United Nations A/CN.9/WG.IV/WP.139/Add.2

General Assembly

Distr.: Limited
17 August 2016

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Fifty-fourth session
Vienna, 31 October-4 November 2016

Draft Model Law on Electronic Transferable Records

Note by the Secretariat

Addendum

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V.16-05261 (E)

II. Draft Model Law on Electronic Transferable Records (*continued*)

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"**Draft article 12. 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 12 reflects the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 79-82).

Comments

2. Significant legal consequences are attached to the indication of time and place in transferable documents and instruments. For instance, recording the time of an endorsement is necessary to establish the sequence of the obligors in the action of recourse. Article 12 points at the importance of indicating that information in electronic transferable records. In the case of endorsements, this is particularly important given that the dematerialized nature of electronic transferable records does not make their temporal sequence apparent as in transferable documents or instruments (A/CN.9/834, para. 38).

3. Provisions relating to the indication of time and place, if any, are to be found in substantive law, which may indicate to what extent and which parties may agree on it. If the indication of time and place is mandatory under substantive law, that requirement must be complied with in accordance with article 9 of the Model Law, mandating that the electronic transferable record shall contain the information "required to be contained in a transferable document or instrument".

4. The words "or permits" clarify that article 12 shall apply also to cases when the law 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). In line with the general rule that the Model Law does not impose any additional information requirement, article 12 does not require the indication of time and place when that information is not mandatory under applicable law.

5. Methods available to indicate time and place in electronic transferable records may vary with the system used. Therefore, article 12 is based on a technology-neutral approach compatible with systems based on registry, token, distributed ledger or other technology (A/CN.9/863, para. 24). The reference to the use of a reliable method in indicating time points at the possibility of using trust services such as trusted time stamping (A/CN.9/869, para. 81).

6. The nature of the electronic transferable record may enable automation of certain steps in the life cycle of the record related to time. For instance, promissory notes may be presented for payment automatically on due date.

7. In registry systems, the system is likely to time-stamp automatically the events occurring in the life cycle of the electronic transferable records. However, automatic time-stamping should not prevent parties from determining otherwise the time of their actions, when possible under substantive law.

8. The provisions on time and place of dispatch and receipt of data messages (article 15 of the UNCITRAL Model Law on Electronic Commerce) and of electronic communications (article 10 of the Electronic Communications Convention) are relevant for contract formation and management but may not be appropriate with respect to the use of electronic transferable records (A/CN.9/834, para. 36).

References to preparatory work

A/CN.9/797, para. 61;
A/CN.9/WG.IV/WP.128/Add.1, paras. 1-4;
A/CN.9/WG.IV/WP.130/Add.1, paras. 1-6;
A/CN.9/WG.IV/WP.132/Add.1, paras. 1-10; A/CN.9/834, paras. 36-46;
A/CN.9/WG.IV/WP.135/Add.1, paras. 1-4; A/CN.9/863; paras. 23-24, 26;
A/CN.9/WG.IV/WP.137/Add.1, paras. 1-4; A/CN.9/869, paras. 79-82.

"**Draft article 13. 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."

Remarks

9. Draft article 13 reflects the deliberations of the Working Group at its fifty-third session to retain the article with the title "Determination of place of business" (A/CN.9/869, paras. 83-92).

Comments

10. The law may attach a number of consequences to the place of business. In particular, the place of business may be relevant for the cross-border use of electronic transferable records (A/CN.9/869, para. 83). Substantive law shall indicate how to identify the relevant place of business, which, in principle, does not need to be different only because of the use of electronic or paper medium. The scope of article 13 is limited to clarifying that the location of an information system, or parts thereof, is not an indicator of a place of business as such (A/CN.9/863, para. 25). That clarification may be particularly useful in light of the likelihood that third parties providing services relating to the management of electronic transferable records will use equipment and technology located in various jurisdictions, or whose location may change regularly, such as in the case of use of cloud computing.

