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Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session (Vienna, 9-13 December 2013)

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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

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[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 facilitate 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]

II. Organization of the session

9. The Working Group, composed of all States members of the Commission, held its forty-eighth session in Vienna from 9 to 13 December 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Brazil, Bulgaria, China, Colombia, Denmark, Ecuador, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Pakistan, Panama, Paraguay, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine and United States of America.

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[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.

10. The session was also attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Chile, Cuba, Czech Republic, Dominican Republic, Malta, Mozambique, Portugal, Qatar, Romania, Sweden and United Arab Emirates. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organizations*: World Customs Organization (WCO);

(b) *International non-governmental organizations*: Comite Maritime International (CMI), European Law Student Association (ELSA), European Multi-Channel and Online Trade Association (EMOTA), Fédération Internationale des Associations de Transitaires et Assimilés (FIATA) and Institute of Law and Technology (Masaryk University).

12. The Working Group elected the following officers:

Chairman: Sr. Agustín MADRID PARRA (Spain)

Rapporteur: Mr. Dusán HORVÁTH (Hungary)

13. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.123); (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.124 and Add.1); and (c) A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.125).

14. 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

15. The Working Group engaged in discussions on the draft provisions on electronic transferable records. 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

Draft article 1. Scope of application

16. Different views were expressed on whether to retain the word "corresponding" in paragraph 2. It was suggested that inclusion of that word would establish a link between a paper-based transferable document or instrument and an electronic transferable record that performed the same functions. It was added that the link would be better established by placing that word before "electronic transferable record". In response, it was explained that the substantive law would determine its applicability to the electronic transferable record, and that therefore the word "corresponding" should be deleted as it could be misleading. After discussion, the Working Group agreed to delete the word "corresponding" in paragraph 2.

17. It was indicated that paragraph 3 aimed at allowing the application of the draft provisions also to electronic transferable records that existed only in an electronic environment, without interfering with their substantive law. It was clarified that paragraph 3 would not be necessary in jurisdictions where no such electronic transferable record existed. It was further indicated that a decision on paragraph 3 could be made only in light of the final form of the draft provisions, which was still undetermined. It was therefore decided that paragraph 3 would be retained in square brackets, pending discussion on the definition of electronic transferable record.

Draft article 2. Exclusions

18. The Working Group agreed to retain paragraph 1 outside square brackets, as a similar provision had proven useful in the enactment of the UNCITRAL Model Law on Electronic Commerce.

19. It was said that the term "financial instrument" contained in paragraph 2 was too broad as it could encompass certain types of paper-based transferable document or instrument. It was explained that the rationale behind paragraph 2 was to exclude instruments of an investment nature. It was suggested that paragraph 2 should refer instead to "stocks, bonds and other investment instruments". It was added that the reference to "other investment instruments" could include derivative instruments, money market instruments and any other financial product available for investment.

20. It was indicated that, if the final form of the draft provisions were to be a treaty, certain paper-based transferable documents or instruments should also be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (see paras. 109-112 below).

Draft article 3. Definitions

21. While it was agreed that other definitions contained in draft article 3 should be examined in the context of the respective relevant draft article, the Working Group had a discussion about the definitions of "electronic transferable record" and "paper-based transferable document or instrument".

22. A number of suggestions were made with regard to both definitions. One was that the two definitions should be aligned closely. Another was that both definitions

should include a reference to the "title or right" rather than merely making a reference to the "right to claim performance of obligation". With regard to the words "specified" or "incorporated", it was noted that "incorporated" was often understood as a notion referring to tangible goods. It was added that a right would not be specified in the document or instrument as substantive law would be the source of such right, and therefore the word "incorporated" would be more appropriate than the word "specified". It was indicated that the word "specified" referred to the performance obligation and not the relevant rights. In response to a question on what was meant by "transferable", it was mentioned that whether a document or instrument was transferable or negotiable was an issue of substantive law not dealt with in the draft provisions.

23. With respect to the definition of "electronic transferable record", it was stated that "transferring the right to performance of obligation" was only one of the functions of an electronic transferable record. Other functions included evidencing the obligation and identifying who had the right to performance. A suggestion was made that the definition should focus on the fact that the holder of the electronic transferable record would be entitled to claim the performance of obligation. Another suggestion was that the definition should convey the three key functions of transferability, title to property and right to performance of obligation. Yet another suggestion was to define electronic transferable record as the electronic equivalent of a paper-based transferable document or instrument, or as an electronic record that served the same functions as a paper-based transferable document or instrument. In that context, the Working Group recalled that the current definition of electronic transferable record had been broadened and thus was not in line with the definition of paper-based transferable document or instrument, in order to cover instruments that existed only in an electronic environment.

