United Nations A/CN.9/828

General Assembly

Distr.: General
18 November 2014

Original: English

United Nations Commission on International Trade Law
Forty-eighth session
Vienna, 29 June-16 July 2015

Report of Working Group IV (Electronic Commerce) on the work of is fiftieth session (Vienna, 10-14 November 2014)

Contents

V.14-07903 (E) 261114 271114

I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[1]

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.[2]

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).[3] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[4] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").[5] In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[6]

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.[7] There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.[8] In that context, the desirability of identifying and focusing on specific types of or specific issues

---

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[3] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

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

[5] Ibid., para. 235.

[6] Ibid.

[7] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.

[8] Ibid., para. 83.

related to electronic transferable records was mentioned.[9] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[10]

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed 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 to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly assist in facilitating electronic commerce in international trade.[11] After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[12] It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.[13]

9. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with 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) (A/CN.9/797, paras. 109-112).

10. 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 its addendum. The Working Group focused on the discussion on the concepts of original, uniqueness, and integrity of an

---

[9] Ibid.

[10] Ibid., para. 90.

[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 227.

[12] Ibid., paras. 230 and 313.

[13] Ibid., para. 313.

electronic transferable record based on principles of functional equivalence and technological neutrality.

11. At its forty-seventh session, in 2014, the Commission took note of the Working Group's key discussions at its forty-eighth and forty-ninth sessions.[14] Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records.[15]

II. Organization of the session

12. The Working Group, composed of all States members of the Commission, held its fiftieth session in Vienna from 10 to 14 November 2014. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, China, Colombia, Denmark, France, Germany, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

13. The session was also attended by observers from the following States: Angola, Belgium, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Egypt, Iraq, Libya, Malta, Nicaragua, Peru, Sweden and Tunisia.

14. The session was also attended by observers from the European Union.

15. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: International Centre for Promotion of Enterprises (ICPE) and World Customs Organization (WCO);

(b) *International non-governmental organizations*: African Center for Cyberlaw and Cybercrime Prevention (ACCP), Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Association of the Bar of the City of New York (ABCNY), China Society of Private International Law (CSPIL), CISG Advisory Council, Institute of Law and Technology (Masaryk University), International Federation of Customs Brokers Associations (IFCBA), International Federation of Freight Forwarders Associations (FIATA), Internet Corporation for Assigned Names and Numbers (ICANN) and Law Association for Asia and the Pacific (LAWASIA).

16. The Working Group elected the following officers:

Chairman: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Ligia GONZÁLEZ LOZANO (Mexico)

17. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.129); and (b) A note by the Secretariat on

---

[14] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17).

[15] Ibid.

draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.130 and Add.1).

18. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

19. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.130 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

20. The Working Group recalled that, at its forty-sixth session, broad support had been expressed for the preparation of draft provisions on electronic transferable records. At that session, the Working Group had agreed that those provisions should be presented in the form of a model law, without prejudice to the decision on the form of its work (A/CN.9/761, para. 93). In light of the progress made during the previous three sessions, views were exchanged on the form of the text to be prepared.

21. One view was that the draft provisions should take the form of a model law. It was explained that, given the limited number of existing legislation on electronic transferable records, a model law would provide useful guidance to States as well as flexibility in addressing differences in national laws. It was indicated that a model law would be easier to update in light of legislative and practical developments. It was further stated that the preparation of a model law would not necessarily preclude the possibility of preparing, at a later stage, an instrument of a treaty nature, which would offer a higher degree of legal uniformity. It was added that those concerns expressed with regard 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”) could be adequately addressed in a model law.

22. Yet, another view was that it was premature to proceed with the preparation of a model law, particularly due to the conflicts it might create with respect to the

Geneva Conventions. Thus, support was expressed for a text of a less binding nature, such as a legislative guide.

23. After discussion, it was agreed that the Working Group would proceed with the preparation of a draft model law on electronic transferable records ("draft Model Law"), subject to a final decision to be made by the Commission.

24. The Working Group then considered the treatment of electronic transferable records that existed only in an electronic environment and had no corresponding paper-based transferable document or instrument. It was suggested that including such records in the scope of the draft Model Law might require adjustments to the overall structure as well as to the wording of the draft Model Law.

