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Draft provisions on electronic transferable records

Note by the Secretariat

Addendum

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II. Draft provisions on electronic transferable records (continued)

C. Use of electronic transferable records (Articles 13-30)

“Draft article 13. Time and place of dispatch and receipt of electronic transferable records

[“1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

“2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.

“3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

“4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article.]

[“Where the law requires [or permits] the indication of a time or a place with respect to the use of a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to the use of an electronic transferable record”.]

Remarks

1. At the Working Group’s forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69). The Working Group may wish to consider whether draft article 13, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records.

2. Moreover, the Working Group may wish to clarify which are the substantive law requirements with respect to the time and place of dispatch and receipt of a paper-based transferable document or instrument and what legal consequences are

attached thereto. In order to transpose those requirements in an electronic environment, a functional equivalence rule has been inserted for consideration of the Working Group.

3. In particular, the Working Group may wish to consider how draft article 13 could operate in registry systems where an electronic transferable record might circulate without being sent to or received at an electronic address. Existing practice with respect to registry systems seems to rely on time-stamping services to record the availability of information in that system. In turn, the availability of information in the system may be the legally relevant moment according to substantive law or contractual agreement, regardless of that information being communicated.¹ On the other hand, practice based on substantive law may allow for the parties' agreement on relevant time, which would then not correspond to the moment when the event is recorded in the system.

4. The Working Group may also wish to consider whether draft article 13 would adequately address the matter in case of use of a token-based system. In that respect, the Working Group may also wish to specifically consider whether, in case of transfer of the electronic transferable record by transmission of its storage medium (e.g., USB key or smart card), the use of an electronic medium would pose specific challenges or if the rule contained in substantive law would apply.

5. An alternative draft of article 13 submitted for the consideration of the Working Group aims at providing a functional equivalent for satisfying date and time requirements that may be set forth in substantive law.

6. The Working Group may further wish to consider defining the terms "originator", "addressee" and "electronic address". Moreover, the Working Group may wish to discuss the relationship between "originator", "issuer" and "transferor".

"Draft article 14. Consent to use an electronic transferable record"

"1. Nothing in this law requires a person to use an electronic transferable record without his or her consent.

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

Remarks

7. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

["Draft article 15. [Issuance of] multiple originals"

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

¹ Recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry states that the registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

[“2. The total number of multiple [operative] electronic records issued shall be indicated in those multiple records.]

[“3. Where multiple [operative] electronic records have been issued, any requirement for presentation of more than one original of a paper-based transferable document or instrument is met by the presentation of one [operative] electronic record[, unless the parties have agreed otherwise.]]”]

Remarks

8. Draft article 15 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). It aims at introducing the possibility of issuing multiple electronic records, each controlled by a different entity, if so wished. However, it should be noted that the same functions pursued with the issuance of multiple paper-based transferable documents or instruments might be achieved in an electronic environment, especially if based on a registry system, by attributing selectively control on one electronic transferable record to multiple entities.

9. The possibility of issuing multiple originals of a paper-based transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49). However, commentators on maritime transport law do not recommend this practice, unless absolutely commercially necessary, due to the possibility of multiple claims for the same performance based on each originals.

10. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”) specifically allows for the issuance of multiple originals of negotiable transport documents. In particular, its article 47, paragraph 1(c) sets forth that: “If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity”. This rule, which applies to paper-based transport documents, reflects current practice. Article 47, paragraph 1(c) of the Rotterdam Rules also deals with negotiable electronic transport records, but does not contain any provision for multiple negotiable electronic transport records.

11. Rule 4.15 of the International Standby Practices — ISP 98, dealing with “Original, Copy and Multiple Documents” allows for presentation of an electronic record, which “is deemed to be an ‘original’”, but does not contain any provision on presentation of multiple “original” electronic records.

12. Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (“eUCP”), dealing with “Originals and Copies”, sets forth that: “Any requirement of the UCP or a eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record”. The commentary to that article explains that the concept of a full set of bills of lading is anachronistic in an electronic environment and would be satisfied by the presentment of a required electronic record “unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted”.

13. Paragraph 2 of draft article 15 contains a provision inspired by article 36, paragraph 2(d) of the Rotterdam Rules and aims at informing all concerned parties of the number of operative electronic records in circulation. The Working Group may wish to consider whether such rule would be desirable in light of the specific features of electronic transferable records, or if such requirement should be satisfied only if already contained in substantive law.

