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Legal issues relating to the use of electronic transferable records

Note by the Secretariat

The following note provides information about the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) for consideration by the Working Group in relation to the draft provisions on electronic transferable records.

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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.¹
2. At the forty-sixth session of the Working Group (Vienna, 29 October-2 November 2012), it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records and broad support was expressed for the preparation of draft provisions in the form of a model law, without prejudice to the decision on the final form (A/CN.9/761, paras. 18 and 93).
3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began review of the draft provisions on electronic transferable records contained in document A/CN.9/WG.IV/WP.122 with 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).
4. At that session, upon considering draft article 1 on the scope of the draft provisions, a question was raised with respect to the compatibility between the use of electronic transferable records, on the one hand, and the provisions contained in the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930, hereinafter referred to as the “Convention on Bills of Exchange and Promissory Notes”)² and the Convention Providing a Uniform Law for Cheques (Geneva, 1931, hereinafter “Convention on Cheques” and jointly referred to as the “Geneva Conventions”).³ This was due to the fact that the Geneva Conventions were prepared in the paper-based context, assuming only the use of paper-based instruments (A/CN.9/WG.IV/WP.122, para. 5).
5. One view was that the paper-based provisions of the Geneva Conventions were not compatible with the use of electronic transferable records. Therefore, it was suggested that those instruments should be excluded from the scope of the draft provisions (A/CN.9/768, para. 20).
6. In response, it was noted that adequate legislative techniques had been developed to address the matter of functional equivalence between written and electronic form. It was, therefore, suggested that bills of exchange, promissory notes and cheques should be included in the scope of the draft provisions, following the Working Group’s understanding that generic rules should encompass various types of electronic transferable records. It was further noted that establishing functional equivalence to overcome obstacles to the use of electronic means arising from existing provisions requiring the use of paper-based documents, had been a constant goal of the Working Group (A/CN.9/768, para. 21).
7. At the forty-sixth session of the Commission, in 2013, a view was expressed that work on electronic transferable records should take into consideration the Geneva Conventions, as dematerialization or introduction of electronic equivalents

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

² League of Nations, *Treaty Series*, vol.143, p.257.

³ League of Nations, *Treaty Series*, vol.143, p.355.

of instruments governed by those Conventions might create legal difficulties in States parties to those Conventions.⁴

8. Accordingly, this note was prepared to provide information about the Geneva Conventions for the consideration by the Working Group with respect to its work on electronic transferable records.

II. Geneva Conventions

A. Convention on Bills of Exchange and Promissory Notes (1930)

9. The Convention on Bills of Exchange and Promissory Notes was adopted in Geneva on 7 June 1930 and entered into force on 1 January 1934.⁵

10. Prepared under the auspices of the League of Nations, the Convention on Bills of Exchange and Promissory Notes aims at unifying the substantive law governing bills of exchange and promissory notes as provided in its Annex I. The Convention consists of general treaty provisions (Articles I to XI), Annex I and Annex II. Annex I consists of two Titles, one on bills of exchange (arts. 1 to 74) and the other on promissory notes (arts. 75 to 78). Consisting of 12 chapters, Title I covers the issuance and form; endorsement; acceptance; avals; maturity; payment; recourse for non-acceptance and non-payment; intervention for honour; parts of a set and copies; alterations and limitation of actions; and general provisions. Title II is rather short, as article 77 extends most of the provisions on bills of exchange to promissory notes. Annex II, which consists of 23 articles, lists permissible reservations by States.

11. The Convention has 26 States parties: Austria, Azerbaijan, Belarus, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Kazakhstan, Kyrgyzstan, Lithuania, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, Russian Federation and Ukraine.⁶ Seven (7) States had signed but not ratified the Convention: Colombia, former Czechoslovakia, Ecuador, Peru, Spain, Turkey, and former Yugoslavia.

12. It should be noted that Kyrgyzstan lodged a reservation to the Convention stating that a bill of exchange or a promissory note may be drawn up only on paper (paper product) (paras. 2 and 9 of the reservation).

13. The following two conventions were prepared in conjunction with and to complement the Convention on Bills of Exchange and Promissory Notes: (i) the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills

⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 226.

⁵ Information about the status of the Convention is available from the depositary at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-10.en.pdf>.

⁶ The following 18 States had ratified or definitively acceded to the Convention: Austria, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland and Russian Federation. Eight (8) States ratified, acceded, or succeeded to the Convention subsequent to the assumption of depositary functions by the Secretary-General: Azerbaijan, Belarus, Hungary, Kazakhstan, Kyrgyzstan, Lithuania, Luxembourg and Ukraine.

of Exchange and Promissory Notes (1930); and (ii) the Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes (1930).

