



# General Assembly

Distr.: Limited  
28 August 2015

Original: English

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**United Nations Commission  
on International Trade Law**  
**Working Group IV (Electronic Commerce)**  
**Fifty-second session**  
Vienna, 9-13 November 2015

## **Draft Model Law on Electronic Transferable Records**

### **Note by the Secretariat**

#### **Addendum**

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## II. Draft Model Law on Electronic Transferable Records (continued)

### C. Use of electronic transferable records (Articles 12-24)

#### “Draft article 12. Indication of time and place in electronic transferable records

“1. 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.

[“2. 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.

“3. 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 2.]”

#### Remarks

1. Draft article 12 reflects the Working Group’s deliberations at its fifty-first session (A/CN.9/834, paras. 36-46). At that session, the Working Group took note that time and place of dispatch and receipt had different relevance for contract formation and management, and for the use of electronic transferable records and decided to review the draft provision accordingly (A/CN.9/834, para. 36).

2. At that session, the Working Group also noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping, thus determining time automatically. It was further noted that applicable law could allow parties to amend that automatic determination by agreement. Moreover, it was indicated that users of registry systems would agree to contractual rules containing a choice of applicable law. It was concluded that those elements reduced the practical relevance of determining time and place with respect to electronic transferable records (A/CN.9/834, para. 36). However, the Working Group may wish to note that the determination of time and place with respect to an electronic transferable record may occur otherwise in token-based systems.

3. Draft paragraph 1 refers to the words “or permits” in order to clarify its application to cases in which the law merely permits but not requires the indication of time or place with respect to a paper-based transferable document or instrument (A/CN.9/834, para. 42).

4. Draft paragraphs 2 and 3 are based on article 10 of the Electronic Communications Convention (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69), which, however, provides a rule on time of receipt and dispatch designed for the exchange of electronic communications and, in particular, for contract formation. In light of its deliberations at its fifty-first session (A/CN.9/834,

paras. 36-46), and of the fact that substantive law is likely to contain provisions on time and place, the Working Group may wish to consider whether draft paragraphs 2 and 3 should be retained.

5. The Working Group may wish to consider whether the adoption of a provision relating to the irrelevance of the location of information systems for the determination of the place of business, when such determination is required by substantive law, would be desirable. The scope of such provision would be limited to clarifying that the location of an information system, or parts thereof, is not, as such, an indicator of a place of business. That clarification might be particularly useful in light of the likelihood that third-party service providers would use equipment and technology located in various jurisdictions. Such provision, based on article 6 of the Electronic Communications Convention, could read as follows:

“1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.”

6. Alternatively, the Working Group may wish to confirm whether the provisions relating to the irrelevance of the location of information systems for the determination of the place of business, and contained in other UNCITRAL texts on electronic commerce, could be relevant as general principles on which this Model Law is based under draft article 4, paragraph 2 of the Model Law.

**“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**

7. Draft article 13 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63). The Working Group may wish to consider whether draft article 13 should be placed after draft article 5 on party autonomy.

**“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 respect to electronic transferable records by issuance of multiple electronic transferable records.

“[2. Where the law requires the indication of the total number of multiple original paper-based transferable documents or instruments issued, the total

number of multiple electronic transferable records issued shall be indicated in those multiple records.]”

**Remarks**

8. Draft article 14 reflects the Working Group’s deliberations at its forty-eighth (A/CN.9/797, paras. 47 and 68) and fifty-first (A/CN.9/834, paras. 47-52) sessions. 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) and is recognized in article 47, subparagraph 1(c) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”). Draft article 14 aims at enabling that possibility in an electronic environment (A/CN.9/834, para. 47), in line with a survey of existing practice that evidenced the use of multiple originals of electronic bills of lading.

9. An alternative approach to drafting paragraph 1, based on the general principle contained in draft article 1, paragraph 2, could focus on clarifying that:

“Nothing in this Law precludes the issuance of multiple electronic transferable records.”

10. The Working Group may wish to confirm that each electronic transferable record in a set of multiple electronic transferable records may be controlled by a different entity, if parties so agree.

11. Some of the functions pursued with the issuance and use of multiple paper-based transferable documents or instruments may be achieved in an electronic environment, especially if using a registry system, by attributing control on one electronic transferable record selectively to multiple entities. Based on the general principle contained in draft article 1, paragraph 2, the Model Law does not preclude control of an electronic transferable record by multiple entities, where allowed by substantive law.

12. Paragraph 2 has been redrafted pursuant to the Working Group’s decision at its fifty-first session to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals (A/CN.9/834, para. 51).

13. 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 Model Law.

**“Draft article 15. Substantive information requirements of electronic transferable records**

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

**Remarks**

14. 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.

15. The Working Group may wish to consider whether to retain draft article 15 in light of the fact that the current text of draft article 10 sets forth that an electronic transferable record should contain all information contained in a paper-based document or instrument.

16. The Working Group may wish to consider whether draft article 15 contains a general rule applicable from the time of creation of the electronic transferable record until it ceases to have any effect or validity. In that case, the Working Group may wish to delete the reference to “the issuance of” as it might limit the scope of the draft article.