25. It was recalled that the Working Group had previously attempted to deal with the issue. For example, the definition of electronic transferable records in draft article 3 had been broadened to include those records that existed only in an electronic environment. Paragraph 3 of draft article 1 aimed at extending the application of the draft provisions to those records in jurisdictions where such records existed.

26. It was suggested that the draft Model Law should not exclude from its scope those records that existed only in an electronic environment, which performed the same functions as or similar functions to a paper-based transferable document or instrument. In that context, it was widely felt that the draft Model Law, by taking a functional approach, could provide needed guidance.

27. However, it was also felt that the Working Group should be cautious in taking such an approach as the key aim of the draft Model Law should be to provide functional equivalence rules enabling the use of paper-based transferable documents or instruments in an electronic environment. It was further mentioned that the Working Group should not be excessively concerned by those records that existed only in an electronic environment, which were present in very few jurisdictions, as the national laws that created such records were already self-sufficient. The concern was also expressed that the inclusion of those records in the scope of the draft Model Law would entail matters of substantive law.

28. After discussion, the Working Group agreed to proceed with the preparation of functional equivalence rules for the use of electronic transferable records corresponding to a paper-based transferable document or instrument. However, as it was generally felt that there was merit in extending the scope of the draft Model Law to those records that existed only in an electronic environment, it was agreed that the Working Group, at a later stage, should review the draft articles to see if and how they could be adjusted in relation to such records.

29. With respect to the scope of application of the draft Model Law, it was explained that, while the main focus of the Model Law was to provide functional equivalence rules for enabling the use of electronic equivalents of paper-based transferable documents or instruments, it would be desirable to provide guidance also with respect to transferable records that existed only in an electronic environment, which already existed in certain jurisdictions. It was clarified that this seemed in line with the broad mandate received from the Commission (A/66/17, para. 238). It was suggested that a structured approach, allowing first for the preparation of provisions dealing with electronic equivalents of paper-based

transferable documents or instruments, and, at a later stage, for the review of those provisions in light of the needs of transferable records that existed only in an electronic environment, would facilitate completion of the project.

30. The Working Group agreed 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 also 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 subsequently be reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment.

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

31. As to the first set of square brackets in the chapeau of paragraph 1, it was agreed that it would be sufficient to refer to "an" electronic transferable record. It was further agreed that the definition of the term "electronic record" should be retained.

32. With respect to the first part of subparagraph 1(a), it was indicated that an electronic transferable record as defined in draft article 3 produced necessarily legal effects, including entitling its holder to performance, and that therefore the word "[operative]" was not necessary (see also A/CN.9/804, para. 72). It was added that the word "[operative]" could be subject to different interpretations and be misunderstood as having substantive implications. It was suggested that the words "to identify the electronic record as the electronic transferable record" should replace the words "to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record".

33. In response, it was said that the qualification "operative" or "authoritative" was necessary to identify the electronic record equivalent to a paper-based transferable document or instrument entitling its holder to performance. It was explained that the identification of the operative or authoritative electronic record was necessary to clarify which electronic record was the transferable record. It was added that, although an electronic transferable record as defined in draft article 3 produced legal effects, that did not suffice to identify which electronic record was the operative or authoritative record. In that line, it was suggested that the words "to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record" should replace the words "to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record".

34. It was recalled that the second part of subparagraph 1(a) originated from previous discussion on uniqueness (see also A/CN.9/804, paras. 71 and 74). It was explained that the reference to prevention of unauthorized replication of electronic transferable records was included with the aim of avoiding the circulation of more than one electronic transferable record, which could lead to multiple claims for performance of the same obligation.

35. After discussion, the Working Group decided to retain the two drafting suggestions relating to the first part of subparagraph (1)(a) in square brackets for

future consideration and to delete the words “to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record”.

36. With respect to paragraph 2, the Working Group discussed whether a reliability standard should be included for each subparagraph of paragraph 1.

37. One view was that there was no need to include a reliability standard for subparagraphs (a) and (b), as other provisions, such as draft articles 12 and 18, already provided such guidance.

38. Another view was that subparagraph (b) required a different treatment as the reliability test need not apply when assessing whether the method rendered the electronic record capable of being subject to control. It was recalled that draft article 18 provided the standard for assessing the reliability of the method used to establish control. Hence, it was suggested that the reliability test should only apply to subparagraphs (a) and (c).

