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Draft Model Law on Electronic Transferable Records

Note by the Secretariat

Addendum

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"Draft article 11. Indication of time and place in electronic transferable records

["Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, a reliable method shall be used to indicate that time or place with respect to an electronic transferable record."]

Remarks

1. Draft article 11 reflects the Working Group's deliberations at its fifty-first (A/CN.9/834, paras. 36-46) and fifty-second (A/CN.9/863, paras. 23-26) sessions.

2. At its fifty-first session, the Working Group took note that time and place of dispatch and receipt had different relevance for contract formation and management, and for the use of electronic transferable records and decided to review the draft provision accordingly (A/CN.9/834, para. 36). At that session, the Working Group also noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping, thus determining time automatically. It was further noted that applicable law could allow parties to amend that automatic determination by agreement. Moreover, it was indicated that users of registry systems would agree to contractual rules containing a choice of applicable law. It was concluded that those elements reduced the practical relevance of determining time and place with respect to electronic transferable records (A/CN.9/834, para. 36).

3. At its fifty-second session, it was noted that the determination of time and place with respect to an electronic transferable record might occur differently in registry-based and in other systems and that therefore a technology-neutral approach was necessary (A/CN.9/863, para. 24). In addition, different views were expressed on the merits of retaining the draft article (ibid., paras. 23-25). In support of its deletion, it was said that the determination of time and place were not specific to electronic transferable records but contained in substantive law. Moreover, it was explained that the reference in draft article 9 to the information "required to be contained in an equivalent transferable document or instrument" would adequately address any requirement to indicate time and place in electronic transferable records.

4. Draft article 11 contains the words "or permits" in order to clarify its application to cases in which the law merely permits, but does not require the indication of time or place with respect to a transferable document or instrument (A/CN.9/834, para. 42).

"Draft article 12. [Location of parties] [Determination of place of business]

"1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

"2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

5. At its fifty-second session, the Working Group decided to include in the draft Model Law a provision on the determination of place of business inspired by article 6 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention") (A/CN.9/863, paras. 25 and 26). The scope of draft article 12 is limited to clarifying that the location of an information system, or parts thereof, is not, as such, an indicator of a place of business. That clarification might be particularly useful in light of the likelihood that third-party service providers would use equipment and technology located in various jurisdictions.

6. The Working Group may wish to confirm that further elements useful in determining the place of business should be found in applicable substantive law.

7. Alternatively, the Working Group may wish to consider whether the provisions relating to the irrelevance of the location of information systems for the determination of the place of business, which are contained in other UNCITRAL texts on electronic commerce, could be relevant as general principles on which the Model Law is based under draft article 3, paragraph 2.

8. Draft article 12 refers to the notion of place of business, which is defined in substantive law. The Working Group may wish to consider whether the location of the information system and the place where the information system could be accessed should be disregarded for the purpose of recognising the validity of the electronic form of the transferable record (see para. 59 below).

"Draft article 13. Consent to use an electronic transferable record

"1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

9. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62 and 63). The Working Group may wish to consider whether draft article 13 should be placed after draft article 4 on party autonomy.

"Draft article 14. Issuance of multiple originals

"1. Where the law permits the issuance of more than one original of a transferable document or instrument, this may be achieved with respect to electronic transferable records by issuance of multiple electronic transferable records.

"[2. Where the law requires the indication of the total number of multiple original transferable documents or instruments issued, the total number of

multiple electronic transferable records issued shall be indicated in those multiple records.]"

Remarks

10. Draft article 14 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 47 and 68) and fifty-first (A/CN.9/834, paras. 47-52) sessions.

11. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49) and is recognized in article 47, subparagraph 1(c) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). Draft article 14 aims at enabling that possibility in an electronic environment (A/CN.9/834, para. 47), in line with a survey of existing practice that evidenced the use of multiple originals of electronic bills of lading. The provision may be relevant also with respect to bills of exchange.

