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## Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session (Vienna, 10-14 October 2011)

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## I. Introduction

1. At its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions for future work in due course.<sup>1</sup> At its forty-second session, in 2009, the Commission requested the Secretariat to prepare studies on electronic transferable records in light of the proposals received at that session (documents A/CN.9/681 and Add.1, and A/CN.9/682).<sup>2</sup>

2. In furtherance of those requests, a document on current and possible future work on electronic commerce (A/CN.9/692) was submitted to the Commission at its forty-third session, in 2010. At that session, the Commission requested the Secretariat to organize a colloquium on the relevant topics, namely, electronic transferable records, identity management and electronic commerce conducted with mobile devices and electronic single window facilities, and to report on the discussions held at that colloquium.<sup>3</sup>

3. At its forty-fourth session in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and A/CN.9/728/Add.1) summarizing the discussions at the colloquium on possible future work on electronic commerce (New York, 14-16 February 2011).<sup>4</sup> At that session, the Commission agreed that Working Group IV (Electronic Commerce) should be reconvened to undertake work in the field of electronic transferable records,<sup>5</sup> and that the deliberations could include certain aspects of the other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1.<sup>6</sup>

## II. Organization of the session

4. The Working Group, composed of all States members of the Commission, held its forty-fifth session in Vienna from 10 to 14 October 2011. The session was attended by representatives of the following States members of the Working Group: Australia, Austria, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Italy, Japan, Kenya, Mexico, Nigeria, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

5. The session was also attended by observers from the following States: Belgium, Croatia, Dominican Republic, Indonesia, Panama, Peru, Romania and Slovakia.

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 195.

<sup>2</sup> *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

<sup>3</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 250.

<sup>4</sup> Information about the colloquium is available at the date of this report from [www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html](http://www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html).

<sup>5</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

<sup>6</sup> *Ibid.*, para. 239.

6. The session was also attended by observers from Palestine and the European Union.
7. The session was also attended by observers from the following international organizations:
  - (a) *Intergovernmental organizations*: World Customs Organization (WCO);
  - (b) *International non-governmental organizations*: Conseil des Notariats de l'Union Européene (CUNE), European Multi-channel and Online Trade Association (EMOTA), Institute of Law and Technology (Masaryk University), International Technology Law Association (ITECHLAW) and New York State Bar Association (NYSBA).
8. The Working Group elected the following officers:

*Chairman*: Sr. D. Agustin MADRID PARRA (Spain)  
*Rapporteur*: Ms. Surangkana WAYUPARB (Thailand)
9. The Working Group had before it the following documents:
  - (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.114);
  - (b) A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.115); and
  - (c) Legal aspects of electronic commerce — Proposal by the Government of Spain (A/CN.9/WG.IV/WP.116).
10. The Working Group adopted the following agenda:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Legal issues relating to the use of electronic transferable records.
  5. Work of other international organizations on legal issues relating to the use of electronic transferable records.
  6. Other business.
  7. Adoption of the report.

### III. Deliberations and decisions

11. During the Working Group's discussion, the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations made a statement. Referring to UNCITRAL texts on electronic commerce, she noted that UNCITRAL had made significant contributions to the harmonization of international commercial law. She also took note of the significant challenges that the Working Group would face, given not only the legal but also technological complexity of the subject matter.
12. On behalf of the Secretary-General, the Legal Counsel stressed that work done by UNCITRAL, at both the Commission and the Working Group level, was highly

recognized in the international business community, particularly in the current time of financial crisis and contraction in international commerce. Noting that the poor were often the most vulnerable, she stressed that enabling the use of new technologies through adoption of relevant legislation could foster economic development. She concluded her statement by highlighting UNCITRAL's role in providing international legal standards that could promote the free flow of trade and commerce, and by indicating that the availability of those standards was essential for trade law reform activities in developing economies and economies in transition.

