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

### **Note by the Secretariat**

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## I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>1</sup>
2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the final form of its work (A/CN.9/761, paras. 90-93).
3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.
4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.
5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record.
6. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).
7. At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.132 and Add.1. The Working Group focused its discussion on the definitions of electronic transferable record, possession and control. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/834, paras. 21-108).

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<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

## II. Draft Model Law on Electronic Transferable Records

### A. General

#### “Draft article 1. Scope of application

- “1. This Law applies to electronic transferable records.
- “2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a paper-based transferable document or instrument.
- “[3. This Law applies to electronic transferable records other than as provided by [the law governing a certain type of electronic transferable record to be specified by the enacting State].”

#### Remarks

8. Draft article 1 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).
9. Draft paragraph 2 sets forth the general principle that the draft Model Law does not affect substantive law applicable to paper-based transferable documents or instruments and to their electronic equivalents. This principle applies to each step of the life cycle of an electronic transferable record. For instance, it enables the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/797, para. 65). It also allows changing the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case (“blank endorsement”) when permissible under substantive law (A/CN.9/828, para. 82).
10. Draft paragraph 3 aims at allowing the application of the draft Model Law also to electronic transferable records that exist only in an electronic environment without interfering with substantive law. In that respect, it should be noted that, in principle, electronic transferable records that are functional equivalent of paper-based transferable documents or instruments and electronic transferable records that exist only in an electronic environment may co-exist in the same jurisdiction. Hence, draft paragraph 3 would not be necessary in jurisdictions where those electronic transferable records do not exist (A/CN.9/797, para. 17).
11. However, the Working Group may wish to note that a law applicable to electronic transferable records that exist only in an electronic environment is likely to define its substantive scope of application. Moreover, the substantive law applicable to an electronic transferable record equivalent to a paper-based transferable document or instrument is defined by reference to that equivalent paper-based transferable document or instrument. The Working Group may wish to consider whether to retain draft paragraph 3 in light of those considerations.

**“Draft article 2. Exclusions**

- “1. This Law does not override any rule of law applicable to consumer protection.
- “2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.
- “3. [This Law does not apply to bills of exchange, promissory notes and cheques.]”

**Remarks**

12. Draft article 2 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20).

13. The Working Group may wish to discuss whether draft paragraph 1 should be retained in light of the fact that draft article 1, paragraph 2, already indicates that the draft Model Law does not affect substantive law. In case it is retained, the Working Group may also wish to consider whether that draft provision should be placed elsewhere in the Model Law, for instance in draft article 1, as it may not constitute an exclusion from the scope of application of the law.

14. The term “securities” in draft paragraph 2 does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes (A/CN.9/834, para. 73).

15. The term “investment instrument” is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

16. The Working Group may wish to confirm that shares and bonds are excluded from the scope of application of the Model Law also when considered negotiable instruments in the relevant jurisdictions.

17. Draft paragraph 3 reflects a view that certain paper-based transferable documents or instruments should be excluded from the scope of application of the Model Law in order to avoid conflicts with treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the “Geneva Conventions”) in jurisdictions where those treaties are in force (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

18. The Working Group may wish to consider whether paragraph 3 should be retained in the draft Model Law to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact the Model Law.

19. Alternatively, the Working Group may wish to consider whether draft paragraph 3 should be drafted as an open-ended exclusion clause along the following lines: “This Law does not apply to [...]” to permit selective application of the Model Law in light of the features of the enacting jurisdiction. That approach could also provide additional flexibility in including in the list, if so wished, certain

instruments or documents, such as letters of credit, whose legal status under the Model Law may be unclear.

**“Draft article 3. Definitions**

“For the purposes of this Law:”

**Remarks**

20. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft Model Law (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition. The Working Group may wish to review the draft definitions once the draft articles of the Model Law have been fully considered and the use of the defined terms ascertained (A/CN.9/828, para. 66).

21. All references to “holder” with respect to an electronic transferable record in the draft provisions have been deleted and replaced with “person in control” (A/CN.9/804, para. 85). The Working Group may wish to clarify in draft article 3 that a “person” may either be a natural or a legal person.

