



Guidance Notes to the I-REC(E) Standard Single Trade Agreement



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WAIVER: The following Guidance Note was developed with the support of the Secretariat of the International REC Standard Foundation exercising all reasonable care.

It serves as a general guide only for the purposes of assisting the users of the I-REC(E) Standard Single Trade Agreement. The International REC Standard Foundation, the International REC Standard Secretariat, its representatives, DLA Piper and other Counsel involved in the development, preparation and approval of this guidance shall not be liable or otherwise responsible for its use and any damages or losses resulting out of its use in any particular case and in whatever jurisdiction. It is the responsibility of each party wishing to use the I-REC(E) Standard Single Trade Agreement to ensure that its terms and conditions are legally binding, valid and enforceable and best serve to protect their legal interests.

This Guidance Note should be read in conjunction with the I-REC(E) Standard Single Trade Agreement.

This Guidance Note should not be relied on as absolute advice and does not replace legal counsel.

For information, comments or concerns regarding the I-REC(E) Standard Single Trade Agreement, this Guidance or any related information, contact DLA Piper at: andreas.gunst@dlapiper.com or kenneth.wallace-mueller@dlapiper.com

For additional information, comments or concerns, contact the I-REC Standard Foundation at: www.irecstandard.org or secretariat@irecstandard.org



Oleg Dobrovolsky
Regional Director, International
REC Standard Foundation
secretariat@irecstandard.org



Andreas Gunst
Partner, DLA Piper
T: +44 780 271 9480
andreas.gunst@dlapiper.com



Kenneth Wallace-Mueller
Senior Associate, DLA Piper
T: +44 207 796 6200
kenneth.wallace-mueller@dlapiper.com

Background to I-REC(E) certificate trading

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Background to the I-REC(E) Standard and I-REC(E) certificates

- The International REC Standard Foundation is a non-profit organisation which has developed and is responsible for the International REC Attribute Tracking Standard (the **I-REC Standard**).
- The I-REC Standard provides for a reliable attribute tracking system which:
 - offers a set of rules, known as the **I-REC(E) Code** and subsidiary documentation, which govern the tracking of renewable electricity production attributes from its generation location to its place of consumption; and
 - offers an operational attribute tracking system through its system of issuance, transfer and redemption of the relevant certificates for renewable power (the **I-REC(E)s**). The implementation of the tracking system is done on a voluntary basis in cooperation with a number of national authorities across the world.
- Currently the I-REC standard is operational in several countries throughout South America (e.g. Mexico, Brazil, Argentina), Africa (e.g. South Africa, Egypt, Nigeria) and the Asia-Pacific Region (e.g. China, India, Australia).
- For more information on the I-REC Standard, the I-REC(E) Code and its method of operation, please visit our website at www.irecstandard.org

Background to the I-REC(E) Standard and I-REC(E) certificates (ctd)

- An I-REC(E) is an electronic certificate issued for 1 MWh of renewable source electricity, which conveys information about the production of a unit of electricity, such as the country in which the electricity was produced, the identity of the production facility, and the energy source.
- An I-REC(E) is issued by the respective I-REC issuer in a given country or region and accredited to the electricity generator's account with the I-REC registry.
- I-REC(E)s are tradable certificates. The trade is performed via the I-REC registry, where participants may either transfer from one account to another account, or by the seller redeeming the certificates on behalf of the buyer.
- I-REC(E)s can be used for a variety of (voluntary) requirements, including Scope 2 reporting under the Green House Gas Protocol, national energy reporting (subject to the country), and general end-user claims.
- The I-REC(E) STA's purpose is to facilitate the national and international trade of I-REC(E)s by offering:
 - an agreement that takes into account the special features of I-REC Standard's tracking system; and
 - a standardised template based on recognised market provisions, which can be amended by the parties.