14. Paragraph 3 of draft article 15 contains a provision inspired by article e8 eUCP. The Working Group may wish to consider whether that paragraph should be retained and, if so, whether it should be placed in draft article 21 on presentation. The Working Group may also wish to consider whether the words “[, unless the parties have agreed otherwise.]” should be retained to stress the possibility for the parties to agree on different modalities, or whether draft article 5 on party autonomy, applicable also to draft article 15, paragraph 3, would suffice.

15. The Working Group may wish to consider whether a provision explicitly forbidding the co-existence of multiple originals on different media should be inserted in the draft provisions.

16. Draft articles 15 and 16 are the only draft provisions that explicitly refer to issuance (see A/CN.9/797, paras. 64-69).

“Draft article 16. Substantive information requirements of electronic transferable records

“Nothing in this law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument.”

Remarks

17. Draft article 16 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding paper-based transferable document or instrument.

18. The Working Group may wish to clarify whether the information requirement contained in draft article 26(1)(b), which aims at ensuring the perduring availability of information in case of change of medium, represents an exception to this rule.

“Draft article 17. 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 paper-based transferable document or instrument.”

Remarks

19. Draft article 17 states that an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument. In particular, some information could be included in an electronic transferable record due to its dynamic nature but not in a paper-based document or instrument (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

“Draft article 18. Possession

“1. 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 with respect to the use of an electronic transferable record if:

(a) A method is used to establish control of that electronic transferable record [and to identify the person in control]; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic transferable record was [created] [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.

[“2. An electronic transferable record shall be capable of [control][being subject to control] by [a single] [one or more] person during its life cycle.”]

Remarks

20. Draft article 18 reflects the Working Group’s deliberations at its forty-eighth (A/CN.9/797, para. 83) and forty-ninth sessions (A/CN.9/804, paras. 51-62 and 63-67).

21. The Working Group may wish to consider whether the word “control” might need to be further clarified taking into consideration the definition of control in draft article 3.

22. The words “[and to identify the person in control]” aim at providing a functional equivalent of the relation between possessor and object of possession, which is a fundamental element of the notion of possession in the physical world.

23. The Working Group may wish to consider whether the word “[created]” or “[generated]” should be retained in order to indicate that the assessment of the reliability of the electronic transferable record may change in light of the type of that record (A/CN.9/804, para. 67).

24. The Working Group may further wish to consider whether to retain draft paragraph 2 that has been added to introduce the requirement that control be exercised throughout the life cycle of the electronic transferable record. The Working Group may wish to consider whether the words “[from the time of its issuance]” should be inserted in paragraph 2 in light of the fact that the draft provisions do not contain a separate provision on issuance.

25. At the forty-ninth session, it was recalled that draft article 18, paragraph 2, was the only draft provision that embodied the idea that an electronic transferable record should be subject to control from the time of its issuance until it ceased to have any effect or validity. However, it was explained that an electronic transferable record need not necessarily be subject to control during its entire life cycle. It was said that that occurred, for instance, when a token-based electronic transferable record was lost. Therefore, it was suggested that that paragraph should instead indicate that an electronic transferable record was capable of being controlled

during its life cycle, particularly in order to allow for its transfer. In response, it was noted that the notion of being subject to control was implicit in an electronic transferable record (A/CN.9/804, para. 61).

26. As for its placement, it was suggested that draft article 18, paragraph 2, could be included in the definition of electronic transferable record, or in the provision on uniqueness, or in a separate article (A/CN.9/804, para. 62).

27. The general rule offering guidance on elements to be considered when assessing reliability is contained in draft article 12. The Working Group may wish to clarify the relationship between draft article 12 and draft article 18.

Draft article 19. [Presumption of person in control]

“A person is deemed to have control of an electronic transferable record if:

(a) the electronic transferable record identifies that person as the person [in control] [asserting control] [who, directly or indirectly, has control over the electronic record]; and

(b) the electronic transferable record is [maintained] by that person.”

Remarks

28. Draft article 19, which refers to a requirement previously contained in Option X of draft article 19 in A/CN.9/WG.IV/WP.128/Add.1, is the only draft provision aimed at identifying the person in control. It does so by establishing a presumption that a person is deemed to have control if the electronic transferable record identifies that person as the person in control and that person is actually able to exercise control. With respect to the latter condition, the Working Group may wish to consider whether the word “[maintained]” is appropriate. The verb “maintain” is used in Section 16(c)(3) of the Uniform Electronic Transactions Act and in Section 9-105 of the Uniform Commercial Code.

