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Draft Model Law on Electronic Transferable Records

Compilation of comments by Governments and international organizations

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated its Working Group IV (Electronic Commerce) to undertake work on electronic transferable records. At its forty-ninth session in 2016, the Commission, expressing its appreciation to Working Group IV (Electronic Commerce) for the progress made in the preparation of a draft Model Law on Electronic Transferable Records, indicated that it expected that the Model Law would be adopted at the Commission's fiftieth session, in 2017.

2. At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group requested the Secretariat to revise the draft Model Law on Electronic Transferable Records and explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect the deliberations and decisions at that session and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law, so that the comments would be before the Commission at its fiftieth session (A/CN.9/897, para. 20).

3. By a note verbale dated 16 February 2017, the Secretariat transmitted the text of the draft Model Law with explanatory notes (A/CN.9/920) to States and to invited international organizations. The present document reproduces the first comments received by the Secretariat on the draft Model Law and the explanatory notes. Comments are reproduced as received by the Secretariat with some formatting changes. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Compilation of comments

A. States

1. Colombia

[Original: Spanish]
[3 April 2017]

1. The model law should state that electronic transferable records should take into account States' domestic regulations relating to the protection of personal data.

2. Article 18, paragraphs 3 and 4: These provisions establish that upon issuance of an electronic transferable record replacing a transferable document, that document ceases to be valid. In that regard, it is suggested that such a document should not cease to be valid but, rather, it should be considered as another original, since legally it would be possible to have one or more originals of that document. Accordingly, there should be notes referring to the existence of both paper-based and electronic originals.

3. Article 19, paragraph 1: The model law should clarify what is considered a "reliable method". This can be done by establishing the criteria that determine such characteristics or by formulating a definition that standardizes the term.

4. It is important that the storage of electronic data should be taken into account. While the draft model law focuses on the transferability of an electronic record, it should stipulate that the processing of personal data, and in particular the storage of such data, should be carried out in accordance with relevant local regulations.

5. While the draft model law seeks to ensure technological neutrality, it is also important to clarify what would be considered a “reliable method” for member States. It is suggested that generic criteria or a clarificatory definition should be included.

6. The minimum metadata to be included in an electronic transferable record should be specified, as should the minimum technical characteristics with respect to format.

7. Since it is often the case that, rather than a single document, an electronic file is transferred, it might be useful to describe such situations and the specific characteristics of such files.

2. Germany

[Original: English]
[4 April 2017]

Chapter III. Use of electronic transferable records

Article 12 (a):

Although we agree that a functional approach should generally be followed in defining the reliability standard, and we support flexible criteria in order to avoid the excessive costs that would be incurred by business if requirements were too narrowly defined, we are strongly convinced, that at least (ii) “The assurance of data integrity”, (iii) “The ability to prevent unauthorized access to and use the system” and (iv) “The security of hardware and software” are mandatory requirements for the reliability of transferable electronic records, especially insofar as cross-border recognition is concerned. These three requirements should be made mandatory for example by way of an “at least” clause so that they feature in all assessments of reliability. We therefore suggest revising Article 12 (a) to that effect.

Article 15:

We suggest revising the notion of “originals” in order to reflect the outcome of discussions surrounding the notion of “uniqueness” in Article 10. We take the view that Article 15 refers to copies and duplications of transferable documents as is the case in Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation. This should be expressly clarified in Article 15 in order to avoid the possibility of multiple claims.

Explanatory Notes to the Model Law on Electronic Transferable Records

Article 1:

Para. 9:

We suggest deleting in the first sentence the words “securities and other” insofar as it specifies that only financial securities, e.g. mid- and long-term securities traded on capital markets, are excluded. The general determination as to which instruments are to be counted as securities is a matter of substantive law.

Suggestion:

> “Paragraph 3 clarifies that the Model Law does not apply to investment instruments.”

Article 2:

Para. 19:

Since the second sentence of paragraph 19 refers to transferable records or instruments, i.e. the “paper-world”, the reference to the “person in control” should be replaced by a reference to the “paper-world” equivalent, i.e. the “possessor”. In

order to make this statement more comprehensive, the sentence could be drafted as follows:

> "It does not aim at affecting the fact that substantive law shall determine the rights of the possessor and determine who is considered as the (rightful) holder."