39. With respect to subparagraph (c), it was agreed that guidance should be sought from draft article 11(2) (see para. 49 below).

40. After discussion, the Working Group agreed that paragraph 2 should be deleted and paragraph 1 could be revised along the following lines:

> “1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of an electronic record if a method is employed:
>
> (a) That is as reliable as appropriate, [to identify that electronic record as the electronic transferable record] [to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record] and to prevent the unauthorized replication of that electronic transferable record;
>
> (b) To render that electronic record capable of being subject to control during its life cycle; and
>
> (c) That is as reliable as appropriate, to retain the integrity of the electronic transferable record.”

Draft article 11. Integrity of an electronic transferable record

41. It was agreed that the contents of draft article 10(1)(c) and of draft article 11(1) were identical and that draft article 11(1) should be deleted.

42. With respect to paragraph 2 of draft article 11, it was explained that the provision should aim at ensuring that changes to the electronic transferable record that had possible legal consequences would need to be documented in order to satisfy the requirement of integrity in draft article 10(1)(c), but this would not include changes of a technical nature. It was added that using language already present in other UNCITRAL texts, and whose meaning was therefore clear, would be preferable to introducing new language.

43. The view was expressed that the term “legally relevant” was unclear and should be deleted. It was explained that the term “authorized” aimed at ensuring that permitted changes would be recorded. It was further explained that paragraph 2 aimed at establishing a standard for assessing the functional equivalent

of integrity, and from that perspective, non-permitted changes should not be documented. However, it was added, in practice the system might document non-permitted changes for other purposes, such as documenting misuse or abuse of an electronic transferable record.

44. Another view expressed was that the term "authorized" could present challenges in determining which changes were authorized. For that reason, it was suggested that the term "legally relevant" should be retained.

45. After discussion, the Working Group agreed that paragraph 2 should be merged with draft article 10 to provide the criteria for assessing integrity and a reliability standard for integrity. It was further agreed that the words "legally relevant" and "authorized" should be retained in square brackets, the words "apart from any change which arises in the normal course of communication, storage and display" should be retained outside square brackets, and the words "[, and in accordance with draft article 30]" should be deleted.

46. The Working Group then considered subparagraph 2(b). Differing views were expressed. One view was that there was no need for the reliability standard to make reference to the purpose for which the information in the electronic transferable record was generated as that purpose was not likely to vary with each type of electronic transferable record.

47. Another view was that the provision contained in subparagraph 2(b) could have an implication broader than the integrity of the electronic transferable record. It was noted that similar reliability standards were found in draft articles 9 and 18. It was suggested that subparagraph 2(b) could be placed in draft article 12. It was explained that the application of the general reliability standard contained in draft article 12 in the various draft articles would differ depending on the purpose of each article and that this would give needed flexibility when assessing the application of the reliability standard in practice. The same would apply if subparagraph 2(b) were to be incorporated in draft article 12.

48. There was support for that view. However, it was pointed out that draft article 12 aimed at setting out a reliability standard for the electronic transferable record management system as a whole, whereas subparagraph 2(b) was specific to the integrity of the record and the information contained therein. It was therefore suggested that subparagraph 2(b) should be retained with respect to the integrity of the electronic transferable record.

49. After discussion, it was agreed that subparagraph 2(b) should be retained as part of draft article 10 (see para. 45 above) and also included, with general application, in draft article 12 for further consideration by the Working Group.

Draft article 18. Possession

50. It was agreed that the words "the use of" in the chapeau of paragraph 1 should be deleted.

51. With respect to subparagraph 1(a), concerns were raised on the use of the word "identify". In particular, it was said that identification could be understood as implying an obligation to name the person in control. In response, it was indicated that the draft Model Law allowed for the issuance of electronic transferable records to bearer, which implied anonymity. After discussion, it was agreed that the words

"[and to identify the person in control]" should be deleted as the notion of control implied the identification of the person in control.

52. With respect to subparagraph 1(b)(i), it was said that the term "generated" should be retained because it referred to a technical process and did not have any substantive law implication. It was added that the same term had been used in other UNCITRAL texts on electronic commerce, such as in article 8(1)(a) of the UNCITRAL Model Law on Electronic Commerce, as well as in the draft Model Law. In that respect, it was also recalled that the term "created" had been used in the Rotterdam Rules.

