



General Assembly

Distr.: Limited
4 March 2013

Original: English

**United Nations Commission
on International Trade Law**
Working Group IV (Electronic Commerce)
Forty-seventh session
New York, 13-17 May 2013

Draft provisions on electronic transferable records

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-3	2
II. Draft provisions on electronic transferable records	4-62	2
A. General provisions (Articles 1-6)	4-11	2
B. Use of electronic transferable records (Articles 7-29)	12-57	6
C. Third-party service providers (Articles 30-33)	58-59	19
D. Cross-border recognition of electronic transferable records (Article 34)	60-62	21



I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.¹
2. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on electronic transferable records (A/CN.9/737, paras. 14-88). At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued considering legal issues that arise during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89) and broad support was expressed for the preparation of draft provisions on electronic transferable records (A/CN.9/761, paras. 90-93).
3. In accordance with that decision, part II of this note contains draft provisions on electronic transferable records presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 92-93).

II. Draft provisions on electronic transferable records

A. General provisions

“Draft article 1. Scope of application

- “1. This Law applies to any kind of electronic transferable record.
- “2. Nothing in this Law affects the application of any rule of law governing a paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.”

Remarks

4. Paragraph 1 of draft article 1 reflects the Working Group’s understanding that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, para. 18). Paragraph 2 of draft article 1 continues to state that the draft provisions should not deal with matters governed by the substantive law on paper-based transferable documents or instruments (A/CN.9/761, paras. 20, 28, 49, 62, 68, 71, 79 and 85).
5. Reference may be made to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931). These Conventions were prepared in a paper-based context and only assume the use of paper-based instruments (for example, reference is made to the “face” and “back” of the instrument and “crossing” of cheques). Although the Conventions do not explicitly preclude the use of electronic equivalents, careful consideration should be given to whether States parties to these Conventions could introduce electronic equivalents of a bill of exchange, a promissory note or a cheque.

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

“Draft article 2. Exclusion

“1. This Law does not override any rule of law applicable to consumer protection.

“2. This Law does not apply to the following: (a) electronic equivalent of securities; (b) electronic payment methods; and (c) ... ”

Remarks

6. Paragraph 1 of draft article 2 mirrors article 1 of the UNCITRAL Model Law on Electronic Signatures (2001) and recognizes that consumer protection law may take precedence over the draft provisions. The Working Group may wish to consider whether to retain this paragraph.

7. Paragraph 2 of draft article 2 reflects the discussion by the Working Group on its scope of work (A/CN.9/761, para. 22). The Working Group may wish to further discuss its scope of work, possibly specifying instruments (for example, electronic money) or transactions (for example, foreign exchange transactions) that should be excluded from the scope of the draft provisions.

“Draft article 3. Definitions

“For the purposes of this Law:

“amendment” means the modification of information contained in the electronic transferable record.

“electronic transferable record” means the electronic equivalent of any paper-based transferable document or instrument [that entitles the holder to claim the performance of obligation specified in the electronic transferable record].

“holder” of an electronic transferable record is a person in control of the electronic transferable record in accordance with the procedure set out in draft article 17.

“issuance” of an electronic transferable record means the issuance of the record in accordance with the procedure set out in draft articles 16 and 17.

“issuer” means a person that issues [or requests the issuance of] an electronic transferable record.

“performance of obligation” means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

“paper-based transferable document or instrument” means any transferable document or instrument issued on paper that entitles the bearer or beneficiary to claim the performance of obligation specified in the paper-based transferable document or instrument.

“release” means the physical or technical step of placing an electronic transferable record under the control of its first holder.

“replacement” means the change in the medium, either from a paper-based transferable document or instrument to an electronic transferable record or vice versa.

“surrender” of an electronic transferable record means the presentation of the electronic transferable record for the performance of obligation in accordance with article 25.

“third-party service provider” means a third party providing services for the use of electronic transferable records.

“transfer” of an electronic transferable record means the transfer of control over an electronic transferable record.”

