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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 12-27)

"***Draft article 12. 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.]"

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 12, 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.

3. In particular, the Working Group may wish to consider how draft article 12 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 12 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 12 submitted for the consideration of the Working Group aims at enabling in an electronic environment the various possible options related to information on date and time.

> "***Draft article 12. Indication of time and place in electronic transferable records***
>
> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to an electronic transferable record."]

6. The Working Group may wish to consider replacing the words "originator" and "addressee" with the word "person in control" or other appropriate term. Alternatively, the Working Group may 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".

7. Draft articles 12 (alternative draft), 14, 20, 21, 22, 24, 25 and 26 refer to instances in which the law does not require, but permits a certain action, or may alternatively require or permit that action. At its fiftieth session, the Working Group agreed that the language used in those provisions should be revised to adequately accommodate functional equivalence rules both when the law requires a certain action and when the law permits it (A/CN.9/828, para. 80). The issue seems to arise from the fact that functional equivalence rules aim at meeting a legal requirement and are drafted accordingly.

8. One view is that where the law permits an action, that permission is still subject to certain requirements. Under that view, the language used to refer to a requirement to be met would apply in both instances, i.e. when the law requires an action and when the law permits an action subject to certain requirements. In that respect, reference to the words "or whether the law simply provides consequences" (contained, for instance, in article 8, paragraph 2, of the UNCITRAL Model Law on

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[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.

Electronic Commerce — see also draft articles 9, 17 and 19 of the draft Model Law) could also be relevant. That view is supported by legislation enacting UNCITRAL texts.[2] Should the Working Group agree with that view, it may wish to consider inserting appropriate guidance in the materials illustrating the draft provisions.

9. An alternative draft could be based on the use of "may" to stress the enabling nature of the rule when introducing the requirements for functional equivalence. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, time or place may be indicated in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 41).

10. Another drafting option could follow the approach taken in draft article 14, paragraph 1, and use the words "this may be achieved". Such approach could offer the advantage of stressing the enabling function of the provision. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, this may be achieved in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 42).

> "***Draft article 13. Consent to use an electronic transferable record***
>
> "1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.
>
> "2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

11. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

> ["***Draft article 14. [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

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[2] For example, Section 18 of the Electronic Transaction Act of South Africa, 2002, on notarization, acknowledgement and certification, reads:
"(2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true reproduction of the document or information.
(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature."

respect to electronic transferable records by [issuance of multiple [operative] electronic records].

["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

12. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). It aims at enabling the possibility of issuing multiple electronic records, each controlled by a different entity, if so wished. However, it should be noted that some of the 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.

13. 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 original. On the other hand, existing practice foresees the use of multiple electronic bills of lading.

14. 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, subparagraph 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, subparagraph 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.

15. 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.

16. 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”.

17. Paragraph 2 of draft article 14 contains a provision inspired by article 36, subparagraph 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 set forth in substantive law.

18. Paragraph 3 of draft article 14 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 19 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 14, paragraph 3, would suffice.

19. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued on different media should be inserted in the draft provisions.

20. Draft articles 14 and 15 are the only draft provisions that explicitly refer to issuance (see A/CN.9/797, paras. 64-69).

> “***Draft article 15. 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

21. Draft article 15 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.

22. The Working Group may wish to clarify whether the information requirement contained in draft article 23(1)(b) (and the corresponding draft article 23(2)(b)), which aims at ensuring the perduring availability of information in case of change of medium, represents an exception to this rule.

> “***Draft article 16. 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

23. Draft article 16 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 17. 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 an electronic transferable record if:

(a) A method is used to establish control of that electronic transferable record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic transferable record was [generated] [issued], 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. A person has control of an electronic transferable record if the method reliably identifies that person as the person in control."

Remarks

24. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67) and fiftieth (A/CN.9/828, paras. 50-56) sessions.

25. The Working Group may wish to consider whether the word "[generated]" or "[issued]" should be retained in light of their current use and possible substantive law implications (A/CN.9/828, paras. 52-54).

26. The Working Group may wish to clarify the relationship between draft article 17 and draft article 11, which contains a general reliability standard.