*“electronic transferable record”* means [an electronic record] [containing authoritative information] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

**Remarks**

22. The definition of “electronic transferable record” reflects the Working Group’s deliberations at its forty-eighth (A/CN.9/797, paras. 21-28) and fifty-first (A/CN.9/834, paras. 23-26, 88 and 95-98 and 100) sessions.

23. The definition of “electronic transferable record” aims at covering both electronic transferable records that are equivalent to paper-based transferable documents or instruments and electronic transferable records that exist only in an electronic environment (A/CN.9/797, para. 23). The Working Group may wish to consider whether that definition should be reviewed in light of the decision to prepare on a priority basis provisions dealing with electronic equivalents of paper-based transferable documents or instruments.

24. The definition of “electronic transferable record” does not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control as well as the substantive rights of the person in control. It also does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft Model Law.

25. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under this definition and that the draft Model Law should only focus on “transferable” documents (A/CN.9/797, paras. 27-28).

26. The words “[containing authoritative information]” were included for further consideration pursuant to a discussion on draft article 10 (A/CN.9/834, paras. 26 and 88) and should therefore be considered in conjunction with that draft article.

27. The Working Group may wish to consider whether the term “[indicated]” is appropriate or whether other terms such as “represented by”, “incorporated”, “specified” or “contained” (A/CN.9/797, para. 22) shall be used.

28. The Working Group may wish to take into account the definition of “electronic record” when considering the definition of “electronic transferable record” (see below, para. 74).

29. At the Working Group’s fifty-first session different views were expressed with respect to the need of retaining the definition of “electronic transferable record” (A/CN.9/834, paras. 95-98). In particular, the view was expressed that an electronic record complying with the requirements set forth in draft article 10 would be an electronic transferable record functionally equivalent to the corresponding paper-based transferable document or instrument. Hence, a definition of electronic transferable record may not be necessary or may be limited to reference to the requirements set forth in draft article 10.

30. In the same line, at that session the following definition of electronic transferable record was suggested, containing a reference to the information requirement in a paper-based transferable document or instrument and the requirements set forth in draft article 10 (A/CN.9/834, para. 100):

*“electronic transferable record”* [is an electronic record that contains all of the information that would make a paper-based transferable document or instrument effective and that complies with the requirements of article 10].

31. Different considerations could apply with respect to a definition of “electronic transferable records” applicable to electronic transferable records existing only in electronic form, which are to be discussed at a later stage.

*“paper-based transferable document or instrument”* means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.

Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.

#### **Remarks**

32. The definition of “paper-based transferable document or instrument” reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). It does not aim at affecting substantive law.

33. The Working Group may wish to consider whether the definition of paper-based transferable document or instrument should be retained in light of its substantive law implications.

34. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, which is inspired by article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”), should be included in the definition of “paper-based transferable document or instrument” or in explanatory material (A/CN.9/768, para. 34 and A/CN.9/797, paras. 25-26), bearing also in mind the content of draft article 2, paragraph 3. The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

“*electronic record*” means information generated, communicated, received or stored by electronic means [, including, where appropriate, all information logically associated with or otherwise linked [together] [thereto] [to it] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently]].

#### Remarks

35. The definition of “electronic record” is based on the definition of “data message” contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The bracketed text aims at highlighting the fact that information may be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). That bracketed text is also meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43). The Working Group may also wish to recall its discussion of “electronic record” with respect to draft article 10 (A/CN.9/828, para. 31).

“*issuer*” means a person that issues, directly or with the assistance of a third party, an electronic transferable record.

#### Remarks

36. The Working Group may wish to consider deleting the definition of “issuer”, which is not used in the draft Model Law after the deletion of draft provisions on issuance (A/CN.9/797, paras. 64-67) and on retention (A/CN.9/834, para. 77).

37. The words “, directly or with the assistance of a third party,” aim at clarifying that when an electronic transferable record is issued by a third-party service provider upon the issuer’s request, the third-party service provider is not considered an issuer under the draft provision (A/CN.9/768, para. 33).

[“*control*” of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].]