“Draft article 20. Delivery

“Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to the use of an electronic transferable record through the transfer [of control] of an electronic transferable record.”

Remarks

29. The Working Group may wish to consider deleting the words “of control” in draft article 20 in light of the definition of “transfer” in draft article 3.

“Draft article 21. Presentation

[“Where the law requires a person to present a paper-based transferable document or instrument [or provides consequences for non-presentation], that requirement is met with respect to the use of an electronic transferable record if that person demonstrates that it has control of the electronic transferable record and indicates the intention to present the electronic transferable record.”]

Remarks

30. At its forty-ninth session, the Working Group decided to retain draft article 21 in square brackets for consideration after clarifying the possible meanings and functions of presentation (A/CN.9/804, para. 79).

31. In particular, it was said that further elements needed to be included in addition to demonstration of control, such as the intention to present the electronic transferable record. It was also suggested that the draft article should state that the person “required to present” must demonstrate that it has control (A/CN.9/804, para. 77). Draft article 21 has been revised accordingly.

32. With respect to the use of the term “presentation” in uniform texts, it should be noted that the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) uses the term “presentment” with reference to both acceptance and payment, while the Convention Providing a Uniform Law for Cheques (Geneva, 1931) uses the term “presentment” with reference to payment only. The term “presentation” is used in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995), which, however, does not deal directly with paper-based transferable documents or instruments. The Conventions on carriage of goods by sea do not use the term “presentation” but rather “surrender”.

33. The Working Group may wish to consider whether the words “[or provides consequences for non-presentation]” should be retained.

“Draft article 22. Endorsement

“Where the law requires [or permits] the endorsement in any form of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record if information relating to the endorsement is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.”

Remarks

34. Draft article 22 reflects the Working Group’s deliberations at its forty-ninth session (A/CN.9/804, paras. 80-81). The words “in any form” have been added to ensure that all modalities of endorsement in a paper-based environment would be captured (A/CN.9/804, para. 80).

35. The words “[logically associated or otherwise linked to]” can also be found in the definition of “electronic record” in draft article 3. The words “[included in]” can be found in draft article 24 with respect to amendment of an electronic transferable record and in other draft provisions. While the words “logically associated or otherwise linked to” might be technically more accurate, the view was expressed that both wordings should be retained as they were not mutually exclusive (A/CN.9/804, para. 81). The Working Group may wish to consider which wording is more appropriate and provide guidance on their uniform use throughout the draft provisions.

36. The Working Group may wish to confirm that issues relating to the validity of an endorsement remain a matter of substantive law.

37. The Working Group may wish to consider adopting standard language for reference to non-mandatory legal requirements (i.e., cases in which the law permits, but does not require, a certain activity, such as those dealt with in draft articles 22, 23, 24, 25, 27, 28 and 29).

“Draft article 23. Transfer of an electronic transferable record

“[[Subject to any rule of law governing the transfer of a paper-based transferable document or instrument][When permissible under applicable law], the person in control may:

(a) transfer to a named person an electronic transferable record issued or transferred to bearer; or

(b) transfer to bearer an electronic transferable record issued or transferred to a named person.]”

Remarks

38. Draft article 23 reflects the deliberations of the Working Group at its forty-ninth session (A/CN.9/804, paras. 82-85). It aims at clarifying the possibility for the person in control to change the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case (“blank endorsement”) when permissible under applicable law. The bracketed text aims at highlighting the fact that the change in the rules for transfer of the electronic transferable record (i.e., to bearer or to order) must be permissible under applicable substantive law. Differences between the two sets of bracketed text are intended to be editorial only.

39. Reference to “holder” has been substituted with reference to “person in control” throughout the draft provisions (A/CN.9/804, para. 85).

40. The Working Group may wish to note that a provision dealing with the possibility of issuing electronic transferable records to bearer has been deleted as that possibility was encompassed in draft article 1, paragraph 2 (A/CN.9/797, para. 65).

“Draft article 24. Amendment of an electronic transferable record

“1. Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], a reliable method shall be employed for amendment of information in an electronic transferable record whereby [all] the amended information is [accurately] reflected in the electronic transferable record and is readily identifiable as such.

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

Remarks

41. Draft article 24 has been recast in light of the suggestions received at the Working Group's forty-eighth session (A/CN.9/797, para. 101). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended.

