United Nations A/CN.9/921/Add.2

General Assembly

Distr.: General
23 May 2017
English
Original: Arabic/English/French/
Russian

United Nations Commission on International Trade Law
Fiftieth session
Vienna, 3-21 July 2017

Draft Model Law on Electronic Transferable Records

Compilation of comments by Governments and international organizations

Addendum

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V.17-03619 (E) 010617 020617

II. Compilation of comments

A. States

6. Côte d'Ivoire

[Original: French]
[4 May 2017]

1. As is known, international commercial transactions now require the use of alternatives to paper documents for the purposes of communicating, recording, authenticating and substantiating information and rights that are to be preserved.

2. I [the Minister of Justice] note that review of the draft Model Law and its explanatory notes highlights:

- The desire to increase legal certainty in electronic commerce
- A legislative framework for the use of modern technologies to foster international trade
- The desired degree of flexibility and clarity in terms of its scope of application on the basis of the needs of each enacting State
- The absence of impact on the substantive law applicable to paper documents or instruments
- Lastly, the proposed legal framework does not prevent the preparation or use of electronic transferable records that have no paper-based equivalent.

3. Therefore, I have the honour to inform you that I have no particular comments regarding this innovative legal framework.

7. Qatar

[Original: Arabic]
[3 May 2017]

1. According to paragraph 3 of article 7, the consent of a person to use an electronic transferable record may be inferred from the person's conduct. This could, however, give rise to disagreement concerning the nature of the conduct required to prove consent. **We are therefore of the view that consent to use an electronic transferable record may be considered to have been given when provided in writing or in any other reliable form**. This would prevent any disagreement with regard to the matter of consent.

2. According to paragraph 2 of article 10, the criterion for assessing the integrity of an electronic transferable record shall be "whether information contained in the electronic transferable record […] has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display." The exception provided for could give rise to disagreement regarding the nature of such a change and the extent of its impact on the original information contained in the record. Any change which arises in the course of communication, storage and display should not affect any part of the original information contained in the record. **We therefore propose that this exception be deleted**.

3. The draft Model Law does not address situations in which an electronic transferable record is issued outside the country in which the record has been authorized and in which the person in control of the record is located while similar records exist in another country or other countries, nor does it address the extent to which information contained in such records may diverge. **We therefore consider it necessary to insert a provision to address the existence of conflicting information in records issued by more than one country**.

4. The draft Model Law does not address whether electronic transferable records can be traded, despite the importance of this issue, its relevance to the purpose of such records and its impact on the fundamental rights of the holder of the record. **We are therefore of the view that provisions on the tradability of records must be included**.

5. “Investment instruments” is not a commonly used term in law, unlike “financial securities”. **We consider that a definition of the term should be provided**.

8. Russian Federation

[Original: Russian]
[27 April 2017]

1. According to subparagraph 1 (b)(i) of article 10 of the draft model law on electronic transferable records, a reliable method of identifying an electronic record as an electronic transferable record is a method that makes it possible to identify that electronic record as the electronic transferable record.

2. In accordance with decisions taken at previous sessions of UNCITRAL Working Group IV (Electronic Commerce), the word “authoritative”, which represented an identifying feature of an electronic record, was deleted from that draft provision and replaced in the English-language version of the draft model law with the definite article “the”.

3. However, as already indicated by the delegation of the Russian Federation, in the Russian language there is no equivalent of the definite article, and consequently the word “authoritative” cannot be deleted without being replaced with another word.

4. Paragraph 1 of draft article 20 enshrines the principle of non-discrimination of foreign electronic transferable records, in accordance with which an electronic record cannot be denied legal effect, validity or enforceability on the ground that it was issued or used abroad.

5. While that principle is fully in line with the policy framework of the draft model law, we believe that the manner in which it is formulated or the manner in which it is explained in the notes might require clarification. In particular, the draft model law and the explanatory notes should not allow the broad interpretation of that principle, which could result in restriction of the right of States to control the validity of electronic transferable records if they have been issued or used abroad.

6. For example, if no control system ensuring a high level of reliability and authenticity of electronic transferable records is established in a foreign State, the State enacting the model law (if the model law is adopted) must reserve the right to deny enforceability of electronic transferable records issued in the territory of such a foreign State. Any other approach could lead to significant abuse in financial and commodity markets through the use of unreliable electronic transferable records issued or used abroad.

7. It would therefore be appropriate to supplement draft article 20 and (or) the explanatory notes with the following provision: “The principle of non-discrimination of electronic transferable records may not in itself constitute a ground for recognizing the legal effect, validity or enforceability of foreign electronic transferable records if such records do not meet the criteria determining the reliability of the method used, as set out in article 12.”