13. The Working Group engaged in discussions on the legal issues relating to the use of electronic transferable records on the basis of document A/CN.9/WG.IV/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

## **IV. Legal issues relating to the use of electronic transferable records**

### **A. Subject matter: electronic transferable records**

14. At the outset, the Working Group proceeded with a general discussion on electronic transferable records. It was recognized that, at present, no internationally accepted, generalized and harmonized legal framework addressed the various issues involved in the use of electronic transferable records, which was deterring their use.

15. In that context, it was suggested that the Working Group should first identify issues arising from the use of transferable documents in the various business sectors and jurisdictions. It was further noted that that discussion should encompass not only possible future use of electronic transferable records but also existing practice.

16. It was also suggested that the Working Group should focus on the legal challenges and obstacles arising from the use of electronic transferable records, such as the creation, issuance, transfer and control of electronic transferable records, and the various methods for identification of the holder, including registries.

17. After discussion, it was generally agreed that the Working Group should proceed to identifying the legal obstacles to the use of electronic transferable records.

18. It was suggested that the Working Group should discuss the concept of electronic transferable records and consider how the relevant issues were addressed in different jurisdictions.

19. A question was raised whether documents entitling the holder to the payment of a sum of money (transferable instruments) should be dealt with separately from those entitling the holder to the delivery of goods (documents of title). In that respect, it was suggested that the Working Group should focus on the discussion of negotiable documents of title.

20. It was also suggested that the Working Group should clarify the differences between transferable instruments and documents of title as well as the differences between negotiable and non-negotiable documents. In that context, it was noted that there was no need to discuss transferable instruments that were non-negotiable, as

the legal issues arising from them were currently addressed by existing UNCITRAL texts on electronic commerce.

21. On the other hand, a comprehensive approach encompassing also securities not yet fully dematerialized was suggested. In that respect, consideration of existing instruments, such as the Unidroit Convention on Substantive Rules for Intermediated Securities, 2009, as well as of work carried out in other forums, including the work of Working Group VI on registration of security rights in movable assets, was recommended.

22. After discussion, it was generally agreed that the Working Group should take a broad approach to its scope of work and take into consideration all possible types of documents in electronic format while leaving open the possibility to differentiate the treatment of those electronic documents, when so desirable.

## **B. Legal challenges for electronic transferable records**

23. The Working Group noted that significant challenges remained when the transfer of the electronic record involved a third party. In that context, it was stressed that transferability and negotiability should be distinguished, with particular focus on the latter as it involved, among others, the protection of third parties. It was agreed that the Working Group should deliberate on the concept of transferability and negotiability in depth and clarify the distinction between those two concepts.

24. It was further noted that, at least in some legal systems, and possibly subject to further qualifications such as the bona fides of the transferee, certain claims to the underlying transactions would not be able to affect the validity of the title transferred with a negotiable instrument. It was mentioned that negotiability of the instrument depended upon both the applicable law and the contractual terms of the instrument.

25. It was indicated that, while paper-based negotiable instruments relied on a presumption of existence of only one original and authentic document, the actual goal of such requirement was to ensure that only one party would be entitled to require performance of the obligation embodied in the negotiable instrument. It was further indicated that such goal might be achieved in the electronic environment without necessarily following the traditional approach, given that electronic records did not exist in only one copy, as electronic transmission itself required duplication of those records.

26. It was suggested that uniqueness in an electronic environment could be achieved through an appropriate use of the notion of control over the negotiable electronic record, which, in turn, would depend on the possibility to reliably identify and authenticate the party exercising control. Such reliable process of identification and authentication, it was added, necessarily required reference to identity management systems. In that respect, it was further indicated that different levels of identification and authentication might be appropriate in light of the different roles of the parties involved in the transfer of the negotiable electronic records.

27. It was further suggested that a discussion of past attempts to establish systems for negotiable records would allow the Working Group to better understand the

reasons that prevented their widespread adoption. Among relevant factors mentioned were obstacles arising from limited acceptance of the underlying legal principles in foreign legal systems as well as the lack of adequate provisions in the applicable law.