11. Article 13, whose text is inspired by article 6, paragraphs 4 and 5 of the Electronic Communications Convention,[1] aims at providing guidance on the determination of a place of business when electronic means are used by indicating that certain elements do not per se identify a place of business (A/CN.9/869, para. 90). Its scope is therefore different from that of article 12, which relates to the indication of the place of business in the electronic transferable record, and not to its determination.

12. Substantive law may allow parties to identify the place of business by agreement. In that case, article 13 may provide a set of suppletive rules on the determination of the place of business that could usefully complement parties' agreements (A/CN.9/869, para. 84). Reference to "place of business" shall be interpreted as reference to the various notions related to geographic location (e.g., residence, domicile, etc.) that may be relevant during the life cycle of the electronic transferable record.

References to preparatory work

A/CN.9/WG.IV/WP.135/Add.1, paras. 5-6; A/CN.9/863, paras. 25-26; A/CN.9/WG.IV/WP.137/Add.1, paras. 5-8; A/CN.9/869, paras. 83-92.

"**Draft article 14. Issuance of multiple originals**

"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 the issuance of multiple electronic transferable records."

Remarks

13. Draft article 14 reflects the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 95-99). Accordingly, paragraph 2 on the indication of the total number of originals issued has been deleted from draft article 14 as redundant, since draft article 9, subparagraph 1(a) already requires that the electronic transferable record should contain an indication of the issuance of multiple originals whenever substantive law set forth that requirement.

14. The Working Group may wish to consider whether a provision dealing with the coexistence of multiple originals issued simultaneously on different media should be inserted in the draft Model Law. This provision may be useful in promoting the use of electronic transferable records while addressing special needs of some parties who may not be in the position of handling those records.

15. In particular, in case the Working Group wishes to insert a provision indicating that multiple originals may be issued simultaneously on different media, such provision could be drafted along the following lines:

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

[1] See also United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), Explanatory Note, United Nations Publication Sales No. E.07.V.2, paras. 116-121.

simultaneous issuance of one or more electronic transferable records and of one or more transferable documents or instruments.

"2. [When one or more electronic transferable records and one or more transferable documents or instruments relating to the same obligation are simultaneously issued] [In case of issuance of one or more electronic transferable records and one or more transferable documents or instruments according to paragraph 1], the electronic transferable records and the transferable documents or instruments shall indicate so."

16. If, on the contrary, the Working Group wishes to insert a provision indicating that multiple originals may not be issued simultaneously on different media, such provision could be drafted along the following lines:

"Where the law permits the issuance of more than one original of a transferable document or instrument, this may not be achieved with the simultaneous issuance of one or more electronic transferable records and of one or more transferable documents or instruments."

Comments

17. 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). Examples of legal provisions recognizing that practice may be found in article 47, paragraph 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")[2] and in article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP"). It has been reported that the practice of issuing multiple originals exists also in the electronic environment.

18. Article 14 aims to enable the continuation of that practice with respect to the use of electronic transferable records (A/CN.9/797, para. 68) when that practice is permitted under applicable law. In that respect, it should be noted that the Model Law does not contain a functional equivalent of the paper-based notion of "original". Instead, the functions fulfilled by the original of a transferable document or instrument with respect to requesting performance are satisfied in an electronic environment by the notions of "singularity" and "control" (see A/CN.9/WG.IV/WP.139, paras. 81-82). Hence, the transposition of the practice of issuing multiple original transferable documents or instruments in an electronic environment requires the issuance of multiple electronic transferable records relating to the performance of the same obligation.

19. However, caution should be exercised when issuing multiple electronic transferable records. In fact, that practice may expose to the possibility of multiple claims for the same performance based on the presentation of each original (A/CN.9/WG.IV/WP.130/Add.1, para. 9). Moreover, the same functions pursued with the issuance of multiple original transferable documents or instruments may be achieved in an electronic environment by attributing selectively control on one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (e.g., title to property of goods, security interests, etc.). In

[2] General Assembly resolution 63/122, annex.

practice, for instance, a registry could record multiple claims having different objects and relating to the same electronic transferable record.

