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Draft Model Law on Electronic Transferable Records with explanatory notes — Proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission

Note by the Secretariat

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I. Introduction

1. At its fiftieth session, in 2017, the Commission will have before it a draft model law on electronic transferable records with explanatory notes ([A/CN.9/920](#)) (referred to below as the “draft Model Law” and the “draft Explanatory Notes”) that reflects the deliberations and decisions of Working Group IV (Electronic Commerce) at its fifty-fourth session (Vienna, 31 October-4 November 2016). The Working Group, at that session, requested the Secretariat to revise the draft model law and the explanatory materials contained in document [A/CN.9/WG.IV/WP.139](#) and its addenda to reflect those deliberations and decisions and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft model law, so that the comments would be received before the Commission at its fiftieth session ([A/CN.9/897](#), para. 20). The comments of Governments and invited international organizations received by the Secretariat on the draft Model Law and the draft Explanatory Notes are contained in document [A/CN.9/921](#) and addenda (the “comments”).

2. Chapter II of this note proposes amendments to the draft Explanatory Notes. The draft Explanatory Notes refer to an introduction whose content was to be inserted by the Secretariat at a later stage. The Secretariat, in section A of chapter II of this note, proposes a draft introduction, which has not been before the Working Group, for consideration by the Commission. Section B of chapter II of this note reflects additional considerations that the Commission may wish to consider in finalizing the draft Model Law and the draft Explanatory Notes, which could be reflected in the article-by-article commentary of what will become the Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records. Those considerations are not raised in the comments or the report of the Working Group on the work of its fifty-fourth session ([A/CN.9/897](#)). They were brought to the attention of the Secretariat on the occasion of consultations held by experts around the world on the draft Model Law and the draft Explanatory Notes, including the Roundtable organized by the Centre for Commercial Law Studies at Queen Mary University of London on 15 February 2017, which the Secretariat attended remotely.

3. Finally, chapter III of this note raises issues of enactment of what will become the UNCITRAL Model Law on Electronic Transferable Records (the “Model Law”) and the relationship of that model law with other UNCITRAL texts in the area of electronic commerce. The Working Group, at its earlier sessions, only briefly discussed those issues (most recently, at its fifty-fourth session [A/CN.9/897](#), paras. 54-60).

II. Proposed amendments to the draft Explanatory Notes

A. Proposed introduction

“A. Purpose of this explanatory note

4. In preparing and adopting the UNCITRAL Model Law on Electronic Transferable Records (hereinafter referred to as “the Model Law”), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information would be provided. This Explanatory Note, drawn from the travaux préparatoires of the Model Law, is intended to be helpful to legislators, to providers and users of services related to electronic transferable records as well as to academics.

5. In the preparation of the Model Law, it was assumed that it would be accompanied by explanatory materials. For example, it was decided in respect of

certain issues not to settle them in the Model Law but to address them in the explanatory materials so as to provide guidance to States enacting the Model Law. Such information might assist States also in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

B. Objectives

6. The increased use of electronic means improves the efficiency of commercial activities, including by allowing reuse and analysis of data, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development both domestically and internationally. However, certainty is needed as to the legal value of the use of those electronic means. In order to address that need, UNCITRAL has prepared a number of texts aimed to remove obstacles to the use of electronic means in commercial activities such as the UNCITRAL Model Law on Electronic Commerce,¹ the UNCITRAL Model Law on Electronic Signatures² and the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”).³ Those texts have been adopted in a large number of jurisdictions so that a uniform law of electronic commerce has effectively been established.

7. Transferable documents and instruments are essential commercial tools. Their availability in electronic form may be greatly beneficial for facilitating electronic commerce in international trade as it could allow for their faster and more secure transmission, among other benefits. Moreover, a fully paperless trade environment may not be established without their use. Electronic equivalents of transferable documents and instruments may be particularly relevant for certain business areas such as transport and logistics, and finance. Finally, the introduction of electronic transferable records may offer an opportunity to review existing commercial practices and introduce new ones. At the same time, the dematerialisation of transferable documents and instruments may pose peculiar challenges given the established practice of employing various paper-based precautions in order to reduce risks associated with the unauthorized duplication of those documents and instruments.