28. It was also suggested that, while UNCITRAL texts and other legislative texts were traditionally inspired by the principles of non-discrimination, technology neutrality and functional equivalence, the peculiar needs posed by negotiable electronic records might require a discussion on the possibility of deviating from such principles. In response, it was stated that, while the peculiar features associated with electronic means might allow for a different treatment of electronic documents vis-à-vis paper ones, such treatment would still need to be drafted in technology neutral terms.

### **C. Functional equivalence and technology neutrality**

29. The Working Group had a preliminary discussion on whether the existing fundamental principles of electronic commerce were sufficient to facilitate the use of electronic transferable records or further principles needed to be developed.

### **D. Functional equivalence for “uniqueness”**

30. In relation to existing practice, it was illustrated that the Electronically Recorded Monetary Claims Act of Japan (2007) aimed at facilitating new financial methods by introducing electronic transferable records as a substitute for paper-based promissory notes or bills.

### **E. Functional equivalence for “possession”: the concept of “control”**

31. Reference was made to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (“Rotterdam Rules”)<sup>7</sup> where the “right of control” was defined as the right to give the carrier instructions in respect of the goods (article 1, para. 12). It was illustrated that under the Rotterdam Rules the notion of right of control was applicable to negotiable and non-negotiable documents as well as to electronic and paper-based documents. Moreover, that notion made reference to procedures relating to the issuance and transfer of records and the identification of the holder as sole subject entitled to performance.

32. It was suggested that trustworthiness, reliability and confidence were paramount factors to be considered in future discussions on control of electronic transferable documents.

33. It was mentioned that an in-depth analysis of different models and technologies for identifying the person in control of the electronic record was required in order to understand how the notion of control could be put into effect in an electronic environment. In that respect, it was emphasized that the Working

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<sup>7</sup> United Nations publication, Sales No. E.09.V.9 (treaty not yet in force).

Group should not limit its work to a specific model but adopt a broad approach accommodating various models and their combinations.

34. Several challenges were said to arise when transposing the notion of a negotiable instrument to the benefit of the bearer into an electronic environment. It was said for example, that a registry would require an inscription such as the name of the person entitled to the instrument.

35. Furthermore, it was suggested that the Working Group should consider issues arising from the conversion of electronic transferable records into paper-based ones and vice versa.

36. In response to a statement that the notion of control was already present in article 6 (3) of the UNCITRAL Model Law on Electronic Signatures, 2001 (“Model law on Electronic Signature”),<sup>8</sup> it was noted that that provision was relevant for the identification of the signatory, while the concept of control of an electronic transferable record aimed at establishing an equivalent of possession of a negotiable instrument in the electronic environment.

37. It was mentioned that the Bill of Lading Electronic Registry Organisation (Bolero) system<sup>9</sup> did not allow for the use of negotiable instruments as it was based on contractual agreements. It was further noted that it did not provide a mechanism to protect third parties, which could lead to difficulties when those parties were involved in cross-border transactions.

## **F. The registry approach**

38. The Working Group engaged in a discussion about the registry approach as a means to achieve the functional equivalence of electronic transferable records. As a starting point, references were made to existing registries, for example, the international registry system established under the Convention on International Interests in Mobile Equipment, 2001 (“Cape Town Convention”), the Bolero system and national registry systems. Reference was also made to the current work being undertaken by Working Group VI on registration of security rights in movable assets (see above, para. 21).

39. While the usefulness of electronic registries was generally recognized by the Working Group, it was suggested that caution should be taken in exploring such an approach. First, it was noted that existing registries were created to address specific needs, for example, the registries established under the Cape Town Convention served the purpose of dealing with highly mobile equipment of significant value. Second, it was suggested that the cost of establishing and operating such registries needed to be carefully considered. Third, a concern was raised that the adoption of the registry approach should not compromise the principle of technological neutrality.

40. After discussion, the Working Group agreed that, while existing registries operating at national and international levels needed to be taken into account, the

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<sup>8</sup> United Nations publication, Sales No. E.02.V.8.