27. Draft paragraph 2 reflects the Working Group's decision at its fiftieth session (A/CN.9/828, paras. 64-65). In particular, it was explained that the adoption of such provision would make it possible for "control" to achieve the same result that "possession" of a paper-based transferable document or instrument brought (A/CN.9/828, para. 61); that reference to the person in control of the electronic transferable record does not imply that the person in control is also the rightful holder of that transferable record as this is for substantive law to determine (ibid.); and that reference to the person in control does not exclude the possibility of having more than one person in control (A/CN.9/828, para. 63). Moreover, it was stated that the electronic transferable record in itself did not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performed that function (ibid.). In this respect, it should be noted that identification should not be understood as implying an obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which imply anonymity (A/CN.9/828, para. 51).

28. The Working Group may wish to refer to the draft definition of "control" in draft article 3 when considering draft article 17 (A/CN.9/828, para. 66).

"***Draft article 18. 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 an electronic transferable record through the transfer of an electronic transferable record."

Remarks

29. Draft article 18 reflects the deliberations of the Working Group at its fiftieth session (A/CN.9/828, para. 68).

30. The Working Group may wish to consider the sequence and placement of draft articles 18, 19 and 20 (A/CN.9/828, para. 75).

31. At the Working Group's fiftieth session, it was suggested that the definition of "transfer" of an electronic transferable record, which set forth that the transfer of an electronic transferable record meant the transfer of control over an electronic transferable record, and draft article 20, which established a functional equivalence rule for the endorsement of an electronic transferable record, should be more closely aligned (A/CN.9/828, para. 79). The Working Group may wish to consider whether that alignment should also involve draft article 18.

32. In that respect, the Working Group may wish to recall that transfer of an electronic transferable record might require under substantive law and contractual agreements both the functional equivalent of transfer of possession, i.e. delivery of a paper-based transferable document or instrument and the functional equivalent of endorsement of a paper-based transferable document or instrument. The Working Group may also wish to recall its decisions to delete a draft provision on transfer (A/CN.9/828, para. 84) as well as a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85).

33. Under that approach, the Working Group may wish to consider the following alternative text of draft article 18:

["Where the law requires transfer of possession of a paper-based transferable document or instrument or provides consequences for the absence of transfer of possession, that requirement is met through the transfer of control over an electronic transferable record."]

34. The Working Group may wish to consider in conjunction with the alternative text of draft article 18 the deletion of the draft definition of "transfer" contained in draft article 3 also in light of possible conflicts with applicable substantive law.

"***Draft article 19. Presentation***

"Where the law requires a person to present for performance or acceptance a paper-based transferable document or instrument or provides consequences for non-presentation, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsements if required, for performance or acceptance."

Remarks

35. Draft article 19 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 73).

"***Draft article 20. 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 an electronic transferable record if information [relating to the endorsement] [indicating the intent to endorse] 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

36. Draft article 20 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80).

37. The Working Group may wish to consider the substitution of the words "relating to the endorsement" with the words "[indicating the intent to endorse]" to better specify that the satisfaction of the generic requirements for writing and signature set forth in articles 8 and 9 should be accompanied by the expression of the intent to endorse.

38. The Working Group may wish to further consider the use of the words "[logically associated or otherwise linked to]" and "[included in]" in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) as well as of the definition of "electronic record" in draft article 3, and with a view to providing guidance on their uniform use throughout the draft provisions.

"***Draft article 21. Amendment of an electronic transferable record***

"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, that requirement is met with respect to an electronic transferable record if a reliable method is employed for amendment of information in the electronic transferable record whereby the amended information is reflected in the electronic transferable record and is readily identifiable as such."

Remarks

39. Draft article 21 has been recast in light of the suggestions received at the Working Group's fiftieth session (A/CN.9/828, paras. 86 and 90). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended.

40. The word "readily" aims at introducing a stringent standard ensuring that users may easily distinguish amendments (A/CN.9/828, para. 88). In that respect, the Working Group may wish to clarify that the draft article does not intend to introduce a new information requirement.

41. An alternative text of draft article 21 under the "may" approach (see above, para. 9) could read as follows:

["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, an electronic transferable record may be amended if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

42. Another alternative text of draft article 21 under the "this may be achieved" approach (see above, para. 10) could read as follows:

["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, this may be achieved in an electronic transferable record if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

43. 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 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 22. Reissuance***

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

Remarks

44. Draft article 22 reflects the Working Groups deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that, similar to paper-based transferable documents or instruments, electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original.

