



General Assembly

Distr.: General
24 June 2009
English
Original: Spanish

United Nations Commission on International Trade Law

Forty-second session

Vienna, 29 June to 17 July

Proposal of the Delegation of Spain Concerning the Future Work of Working Group IV*

* This document was submitted late owing to the fact the proposal contained herein was received on 24 June 2009.



1. During the forty-first session of the Commission, several proposals were put forward to guide the possible future work of Working Group IV on the creation and regulation of “single windows” (SW) in international trade. The goals that could be achieved by identifying the legal and operational principles applicable to SW include the fostering of legal certainty and security in the exchange of electronic documents in cross-border operations and the simplification of procedures based on the exchange of information, both for traders and for State administrations. It was also stated that, closely linked to this topic, another possible area of work related to electronic negotiable documents and, more generally, the transfer of rights through electronic communications.

2. The delegation of Spain supported the proposals made along these lines and continues to find interesting the approaches on which they are based. As the delegation of Spain indicated at the time, of all the topics proposed, the one that elicited the most interest was the regime for the creation and transfer of negotiable electronic records and the negotiation of rights by electronic means. The identification and promotion of a harmonized regime, or at least a number of harmonized principles, relating to such activities, could yield many benefits by making it possible to develop rules for all the legal processes based on the use of electronic communication and on the exchange of information for more specific purposes. Mechanisms for the transfer or negotiation of rights, including those based on the flow of written documents, show a very similar structure irrespective of the area in which they take place and the nature and content of the rights concerned. Such similarities will probably increase as use of electronic means for this purpose becomes more widespread.

3. Existing systems for the transfer of rights or documents that rely on information structures within or outside the network for electronic communications are based on the creation of registries. The systems that have been emerging in the electronic environment over the past two decades either have a registry-based structure that has been created on an ad hoc basis or make use of registries already in existence. In the field of e-commerce law, both national and international (in the case of the latter as a result of the work of UNCITRAL), negotiable or transferable electronic records already enjoy the same legal recognition as paper records. Such recognition is based on the idea that an electronic (intangible) record can be handled in much the same way as any paper record. The most important consideration in deciding whether to recognize title to a document and the rights contained therein is the notion of control of the record or document. Contrary to what one might initially think, this notion has been conceived with the aim of encompassing registry systems precisely because such systems are all there is at present.

4. There is a clear and compelling need for a minimally harmonized regulation governing the electronic transfer or negotiation of rights or documents that is capable of fostering the migration of cross-border processes and operations of this kind to the electronic environment. Such a regulation might focus on the transfer of rights through the assignment regime by electronic means, but it should also include other specific modes of transfer based on the issue and use of certain documents or securities (transferable securities, cash-based securities, instruments of title or securities based on property or rights in rem in property, etc.). A key requirement for the viability and success of such processes, whose role and significance must

therefore be taken into account by any future legal framework, is the involvement of what are known as trusted third parties.

5. Trusted third parties, such as certification entities or authorities, play a very significant role in some legally recognized cases in areas such as electronic signatures. Their presence in the electronic environment, however, is acquiring and will doubtless continue to acquire substantially greater importance and to exert a far greater impact on the degree of certainty and security of relations in electronic environments. This is due to operators' vital need in such relations to enjoy a minimum degree of certainty as to the identity of the parties involved, the authenticity and content of the information, the legal consistency and content of the intangible assets (such as rights) that may be exchanged solely by way of mutual notification and, of course, the applicable legal regime.

6. In the case of many of these procedures, some of which lie outside the scope of legal norms, while being implicit in their aims, the only means currently available for building the desired degree of confidence and certainty among the parties and promoting the security of transactions consists in involving a trusted third party. This is exactly what happens in registry systems for the negotiation of rights. Such systems normally rely on the contractual authority conferred on one or more entities that provide, in addition to the communication system and the electronic signature infrastructure (which may in turn rely on a specific national public-key infrastructure), the registry infrastructure, with the legal status that it may acquire in relations between the operators involved.

7. A regulation dealing with trusted third parties and their functions in the context of the transfer or negotiation of rights, documents or securities and in an electronic context could also lay the foundations for a set of rules dealing more broadly with their role in electronic relations and transactions in pursuit of any contractual goal. Existing efforts in this context and their outcome could thus have a highly beneficial impact on, and develop a measure of synergy with, other activities and relations based or dependent on exchanges of information in the network and their legal, legislative and contractual regime. This applies to both strictly private relations and relations with the public authorities (in many cases it is the authorities themselves who assume the role of a trusted third party).

8. With regard to the aims pursued by the approach described above and the formal means whereby they might be achieved, the delegation of Spain has no desire to submit non-negotiable proposals. It does, however, consider that the resulting instrument should regulate:

- The ways in which rights should be negotiated or transmitted electronically and the formal conditions to be met;
- The broad consequences of transmission and the specific consequences that should be associated with the regime governing documents, securities or negotiable or transferable rights;
- The types of documents or negotiable instruments that would come within the scope of the proposed regulation;

- The responsibility to be assumed by the transmitter;
- The extent to which the debtor of the underlying obligation should be involved in the transfer or negotiation and its consequences;
- The protection to be enjoyed by a third-party buyer in good faith, in respect of the different modes of transmission of rights regulated, vis-à-vis both the debtor and the rights of other third parties;
- The consequences of the intervention of third-party entities or certifying authorities (whether or not they are providers of other services), including:
 - Implications of their intervention for the position of the parties (debtor, transmitter and buyer);
 - Liability for damages ensuing from their conduct;
- The relevant notion of a trusted third-party certifier and its possible submission to national supervisory authorities.

9. Without wishing to rule out other possibilities, the delegation of Spain also draws attention to the positive experience with and high success rate of model laws in the area of electronic commerce law. A model law may well be the appropriate framework for an initiative such as that proposed, given the greater flexibility of implementation it offers to States contemplating its use and the greater ease of improving its content after it has been elaborated.