20. Article 14 does not contain an obligation to indicate whether multiple originals have been issued. If substantive law contains that obligation, the electronic transferable record must comply with it in accordance with the information requirements contained in article 9, subparagraph 1(a) of the Model Law (A/CN.9/869, paras. 97 and 99).

21. Similarly, article 14 does not specify whether one or all originals must be presented to request the performance of the obligation contained in the electronic transferable record as this matter is determined by applicable law or, where possible, contractual agreement (for additional information on substantive law, see A/CN.9/WG.IV/WP.132/Add.1, paras. 14-16).

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 25; A/CN.9/768, paras. 71-74;
A/CN.9/WG.IV/WP.124, paras. 49-50; A/CN.9/797, paras. 47, 68-69;
A/CN.9/WG.IV/WP.128/Add.1, paras. 6-7; A/CN.9/804, para. 50;
A/CN.9/WG.IV/WP.130/Add.1, paras. 8-16;
A/CN.9/WG.IV/WP.132/Add.1, paras. 12-20; A/CN.9/834, paras. 47-52;
A/CN.9/WG.IV/WP.135/Add.1, paras. 8-13;
A/CN.9/WG.IV/WP.137/Add.1, paras. 10-16; A/CN.9/869, paras. 95-99.

> "**Draft article 15. 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."

Comments

22. As a general rule, the electronic transferable record shall contain all the information contained in the transferable document or instrument (article 9, subparagraph 1(a) of the Model Law). The Model Law does not require the insertion of information additional to that contained in a transferable document or instruments for the issuance and use of an electronic transferable record. Requiring that additional information would create a legal requirement that does not exist with respect to the issuance and use of transferable documents or instruments and therefore could constitute discrimination against the use of electronic means.

23. Adding to that general rule, article 15 clarifies that the electronic transferable record may, but does not need to contain information additional to that contained in the transferable document or instrument. In other words, while 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 due to the different nature of the two media (A/CN.9/869, paras. 101 and 102).

24. Examples of such additional information include information necessary due to technical reasons, such as metadata or a unique identifier (A/CN.9/761, para. 32). Moreover, such additional information could consist of dynamic information,

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

References to preparatory work

A/CN.9/WG.IV/WP.118, paras. 36-37; A/CN.9/761, para. 32;
A/CN.9/WG.IV/WP.122, para. 22; A/CN.9/768, para. 66;
A/CN.9/WG.IV/WP.124, paras. 51-54; A/CN.9/797, paras. 70-73;
A/CN.9/WG.IV/WP.128/Add.1, para. 10;
A/CN.9/WG.IV/WP.130/Add.1, para. 19;
A/CN.9/WG.IV/WP.132/Add.1, para. 23;
A/CN.9/WG.IV/WP.135/Add.1, para. 18;
A/CN.9/WG.IV/WP.137/Add.1, paras. 21-22; A/CN.9/869, paras. 101-102.

> "**Draft article 16. 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 the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Remarks

25. Draft article 16 has been recast pursuant to the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 111-114) on the understanding that the words "included in" encompass instances when the information was logically associated with or otherwise linked to the electronic transferable record.

Comments

26. Transferable documents or instruments may be transferred by delivery and by endorsement (for comments on delivery, see A/CN.9/WG.IV/WP.139/Add.1, paras. 41-43). Substantive law sets forth the conditions for the circulation of transferable documents or instruments, which apply to functionally equivalent electronic transferable records. Article 16 identifies the requirements that need to be complied with in order to achieve functional equivalence of endorsement in addition to the requirements for functional equivalence of written form and signature (A/CN.9/768, para. 46; A/CN.9/WG.IV/WP.128/Add.1, para. 23).

27. While national laws may contain a wide range of formal prescriptions for endorsement in a paper-based environment, article 16 aims to achieve functional equivalence of the notion of endorsement regardless of those requirements and in line with the approach taken for other functional equivalence rules in the Model Law. Hence, article 16 adds to the functional equivalence rules for writing, signature and transfer already contained in the Model Law by providing also for specific forms of endorsement required under substantive law, such as endorsements on the back of a transferable document or instrument or by affixing an *allonge* (A/CN.9/828, para. 76).

