



Funded by the European Union

EU TRADE RELATED ASSISTANCE PHASE II

Consultative Workshop on Draft Electronic Transactions Act

Celebrating



Years of Partnership

'Working Together - Wok Bung Wantaim'
#EUPNGPartnership

10 May 2018

Lamana Hotel

<http://www.pngeutra2.org.pg>



Implemented by the Department of
Trade, Commerce and Industry

Section of the Draft Electronic Transactions Act – Electronic Transferable Records

Ms. Irina Kireeva, Legal Expert



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



Why to move to the concept of Electronic Transferable Records?

- For traditional commerce, to carry out the complete commercial transaction a loads of paper based documentation is necessary (e.g. commercial invoices, certificates of origin, transport documentation, insurance policies etc.)
- It is said that paperwork costs reaches up to 10% of the transaction total value
- The aim: elimination of the paper based documentation



The concept of Electronic Transferable Records

TERM COVERING ELECTRONIC EQUIVALENTS FOR:

- **DOCUMENTS OF TITLE (Transferable documents)**
 - Documents which in the regular course of business or financing are treated as adequately evidencing that the person in possession of such document is entitled to receive, hold, and dispose of the document and the goods indicated therein
 - e.g. Bill of Lading, Warehouse receipt, Negotiable waybills & consignment notes
- **NEGOTIABLE INSTRUMENTS (Transferable instruments)**
 - Financial instruments that may contain an unconditional promise to pay a fixed amount of money to the holder of the instrument, or an order to a third party to pay the holder of the instrument
 - e.g. Bill of Exchange (Draft), Promissory Note, Cheque



Acknowledgement of UNCITRAL recent work:

- UNCITRAL IV - Working Group (on Electronic Commerce)
- Rules on ELECTRONIC TRANSFERABLE RECORDS
- Started in 2011 / end of work – 2017
- The output: Model Law on Electronic Transferable Records (MLETR)



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



What has been done so far?

- Introduction to the NON-DISCRIMINATION PRINCIPLE: *“Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form electronic record”*
- The contractual formalities have been satisfied in electronic environment through the FUNCTIONAL EQUIVALENCE approach (e.g. written form, signature, original)
- Evidentiary function of the electronic record has the same value as of the paper based documents



Substantive Law Remarks

Transferable document & instrument common features:

- A **promise or an order in writing** to perform the incorporated obligation which may consist of delivery of goods or payment to the lawful holder of the document
- **Transfer of incorporated rights** always requires the delivery of the document whether it is bearer, order or straight document (token function)
- The person claiming the incorporated rights must always identify themselves by presentation of a document



The Functional Equivalence

The functional equivalence is achieved by

PAPER BASED ENVIRONMENT	ELECTRONIC ENVIRONMENT
Transferable document & instrument	ETR
Writing form	Information is accessible so as to be usable for subsequent reference
<ul style="list-style-type: none">• Handwritten signature	<ul style="list-style-type: none">• Electronic signature
<ul style="list-style-type: none">• Incorporated right/obligation	<ul style="list-style-type: none">• Contained right/obligation
<ul style="list-style-type: none">• Uniqness	<ul style="list-style-type: none">• Authoritative record
<ul style="list-style-type: none">• Possesion	<ul style="list-style-type: none">• Control



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



Scope of Application

Electronic transferable records:

- Only equivalents for paper based transferable documents & instruments
- Securities such as shares and bonds are excluded
- Does not override law applicable to consumer protection



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



The principle of respect for substantive law, which is relevant throughout the Act, with respect to electronic transferable records.

Hence, existing law of Papua New Guinea applicable to each transferable document or interest (e.g. bills of lading, bills of exchange, promissory notes, checks and warehouse receipts) remains unaffected.



Definition of the Electronic Transferable Record:

Only Electronic Records that comply with law requirements:

- (a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and
- (b) A reliable method is used:
 - (i) To identify that electronic record as the electronic transferable record;
 - (ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and
 - (iii) To retain the integrity of that electronic record.



THE CONCEPT OF CONTROL

Requirements for the functional equivalence of possession of a transferable document or instrument. To that end, the system has to reliably establish **exclusive control of the record by the person in control**, and **to identify the person in control as such**.



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



THE CONCEPT OF CONTROL

Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

- (a) To establish exclusive control of that electronic transferable record by a person; and
- (b) To identify that person as the person in control.

Where the law requires or permits transfer of possession of a 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.



GENERAL RELIABILITY STANDARD

An open-ended list of elements that could be relevant to assess the reliability of the method used for managing electronic transferable records:

- (i) Any operational rules relevant to the assessment of reliability;
- (ii) The assurance of data integrity;
- (iii) The ability to prevent unauthorized access to and use of the system;
- (iv) The security of hardware and software;
- (v) The regularity and extent of audit by an independent body;
- (vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
- (vii) Any applicable industry standard.

Other relevant elements may include contractual agreements, as far as the relevant parties are concerned.



INDICATION OF TIME AND PLACE IN ELECTRONIC TRANSFERABLE RECORDS

Declaratory provision pointing at the need to provide certain information, such as that on time and place. That information may be provided automatically (e.g. with time-stamping or by embedding GPS coordinates) or may record a contractual agreement, when possible.



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



ENDORSEMENT & AMENDMENT

Clarification that endorsement, which is an event that occurs regularly in the life cycle of transferable documents and instruments, may be effected electronically by meeting the requirements for written form and for electronic signatures.

Amendment of electronic transferable records is admitted when possible for transferable documents and instruments. An additional requirement is provided, for the identification of amended information as such, since in an electronic form that amendment may not be immediately evident as it would be on paper.



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry



16

REPLACEMENT OF A TRANSFERABLE DOCUMENT OR INSTRUMENT WITH AN ELECTRONIC TRANSFERABLE RECORD AND VISA-VERSA

The procedure for replacing a transferable document with an electronic transferable record. The overarching goal is to avoid the circulation of two concurring valid documents, which may provide double title to claim the same goods or sum of money.

In practice, conversion from electronic to paper may occur more frequently since there may be a participant not ready or willing to use electronic means. It is to be noted that metadata will not be reproduced on the transferable document or instrument, but will have to be stored adequately.



NON-DISCRIMINATION OF FOREIGN ELECTRONIC TRANSFERABLE RECORDS

The principle of geographic non-discrimination with respect to electronic transferable records:

- An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad.
- No affect or derogation for electronic transferable records of rules of private international law governing a transferable document or instrument.



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry





Thank you for your attention!
Any questions?



Funded by the European Union
Implemented by the Department of Trade, Commerce and Industry

