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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 Model Law on Electronic Transferable Records (A/CN.9/828, para. 23). 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.
8. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.135 and Add.1. In particular, the Working Group discussed the relation between draft articles referring to a “reliable method” and a general reliability standard, as well as the elements relevant for assessing reliability.

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

9. At its fifty-third session, (New York, 9-13 May 2016), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.137 and Add.1.

10. Part II of this note contains the draft provisions of the Model Law reflecting the deliberations and decisions of the Working Group during its fifty-third session (A/CN.9/869, paras. 19-131) as well as comments to be used for an Explanatory Note to the Model Law on Electronic Transferable Records.

## 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 transferable document or instrument including any rule of law applicable to consumer protection.

“3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [...].<sup>2</sup>”

#### Remarks

11. At its fifty-third session, the Working Group confirmed its understanding that paragraph 3 included an open-ended exclusion list that permitted application of the draft Model Law according to the needs of each enacting jurisdiction so as to provide both flexibility and clarity on the scope of application of the Model Law (A/CN.9/869, paras. 19-23). At that session, the Working Group identified three possible types of exclusions (A/CN.9/869, para. 23), referred to in the footnote inserted at the end of paragraph 3.

#### Comments

12. As indicated in the definition of “transferable document or instrument”, the words “transferable document or instrument” refer to a transferable document or instrument issued on paper (as opposed to an electronic transferable record) in the Arabic, Chinese, English and Russian language versions of the Model Law (A/CN.9/863, para. 93 and A/CN.9/WG.IV/WP.137, para. 28). The words “paper-based” are used for linguistic clarity before the words “transferable document or instrument” in the French and Spanish language versions of the Model Law.

<sup>2</sup> The enacting State may consider including a reference to: (i) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (ii) documents and instruments falling under the scope of 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); and (iii) electronic transferable records existing only in electronic form.

*Paragraph 1*

13. The Model Law provides for generic rules that may apply to various types of electronic transferable records based on the principle of technology neutrality and a functional equivalence approach. The principle of technology neutrality entails adopting a system-neutral approach, enabling the use of models based on registry, token, distributed ledger and other technology.

14. 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”) provided a starting point for defining the scope of application of the Model Law. That provision excludes from the scope of application of the Electronic Communications Convention “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”. That exclusion is due to the fact that at the time of the adoption of the Convention “finding a solution for this problem [of the legal treatment of electronic transferable records] required a combination of legal, technological and business solutions, which had not yet been fully developed and tested”.<sup>3</sup>

15. The Model Law focuses on the transferability of the record and not on its negotiability on the understanding that negotiability relates to the underlying rights of the holder of the instrument, which fall under substantive law (A/CN.9/761, para. 21).

16. Certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, do not fall under the definition of “transferable document or instrument” contained in the Model Law (see below, para. 34). The Model Law would therefore not apply to those documents or instruments (A/CN.9/797, paras. 27 and 28). However, that conclusion should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system since such prohibition is likely to result in unnecessary multiplication of systems and increase of costs (A/CN.9/869, para. 24).

*Paragraph 2*

17. Paragraph 2 sets forth the general principle that the Model Law does not affect substantive law, including rules of private international law, applicable to transferable documents or instruments. Hence, the same substantive law applies to a transferable document or instrument and to the electronic transferable record containing the same information as that transferable document or instrument. The principle applies to each step of the life cycle of an electronic transferable record.

18. One consequence of the rule contained in paragraph 2 is that the Model Law may not be used to create electronic transferable records that do not have an equivalent transferable document or instrument. Allowing such creation would circumvent the principle of *numerus clausus* of transferable documents or instruments, where that principle is applicable.

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<sup>3</sup> United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), Explanatory Note, United Nations Publication Sales No. E.07.V.2, para. 81.