#### Remarks

38. The draft definition of “control” has been placed in square brackets further to a decision of the Working Group at its fiftieth session made in conjunction with its

consideration of draft article 17 on possession (A/CN.9/828, paras. 66-67). Draft article 17 aims at setting forth the requirements necessary to establish control as the functional equivalent of possession. In light of the fact that possession is a notion defined in substantive law, the Working Group may wish to consider whether a definition of “control” is necessary (A/CN.9/834, para. 83).

“*amendment*” means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 20.

#### **Remarks**

39. The Working Group may wish to consider deleting this definition in light of the fact that the term “amendment” occurs only in draft article 20, which, in turn, currently contains a functional equivalence rule. Moreover, defining the term “amendment” might be interpreted as having unintended substantive law implications.

“*performance of obligation*” means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

#### **Remarks**

40. The Working Group may wish to consider whether to retain this definition in light of its substantive law implications. The draft definition refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22). The term “performance of obligation” appears in the definitions of “electronic transferable record” and of “paper-based transferable document or instrument”.

“*obligor*” means the person [indicated] in a paper-based transferable document or instrument or in an electronic transferable record as having the obligation to perform [the obligation contained in that document, instrument or record].

#### **Remarks**

41. The definition of “obligor” has been reviewed in order to further clarify that it has only descriptive value and that substantive law shall determine who the obligor is. The Working Group may wish to consider whether the definition of “obligor” should be retained in light of the fact that the notion may be defined under substantive law.

42. The term “obligor” currently appears only in draft article 18 on presentation. The Working Group may wish to consider the continued relevance of that draft definition in light of the final form of that article.

43. If the definition of “obligor” is retained, the Working Group may wish to consider whether the term “[indicated]” is appropriate or whether another term may be used (see para. 27 above).

“*replacement*” means substitution of an electronic transferable record for a paper-based transferable document or instrument or [vice versa] [conversely]



[substitution of a paper-based transferable document or instrument for an electronic transferable record].

#### Remarks

44. The Working Group may wish to consider deleting the definition of the term “replacement” since that term no longer appears in the draft Model Law.

#### “Draft article 4. Interpretation

“1. This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].

“2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

#### Remarks

45. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that domestic enactments of the Model Law should be interpreted with reference to their international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). Similar wording is found in article 3 of the UNCITRAL Model Law on Electronic Commerce and in article 4 of the UNCITRAL Model Law on Electronic Signature.

46. The words “This Law is derived from a model law of international origin” have been included pursuant to a decision made by the Working Group at its forty-seventh session, in order to emphasize that the law constituted an enactment of a model law with international origin (A/CN.9/768, para. 35). Those words do not appear in other UNCITRAL texts. Alternatively, the Working Group may wish to consider whether that language should be contained and the underlying notion be further developed in guidance materials.

47. The Working Group may wish to consider whether the words “[and the observance of good faith]” should be retained in light of the possible substantive law implications, and, in particular, of the relevance that the notion of good faith has in the substantive law of paper-based transferable documents or instruments. Reference to good faith is contained in several other UNCITRAL texts, including those on electronic commerce. Alternatively, the Working Group may wish to clarify whether that reference is intended as to good faith in the application of the law.

48. The notion of “general principles” contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG”) is the provision containing that notion that has been most interpreted by case law.

49. The notion of “general principles” contained in draft paragraph 2 refers to the general principles of electronic communications (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the fundamental principles of non-discrimination against electronic communications, technological neutrality and functional equivalence are

general principles underlying the draft Model Law. Other general principles might be identified as the work of the Working Group progresses.

50. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant to define the notion of general principles contained in the draft Model Law.

**“Draft article 5. Party autonomy [and privity of contract]**

“1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 1, 2, 4, 5 paragraph 2, 6, 7, [...]][, unless that agreement would not be valid or effective under applicable law].

“2. Such an agreement does not affect the rights of any person that is not a party to that agreement.”

**Remarks**

51. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32).

52. While party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts, the Working Group may wish to note that that principle has found some limits in its implementation in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy. Article 4 of the UNCITRAL Model Law on Electronic Commerce and article 5 of the UNCITRAL Model Law on Electronic Signature provide examples of that approach. The words “[, unless that agreement would not be valid or effective under applicable law]”, contained in article 5 of the UNCITRAL Model Law on Electronic Signature, have been inserted in draft article 5 of the Model Law to reflect that approach.