Article 10:

General Remark:

The explanatory notes on Article 10 are key to the functioning of the Model Law. Article 10 is a central provision in ensuring the "uniqueness" of an electronic transferable record. Uniqueness is an essential feature that contributes to prevent the existence of multiple claims for performance of the same obligation. Another requirement that prevents multiple and repeated requests for performance of the same obligation is, with regard to bills of exchange, for example, the requirement of presentment and surrender for payment. We take the view that uniqueness (in the same way as authenticity) pertains to the document or instrument, and therefore also the electronic record thereof. The singularity of claims is a consequence of uniqueness (and authenticity) of the record that incorporates the performance obligation. Control (the functional equivalent of possession) is something different and not necessarily linked to these notions. The person in control may change throughout the life cycle of an electronic transferable record, for example, by transfer thereof. However, the singularity of the right to claim performance of the obligation is not affected by a change of the person in control. To provide for uniqueness in an electronic environment does not mean establishing full equivalence to the paper document, which, as a physical object, is by nature unique. That may not be technically feasible. Rather, uniqueness should provide for a functional equivalent of the effects linked to an original/authentic paper document in the paper world. Since the distinction between transferability and negotiability and the distinction between financial instruments and documents of title is not known to all jurisdictions (it is unknown to German law) and since the Model Law focuses on transferability (see in particular para. 3 of the Explanatory Notes), it does not seem useful to refer to the terms "document of title or negotiable instrument" in the last sentence of paragraph 63.

Para. 63:

We suggest: (a) adding in the second sentence "the existence of" before the words "multiple claims"; (b) adding the words "for performance of the same obligation" after the word "claims"; and (c) for clarity and correctness, we suggest revising the last sentence as follows:

> "Providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge".

Suggestion:

> "Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid the existence of multiple claims for performance of the same obligation."

Para. 64:

We suggest: (a) revising the first sentence as follows: "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a respective transferable document or instrument is not obvious due to the lack of a tangible medium."; (b) in the third sentence adding the words "a paper document, as a physical object, is by nature unique and, furthermore" after the word "However".

Suggestion:

> "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a respective transferable document or instrument is not obvious due to the lack of a tangible medium. In fact, the notion of uniqueness poses challenges also with respect to transferable documents or instruments, since paper does not provide an absolute guarantee of non-replicability. However, a paper document as a physical object is by nature unique and, furthermore, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium while practices on the use of electronic transferable records are not yet equally well-established."

Para. 65:

We suggest: (a) adding "the existence of" before the word "multiple"; (b) replacing the word "requests" with the word "claims"; and (c) deleting the text after the word "obligation".

Suggestion:

> "Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation."

Para. 67:

For the same reason, we suggest deleting the words "and control".

Suggestion:

> "One effect of the adoption of the notion of "singularity" in the Model Law is the prevention of unauthorized replication of electronic transferable record by the system."

Para. 68:

We take the view that this Model Law applies only to electronic equivalents of what may generally be referred to as "securities". It does not apply to instruments with a mere evidentiary function that do not meet the requirements of transferable records or instruments as defined in Article 2. This should be clearly expressed. We therefore support adding the word "also" in the last sentence after the words "electronic transferable record may".

Suggestion:

> "For instance, an electronic transferable record may also have an evidentiary value […]".

Para. 70:

We take the view that paragraph 70 should be made subject only to paragraph 4. If so, "if these are issued as instruments not to order" should be added to the second sentence.

Suggestion:

> "This could be the case, in certain jurisdictions, of straight or nominative instruments, such as promissory notes, bills of lading or bills of exchange, if these are issued as instruments not to order."

Para. 82:

The provisions of the Model Law do not use the term "original". Nevertheless, its provisions aim at establishing an electronic transferable record that is finally functionally equivalent to what is considered an original or authentic transferable

document or instrument in the paper-world. The first and the fourth sentence should therefore be drafted as follows:

> "Unlike other UNCITRAL texts on electronic commerce, the Model Law does not use the term "original" in the provisions that contain the requirements for establishing functional equivalence to the paper-based notion of "original". […] With regard to the dynamic notion of "original" in the context of electronic transferable records, Article 10, subparagraph 1(b)(iii), […]."

Para. 83:

We suggest revising the text in light of the proposed changes above (para. 65), following the line that control must be distinguished from uniqueness. In any case consideration must be given to the fact that "singularity" allows a specific electronic record to be identified as the electronic transferable record entitling the person in control to claim to performance.

Para. 83 should be drafted as follows:

> "Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both a specific electronic record as the electronic transferable record to entitle the person in control to claim performance and that is the object of control (see above paras. 65-76)."