53. It was suggested that the term "issued" could replace both "generated" and "created" since it was widely used in business practice and had an established meaning. Concerns were raised that the term "issued" had certain substantive law implications. Different views were expressed on whether its use would pose challenges given the correlation between control as a functional equivalent of possession and issuance.

54. After discussion, the Working Group agreed to retain the terms "[generated]" and "[issued]" in subparagraph 1(b)(i) for future consideration.

55. It was indicated that paragraph 2 was redundant in light of draft article 10(1)(b). It was explained that since that provision set forth a requirement with respect to electronic transferable records, it would be better placed in draft article 10. The Working Group agreed to delete paragraph 2.

56. In that context, it was suggested that the reference to "life cycle" in draft article 10(1)(b) could be replaced with language similar in content but more descriptive, such as that used in article 1(21) of the Rotterdam Rules.

Draft article 19. [Presumption of person in control]

57. It was noted that draft article 19 originated from a provision establishing the requirements of control. It was explained that other aspects of that provision had been incorporated in the definition of "control" in draft article 3 as well as in draft article 18. It was stated that, while the aim of current draft article 19 was to provide a "safe harbour" rule for the reliability of a method establishing control (A/CN.9/WG.IV/WP.128/Add.1, para. 14), a discussion to clarify its actual scope was required.

58. It was said that the current formulation of the draft article as a presumption rule added an unnecessary element of complexity. It was further explained that presumption rules might be useful in substantive law, but not in a text aimed at achieving functional equivalence. Hence, it was indicated that the draft article should be drafted as an assertive rule. It was also suggested that the draft definition of "control" could be incorporated in the draft article.

59. It was said that subparagraph (a) should take into consideration instances when the person in control was identified other than by the electronic transferable record. In that respect, it was said that subparagraph (a) should refer to the method used for identification instead.

60. A suggestion was made that draft article 19 could be revised along the following lines to set out the requirements of control: "For the purposes of this law,

a person has control of an electronic transferable record when the method employed reliably identifies such person as the person entitled to the rights evidenced by the electronic transferable record."

61. It was explained that draft article 19 as revised would make it possible for "control" to achieve the same result that "possession" of a paper-based transferable document or instrument brought, without touching upon substantive law. It was stated that the method to be employed to establish control would identify the person with the rights, while the substantive law would decide whether or not that person was the rightful holder. It was also noted that the current definition of control, which merely stated that control was a factual power to deal with or dispose of the electronic transferable record, did not provide sufficient guidance.

62. While support was expressed for that proposal as it aimed at describing in an assertive manner how control was to be established, concerns were also raised. It was said that the revised article did not fully set out the requirements of control. It was also pointed out that referring to the "person entitled to the rights evidenced by the electronic transferable record" was inappropriate as that referred only to the rightful holder under substantive law. It was further suggested that the definition of "control" provided in draft article 3 could be incorporated into draft article 19.

63. It was generally felt that the key element to be incorporated in the draft article was that the method establishing control identified a person in control (or, possibly, more than one person), without implying whether that person would have the right to performance of the obligation. It was further noted that the draft article would not need to touch upon the legal consequences of a person being in control of the electronic transferable record. It was also stated that an electronic transferable record in itself did not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performed that function. It was added that a reliable identification of the person in control was needed to build confidence of third parties in the use of electronic transferable records.

64. After discussion, the Working Group agreed that draft article 19 should be revised as follows:

> "A person has control of an electronic transferable record if the method reliably identifies that person as the person in control."

65. It was also agreed that draft article 19 would be better placed as a separate paragraph in draft article 18, thereby supplementing the functional equivalence rule contained therein.

66. The view was expressed that the resulting provision would render the definition of "control" in the draft Model Law unnecessary. This was objected to as the current definition of "control" provided some guidance to the readers of the draft Model Law. It was added that decisions on definitions could be better taken once the draft articles of the Model Law had been fully considered and the use of the defined terms ascertained.

67. After discussion, it was agreed that the definition of "control" would be retained in the draft Model Law in square brackets.

Draft article 20. Delivery

68. With respect to draft article 20, it was agreed that the words "[of control]" could be deleted in light of the definition of the term "transfer" in draft article 3.