19. During the preparation of the Model Law, UNCITRAL agreed that certain issues related to electronic transferable records did not require a dedicated provision, since those issues were matters of substantive law. Such matters include:

- (a) The definition of “performance of an obligation” (A/CN.9/863, para. 90);
- (b) The issuance of an electronic transferable record to bearer (A/CN.9/797, para. 65);
- (c) The change of the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to the order of a named person and the reverse case (“blank endorsement”) (A/CN.9/828, paras. 81-84);
- (d) The reissuance of an electronic transferable record (A/CN.9/869, para. 115);
- (e) Division and consolidation of electronic transferable records (A/CN.9/869, para. 123); and
- (f) The use of an electronic transferable record, including as collateral for security rights purposes (see below, para. 21).

20. The explicit reference to consumer protection law aims at clarifying the interaction between that law and the Model Law (A/CN.9/863, paras. 20 and 22) and represents an application of the general principle that the Model Law does not affect the substantive law applicable to transferable documents or instruments.

### *Paragraph 3*

21. Paragraph 3 clarifies that the Model Law does not apply to securities and other investment instruments. 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). The term “securities” 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).

22. The purpose of paragraph 3 is to permit the exclusion of certain documents or instruments from the scope of the Model Law. To that end, paragraph 3 includes an open-ended exclusion list that permits application of the Model Law according to the needs of each enacting jurisdiction, thus providing both flexibility and clarity on the scope of application of the Model Law.

23. The footnote to paragraph 3 highlights three possible types of exclusions and does not prevent States from adding other types of exclusions according to their needs:

- (a) Certain instruments or documents, such as letters of credit, which may be considered transferable documents or instruments in some jurisdictions but not in others. In that respect, it should be noted that national legislation does not define transferable documents and instruments in a uniform manner (A/CN.9/869, para. 19);
- (b) State parties to 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”) may

consider excluding documents or instruments falling under the scope of those Conventions in order to avoid possible conflicts between the Geneva Conventions and the Model Law, if so believed (see below, paras. 24-28);

(c) Electronic transferable records that exist only in an electronic environment. Such exclusion could be useful in jurisdictions allowing for the use of both electronic transferable records that are functional equivalent of transferable documents or instruments and of electronic transferable records that exist only in an electronic environment. In that respect, it should be noted that a provision allowing for the application of the Model Law to purely electronic transferable records on a residual basis, so that in case of conflict the Model Law would not prevail over the law applicable to such electronic transferable records, was not inserted in the Model Law due to concerns on the interaction between the general principles contained in the Model Law and the general principles contained in laws of a different nature (A/CN.9/869, para. 22).

#### *The Geneva Conventions*

24. During the preparation of the Model Law, different views have been expressed on the interaction between the Model Law and the Geneva Conventions (see, for example, A/CN.9/768, paras. 20-22; A/CN.9/WG.IV/WP.125; A/CN.9/797, paras. 109-112).

25. One view expressed was that formalism was a fundamental principle underpinning the Geneva Conventions that prevented the use of electronic means and therefore the instruments falling under the scope of those Conventions should always be excluded from the scope of the Model Law (A/CN.9/797, para. 110).

26. In order to accommodate that view, the Model Law allows for exclusion of the documents and instruments falling under the scope of the Geneva Conventions (see above, para. 23(b)).

27. Jurisdictions adhering to that view and wishing to enable the use of electronic versions of the documents and instruments falling under the scope of the Geneva Conventions may consider introducing electronic transferable records existing only in an electronic environment, which will not be functional equivalents of the documents and instruments falling under the scope of the Geneva Conventions and will not fall under the scope of the Model Law.<sup>4</sup>

28. Another view expressed was that the scope of the Model Law should include instruments falling under the scope of the Geneva Conventions on the understanding that the Model Law generally aimed at overcoming obstacles to the use of electronic means arising from form requirements relating to the use of paper-based transferable documents or instruments (A/CN.9/768, para. 21).

#### *References to preparatory work*

A/CN.9/WG.IV/WP.118, paras. 2-25; A/CN.9/761, paras. 18-25, 28-30;  
A/CN.9/WG.IV/WP.122, paras. 4-7; A/CN.9/768, paras. 17-24;  
A/CN.9/WG.IV/WP.124, paras. 5-11; A/CN.9/797, paras. 16-20, 27-28, 65, 109-112;

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<sup>4</sup> For an example, see the Electronically Recorded Monetary Claims Act (Act No. 102 of 2007) of Japan.