12. Under an alternative approach based on the general principle contained in draft article 1, paragraph 2, paragraph 1 could indicate that:

"Nothing in this Law precludes the issuance of multiple electronic transferable records".

13. Some of the functions pursued with the issuance and use of multiple transferable documents or instruments may be achieved in an electronic environment, by attributing selectively to multiple entities control on one electronic transferable record. Based on the general principle contained in draft article 1, paragraph 2, the Model Law does not preclude control of an electronic transferable record by multiple entities, where allowed by substantive law.

14. The Working Group may wish to confirm that each electronic transferable record in a set of multiple electronic transferable records may be controlled by a different entity, if parties so agree.

15. Paragraph 2 has been redrafted pursuant to the Working Group's decision at its fifty-first session to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals (A/CN.9/834, para. 51).

16. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued simultaneously on different media should be inserted in the draft Model Law.

"Draft article 15. [Substantive] information requirements of electronic transferable records

"Nothing in this Law requires additional [substantive] information for [the issuance of] an electronic transferable record beyond that required for [the issuance of] a transferable document or instrument."

Remarks

17. Draft article 15 reflects a decision of the Working Group at its forty-eighth session to insert a provision dealing with substantive information requirements (A/CN.9/797, para. 73). It states that no additional substantive

information is required for the issuance of an electronic transferable record than that required for a corresponding transferable document or instrument.

18. The Working Group may wish to clarify the relation between draft article 15 and draft article 9, which requires that an electronic record should contain all information contained in a transferable document or instrument in order to be an electronic transferable record functionally equivalent to that transferable document or instrument.

19. The Working Group may wish to consider whether draft article 15 contains a general rule applicable from the time of creation of the electronic transferable record until it ceases to have any effect or validity. In that case, the Working Group may wish to delete the reference to "the issuance of" as it might limit the scope of the draft article.

20. The Working Group may wish to also consider whether the word "substantive" should be included between the words "additional" and "information" to align the article with its title.

"Draft article 16. Additional information in electronic transferable records

"Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument."

Remarks

21. Draft article 16 reflects a decision by the Working Group to clarify that, while draft article 15 of the Model Law does not impose any additional information requirement for electronic transferable records, it also does not prevent the inclusion in those records of additional information that may not be contained in a transferable document or instrument (A/CN.9/797, para. 73). Examples of such additional information include information that can be displayed only in electronic form or necessary due to technical reasons.

22. In particular, dynamic information, i.e. information that may change periodically or continuously based on an external source, may be included in an electronic transferable record due to its nature but not in a transferable document or instrument (A/CN.9/768, para. 66 and A/CN.9/797, para. 73). The price of a publicly-traded commodity and the position of a vessel are examples of such information.

"Draft article 17. [Control]

"1. Where the law requires the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To [identify] [establish] that person as the person in control.

"2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic

transferable record through the transfer of control over the electronic transferable record."

Remarks

23. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67), fiftieth (A/CN.9/828, paras. 50-56), fifty-first (A/CN.9/834, paras. 34, 35 and 91-94) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. It sets forth control of an electronic transferable record as the functional equivalent of possession of a transferable document or instrument.

24. The Working Group may wish to note that, pursuant to a decision at its fifty-second session, the definition of "control" has been deleted from the draft Model Law as being implicit in draft article 17 (A/CN.9/863, para. 102). At that session, there was broad consensus on the statement that both control and possession were factual situations and that the person in control of an electronic transferable record was in the same position as the possessor of an equivalent transferable document or instrument. There was also broad consensus on the statement that control could not affect or limit the legal consequences arising from possession and that those legal consequences would be determined by applicable substantive law. At that session, it was further stated that parties could agree on the modalities for the exercise of possession, but not modify the notion of possession itself (ibid., para. 101).