Article 11:

Para. 94:

We take the view that the text, as it is currently drafted, does not precisely reflect the statement of Article 11, paragraph 1 (b) and, furthermore, does not reflect the consensus in the Working Group. It should therefore be revised carefully in accordance with the statements contained in paragraph 101 of document A/CN.9/863 (report of the 52nd session): "It was stated that both control and possession were factual situations and that the person in control of an electronic transferable record was in the same position as the possessor of an equivalent transferable document or instrument. It was also stated that control could not affect or limit the legal consequences arising from possession and that those legal consequences would be determined by applicable substantive law. Broad consensus was expressed on those statements. It was further stated that parties could agree on the modalities for the exercise of possession, but not modify the notion of possession itself." Therefore, we suggest: (a) replacing the words "the holder of the electronic transferable record" in the first sentence by the words "as such", since reference to "the holder" at this point would imply a statement about the substantive-law effects of being identified as the person in control (if an explanatory element is needed, we suggest using the wording of paragraph 101 of document A/CN.9/863); (b) replacing the word "holder" in the second sentence with "possessor" in order to clarify that control in the electronic world is equivalent (only) to possession in the paper world. "Holder" has substantive-law implications, possibly referring to whether the person is a "rightful" holder or not.

Suggestion:

> "Subparagraph 1 (b) requires to reliably identify the person in control as such of the electronic transferable record. The person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent transferable document or instrument."

Para. 96:

We suggest revising the text after the first sentence along the following lines: "The use of the services of a third party to exercise exclusive control does not affect exclusivity of control. It does neither imply nor excludes that the third-party service

provider or any other intermediary is a person in control. Rather this is to determine by the applicable substantive law". This would make it clear that the Model Law neither excludes nor contradicts the underlying factual and legal assumptions of intermediate securities holding models, which are reliant on the notion that intermediaries have (indirect or mediate) possession of the securities registered in the securities accounts they maintain and operate (for other intermediaries or the ultimate account holder).

Para. 102:

We suggest revising the last sentence as follows:

> "The Model Law does not contain specific provisions on surrender since paragraph 2, which governs transfer of control as the functional equivalent of transfer of possession and thus of delivery, would apply also to those cases."

Article 12:

General remark:

We are convinced that the reasonable reliability requirements are important for a well-functioning Model Law, especially in cross-border contexts. Article 12 and the corresponding explanatory notes are essential for the common interpretation and therefore the effectiveness of this standard. As mentioned above, we suggest that a mandatory assessment of (at least) data integrity, access protection and hard- and software security, are necessary in order to implement a general reliability standard for electronic transferable records. We therefore suggest revising the explanatory notes in paras. 103-111. It should be clarified that party agreements cannot derogate from these minimum requirements.

Para. 104:

We suggest, for example, revising the text after the words "elements that" to underline the fact that the above (Art. 12) indicated elements contained in Article 12 are "conditio sine qua non" for the reliability of transferable electronic records.

Para. 119:

We suggest adding a text after the words "not to make it dependent on party autonomy" that highlights that the requirements: (ii) "The assurance of data integrity", (iii) "The ability to prevent unauthorized access to and use the system" and (iv) "The security of hardware and software", listed in Article 12, are mandatory.

Article 15:

Para. 133:

We suggest revising the second sentence with regard to the changes proposed above (para. 65) to the effect that control must be distinguished from uniqueness.

3. Hungary

[Original: English]
[4 April 2017]

Article 2 of the draft defined the expression "electronic record" as "information generated, communicated, received or stored by electronic means". Storing and archiving electronic data has encountered several difficulties lately from the aspect of commerce in Hungary: the system and method of e-invoicing is developing rapidly, but the legal framework of archiving the invoices (Hungarian Ministerial Decree 114/2007 (XIJ.29.) on the rules of digital archiving) is no longer applicable to all cases. In the last ten years, e-invoicing, and in general, digitalization became a much more complex and developed area than it was in 2007. Because of this, a modernization and reform of the framework is urgently needed: with a new, more

flexible, transitive and business-friendly legal background, the storing and archiving of e-invoices would be quicker and easier (it would significantly help the enforcement of the principle of technology neutrality too). It would also help decreasing the number of regular, paper-based invoices, thus decreasing the administrative burden, and, as a collateral effect, it would increase competition between parties providing archiving services, decrease the prices of such services, and improve their quality as well.

