United Nations A/CN.9/WG.IV/WP.168

General Assembly

Distr.: Limited
22 March 2021

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Sixty-first session
New York (online), 5–9 April 2021

Draft Provisions on the Use and Cross border Recognition of Identity Management and Trust Services

Submission by the World Bank

Note by the Secretariat

The World Bank submitted a paper for consideration at the sixty-first session of the Working Group. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

V.21-01855 (E)

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Annex

The World Bank is pleased to submit the following comments on Draft Provisions on the Use and Cross-border Recognition of Identity Management and Trust Services (A/CN.9/WG.IV/WP.167) on the occasion of the 61st session of the meeting of Working Group IV in New York (online) from 5–9 April 2021.

The comments – on the questions of liability and on the use of identity/identification/identifying in electronic signature – are organized and presented as follows: the reference to the subject is in the left-hand column; the comment or proposed edit of the World Bank is in the middle column; and the rationale for (or explanation of) the comment is in the right-hand column.

Issue	**WB Comment/Edit**	**Rationale**
Liability	World Bank advises that the draft provisions should opt to rely on liability under applicable law, without establishing any new basis for liability.	Relying on liability under applicable law, without establishing any new basis for liability in the draft provisions, is simpler and has the same result of individually working through all the several elements needed to retain the liability provision but to reformulate it as a statutory basis for liability; meaning that elements such as fault could be removed, and adding a provision that any person suffering damage is entitled to bring a claim. Similarly, relying on contractual liability under applicable law without establishing a statutory basis for liability could subject the text to national law idiosyncrasies, thus potentially undermining consistent, global application.
Electronic Signature & Identity/ Identification/ Identifying	World Bank advises that the draft provisions should not say that an "e-signature" is used "to identify" a party, but rather that it is used to "authenticate" a party. There are two implications to consider: an "e-signature" should not be confused with "identity", nor should it be thought of as an "identity credential". The use of the verb "to identify" in art. 16 (1)(a), art. 20(1)(d) and art. 21 (1) (see below) may be misleading and could cause confusion given, first, the definition of "identity" (art. 1(d)) and, second, the use of identity in provisions relating to IdM and to electronic identification in articles 5–12. As such, it is recommended that art. 16(1)(a), art. 20(1)(d) and art. 21(1) of the draft provisions be revised as follows: "*Article 16. Electronic signatures* *1. Where a rule of law requires or permits a signature of a person, that rule is satisfied in relation to a data message if a reliable method is used to:* *(a) ~~identify~~ [authenticate] the person; and…*" "*Article 20. Electronic registered delivery services* *1. Where a rule of law requires or permits certain documents, records or information to be delivered by registered mail or similar service,*	The purpose of an e-signature is to ***authenticate*** a party to an e-transaction, a function which is for the benefit of the relying party to the e-transaction; by contrast, the "***identity***" of a person is principally for the benefit of the party making the assertion that they are who say they are (even if it may also be beneficial to the relying party to the transaction). The use of the term "to ***identify***" in the draft provisions may cause confusion between the two notions. An e-signature is not an identity credential. However, the generic use of the verb "to identify" in current art. 16 (even though drawn from art. 7 of the 2001 Model Law) mixes the two notions. The term's use is (probably) not meant to signify recognition of an "identity", nor to imply that the e-signature itself is an identity credential, as in the case of IdM. The "identification" of a party to an e-transaction via an e-signature is for the benefit of the other (relying) party to the transaction, providing that relying party with the comfort that the transaction cannot be repudiated: the e-signature is a reliable source of proof that the originating party is the party to the transaction. But the e-signature itself is neither an identity – that is, it is not "*a set of attributes that allows a person to be uniquely distinguished within a particular context*" (see art. 1(d)) – nor an identity credential. Rather than "identify", the e-signature ***authenticates*** – that is, it attributes an identifier (i.e., the e-signature) to an object (i.e., the asserting party to the transaction).

	that rule is satisfied in relation to a data message if a reliable method is used: *[…]* *(d) To ~~identify~~ [authenticate] the sender and the recipient.*" "*Article 21. Website authentication* *1. Where a rule of law requires or permits the authentication of a website, that rule is satisfied if a reliable method is used to ~~identify~~ [authenticate] the person who holds the domain name for the website and to link that person to the website.[…]*" These proposed revisions may require the addition of a defined term for "authentication" (differentiating it from "electronic identification" of art. 1(c)). It is understood that the use of "to identify" in the current draft is drawn from the 2001 Model Law on E-Signatures.	Perhaps the best way to handle this potential confusion is to deal with it in the commentary to the draft provisions.