Draft article 21. Presentation

69. The view was expressed that there was no need to retain draft article 21 as there was no clear distinction between delivery and presentation. It was added that a dedicated provision on presentation would not be necessary, since draft articles on endorsement and control would suffice to establish the functional equivalence of presentation. Another view was that presentation performed a function different from delivery and thus, it was necessary to have a functional equivalence rule for presentation.

70. Support was expressed for retaining the words "or provides consequences for non-presentation" outside square brackets to cover all possible circumstances.

71. It was indicated that reference to the intention to present the electronic transferable record was not needed in the draft article since the draft Model Law should not refer to the will of the parties, which was relevant for substantive law. It was also pointed out that the intention to present was implicit in the act of presentation itself. In response, it was noted that, if the reference to the intention to present were to be deleted, the resulting text would refer only to demonstration of control of the electronic transferable record, which was not a matter exclusive to presentation, but common to the entire life cycle of the electronic transferable record.

72. During the discussion of draft article 21, a suggestion was made that the words "the use of" should be deleted in line with the decision made with respect to draft article 18 (see above, para. 50). It was agreed that the words "the use of" should be deleted. Furthermore, the Secretariat was requested to review those draft articles (for example, articles 8, 9, 10, 13, 15, 20 and 22) where the words "with respect to the use of an electronic transferable record" were used and to revise them accordingly.

73. After discussion, the Working Group agreed to adopt the following text as the basis for its deliberations:

> "Where the law requires a person to present for performance or acceptance a paper-based transferable document or instrument or provides consequences for non-presentation, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsements if required, for performance or acceptance."

74. A concern was expressed that the revised draft article 21 might have unintended substantive law implications.

75. A number of suggestions were made with respect to the sequence and placement of draft articles 20, 21, 22 and 23.

Draft article 22. Endorsement

76. It was recalled that endorsement was one of the two elements for transferring paper-based transferable documents or instruments, the other being delivery. It was

suggested that a provision on endorsement would not be necessary, given that the draft Model Law already contained functional equivalence rules for writing, signature and transfer. However, in response, it was said that the draft article was necessary to provide functional equivalence for forms of endorsement required under substantive law, such as endorsements on the back of a paper-based transferable document or instrument or by affixing an allonge, and should therefore be retained.

77. It was indicated that there were instances when substantive law allowed for, but did not require endorsement, and that therefore the words "or permits" should be retained.

78. It was said that the words "logically associated or otherwise linked to" better reflected current practice and were technology-neutral. However, the view that the words "included in" would more accurately reflect current practice was also expressed. It was added that reference to "logically associated or otherwise linked to" was already present in the definition of electronic record and that the retention of the words "included in" would also cover cases where information relating to the endorsement was logically associated or otherwise linked to the electronic record, thereby forming a composite electronic record.

79. It was suggested that the definition of "transfer" of an electronic transferable record, which set forth that the transfer of an electronic transferable record meant the transfer of control over an electronic transferable record, and draft article 22, which established a functional equivalence rule for the endorsement of an electronic transferable record, should be more closely aligned.

80. After discussion, the Working Group agreed to retain the draft article as well as the words "or permits" outside square brackets. It was also agreed that the words "that requirement is met" should be revised to take into account instances where the law permitted an endorsement and that similar drafting changes should be made to other articles in the draft Model Law. It further agreed to retain the words "logically associated or otherwise linked to" as well as "included in" to provide for all possible instances and methods for the incorporation of an endorsement in an electronic transferable record.

Draft article 23. Transfer of an electronic transferable record

81. A suggestion was made that draft article 23 should be transformed into a functional equivalence rule along the following lines:

> "Where the law requires or permits the issuance or transfer of a paper-based transferable document or instrument to bearer, that is met with respect to an electronic transferable record if the electronic transferable record is issued or transferred in a manner that the identity of the person in control of the electronic transferable record is not known.
>
> "Where the law requires or permits a paper-based transferable document or instrument that is issued to bearer to be transferred to a named person, that is met with respect to an electronic transferable record if the electronic transferable record, which was issued to a person in control whose identity is unknown, is transferred to a person in control whose identity is known."