17. The Working Group may wish to also consider whether the word “substantive” should be included between the words “additional” and “information” to align the article with its title.

**“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**

18. 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, dynamic information, i.e. information that may change periodically or continuously based on an external source, may be included in an electronic transferable record due to its 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] [Control]**

“1. Where the law requires the possession of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if:

(a) A method is used to establish exclusive control of that electronic transferable record by a person and to reliably [identify] [establish] that person as 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 generated, in 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. Where the law requires transfer of possession of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.”

## Remarks

19. 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), fiftieth (A/CN.9/828, paras. 50-56) and fifty-first (A/CN.9/834, paras. 34 and 35 and 91-94) sessions. It sets forth control of an electronic transferable record as the functional equivalent of possession of a paper-based transferable document or instrument.
20. The words "or provides consequences for the absence of possession" in draft paragraph 1 and "or provides consequences for the absence of transfer of possession" in draft paragraph 2 have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).
21. With regard to draft paragraph 1(a), it was explained that reference to the person in control of the electronic transferable record does not imply that that person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61) 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).
22. With respect to "identify", the Working Group may wish to note that the electronic transferable record in itself does not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performs that function (A/CN.9/828, para. 63). Moreover, 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 implies anonymity (A/CN.9/828, para. 51). However, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement.
23. With respect to "establish", the Working Group may wish to consider whether that word has substantive law implications.
24. Draft paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a paper-based transferable document or instrument (A/CN.9/834, paras. 31-33).
25. The Working Group may also wish to consider whether "Control" would be an appropriate title for draft article 17 in light of its content.
26. The Working Group may also wish to consider whether draft article 17 should be placed consecutively after draft article 10 (A/CN.9/834, para. 92).
27. The Working Group may wish to clarify the relationship between draft article 17 and draft article 11, which contains a general reliability standard.
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 and A/CN.9/834, para. 83).

### **"Draft article 18. Presentation**

"Where the law requires a person to present [for performance or acceptance] a paper-based transferable document or instrument, that requirement is met with

respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsement if required[, for performance or acceptance].”

### Remarks

29. Draft article 18 reflects the Working Group’s deliberations at its fiftieth session (A/CN.9/828, para. 73). The words “or provides consequences for non-presentation” have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

30. Draft article 18 was intended to provide both for presentation and for surrender of a paper-based transferable document or instrument for its performance (A/CN.9/WG.IV/WP.124/Add.1, para. 12). However, presentation is not limited to requests for performance, but may extend to acceptance (see paragraph 33 below). Moreover, transfer of a paper-based transferable document or instrument may not be required for presentation, as the person in control requires performance or demands acceptance upon demonstration of its control of the paper-based transferable document or instrument, but does not transfer that document or instrument (see, for instance, article 24 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes, 1930).

31. In light of the above, the Working Group may wish to consider the following text of draft article 18:

“Where the law requires a person to present [for performance or acceptance] a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used to present the electronic transferable record.”

32. In that respect, the Working Group may wish to note that in existing electronic systems presentation of an electronic transferable record on a due date may be automatic, which is not possible in a paper-based environment.

33. The Working Group may wish to consider whether the words “for performance or acceptance” should be retained in light of the fact that under substantive law presentation could refer to a number of purposes, such as presentation of a bill of exchange for acceptance (A/CN.9/804, para. 78).

34. With regard to surrender of the electronic transferable record, the Working Group may wish to consider that the design of the system for electronic transferable records management may not require the transfer of control of an electronic transferable record to the obligor upon performance, especially in case of third-party registries. In that case, the registry operator may terminate and archive the electronic transferable record directly, upon confirmation of performance. In that regard, the Working Group may also wish to note its decision to delete a draft article on termination of electronic transferable records (A/CN.9/834, para. 68).

### “Draft article 19. Endorsement

“Where the law requires or permits the endorsement in any form of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [constituting endorsement] [indicating the intention 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**

35. Draft article 19 reflects the Working Group’s deliberations at its fiftieth session (A/CN.9/828, para. 80). The words “or provides consequences for the absence of endorsement” have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

36. The Working Group may wish to consider the substitution of the words “relating to the endorsement” with the words “indicating the intention 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. Another drafting option may use the words “constituting endorsement”.

37. The Working Group may wish to further consider the use of the words “logically associated with 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 Model Law.

**“Draft article 20. Amendment**

“Where the law requires or permits the amendment of a paper-based transferable document or instrument, 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**

38. Draft article 20 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. The words “or provides consequences for the absence of an amendment” have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

39. Based on the consideration that readily identifiable amended information is necessarily reflected in the electronic transferable record, the Working Group may wish to consider whether the second part of draft article 20 may be drafted along the following lines:

“[...] if a reliable method is employed for amendment of information in the electronic transferable record so that the amended information is readily identifiable as such.”