A/CN.9/WG.IV/WP.125, paras. 1-36;  
A/CN.9/WG.IV/WP.128, paras. 5-10;  
A/CN.9/WG.IV/WP.130, paras. 6-12; A/CN.9/828, paras. 24 -30 and 81-84;  
A/CN.9/WG.IV/WP.132, paras. 7-14; A/CN.9/834, paras. 72-73;  
A/CN.9/WG.IV/WP.135, paras. 8-19; A/CN.9/863, paras. 17-22;  
A/CN.9/WG.IV/WP.137, paras. 10-18; A/CN.9/869, paras. 19-23

#### **“Draft article 2. Definitions**

*‘electronic transferable record’* is an electronic record that complies with the requirements of article 9.”

#### **Remarks**

29. The definition of “electronic transferable record” reflects the modifications agreed upon in light of the information requirements contained in draft article 9 pursuant to the Working Group’s decision at its fifty-third session (A/CN.9/869, para. 25).

30. It has been suggested that the definition of “electronic transferable record” should be reviewed upon completion of the consideration of all articles of the Model Law to evaluate its appropriateness for each instance where the defined term is used (A/CN.9/869, para. 25).

31. The definition of “electronic transferable record” does not cover electronic transferable records that exist only in an electronic environment (A/CN.9/863, para. 91; see also A/CN.9/797, para. 23).

#### **Comments**

32. The definition of “electronic transferable record” reflects the functional equivalent approach (A/CN.9/863, paras. 91 and 92) and refers to electronic transferable records that are equivalent to transferable documents or instruments. It 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. Likewise, it 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 Model Law.

33. In line with the general approach and the scope of the Model Law, the definition of “electronic transferable record” is meant to apply to electronic transferable records that are functionally equivalent to transferable documents or instruments. Yet, the Model Law does not preclude the development and use of electronic transferable records that do not have a paper equivalent as those records are not governed by the Model Law (A/CN.9/863, para. 91).

34. The definition of “electronic transferable record” does not cover certain documents or instruments, which are generally transferable, but whose transferability may be limited due to other agreements. This could be the case, in certain jurisdictions, of straight bills of lading. Substantive law shall determine which documents or instruments are transferable. Moreover, this limitation of the

definition of “electronic transferable record” should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system (see also above, para. 16).

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

### Remarks

35. The definition of “transferable document or instrument” reflects the editorial changes agreed to by the Working Group at its fifty-third session (A/CN.9/869, para. 27).

### Comments

36. The definition of “transferable document or instrument” focuses on the key functions of transferability and of providing a title or right to performance. It does not affect 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.

37. Applicable substantive law shall determine which documents or instruments are transferable in the various jurisdictions (A/CN.9/863, para. 94). An indicative list of transferable documents or instruments, inspired by article 2, paragraph 2, of the United Nations Convention on the Electronic Communications Convention includes: bills of exchange; cheques; promissory notes; consignment notes; bills of lading, warehouse receipts, cargo insurance certificates and air waybills.

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

### Comments

38. The definition of “electronic record” is based on the definition of “data message” contained in the UNCITRAL Model Law on Electronic Commerce (1996)<sup>5</sup> and in the Electronic Communications Convention and aims to clarify that electronic records may, but do not need to, include a set of composite information (A/CN.9/797, paras. 43-45). It highlights the fact that information may be associated with the electronic transferable record at the time of issuance or at any time thereafter (e.g., information related to endorsement). For example, the generation of metadata does not necessarily take place after the generation of a record, but could also precede it. The composite nature of an electronic transferable record is particularly relevant for the notion of “integrity” contained in article 9, paragraph 2 of the Model Law (A/CN.9/863, para. 96).

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<sup>5</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication Sales No. E.99.V.4.