28. Inserting in article 16 specific references to certain form requirements, but not to others, might be interpreted as excluding those other requirements from the scope of the article, thus ultimately frustrating its purpose (A/CN.9/804, para. 80). Hence, article 16 does not refer to any specific form of requirement, but includes all of them.

29. The words "or permits" are included in article 16 to provide for instances when substantive law allows for, but does not require endorsement (A/CN.9/828, para. 77).

30. The words "included in" have been chosen as reflecting more accurately current practice (A/CN.9/828, para. 78) and to encompass instances when the information is logically associated with or otherwise linked to the electronic transferable record (A/CN.9/869, para. 114), thus enabling the use of different models for electronic transferable records management systems in line with the principle of technology neutrality.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 14, 47-49; A/CN.9/768, paras. 46, 102;
A/CN.9/WG.IV/WP.124/Add.1, paras. 13-15; A/CN.9/797, paras. 95-97;
A/CN.9/WG.IV/WP.128/Add.1, paras. 22-27; A/CN.9/804, paras. 80-81;
A/CN.9/WG.IV/WP.130/Add.1, paras. 34-37; A/CN.9/828, paras. 76-80;
A/CN.9/WG.IV/WP.132/Add.1, paras. 36-38;
A/CN.9/WG.IV/WP.135/Add.1, paras. 35-37;
A/CN.9/WG.IV/WP.137/Add.1, paras. 31-33; A/CN.9/869, paras. 111-114.

> "**Draft article 17. 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."

Comments

31. Substantive law or contractual agreements may allow for the amendment of a transferable document or instrument and specify who has the authority to amend the electronic transferable record, under what circumstances and whether a duty to notify third parties of the amendment exists (A/CN.9/761, para. 49 and A/CN.9/768, para. 95). Article 17 provides a functional equivalence rule for instances in which an electronic transferable record may be amended. The amendments referred to in article 17 are of legal and not technical nature.

32. Article 17 sets forth an objective standard, as indicated by the use of the word "identified" (A/CN.9/828, paras. 86 and 87), for the identification of amended information in an electronic environment. 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. Qualifiers to identification, such as "accurately" or "readily", do not provide an objective

standard while introducing an additional burden and imposing cost on system operators (A/CN.9/828, para. 88 and A/CN.9/863, para. 84).

33. Thus, article 17 aims to provide evidence of and trace all (A/CN.9/828, para. 88) amended information (A/CN.9/828, para. 85). The article is in line with the general obligation to preserve the integrity of the electronic transferable record contained in article 9 of the Model Law (A/CN.9/WG.IV/WP.139/Add.1, para. 23). It does, however, go beyond that general obligation, as the amended information shall not only be recorded but also identified as such and therefore recognizable.

34. Article 17 requires that a reliable method shall be used to identify the amended information, but does not set out the method to be employed to identify the amendment or the amended information, as that could impose an additional burden on the management of the electronic transferable record (A/CN.9/828, paras. 89 and 90). The reliability of the method shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

35. The words "or permits" aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record but does not require it (A/CN.9/WG.IV/WP.130/Add.1, para. 42).

References to preparatory work

A/CN.9/761, paras. 45-49; A/CN.9/WG.IV/WP.118/Add.1, paras. 1-5;
A/CN.9/WG.IV/WP.122, paras. 36-39; A/CN.9/768, paras. 93-97;
A/CN.9/WG.IV/WP.124/Add.1, paras. 21-26; A/CN.9/797, para. 101;
A/CN.9/WG.IV/WP.128/Add.1, paras. 33-38; A/CN.9/804, para. 86;
A/CN.9/WG.IV/WP.130/Add.1, paras. 41-45; A/CN.9/828, paras. 85-90;
A/CN.9/WG.IV/WP.132/Add.1, paras. 39-43;
A/CN.9/WG.IV/WP.135/Add.1, paras. 38-40; A/CN.9/863, paras. 83-87;
A/CN.9/WG.IV/WP.137/Add.1, paras. 34-35.