8. UNCITRAL dealt with the subject of transferable documents and instruments in electronic forms before the adoption of the Model Law. The possibility of issuing bills of lading electronically is envisaged in article 14(3) of the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”).⁴ Articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce provide rules on actions related to contracts of carriage of goods and to transport documents that enable the dematerialization, among others, of documents incorporating a claim to delivery of goods.⁵ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”)⁶ devotes a chapter to electronic transport records. In particular, article 8 of the Rotterdam Rules provides for the use and effect of electronic transport records, article 9 indicates the procedures for use of negotiable electronic transport records and article 10 sets out rules for the replacement of negotiable transport documents with negotiable electronic transport records and vice versa. Moreover, the

¹ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication, Sales No. E.99.V.4.

² UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication, Sales No. E.02.V.8.

³ General Assembly resolution 60/21, annex.

⁴ United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

⁵ Those provisions have been enacted in national laws. However, details on their application in business practice are not available.

⁶ General Assembly resolution 63/122, annex.

Rotterdam Rules define both the notion of electronic transport record (article 1(18))⁷ and that of negotiable electronic transport record (article 1(19)).⁸

9. Unlike those instruments, the Electronic Communications Convention excludes from its scope of application “bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money” (article 2(2)). That exclusion was based on the view that finding a solution to the challenges posed by the potential consequences of unauthorized duplication of those documents and instruments required a combination of legal, technological and business solutions, which had not yet been fully developed and tested.⁹

10. In 2011, when the Commission decided to undertake work in the field of electronic transferable records, support was expressed for that work in light of benefits that the formulation of uniform legal standards in that field could bring to the promotion of electronic communications in international trade generally as well as to the implementation of the Rotterdam Rules and to other areas of transport business specifically.¹⁰ UNCITRAL decided to prepare a model law to enable the use of electronic transferable records on the basis of their functional equivalence with transferable documents or instruments, building upon the fundamental principles underlying existing UNCITRAL texts in the area of electronic commerce, namely non-discrimination against the use of electronic communications, functional equivalence and technological neutrality.

11. Facilitating the cross-border use of electronic transferable records is of significant practical importance. In that respect, it should be noted that national legislation predating the adoption of the Model Law and dealing with specific types of electronic transferable records did not address cross-border aspects. Moreover, to the extent that that legislation adopted specific models and technologies, the use of those models and technologies could create additional obstacles to the cross-border use of electronic transferable records. The Model Law aims at facilitating the cross-border use of transferable documents and instruments by providing not only a uniform and neutral text for adoption by all jurisdictions but also a dedicated provision addressing cross-border aspects of electronic transferable records.

12. UNCITRAL intends to continue monitoring the technical, legal and commercial developments that underline the Model Law. It may, if advisable, decide to add new model provisions to the Model Law or modify the existing ones.

C. Scope

13. The Model Law applies to electronic transferable records that are functional equivalent to transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer

⁷ Rotterdam Rules, article 1(18): “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage.

⁸ Ibid., article 1(19): “Negotiable electronic transport record” means an electronic transport record: (a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and (b) The use of which meets the requirements of article 9, paragraph 1.

⁹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 27.

¹⁰ Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 235.

of the claim to that performance by transferring the document or instrument. The law of each jurisdiction will determine which documents or instruments are transferable. Consequently, the Model Law does not apply to electronic transferable records existing only in electronic form and to medium-neutral electronic transferable records as those records do not need a functional equivalent to operate in the electronic environment.

14. The Model Law does not aim to affect in any manner existing law applicable to transferable documents or instruments, which is referred to as “substantive law” and includes rules on private international law.

D. Structure

15. The Model Law is divided in four chapters. The first chapter contains general provisions relating to the scope of application of the Model Law and to certain general principles. The second chapter contains provisions on functional equivalence. The third chapter contains provisions on the use of electronic transferable records. The fourth chapter deals with the cross-border recognition of electronic transferable records.