45. In that respect, the Working Group may wish to consider whether draft article 22 should be retained in light of draft article 1, paragraph 2.

"***Draft article 23. Change of medium***

"1. If a paper-based transferable document or instrument has been issued and the holder and the obligor agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall surrender the paper-based transferable document or instrument to the obligor;

(b) The obligor shall issue to the holder, 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) 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 obligor agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The person in control shall [surrender] [transfer] the electronic transferable record to the obligor;

(b) The 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) Upon issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Change of medium according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"4. 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].

"5. 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

46. Draft article 23 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102-103) and fiftieth (A/CN.9/828, para. 102) sessions.

47. Draft article 23 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced document or record would not further circulate (A/CN.9/828, para. 95).

48. The requirements set forth in subparagraphs (a), (b) and (c) of paragraphs 1 and 2 are concurrent and not sequential, and the parties are in a position to determine the most adequate sequence for meeting those requirements in light of all circumstances (ibid., para. 98).

49. With respect to the parties whose agreement is required for change of medium, the draft article requires for change of medium the consent of both obligor and person in control or holder. However, the Working Group may wish to note that obligor and issuer may not be the same party in bills of exchange (A/CN.9/828, para. 99). Moreover, under the current definition of "obligor" in draft article 3, the consent of the endorsers would also be required, thus involving a potentially high number of parties not necessarily affected by the change of medium (ibid.).

50. In that respect, the Working Group may wish to further note that prevailing practice, based on contractual terms applicable to registry-based systems, and existing law require only a request of the holder for change of medium and recognize only change from electronic to paper form (A/CN.9/828, para. 100). That approach takes into account the fact that parties involved in the change of medium could be obliged to comply with that request under substantive law if not already bound by contractual terms.

51. In light of the above, the Working Group may wish to consider whether making change of medium conditional only to the request of the holder would suffice. In doing so, the Working Group may wish to take into account draft article 13, requiring agreement to the use of electronic means, including implicitly or in general conditions. In that respect, the Working Group may also wish to consider whether that request of change of medium should be made to the issuer. Another possibility in that respect could be to grant the obligor to whom the document, or instrument or record is presented for performance the possibility to require a replacement at the time of presentation if dissatisfied with the medium in use at that time. The rationale for that rule is that the medium may become relevant for the obligor only at the moment of presentation.

52. Alternatively, the Working Group may wish to consider whether the agreement of the issuer should also be required, also in view of the suggestion to redraft the definition of "obligor" so as not to include endorsers (A/CN.9/828, para. 99).

53. The Working Group may wish to consider whether the word "[surrender]" or the word "[transfer]" should be used in draft subparagraph 2(a). The words "[of control]" have been deleted in light of the definition of "control" contained in draft article 3 (A/CN.9/828, para. 68).

54. Draft paragraphs 4 and 5 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. The Working Group may wish to consider whether such rule would be necessary, as it might not be contained in substantive law since it is specific to replacement due to a technical failure in a procedure involving an electronic transferable record. Alternatively, the Working Group may clarify whether such rule should derive from substantive law, and therefore be applicable to electronic transferable records by virtue of draft article 1, paragraph 2 (see also above, paras. 44-45).

55. The Working Group may wish to consider the relation between draft paragraphs 4 and 5 and draft article 22. The Working Group may also wish to consider the relevance of the use of the word "upon" in draft article 23 for the sequence of invalidation and issuance of documents, instruments and records.

56. The Working Group may wish to consider whether the word "[terminated]" is adequate for the purpose of draft paragraphs 4 and 5, which refer to instances 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 24. 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, an electronic transferable record may be divided or consolidated if:

(a) A reliable method is used to divide or consolidate the electronic transferable record; and

(b) The divided or consolidated electronic transferable record contains a statement identifying it as such.

"2. Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity."

Remarks

57. In light of the suggestions made at the Working Group's fiftieth session, draft article 24 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

58. The Working Group may wish to consider whether draft subparagraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

59. The Working Group may also wish to consider whether draft paragraph 2 should be retained, including for declaratory purposes, or deleted as it might interfere with substantive law.