B. Convention on Cheques (1931)

14. The Convention on Cheques was adopted in Geneva on 19 March 1931 and entered into force on 1 January 1934.⁷

15. Also prepared under the auspices of the League of Nations, the Convention on Cheques aims at unifying the substantive law governing cheques as provided in its Annex I. The Convention consists of general treaty provisions (Articles I to XI), Annex I and Annex II. Annex I, consisting of 10 chapters, provides a uniform law on cheques: the drawing and form of a cheque; negotiation; avals; presentment and payment; crossed cheques and cheques payable in account; recourse for non-payment; parts of a set; alterations; limitation of actions; and general provisions. Annex II, which consists of 31 articles, lists permissible reservations by States.

16. The Convention has 25 States parties: Austria, Azerbaijan, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Indonesia, Italy, Japan, Liberia, Lithuania, Luxembourg, Malawi, Monaco, Netherlands, Nicaragua, Norway, Poland, Portugal, Sweden and Switzerland.⁸ Seven (7) States had signed but not ratified the Convention: former Czechoslovakia, Ecuador, Mexico, Romania, Spain, Turkey and former Yugoslavia.

17. The following two conventions were prepared in conjunction with and to complement the Convention on Cheques: (i) the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (1931); and (ii) the Convention on the Stamp Laws in connection with Cheques (1931).

C. Paper-based provisions of the Geneva Conventions

18. The Geneva Conventions were drafted and adopted when information of commercial nature was stored predominantly in the paper form. Computers or the Internet did not exist, much less the modern concepts of electronic commerce. As a result, the provisions in the Geneva Conventions assume the use of paper as it was the only form of medium for bills of exchange, promissory notes and cheques.

19. For example, the words “written” and “writing” are used throughout the Convention on Bills of Exchange and Promissory Notes (Annex I, arts. 5, 9, 12, 13, 16, 25, 29 and 46) and the Convention on Cheques (Annex I, arts. 16, 37, 39, 40 and 43). The words “signature” and “sign” are also used in the Convention on Bills of Exchange and Promissory Notes (Annex I, arts. 1, 7, 8, 13, 16, 25, 29, 30, 31, 40,

⁷ Information about the status of the Convention is available from the depositary at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-11.en.pdf>.

⁸ The following 16 States had ratified or definitively acceded to the Convention: Brazil, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, Netherlands, Nicaragua, Norway, Poland, Portugal, Sweden, and Switzerland. Nine (9) States have ratified, acceded, or succeeded to the Convention subsequent to the assumption of depositary functions by the Secretary-General: Austria, Azerbaijan, Belgium, Hungary, Indonesia, Liberia, Lithuania, Luxembourg and Malawi.

45, 46, 47, 54, 56, 57, 65, 69, 75 and 77) and the Convention on Cheques (Annex I, arts. 1, 10, 11, 16, 19, 25, 26, 35, 42, 43, 44, 48, 50 and 51). As to these form requirements, draft articles 8 and 9 contained in document A/CN.9/WG.IV/WP.124 may provide rules to achieve functional equivalence.

20. Some other examples of the paper-based provisions in the Geneva Conventions are as follows (emphasis added in italics):

Convention on Bills of Exchange and Promissory Notes: Annex I. Uniform law on bills of exchange and promissory notes

Article 13

An endorsement must be written on the bill of exchange or on a *slip affixed* thereto (*allonge*). ... In the latter case, the endorsement, to be valid, must be written on the back of the bill of exchange or on the *slip attached* thereto (*allonge*).

Article 25

An acceptance is written on the bill of exchange. It is expressed by the word “accepted” or any other equivalent term. It is signed by the drawee. The simple signature of the drawee on the *face* of the bill constitutes an acceptance.

When the bill is payable at a certain time after sight, or when it must be *presented* for acceptance within a certain limit of time in accordance with a special stipulation the acceptance must be dated as of the day when the acceptance is given unless the holder requires it shall be dated as of the day of *presentment*.

Article 31

The “aval” is given either on the *bill itself* or on an “*allonge*”. It is expressed by the words “good as aval” (“bon pour aval”) or by any other equivalent formula. It is signed by the giver of the “aval”. It is deemed to be constituted by the mere signature of the giver of the “aval” placed on the *face* of the bill, except in the case of the signature of the drawee or of the drawer.

Article 54

Should the *presentment* of the bill of exchange or the drawing up of the protest within the prescribed limits of time be prevented by an insurmountable obstacle (legal prohibition (prescription légale) by any State or other case of vis major), these limits of time shall be extended. The holder is bound to give notice without delay of the case of vis major to his endorser and to specify this notice, which he must *date and sign, on the bill or on an allonge*; in other respects the provisions of Article 45 shall apply.

When vis major has terminated the holder must without delay *present* the bill of exchange for acceptance or payment and,

Convention on Cheques: Annex I. Uniform law on cheques**Article 16**

An endorsement must be written on the cheque or on a *slip affixed* thereto (*allonge*). ... In the latter case, the endorsement, to be valid, must be written on the back of the cheque or on the *slip attached* thereto (*allonge*).