82. On the other hand, it was suggested that draft article 23 should be deleted because it would be sufficient for the draft Model Law to allow for the issuance and transfer of electronic transferable records to bearer in the same manner as paper-based transferable documents or instruments, a result which was already achieved in draft article 1, paragraph 2. It was said that if the draft article were to be revised as a functional equivalence rule (see para. 81 above), it could have an unintended effect of imposing additional requirements when an electronic transferable record was issued or transferred to bearer. In that context, the practical reasons for issuing or transferring paper-based transferable documents or instruments to bearer were stressed (for example, parties in the chain of transfers might not wish to endorse the document or instrument so as not to attract liability).

83. In response, it was stated that the electronic environment posed peculiar challenges since there could be uncertainty as to what constituted an electronic transferable record issued or transferred to bearer. It was explained that a user of the electronic transferable record system would, in most cases, have to identify itself to access the system. In that case, while the electronic transferable record itself might not expressly indicate the name of the person in control, the system would nonetheless contain such information. If such information was made available to the person in control at the end of the chain of transfers, and in particular if such information, once associated with the electronic transferable record, was made available to the transferee, the question arose whether that electronic transferable record could be considered the functional equivalent of a paper-based transferable document or instrument to bearer. It was further indicated that a functional equivalence rule on this matter was needed because draft article 1, paragraph 2, referred the matter to substantive law without providing additional guidance.

84. While some support was expressed for retaining the draft article as revised (see para. 81 above), the Working Group agreed to delete draft article 23.

Draft article 24. Amendment of an electronic transferable record

85. With respect to draft article 24, it was widely felt that the key element to be incorporated was the possibility to evidence and trace any amended information contained in an electronic transferable record.

86. As to its structure, there was agreement that draft article 24 should be aligned with other draft articles providing a functional equivalence rule (for example, articles 20 to 22) along the following lines:

> "Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], that requirement is met with respect to an electronic transferable record, if a method is employed to reflect all the amended information and to identify the amended information as such."

87. A view was expressed that draft article 24 could be deleted considering that an amendment generally consisted of a writing and a signature, for which draft articles 8 and 9 already provided functional equivalence rules. Hence, if retained as a functional equivalence rule (see para. 86 above), draft article 24 would need to merely refer to draft articles 8 and 9 and state that such an amendment would need to be identifiable as such.

88. Drafting suggestions were also made. While it was argued that the inclusion of the word “all” emphasized the need to reflect every amended information, it was generally felt that that notion was evident in paragraph 1 even without the word “all”. It was also widely felt that the term “accurately” could be deleted as it did not provide an objective standard while introducing an additional burden. A similar argument was made with respect to the word “readily”. In response, it was stated that without such qualification the burden of identifying amended information would fall on the users of the system, since in an electronic environment all amended information would be identifiable, albeit not easily for the users. Therefore, it was indicated that the adoption of a stringent standard would be desirable so that users would be able to easily and readily distinguish amended information.

89. With respect to paragraph 2, it was suggested that as long as paragraph 1 included a requirement that any amended information would be identifiable as such, a statement to that effect would not be necessary in the electronic transferable record. It was also stated that the method to be employed to identify the amendment or the amended information need not be set out in the draft Model Law as it could impose additional burden on the management of the electronic transferable record. There was general support for that suggestion.

90. After discussion, it was agreed that draft article 24 should be recast as a functional equivalence rule similar to other draft articles taking into account the suggestions made above. It was also agreed that the square brackets around the words “or permits” and “or provides consequences for the absence of an amendment” should be removed. It was further agreed that the words “[all]” and “[accurately]” as well as paragraph 2 should be deleted.

Draft article 25. Reissuance

91. The view was expressed that paragraph 1 could be deleted as it was simply a restatement of draft article 1, paragraph 2, stating that if reissuance were permitted under substantive law, it should also be allowed for electronic transferable records. However, it was noted that there was some merit in retaining the paragraph to confirm that understanding.

92. It was also suggested that paragraph 2 could be deleted as it introduced an additional requirement that might not exist under substantive law. That view was supported by practice in the transport industry, whereby a reissued bill of lading would bear no indication of such reissuance.

93. After discussion, it was agreed that paragraph 1 should be retained, while paragraph 2 should be deleted.

Draft article 26. Replacement

94. It was suggested that the heading of the draft article should be changed to “Change of medium” to reflect the actual content of the provision.