Remarks

8. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. Among others, the Working Group may wish to consider whether:

(a) To include a definition of “authoritative copy” following its discussion on draft article 17;

(b) To include a definition of “control” by referring to the procedure set out in draft article 17;

(c) The definition of “electronic transferable records” correctly reflects the understanding of the Working Group that it should focus on enabling the use of electronic transferable records as equivalents of existing paper-based transferable documents or instruments (A/CN.9/761, paras. 22 and 29). In that context, the Working Group may wish to further discuss the treatment of instruments that exist only in the electronic environment, in particular whether to exclude them from the scope of its work (A/CN.9/761, para. 29);

(d) The phrase in square brackets in the definition of “electronic transferable records” should be retained (see paras. 29-31 below);

(e) To alternatively define “holder” as being a person who has been issued an electronic transferable record or a transferee of an electronic transferable record without any reference to control;

(f) To include a definition of “beneficiary”, “obligee”, “controlling party” (see United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008), the “Rotterdam Rules”) or some other term, as separate from the “holder”, referring to the person entitled to claim the performance of obligation;

(g) The use of the term “person” or “party” in the draft provisions is appropriate;

(h) To include a definition of “obligor” or some other term, as separate from the “issuer”, referring to the person specified in a paper-based transferable document or instrument or an electronic transferable record with the obligation to perform;

(i) To use the term “performance of obligation” to refer generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”) (A/CN.9/761, para. 22);

(j) To use a shorter term “paper-based transferable record” instead of “paper-based transferable document or instrument” and to provide examples (bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts);

(k) To retain the definition of “release” as distinct from issuance (A/CN.9/761, para. 31);

(l) The term “replacement” used in article 10 of the Rotterdam Rules would be appropriate to refer to the change in medium or whether to use other terms (for example, conversion or substitution) (see para. 44 below);

(m) To use the term “surrender” only in the context of presentation for performance (see draft article 25 and para. 49 below);

(n) To provide a non-exhaustive list of services to be provided by a third-party service provider (for example, the issuance, transfer, replacement and archiving of electronic transferable records) and to provide examples of such service providers (for example, a registry operator or a repository); and

(o) To retain the definition of “transfer” of an electronic transferable record.

“Draft article 4. Interpretation

“1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

“2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

Remarks

9. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions, while enacted as part of domestic law, should be interpreted with reference to their international origin in order to facilitate uniform interpretation in various countries. Inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), most UNCITRAL texts, including the UNCITRAL Model Law on Electronic Commerce (article 3) as well as the Electronic Communications Convention (article 5), contain such a provision. The Working Group may wish to consider whether to retain draft article 4 and, if retained, possibly discuss the general principles the draft provisions should be based on. For example, the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce provides a non-exhaustive list of general principles, such as to facilitate electronic commerce among and within nations, to promote and encourage the implementation of new information technologies and to support commercial practice.

“Draft article 5. Party autonomy

“The provisions of this Law may be derogated from or their effect may be varied by agreement.”

Remarks

10. While provisions similar to draft article 5 appear in UNCITRAL texts on electronic commerce (article 4 of the UNCITRAL Model Law on Electronic Commerce and article 3 of the Electronic Communications Convention), the Working Group may wish to consider whether draft article 5 is appropriate for draft provisions on the use of electronic transferable records, which would generally entail the involvement of third parties. The Working Group may also wish to discuss the issues related to the protection of third parties in this context.

“Draft article 6. Information requirements

“Nothing in this Law affects the application of any rule of law that may require a person to disclose their identities, places of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.”

Remarks

11. Draft article 6 mirrors article 7 of the Electronic Communications Convention which reminds parties of the need to comply with possible disclosure obligations that might exist under other domestic law (Explanatory note on the Electronic Communications Convention, paras. 122-128).

B. Use of electronic transferable records

“Draft article 7. Legal recognition of an electronic transferable record

“An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in an electronic medium.”

“Draft article 8. Writing

“Where the law requires that [information] [a communication] should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic record by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.”

“Draft article 9. Signature

“Where the law requires that [a paper-based document or instrument] [a communication] should be signed by a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person’s intention in respect of the information contained in [the electronic transferable record] [the communication]; and

- (b) The method used is either:
- (i) As reliable as appropriate for the purpose for which [the electronic transferable record] [the communication] was generated, in the light of all the relevant circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

Remarks

12. Based on articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention (paragraphs 2 and 3), draft articles 8 and 9 establish minimum standards on form requirements that may exist under “the law”, meaning any rule of law governing a paper-based transferable document or instrument. The Working Group may wish to consider whether these draft articles should apply generally to such requirements in the law.