Guidance to the use of the I-REC(E) Single Trade Agreement

Clauses 1 to 4: Basic contractual terms

- **Clause 1** (*Subject of this Agreement and Interpretation*) relates to the operation of the agreement. Users are to include the date upon which they wish for the I-REC(E) STA to become effective.
- **Clause 2** (*Trade Identifier*) relates to the trade identifier, an optional reference number which may be agreed between specific Parties.
- **Clause 3** (*Seller*) and **Clause 4** (*Buyer*) include fields for parties to insert their specific information.
 - The Buyer's Account no. (**Clause 4** (*Buyer*) – *I-REC(E) Registry Details*) does not need to be populated in case the parties agree on transfer by redemption statement transfer (see **Clause 6.1** (*Buyer*)).
 - The format of the I-REC(E) STA allows parties to include additional details beyond the expressly listed fields.
 - By way of example, where the authorised signatory for a party is a different person from the contract manager, this may be separated included.
 - Additionally, where a party is a larger corporate entity with a dedicated trading team, their contact details may be included, as well as instructions on the responsible contact person in different circumstances.

Clause 5: Transaction details

- Under **Clause 5.1** (*I-REC(E) Details*) refers to the **Annex**, where users may specify the production period, country of production, production device details, issuer, country of delivery, technology, delivery date, quantity (in MWh), the I-REC(E) price and the contract price for all I-REC(E)s to be traded under one agreement. The final column offers space to include any additional details the parties may want to specify. Depending on how many batches of I-REC(E)s shall be traded, lines may be deleted or added as appropriate.
- The field in **Clause 5.2** (*Default Interest Rate*) allows the parties to insert an agreed interest rate for late payments, e.g. 3 % above the three months EURIBOR interest rate per annum.
- The fields in **Clause 5.3** (*Special Conditions*) may be used to add further specifications beyond those specified under Clause 5.1 in conjunction with the Annex and Clause 5.2.

Clause 6: Transfer mechanism

- **Clause 6.1** (*Transfer*) provides for two different transfer options in respect to the I-REC(E)s, of which users may choose one by ticking the relevant box, namely:
 - Electronic Transfer, where I-REC(E)s are electronically removed from the seller's registry account and credited to the buyer's account; and
 - Redemption Statement Transfer, where the I-REC(E)s remain in the seller's account, but the seller must request the registry operator to cancel these I-REC(E)s (removing these from circulation) and the operator issues a standardised redemption statement, which can be transferred to the buyer in an agreed form, such as by email.
- Electronic transfers are in general more frequently used, including for national and international transfers.
- Redemption statements are commonly used in transactions, where a buyer does not have or does not wish to have a registry account.
- Where Redemption Statement Transfer is selected, **Clause 6.3** (*Delivery by Redemption Statement Transfer*) sets out the standard information that is set out by the I-REC Standard on a Redemption Statement.

Clause 6: Transfer mechanism (ctd)

- Where Electronic Transfer is selected, **Clause 6.4** (*Account with I-REC(E) Registry*) creates an obligation for both parties to ensure that their account is properly established and capable of delivering and accepting certificates. In practice, this means that both parties must hold accounts and have full transfer rights, rather than restricted accounts. For the avoidance of doubt, this obligation does not apply to the buyer in case transfer by redemption statement has been selected.
- **Clause 6.5** (*Title and Risk*) deals with the transfer of title and risk in both transfer mechanisms:
 - For Electronic Transfer, title and risk pass when the I-REC(E)s are credited to the buyer's account. Subject to any relief such as under force majeure, where I-REC(E)s are not credited in the buyer's account following transfer, the risk lies with the seller and the buyer will not be obliged to pay for such I-REC(E)s.
 - For Redemption Statement Transfer, as the I-REC(E)s themselves are not transferred, title and risk pass when the redemption statement is received by the buyer, which is commonly upon receipt of the email in the buyer's email account. If the redemption statement is not received, the buyer may request the seller to send another copy of the email.
 - In either case, no restrictions are placed on the party suffering loss from claiming damages from a responsible third party under the governing law of the I-REC(E) STA.

Clauses 7 to 9: Financial obligations

- **Clause 7** (*VAT and Local Taxes*) deals with VAT and local taxes in relation to the contract price. Clause 7.2 reflects the general position on VAT in the EU. Clauses 7.4 and 7.5 reflect a general wording for all other potential taxes triggered by the sale of I-REC(E)s under any national law which allows the seller to pass on other taxes to buyer and puts both parties under the obligation to do all things necessary in order to obtain an exemption or relief of other taxes associated with the sale of I-REC(E)s under applicable national tax law. This Clause 7 and the tax position more generally in relation to the transaction should however be considered by local counsel when negotiating the I-REC(E) STA.
- **Clause 8** (*Transaction Costs*) provides that each party bears its own fees and expenses incurred in connection with the I-REC(E) STA as well as the performance of the I-REC(E)s transaction contemplated under the I-REC(E) STA. This provision primarily serves to clarify the positions of the parties during the negotiations and performance of the executed contract.
- **Clause 9** (*Invoicing and Payment*) sets out the invoicing process, the relevant payment periods, and interest due on late payments. **Clause 9.5** deals in particular with invoice disputes, setting out a payment obligation on the buyer for the undisputed portion, and a true-up mechanism following resolution of the dispute.