"**Draft article 18. Replacement of a transferable document or instrument with an electronic transferable record**

"1. An electronic transferable record may replace a transferable document or instrument 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 paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and 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

36. Draft article 18 has been recast to reflect the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras. 116-120). Accordingly, paragraph 1 is drafted in the active voice. Paragraph 3 now contains a reference to paragraph 1 in addition to paragraph 2 to clarify that the electronic transferable record has to be issued in accordance with both paragraphs.

37. The Working Group may wish to note that a transferable document or instrument may be 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 and if possible, that the electronic transferable record shall be issued in compliance with draft article 18.

38. The Working Group may wish to consider whether the comments to draft articles 18 and 19 should be combined, since the structure of the two articles is similar.

Comments

39. If the law recognizes the use of both transferable documents or instruments and electronic transferable records, the need for a change of medium may arise during the life cycle of those documents, instruments or records. Enabling change of medium is critical for the wider acceptance and use of electronic transferable records, especially when used across borders, given the different levels of acceptance of electronic means and readiness for their use in different States and business communities (A/CN.9/761, para. 72).

40. While modern legal texts based on medium neutrality may recognize the possibility of change of medium,[3] laws dealing exclusively with transferable documents or instruments are unlikely to foresee it. Articles 18 and 19 of the Model Law aim to fill that gap.

41. Articles 18 and 19 have a substantive nature and aim at satisfying two main goals: enabling change of medium without loss of information; and ensuring that the replaced transferable document or instrument will not further circulate (A/CN.9/828, para. 95) so as to prevent the coexistence of two claims to performance of the same obligation and, more generally, not to affect in any manner the rights and obligations of any party (A/CN.9/834, para. 54).

42. Article 18 omits the reference to substantive legal notions such as “issuer”, “obligor”, “holder” and “person in control” in order to accommodate the variety of schemes used in the various transferable documents or instruments, thus providing the flexibility needed to accommodate business practice (A/CN.9/834, paras. 57 and 64 and A/CN.9/WG.IV/WP.135/Add.1, para. 44).

43. Substantive law, including parties’ agreement, identifies those parties whose consent is relevant for the change of medium (A/CN.9/834, para. 62) and which parties, if any, need to be notified of the change.

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[3] See article 17 of An Act to Establish a Legal Framework for Information Technology, CQLR c C-1.1 (Québec); see also article 10 of the Rotterdam Rules.

44. Paragraph 1 requires that a reliable method shall be used for the change of medium. The reliability of the method shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

45. The word “replace” in paragraph 1 does not refer to the notion of reissuance, since reissuance and change of medium are distinct concepts and article 18 is clearly meant to refer to the latter (A/CN.9/869, para. 116).

46. The requirements set forth in paragraph 2 (a) and (b) are concurrent but not sequential. The electronic transferable records management system will in practice determine the steps in which they are implemented. The legal consequence for non-compliance with any of them is the invalidity of the change of medium and, consequently, of the electronic transferable record (A/CN.9/834, para. 58).

47. 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. The word “upon” indicates that there should be no interval between the issuance of the replacement and the termination of the replaced document or record (A/CN.9/828, paras. 97 and 102).

48. The words “shall be made inoperative and” before the word “ceases” reflect that the transferable document or instrument could not be further transferred after change of medium. They leave sufficient flexibility on the choice of the method to render the transferable document or instrument inoperative (A/CN.9/869, para. 118).

49. A transferable document or instrument could fulfil other functions besides transferability, such as providing evidence of a contract for the carriage of goods and of receipt of the goods, or, with respect to transferable documents or instruments, providing evidence of the chain of endorsements for an action in recourse. The ability to fulfil those additional functions may continue after the document or instrument has been made inoperative (A/CN.9/869, para. 118).

50. Paragraph 3 refers to the issuance of the electronic transferable record in accordance with paragraphs 1 and 2, to clarify that the electronic transferable record has to be issued in accordance with both paragraphs (A/CN.9/869, para. 119).