<sup>9</sup> Bolero is set up under English Law and is governed by its own private law framework, the Bolero Rulebook. For a description of Bolero, see A/CN.9/WG.IV/WP.90, paras. 75-86.

registry approach was not to be considered as the only approach available to achieve functional equivalence of electronic transferable records. Furthermore, it was stressed that coordination with Working Group VI was essential.

## **G. Possible methodology for future work by the Working Group**

41. It was noted that the lists of topics submitted for possible future consideration (A/CN.9/WG.IV/WP.115, para. 69, and A/CN.9/WG.IV/WP.116, section 4) provided a useful starting point to identify relevant topics.

42. It was suggested that a discussion on the liability of trusted third parties and other service providers, and therefore not limited to registry operators, would be desirable. In response, it was noted that past attempts to deal with liability issues in the Working Group had highlighted the existence of different approaches in the various jurisdictions.

43. It was generally agreed that it was premature to specify the form of the work to be undertaken. It was suggested that it could include a range of instruments. It was further said that clarifications on this point would be possible with progress of work.

44. In that respect, it was said that the Working Group should aim at drafting texts directly related to the needs of the electronic environment and that did not affect the underlying legal provisions. It was added that it was necessary to ensure that those texts be in accordance with the mandate of UNCITRAL and effectively contribute to the development of international trade. Therefore, they should address issues relating to cross-border recognition of electronic transferable records.

45. Some delegations raised concern that any work in the field of electronic commerce might not be needed given the absence of any identifiable problems with respect to electronic transferable records. Conversely, other delegations stated that such work would provide practical and financial benefits to persons who would not otherwise use electronic transferable records. Consultations by some States with their stakeholders had not revealed any situation that caused problems with respect to electronic transferable records and it was suggested that in the absence of legal obstacles to the use of electronic transferable records, the Working Group should consider other work such as providing rules for identity management.

46. In response to the observation that there was no reported legal obstacle to the use of electronic transferable documents, it was noted that the establishment of an enabling legislative environment generated confidence in users about the status of electronic transferable documents, thus promoting the use of those documents. It was added that, in certain jurisdictions, negotiable instruments could be used only if statutory provisions allowed them, and that the lack of such provisions prevented the development of a practice.

47. It was pointed out that while examples of domestic legislation on electronic transferable documents suggested some need for legislation, and that some domestic legislation had been effective, legal obstacles might exist in the use of electronic transferable records in a cross-border context, for example, in the use of electronic bills of lading, for which harmonized rule-making by the Working Group might meet industry needs.



48. It was suggested that a compilation of the practice in the various jurisdictions and business sectors would be useful to identify legal obstacles to the use of electronic transferable documents. In that regard, it was mentioned that the Working Group would benefit from concrete examples of different systems and a list of legal obstacles identified, in particular, in the area of international trade.

49. On the other hand, it was also suggested that the Working Group should first consider the general principles of the law of electronic transferable documents. It was explained that that approach would allow full consideration of the implications of future decisions on more detailed rules.

50. It was further suggested that definition of the terms “electronic transferable documents” and “electronic negotiable documents” would be useful to identify the scope of work.

51. In that respect, it was explained that in common law systems, negotiable instruments were considered a subset of transferable documents qualified by the fact that the negotiation of the instrument took place without reference to the underlying transaction. It was added that the holder in due course of a negotiable instrument could receive a better title to the payment of a sum of money or to the delivery of goods than that held by the transferor, provided other requirements were satisfied.

52. It was mentioned that electronic transferable records were excluded from the scope of UNCITRAL texts on electronic commerce and that therefore, they should be the object of future work.

53. It was further explained that negotiable instrument regimes existing in civil law jurisdictions were similar to those in place in common law jurisdictions. It was noted that such instruments, when issued to the holder, were circulated by endorsement and delivery and, when issued to the bearer, by simple delivery. Therefore, possession of the document was the critical element in their negotiation.