13. As mentioned (see para. 5 above), there may be other form requirements which exist only in the paper-based context. The Working Group may wish to consider whether draft article 8 would sufficiently address such instances or additional provisions would need to be prepared.

“Draft article 10. Possession

“Where the law requires the possession of a paper-based transferable document or instrument or provides consequences for the absence of possession, that requirement is met through the control of an electronic transferable record in accordance with the procedure set out in draft article 17.”

“Draft article 11. Delivery [and endorsement]

“Where the law requires the delivery [and endorsement] of a paper-based transferable document or instrument or provides consequences for the absence of delivery [and endorsement], that requirement is met through the transfer of control of an electronic transferable record in accordance with draft article 19.”

Remarks

14. Draft article 10 reflects the understanding of the Working Group that the functional equivalence of possession is achieved through control (A/CN.9/761, paras. 24-25). Draft article 11 states that delivery and endorsement requirements that exist under law governing paper-based documents or instruments are met through the transfer of control (A/CN.9/761, para. 50). The Working Group may wish to consider whether the reference to endorsement should be retained in draft article 11, as endorsement may not always be required (for example, instruments issued to bearer). Moreover, an endorsement would generally be in writing with a signature and the requirements for both could be met through draft articles 8 and 9.

“Draft article 12. Original

“1. Where the law requires that a paper-based transferable document or instrument should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met with respect to the use of an electronic transferable record if:

(a) There exists a reliable assurance as to the integrity of the information the electronic transferable record contains from the time when it was first generated in its final form; and

(b) Where it is required that the information the electronic transferable record contains be made available, that information is capable of being displayed to the person to whom it is to be made available.

“2. For the purposes of paragraph 1 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.”

Remarks

15. Draft article 12 establishes a minimum standard on form requirement to be met by an electronic transferable record for it to be regarded as the functional equivalent of an original. It mirrors article 8 of the UNCITRAL Model Law on Electronic Commerce and article 9, paragraph 4, of the Electronic Communications Convention. The Working Group may wish to consider whether to retain such a provision.

16. The Working Group may wish to note that the concept of “original” as typically used in an electronic transferable record context may be different. Therefore, it may be necessary to distinguish the requirement that an electronic transferable record be made available or retained in its original form from the requirement that it be unique. As such, the Working Group may wish to discuss draft article 12 in connection with following draft articles on uniqueness and integrity.

17. Article 12 of the Act to Establish a Legal Framework for Information Technology (RSQ, c C-1.1) of Quebec may also shed light.² It states that “A technology-based document may fulfil the functions of an original. To that end, the integrity of the document must be ensured and, where the desired function is to establish: (1) that the document is the source document from which copies are made, the components of the source document must be retained so that they may subsequently be used as a reference; (2) that the document is unique, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, in particular through the inclusion of an exclusive or distinctive component or the exclusion of any form of reproduction; (3) that the

² The full text of the Act is available at www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_1_1/C1_1_A.html.

document is the first form of a document linked to a person, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, to identify the person with whom the document is linked and to maintain the link throughout the life cycle of the document.”

“Draft article 13. Uniqueness of an electronic transferable record

“1. A reliable method shall be used to render an electronic transferable record unique [preventing the circulation of multiples records relating to the same performance obligation] [entitling only a single holder to the performance of obligation].

“2. A method satisfies paragraph 1, if it:

(a) Ensures that an electronic transferable record cannot be reproduced; or

(b) Designates an authoritative copy of an electronic transferable record in accordance with the procedure set out in draft article 17.”

Remarks

18. Draft article 13 reflects the discussion of the Working Group, whereby it was agreed that uniqueness should aim at entitling only one holder of the electronic transferable record to the performance of obligation (A/CN.9/761, paras. 33-37 and A/CN.9/WG.IV/WP.118, paras. 39-50). The Working Group may wish to consider whether to include in paragraph 1 the phrase in square brackets.

“Draft article 14. Integrity of an electronic transferable record

“1. A reliable method shall be used to provide assurance that an electronic transferable record retains its integrity from the time when it was first issued.

“2. For the purposes of paragraph 1:

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from [the addition of any change] that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

Remarks

19. Subject to its discussion on draft article 12, the Working Group may wish to consider whether to retain draft article 14.

“Draft article 15. Consent to use an electronic transferable record

“1. Nothing in this Law requires a person to use an electronic transferable record.