Article 37

The drawer or holder of a cheque may *cross* it with the effects stated in the next article hereof. A crossing takes the form of *two parallel lines drawn on the face* of the cheque. ... The crossing is general if it consists of *the two lines only or if between the lines* the term “banker” or some equivalent is inserted; it is special if the name of a banker is *written between the lines*. A general *crossing* may be converted into a special *crossing*, but a special crossing may not be converted into a general *crossing*.

Article 38

A cheque which is *crossed* generally can be paid by the drawee only to a banker or to a customer of the drawee. A cheque which is *crossed* specially can be paid by the drawee only to the named banker, or if the latter is the drawee, to his customer. Nevertheless, the named banker may procure the cheque to be collected by another banker. A banker may not acquire a *crossed* cheque except from one of his customers or from another banker. He may not collect it for the account of other persons than the foregoing. A cheque bearing several special *crossings* may not be paid by the drawee except in a case where there are *two crossings*, one of which is for collection through a clearing-house.

Article 39

The drawer or the holder of a cheque may forbid its payment in cash by *writing transversally across the face* of the cheque the words “payable in account” (“à porter en compte”) or a similar expression.

III. Considerations

21. It is quite obvious that the provisions of the Geneva Conventions were prepared for the paper-based environment. The question arises whether States parties to the Geneva Conventions would be able to introduce electronic bills of exchange, promissory notes and cheques. The answer to this question would have an impact on the scope of the draft provisions on electronic transferable records, its final form and adoption of the finalized text by States parties to the Geneva Conventions. For instance, if the final form were to be a model law, States parties to the Geneva Conventions may simply choose not to apply the model law provisions to bills of exchange, promissory notes or cheques.

22. If the paper-based provisions of the Geneva Conventions are to be strictly interpreted to permit only paper-based bills of exchange, promissory notes and cheques, States parties to those Convention would not be able to introduce the electronic equivalent of bills of exchange, promissory notes or cheques, without

being in breach of the respective Convention. Under such circumstance, if those States were to introduce electronic equivalent of bills of exchange, promissory notes or cheques, they would have the option of requesting amendment of some or all of the provisions of the Geneva Conventions in accordance with Article IX,⁹ or denouncing the Geneva Conventions in accordance with Article VIII. Making reservations with respect to paper-based provisions may present challenges as States parties are generally prohibited from making reservations after ratification or accession (Article I of the Geneva Conventions) except with regard to certain provisions in Annex II (Convention on Bills of Exchange and Promissory Notes, Annex II, arts. 8, 12 and 18, Convention on Cheques, Annex II, arts. 9, 22, 27 and 30) and only in urgent cases (Convention on Bills of Exchange and Promissory Notes, Annex II, arts. 7 and 22, Convention on Cheques, Annex II, arts. 17 and 28).

23. Under such a strict interpretation, an alternative for States parties to the Geneva Conventions could be to introduce new electronic instruments that fulfil the functions of bills of exchange, promissory notes or cheques, without necessarily denominating them as such. An example can be found in the Electronically Recorded Monetary Claims Act (Act No. 102 of 2007, “ERMCA”) of Japan,¹⁰ which provides rules on electronically recorded monetary claims, monetary claims for which electronic records in the registry are required for their assignment. It should also be noted that other electronic means, for example, wire transfers, have been developed to fulfil the functions that used to be served by promissory notes or cheques.

24. Although the Geneva Conventions contain provisions that allude to the use of paper-based bills of exchange, promissory notes and cheques, they do not have any explicit reference to the use of the “paper” form (except for the reservation lodged by Kyrgyzstan). Accordingly, it may be possible to interpret the Geneva Conventions as not explicitly precluding the use of the electronic medium as the electronic environment did not exist when the Geneva Conventions were drafted. Adopting this rather flexible interpretation would allow States parties to the Geneva Conventions to develop rules on electronic equivalents of bills of exchange, promissory notes or cheques without being in breach of the Geneva Conventions.

25. It should be noted that one of the key objectives of UNCITRAL is to promote legal certainty in international trade. Moreover, establishing functional equivalence to overcome obstacles to the use of electronic means arising from existing provisions requiring the use of paper-based documents has been the constant goal of the Working Group on Electronic Commerce (A/CN.9/768, para. 21). Consequently, the Working Group may wish to consider adequate legislative techniques to address the matter of functional equivalence between paper-based provisions in the Geneva

⁹ **Article IX.** Every Member of the League of Nations and every non-Member State in respect of which the present Convention is in force, may forward to the Secretary-General of the League of Nations, after the expiry of the fourth year following the entry into force of the Convention, a request for the revision of some or all of the provisions of this Convention. If such request, after being communicated to the other Members or non-Member States between which the Convention is at that time in force, is supported within one year by at least six of them, the Council of the League of Nations shall decide whether a Conference shall be convened for the purpose.