E. Background and drafting history¹¹

16. The possibility of future work by UNCITRAL with regard to issues of negotiability and transferability of rights in goods in an electronic environment was first mentioned at the Commission’s twenty-seventh session, in 1994,¹² and subsequently discussed in various sessions of the Commission and its working groups, in particular in the context of electronic commerce and transport law.¹³ In that framework, two documents have dealt in depth with substantive aspects of the topic:

(a) Document [A/CN.9/WG.IV/WP.69](#) discussed both paper-based and electronic bills of lading and other maritime transport documents. In particular, that document provided an overview of the attempts to deal with bills of lading in the electronic environment, and made suggestions for model legislative provisions which were eventually adopted as articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce. Furthermore, that document contained a preliminary analysis of the conditions for establishing the functional equivalence of electronic and paper-based bills of lading. In this respect, it highlighted as a key issue the possibility to identify with certainty the holder of the bill, which would be entitled to delivery of the goods. Such issue brought into focus the need to ensure the uniqueness of the electronic record incorporating the title to the goods;¹⁴

(b) Document [A/CN.9/WG.IV/WP.90](#) discussed in general legal issues relating to transfer of rights in tangible goods and other rights. It offered a comparative description of the methods used for the transfer of property interests in tangible property and for the perfection of security interests, and of the challenges posed by the transposition of those methods in the electronic environment. It also provided an update on ongoing efforts for the use of electronic means in transfer of rights in tangible goods. With respect to documents of title and negotiable instruments, that document stressed the desirability to ensure control over the electronic transferable record in a manner equivalent to physical possession, and suggested that a combination of a registry system and adequately secure technology

¹¹ References to specific documents and paragraphs are provided in this section of the note for ease of reference. The editorial style of the section will be aligned with that applied to the rest of the draft Explanatory Notes after their approval.

¹² *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, para. 201.

¹³ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 291-293. See also [A/CN.9/484](#), paras. 87-93. For an historical record of previous sessions, see [A/CN.9/WG.IV/WP.90](#), paras. 1-4.

¹⁴ [A/CN.9/WG.IV/WP.69](#), para. 92.

could assist in addressing issues relating to the singularity and authenticity of the electronic record.¹⁵

17. At its forty-first and forty-second sessions, in 2008 and 2009, respectively, the Commission received proposals from States for work on electronic transferable records.¹⁶ After preparatory work,¹⁷ the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.¹⁸

18. The Working Group worked in that field from its forty-fifth session (Vienna, 10-14 October 2011) to its fifty-fourth session (Vienna, 31 October-4 November 2016).¹⁹ At its forty-seventh session (New York, 13-17 May 2013), the Working Group reached the general understanding that its work should be guided by the principles of functional equivalence and technological neutrality, and should not deal with matters governed by the substantive law (A/CN.9/768, para. 14). At its fiftieth session (Vienna, 10-14 November 2014), the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23) with priority given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments (A/CN.9/828, para. 30). At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group completed its work on the preparation of a draft model law on electronic transferable records with accompanying explanatory materials. It authorized the transmission of the text (a) for comments by Governments and international organizations invited to sessions of the Working Group and (b) to the Commission for consideration at its fiftieth session, in 2017, together with any comments from Governments and international organizations (A/CN.9/897, para. 20).

19. At its forty-fifth to forty-ninth sessions, in 2012 to 2016, respectively, the Commission considered the progress report of the Working Group, reaffirming its mandate and endorsing its decision to prepare a model law with explanatory materials.²⁰ At its forty-ninth Commission session, in 2016, it was noted that the draft model law being prepared by the Working Group focused on domestic aspects of the use of electronic transferable records equivalent to paper-based transferable documents or instruments, and that international aspects of the use of those records, as well as the use of transferable records existing only in electronic form, would be addressed at a later stage.²¹

20. At its fiftieth session, in 2017, the Commission ... [*to be added by the Secretariat in due course*]

21. The General Assembly, by its resolution ... [*to be added by the Secretariat in due course*]"

¹⁵ A/CN.9/WG.IV/WP.90, paras. 35-37.

¹⁶ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 335; and *ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 338.

¹⁷ *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 245-247 and 250; and *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 232-235.