“[2. The use of an electronic transferable record requires the consent of the parties as provided in draft articles 16, 19, 22, 23 and 24.]

“3. The consent of a person to use an electronic transferable record may be inferred from the person’s conduct.”

Remarks

20. Draft article 15 is based on article 8, paragraph 2 of the Electronic Communications Convention. The Working Group may wish to consider whether paragraph 2, which states a general requirement for consent of the parties should be retained in the draft provisions.

“Draft article 16. Issuance of an electronic transferable record

“1. The issuance of an electronic transferable record shall require the consent of the issuer and the first holder to use an electronic medium.

“2. The information required for the issuance of a paper-based transferable document or instrument shall be required for the issuance of an electronic transferable record.

“3. Upon issuance, an electronic transferable record may contain additional information, including the consent as provided in paragraph 1 as well as information to uniquely identify the electronic transferable record.

“4. [Subject to any rule of law governing the issuance of a paper-based transferable document or instrument,] an electronic transferable record may be issued to bearer.

“5. An electronic transferable record is deemed to have been issued when the first holder [establishes] [is able to exercise] control of the electronic transferable record in accordance with the procedure set out in draft article 17.

“6. Upon issuance, an electronic transferable record shall be subject to control until it ceases to have any effect or validity.

“7. Where the law requires the issuance of more than one original of a paper-based transferable document or instrument, that requirement is met if [a single authoritative copy of the electronic transferable record exists] [the first holder establishes control] in accordance with the procedure set out in draft article 17.”

Remarks

21. Paragraph 1 of draft article 16 states that parties involved in the issuance of an electronic transferable record would need to agree to use an electronic medium (A/CN.9/761, para. 32). The Working Group may wish to consider how this paragraph will operate when the electronic transferable record is issued to bearer as mentioned in paragraph 4.

22. Paragraph 2 is a reminder that the law governing paper-based transferable document or instrument applies to electronic transferable records (see also draft article 2). The Working Group may wish to consider whether such provisions should be kept. An example of information to uniquely identify the electronic transferable record in paragraph 3 could be an identification number assigned to the record (A/CN.9/761, para. 32).

23. Paragraph 4 reflects the discussion of the Working Group that the draft provisions should enable the use of electronic transferable records issued to bearer (A/CN.9/761, para. 26). The Working Group may wish to consider whether this possibility should be expressly set out in the draft provisions.

24. The Working Group may wish to consider whether to retain paragraph 5 which addresses the time of issuance. The Working Group may also wish to consider whether a similar provision on the place of issuance would be useful (for example, “an electronic transferable record is deemed to have been issued where the issuer has its place of business”).

25. With respect to paragraph 7, the Working Group may wish to consider whether it is better placed with draft article 12 (A/CN.9/761, para. 36).

“Draft article 17. Control

“1. A person has control of an electronic transferable record if a method used for evidencing transfer of interests in the electronic transferable record reliably establishes that person as the person to which the electronic transferable record was issued or transferred.

“2. A method satisfies paragraph 1, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

(a) A single authoritative copy of the electronic transferable record exists which is unique, identifiable and unalterable, except as otherwise provided in draft article 20;

(b) The authoritative copy identifies the person asserting control as:
(i) the person to which the document was issued; or (ii) the person to which the electronic transferable record was most recently transferred;

(c) The authoritative copy is communicated to and maintained by the person asserting control;

(d) The uniqueness and integrity of the authoritative copy is preserved;
and

(e) [Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy] [the authoritative copy is readily identifiable as such].”

Remarks

26. Draft article 17 was prepared based on section 7-106 (Control of Electronic Document of Title) of the Uniform Commercial Code (UCC) of the United States of America with minor changes. The Working Group may wish to consider whether such an approach would be suitable for its work.

27. Subparagraphs (a) and (d) of paragraph 2 should be discussed in connection with articles 13 and 14 on uniqueness and integrity of an electronic transferable record. Subparagraph (b) should be understood to mean that the authoritative copy shall identify a person asserting control but not necessarily disclose the identity (name) of that person. Therefore, it would still be possible to identify the holder of an electronic transferable record issued to bearer.

28. The Working Group may wish to consider whether the time when a person establishes or is able to exercise control (for example, in draft article 16, para. 5) is when the authoritative copy is communicated to the person asserting control.