39. Moreover, the definition of “electronic record” provides also for the possibility that in certain electronic transferable records management systems data elements may, taken together, provide the information constituting the electronic transferable record, but with no discrete record constituting in itself the electronic transferable record (A/CN.9/804, para. 71). The word “logically” refers to computer software and not to human logic (A/CN.9/863, para. 97).

*References to preparatory work*

A/CN.9/WG.IV/WP.122, para. 8; A/CN.9/768, paras. 25-34;  
 A/CN.9/WG.IV/WP.124, paras. 12-23; A/CN.9/797, paras. 21-28, 43-45;  
 A/CN.9/WG.IV/WP.128, paras. 11-30;  
 A/CN.9/WG.IV/WP.130, paras. 13-34; A/CN.9/828, para. 31;  
 A/CN.9/WG.IV/WP.132, paras. 15-36; A/CN.9/834, paras. 25-26, 95-98 and 100;  
 A/CN.9/WG.IV/WP.135, paras. 20-44; A/CN.9/863, paras. 88-102;  
 A/CN.9/WG.IV/WP.137, paras. 19-30; A/CN.9/869, paras. 24-27

**“Draft article 3. 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.

“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**

40. The words “and the observance of good faith” have been deleted from paragraph 1 pursuant to the Working Group’s decision at its fifty-third session on the understanding that the principle of good faith, as a general principle of international law, could be included in the general principles on which the draft Model Law is based under paragraph 2 (A/CN.9/869, para. 30).

41. With regard to paragraph 2 the Working Group may wish to discuss which are the general principles underlying the Model Law (see below, paras. 45-46).

**Comments**

*International origin and promotion of uniform interpretation*

42. Article 3 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 and the need to promote their uniform interpretation in light of that origin. The uniform interpretation of UNCITRAL texts is a key element to ensure predictability of the law applicable to commercial transactions across borders.

43. Similar wording appears in several UNCITRAL texts, including in article 3 of the UNCITRAL Model Law on Electronic Commerce and article 4 of the UNCITRAL Model Law on Electronic Signature, and was first introduced in

article 7 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).<sup>6</sup> The words “This Law is derived from a model law of international origin” emphasize that the law constitutes an enactment of a model law with international origin (A/CN.9/768, para. 35) and are not contained in other UNCITRAL texts.

44. Article 3, unlike other provisions contained in UNCITRAL texts and dealing with their international origin and uniform interpretation, does not refer to the notion of “good faith”. That exclusion is due to the fact that the principle of “good faith” has a specific meaning with respect to transferable documents or instruments, which is distinct from the general principle of good faith in international trade law (A/CN.9/869, para. 29). The principle of “good faith” as a general principle of international law could be included in the general principles on which the Model Law is based (A/CN.9/869, para. 30).

#### *General principles*

45. The notion of “general principles” 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”)<sup>7</sup> is the provision containing that notion that has been most interpreted by case law.<sup>8</sup>

46. The notion of “general principles” contained in paragraph 2 refers to the general principles of the law governing electronic communications (A/CN.9/797, para. 29), including those already identified and stated in UNCITRAL texts such as the principles of non-discrimination against electronic communications, technological neutrality and functional equivalence. The identification of those general principles and of their exact content and operation may take place progressively in light of the increasing level of use, application and interpretation of the Model Law. Such progressive determination provides flexibility in the interpretation of the Model Law useful to ensure its ability to accommodate evolving commercial practices and business needs.

#### *References to preparatory work*

A/CN.9/WG.IV/WP.122, para. 9; A/CN.9/768, para. 35;  
A/CN.9/WG.IV/WP.124, paras. 24-25; A/CN.9/797, para. 29;  
A/CN.9/WG.IV/WP.128, paras. 31-35;  
A/CN.9/WG.IV/WP.130, paras. 35-40;  
A/CN.9/WG.IV/WP.132, paras. 37-42;  
A/CN.9/WG.IV/WP.135, paras. 45-50;  
A/CN.9/WG.IV/WP.137, paras. 31-35; A/CN.9/869, paras. 28-31

#### **“Draft article 4. Party autonomy [and privity of contract]**

“1. The parties may derogate from or vary by agreement [provisions of this Law].