8. Moreover, it is noteworthy that all of the criteria determining the reliability of the method used with respect to an electronic record, as set out in draft article 12, are non-mandatory, which would appear not to be correct in all cases. Criteria relating to technical security (such as assurance of data integrity, prevention of unauthorized access and security of hardware and software) should be applied to all types of electronic transferable record.

9. Furthermore, the note regarding the non-mandatory nature of certain provisions of the draft also applies to the draft as a whole: the draft does not set out any restrictions with respect to the application of reservations and exceptions by States enacting the model law, which could disrupt the uniformity of its application, including with regard to such fundamental matters as identification of the persons who have signed a document and the reliability of the methods used to create and transfer electronic transferable records.

B. Intergovernmental organizations

3. Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States

[Original: Russian]
[24 May 2017]

PROPOSED AMENDMENTS TO THE DRAFT MODEL LAW ON ELECTRONIC TRANSFERABLE RECORDS

The draft Model Law is aimed at harmonizing States' legislation with respect to the legal aspects of actions carried out using electronic means. In that regard, the idea of the law is very timely, useful and relevant. In view of the subject matter and objectives of the Model Law, the following comments and proposals regarding the draft text of the Model Law are considered appropriate.

The definition of "electronic transferable record"

Within the meaning of the Model Law, this term is a broader equivalent of the term "electronic document" used in the legal systems of many countries, including the Russian Federation; the scope of application and legal consequences with respect to an electronic transferable record are identical to those with respect to an electronic document in Russian legislation. Given that an electronic document constitutes a form of electronic transferable record and, moreover, is the form most frequently encountered in business practice, it would be useful to include in the definition of "electronic record" the words "including an electronic document".

Article 6

This article suggests that an electronic transferable record is a transferable document in electronic form. However, the inclusion in an electronic transferable record of information other than that contained in a transferable document makes the electronic document an independent document, as a result of which the provisions on the equivalent legal force of a transferable document and an electronic transferable record where the document and the record are assumed to be identical for the purposes of a commercial transaction cannot be applied. If article 6 is to provide for the inclusion in the electronic transferable record of information necessary for the process of electronic transfer of data, or if it is to provide for changes to the original format of the record as viewed by the sender or to the final format of the record as viewed by the recipient, this should be duly clarified in the text of the draft article.

Article 7, paragraph 3

It would appear that, for the purposes of determining the voluntariness of use of an electronic transferable record, the general provisions of civil law should be applied in order to verify the voluntariness and reasonableness of a person's actions. One of the means of achieving such a determination might be to analyse the conduct of that person, that is, to consider any statement to the effect that those actions have not been taken voluntarily, together with the necessary proof of the validity of such a statement.

Article 9

It is necessary to establish that the method used to identify a person must be provided for by national legislation and, in the cases specified by national legislation, must be duly authenticated (certified). This provision, for example, is applicable to electronic signature, which is the most common and trusted means of authenticating electronic documents in business practice. Alternative means of identification may be provided for in an agreement between the parties or by national legislation, for example, a login and password (for example, for facilities providing e-government or banking services) or identification through an SMS sent to a mobile telephone.

Article 11

It appears that a definition of control of an electronic transferable record is needed, including a definition of control over the integrity and inalterability of an electronic transferable record.

Article 13

There appears to be a need for a more detailed definition of the concept of reliability of the determination of date and time with respect to an electronic transferable record.

Article 14

The provisions of this article should cover not only businesses, given that entities that carry out electronic transactions may be non-commercial organizations.

Articles 18 and 19

It is proposed that paragraph 3 of each article be deleted, because in many jurisdictions the availability of an electronic document does not mean that a paper document ceases to be legally valid. Also, a definition of "a reliable method for the change of medium" is needed in both articles.

Article 20

It may be that paragraphs 1 and 2 contradict one another to some extent, since, according to the provisions of paragraph 2, any legal requirements that must be met in order for a document issued abroad to be considered legally valid continue to apply, as a result of which paragraph 1 cannot be meaningfully applied in practice.

We kindly request that these comments and proposals be taken into account in the course of further work on the draft Model Law.

C. Non-governmental organizations

2. International Federation of Freight Forwarders Associations

[Original: English]
[2 May 2017]

A. Need and approach of the Draft Model Law on Electronic Transferable Records

1. The International Federation of Freight Forwarders Associations (FIATA) is a non-governmental international organization that represents and unites the freight forwarding industry worldwide. It currently relies on the contribution and active participation of the international forwarders associations in more than 100 countries, comprising more than 40,000 member companies. As such, FIATA is concerned with any practices and legal rules or instruments that may directly or indirectly affect the transportation intermediation or the international freight forwarding industry.