“Draft article 18. Holder

“1. A person having control of an electronic transferable record in accordance with article 17 is the holder of the electronic transferable record.

“2. A holder is entitled to: ... ”

Remarks

29. The Working Group may wish to consider whether there is merit in retaining draft article 18 or it is sufficient to have a definition of holder as provided in draft article 3. A holder of an electronic transferable record would only have de facto control of the electronic transferable record. Whether the holder is the rightful holder and the substantive rights of the holder would be matters for the substantive law. The Working Group may wish to consider whether paragraph 2 should set out a non-exhaustive list of a holder’s rights, if any, arising from de facto control of the electronic transferable record.

30. In that context, the Working Group may also wish to refer to Chapter 10 of the Rotterdam Rules on the rights of the controlling party.³ The Rotterdam Rules use the terms “right of control” and “controlling party” which both relate to substantive rights of the holder of a negotiable electronic transport record. It should be noted that “controlling party” in the Rotterdam Rules refer to the party with the right of control. Article 51, paragraph 4 of the Rotterdam Rules therefore stipulates that the de facto holder of the negotiable electronic transport record is the controlling party, who may exercise the right of control provided in article 50.

31. Therefore, the Working Group may wish to confirm that the holder of an electronic transferable record in the draft provisions shall be understood as the person in de facto control of the electronic transferable record. Whether the holder

³ The following are excerpts from the Rotterdam Rules:

“Article 1. Definitions

[...]

“13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.”

“Article 50. Exercise and extent of right of control

“1. The right of control may be exercised only by the controlling party and is limited to

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
(b) The right to obtain delivery of the goods ...
(c) The right to replace the consignee by any other person including the controlling party.

“2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.”

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

[...]

“4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party.
(b) The holder may transfer the right of control to another person by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.
(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.”

is entitled to performance would be a matter of substantive law, and the draft provisions would not endow the holder with such rights (see para. 8 (d) above).

“Draft article 19. Transfer of control of an electronic transferable record

“1. A holder of an electronic transferable record may transfer the electronic transferable record by transferring the control of the record to the transferee.

“2. [Subject to any rule of law governing the transfer of a paper-based transferable document or instrument,] an electronic transferable record issued to bearer may be transferred to a named person and vice versa.

“3. [The transfer of an electronic transferable record is effective] [An electronic transferable record is deemed to have been transferred] when the transferee obtains [establishes] [is able to exercise] control of the electronic transferable record in accordance with the procedure set out in article 17.

“4. The transferee of an electronic transferable record is deemed to have consented to the use of the electronic medium.

“5. Upon transfer, a statement indicating the transfer shall be included in the electronic transferable record.”

Remarks

32. The Working Group agreed that rules on the transfer of control should be prepared (A/CN.9/761, paras. 50-58). While it was noted that transfer of control would be achieved through the amendment of the electronic transferable record (A/CN.9/761, para. 49), the Working Group may wish to consider whether draft article 19 should not deal with the procedure for transfer of control as distinct from an amendment.

33. Paragraph 2 was drafted to reflect the Working Group’s discussion that transfer of control should allow for change in the manner of transmission to the bearer, if the record had been issued to a named person and to a named person, if the record had been issued to bearer (A/CN.9/761, para. 55). Paragraph 3 addresses the time when the transfer of control takes place (A/CN.9/761, para. 56). The Working Group may wish to consider whether a more specific rule should be prepared along the lines of article 10 of the Electronic Communications Convention.

34. As to paragraph 4, the Working Group may wish to consider whether the consent of the transferee to use the electronic medium should be expressly required or could be inferred (draft article 15, para. 3).

35. The Working Group may wish to further discuss the need to include provisions on the circumstances of an ineffective transfer and the transfer of partial rights in the electronic transferable record.

“Draft article 20. Amendment of an electronic transferable record

“1. A reliable procedure for amendment of an electronic transferable record shall be provided, which shall also address unauthorized amendments.

“2. When the law requires that parties affected by the amendment should be notified with respect to the amendment of a paper-based document or

instrument, the same requirement shall apply to the amendment of an electronic transferable record.

“3. Amendment of an electronic transferable record [for a purpose other than transferring control] is effective when the amended information is reflected in the authoritative copy.

“4. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record.