The draft, however does not have an article about storing and archiving any kind of electronic transferable record. With the process of storing is an essential and inevitable part of managing electronic data, Hungary would respectfully suggest the Working Group to include some general provisions about the reliable method and know-how about it in the Model Law.

4. United States of America

[Original: English]
[4 April 2017]

Paragraph 65 of the Explanatory Notes indicates that “singularity” and “control” are intended to prevent the possibility of multiple requests to perform the same obligation. Paragraph 67 of the Explanatory Notes states that an effect of “singularity” and “control” is the prevention of unauthorized replication of an electronic transferable record. In this regard, it is important to recognize that, while unauthorized replication is to be prevented, there may still be multiple versions of the data that constitute the electronic transferable record. It is “control” that will prevent multiple claims for performance.

Unfortunately, there has been confusion between singularity of document or record and singularity of claim. The model law seeks to achieve the latter. As systems may retain copies of data, there might not be a singular record. However, “control” should address concerns stemming from this possibility, because the concept of control in the draft model law specifically deals with the singularity of the claim and thereby eliminates the need to identify a singular record to prevent multiple claims. By definition, control limits the parties that may make a claim on an electronic transferable record without having to design a system that provides for a singular record.

Paragraphs 76-78 of the Explanatory Notes are misguided in this regard. While Article 10(1)(b)(i) of the Model Law contemplates utilization of a reliable method to identify an electronic record as the electronic transferable record that will be relevant to parties to a transaction, it cannot contemplate that this electronic record will necessarily be unique. Instead, working with the concepts of “control” found in Article 10(1)(b)(ii) and Article 11, Article 10(1)(b)(i) operates to identify the relevant electronic record for the transaction to be undertaken. For this reason, the Explanatory Notes should be revised to state instead that the provision will assist in identifying the electronic transferable records for the purpose of the relevant transaction.

In a purely drafting matter, the title of Article 14 does not accurately characterize the text that is contained in the article. While the title refers to the “[d]etermination” of the place of business, the operative text identifies bases that are not alone sufficient for the determination. Nowhere in the text of that article are there rules for the determination of the place of business. For this reason, the title could be simplified to “Place of business”.

B. Intergovernmental organizations

1. World Trade Organization (WTO)

[Original: English]
[3 April 2017]

Facilitating the use of electronic documentation is without question an important feature of the enabling environment for electronic commerce, in which the WTO has pursued a Work Programme since 1998.

The WTO's key area of interest concerns the possible implications of the Draft Model Law for international trade and, in particular, for the WTO's multilateral rules. Among the pillars of the multilateral trade regime are the principles of transparency (making measures public), non-discrimination among Member countries (most favoured nation treatment), and non-discrimination against foreign imports of goods and of services or their suppliers (national treatment). These principles apply both in terms of cross-border transactions, commercially present juridical or natural persons in the case of services trade, and domestic regulatory measures that may haven such effects. In reviewing the provisions of the Draft Model Law, we found no provisions that would explicitly contradict the WTO principles noted above.

Due to its perhaps more direct link to trade concerns, we gave particular attention to Article 20, on non-discrimination of foreign electronic transferable records, as well as the Explanatory Notes and negotiating history, as cited in the Notes. The wording of Article 20, paragraph 1, stating "electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad" is certainly consistent with the most favoured nation trade principle and broader non-discrimination principles. However, we would like to call your attention to jurisprudence in international trade that de facto discrimination would be relevant, for example, in implementation, even where, on a de jure basis, a law's provisions do not explicitly discriminate based on origin.

In this respect, we note with interest the observations in the Explanatory Notes regarding Article 20, paragraph 1, where it is indicated that:

> "paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that does not recognize the legal validity of electronic transferable records. However, paragraph 1 also does not prevent that an electronic transferable record issued or used in a jurisdiction not allowing the issuance and use of electronic transferable records, and that otherwise complies with the requirements of applicable substantive law, could be recognized in a jurisdiction enacting the Model Law."

Given this interpretation, and in terms of governments' exercise of the flexibility that is implied, it might be useful to recall that the underlying domestic criteria concerning acceptance or non-acceptance of electronic transferable records issued or used in a jurisdiction not allowing the issuance and use of such records should not only be made public (transparency) but also be non-discriminatory. Therefore, the relevant implementing measures in such cases should be objective in nature and also not, in themselves, based "solely" on origin. This assumes that acceptance of such records from jurisdictions that do allow their issuance or use would normally not raise these issues.