54. As to the scope of work, it was suggested that a list of documents contained in article 2 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”)<sup>10</sup> could provide a useful starting point for discussion. It was recalled that those documents were excluded from the scope of application of the Convention due to the difficulty of creating an electronic equivalent of paper-based negotiability and, in particular, of ensuring the singularity of those documents. It was added that the common element of those documents was the possibility of transferring rights with the document. Reference was also made to articles 9 and 10 of the Rotterdam Rules as being relevant.

55. One suggestion was to identify common and minimum legal requirements for negotiability and the legal obstacles to their transposal in the electronic environment. On the other hand, a concern was raised that legal obstacles to the use of electronic transferable documents and actual industry needs for the use of those documents should be identified prior to engaging in a discussion on the scope of work.

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<sup>10</sup> United Nations publication, Sales No. E.07.V.2 (treaty not yet in force).

56. It was suggested that cross-border recognition was an implicit goal in all issues related to electronic transferable documents. The possibility of clarifying the relation between electronic transferable documents, on the one hand, and electronic money and payments, on the other hand, was also mentioned.

57. The Working Group engaged in a discussion on the creation of electronic transferable documents. It was clarified that the issue being dealt with was not how the rights embodied in electronic transferable documents were created, as that matter was governed by substantive law. Instead, the issue to be considered was the creation of the form of an electronic transferable document that could achieve functional equivalence with a transferable paper-based document.

58. It was generally agreed that UNCITRAL texts on electronic commerce already provided principles for achieving functional equivalence for “writing” and “signature” that may be relevant to the creation of electronic transferable documents, subject to further qualification in light of actual needs.

59. It was suggested that the question of the party entitled to issue or request issuance of an electronic transferable document would also need to be addressed, particularly under the registry approach. In that context, references were made to article 35 of the Rotterdam Rules and the relevant provisions in the Korean law regarding the issuance of the electronic bill of lading (A/CN.9/692, paras. 30-32).

60. It was explained that a signature could perform at least two functions in the context of electronic transferable documents: first, identifying the party and linking that party to the content of the document and second, preserving the integrity of the content of the document, if technology so allowed. However, it was added that that second function could be achieved otherwise: for instance, in a registry system, integrity of the record could be assured by the registry system itself.

61. The Working Group then considered the topics of transfer and enforcement of rights in electronic transferable documents. It was said that those topics were closely related.

62. It was explained that different models could be used for the transfer of those documents and the rights embodied therein, such as the registry model and the token model. It was further said that significant differences in the technical features of those models could exist, for example, with respect to the type of electronic signature and associated level of security.

63. It was indicated that a distinguishing feature of negotiable instruments and documents of title was the protection granted against claims from third parties. It was added that such feature could be obtained only with statutory provisions, as contractual agreements could not affect third parties. Moreover, it was added that in certain jurisdictions, the issuance of those instruments and documents was subject to the existence of an explicit legal provision.

64. It was emphasized that, since delivery was necessary for transferring possession of negotiable instruments and documents of title and of the rights embodied therein, defining a functional equivalent to the notion of possession would permit effective transfer of electronic transferable documents and the rights they represented.

65. It was noted that envisageable mechanisms for the transfer of electronic transferable documents were significantly different from those in place for paper-based transferable documents. Therefore, it was suggested that legal standards should enable the use of electronic transferable documents by defining the general requirements for the functional equivalent of possession, while technology would implement those requirements. It was further explained that, once the functional equivalent of possession was achieved, effects such as negotiability would derive from substantive law applicable both to electronic and to paper-based transferable documents.

66. With respect to uniqueness, it was said that the functional equivalent of possession should identify the sole holder entitled to performance and exclude all persons other than the holder from demanding performance.

67. It was further said that the requirements for the presentation of the electronic transferable document deserved careful consideration, as that presentation might require additional cooperation from the recipient.

68. It was illustrated that reliable identification of the holder was important not only to allow exercise of the right of control but also to verify the validity of the chain of transfers of the document.

69. With respect to identification of the holder, it was explained that two approaches existed. Under the first approach, the law referred entirely to the parties' agreement to determine the adequate level of identification. Under the second approach, the law enumerated requirements on the necessary level of identification. It was suggested that the second approach should be explored bearing in mind the principle of technological neutrality. In that connection, reference was made to the relevant provisions of the Model Law on Electronic Signatures as a possible basis for the preparation of future texts.