¹⁸ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

¹⁹ For the reports of the Working Group on the work of those sessions, see A/CN.9/737, A/CN.9/761, A/CN.9/768, A/CN.9/797, A/CN.9/804, A/CN.9/828, A/CN.9/834, A/CN.9/863, A/CN.9/869 and A/CN.9/897.

²⁰ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 90; *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 230; *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 149; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, para. 231; and *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 226.

²¹ *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 226.

B. Proposed amendments to the article-by-article commentary

Article 1. Scope of application

Paragraph 3

22. Paragraph 11(c) of the draft Explanatory Notes indicates that the possible types of exclusion from the scope of application of the Model Law include electronic transferable records existing only in an electronic environment. The Commission may wish to consider whether electronic transferable records whose substantive law is medium neutral should be added as a possible type of exclusion. Negotiable electronic transport records issued under the Rotterdam Rules provide an example of such electronic transferable records. The rationale for such exclusion could be that in both cases the need for a functional equivalent of transferable documents or instruments does not arise.

23. The Commission may also wish to consider whether it should be further explained that the possible exclusion of electronic transferable records existing only in an electronic environment and of electronic transferable records whose substantive law is medium neutral from the scope of application of the Model Law should not be interpreted as preventing the use of the Model Law or of some of its provisions, by contractual integration or as otherwise appropriate, in relation to the use of those electronic transferable records.

Article 2. Definitions

24. The Commission may wish to consider whether a clarification should be added that the reference to insurance certificates contained in paragraph 20 of the draft Explanatory Notes should not be understood as referring to various types of certificates and other documents required and issued under certain treaties concluded by the International Maritime Organization (IMO). Those documents are not “transferable documents or instruments” in the meaning of article 2 of the draft Model Law and therefore the Model Law would not be applicable.

25. In particular, “insurance certificates” issued to fulfil obligations contained in certain IMO treaties do not fall under the definition of “transferable documents or instruments”. For instance, the 1992 International Convention on Civil Liability for Oil Pollution Damage,²² the 2007 Nairobi International Convention on the Removal of Wrecks²³ and other so-called “civil liability conventions” contain the requirement that the shipowner shall maintain insurance in place covering the civil liability and impose an obligation on the government of the ships’ flag to issue a certificate confirming that the insurance is in place. That certificate is issued on the basis of an insurance policy, which very often in the shipping industry is called a “Blue Card”. The underlying insurance may be considered to be “transferable”, but the certificate is an administrative document confirming that the relevant government body has verified that the insurance policy is in place.

Article 4. Party autonomy and privity of contract

26. In light also of the considerations expressed in paragraph 32 of the draft Explanatory Notes, the Commission may wish to consider whether additional guidance should be provided in identifying provisions of the Model Law from which the parties may derogate. In that respect, the suggestion has been made that derogations should be allowed only with respect to chapter III of the Model Law and as permitted by substantive law.

²² United Nations, *Treaty Series*, vol. 1956, p. 255.

²³ IMO document LEG/CONF.16/19; 46 International Legal Materials 694 (2007).

Article 7. Legal recognition of an electronic transferable record

27. The Commission may wish to consider whether paragraph 48 of the draft Explanatory Notes should be revised to reflect that not all token-based and distributed ledger-based systems lack a centralized operator. The revised paragraph could read: "... such as some token-based and distributed ledger-based systems, ...".

Article 9. Signature

28. The Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes that an electronic record could be signed by a legal person when permissible under substantive law and that therefore reference to electronic signatures in article 9 of the draft Model Law is intended also as reference to electronic seals or other methods used to enable the signature of a legal person electronically.

Article 10. Requirements for the use of an electronic transferable record*Subparagraph 1(b)(iii)*

29. In paragraph 81 of the Explanatory Note it is explained that, while integrity is a fact and, as such, is objective, the reliable method used to retain integrity is relative or subjective. In that paragraph it is also explained that the general reliability standard contained in article 12 of the draft Model Law applies to the assessment of the method used to retain integrity. However, paragraph 119 of the Explanatory Note indicates that the general reliability standard contained in article 12 is objective. The Commission may wish to consider whether the relationship between the notion of integrity and the application to that notion of a general reliability standard should be further clarified.