51. 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). Though a general principle already contained in the Model Law, the paragraph was retained in view of its declaratory function (A/CN.9/828, paras. 101 and 102).

References to preparatory work

A/CN.9/761, paras. 72-77;
A/CN.9/WG.IV/WP.122, paras. 44-46; A/CN.9/768, para. 101;
A/CN.9/WG.IV/WP.124/Add.1, paras. 27-31; A/CN.9/797, paras. 102-103;
A/CN.9/WG.IV/WP.128/Add.1, paras. 40-47;
A/CN.9/WG.IV/WP.130/Add.1, paras. 47-54; A/CN.9/828, paras. 94-102;
A/CN.9/WG.IV/WP.132/Add.1, paras. 46-56; A/CN.9/834, paras. 53-64;
A/CN.9/WG.IV/WP.135/Add.1, paras. 43-48;
A/CN.9/WG.IV/WP.137/Add.1, paras. 38-43; A/CN.9/869, paras. 116-120.

"**Draft article 19. Replacement of an electronic transferable record with a transferable document or instrument**

"1. A transferable document or instrument may replace an electronic transferable record 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 paragraphs 1 and 2, the electronic transferable record shall be made inoperative and 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

52. Pursuant to the Working Group's decision at its fifty-third session (A/CN.9/869, paras. 121, 116-120), draft article 19 reflects the changes agreed upon for draft article 18 since the two draft articles share the same structure.

53. Accordingly, paragraph 1 is drafted in the active voice on the basis of the alternative draft contained in A/CN.9/WG.IV/WP.137/Add.1, paragraph 47. Paragraph 3 now contains a reference to paragraph 1 in addition to paragraph 2 to clarify that the transferable document or instrument had to be issued in accordance with both paragraphs.

54. Further, paragraph 3 includes the words "shall be made inoperative and" before the word "ceases" to reflect that the electronic transferable record could not be further transferred after change of medium leaving sufficient flexibility to industry on the choice of the method to render the electronic transferable record inoperative.

Comments

55. Article 19 provides for the replacement of an electronic transferable record with a transferable document or instrument. A survey of business practice indicates that such replacement is more frequent than the reverse 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 (A/CN.9/WP.137/Add.1, para. 44).

56. Under certain national laws, a paper-based print-out of an electronic record may be considered as equivalent to an electronic record.[4] Under article 19 a print-out of an electronic transferable record needs to meet the requirements of that article in order to have effect as a transferable document or instrument replacing the corresponding electronic transferable record.

57. The content of article 19 mirrors that of article 18 on the replacement of a transferable document or instrument with an electronic transferable record (A/CN.9/834, para. 64). Therefore, the comments in paragraphs 39-51 above also apply, mutatis mutandis, to article 19.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 44-46; A/CN.9/768, para. 101;
A/CN.9/WG.IV/WP.124/Add.1, paras. 27-31; A/CN.9/797, paras. 102-103;
A/CN.9/WG.IV/WP.128/Add.1, paras. 40-47;
A/CN.9/WG.IV/WP.130/Add.1, paras. 47-54; A/CN.9/828, paras. 94-102;
A/CN.9/WG.IV/WP.132/Add.1, paras. 46-56; A/CN.9/834, paras. 53-64;
A/CN.9/WG.IV/WP.135/Add.1, paras. 49-51;
A/CN.9/WG.IV/WP.137/Add.1, paras. 44-47; A/CN.9/869, paras. 121-122.

Third-party service providers

58. Depending on the model chosen, electronic transferable records management systems may require the use of services provided by third parties. The Model Law is technology neutral and therefore compatible with all models. Reference in the Model Law to electronic transferable record management systems does not imply the existence of a system administrator or other form of centralized control.

59. UNCITRAL texts on electronic commerce have sometimes dealt with the conduct of third-party service providers. In particular, articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures provide guidance on the assessment of the conduct of a third-party service provider and of the trustworthiness of its services.