70. In the same line, reference was made to article 8 (3) of the UNCITRAL Model Law on Electronic Commerce, 1996 ("Model Law on Electronic Commerce")<sup>11</sup> as a possible source of inspiration for standards for originality and integrity of the electronic transferable document.

71. The Working Group engaged in a discussion on registries for electronic transferable documents. It was illustrated that in some cases, the law mandated the establishment of registries, which could be operated by either public or private entities, while in other cases, industry demand drove the development of private registries in accordance with minimal legal requirements and under governmental supervision.

72. A question was raised whether registries for electronic transferable documents would operate at a national or international level. It was pointed out that international registries would require additional mechanisms to ensure transparency and neutrality in their operation, and that coordination and interoperability between national and international registries should be ensured to preserve legal certainty.

73. Another question was raised whether registries for electronic transferable documents would be tailored to specific types of those documents or would

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<sup>11</sup> United Nations publication, Sales No. E.99.V.4.

encompass multiple types. In that regard, it was noted that registries that focused on a specific document or industry did not pose particular challenges with respect to user awareness since those registries required user's participation, or were particularly relevant for that industry. On the other hand, registries dealing with a wider range of electronic transferable documents might require additional measures to enhance user awareness.

74. It was indicated that the design and operation of registries would depend on a number of elements including the type of electronic transferable document, the technology adopted for the registry, industry and market demand. A question was posed whether a registry system adopting a specific technology could accommodate all types of electronic transferable documents and operate in countries with varying levels of available information and communication technology.

75. In light of the above, it was suggested that the Working Group could focus on identifying requirements for the establishment of registries and possible modalities for the transfer of electronic transferable documents in those registries.

76. The Working Group was briefed about the work of Working Group VI (Security Interest) on the preparation of a text on the registration of security rights in movable assets. It was first recalled that efforts had already been made to ensure consistency of the UNCITRAL Legislative Guide on Secured Transactions ("UNCITRAL Secured Transactions Guide")<sup>12</sup> with the fundamental principles of UNCITRAL texts on electronic commerce. Such coordination resulted in recommendations 11 and 12 of the UNCITRAL Secured Transactions Guide.

77. It was further explained that the aim of the current work was to provide guidelines for the establishment and operation of a security rights registry based on the UNCITRAL Secured Transactions Guide and, in particular, Chapter IV. As the registry being envisaged was, to the extent possible, an electronic one, a discussion had taken place at the eighteenth session of Working Group VI to ensure consistency with the fundamental principles of UNCITRAL texts on electronic commerce (A/CN.9/714, paras. 34-47).

78. It was noted that the following characteristics differentiated a security rights registry, as envisaged by the UNCITRAL Secured Transactions Guide, from a title registry. First, the security rights registry was based on notice registration and not on document registration. Second, the purpose of the registration was not to create the security right but rather to make it effective against third parties. Therefore, the notice was merely a reference point for third parties informing them of the possible existence of a security right. Third, the security rights registry was grantor-based and not asset-based. Finally, no formal authorization was required in the notice registration process. Based upon these distinctions, it was generally agreed that a security rights registry was significantly different from a title registry.

79. It was further noted that the UNCITRAL Secured Transactions Guide and the text being prepared had sections on the coordination of registries, including possible coordination between title registry and security rights registry, which could be useful in future deliberations of Working Group IV.

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<sup>12</sup> United Nations Publication, Sales No. E.09.V.12.

80. The Working Group engaged in a discussion on the extent to which the issuer should remain involved in the transfer or negotiation of an electronic transferable document. It was explained that the issuance of an electronic transferable document entailed agreement on the technology to be used between the issuer and the first holder. The necessity to ensure that that document could be subsequently circulated without the involvement of the issuer was stressed. It was also pointed out that from the technological perspective, the involvement of the issuer during the life cycle of the electronic transferable document depended on the type of technology used.