Clause 10: Failure to deliver and accept

- **Clause 10** (*Failure to Deliver and Accept*) provides for two mechanisms, depending on whether the seller fails to deliver or the buyer fails to accept the quantity of I-REC(E)s (in full or in part), provided this is not due to force majeure.
- In either case, subject to a cure period of 3 business days following written notification by the non-defaulting party, the defaulting party is to pay compensation.
 - This is determined using the mark-to-market valuation method, which reflects the loss suffered by the non-defaulting party in selling or buying replacement I-REC(E)s.
 - This default compensation includes reasonable transaction costs and expenses which the non-defaulting party has incurred as a result of default. This includes brokerage fees, commissions and other third-party costs and expenses.
- Parties may wish to consider whether, instead of receiving compensation, they would prefer to receive replacement I-REC(E)s, either from the same project or a project of similar location or generation type. This can be amended using Clause 25 (*Special Conditions*).
- Whilst non-acceptance of I-REC(E)s may be considered an unlikely event given the automatic nature of electronic transfer, it is designed to cover events including where the buyer's account is incapable of receiving I-REC(E)s, as well as where an emailed copy of a redemption statement is not accepted by the buyer's email server.

Clauses 11 & 12: Risk allocation provisions

- **Clause 11** (*Representations and Warranties*) provides for:
 - transfer-specific representations and warranties for the seller and the buyer separately; and
 - general representations and warranties that apply to both parties, which are customary to B2B agreements and serve to confirm the relationship between and legal standing of the parties.
- More detailed representations and warranties of the seller may be desirable where the buyer is a trader or supplier seeking to sell the I-REC(E)s to an end-consumer for voluntary or mandatory compliance purposes. These may include restrictions to a certain project, energy source (e.g. wind, solar) or country.
- **Clause 12** (*Limitation of Liability*) sets a liability cap at an amount equal to the contract value, i.e. the Total Contract Price.
 - This liability cap is subject to mandatory limitation exemptions under national law.
 - The standard position of the I-REC(E) STA is derived from English law, and, in accordance with statutory requirements, carves out damage caused by gross negligence, intentional default or fraud from the liability cap.
 - Where the parties elect a specific governing law in **Clause 24.1**, this clause in particular would need to be considered and potentially amended by local counsel to avoid any competent court from striking it out.

Clause 13: Force majeure

- **Clause 13** provides a key exception to the rule that both parties must fulfil their contractual obligations owed to each other, specifically:
 - an event beyond the control of a party;
 - which it could not reasonably have avoided or overcome; and
 - which makes it impossible for such party to transfer or accept I-REC(E)s.
- In addition to this broad definition, **Clause 13.1(a)–(c)** includes three demonstrative examples common to I-REC(E) transfer agreements concerning:
 - the suspension, failure or malfunction of the I-REC(E) registry, including its transfer system;
 - in case of redemption statement transfer, a delay or refusal to redeem the I-REC(E)s by the registry operator, provided that such delay or refusal is not due to a breach of (i) the Seller, or of (ii) the Seller and an Upstream Party to comply with Applicable Rules; or
 - a failure of the issuer to validly issue the I-REC(E)s, provided that such delay or refusal is not due to a breach of (i) the Seller, or (ii) of the Seller and an Upstream Party to comply with Applicable Rules.
- Under **Clause 13.1(b) and/or (c)**, using the tickboxes parties may wish to expand the scope of force majeure to cover an upstream counterparty of the seller, which may be of particular relevance in a chain transaction. Of note is that the terms Applicable Rules covers I-REC scheme contracts, including any operational contracts entered into for the issuance of I-REC(E)s or registry access.