25. With regard to paragraph 1, it was explained that reference to the person in control of the electronic transferable record does not imply that that person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61). It was also explained that reference to the person in control does not exclude the possibility of having more than one person exercising control (A/CN.9/828, para. 63, and para. 13 above; see also para. 14 above, regarding the possibility of having different persons in control of each record in a set of multiple electronic transferable records). The Working Group may wish to clarify that a "person" may either be a natural or a legal person.

26. With respect to "identify", the Working Group may wish to note that the electronic transferable record in itself does not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performs that function (A/CN.9/828, para. 63). Moreover, identification should not be understood as implying an obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which implies anonymity (A/CN.9/828, para. 51). However, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement.

27. The Working Group may wish to consider whether the word "establish" has substantive law implications.

28. Paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a transferable document or instrument (A/CN.9/834, paras. 31-33). It includes the words "or permits" in order to clarify its application to cases in which the law

merely permits, but does not require transfer of possession of a transferable document or instrument.

29. The Working Group may wish to consider whether "Control" would be an appropriate title for draft article 17 in light of its content.

30. The Working Group may also wish to consider whether draft article 17 should be placed consecutively after draft article 9 (A/CN.9/834, para. 92).

"Draft article 18. Endorsement

"Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [constituting endorsement] [indicating the intention to endorse] is [logically associated with or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Remarks

31. Draft article 18 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80).

32. The Working Group may wish to consider substituting the words "relating to the endorsement" with the words "indicating the intention to endorse" to better specify that the satisfaction of the generic requirements for writing and signature set forth in draft articles 7 and 8 should be accompanied by the expression of the intent to endorse. The use of the words "constituting endorsement" may provide another drafting option.

33. The Working Group may wish to provide guidance on the use of the words "logically associated with or otherwise linked to" and "included in" throughout the draft Model Law, in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) and of the draft definition of "electronic record" contained in draft article 2 (A/CN.9/WG.IV/WP.137, para. 30).

"Draft article 19. Amendment

"Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such."

Remarks

34. Draft article 19 reflects the Working Group's deliberations at its fiftieth and (A/CN.9/828, paras. 86 and 90) and fifty-second (A/CN.9/863, paras. 83-87) sessions. It provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

35. Draft article 19 sets forth an objective standard for the identification of amended information in an electronic environment in a manner similar to the paper-based environment (A/CN.9/828, paras. 86 and 87), as indicated by the use of the word "identified". The rationale for requesting the identification of the amended

information lies in the fact that, while amendments may be easily identifiable in a paper-based environment due to the nature of that medium, that may not be the case in an electronic environment.

"Draft article 20. Reissuance

"Where the law permits the reissuance of a transferable document or instrument, an electronic transferable record may be reissued."

Remarks

36. Draft article 20 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original. Thus, the draft article presupposes the prior existence of an electronic transferable record for its reissuance.

37. The Working Group may wish to consider whether draft article 20 should be retained due to its declaratory value, or it should be deleted as the possibility of re-issuing an electronic transferable record is already available under draft article 1, paragraph 2.

"Draft article 21. Replacement of a transferable document or instrument with an electronic transferable record

"1. A change of medium of a transferable document or instrument to an electronic transferable record may be performed if a reliable method for the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The electronic transferable record shall include all the information contained in the transferable document or instrument; and

(b) A statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraph 2, the transferable document or instrument ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

38. Draft article 21 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced transferable document or instrument would not further circulate (A/CN.9/828, para. 95).

39. Draft article 21 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102 and 103), fiftieth (A/CN.9/828, para. 102),

fifty-first (A/CN.9/834, paras. 57-64) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. By omitting the reference to substantive legal notions such as "issuer", "obligor", "holder" and "the person in control", this approach aims at accommodating the variety of schemes used in the various transferable documents or instruments. Consequently, and in light also of the need to consent to the use of electronic means set forth in draft article 13, draft article 21, does not contain any reference to consent. Substantive law, including parties' agreement, would identify those parties whose consent is relevant for the change of medium (A/CN.9/834, para. 62).

40. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

> "An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used."