24. With respect to the definition of "paper-based transferable document or instrument", the Working Group recalled that the definition originated from 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"). Yet, a suggestion was made that it should focus on the fact that a paper-based transferable document or instrument was capable of transferring rights specified in that document or instrument (in line with the definition of electronic transferable record) and that this could be done by delivery with or without endorsement. As to the first point, it was mentioned that "being capable of transferring rights" implied that the holder was entitled to the rights embodied. With respect to the second point, it was noted that the method of transferring the rights was a matter of substantive law and need not be reflected in the definition. While another suggestion was to delete the definition of "paper-based transferable document or instrument", it was noted that there was a need to retain the definition in order to reflect the underlying rule that the law governing paper-based transferable documents or instruments was not affected by the draft provisions as stated in article 1, paragraph 2. It was further noted that certain draft articles contained reference to paper-based transferable documents or instruments (e.g., draft article 23).

25. Another suggestion was to include a list of paper-based transferable documents or instruments to be covered. In response, it was noted that such an approach could unnecessarily limit the scope of the draft provisions and that

defining the term in a generic manner would be more appropriate. However, it was added that there was merit in including an indicative list of examples either in the definition or in the commentary.

26. It was generally agreed that there was a need to align the definitions of "paper-based transferable document or instrument" and "electronic transferable record" by including both the "transferability" and the "entitlement" aspects. It was also agreed that the definition of "paper-based transferable document or instrument" could include an indicative list of examples, while whether those examples would be retained in the definition or in the commentary would be discussed at a later stage. The Secretariat was requested to provide a revised draft of the definitions in square brackets for further discussion.

27. In that context, a question was raised with regard to the applicability of the draft provisions to straight (non-transferable) bills of lading and other non-transferable documents or instruments. It was noted that even though such a document or instrument would not be transferable, there might be merit in applying the draft provisions to such document or instrument, as requirements for "possession" and "delivery" discussed in the draft provisions might be required for its use. In response, it was stated that the current definitions presupposed the exclusion of such instruments by making reference to "transferable" and that the Working Group should focus on documents or instruments that were intended to be transferred.

28. After discussion, the Working Group agreed that straight (non-transferable) bills of lading and other non-transferable documents or instruments should not be covered within the definitions of "electronic transferable record" and "paper-based transferable document or instrument" and thus were outside the scope of the draft provisions. It was also agreed that the draft provisions should only focus on "transferable" documents, instruments or records in accordance with the mandate given by the Commission to the Working Group.

Draft article 4. Interpretation

29. It was said that the reference to "general principles" contained in paragraph 2 should be further explained in order to provide adequate guidance. In that respect, it was clarified that those general principles referred to the law governing electronic communications, and not to the law governing paper-based transferable documents or instruments. After discussion, the Working Group decided to retain draft article 4, subject to further explanation of its content and operation.

Draft article 5. Party autonomy

30. It was indicated that parties should be allowed to derogate from and vary any article of the draft provisions as this was necessary, inter alia, to ensure adaptability to technological developments. In that respect, it was noted that some draft provisions referred to not yet existing procedures and processes, and that therefore it would be inappropriate to limit the parties' ability to adjust to future developments. It was further noted that draft article 5 referred not only to party autonomy but also to privity of contract, which should be reflected in the title of the draft article. It was added that the provisions of mandatory nature contained in substantive law would in any case not be affected by the draft provisions.

31. It was noted that the draft provisions worked together as a set to provide minimum requirements for functional equivalence and that the parties should only be allowed to derogate from the draft provisions in its entirety and not just some provisions because if only some provisions were derogated from, the remaining provisions would not be sufficient to achieve functional equivalence. It was also noted that draft article 13 provided that a person's consent would be required for the use of electronic transferable records, and therefore the purpose of draft article 5 might already be achieved through draft article 13.

32. The Working Group agreed to retain draft article 5 in square brackets and to indicate those draft articles that would not be subject to party autonomy.

Draft article 6. Information requirements

33. The Working Group decided to retain draft article 6 in its current form.

Provisions on electronic transactions (draft articles 7-10)

34. It was widely felt that draft articles 7 to 10 could be retained in a separate section as currently presented in A/CN.9/WG.IV/WP.124. It was also mentioned that the principle of party autonomy would be applicable to those articles as parties should be able to derogate from them.

Draft article 7. Legal recognition of an electronic transferable record

35. Noting that draft article 7 stated the principle of non-discrimination, the Working Group agreed to retain it in its current form.

Draft article 8. Writing

36. Recalling that draft articles 8 and 9 were based on provisions adopted by UNCITRAL for establishing minimum standards on form requirements, the Working Group examined the terminology used in those provisions, mainly "data message" and "electronic communication". It was recalled that the Electronic Communications Convention included a definition of "electronic communication" establishing a link between the notions of "communication" and "data message".

37. It was widely felt that draft article 8 should also apply when "information" was required to be in writing, as information might not necessarily be communicated. It was further suggested that the draft provisions should focus on the use of electronic transferable records and therefore it would be sufficient to state that the written form requirement was met when information contained in or related to the electronic transferable record was accessible so as to be usable for subsequent reference.