¹⁰ ERMCA came into force in Japan on 1 December 2008, for the purposes of facilitating businesses’ financing activities.

Conventions as it had done with respect to the writing and signature requirements. Furthermore, it should be noted that other international conventions, treaties or agreements (hereinafter “international instruments”) as well as domestic legislations on paper-based transferable documents or instruments may contain provisions similar to the paper-based provisions of the Geneva Conventions. Overall, such an exercise would assist in achieving the goal of the Working Group to prepare generic rules encompassing various types of electronic transferable records.

26. The interaction between the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) as well as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) and the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) could be an example. Certain formal requirements contained in the New York Convention and the CISG posed obstacles to the wide use of electronic communications and thus, the Electronic Communications Convention aimed at removing those formal obstacles by establishing equivalence between electronic and written form.

27. In this context, the Working Group may wish to consider the mechanism employed in article 20 of the Electronic Communications Convention.¹¹ The aim of article 20 is to remove possible legal obstacles to electronic commerce that might arise under existing international instruments, without formally amending any international instrument or providing an authentic interpretation of such international instrument. The combined effect of paragraphs 1 and 2 of article 20 is that by becoming a party to the Electronic Communications Convention, a State would automatically undertake to apply the provisions of the Electronic Communications Convention to electronic communications exchange in connection with any of the international instruments to which a State is or may become a Contracting Party.

28. Without prejudice to the decision on the final form of work, the Working Group may wish to consider taking an approach similar to article 20 of the Electronic Communications Convention. This could be done by adopting a protocol to the Electronic Communications Convention that would enable the use of electronic transferable records in conjunction with existing international instruments that regulate paper-based transferable documents or instruments. This would not only be limited to the Geneva Conventions but other international instruments, for example, the United Nations Convention on the International Bills of Exchange and International Promissory Notes, the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”) and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague-Visby Rules).

¹¹ Article 20, paragraph 1 states that the provisions of the Electronic Communications Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the international conventions, to which a Contracting State to the Electronic Communications Convention is or may become a Contracting State, and lists six international conventions including the New York Convention and the CISG. Article 20, paragraph 2, further extends paragraph 1 to international convention, treaty or agreement not specifically referred to in paragraph 1, unless the State has made a declaration not to be bound.

29. It should be further noted that the United Nations Convention on International Bills of Exchange and International Promissory Notes and the Hamburg Rules were not included in the list provided in article 20 of the Electronic Communications Convention. At that time, it was considered that possible problems relating to the use of electronic communications under those Conventions, as well as other international instruments dealing with negotiable instruments or transport documents, might require specific treatment and that it would not be appropriate to address those problems in the Electronic Communications Convention (A/CN.9/527, paras. 27-41).

30. The interaction between the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (with amendments adopted in 2006) is another example of legislative technique. The original 1985 version of the Model Law closely followed article II (2) of the New York Convention with respect to the definition and form of arbitration agreement and required that an arbitration agreement be in writing. The revised article 7 of the 2006 Model Law offers two options. The first approach follows the detailed structure of the original 1985 text. It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires the signature of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention. The second approach in the revised article 7 defines the arbitration agreement in a manner that omits any form requirement.

31. When adopting the amendments to the UNCITRAL Model Law on International Commercial Arbitration in 2006, the Commission also adopted a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006) (hereinafter “the Recommendation”)”, which provides another example of legislative technique. The Recommendation was drafted in recognition of the increasing use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards.

32. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration.

33. In any case, the Working Group may wish to carefully consider the paper-based provisions of the Geneva Conventions, other international instruments and domestic legislations to first identify paper-based requirements that exist in the substantive law.

34. In doing so, it might also be worthwhile to look into the practical reasoning of such paper-based provisions. For example, requiring an endorsement on the back of the bill of exchange or on the slip affixed thereto may have been to deal with limited space on the front of the bill of exchange. Such an issue would not have much practical significance in an electronic environment.

35. Once the paper-based provisions are identified, provisions similar to draft articles 8, 9, 10, 16, 18, 19 and 20 as contained in A/CN.9/WG.IV/WP.124 and Add.1 may be prepared to achieve the functional equivalence of such requirements. For instance, the requirement that the endorsement be on the “back” or the signature be on the “face” of the paper-based bill of exchange could be met in an electronic bill of exchange when the relevant information is identifiable as such. An “*allonge*” in the paper-based context can be achieved through an electronic attachment.

36. The functional equivalent approach has enabled many types of paper-based documents to be adapted into an electronic environment. The Working Group may wish to view the paper-based provisions of the Geneva Conventions not as a legal impediment but an opportunity to interpret them in a manner that adequately reflects and accommodates the modern technological advances.