42. The words [or permits] aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record by virtue of party autonomy but does not require it.

43. The words [all] and [accurately] aim at providing drafting options to introduce a duty to document any relevant change in the information contained in the electronic transferable record (A/CN.9/797, para. 72).

44. Draft paragraph 2 aims at satisfying the goal of documenting changes to the electronic transferable record by requiring a statement relating to the amendment. That information requirement might not exist with respect to paper-based transferable documents or instruments due to the fact that amendments on paper are self-evident.

45. In considering the standards for assessing the reliability of the method used for amendment of an electronic transferable record, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

“Draft article 25. Reissuance

“1. Where the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued.

“2. Upon reissuance of an electronic transferable record, a statement to the effect that a reissuance has taken place shall be included in the electronic transferable record.”

Remarks

46. Draft article 25 has been recast in light of the suggestions at the forty-eighth session (A/CN.9/797, para. 104). It now aims at providing a general rule on reissuance of electronic transferable records, which is possible whenever allowed by substantive law. The Working Group may wish to clarify that the provision would apply to technical issues specific to the use of electronic means, such as the corruption of the method of control of an electronic transferable record.

“Draft article 26. Replacement

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

(a) The person in control shall [present] [surrender] [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the person in control, in place of the paper-based transferable document or instrument, an electronic transferable

record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) [After] [Upon] issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

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

(a) The person in control shall [present] [surrender] [for replacement] [transfer control of] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the person in control, 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) [After] [Upon] issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

“3. Parties may consent to replacement at any time prior [or simultaneously] to the replacement.

“4. Replacement according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

“5. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the electronic transferable record has not been issued for technical reasons, the paper-based transferable document or instrument may be reissued [or the replacing electronic transferable record may be issued].

“6. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the paper-based transferable document or instrument has not been issued for technical reasons, the electronic transferable record may be reissued [or the replacing paper-based transferable document or instrument may be issued].”

Remarks

47. Draft article 26 reflects the suggestions made at the Working Group’s forty-eighth session (A/CN.9/797, paras. 102-103).

48. The Working Group may wish to consider whether the word “[upon]” should be replaced by the word “[after]” to more accurately indicate that cessation of validity and effect is subject to successful issuance of the replacing record, or document or instrument. Alternatively, the Working Group may wish to consider specifying in draft article 26 that the replaced record, or document or instrument, will cease to have effect or validity only after issuance of its replacement.

49. The Working Group may wish to clarify whether the words “all information” in subparagraph 2(b) refer to substantive information only or also include technical information specific to the electronic medium (A/CN.9/797, para. 103).

50. The Working Group may wish to further discuss which parties, in addition to the person in control, ought to consent to or otherwise be involved in the replacement as it is unlikely that the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). The Working Group may wish to consider that, while a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record is presented (A/CN.9/768, para. 101). Thus, requiring the obligor's consent for replacement prior to presentation might not be necessary.

51. Draft paragraph 3 aims at providing the possibility of prior consent to replacement. The Working Group may wish to consider that draft paragraph in conjunction with draft article 14 providing a general rule on consent requirement.

52. The Working Group may wish to consider whether to retain draft paragraph 4, whose purpose is to clarify that substantive rights and obligations are not affected by replacement, or to include such clarification in the explanatory material.

53. Draft article 26, paragraphs 5 and 6 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but the corresponding record, document or instrument has not been issued for technical reasons. Such rule may not be contained in substantive law since it is specific to replacement involving an electronic transferable record.

54. The Working Group may wish to consider whether the word "[terminated]" is adequate for the purpose of draft paragraphs 5 and 6, which refer to situations where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in draft subparagraphs 1(c) and 2(c). The word "[invalidated]" might offer an alternative drafting option.

"Draft article 27. Division and consolidation of an electronic transferable record"

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, a reliable method for division or consolidation of an electronic transferable record shall be provided.

"2. If an electronic transferable record has been issued and the person in control and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The person in control shall [transfer] [present for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases 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 resulting new electronic transferable records.

“3. If the person in control of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The person in control shall [transfer] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease 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 consolidated electronic transferable record.”]

Remarks

55. Draft article 27 reflects the Working Group’s suggestions at its forty-eighth session (A/CN.9/797, para. 106). In deliberating, the Working Group may wish to refer also to the considerations expressed in A/CN.9/WG.IV/WP.124/Add.1, paragraphs 33 and 34. The use of the word “transfer” instead of the word “present” is suggested in order to avoid reference to substantive law notions.