Paragraph 2

30. The Commission may wish to consider whether a clarification should be inserted in the draft Explanatory Notes that the notion of integrity would allow, among others, a reliable assurance of the link between any electronic signature affixed on the electronic transferable record and the content of that record at the time the electronic signature was affixed so that, in practice, that link could permit verification of the content of the record that was actually signed.

Article 12. General reliability standard

31. The Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that the operational rules referred to in subparagraph (a)(i) of article 12 of the draft Model Law may contain an agreement on reliability and that, in that case, that agreement would not be relevant for third parties.

32. The Commission may also wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that reference to "industry standard" in subparagraph (a)(vii) of article 12 of the draft Model Law should not be interpreted in a manner that could hinder supply chain management. In that respect, the Commission may wish to note that applicable standards are often understood as accepted standards, but that the acceptance of those standards may be limited to a specific business field (e.g. banking or maritime transport). Moreover, the Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that reference to "industry standard" should not be interpreted in a manner that could hinder competition.

Article 15. Issuance of multiple originals

33. The Commission may wish to consider whether a clarification should be inserted in the draft Explanatory Notes that the issuance of multiple originals does not affect the implementation of the notion of singularity, reflected in article 10, paragraph (1)(b)(i), of the draft Model Law, as each original would be identified as the electronic transferable record. It may further wish to consider whether it should also clarify that, in the case of issuance of multiple originals, control may be exercised on each electronic transferable record by different entities, and therefore it does not need to be necessarily exercised simultaneously on all of the records by the same entity.

34. With respect to paragraph 131 of the draft Explanatory Notes, the Commission may wish to note that, further to enquiry, it was indicated that the practice of issuing multiple originals in an electronic environment did not exist yet, but its implementation had been requested by business. It is therefore suggested to replace the words “the practice of” with the words “a business demand for”.

35. With respect to paragraph 132 of the draft Explanatory Notes, it has been observed that applicable law designed to operate in a paper-based environment is unlikely to provide explicitly for the case of issuance of multiple originals on different media. The Commission may therefore wish to consider whether to further clarify that the Model Law does not prevent the issuance of multiple originals on different media when applicable law permits the issuance of multiple originals on paper.

III. Relationship of the draft Model Law with other UNCITRAL texts in the area of electronic commerce

36. Preliminary work on the enactment of the Model Law has highlighted certain issues relating to the interplay between the draft Model Law and pre-existing UNCITRAL texts on electronic commerce as well as to some issues relating to legislative techniques in the enactment of the Model Law. Those issues may be particularly relevant for jurisdictions that have already enacted UNCITRAL texts in the area of electronic commerce.

37. The Working Group has discussed the relationship between the draft model law and the existing UNCITRAL texts in the area of electronic commerce (most recently, at its fifty-fourth session ([A/CN.9/897](#), paras. 58-60)), and specifically with respect to draft article 9 on electronic signatures ([A/CN.9/797](#), para. 40, and [A/CN.9/WG.IV/WP.124](#), para. 34).

Relationship with articles 16 and 17 of the Model Law on Electronic Commerce

38. UNCITRAL has dealt with electronic transferable records used in conjunction with the carriage of goods in articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce.²⁴

39. Articles 16 and 17 of the Model Law on Electronic Commerce are based on an approach different from that adopted in the draft Model Law. For instance, article 17, paragraph 3, of the Model Law on Electronic Commerce refers to the notion of “uniqueness” as a requirement to establish the functional equivalence of “possession”. On the other hand, article 10 of the draft Model Law relies on the notions of “control” and “singularity” to achieve that result.

40. Hence, jurisdictions having enacted articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce may need guidance on the relationship between those articles and the Model Law when reviewing their legislation with a

²⁴ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication, Sales No. E.99.V.4.

view to modernizing it. The Commission may wish to consider whether it should recommend that those jurisdictions should consider replacing those articles with an enactment of the Model Law.

41. The Commission may also wish to consider whether it should recommend that jurisdictions intending to enact articles 16 and 17 of the Model Law on Electronic Commerce should consider instead enacting the Model Law.