38. Yet another suggestion was to delete the words "with respect to the use of an electronic transferable record" in order to formulate draft article 8 as a general rule on written form requirement. That suggestion was objected to as being too broad and one that should be contained in the general electronic transactions law.

39. After discussion, the Working Group agreed to delete the word "[communication]", to remove the square brackets around the word "information", to delete the words "by [an electronic communication][an electronic record]" and to request the Secretariat to revise the words "contained therein".

Draft article 9. Signature

40. While it was noted that the UNCITRAL Model Law on Electronic Signatures contained a two-tier approach in article 6, paragraph 3, it was agreed that such an approach would not be required in the draft provisions and that draft article 9 should mirror article 9, paragraph 3, of the Electronic Communications Convention.

41. With regard to the first set of square brackets, it was widely felt that the words "a signature of a person" were more appropriate for the purposes of the draft provisions.

42. With regard to the second and third sets of square brackets, a suggestion was made that they could be deleted entirely by including the word "relevant" in front of the word "information" in subparagraph (a) and replacing the third set of square brackets with the words "the information". That suggestion was objected to as the term "relevant" could be understood as referring to some of the information contained in the electronic record and not to the entire record. It was further noted that the word "intention" was sufficient to link the person and the relevant information. Therefore, it was agreed to delete the words "the communication" and to retain the words "the electronic record" outside square brackets in the second and third sets of square brackets.

43. In that context, the Working Group examined the definition of the term "electronic record" as provided in draft article 3. While support was expressed for that definition, it was noted that that definition was not different from the definition of "data message" contained in the Model Law on Electronic Commerce and in the Electronic Communications Convention. Therefore, in order to distinguish the term "electronic record" from the term "data message" and to highlight the fact that other information might be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement), a suggestion was made that the definition of "electronic record" should be recast to "information generated, communicated, received, and/or stored by electronic means, including all information logically associated or otherwise linked together, whether generated contemporaneously or not". It was explained that such a definition would also be in line with the definition of "electronic transport record" provided in article 1, paragraph 18, of the Rotterdam Rules. While there was support for that suggestion, it was noted that the definition should clarify that not all electronic records included a set of composite information. Therefore, it was suggested to revise the proposed definition along the following lines: "information generated, communicated, received, and/or stored by electronic means, which may, where appropriate, include all information logically associated or otherwise linked together, whether generated contemporaneously or not".

44. Another proposal was to add the words "endorsed" and "archived" in the current definition of "electronic records" contained in draft article 3 in order to capture the rationale behind the proposed revised definition of "electronic record" (see para. 43 above) without introducing non-legal terminology.

45. After discussion, the Working Group agreed to add the words "which may, where appropriate, include all information logically associated or otherwise linked together, whether generated contemporaneously or not" in square brackets after the current definition of "electronic record" in draft article 3.

46. During the discussion of draft articles 8 and 9, a question was raised with regard to the appropriateness of the words "or provides consequences for the absence of" in both articles. It was stated that there would be no "requirement" that could be met if the law only provided consequences for the absence of a writing. It was suggested that the words "where the law explicitly or implicitly requires" should be used instead. In response, it was recalled that article 6, paragraph 1, and article 7, paragraph 1, of the Model Law on Electronic Commerce referred to explicit requirements in the law, while the notion of implicit requirement (whereby the law only provided the consequences for not meeting the requirement) was dealt with in paragraph 2 of both articles. It was further recalled that the current drafting was based on article 9, paragraphs 2 and 3, of the Electronic Communication Convention, which aimed at covering both instances. After discussion, the Working Group decided to retain the current structure of draft articles 8 and 9.

Draft article 10. Original

Draft article 11. Uniqueness

Draft article 12. Integrity

47. It was said that the need for a rule on the functional equivalence of a paper-based original in draft article 10 could be related to enabling the issuance of multiple originals, as envisaged in draft article 14, paragraph 4. It was added that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts on electronic commerce. It was decided that draft article 10 would be discussed in conjunction with draft article 14, paragraph 4.

48. With respect to draft article 11, it was indicated that the notion of uniqueness was not a necessary requirement for all electronic transferable records, and it was suggested that the draft article should be redrafted accordingly. It was further explained that in some cases, the notion of control could suffice to prevent the risk of exposing the debtor to multiple requests for performance. It was also noted that the notion of "reliable method" contained in draft article 11, paragraph 1 did not provide sufficient guidance.

49. In response, it was indicated that the notion of uniqueness was a key feature of electronic transferable records. It was added that that notion provided for identifying with certainty the content of the obligation, but not the parties thereto.

50. After its consideration of draft article 17 (see paras. 75-90 below), the Working Group resumed its discussion on draft articles 10, 11 and 12. It was reiterated that the notion of uniqueness was not a general requirement for electronic transferable records (see para. 48 above) and that in practice, it could be very difficult to achieve uniqueness in an electronic environment. It was stressed that uniqueness should not be perceived as a quality on its own and that emphasis should rather be on the function that uniqueness achieved, namely, prevention of multiple claims. In that line, it was mentioned that there were various methods to replicate that function in an electronic environment without necessarily requiring uniqueness. There was general support for those ideas. Consequently, a suggestion was made that draft article 10 could read as follows: "A reliable method shall be employed to render the electronic transferable record identifiable as such and to prevent its unauthorized replication." That suggestion received support.