Clause 13: Force majeure (ctd)

- In **Clause 13.1(d)** users may add events which shall not constitute force majeure. If this option is not used, no express exclusions apply, and an event would need to fulfil the prescribed test. Additionally, users may wish to set out further transaction specific force majeure events in **Clause 25** (*Specific Conditions*).
- **Clause 13.2** sets out the process for a party to claim force majeure and requires such party to use all reasonable efforts to terminate or overcome the event. The claiming party is thereby relieved from its performance obligations (which are not suspended), and under **Clause 13.3** the other party is equally relieved from its obligations.
- Where a force majeure events lasts over 30 consecutive days, and
 - Affects only part of the I-REC(E)s to be delivered under the agreement, the parties may agree to discharge their respective obligations with regard to the affected quantity of the I-REC(E)s while the obligations regarding the non-affected quantity of I-REC(E)s remain unaltered; or
 - The whole quantity of I-REC(E)s is affected, then either party has the right to terminate in accordance with **Clause 15.2(e)** (*Term and Termination Event*).
- **Clause 13.5** provides for a definition of “Upstream Party” which shall apply in case the parties have chosen Clause 13.1(b)(ii) and/or Clause 13.1(c)(ii) to be applicable.
- **Clause 16.3** (*Change in Applicable Rules*) clarifies that, where an event may be captured by the definitions of a force majeure event and a change in applicable rules, it is deemed a change in applicable rules only.

Clause 14: Confidentiality

- **Clause 14.1** provides for a general disclosure prohibition of Confidential Information and **Clause 14.2** sets out an exhaustive list of exemptions.
 - Both the terms of the I-REC(E) STA itself as well as any other documents relating to the I-REC(E) STA are considered confidential information.
 - The contracting parties may separately agree on further specific documents or information that is to be considered confidential information in **Clause 25** (*Specific Conditions*).
- **Clause 14.3** extends the scope of a breach of the confidentiality obligation beyond contractual damages to allow for the affected parties to seek injunctive relief where available under the governing law and relevant jurisdictions.
- Under **Clause 14.4**, the confidentiality obligation survives the I-REC(E) STA by one year following the last delivery date. Such a survival clause is common in such trade agreements, however if users wish to remove, shorten or extend this period, this may be done in **Clause 25** (*Specific Conditions*).

Clause 15: Term & termination events

- **Clause 15.2** sets out five exhaustive events which entitle one or both parties to terminate.
 - These events are subject to express cure periods, with exception of insolvency (**Clause 15.2(a)**), force majeure exceeding 30 consecutive calendar days (**Clause 15.2(e)**) and an unresolved change in applicable rules event (however this is subject to a separate negotiating regime) (**Clause 15.2(f)**).
 - The termination event in **Clause 15.2(a)** regarding bankruptcy, insolvency or liquidation is based on English law and may not be enforceable under the insolvency law of specific jurisdictions. Subject to the choice of governing law, this clause should be reviewed by local counsel.
 - The parties may add or remove termination events or vary the length of the cure periods lengths under **Clause 25** (*Specific Conditions*).
- **Clause 15.3** and **Clause 15.4** set out the termination notification process.

Clause 15: Term & termination events (ctd)

- **Clause 15.5** sets out two calculations for the termination amount, which are separate depending on whether the seller or the buyer is the non-defaulting party.
 - The termination amount is determined using the mark-to-market valuation method, which reflects the loss suffered by the non-defaulting party in selling or buying replacement I-REC(E)s.
 - The termination amount calculation includes reasonable transaction costs and expenses which the non-defaulting party has incurred as a result of default. This includes brokerage fees, commissions and other third-party costs and expenses.
- **Clause 15.6** sets out that the non-defaulting party is to calculate the termination amount, and that payment of the termination amount is the sole remedy for losses resulting from the default and the termination.