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<sup>6</sup> United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

<sup>8</sup> See also the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, comment under article 7.

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

### Remarks

47. Paragraph 1 has been modified pursuant to the decision of the Working Group at its fifty-third session, so as to enable enacting States to identify which provisions could be derogated from, since each enacting jurisdiction may allow derogation of different provisions (A/CN.9/869, paras. 37, 42 and 43).

48. The Working Group may wish to consider paragraph 2, whose consideration was deferred to a future session at the Working Group's fifty-third session (A/CN.9/869, para. 44).

49. In light of its deliberations on paragraph 2, the Working Group may wish to consider the title of draft article 4. The words in square brackets, “privity of contract”, were included to emphasise that draft article 4 dealt not only with party autonomy but also with privity of contract (A/CN.9/797, para. 30).

### Comments

50. Party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts. Limiting party autonomy could hinder technological innovation and the development of new business practices. Moreover, party autonomy may provide desired flexibility in the implementation of the Model Law.

51. However, the implementation of the principle of party autonomy has found some limits in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy.

52. In particular, article 4 of the UNCITRAL Model Law on Electronic Commerce allows variation by agreement of the provisions on electronic communications, but sets limits to variation by agreement of functional equivalence rules, also to avoid circumventing form requirements of mandatory application. Moreover, party autonomy may not affect rights and obligations of third parties.<sup>9</sup>

53. Moreover, article 5 of the UNCITRAL Model Law on Electronic Signatures indicates that parties may derogate from all provisions of that Model Law, unless derogation would not be valid or effective under applicable law, i.e. it would affect rules of mandatory application such as those relating to public policy.<sup>10</sup> A similar approach is adopted in article 3 of the Electronic Communications Convention.<sup>11</sup>

54. Similarly, the Model Law provides broad party autonomy within the limits of mandatory law and without affecting rights and obligations of third parties. In particular, it should be noted that certain jurisdictions, in particular those belonging to the civil law tradition, recognize the principle of *numerus clausus* of transferable documents or instruments (A/CN.9/768, para. 36). The Model Law does not aim at offering manners to circumvent by agreement that principle, in line with the general

<sup>9</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, paras. 44-45.

<sup>10</sup> UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication Sales No. E.02.V.8, paras. 111-112.

<sup>11</sup> United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 85.

principle that the Model Law does not affect substantive law provisions. At the same time, and based on the same general principle, the Model Law does not limit in any manner the ability of the parties to derogate from or vary substantive law.

55. Therefore, a careful analysis is necessary to ascertain which provisions of the Model Law could be derogated from or varied. The Model Law leaves this assessment to the enacting State, in order to accommodate differences in legal systems. To that end, paragraph 1 contains square brackets, in which the enacting State could identify the provisions which could be derogated from or varied (A/CN.9/869, paras. 37, 42 and 43).

*References to preparatory work*

A/CN.9/WG.IV/WP.122, para. 10; A/CN.9/768, paras. 36-37;  
A/CN.9/WG.IV/WP.124, para. 26; A/CN.9/797, paras. 30-32 and 113;  
A/CN.9/WG.IV/WP.128, para. 36;  
A/CN.9/WG.IV/WP.130, para. 41;  
A/CN.9/WG.IV/WP.132, para. 43;  
A/CN.9/WG.IV/WP.135, paras. 51-53;  
A/CN.9/WG.IV/WP.137, paras. 36-39; A/CN.9/869, paras. 32-44

**“Draft article 5. 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.”

**Comments**

56. Article 5, inspired by article 7 of the Electronic Communications Convention, highlights the need to comply with possible disclosure obligations that might exist under other law. Examples of those information requirements include information to be provided under consumer protection law and to prevent money-laundering and other criminal activities.

57. The obligation to comply with those information requirements arises from the principle that the Model Law does not affect substantive law contained in article 1, paragraph 2 of the Model Law. The reference to other law containing the information requirements provides desirable flexibility since those requirements are likely to change over time (A/CN.9/869, paras. 45-47). Article 5 does not deal with the legal consequences attached to violating information requirements, which are contained, like the information requirement itself, in other law.