95. It was recalled that the draft article had a substantive nature due to the fact that the law applicable to paper-based transferable documents or instruments was unlikely to provide rules for change in medium. It was added that the draft article should satisfy two main goals, i.e., enabling change of medium without loss of

information and ensuring that the replaced document or record would not further circulate.

96. It was suggested that the word “holder” should substitute the words “person in control” in the chapeau of paragraph 1 and in subparagraphs 1(a) and (b), as those provisions referred to the holder in possession of a paper-based transferable document or instrument. The suggestion was also made that the words “change the medium by replacing” should substitute the word “replace” in the chapeau of paragraph 1 for clarification.

97. It was further suggested that the word “surrender” should be retained in the draft article because the word “present” had a specific meaning under draft article 21. It was suggested that the words “replacement for” should be deleted as they were superfluous. It was also said that the word “upon” was preferable to the word “after” to express the notion that there should be no interval between the issuance of the replacement and the termination of the replaced document or record.

98. Different views were expressed on the sequence of the various steps needed for change of medium. In particular, it was noted that, if the replaced document or record were to cease to have any effect or validity before the issuance of its replacement, this could expose the holder or the person in control to having no document or record in case the issuance of the replacement was not completed. On the other hand, if the replaced document or record were to cease to have any effect or validity after the issuance of its replacement, the obligor could be exposed to multiple claims based on both an electronic transferable record and a paper-based transferable document or instrument in case the replaced document or record had not been terminated. In response, it was noted that the requirements set forth in subparagraphs (a), (b) and (c) of paragraphs 1 and 2 were concurrent and not sequential, and that the parties would be in a position to determine the most adequate sequence for meeting those requirements in light of all circumstances.

99. With respect to the consent requirement, it was suggested that reference should be made to the obligor as the holder would have the right to compel performance by the obligor. In response, it was said that an obligor would be able to issue the replacement instrument only when it was also the issuer, for example, in bills of lading and promissory notes, but that the issuer and the obligor were different parties in bills of exchange. It was added that reference to the obligor as the person entitled to express consent to the change of medium would be too broad since, under its current definition, “obligor” would include endorsers and that would lead to requiring consent of a number of parties not directly affected by the change of medium, with significant increase in cost and time. In that respect, it was suggested that the matter could be further considered in conjunction with the definition of “obligor”, which was used only in draft articles 26 and 27 of the draft Model Law.

100. It was illustrated that some existing legislation and practice recognized only change of medium from electronic to paper, and that in those cases the request of the holder could suffice to change medium, while the obligor would have to comply.

101. It was indicated that paragraph 3 repeated a concept already contained in the draft Model Law and that it should be deleted. Similarly, it was indicated that paragraph 4 restated a notion already present in the draft Model Law as well as a general legal principle, and that therefore it should be deleted. In response, it was said that paragraph 4 performed useful declaratory functions.

102. After discussion, the Working Group agreed that: the title of the draft article should be revised to "Change of medium"; the word "holder" should replace the words "person in control" in the chapeau of paragraph 1 and in subparagraphs 1(a) and (b); the word "[issuer]" should be deleted and the word "obligor" should be kept outside square brackets for future consideration; the words "[present]" and "[for replacement]" should be deleted while the word "surrender" should be retained outside square brackets; and the word "upon" should be kept outside square brackets and the word "[after]" deleted. It was further agreed that paragraphs 1 and 2 should be recast in order to reflect that the requirements contained therein were concurrent and not sequential, and that paragraphs 5 and 6 should be revised taking into account the suggestions mentioned above. The Working Group also agreed to delete paragraph 3 and to retain paragraph 4.

Draft article 27. Division and consolidation of an electronic transferable record

103. It was noted that the draft article should aim at providing a functional equivalence rule and should be recast accordingly. It was indicated that different levels of details were possible, and that, while a more generic rule could promote technology neutrality, a more detailed rule could provide additional useful guidance. In that respect, it was said that reference to a reliable method as the sole requirement for functional equivalence could be sufficient. However, it was also suggested that elements in paragraphs 2 and 3 could be considered as requirements of such a functional equivalence rule.

104. After discussion, the Working Group agreed that paragraph 1 should be aligned with other functional equivalence rules. It was also agreed that paragraphs 2 and 3 should be deleted, while certain elements of paragraphs 2 and 3 could become part of paragraph 1.