51. It was also suggested that draft articles 10 and 11 should be merged to provide a technology-neutral rule on functional equivalence of "original". In response, a concern was raised that draft article 10 and draft articles 11 and 12 served different purposes. While draft article 10 provided a functional equivalent of "original", draft articles 11 and 12 set out a reliability test for establishing control of an electronic transferable record. It was further stated that the deletion of draft articles 11 and 12 would undermine the operation of draft article 17 on control.

52. After discussion, it was suggested that draft article 10 should be revised as follows: "Where the law requires the original of a paper-based transferable document or instrument, or provides consequences for the absence of the original, that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed: (a) to provide assurance that the electronic transferable record retains its integrity from the time when it was first generated in its final form; and (b) to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record" (hereinafter the "revised draft article 10"). It was explained that such a rule would provide for functional equivalence of "original" incorporating the elements of integrity and uniqueness contained in draft articles 11 and 12. It was further explained that the wording of subparagraph (b) in the revised draft article 10 departed from that of article 8 of the Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention because of the different notion of "original" in the context of electronic transferable records (see para. 47 above).

53. A concern was raised with respect to the words "the original" in the revised draft article 10. It was explained that substantive law generally included a reference to the paper-based transferable document or instrument itself without explicitly requiring it to be "the original" and that "the original" status of the paper-based transferable document or instrument was generally assumed rather than explicitly stipulated. Therefore, it was suggested to delete the words "the original of" from the revised draft article 10.

54. In that respect, it was noted that "the law" in the revised draft article 10 should be understood broadly and in a manner similar to the word "the law" in article 9 of the Electronic Communications Convention, which referred to various sources of law and intended to encompass not only statutory or regulatory law but also judicially created law and other procedural law.

55. Another view was that the words "the original" did not pose a challenge. It was said that certain legislations contained a formal requirement for an original, and that legislations that did not contain an explicit stipulation for an original nonetheless implicitly required an original by providing for consequences for the absence of an original. It was stated that a rule of functional equivalence should therefore be provided. It was further stated that requirements for the original also existed in current business practice.

56. After discussion, it was agreed that the words "the original" in the revised draft article 10 should be placed in square brackets for possible clarification or redrafting.

57. Another concern was that the notion of "original" should be understood to be distinct from the notion of "uniqueness". It was also noted that the word "unique"

might be problematic to implement in practice and could give rise to difficulties of interpretation, and thus no reference should be made to the electronic transferable record being unique in the revised draft article 10. To accommodate that concern, a suggestion was made that subparagraph (b) might be drafted along the following lines: "to render the electronic transferable record identifiable as such and to prevent its unauthorized replication" (see para. 50 above).

58. As to the formulation of draft articles 10, 11 and 12, various suggestions were made. One was that draft article 11, paragraph 2, and draft article 12, paragraph 2, could be merged with the revised draft article 10, there being no need to retain three separate articles. It was stated that the merged text would provide a functional equivalence rule for the "original" requirement and that the notions of uniqueness and integrity were notions that supported such a rule. It was also suggested that rules relating to the issuance of multiple originals could be formulated as a separate article (see para. 47 above).

59. It was noted that, when considering draft article 17 on control, the Working Group had postponed the discussion on whether there should be a link between the notion of control and the notions of uniqueness and integrity with respect to the reliability test (see paras. 85-90 below). It was therefore indicated that if draft articles 11 and 12 were to be merged with the revised draft article 10, draft article 17 would need to contain those elements of draft articles 11 and 12 that could no longer be referred to. Another suggestion was that draft articles 10, 11 and 12 should be retained separately. Yet another suggestion was that draft articles 10, 11 and 12 should be recast to two draft articles, one providing a functional equivalence rule for "original" and dealing with multiple originals and another providing the reliability test for uniqueness and integrity.

60. After discussion, the Working Group agreed to revise and place in square brackets draft article 10, taking into consideration the suggestions mentioned above (see paras. 50-59 above).

Time and place of dispatch and receipt

61. It was suggested that the draft provisions should include rules on the time and place of dispatch and receipt of electronic communications in conjunction with the use of electronic transferable records. It was explained that those rules would not interfere with substantive law. It was added that article 10 of the Electronic Communications Convention could provide a useful starting point for drafting such rules. In response, it was said that the actual need for such rules might be better assessed after the discussion of draft article 17 on control.

Draft article 13. Consent to use an electronic transferable record

62. After discussion, the Working Group agreed to remove the square brackets in paragraph 1 and to delete paragraph 2. It was explained that those changes were of an editorial nature and were not meant to affect the operation of the draft article with respect to legal requirements, on the one hand, and consent of the parties, on the other hand.