53. Alternatively, the possibility of derogating from or varying a provision of the draft Model Law could be indicated by inserting specific language, such as “unless otherwise agreed by the parties”, in the provision that may be derogated from or varied by the parties.

**“Draft article 6. Information requirements**

“Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.”

54. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

**B. Provisions on electronic transactions**

55. The Working Group at its forty-eighth session decided to retain draft articles 7-9 as a separate section (A/CN.9/797, para. 34). The Working Group may

wish to review its decision in light of the final form of the draft Model Law as well as the content of those articles.

**“Draft article 7. Legal recognition of an electronic transferable record**

“An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.”

**Remarks**

56. Draft article 7 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 7 in its current form (A/CN.9/804, para. 17, see also A/CN.9/768, para. 39).

**“Draft article 8. Writing**

“Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference.”

**Remarks**

57. Draft article 8 reflects the Working Group’s deliberations at its forty-ninth session (A/CN.9/804, paras. 18-19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38). 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).

58. Pursuant to a decision of the Working Group at its fifty-first session, the explanatory material to the draft provisions will reflect the understanding that any legal requirement contained in the draft Model Law implies consequences for the case it is not met, making it not necessary to explicitly refer to those consequences (A/CN.9/834, paras. 43 and 46). Accordingly, the words “or provides consequences for the absence of a writing” have been deleted from draft article 10 and elsewhere throughout the draft Model Law since they are redundant.

59. At the forty-ninth session, it was suggested that draft article 8 might not be necessary as the fulfilment of the functional equivalence of the “writing” requirement was implied in the definition of “electronic transferable record” in draft article 3. In response, it was stated that a rule on the “writing” requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to consider the desirability of maintaining draft article 8 in light of draft articles 10 and 11.

60. In case of law applicable to electronic transferable records existing only in electronic form, the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 8, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

**“Draft article 9. Signature**

“Where the law requires a signature of a person, that requirement is met [with respect to] [in relation to] [by] an electronic transferable record if:

- (a) A method is used to identify that person and to indicate that person’s intention in respect of the information contained in the electronic record; and
- (b) The method used is either:
  - (i) As reliable as appropriate for the purpose for which the electronic record was generated, in the 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.”

**Remarks**

61. Draft article 9 reflects the Working Group’s deliberations at its forty-ninth session (A/CN.9/804, para. 20). It establishes the requirements for the functional equivalence of “signature” (ibid.) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46; see also A/CN.9/834, para. 43). Draft article 9 is based on the text of article 9, paragraph 3, of the Electronic Communications Convention. The words “or provides consequences for the absence of a signature” have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

62. The reference in draft subparagraph (b)(i) to “as reliable as appropriate” is similar to that contained in article 9, paragraph 3, of the Electronic Communications Convention and is distinct from the references contained in other draft articles to a “reliable method”. The Working Group may wish to clarify whether that reference is distinct from the reference to a method “as reliable as appropriate” contained in draft article 17 since that draft article deals with functional equivalence of possession, which is not discussed in the Electronic Communications Convention.

63. The explanatory note to the Electronic Communications Convention provides guidance on the content and operation of the notion of “reliability” in the context of article 9, paragraph 3, of that Convention.<sup>2</sup> The Working Group may wish to confirm that the guidance provided in that explanatory note would be appropriate in interpreting draft article 9, subparagraph (b)(i).

64. In that respect, the Working Group may wish to clarify whether the general reliability standard contained in draft article 11 would also apply to draft article 9, subparagraph (b)(i) (A/CN.9/804, para. 20).

65. Another option would be to include in draft article 9 text similar to the requirements set forth in article 6, paragraph 3, of the Model Law on Electronic Signatures, thus providing a specific reliability standard applicable only to draft

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<sup>2</sup> United Nations, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, paras. 161-164.

article 9, subparagraph (b)(i). It should, however, be noted that the Working Group had already agreed that such “two-tier” approach would not be adopted in the draft provisions (A/CN.9/797, para. 40).