Methods of enactment of the Model Law and their effect on functional equivalence standards

42. In national law, provisions on the functional equivalence of the notions of “writing” and “signature” are usually contained in the general law on electronic transactions. They are often based on the corresponding provisions of the Model Law on Electronic Commerce and of the UNCITRAL Model Law on Electronic Signatures.²⁵

43. Article 8 of the draft Model Law is inspired by article 6, paragraph 1, of the Model Law on Electronic Commerce. Unlike article 9, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”),²⁶ draft article 8 refers to the notion of “information” instead of “communication” as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37).

44. Article 9 of the draft Model Law, on electronic signatures, is inspired by article 7, paragraph 1(b), of the Model Law on Electronic Commerce, as amended by article 9, paragraph 3, of the Electronic Communications Convention. Draft article 9 does not follow the two-tier approach adopted in article 6 of the Model Law on Electronic Signatures (A/CN.9/797, para. 40).

45. Regardless of whether the Model Law is enacted as a stand-alone piece of legislation or as part of the general law on electronic transactions, the enacting jurisdiction may indicate that the general law on electronic transactions will apply to electronic transferable records, unless the law on electronic transferable records provides otherwise.

46. In that case, if articles 8 and 9 of the Model Law are enacted, a special functional equivalence regime would apply to electronic transferable records. However, if articles 8 and 9 of the Model Law are not enacted, the same functional equivalence standard for the notions of “writing” and “signature” would be applicable to transferable and non-transferable electronic records.

47. In light of the above, the Commission may wish to provide guidance on techniques of enactment of the Model Law, in particular, as part of the general legislation on electronic transactions. In doing so, it may wish to indicate whether it would be preferable that different or a single functional equivalence standard for the notions of “writing” and “signature” should apply to transferable and non-transferable electronic records, taking into account that the Model Law may provide a more modern approach with respect to electronic signatures.

48. Moreover, the Commission may wish to clarify the relationship, if any, between article 12 of the draft Model Law, on a general reliability standard, and article 10 of the UNCITRAL Model Law on Electronic Signatures, on trustworthiness of systems, procedures and human resources used by a certification service provider.

²⁵ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication, Sales No. E.02.V.8.

²⁶ General Assembly resolution 60/21, annex.

Possible compilation of consolidated UNCITRAL model provisions on electronic commerce

49. Although electronic communications have already been used in commercial transactions for some time, increased familiarity of the business community constantly improves the understanding of their possible use. In turn, that additional knowledge leads to the development of new business models and practices, which may require adequate legal treatment.

50. Such evolution suggests verifying periodically the continuing suitability of UNCITRAL texts on electronic commerce for modern commercial operations conducted with electronic means. For instance, article 10 of the Electronic Communications Convention on time and place of dispatch and receipt of electronic communications, modifies certain aspects of article 15 of the Model Law on Electronic Commerce.²⁷ The introduction of the Model Law may bring an additional layer of complexity in light also of the considerations expressed above (paras. 38-48).

51. In that respect, it should be further noted that a significant amount of jurisdictions have enacted domestically provisions contained in the Electronic Communications Convention without formally adopting the treaty, while others have done so in conjunction with or in preparation for formal adoption of that Convention.

52. Moreover, chapters on electronic commerce contained in free trade agreements and paperless trade facilitation agreements increasingly refer to the Model Law on Electronic Commerce or to the Electronic Communications Convention as desirable legislative standards. However, given the variations introduced with the evolution of those texts, it may not be assured that jurisdictions would always enact the most recent uniform legislative model.

53. In light of the above, the Commission may wish to consider whether the consolidation and compilation of the provisions of the UNCITRAL model laws in the area of electronic commerce and of the substantive provisions of the Electronic Communications Convention could be desirable and useful. That work would exclude the preparation of new legislative provisions. Its outcome would offer a coherent and convenient uniform model to jurisdictions wishing to adopt or modernize laws in that area.

²⁷ Explanatory Note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, United Nations Publication, Sales No. E.07.V.2, paras. 177 and 183.