“5. An amendment of an electronic transferable record shall be readily identifiable as authorized.”

Remarks

36. The Working Group agreed that the draft provisions should acknowledge the need to address amendments and their effectiveness, while issues of establishing which party could make such amendments and under what circumstances should be left to substantive law (A/CN.9/761, para. 49). As mentioned, the Working Group may wish to consider whether transfer of an electronic transferable record should be achieved through the amendment of that record (see para. 32 above).

37. Draft article 20 does not include a paragraph on who has the authority to make amendments, leaving the matter to the substantive law. However, the Working Group may wish to consider whether there shall be circumstances where the holder of the electronic transferable record may amend the record unilaterally.

38. Paragraph 2 confirms that the same notice requirements for paper-based documents or instruments shall apply to electronic transferable records (A/CN.9/761, para. 47) and paragraph 3 addresses the time when an amendment is effective.

39. With respect to paragraph 4, the Working Group may wish to consider whether such a statement should be included in the electronic transferable record and, if so, what other information should be included (for example, the identity of the person requesting amendment or time of request). As the present draft provisions provide for inclusion of other types of statements (for example, draft articles 22, 23, 24 and 26), whether such statements should be treated as amendments would also need to be discussed.

“Draft article 21. Error in information contained in an electronic transferable record

“A reliable procedure to address input errors with respect to the use of an electronic transferable record shall be provided.”

Remarks

40. Draft article 21 reflects the Working Group’s discussion on input errors in the electronic environment (A/CN.9/761, paras. 59-62). While the possibility of introducing a rule similar to article 14 of the Electronic Communications Convention may be sought, it would be difficult to derive a rule that could be applicable to various systems and technology. The Working Group may wish to consider whether draft article 21 is sufficient.

“Draft article 22. Division of an electronic transferable record

“If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall [surrender] [present for division] the electronic transferable record to the [issuer/obligor];

(b) The newly divided electronic transferable records shall be issued in accordance with draft article 16 and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the original electronic transferable record and other newly divided electronic transferable record(s); and

(c) Upon division, the original electronic transferable record ceases thereafter to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the newly divided electronic transferable records.”

“Draft article 23. Consolidation of electronic transferable records

“If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agree with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall [surrender] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The newly consolidated electronic transferable record shall be issued in accordance with draft article 16 and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the original electronic transferable records;

(c) Upon consolidation, the original electronic transferable records cease thereafter to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the newly consolidated electronic transferable record.”

Remarks

41. Draft articles 22 and 23 were prepared based on the basis of article 10 of the Rotterdam Rules on replacement, following the discussion by the Working Group on splitting and consolidation of electronic transferable records (A/CN.9/761, paras. 66-67). The Working Group may wish to consider whether the procedure set out in these draft articles are a matter of substantive law and, if so, whether the draft provisions should merely state the need for a procedure to address division and consolidation of electronic transferable records.

42. The Working Group may also wish to consider whether the draft articles would need to take into consideration the possibility of a paper-based document or instrument being involved in the division or consolidation process or the present

draft articles in conjunction with draft article 24 on replacement would be sufficient to address such circumstances.

43. The Working Group may also wish to note that the phrase “original” electronic transferable record is used in draft articles 22 and 23 to refer to the electronic transferable record that ceases to have any effect or validity due to division or consolidation. To avoid confusion, the Working Group may wish to consider using some other term (for example, substituted, initial or pre-existing).

“Draft article 24. Replacement

“1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument by an electronic transferable record:

(a) The holder shall [surrender] [present for replacement] the paper-based transferable document or instrument, or all of them if more than one has been issued, to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record in accordance with draft article 16 which shall include a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) The paper-based transferable document or instrument ceases thereafter to have any effect or validity.

“2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record by a paper-based document or instrument:

(a) The holder shall [surrender] [present for replacement] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) The electronic transferable record ceases thereafter to have any effect or validity.

“3. The replacement of a paper-based transferable document or instrument or an electronic transferable record shall be subject to procedures that provide for its reissuance in the original [form] [medium].”

Remarks

44. Draft articles 24 mirrors article 10 of the Rotterdam Rules on replacement, following the discussion by the Working Group (A/CN.9/761, paras. 72-77). The Working Group may wish to first make a decision on whether to use the term “conversion/convert” or “replacement/replace”, which would refer to the change in the medium with the legal effect and information contained in the document, instrument or record, unchanged.