58. Article 5 does not prohibit the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/768, para. 38). In that respect, it should be noted that an electronic transferable records management system may allow to identify the person in control of an electronic transferable record for regulatory purposes (e.g., anti-money-laundering) but not for commercial law purposes (e.g., for an action in recourse).

*References to preparatory work*

A/CN.9/WG.IV/WP.122, para. 11; A/CN.9/768, para. 38;  
 A/CN.9/WG.IV/WP.124, para. 27; A/CN.9/797, para. 33;  
 A/CN.9/WG.IV/WP.128, para. 37;  
 A/CN.9/WG.IV/WP.130, para. 42;  
 A/CN.9/WG.IV/WP.132, para. 44;  
 A/CN.9/WG.IV/WP.135, para. 54;  
 A/CN.9/WG.IV/WP.137, paras. 40-41; A/CN.9/869, paras. 45-47

**B. Provisions on electronic transactions****Remarks**

59. Subject to further decisions of the Working Group, the Model Law is divided in four sections (“General”, articles 1-5; “Provisions on electronic transactions”, articles 6-8; “Use of electronic transferable records”, articles 9-19; and “Cross-border recognition of electronic transferable records”, article 20).

60. The Working Group at its forty-eighth session decided to retain draft articles 6-8 as a separate section (A/CN.9/797, para. 34; see also A/CN.9/768, para. 40). The Working Group may wish to review its decision in light of the progress made in the preparation of the Model Law and of the fact that articles 6-8 relate to the use of electronic transferable records and not to electronic transactions. In that respect, the Working Group may also wish to consider whether article 6 should be included in the “General” section of the Model Law in light of its content.

*References to preparatory work*

A/CN.9/768, paras. 40 and 44;  
 A/CN.9/WG.IV/WP.124, paras. 28 and 29; A/CN.9/797, para. 34;  
 A/CN.9/WG.IV/WP.130, para. 43;  
 A/CN.9/WG.IV/WP.132, para. 45;  
 A/CN.9/WG.IV/WP.135, para. 55;  
 A/CN.9/WG.IV/WP.137, para. 42

**Comments**

61. Any reference to a legal requirement contained in the provisions of the Model Law setting forth functional equivalence rules implies a reference to the consequences arising when a legal requirement is not met, making it not necessary to explicitly refer to those consequences (A/CN.9/834, paras. 43 and 46). Accordingly, the Model Law does not contain the words “or provides consequences” after the words “when the law requires”.

**“Draft article 6. Legal recognition of an electronic transferable record**

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

“2. Nothing in this Law requires a person to use an electronic transferable record without that person’s consent.

“3. The consent of a person to use an electronic transferable record may be inferred from the person’s conduct.”

### Remarks

62. Draft article 6 reflects the decisions made by the Working Group at its fifty-third session (A/CN.9/869, paras. 93 and 94), namely, to include the provisions on consent, priorly contained in a separate article, in this article.

### Comments

#### *Paragraph 1*

63. Paragraph 1 restates the general principle of non-discrimination against the use of electronic means that is contained in article 5 of the UNCITRAL Model Law on Electronic Commerce and in article 8, paragraph 1, of the Electronic Communications Convention.

64. By stating that information “shall not be denied validity or enforceability on the sole ground that it is in electronic form”, paragraph 1 merely indicates that the form in which an electronic transferable record is presented or retained cannot be used as the only reason for which that transferable record would be denied legal effectiveness, validity or enforceability. However, the provision should not be misinterpreted as establishing the legal validity of an electronic transferable record or any information therein.<sup>12</sup>

#### *Paragraphs 2 and 3*

65. Paragraphs 2 and 3 are inspired by article 8, paragraph 2 of the Electronic Communications Convention.

66. Paragraph 2 clarifies that legal recognition of electronic transferable records does not imply a requirement to use or accept them. However, enacting jurisdictions may decide to mandate the use of electronic transferable records, at least with respect to some categories of users and some types of transferable documents and instruments, in light of the policy goals pursued.<sup>13</sup>

67. The requirement of “consent” is a general one and applies to all instances where an electronic transferable record is used under the Model Law and to all parties involved in the life cycle of the electronic transferable record (A/CN.9/768, para. 57). Therefore, other provisions of the Model Law do not contain an explicit reference to consent (A/CN.9/768, para. 57, see also A/CN.9/WG.IV/WP.124, para. 41).