Clause 16: Change in applicable rules

- The performance of the I-REC(E) STA is highly reliant on the legal structures set up by the International REC Standard Foundation as well as Evident/I-REC Services B.V., in particular the Evident Code for I-REC(Electricity) (**I-REC(E) Code**), Code Supporting Documents and the International Attribute Tracking Standard (**I-REC Standard**) (together the **I-REC Rules**).
- Additionally, the I-REC(E) STA also relies on statutory law, especially in those countries, where the I-REC(E) system has been implemented or supplemented by national statutory law.
- A change in the I-REC Rules or international, supranational (i.e. especially EU) or national law, a court judgment or administrative decision which materially affects these legal structures may cause performance of the I-REC(E) STA to be frustrated.
- **Clause 16** allows Parties to renegotiate the I-REC(E) STA where a change in applicable rules:
 - makes it impossible or unlawful to give effect to the I-REC(E) STA;
 - makes it impossible for a party to perform its delivery or acceptance obligations; or
 - materially and adversely affects the benefit of this agreement to the parties.
- The parties are obliged to negotiate in good faith (under **Clause 16.1**) for a period of 30 calendar days (under **Clause 16.2**), after which either party may terminate the I-REC(E) STA.

Clause 16: Change in applicable rules (ctd)

- **Clause 16.5** includes several definitions for the purposes of this Clause 16. Amongst others, “applicable rules” essentially includes
 - The I-REC Rules and any kind of ancillary or supporting documents;
 - Any private law entered into between the parties and an official I-REC entity (in particular the issuer, registry operator, code manager, I-REC Standard foundation); and
 - Any international, supranational (i. e. especially EU) or national binding legal instrument.
- Users may establish guidelines for these negotiations, introduce an escalation instance (such as a meeting between senior officers of the parties, or arbitration), vary the negotiation period, or add further events which may trigger the change in law negotiation rights under **Clause 25** (*Specific Conditions*).
- **Clause 16** does not exclude price adjustments as part of these negotiations, however users may restrict this right or add other conditions using **Clause 25** (*Specific Conditions*).

Clauses 17 to 20: Operation of the agreement

- Under **Clause 17** (*Assignment*) the rights or obligations of the I-REC(E) STA can only be assigned from one of the parties to a third party subject to prior written consent from the other contracting party.
 - Such consent is not required where the assignee is an affiliate of the assignor (as defined in **Clause 17.4**) incorporated in the same jurisdiction and has equivalent or greater creditworthiness.
- It is worth noting that novation (i.e. the replacement of one party to a new third party) under English law requires a separate deed of novation and is therefore not expressly regulated in the I-REC(E) STA.
 - Where the I-REC(E) STA is governed by another legal system, parties may wish to expressly detail such transfer rights (in addition to assignment) under **Clause 25** (*Special Conditions*).
- **Clause 18** (*Notification and Correspondence Terms*) sets out deemed delivery dates for any communication between the parties. This has particularly relevance to notification obligations and cure periods of termination events under **Clause 15** (*Term and Termination Event*).
- **Clause 19** (*Telephone Recordings and Personal Data Protection*) entitles parties to record any telephone conversations between themselves. Users should ensure they are in compliance with any statutory requirements such as the EU GDPR.
- **Clause 20** (*Severability*) provides that where a competent court deems any individual provision of the I-REC(E) STA to be invalid or unenforceable, the remaining provisions remain valid and enforceable. Users may wish to review this clause, as differing statutory requirements may apply in some jurisdictions.

Clauses 21 to 25: Operation of the agreement (ctd)

- **Clause 21** (*Entire Agreement*) provides that previous agreements, including oral agreements, are superseded by the I-REC(E) STA . Where two parties wish for an existing agreement to continue in force, this should be carved out from this provision using **Clause 25** (*Special Conditions*).
- Under **Clause 22** (*Amendment*) any amendments or additions to the I-REC(E) STA must be written and signed to have effect. This includes any amendments following change in law negotiations.
- **Clause 23** (*Third Party Rights*) excludes third parties from having any rights under the I-REC(E) STA.
- Under **Clause 24** (*Governing Law and Dispute Resolution*) users are to select an appropriate governing law for the I-REC(E) STA.
 - Parties should seek advice from local counsel from the jurisdiction of the governing law to ensure that the provisions of the I-REC(E) STA (as amended) are compliant and enforceable.
 - An additional consideration is the insolvency laws of the jurisdictions in which the parties are incorporated, as this may impact the enforceability of provisions including termination and continuing performance following insolvency of a party.
 - Under **Clause 24.2 and 24.3**, users may specify an applicable arbitration court.
- **Clause 25** (*Special Conditions*) allows users to add, remove (disapply), or modify any provisions of the I-REC(E) STA. Any such amendments should be discussed with local counsel to ensure enforceability.