2. FIATA very much welcomes the efforts undertaken by UNCITRAL and its Secretariat to finalize an instrument that addresses the issuance of electronic transferable records in order to provide them with certain and predictable legal effects. The transportation and the freight forwarding industry intensively rely on the issuance of paper and electronic documents. The industry increasingly relies on the use of electronic documents for several different purposes and is slowly migrating documentary processes to the electronic environment, given the many advantages that the use of electronic means brings about in terms of time, security and cost. Among the documents traditionally used in the context of transportation activities prominently stand bills of lading issued as negotiable documents. FIATA perceives that negotiable or transferable electronic records lack a proper legal regime in most of the countries whose industry is involved in international trade and relies or depends on the international transportation network. In FIATA's and FIATA members' experience, it is also clear that in the very few countries that have addressed the issuance and use of electronic negotiable documents, such as bills of lading, the industry has quickly abandoned the use of paper for this purpose and moved to the use of electronic documents and tools.

3. It is FIATA's view that the Draft Model Law on Electronic Transferable Records (DMLETR) may potentially make a valuable contribution to the progress of the law in this field, and to the spread of the use of negotiable records in safe conditions. As a Model Law, the chosen instrument, in the first place and like in previous experiences in the field of electronic commerce, will allow enough flexibility to induce a wider adoption of the proposed set of rules. Also, the basic goal of the DMLETR seems to be to essentially set the conditions for the valid issuance in electronic form of the paper-based documents that existing law currently addresses and regulates, by exclusively setting formal requirements on the basis of the functional equivalent and the technology neutrality principles, among others. FIATA considers that this is a modest and yet balanced approach, which may potentially make an important contribution since, other than opening the door to the use in electronic form of documents that current practice is familiar with, it may help to set the legal basis for the development of new practices and documentary processes akin to those based on the use of negotiable or transferable instruments or documents.

4. Likewise, and in terms of the scope of application of the proposed instrument, the DMLETR builds on the existing rules that allow the use of electronic documents or records, which already provide the basis for their validity and evidentiary effect in all those respects that do not strictly depend on, or relate to their transferable or negotiable character. The freight forwarding industry heavily relies on the use of documents, such as waybills or cargo receipts, which in most countries may already be issued in electronic form and which are not affected by the provisions of the DMLETR.

B. Particular concerns regarding the proposed draft

5. The foregoing being said, FIATA wishes to express certain specific particular concerns as regards some of the provisions that the DMLETR contains in its current wording, and which in FIATA's view may limit or distort the expected or potential usefulness of the proposed framework.

6. The first issue relates to the mandatory or, alternatively, non-mandatory character of the model law, and consequently to whether its provisions (or the national law provisions that enact or implement them) may be modified by contract. The DMLETR wisely reflects, and existing practice clearly shows that the use of electronic transferable or negotiable records requires that the parties involved in their issuance or transfer agree on the technology and the method to be used for that purpose. This being the starting point, the main concern of the DMLETR seems to be to lay down the proper formal requirements that set the threshold for recognition of an electronic transferable record and its effects as such, on the basis of several different elements. Current draft article 4, paragraph 1 does however foresee that the

scheme of the DMLETR allows the parties to vary its provisions by contract, and leaves to enacting states to identify the provisions that would fall under this rule. It is the view of FIATA that formal requirements of the kind of those addressed by the DMLETR, which provide the core value of the law, are of a mandatory character in currently existing paper-based law, and it should probably be the same under the DMLETR, in order to make sure that an important part of the goals of negotiable or transferable instruments law in its present state (with a strong formal basis) are preserved. Introducing freedom of contract in too many of the elements of the DMLETR would also undermine another of the important goals of the instrument, which should be ensuring a minimum level of harmonization in the field. Whether it is addressed in the black letter rules or in the explanatory notes of the DMLETR, in FIATA's opinion the provisions that ought to be made or recommended as mandatory should include[1] draft articles 8 to 12 (inclusive) which deal with writing and signature requirements, requirements for the existence of an electronic transferable record, control of an electronic transferable record and the standard for the assessment of reliability. If this issue is addressed in the black letter rules, a revised text for draft article 4, paragraph 1 may be:

> "Except for articles 1 to 3, 5 to 12 and 20, para. 2, the parties may derogate from or vary by agreement the provisions of this law."

7. The DMLETR grounds recognition of the existence and effects of electronic transferable records, as defined by its provisions, on the level of reliability of the method employed by the parties for the use thereof (reliability, therefore, provides the reference to determine compliance — or non-compliance — with formal requirements in the model law that refer to the legal effectiveness of the method used by the parties). A second point of concern for FIATA relates to the elements that may be taken into account in the assessment of the level of reliability of such method. Current draft article 12, paragraph 1 lists several factors that may be relevant in the said context, and seems to intentionally leave outside such list, and deprive of any relevance for these purposes, contractual agreements between the parties relating to the technology or method chosen and its agreed validity or reliability.[2] Such a policy option seems to be based on the assumption that the legal regime of transferable or negotiable instruments or documents is specifically targeted at the protection of the interests of third parties, and consequently allowing the parties to agree on the standard of reliability would fundamentally depart from such basic principle and leave third parties unprotected. It is submitted that such a view may not be completely well grounded, and the deletion of any reference to the agreements of the parties in this context may well deprive the Model Law of some of its potential usefulness.