63. The Working Group agreed to retain paragraph 3 in its current form.

Draft article 14. Issuance of an electronic transferable record

64. It was said that paragraph 1 was superfluous as it reiterated the rule already contained at a general level in draft article 13, paragraph 1. Consequently, the Working Group agreed to delete paragraph 1.

65. While it was recalled that paragraph 2 was included to specifically deal with the possibility of issuing an electronic transferable record to bearer, it was stated that paragraph 2 should be deleted as it reiterated the general principle stated in article 1, paragraph 2. It was agreed that the accompanying text to draft article 1, paragraph 2, should specify that electronic transferable records may be issued to the bearer when permitted under substantive law.

66. It was agreed that paragraph 3 should be moved to draft article 17 on control.

67. It was indicated that the definition of "issuance" contained in draft article 3 did not establish a functional equivalence of the notion of "issuance" in the paper-based environment as it merely referred to draft articles 14 and 17. In response, it was said that the definition of "issuance" was drafted so as to fully respect substantive law, which would set forth requirements for issuance. It was added that the draft provisions did not contain a functional equivalence rule for "issuance".

68. It was recalled that paragraph 4 was closely related to draft article 10 (see para. 47 above). In that context, it was indicated that the practice of issuing multiple originals of paper-based negotiable transport documents still existed and that one reason was to safeguard against loss of an original, but other reasons for that practice still needed to be ascertained. It was also indicated that the draft provisions should facilitate the continuation of existing practices and therefore it would be prudent to include a provision on the issuance of multiple originals, unless the industry requested that such practice should not be permitted to continue in an electronic environment.

69. The Working Group agreed to defer consideration of paragraph 4, which would need to be considered in conjunction with draft article 10, pending the compilation of further information on existing practices relating to the issuance of multiple originals.

Draft article 15. Additional information in an electronic transferable record

70. It was said that the use of electronic transferable records required the inclusion of information, such as a unique identifier, that might not be found on paper-based equivalents. Broad support was expressed for the principle of non-discrimination in draft article 7, which provided the rationale for paragraph 1. However, concerns were raised that paragraph 1 could be interpreted as preventing the inclusion of such additional information. A suggestion was made that paragraph 1 could be reflected in the text accompanying draft article 7 and consequently be deleted.

71. In response, it was indicated that the possibility of including additional information that related to the nature of the electronic transferable record, including technical information, was meant to be covered under paragraph 2, while paragraph 1 aimed at ensuring that electronic transferable records were not discriminated vis-à-vis their paper-based equivalents with regard to substantive information requirements. For instance, it was explained, a law should not contain a

requirement to sign an amendment to an electronic transferable record if it did not require the same for the paper-based equivalent.

72. The importance of documenting any change to the information contained in the electronic transferable record was stressed.

73. After discussion, it was agreed that draft article 15 should be separated into two draft articles: one dealing with substantive information requirements and another dealing with the possibility of including in the electronic transferable record additional information that related to its electronic nature or was necessary due to technical reasons.

Draft article 16. Possession

Draft article 17. Control

74. With respect to draft article 16, the Working Group confirmed that there was no need to refer to "exclusive" control as the concept of control in itself implied exclusivity.

75. With respect to draft article 17, it was widely felt that the concept of control referred only to factual control and that a person who exercised control might not necessarily be the rightful holder, which was a matter of substantive law.

76. In that connection, a suggestion was made that draft articles 16 and 17 should aim at providing a rule for legitimate possession and that control should only be understood to mean legitimate control. It was further stated that a person in control should be the rightful holder and unless that result was achieved, the method employed for the use of electronic transferable records would not be considered reliable. In response, it was reiterated that whether control of an electronic transferable record was legitimate or not was a matter of substantive law and that the Working Group had understood control to be "factual", so as to achieve the functional equivalence of "factual or physical" possession in a paper-based environment.

77. With regard to draft article 17, paragraph 1, differing views were expressed.

78. One view was that the first square bracketed text at the end of paragraph 1 ("the person which, directly or indirectly, has the de facto power over the electronic transferable record") better reflected the understanding of the Working Group that control meant that the person in control had the de facto power to deal with or factually dispose of the electronic transferable record. It was further noted that the reference to "issuance" and "transfer" in the second square bracketed text ("the person to which the electronic transferable record was issued or transferred") posed challenges as it would only apply when the issuance or transfer was legitimate but not when a person had obtained control without the consent of the previous holder. It was explained that the concept of de facto power would cover instances similar to a thief's possession of a paper-based transferable document or instrument. It was also explained that the second square bracketed text caused a circularity problem as the notion of issuance and transfer relied, in turn, on the concept of control.

79. While there was general support for that view (see para. 78 above), another view was that the second square bracketed text would be preferable as it only dealt with the factual aspects of issuance and transfer of an electronic transferable record

without any legal implication. Moreover, it was stated that the term "de facto power" in the first square bracketed text was an unknown legal concept.