45. The Working Group would further need to discuss which parties should consent to or otherwise be involved in the replacement (A/CN.9/761, para. 76) or whether this was a matter for the substantive law.

46. Paragraph 3 of draft article 24 was prepared to address circumstances where the replaced document or record would need to be restored such as when the new substitute document or record had not been effectively issued or had been lost (A/CN.9/761, para. 76). The Working Group may wish to consider whether such a restoration clause would also be needed for procedures dealing with division and consolidation.

“Draft article 25. [Surrender] [Presentation for performance]”

“Where the law requires the [surrender] [presentation for performance] of a paper-based transferable document or instrument or provides for the consequences for the absence of [surrender] [presentation for performance], that requirement is met upon demonstration by the holder that it is the holder of the electronic transferable record in accordance with the procedure set out in draft article 17.”

Remarks

47. It was pointed out that presentation for performance in the electronic environment introduced significant practical challenges due to remoteness and possible lack of familiarity between the parties. The Working Group agreed that a rule should be prepared aimed at achieving the functional equivalence of physical delivery of paper-based documents (A/CN.9/761, paras. 70-71).

48. In certain cases, the law governing paper-based documents or instruments might have a requirement to surrender the document or instrument for its performance. Draft article 25 aims at achieving the functional equivalence of surrender by mirroring article 47, paragraph 1, subparagraph (a)(ii), of the Rotterdam Rules. The Working Group may wish to consider whether such a provision should be retained or the matter could be addressed with draft article 11 on delivery.

49. The Working Group may wish to further consider whether the term surrender could be understood to encompass presentation for division, consolidation, replacement as well as for performance (draft articles 22-25).

“Draft article 26. Performance of obligation”

“1. A reliable method shall be used to provide confirmation that performance of obligation has been effected. Upon such confirmation, the electronic transferable record shall cease to have any effect or validity.

“2. The issuer/obligor may refuse the performance of obligation if:

(a) The person asserting control of an electronic transferable record does not demonstrate that it is the holder in accordance with the procedures set out in draft article 17;

(b) There is more than one person demonstrating that it is the holder; or

(c) ...

“3. When the [issuer/obligor] refuses the performance of obligation in accordance with paragraph 2, the holder shall retain control of the electronic transferable record and a statement to the effect that the [issuer/obligor] refused the performance of obligation shall be included in the electronic transferable record.

“4. When there is partial performance of obligation, the electronic record shall be amended in accordance with draft article 20 and [include a statement to the effect that there was partial performance].”

Remarks

50. The Working Group may wish to consider whether the paragraphs of draft article 26 deal with matters of substantive law and should not be included in the draft provisions.

51. Paragraph 3 addresses refusal by the issuer/obligor to perform the obligation and paragraph 4 addresses the issue of partial performance through the amendment of the electronic transferable record (A/CN.9/761, para. 70). The Working Group may wish to consider whether the draft article should also address the holder’s refusal to receive or accept the performance of obligation.

“Draft article 27. Termination of an electronic transferable record

“1. When an electronic transferable record ceases to have effect or validity in accordance with articles 22, 23, 24 and 26, the electronic transferable record shall be terminated and a method shall be provided to prevent further circulation of that electronic transferable record.

“2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument should be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated.”

Remarks

52. Draft article 27 deals with the termination of an electronic transferable record and it does not deal with the termination of the underlying obligation, which is a matter of substantive law (A/CN.9/761, para. 78). The Working Group may wish to consider whether there is a need to distinguish the termination of an electronic transferable record upon its replacement (draft article 24) from the termination upon the performance of obligation (draft article 26) (A/CN.9/761, para. 75).

53. Paragraph 2 replicates the requirement to include annotations indicating termination in paper-based documents or instruments.

54. The Working Group may wish to consider inserting a paragraph requiring the notification of termination to relevant parties in draft article 27.

“Draft article 28. Security right in an electronic transferable record

“A security right may be created in an electronic transferable record in accordance with the applicable secured transactions law.”

Remarks

55. The Working Group may wish to consider whether the following text may be more appropriate to reflect its discussion (A/CN.9/761, paras. 63-65): “A reliable procedure to allow [the creation of a security right in an electronic transferable record] [the use of electronic transferable records for security right purposes] shall be provided.”