66. The Working Group may wish to consider whether the text of draft article 9 should better clarify that that provision applies to electronic transferable records only and not to other electronic records that are not transferable but are somehow related to an electronic transferable record. Alternative wording is suggested to that end. The words “with respect to” have been used in the chapeau of draft article 9. The words “in relation to” are used in article 9, paragraph 3, of the Electronic Communications Convention. The word “by” has been used in other UNCITRAL provisions on functional equivalence and may suggest a narrower application of draft article 9.

#### **Remarks on “original”**

67. After noting that the notion of “original” in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for “original” in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of “control”. It was further explained that the notion of “control” could identify both the person entitled to performance and the object of control (A/CN.9/804, para. 39).

### **C. Use of electronic transferable records**

#### **“Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]”**

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

(a) The electronic record contains the information that would be required to be contained in an equivalent paper-based transferable document or instrument; and

(b) A method is employed:

(i) That is as reliable as appropriate to identify that electronic record as the [authoritative] record constituting the electronic transferable record;

(ii) [To render] [That renders] that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) That is as reliable as appropriate, to retain the integrity of the electronic transferable record”.

“2. The criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [authorized] change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

### Remarks

68. Draft article 10 has been recast in light of the Working Group’s deliberations at its fifty-first session (A/CN.9/834, paras. 21-30, 85-94 and 99). The current text aims at combining the two prevalent approaches to avoid multiple claims for performance, i.e. “singularity” and “control” (A/CN.9/834, para. 86).

69. Draft article 10 aims to offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 10 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of “control” would make it possible not to refer to the notion of “uniqueness”, which posed technical challenges (A/CN.9/804, para. 38).

70. The Working Group agreed that reference to the definition of “electronic record” would suffice to provide for cases when, as it may happen in certain registry systems, there might be data elements that, taken together, provided the information constituting the electronic transferable record, with no discrete record constituting the electronic transferable record (A/CN.9/828, para. 31).

71. The words “or provides consequences for its absence” have been deleted in draft paragraph 1 pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

72. Subparagraph 1(a) states that the electronic record should contain the information required in a paper-based transferable document or instrument. The Working Group may wish to consider whether the word “equivalent” before the word “paper-based” could be misleading in view of the purpose of draft article 10 to provide a rule on functional equivalence. Alternative drafting, such as the use of the word “respective”, might also be considered.

73. Subparagraph 1(b)(i) sets forth the requirement to identify an electronic record as the record containing the operative or authoritative information necessary to establish that record as an electronic transferable record. That requirement implements the “singularity” approach (A/CN.9/834, para. 86). The reliability standard contained in subparagraph 1(b)(i) should be assessed against general reliability standards (A/CN.9/828, para. 37).

74. The Working Group may wish to consider whether to retain the word “authoritative” to identify the electronic transferable record (A/CN.9/834, paras. 101-104) in light of the fact that information establishing the electronic record as an electronic transferable record is, by itself, authoritative and therefore that qualification might, on the one hand, be unnecessary and, on the other hand,

have the unintended effect of fostering litigation on the meaning of the term “authoritative”.

75. If the Working Group decides not to retain the word “authoritative”, it may further wish to consider whether the provision might be further simplified as follows:

“(i) That is as reliable as appropriate to identify that electronic record as the electronic transferable record;”.

76. Subparagraph 1(b)(ii) sets forth the requirement that the electronic transferable record should be capable of being controlled from its creation until it ceases to have any effect or validity, particularly in order to allow for its transfer. That requirement implements the “control” approach (A/CN.9/834, para. 86). Subparagraph 1(b)(ii) is not subject to a reliability test as draft article 17 provides the reliability standard to assess the method used to establish control (A/CN.9/828, para. 38). The suggestion of using the words “that renders” instead of “to render” is meant to be purely editorial.

77. The draft provision reflects the view that an electronic transferable record might not necessarily be actually subject to control (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

78. With regard to paragraph 2, at its fiftieth session, the Working Group agreed to insert a provision on the assessment of the reliability standard for the notion of integrity (A/CN.9/828, para. 49). That provision indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes from its creation until it ceases to have any effect or validity (as opposed to changes of purely technical nature) remains complete and unaltered (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce.