80. In order to comprehensively address those concerns, a suggestion was made that draft article 16 and draft article 17, paragraph 1, should be merged and contain a reference to "de facto control of an electronic transferable record, which shall be established by a reliable method". It was explained that the revised draft article would provide a functional equivalence rule for physical possession. It was further explained that such an approach would respect technological neutrality as the method for establishing control differed from one information system to another. For the same reason, it was said that there was no need to illustrate or define how control was to be established.

81. While there was support for that suggestion (see para. 80 above), a concern was raised that "de facto control" could be understood to have a different meaning from the general notion of "control". Another concern was that the substance of draft article 17, paragraph 1, which aimed at describing control, was no longer available.

82. In response, it was noted that the general notion of "control" would not be affected by adding the words "de facto". It was added that the addition of those words emphasized the factual aspect of control and that whether control was legitimate or not was a matter of substantive law. Accordingly, it was suggested to place the words "de facto" in square brackets, to include some explanation on what was meant by de facto control and to consider whether the factual aspect of control might possibly be included in the definition of "control". Those suggestions received support.

83. After discussion, it was agreed that draft article 17, paragraph 1, should be deleted and that draft article 16 should be revised as follows: "Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met through the [de facto] control of an electronic transferable record, which shall be established by a reliable method." It was further clarified that the words "de facto" were put in square brackets to provide the Secretariat with some flexibility in preparing the revised draft article, for example, by introducing a different term, by including an explanation of the term "de facto", or by adding a definition of the term "control" as being "de facto" in draft article 3.

84. As to the heading of the revised draft article 16, while a suggestion was made that it should refer to "possession and control", it was widely felt that the current heading "possession" would be more appropriate and in line with other functional equivalence rules contained in the draft provisions.

85. Noting that the revised draft article 16 included a reference to "a reliable method", differing views were expressed with respect to draft article 17, paragraph 2.

86. One view was that draft article 17, paragraph 2, should be understood as a safe harbour provision or as providing mere guidance by identifying an example of when a method would be considered to meet the reliability standard. Another view was that an illustrative list of factors that might be relevant to the reliability standard could be provided. It was explained that the level of reliability depended on the

information system and that it was for the parties to choose the level of reliability adequate for their transactions. It was noted that such an approach had been taken in the Electronic Communications Convention (e.g., article 9, subparagraph 3(b)(i)). It was also mentioned that setting mandatory minimum requirements could have a negative impact on existing business practices, which differed significantly in the way they ensured reliability. Accordingly, one suggestion was to delete draft article 17, paragraph 2.

87. A view was expressed that draft article 17, paragraph 2 was not a safe harbour provision for the notion of "control", but was in fact a safe harbour provision for the notion of the "holder being in control" of an electronic transferable record. Therefore, it was suggested that the paragraph should be placed elsewhere, if retained.

88. Another view was that the draft provisions should set forth, in technology-neutral terms, mandatory minimum requirements for any method to be considered reliable, similar to the approach taken in article 6, paragraph 3, of the Model Law on Electronic Signatures. It was stated that referring to a "reliable" method without specifying such requirements would be of little value as that notion would have no meaning and could actually cause more uncertainty. It was stressed that as the draft provisions contained several draft articles referring to "reliable", the need arose to specify objective criteria for meeting that requirement in a general manner. It was said that such criteria would increase legal certainty, particularly for commercial operators involved in the use and management of the electronic transferable records. To that end, the following draft provision was suggested as a starting point for future discussion: "In determining reliability for the purposes of draft articles 11, 12 and 16, regard shall be had to the extent to which the method employed is able to ensure data integrity and to prevent unauthorised access to and use of the [system] [method]". In response, it was said that parameters offering guidance on reliability should vary with each draft article where a reliable method was referred to, as each draft article required a reliable method for the purpose of establishing a different quality, and that draft article 17 should only focus on offering guidance with respect to the notion of control.

89. After discussion, it was agreed that draft provisions offering guidance on reliability should present for future discussion by the Working Group various approaches, namely, listing mandatory minimum requirements, presenting possible elements to be considered, and providing a safe harbour rule.

90. Yet another suggestion was that draft article 17, subparagraph 2(b) should be deleted as it dealt with the question of whether and to whom the electronic transferable record was issued or transferred, which were matters of substantive law. It was suggested that subparagraph 2(b) should be revised as follows: "The electronic transferable record identifies the person who, directly or indirectly, has de facto power over the record".

Draft article 18. Delivery

91. A suggestion was made that draft article 18 should be deleted as no functional equivalence rule was necessary for the concept of delivery. In response, it was said that delivery was a common requirement in substantive law and therefore draft

article 18 should be retained. It was suggested that the reference to draft article 21 was superfluous.

92. After discussion, the Working Group decided to retain draft article 18 and to delete the words “in accordance with draft article 21”.