56. The Working Group may wish to note that the UNCITRAL Legislative Guide on Secured Transactions (2007) defines a security right as a property right in a movable asset that is created by agreement and secures payment of other performance of an obligation, regardless of whether the parties have denominated it as a security right.

“Draft article 29. Archiving information in an electronic transferable record

“1. Where the law requires that a paper-based transferable document or instrument be archived, that requirement is met by archiving an electronic transferable record provided that the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The electronic transferable record is archived in the format in which it was issued or in a format which can be demonstrated to represent accurately the information contained therein; and

(c) Such information, if any, is archived as enables the identification of the issuer and holder(s) of the electronic transferable record and the date and time when it was issued and transferred as well as when it ceases to have any effect or validity.

“2. The requirements referred to in paragraph 2 may be satisfied by using the services of a third-party service provider, provided that the conditions set forth in that paragraph are met.”

Remarks

57. Draft article 29 deals with the storage of information in electronic transferable records and was prepared mirroring article 10 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/761, para. 81). The Working Group may wish to consider whether the same requirement shall also apply to electronic transferable records that have been divided or consolidated in accordance with draft articles 22 and 23 and to a paper-based transferable document or instrument or an electronic transferable record that have been replaced in accordance with draft article 24.

C. Third-party service providers***“Draft article 30. Functions of a third-party service provider***

“A third-party service provider shall provide the following functions with respect to the use of electronic transferable records:

(a) ...”

“Draft article 31. Conduct of a third-party service provider

“1. Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with representations made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the life cycle of an electronic transferable record;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record:

(i) The identity of the third-party service provider;

(ii) That the holder that is identified in an electronic transferable record had control of the electronic transferable record when the electronic transferable record was issued;

(iii) That information contained in the electronic transferable record was valid at or before the time when the electronic transferable record was issued;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify the issuer/obligor and the holder;

(ii) Any limitation on the purpose or value for which the electronic transferable record may be used;

(iii) That the information contained in an electronic transferable record is valid and has not been compromised;

(iv) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Utilize trustworthy systems, procedures and human resources in performing its services.

“2. A third-party service provider shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.”

“Draft article 32. Trustworthiness [Licensing requirements]

“For the purposes of article 31, paragraph 1 (e) of this Law in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable record;

(d) Availability of information to related parties;

- (e) Regularity and extent of audit by an independent body;
- (f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; or
- (g) Any other relevant factor.”

“Draft article 33. Liability of the third-party service provider

“1. A third-party service provider shall be liable for any damages caused by its negligence or mistake with respect to the use of electronic transferable records.

“2. A third-party service providers shall not be liable for damages:

- (a) Arising from a failure to perform any of its obligations if the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences;

- (b) Related to the performance of obligation; or

- (c) Arising from the service user’s negligence or violation of its obligation.”

Remarks

58. At its last session, the Working Group had a preliminary discussion on issues related to third-party service providers (A/CN.9/761, paras. 83-86). Draft articles 30 to 33 were prepared based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures on certification service providers as a possible approach.

59. The Working Group may wish to consider whether to include provisions on third-party service providers and to what extent. If included, such rules should aim at encompassing all third-party service providers without reference to any specific technology or system (A/CN.9/761, para. 27).

D. Cross-border recognition of electronic transferable records

“Draft article 34. Recognition of foreign electronic transferable records

“1. In determining whether, or to what extent, an electronic transferable record is legally effective, no regard shall be had to the location where the electronic transferable record is issued or used.

“2. An electronic transferable record issued outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic transferable record issued in [the enacting State] if it offers a substantially equivalent level of reliability.

“3. In determining whether an electronic transferable record offers a substantially equivalent level of reliability for the purposes of paragraph 2,

regard shall be had to recognized international standards and to any other relevant factors.”

Remarks

60. 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.⁴ The Working Group also reiterated the importance of cross-border aspects of legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

61. Article 34 was drafted to mirror article 12 of the UNCITRAL Model Law on Electronic Signatures. However, it should be noted that the draft provisions do not include any reference to the “location where electronic transferable record is issued or used.”

62. The Working Group may wish to consider whether the approach in draft article 34 would be appropriate to address cross-border aspects. An alternative approach could be to adopt conflict-of-laws provisions similar to those provided in the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (Geneva, 7 June 1930).

⁴ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.