Draft article 28. Termination of an electronic transferable record

105. With respect to the draft article, the view was expressed that the current wording emphasized too much the end-result of "preventing circulation" and that the reference to the word "circulation" was not clear. It was also suggested that the draft article should be recast following the structure of other functional equivalence rules.

106. As to the content of the rule, a number of options were suggested: (i) to retain the current wording "preventing further circulation of an electronic transferable record"; (ii) to refer to "termination of the electronic transferable record"; (iii) to refer to "depriving the electronic transferable record of its effects as such"; and (iv) to refer to "preventing further transfer of the electronic transferable record".

107. It was recalled that the aim of the draft article was to provide guidance on how termination could be achieved in an electronic environment. In that context, it was suggested that simply referring to "termination" of the electronic transferable record might not provide sufficient guidance. The need to consider the use of the word "termination" throughout the draft Model Law was stressed.

108. After discussion, it was agreed that paragraph 1 should be revised along the following lines: "Where the law requires or permits the termination of a paper-based transferable document or instrument or provides consequences for its non-termination, that is met with respect to an electronic transferable record if a

reliable method is used [to terminate the electronic transferable record][to prevent further transfer/circulation of the electronic transferable record].” It was further agreed that paragraph 2 should be deleted.

Draft article 29. Use of an electronic transferable record for security rights purposes

109. With respect to the draft article, it was agreed that paragraph 1 should be recast in the format similar to other functional equivalence rules. In that context, it was noted that the variance in the substantive laws governing paper-based transferable documents or instruments, particularly with respect to their use for security right purposes, made it difficult to formulate a rule more concrete than as provided in the draft article, which was only permissive in nature.

110. After discussion, it was agreed that paragraph 1 should be recast as a functional equivalence rule possibly providing guidance on the elements to be considered to enable the use of electronic transferable records as collateral in secured transactions.

111. It was further agreed that a new paragraph could be included either in the draft article or elsewhere in the draft Model Law stating that the draft Model Law would not affect the application of any rule of law governing security rights in paper-based transferable documents or instruments or electronic transferable records.

V. Technical assistance and coordination

112. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat in the field of electronic commerce. Particular reference was made to recent or upcoming events in Sri Lanka, Colombia, China and Australia to promote UNCITRAL texts on electronic commerce, as those States were already signatories of the United Nations Convention on the Use of Electronic Communications in International Contracts (the Electronic Communications Convention) or had already made significant steps to become a party to that Convention.

113. The Working Group was informed of the status of the Electronic Communications Convention, which now had six States parties, with Montenegro being the most recent to ratify the Convention in September 2014. It was further noted that an increasing number of States had enacted national legislation that included substantive provisions of the Electronic Communications Convention. In that context, the interaction between the Convention and other UNCITRAL texts, in particular the United Nations Convention on Contracts for the International Sale of Goods and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was highlighted.

114. It was further mentioned that the Secretariat continued to be engaged in providing law reform assistance to States in preparing, updating and reviewing their electronic commerce legislation, and that the UNCITRAL website was constantly updated with information about States that have enacted legislation based on UNCITRAL texts.

115. The Working Group also took note of ongoing coordination activities, among others with United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP), United Nations Conference on Trade and Development (UNCTAD) and Asia-Pacific Economic Commission (APEC).

116. The Working Group also heard a presentation by a representative of the European Commission on the Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation), which was adopted on 23 July 2014 and entered into force on 17 September 2014 providing a predictable regulatory environment to enable secure and seamless electronic interactions. Other developments in the European Union with respect to identification and trust services and their possible implications for the private sector as well as globally were mentioned. It was said that certain aspects of the eIDAS Regulation could shed light on the present and future work of the Working Group.

117. The Working Group also heard a presentation on an ongoing research project on the use of electronic transferable records for supply chain financing carried out at the University of Goteborg. It was mentioned that preliminary findings highlighted the need to fully understand the developments in the functions of negotiable transport documents, and how they could interact with, and possibly further modernize secured transactions law and practice. It was indicated that the outcome of that research project could be particularly useful to promote access to credit for small and medium-sized enterprises. In that respect, it was added that the traditional use of negotiable transport documents presupposed a time frame not adequate for modern logistics practice and that their dematerialization could have a major impact in expanding their use.