8. Third parties protected in negotiable instruments' or documents' law are the ones involved in the transfer or circulation of the document itself (e.g., the third-party transferee/holder in good faith/due course). In light of FIATA's understanding of existing practice, such third parties would not be unprotected by giving relevance to contractual agreements between the parties (to the contrary, they would be protected through contractual arrangements providing a specification of what is considered reliable — and may be relied upon — by contract, something that is otherwise left undetermined in the law). In the said context, other third parties may deserve protection, but such protection would have to be sought in other legal rules. This is what FIATA sees in other UNCITRAL instruments, where the validity of, e.g., an electronic signature is made dependent on whether the method used for signing a document reliably ensures the fulfilment of the functions deemed to be performed by a handwritten signature (and correspondingly required for an electronic one to be valid). For this purpose, relevance is given also to the agreements of the parties, thereby leaving the door open to the recognition of legal effects to signatures between two parties provided they meet the agreed standards,

[1] Along with those that relate to the scope of application and interpretation of the law itself (draft articles 1 to 3, and 5 to 7, and 20, para. 2).

[2] See comments in the draft Explanatory Note, para. 119.

whether the resulting acts indirectly affect third parties or not.[3] The standard of reliability in DMLETR provides an objective reference, whose contents are also and nonetheless fulfilled by the parties involved in transactions through their contracts, as a way to avoid the uncertainty attached to undetermined notions. The exclusion of contractual agreements of the parties from the list in draft article 12, paragraph 1 DMLETR, as well as from the elements that, if relevant, may be considered for the purpose to assess reliability, in current practice will simply and precisely reopen that area of uncertainty, should the Model Law be widely enacted with the terms described.

9. FIATA is aware that Working Group IV has made an effort to reach a consensus on this issue, which is currently reflected in draft article 12 and the accompanying explanatory notes. However, should the foregoing remarks merit any consideration, FIATA would recommend that:

(a) An additional section to paragraph (a) or draft article 12 be added with the following wording: “any relevant agreement existing between the parties”; or

(b) Paragraph 119 in document A/CN.9/920 be deleted, so that no express indication as to the feasible relevance of contractual agreements is made, thus leaving the question to the interpreter under the general wording of draft article 12.

10. Finally, FIATA finds some difficulties in the provision in draft article 15 of the DMLETR. On the basis of the functional equivalence principle, this provision (combined with other provisions of the draft Model Law) allows the issuance of multiple transferable records (provided a reliable method is employed for that purpose) in order to meet requirements of paper-based law relating to the valid issuance of multiple originals of a paper transferable document. FIATA’s concerns with regard to this provision focus on whether it is strictly needed and on how it should be interpreted.

11. In FIATA’s experience, paper bills of lading started to be issued in more than one original (normally three, one for the shipper, one for consignee and one for the banker/broker, or alternatively three for the banker providing the documentary credit) essentially with the purpose to manage and mitigate travel and delivery risks. The various originals are meant to function as a single bill of lading (all originals must expressly state for this purpose that they are part of a set). The said practice has always been approached with caution, as the mere fact that more than one original is issued entails an increased risk of fraud, theft or unauthorized or otherwise wrongful release of the goods. FIATA finds that all purposes covered in paper-based practice through the use of multiple originals may be achieved in the electronic environment without the need to issue more than one original, or more than one electronic transferable record, a reason for which the provision in draft article 15 is not clearly needed.

12. In addition to the foregoing, the provision in the draft article, as it currently stands, creates in FIATA’s view some problems of interpretation, as it seems to equate the issuance of a transferable or negotiable document in more than one original with the issuance of more than one electronic transferable record. Although the logic of the DMLETR seems to indicate that each of these electronic transferable records must be treated as one of the originals of a single set (thus being also necessary under applicable law that each of the electronic transferable records indicates that it is one of a single set to benefit from the principle in draft article 15), from a literal point of view this is not entirely clear, and the provision raises many questions as to its relation with other provisions, including in particular draft articles 2, second paragraph, and 10 (on the notion of electronic transferable record) and draft article 11 (on control). FIATA finds that, whereas there are already several examples in practice of how electronic transferable records are being used on the basis of different systems and methods, there is no indication for the time being of whether such records are issued in more than one “original” or independent

[3] See, e.g., Art. 6, para. 1 of the UNCITRAL Model Law on Electronic Signatures (2001).

copy (with the purpose to replicate the practice based on the issuance of more than one paper original), and consequently there is no useful example that may be taken into account to shape the rule in draft article 15. Until that circumstance changes, FIATA would advise that this provision not be included in the Model Law.