40. The word “readily” aims at introducing a stringent standard ensuring that users may easily distinguish amendments (A/CN.9/828, para. 88). This standard relates to the fact that amendments in a paper-based environments may be easy to identify due



to the nature of that medium, while that may not be the case in an electronic environment. In that respect, the Working Group may wish to clarify that the draft article does not intend to introduce a new information requirement, which might contradict draft article 15.

**“Draft article 21. Reissuance**

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

**Remarks**

41. Draft article 21 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.

42. The Working Group may wish to consider whether draft article 21 should be retained due to its declaratory value, or it should be deleted as the possibility of re-issuing an electronic transferable record is already available under draft article 1, paragraph 2.

**“Draft article 22. [Change of medium] [Replacement of a paper-based transferable document or instrument with an electronic transferable record]**

“1. A change of medium of a paper-based transferable document or instrument to an electronic transferable record may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The electronic transferable record shall include all the information contained in the paper-based transferable document or instrument; and

(b) A statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraph 2, the paper-based transferable document or instrument ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties.”

**Remarks**

43. Draft article 22 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).

44. Draft article 22 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102-103), fiftieth (A/CN.9/828, para. 102) and fifty-first (A/CN.9/834, paras. 57-64) sessions. By omitting the reference to substantive legal notions such as "issuer", "obligor", "holder" and "the person in control", this approach aims at accommodating the variety of schemes used in the various paper-based transferable documents or instruments. Consequently, and in light also of the need to consent to the use of electronic means set forth in draft article 13, draft article 22 does not contain any reference to consent. Substantive law, including parties' agreement, would identify those parties whose consent is relevant for change of medium (A/CN.9/834, paras. 62).

45. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

"An electronic transferable record may replace a paper-based transferable document or instrument if a method that is as reliable as appropriate for the purpose of the change of medium is used."

46. The requirements set forth in paragraph 2 (a) and (b) are concurrent. The legal consequence for non-compliance with any of them would be the invalidity of the change of medium (A/CN.9/834, para. 58).

47. Draft paragraph 3 sets forth that, when the change of medium has taken place, the paper-based transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiplicity of claims for performance.

48. Draft paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium (A/CN.9/834, para. 61).

**"Draft article 23. [Replacement of an electronic transferable record with a paper-based transferable document or instrument]**

"1. A change of medium of an electronic transferable record to a paper-based transferable document or instrument may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The paper-based transferable document or instrument shall include all the information contained in the electronic transferable record; and

(b) A statement indicating a change of medium shall be inserted in the paper-based transferable document or instrument.

3. Upon issuance of the paper-based transferable document or instrument in accordance with paragraph 2, the electronic transferable record ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

## Remarks

49. Draft article 23 provides for the case of replacement of an electronic transferable record with a paper-based transferable document or instrument. Its content mirrors that of draft article 22 (A/CN.9/834, paras. 64). A survey of business practice indicates that such replacement is the more frequent case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means.

50. Under certain national laws, the paper-based print-out of an electronic record may fall under the definition of electronic record. However, under draft article 23, a print-out of an electronic transferable record that does not meet the requirements of that draft article would have no effect as a paper-based transferable document or instrument replacing the corresponding electronic transferable record.

51. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

“A paper-based transferable document or instrument may replace an electronic transferable record if a method that is as reliable as appropriate for the purpose of the change of medium is used.”

### “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

52. 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).

53. The Working Group may wish to consider whether draft paragraph 1 should be retained for declaratory purposes, or whether draft article 1, paragraph 2 might suffice to enable division and consolidation of electronic transferable records.

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

55. The Working Group may further wish to consider whether to retain draft paragraph 2, which introduces a substantive rule that may not be compatible with the law and practice of securitization. Alternatively, the Working Group may wish to

clarify that substantive law shall determine the effect or validity of electronic transferable records after division or consolidation.

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

**“Third-party service providers”**

**Remarks**

57. The Working Group may wish to note that, pursuant to a decision at its fifty-first session (A/CN.9/834, para. 78), the subject of third-party service providers as set out in A/CN.9/WG.IV/WP.132/Add.1, paras. 75-78 would be addressed in explanatory materials or a guidance document.

**D. Cross-border recognition of electronic transferable records  
(Article 25)**

**“Draft article 25. 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**

58. 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.<sup>1</sup> The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

59. Draft article 25 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature. The words “in a foreign State”, “abroad” and “outside [the enacting jurisdiction]” are alternatives on how to refer to the foreign jurisdiction provided for the Working Group’s consideration.

60. The Working Group may wish to clarify if under draft article 25 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use

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<sup>1</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.

of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 25.

61. 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.

62. Alternatively, the Working Group may wish to clarify that draft article 25 aims only at preventing the place of origin of the electronic transferable record from being a reason in itself to deny legal validity or effect to an electronic transferable record. However, in order to achieve legal validity or effect in a certain jurisdiction, an electronic transferable record of foreign origin would have to comply with the substantive law requirements of that jurisdiction.

63. Paragraph 2 reflects the Working Group’s understanding that the draft Model Law 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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