68. The consent to use an electronic transferable record does not need to be expressly indicated or given in any particular form. While absolute certainty can be accomplished by obtaining an explicit consent before using an electronic

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<sup>12</sup> See also United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 129.

<sup>13</sup> See, for instance, article 6-2 of the Act on Issuance and Negotiation of Electronic Bills of Exchanges and Promissory Notes (Law 7197 of 22 March 2004, as amended) of the Republic of Korea.

transferable record, such an explicit consent should not be mandated as it would create an unreasonable barrier to the use of electronic means.

69. The consent to using electronic transferable records may be inferred from all circumstances, including parties' conduct. While certain systems used for electronic transferable records management, such as registry-based systems, may require acceptance of system rules, which include or imply consent to the use of electronic transferable records, other systems, such as token-based and distributed ledger-based systems, do not require prior acceptance of contractual rules, and therefore consent may be inferred by circumstances such as exercise of control on the electronic transferable record or performance of the obligation contained in the electronic transferable record.

#### **References to preparatory work**

A/CN.9/WG.IV/WP.122, paras. 11 and 20; A/CN.9/768, paras. 39, 57-58;  
 A/CN.9/WG.IV/WP.124, para. 30, paras. 40-44; A/CN.9/797, paras. 34-35, 62-63;  
 A/CN.9/WG.IV/WP.128, para. 37; A/CN.9/WG.IV/WP.128/Add.1, para. 5;  
 A/CN.9/804, para. 17;  
 A/CN.9/WG.IV/WP.130, para. 44; WP.130/Add.1, para. 7;  
 A/CN.9/WG.IV/WP.132, para. 46; WP.132/Add.1, para. 11;  
 A/CN.9/WG.IV/WP.135, para. 56; WP.135/Add.1, para. 7;  
 A/CN.9/WG.IV/WP.137, para. 43; WP.137/Add.1, para. 9; A/CN.9/869, paras. 93 and 94

#### **“Draft article 7. 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**

70. In its future deliberations on a 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 7, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

71. At the Working Group's forty-ninth session, it was suggested that draft article 7 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 2. 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). In light of that discussion, the Working Group may wish to clarify the relationship between draft article 7 and draft article 9, setting forth information and integrity requirements for the functional equivalence of transferable documents or instruments.

### Comments

72. Article 7 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). It is inspired by article 6, paragraph 1 of the UNCITRAL Model Law on Electronic Commerce.<sup>14</sup> However, article 7 refers to the notion of “information” instead of “communication” as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37), depending on the system chosen for electronic transferable records management.

73. Article 7 sets forth a functional equivalence rule for the notion of “writing” with respect to electronic transferable records only. The use of writing is instrumental in performing several actions that may occur during the life cycle of an electronic transferable record, such as endorsement (A/CN.9/768, para. 46).

74. The general rule on functional equivalence between electronic and written form contained in the law on electronic transactions (A/CN.9/797, para. 38) applies to all electronic records that are not transferable. If the Model Law on Electronic Transferable Records is enacted by consolidation with an enactment of the UNCITRAL Model Law on Electronic Commerce or similar text, the enacting jurisdiction may consider adopting a single provision for the functional equivalence of written and electronic form, which will apply to both transferable and non-transferable electronic records.

