 3 of the Draft Model Law (See, Section 5(2)).

Appendix: The Relevant Provisions in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).

Article 1. Definitions

For the purposes of this Convention:

……

18. "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. "Negotiable electronic transport record" means an electronic transport record:

(a) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. "Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record.

21. The "issuance" of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

.....

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

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Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity.

When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

Article 51. Identity of the controlling party and transfer of the right of control

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.