Draft article 19. Presentation

93. A question was raised whether presentation entailed handing over of the paper-based transferable document to the obligor for performance, as that aspect had not been captured in draft article 19. It was said that, as the requirements for presentation were indeed different from those for delivery, a separate provision for presentation was necessary. A view was expressed that cases existed in which presentation could occur without delivery.

94. The Working Group decided to retain draft article 19 for future consideration.

Draft article 20. Endorsement

95. It was explained that while signature and writing were indeed elements of endorsement, those elements were shared with other concepts related to paper-based documents or instruments, for example, acceptance. It was recalled that in a paper-based environment, a peculiar feature of endorsement was its placement on the back of the document or instrument. It was suggested that draft article 20 should be redrafted to better reflect the functions of endorsement.

96. The view was expressed that, if both delivery and endorsement were required for transfer of a paper-based transferable document or instrument, transfer of control of an electronic transferable record in accordance with the draft provisions without meeting the endorsement requirement would result in the transferee being in control of the record, but not being the rightful holder.

97. Subject to those views, the Working Group decided to retain draft article 20 for future consideration.

Draft article 21. Transfer of an electronic transferable record

98. It was suggested that paragraph 1 was superfluous as it merely restated what was already expressed in the definition of “transfer”. In response, it was noted that draft article 21 was justified in light of the prominence of the notion of transfer in the paper-based environment.

99. It was indicated that paragraph 2 was unclear and that the underlying notion referring to the possibility of modifying the requirements for transfer of an electronic transferable record, when permitted by substantive law, was already implicit in draft article 1, paragraph 2. It was added that a clarification to that end could be included in the text accompanying draft article 1, paragraph 2, and that draft article 21, paragraph 2, could be deleted accordingly.

100. Subject to those views, the Working Group decided to retain draft article 21 for future consideration.

Draft article 22. Amendment of an electronic transferable record

101. With respect to draft article 22, it was suggested that: (a) it would be useful to clarify the difference between amendments and other events that added to the substance of an electronic transferable record, such as endorsements and transfer of control; (b) a distinction should be made between amendments which pertain to substantive information and inclusion of additional technical information as mentioned in draft article 15, paragraph 2; (c) a general statement should be provided that an electronic transferable record could be modified; (d) the use of the word "shall" in the draft article and in other draft articles should be revised, as it should not be interpreted as restricting party autonomy; and (e) draft article 22 should be restructured as a functional equivalence rule (see A/CN.9/WG.IV/WP.124/Add.1, para. 24).

Draft article 23. Replacement

102. With respect to draft article 23, it was suggested that: (a) paragraph 3 was not necessary since it reiterated a general rule of party autonomy and thus should be deleted or if retained, the words "or simultaneously" should be added after the words "any time prior"; (b) the word "present" might be replaced with the word "surrender" or some other term taking into account their notions in the substantive law; and (c) further consideration should be given to the words "obligor" and "issuer".

103. In that context, a question was asked if the words "all information contained" in draft article 23, subparagraph 2(b) referred to substantive information or also to information specific to the electronic medium, such as information about the date and time of transfer of control, which might only be required in the electronic medium.

Draft article 24. Reissuance in the original medium

104. With respect to draft article 24, it was suggested that: (a) it should be closely examined in relation to draft article 23 to avoid any contradiction and the two draft articles could be combined; (b) additional rules on the preservation of paper-based transferable documents or instruments upon replacement to electronic transferable records might be provided (see also A/CN.9/WG.IV/WP.124/Add.1, para. 43); (c) it might be expanded to include a separate rule for reissuance due to other reasons, for example, loss or damage; (d) how replacement of an electronic transferable record with a paper-based transferable document or instrument (dealt in draft article 23) and the reissuance of a paper-based transferable document or instrument (dealt in draft article 24) would interact with the substantive law should be examined; (e) draft article 24 should focus on providing a rule for cases in which a problem arose in the replacement process, since that would probably not be dealt with in the substantive law; and (f) the actual practice of replacement should be considered.

Draft article 25. Division and consolidation of an electronic transferable record

105. With respect to draft article 25, it was suggested that: (a) square bracketed version of paragraph 1 was preferable so as to respect party autonomy; and (b) draft article 25 should be considered in conjunction with draft articles 12, 22 and 23.

106. It was also suggested that draft articles 25, 26 and 27 should be formulated into a functional equivalence rule with the chapeau revised along the following lines: “where any rule of law governing a paper-based transferable document or instrument permits …”.

Draft article 29. Conduct of a third-party service provider

Draft article 30. Trustworthiness

107. It was suggested that draft article 29 and 30 ought to be placed in an explanatory note as they were regulatory in nature. It was further said that parties should have the autonomy to choose whether or not to use a third-party service provider as well as the level of trustworthiness of the services. It was also suggested that the term “relying party” in draft article 29 would need to be clarified.

Draft article 31. Non-discrimination of foreign electronic transferable records

108. With respect to draft article 31, it was said the paragraphs 1 and 2 should be redrafted to avoid any contradictions, particularly in light of the rule under which the law of the jurisdiction where the paper-based transferable document or instrument was issued applied to matters of validity of that document or instrument.