60. However, the enabling scope of the Model Law is not compatible with regulatory concerns, which should be addressed in other legislation. Moreover, expected developments in technology and business practice recommend a flexible approach when assessing the conduct of third-party service providers. Hence, the Model Law leaves freedom of choice of third-party service providers as well as of the type of services requested and of their technology (A/CN.9/834, para. 78).

61. In that respect, it should be noted that the general reliability standard set forth in article 11 of the Model Law, and specific standards such as the criterion to assess integrity contained in article 9, paragraph 2 of the Model Law provide parameters to assess the reliability of an electronic transferable record and of its management system. Designers of those management systems need to comply with those standards in order to set up commercially viable enterprises.

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[4] See, e.g., Electronic Transactions Act, 2007 of Saint Vincent and the Grenadines, Section 11(2): "Where a rule of law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, the requirement is met if the person provides a print-out certified to be a true reproduction of the document or information."

D. Cross-border recognition of electronic transferable records (Article 20)

> "**Draft article 20. 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.
>
> "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

62. Draft article 20 reflects the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras 124-131). Accordingly, paragraph 1 aims to provide only for non-discrimination of foreign electronic transferable records (A/CN.9/869, para. 128).

Comments

63. Article 20 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the fact that it was issued or used abroad and without affecting private international law rules (A/CN.9/869, paras. 125 and 129).

64. The need for an international regime to facilitate the cross-border use of electronic transferable records was already recognized at the outset of the work and reiterated throughout the deliberations on the Model Law (A/CN.9/761, paras. 87-89; A/CN.9/863, para. 77). That need was also emphasized by the Commission at its forty-fifth session (A/67/17, para. 83).

65. However, different views were expressed on how to achieve that goal. 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 applying a special set of conflict of laws provisions for electronic transferable records. On the other hand, there was awareness of the importance of dealing adequately with aspects relating to the international use of the Model Law for its success and expression of the desire to favour its cross-border application regardless of the number of enactments (A/CN.9/863, paras. 77-82).

Paragraph 1

66. 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. A provision similar in scope may be found in article 12, paragraph 1 of the UNCITRAL Model Law on Electronic Signatures.

67. The words “issued or used” aim at covering all events occurring during the life cycle of an electronic transferable record. In determining the location of the place of business, article 13 of the Model Law may also be relevant.

68. Paragraph 1 does not affect substantive law, including private international law (A/CN.9/869, para. 125). Thus, for instance, paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that does not recognize the legal validity of electronic transferable records (A/CN.9/869, para. 125). However, paragraph 1 also does not prevent that 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 (see also A/CN.9/863, para. 79).

69. The word “abroad” is used to refer to a jurisdiction other than the enacting one, including a different territorial unit in States comprising more than one.

70. Paragraph 2 reflects the understanding that the Model Law should not displace existing private international law applicable to transferable documents or instruments (A/CN.9/768, para. 111). The introduction of dedicated provisions would lead to a dual private international law regime, which is not desirable (A/CN.9/869, para. 78).

71. Paragraph 2 implements the general principle already contained in article 1, paragraph 2 of the Model Law (A/CN.9/WG.IV/WP.139, para. 17). It clarifies that private international law rules are considered substantive law for the purposes of that article (A/CN.9/869, para. 129).

72. Since paragraph 1 refers only to non-discrimination while paragraph 2 relates to private international law, the two paragraphs operate on different levels and do not interfere.

References to preparatory work

A/67/17, para. 83;
A/CN.9/WG.IV/WP.122, paras. 60-62; A/CN.9/768, para. 111;
A/CN.9/WG.IV/WP.124/Add.1, paras. 45-47; A/CN.9/797, para. 108;
A/CN.9/WG.IV/WP.128/Add.1, paras. 62-66;
A/CN.9/WG.IV/WP.130/Add.1, paras. 71-75;
A/CN.9/WG.IV/WP.132/Add.1, paras. 79-83;
A/CN.9/WG.IV/WP.135/Add.1, paras. 58-63; A/CN.9/863, paras. 77-82;
A/CN.9/WG.IV/WP.137/Add.1, paras. 52-63; A/CN.9/869, paras. 124-131.