41. The requirements set forth in paragraph 2 (a) and (b) are concurrent. The legal consequence for non-compliance with any of them would be the invalidity of the change of medium and, consequently, of the electronic transferable record (A/CN.9/834, para. 58).

42. Draft paragraph 3 sets forth that, when the change of medium has taken place, the transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. In that respect, a transferable document or instrument may be destroyed or otherwise invalidated on the wrong assumption of the validity of the electronic transferable record replacing it. In that case, the Working Group may wish to confirm that substantive law would apply to the reissuance of the transferable document or instrument, or, alternatively, that the electronic transferable record shall be issued in compliance with draft article 21.

43. Draft paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium (A/CN.9/834, para. 61).

> **"Draft article 22. Replacement of an electronic transferable record with a transferable document or instrument**
>
> "1. A change of medium of an electronic transferable record to a transferable document or instrument may be performed if a reliable method for the change of medium is used.
>
> 2. For the change of medium to take effect, the following requirements shall be met:
>
> (a) The transferable document or instrument shall include all the information contained in the electronic transferable record; and
>
> (b) A statement indicating a change of medium shall be inserted in the transferable document or instrument.
>
> 3. Upon issuance of the transferable document or instrument in accordance with paragraph 2, the electronic transferable record ceases to have any effect or validity.
>
> 4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

44. Draft article 22 provides for the replacement of an electronic transferable record with a transferable document or instrument. Its content mirrors that of draft article 21 (A/CN.9/834, para. 64). A survey of business practice indicates that such replacement is the more frequent case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means.

45. Under certain national laws, the paper-based print-out of an electronic record may fall under the definition of electronic record. However, under draft article 22, a print-out of an electronic transferable record that does not meet the requirements of that draft article would have no effect as a transferable document or instrument replacing the corresponding electronic transferable record.

46. Draft paragraph 3 sets forth that, when the change of medium has taken place, the electronic transferable record ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. In that respect, an electronic transferable record may be destroyed or otherwise invalidated on the wrong assumption of the validity of the transferable document or instrument replacing it. In that case, the Working Group may wish to confirm that, where substantive law allows, the electronic transferable record shall be reissued in compliance with draft article 20, or, alternatively, that the transferable document or instrument shall be issued in compliance with draft article 22.

47. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

> "A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used."

> **"Draft article 23. Division and consolidation of an electronic transferable record**

> "[1. Where the law permits the division or consolidation of a transferable document or instrument, an electronic transferable record may be divided or consolidated if:

> (a) A reliable method is used to divide or consolidate the electronic transferable record[; and

> (b) The divided or consolidated electronic transferable record contains a statement identifying it as such].]

> "[2. Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity.]"

Remarks

48. In light of the suggestions made at the Working Group's fiftieth session, draft article 23 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

49. The Working Group may wish to consider whether paragraph 1 should be retained for declaratory purposes, or whether draft article 1, paragraph 2 might suffice to enable division and consolidation of electronic transferable records.

50. The Working Group may also wish to consider whether subparagraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

51. The Working Group may further wish to consider whether to retain draft paragraph 2, which introduces a substantive rule that may not be compatible with the law and practice of securitization. Alternatively, the Working Group may wish to clarify that substantive law shall determine the effect or validity of electronic transferable records after division or consolidation.

D. Cross-border recognition of electronic transferable records (Article 24)

"Draft article 24. Non-discrimination of foreign electronic transferable records

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [abroad] [outside [the enacting jurisdiction]] [, or that its issuance or use involved the services of a third party based, in part or wholly, [abroad] [outside [the enacting jurisdiction]]] [, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument."

Remarks

52. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[1] The Working Group also stressed the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89 and A/CN.9/863, para. 77).

53. At the Working Group's fifty-second session, several views were expressed on the draft article. On the one hand, there was the desire not to displace existing private international law rules and to avoid the creation of a dual regime with a special set of provisions for electronic transferable records. On the other hand, there was awareness of the importance of aspects relating to the international use of the Model Law for its success and expression of the desire to favour the cross-border application of the Model Law regardless of the number of enactments (A/CN.9/863, paras. 77-82).