56. In considering the standards for assessing the reliability of the method used for division and consolidation of electronic transferable records, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

“Draft article 28. Termination of an electronic transferable record

“1. Where the law requires or permits the termination of a paper-based transferable document or instrument, a reliable method shall be provided to prevent further circulation of the electronic transferable record.”

“2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument 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

57. Draft article 28 reflects the suggestions made at the forty-eighth session (A/CN.9/797, para. 106). It now contains a general functional equivalence rule.

58. In considering the standards for assessing the reliability of the method used for termination of an electronic transferable record, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

“Draft article 29. Use of an electronic transferable record for security right purposes

“Where the law permits the use of a paper-based transferable document or instrument for security right purposes, a reliable method to allow the use of electronic transferable records for security right purposes shall be provided.”

Remarks

59. Draft article 29 reflects the suggestion made at the forty-eighth session that it should be formulated as a functional equivalence rule (A/CN.9/797, para. 106).

60. In considering the standards for assessing the reliability of the method used for the use of an electronic transferable record for security right purposes, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

“Draft article 30. Retention of [information in] an electronic transferable record

“1. Where the law requires that a paper-based transferable document or instrument be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

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

(b) The integrity of the electronic transferable record is assured in accordance with draft article 11[, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information enabling the identification of the [issuer and person in control of the electronic transferable record] [parties] and [indicating the date and time [when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated]]] [of legally relevant events] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record [and indicating the date and time of their involvement] is made available].

“2. A person may satisfy the requirement referred to in paragraph 1 by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met.”

Remarks

61. Draft article 30 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on

Electronic Commerce. The Working Group may wish to take into consideration draft article 11 on integrity when discussing draft article 30.

62. The Working Group may wish to consider whether reference should be made to retention of an electronic transferable record in spite of the fact that the retained electronic record may no longer be transferred. In that respect, the Working Group may wish to consider making reference to the information contained in the electronic transferable record.

63. The words “[, apart from any change that arises from the need to ensure that the record may not further circulate]” were added in subparagraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

64. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72). In particular, the words “[parties]” and “[of legally relevant events]” have been added in subparagraph 1(c) to capture all parties and events relevant during the life cycle of the electronic transferable record. References to the date and time of relevant events have also been added. The Working Group may wish to consider whether those drafting suggestions should be retained and, if so, whether the resulting subparagraphs 1(c) and 1(e) coincide in scope and operation. In that regard, the Working Group may also wish to clarify whether requirements on the information to be retained should be set forth in substantive law.

65. The Working Group may also wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

66. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft provisions (A/CN.9/797, para. 104, subpara. (b) and A/CN.9/ WG.IV/WP.124/ Add.1, para. 43). In that case, the Working Group may wish to clarify whether that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers (Articles 31-32)

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

“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 statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

- (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 person in control] [concerned parties];
 - (ii) That the electronic transferable record has retained its integrity and has not been compromised;
 - (iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;
- (e) Use trustworthy systems, procedures and human resources in performing its services.”

“Draft article 32. Trustworthiness

“For the purposes of article 31, subparagraph (e) 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 records;
- (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; and
- (g) Any other relevant factor.”

67. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 31 and 32 on third-party service providers had already been revised in light of the considerations expressed by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

68. The placement of these draft articles would depend on the final form of the draft provisions. It was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

69. The words “[concerned parties]” have been added in draft article 31 subparagraph (d)(i) to require identification of all parties relevant during the life cycle of the electronic transferable record. This is necessary, for instance, to ensure the possibility of an action in recourse.

70. The Working Group may also wish to clarify the meaning of the term “relying party” in draft article 31 (A/CN.9/797, para. 107).

E. Cross-border recognition of electronic transferable records (Article 33)

“Draft article 33. 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 [in a foreign State][abroad][, or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State][abroad]][, if it offers a substantially equivalent level of reliability].

“2. Nothing in this law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records.”

Remarks

71. 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.² The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

72. Draft article 33 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

73. The Working Group may wish to clarify if under draft article 33 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognised in another jurisdiction enacting draft article 33.

74. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words “[, if it offers a substantially equivalent level of reliability]” are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

75. Paragraph 2 reflects the Working Group’s understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

² *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.