79. The Working Group may wish to consider whether the word “authorized” in draft paragraph 2 should be retained in light of its discussions on the desirability to record all or only selected changes, and on the difference between authorized and legitimate changes (A/CN.9/834, paras. 27-30; A/CN.9/828, paras. 42-44; A/CN.9/804, paras. 30-32).

80. The Working Group may wish to consider the definition of an electronic transferable record in draft article 3 in conjunction with its deliberations on draft article 10 (see paras. 22-31 above, and A/CN.9/834, paras. 95-100).

#### **“Draft article 11. General reliability standard**

“1. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.

“2. In determining whether, or to what extent, a method is reliable [for the purposes of articles 10, 17 and ...], regard may be had to the following factors:

- (a) Level of assurance of data integrity;
- (b) Ability to prevent unauthorized access to and use of the system;
- (c) Quality of hardware and software systems;

- (d) Regularity and extent of audit by an independent body;
- (e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
- (f) [Any agreement among the parties;]
- (g) Any other relevant factor.”

### Remarks

81. Draft article 11 aims at providing a general reliability standard. At the Working Group’s forty-ninth session, different views were expressed with respect to the desirability of inserting such provision (A/CN.9/804, paras. 41-49).

82. On the one hand, it was indicated that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was added that, while party autonomy could suffice to establish reliability standards in closed systems, there was still a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality (A/CN.9/804, para. 43).

83. Moreover, the inclusion of additional factors to assess reliability was suggested. Those factors related to: quality of staff; sufficient financial resources and liability insurance; existence of a notification procedure for security breaches and of reliable audit trails (A/CN.9/804, paras. 44-45).

84. However, at that session the view was also expressed that the existing and newly-suggested reliability factors were too detailed and that the provision was regulatory in nature. It was added that the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions (A/CN.9/804, para. 46).

85. In that same line, it was stated that the presence of a general reliability standard could hamper use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further indicated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context (A/CN.9/804, para. 42).

86. In conclusion, the Working Group agreed to further consider draft article 11 as a possible general rule on system reliability. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method (A/CN.9/804, para. 49).

87. At its fiftieth session, the Working Group agreed to incorporate in draft article 11 text providing general guidance on the reliability standard (A/CN.9/828, paras. 47 and 49). That language, inspired also by article 17, paragraph 4, of the



UNCITRAL Model Law on Electronic Commerce, has been inserted as paragraph 1 of draft article 11.

88. Draft articles 10, on the information constituting the electronic transferable record, 12 on indication of time and place, 20 on amendment, 22 and 23 on change of medium, and 24 on division and consolidation refer to the use of a reliable method. The Working Group may wish to confirm that draft article 11 would suffice to assess the reliability of the various methods referred to in those draft articles.

89. In that respect, the Working Group may wish to consider whether the word “required” in paragraph 1 is adequate to describe the relation between the general reliability standard and the various provisions where that standard is relevant.

90. Draft articles 9 on signature, 10 with respect to integrity, and 17 on possession and control contain a specific standard for the assessment of reliability. The Working Group may wish to clarify the relation, if any, between the general reliability standard contained in draft article 11 and the specific reliability standards contained in those draft articles.

91. In case no relation between the general reliability standard contained in draft article 11 and the specific reliability standards contained in draft articles 9, 10 and 17 existed, the Working Group may wish to consider adopting language excluding those articles from the scope of application of the general reliability standards, for example, by adding the following statement at the beginning of draft article 11, paragraph 1: “Unless otherwise provided in this Law,”.

92. The Working Group may wish to discuss whether subparagraph 2(a) should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 10.

93. The Working Group may also wish to discuss whether subparagraph 2(b) should refer to unauthorized access and use of the system or rather to unauthorized access and use of the method employed to establish control in light also of draft article 17. In that respect, the Working Group may wish to clarify the relation between the reference to a “system” contained in subparagraph 2(b) and the reference to “hardware and software systems” contained in subparagraph 2(c).

94. The Working Group may further wish to consider dealing with system reliability in the explanatory material discussing third-party service providers (A/CN.9/834, para. 78).

95. Draft subparagraph 2(f) was inserted to highlight the relevance of any agreement of the parties when assessing reliability.