60. 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 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 25. Termination of an electronic transferable record***

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument or provides consequences for its non-termination, an electronic transferable record may be terminated if a reliable method is used [to terminate the electronic transferable record] [to prevent further [transfer][circulation] of the electronic transferable record]."

Remarks

61. Draft article 25 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, para. 106) and fiftieth (A/CN.9/828, para. 108) sessions. It now contains a general functional equivalence rule that follows the structure of similar rules dealing with requirement or possibility (see also above, paras. 7-10).

62. Draft article 25 aims at providing guidance on how termination could be achieved in an electronic environment. Draft article 23 of the Model Law contains a reference to termination of electronic transferable records.

63. The Working Group may wish to consider whether to retain the word "[circulation]" or the word "[transfer]" also in light of the definition of "transfer"

contained in draft article 3 and of the fact that at the Working Group's fiftieth session it was said that the reference to the word "[circulation]" was unclear (A/CN.9/828, para. 105).

64. 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 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 26. Use of an electronic transferable record for security right purposes***

"1. Where the law permits the use of a paper-based transferable document or instrument for security right purposes, an electronic transferable record may be used for those purposes if a reliable method is provided to allow the use of electronic transferable records for security right purposes.

"[2. Nothing in this Law affects the application of any rule of law governing security rights in paper-based transferable documents or instruments or electronic transferable records.]"

Remarks

65. In light of the suggestions made at the Working Group's fiftieth session, draft article 26 has been realigned with other functional equivalence rules (A/CN.9/828, para. 110).

66. Draft paragraph 2 has been inserted to clarify that the draft Model Law would not affect the substantive law governing security rights (A/CN.9/828, para. 111).

67. An alternative text of draft article 26, specifying the requirements for the perfection of security rights or interests upon an electronic transferable record, might read as follows:

["***Draft article 26. Perfection of security rights or interests upon an electronic transferable record***

"1. Where the law requires or permits perfection of a security interest on a paper-based transferable document or instrument [or provides consequences for its absence], that requirement is met with respect to an electronic transferable record:

(a) If the law requires [a qualified transfer, or] endorsement and delivery of the paper-based transferable document or instrument, with the transfer of control of the record and its endorsement [in accordance with [articles 18 and 20 of] this Law];

(b) If the law requires the amendment, or the amendment and signature of the paper document, with the amendment, or the amendment and the signature of the electronic transferable record [indicating the intent to perfect a security right] [in accordance with [articles 9 and 21 of] this Law].

"[2. Nothing in this Law affects the application of any other provision regulating security rights or interests that may be perfected upon an electronic transferable record or a paper-based transferable document or instrument.]"]

68. 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 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 27. 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 10[, 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

69. Draft article 27 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 10, subparagraph 1(c) and paragraph 2, on integrity when discussing draft article 27.

70. 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 or, alternatively, to an "electronic record".

71. 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.

72. 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 wish to clarify, also in light of draft article 15, whether requirements on the information to be retained should be set forth in substantive law.

73. 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.

74. 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 Model Law (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 28-29)

"***Draft article 28. 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 29. Trustworthiness***

"For the purposes of article 28, 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."

75. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 28 and 29 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).

76. The placement of these draft articles would depend on the final form of the draft provisions. In that respect, 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).

77. The words "[concerned parties]" have been added in draft article 28, subparagraph (d)(i), to require identification of all parties relevant during the life cycle of the electronic transferable record. That may be necessary, for instance, to ensure the possibility of an action in recourse.

78. The Working Group may wish to clarify the meaning of the term "relying party" in draft article 28 (A/CN.9/797, para. 107) also in view of the definition of "relying party" contained in article 2(f) of the UNCITRAL Model Law on Electronic Signatures.

E. Cross-border recognition of electronic transferable records (Article 30)

"***Draft article 30. 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][outside [the enacting jurisdiction]][, or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State][abroad][outside [the enacting jurisdiction]]][, 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

79. 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.[3] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

80. Draft article 30 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

81. The Working Group may wish to clarify if under draft article 30 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 recognized in another jurisdiction enacting draft article 30.

82. 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.

83. 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).

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