54. In that line, the Working Group may wish to confirm that the promotion of the international use of the Model Law should be pursued with respect to issues of validity related to the electronic form of the transferable record, while issues of substantive law, including private international law aspects thereof, should not be affected by the Model Law.

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

55. Paragraph 1 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the place of origin or of use of the electronic transferable record. In other words, paragraph 1 aims to prevent that the place of origin or of use of the electronic transferable record could be considered in themselves reasons to deny legal validity or effect to an electronic transferable record. The words "abroad" and "outside [the enacting jurisdiction]" are editorial alternatives on how to refer to a jurisdiction other than the enacting one. In considering those alternatives, the Working Group may wish to keep in mind the needs of States comprising more than one territorial unit.

56. At the Working Group's fifty-second session, it was noted that an electronic transferable record might be issued in a jurisdiction that did not recognise the use of electronic transferable records, and that recognition of its validity could be sought in a jurisdiction that allowed that use. In that case, it was added, it could be useful to permit recognition of the validity of the electronic transferable record in the latter jurisdiction, provided legal requirements set forth in that jurisdiction were met (A/CN.9/863, para. 79).

57. Hence, the Working Group may wish to confirm that under paragraph 1 an electronic transferable record issued or used in a jurisdiction that does not allow the issuance and use of electronic transferable records, and that otherwise complies with the requirements of applicable substantive law, could be recognized in a jurisdiction enacting the Model Law.

58. At the Working Group's fifty-second session, reference was also made to the possibility of introducing reciprocity standards in the cross-border recognition of electronic transferable records (A/CN.9/863, para. 80). In that respect, the Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words "if it offers a substantially equivalent level of reliability" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

59. Alternatively, the Working Group may wish to consider the following alternative draft of paragraph 1, based on the notion of irrelevance of the place of issuance and use of electronic transferable records, as well as of the location of information systems or of the place where those systems may be accessed. The scope of the proposed alternative draft of paragraph 1 is limited to validity issues relating to the electronic nature of the record. That approach could be particularly appropriate in light of the distributed nature of block-chain-based systems and of the difficulty of determining their exact geographic location.

> "In determining whether, or to what extent, an electronic transferable record is legally effective, valid or enforceable because of its electronic form, no regard shall be had:
>
> (a) To the location where the electronic transferable record is issued or used;
>
> (b) To the location of the information system, or parts thereof, used in connection with the electronic transferable record; or
>
> (c) To the location where the information system used in connection with the electronic transferable record may be accessed."

60. Paragraph 2 reflects the Working Group's understanding that the draft Model Law should not displace existing private international law applicable to transferable documents or instruments (A/CN.9/768, para. 111). This paragraph restates a general principle already contained in article 1, paragraph 2 of the draft Model Law. The Working Group may wish to consider retaining paragraph 2 in light of the fact that private international law rules are often considered procedural rules and that therefore the term "substantive law" could be interpreted as not including private international law.

61. In order to achieve broader cross-border use of electronic transferable records, the Working Group may also wish to consider positively promoting their recognition under private international law by adopting a provision along the following lines:

> "When the rules of private international law lead to the application of a law that does not recognize the issuance and use of electronic transferable records because of their form, this Law shall apply."

62. The effect of the proposed provision would be to displace rules of private international law that do not allow for the recognition of electronic transferable records due to their electronic form only. It does not aim at permitting the issuance and use of electronic transferable records that do not comply with substantive law requirements, as determined by applicable private international law rules. The draft provision would be applicable as lex fori or, where possible, as law chosen by the parties.

63. The Working Group may wish to note that the words "When the rules of private international law lead to the application of a law" are found in article 1(1)(b) CISG and that judicial precedents on the interpretation and application of those words could provide useful guidance also in the context of the draft Model Law.