Relationship with the Geneva Conventions

109. The Working Group considered the Geneva Conventions in relation to the draft provisions based on document A/CN.9/WG.IV/WP.125 (see para. 20 above).

110. With respect to the possibility of adopting a flexible interpretation of the Geneva Conventions (see A/CN.9/WG.IV/WP.125, para. 24), it was noted that the Geneva Conventions were to be strictly interpreted to permit only paper-based instruments. It was indicated that formalism was a fundamental principle underpinning the Geneva Conventions and that functional equivalence might not suffice to satisfy that principle. It was explained that, for that reason, one jurisdiction had introduced electronic equivalents of the paper-based instruments falling under the scope of the Geneva Conventions as distinct legal notions under a separate substantive law (see A/CN.9/WG.IV/WP.125, para. 23).

111. With respect to the possibility of adopting a protocol to the Electronic Communications Convention (see A/CN.9/WG.IV/WP.125, para. 28), which would remove the current exclusion of electronic transferable records from the scope of application of the Electronic Communications Convention and enable its interaction with the Geneva Conventions in a manner akin to that already envisaged in article 20 of the Electronic Communications Convention, it was stated that that was not a feasible option. It was noted that the Geneva Conventions contained provisions on their amendment that could not be circumvented. It was added that a protocol amending the Geneva Conventions would need to be adopted by all States parties to those Conventions, which was unlikely.

112. It was further indicated that, if the outcome of the current work of the Working Group would be in the form of a model law, it would be possible for enacting States that are parties to the Geneva Conventions to exclude instruments dealt with in the Geneva Conventions from the scope of application in their national law, thus preventing potential conflicts.

Other remarks

113. During the session, it was stated that party autonomy was a key element in the maritime industry as the various parties involved (shippers, carriers, banks, governments, etc.) applied different standards or requirements for the use of transport documents. It was further stated that the critical aspect in using transport documents was ensuring the singularity of performance so that only one holder would be entitled to performance of obligation. It was reiterated that achieving uniqueness in an electronic environment would be quite difficult as the information system would typically generate multiple records stored in various locations, for instance, to ensure business continuity. With respect to multiple originals, it was noted that there might be various methods in an electronic environment to achieve the functions performed through multiple originals in a paper-based environment.

114. The Working Group heard a presentation by the Korean Financial Telecommunications and Clearings Institute on the management of electronic promissory notes in the Republic of Korea. The legal framework and business procedures for electronic promissory notes were illustrated in light of the draft provisions. In addition, some suggestions were made with respect to the practical aspects of operating an electronic transferable record management system.

V. Technical assistance and coordination

115. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce.

116. The Working Group heard also a report on the progress of the preparation of a draft regional arrangement for the facilitation of cross-border paperless trade promoted by the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) in the framework of the implementation of UN/ESCAP resolution 68/3. The use of UNCITRAL texts for building an enabling legal environment for paperless trade in that draft arrangement was highlighted.

117. The Working Group also took note of the coordination activity with the United Nations Centre for Trade Facilitation and E-business (UN/CEFACT) on the revision of UN/CEFACT recommendation 14 (Authentication of trade documents) and work related to single windows interoperability.

118. The Working Group was further informed of recent developments relating to the use of electronic communications in the Russian Federation with a view to facilitating cross-border recognition at the international and regional levels. In particular, reference was made to the Asia-Pacific Economic Cooperation (APEC) Project “Interoperable ICT: Semantic, linguistic and their aspects”, which analysed linguistic, semantic and other aspects of interoperability including the trusted cross-border exchange of electronic documents in order to facilitate interaction of automated systems for economic integration in the APEC region. The Working Group was also informed that the domestic procedures for the ratification of the Electronic Communications Convention by the Russian Federation had been completed.

119. The Working Group was informed of progress made by the Paperless Trading Subgroup of the APEC Electronic Commerce Steering Group, particularly with respect to the e-b/L exchange project involving China, the Republic of Korea and the Russian Federation.

120. The Working Group also heard a presentation by a representative of the European Commission on the proposed Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (e-IDAS), which dealt with mutual recognition of electronic identification and electronic trust services (e-signature, e-seals, time stamping, e-delivery, e-document and website authentication) in the European Union. It was said that certain aspects of the proposed Regulation could shed light on the issues that the Working Group was seeking to address with respect to electronic transferable records.

121. The Working Group expressed its appreciation to the Secretariat for the information provided on technical assistance and coordination activities. The Secretariat was requested to continue working closely with relevant organizations to monitor activities relating to the preparation and promotion of legal texts on electronic commerce with a view to ensuring coordination between the various initiatives and to continue reporting on those activities to the Working Group. States were also asked to provide relevant information to the Secretariat.

VI. Other business

122. The Working Group was informed that the forty-ninth session was scheduled to take place in New York from 28 April to 2 May 2014.