### *References to preparatory work*

A/CN.9/WG.IV/WP.122, paras. 12-13; A/CN.9/768, paras. 40-44;  
A/CN.9/WG.IV/WP.124, paras. 31-33; A/CN.9/797, paras. 36-39;  
A/CN.9/WG.IV/WP.128, paras. 38-39; A/CN.9/804, paras. 18-19;  
A/CN.9/WG.IV/WP.130, paras. 45-47;  
A/CN.9/WG.IV/WP.132, paras. 47-49;  
A/CN.9/WG.IV/WP.135, paras. 57-60;  
A/CN.9/WG.IV/WP.137, paras. 44-47;

### “Draft article 8. Signature

“Where the law requires a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person’s intention in respect of the information contained in the electronic record.”

### Remarks

75. At its fifty-third session, the Working Group agreed that draft article 8 is meant to apply only to electronic transferable record and not to electronic records that are not transferable, though used in connection with electronic transferable records (A/CN.9/869, paras. 48-49). In light of that conclusion, the Working Group may wish to further consider its decision that draft article 8 should refer to the information contained in the “electronic record” and not to the “electronic

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<sup>14</sup> For comments on that provision, see UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, paras. 47-50.

transferable record” as that article deals with a general signature requirement in the substantive law (A/CN.9/804, para. 20).

### **Comments**

76. Article 8 establishes the requirements for the functional equivalence of “signature” (A/CN.9/804, para. 20) 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).

77. Article 8 is inspired by article 7, subparagraph 1(b) of the UNCITRAL Model Law on Electronic Commerce. Moreover, following the text of article 9, paragraph 3 of the Electronic Communications Convention, it refers to the “intention” of the party so as to better capture the different functions that may be pursued with the use of an electronic signature. The reliability of the method referred to in article 8 shall be assessed according to the general reliability standard contained in article 11.

78. The reference to the signature requirement being fulfilled “by” an electronic transferable record is meant to clarify that article 8 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 (A/CN.9/869, paras. 48-49). Hence, article 8 sets forth a functional equivalence rule for the notion of “signature” with respect to electronic transferable records only.

79. Certain electronic transferable records management systems, such as those based on distributed ledger, may use pseudonyms rather than real names. In that case, the requirement to identify the signatory may be satisfied by linking pseudonym and real name as needed.

80. The general rule on functional equivalence of electronic and handwritten signatures contained in the law on electronic signatures applies to signatures used in relation to all electronic records that are not transferable. If the Model Law on Electronic Transferable Records is enacted by consolidation with an enactment of the UNCITRAL Model Law on Electronic Signatures or similar text, the enacting jurisdiction may consider adopting a single provision for the functional equivalence of electronic and handwritten signatures, which will apply to both transferable and non-transferable electronic records.

### **Notion of “Original”**

#### **Comments**

81. Unlike other UNCITRAL texts on electronic commerce, the Model Law does not contain a functional equivalence rule for the paper-based notion of “original” (A/CN.9/804, para. 40). In that respect, it should be noted that article 8 of the UNCITRAL Model Law on Electronic Commerce refers to a static notion of “original” while electronic transferable records are meant, by their own nature, to circulate. Therefore, the notion of “original” in the context of electronic transferable records is different from that adopted in previously-adopted UNCITRAL texts (A/CN.9/797, para. 47). Accordingly, the Model Law refers to integrity of the electronic transferable record as one of the requirements that need to be fulfilled in

order to achieve functional equivalence with a transferable document or instrument (art. 9, subpara. 1(b)(iii)) (see A/CN.9/WG.IV/WP.139/Add.1, para. 24).

82. Hence, while the notion of “original” of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of “singularity” and “control” that allow identifying both the person entitled to performance and the object of control.

*References to preparatory work*

A/CN.9/WG.IV/WP.122, paras. 12-13; A/CN.9/768, paras. 41 and 43;  
A/CN.9/WG.IV/WP.124, paras. 31-34; A/CN.9/797, paras. 40-47;  
A/CN.9/WG.IV/WP.128, paras. 40-41; A/CN.9/804, para. 20;  
A/CN.9/WG.IV/WP.130, paras. 48-53;  
A/CN.9/WG.IV/WP.132, paras. 50-55;  
A/CN.9/WG.IV/WP.135, paras. 61-67;  
A/CN.9/WG.IV/WP.137, paras. 48-51; A/CN.9/869, paras. 48-49.