81. The Working Group then discussed the impact of different modes of transferring rights in electronic transferable documents on the protection of third parties in good faith. In that respect, it was said that protection of third parties was derived from substantive law. It was stressed that electronic and paper-based transferable documents should give the same level of protection to third parties.

82. However, it was also said that different systems for electronic transferable documents could offer varying levels of protection to third parties. In particular, it was added, while several examples of registry-based systems giving adequate protection to third parties existed, less information was available to the Working Group at this time on token-based systems. It was further indicated that, while certain systems might in practice provide lesser protection to third parties, it was desirable to leave flexibility in developing solutions adequate to actual business needs.

83. There was general agreement that issues relating to the liability of third parties involved in the transfer or storage of electronic transferable documents, or in the identification of the parties of those documents, were relevant and that therefore they should be retained for future deliberation. However, the view was also heard that such issues were not limited to electronic transferable documents.

84. The Working Group moved to consider the matter of the conversion of electronic transferable documents to paper-based ones, and vice versa. The importance of that matter for the acceptance of electronic transferable documents in business practice was stressed in light of varying levels of technological development in different countries and among commercial operators.

85. The “Loi concernant le cadre juridique des technologies de l’information” of Québec, province of Canada (L.R.Q., chapitre C-1.1) was mentioned as useful reference for future work on this topic. It was explained that in that law, the notion of document was defined in technology neutral terms, and that that approach allowed the exchange of paper and electronic support at any time without affecting the legal status of the information contained in the document, provided the conversion procedure was documented in order to ensure integrity of that information (article 17). It was added that article 17 (5) of the Model Law on Electronic Commerce could also provide useful guidance on conversion of documents.

86. It was indicated that in the United States of America, in some systems, if a paper-based transferable document needed to be converted to an electronic form, it had to be presented to the issuer, and that, if an electronic transferable document had to be converted to a paper-based one, control on it had to be surrendered. Moreover, the replacing document had to mention that a replacement took place. It was explained that the goal of such procedure, which was similar to the mechanism

provided for in article 10 of the Rotterdam Rules, was to ensure that only one transferable document would remain in circulation. Reference was also made to the Check Clearing for the 21st Century Act which allowed the creation of an electronic version of the paper check.

87. Similar provisions were illustrated with respect to the law of the Republic of Korea, which, in the case of conversion of an electronic bill of lading, required the annotation of previous endorsements on the back of the paper-based bill of lading (see also A/CN.9/692, para. 37). In that respect, a question was raised whether the conversion of the document would require an agreement between the issuer and the holder, or whether the request of one party, at least in some circumstances, would suffice.

88. Different practices were reported with respect to conversion of electronic and paper-based non-transferable documents. It was explained that in Italy the conversion of a paper-based document to an electronic one had to be certified by a trusted third party (a notary or the public administration) in order to maintain the same legal validity of the document, while in Paraguay electronic documents could maintain legal validity when printed on paper with an identification number and bar code. Other jurisdictions reported resistance to the destruction of converted paper-based documents.

## **V. Work of other international organizations on legal issues relating to the use of electronic transferable records**

89. The Working Group moved to discuss work of other organizations on legal issues relating to electronic commerce and, in particular, draft Recommendation 37 on Signed Digital Evidence Interoperability of the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) (the “draft Recommendation”). It was indicated that some States as well as the UNCITRAL Secretariat had responded to the invitation to submit comments on the draft Recommendation to its Project Team within the Open Development Process.

90. The following concerns on the draft Recommendation were raised. First, the general approach adopted in the draft Recommendation seemed to run against the fundamental principles of UNCITRAL texts on electronic commerce, in particular, the principle of technology neutrality, by favouring a specific type of electronic signature. Second, the draft Recommendation seemed not to allow parties the flexibility to agree on the technology more appropriate to their needs. Lastly, certain terms used in the draft Recommendation, such as “evidence”, had legal implications, despite the disclaimer contained in the draft Recommendation stating the contrary.

91. After discussion, the Working Group expressed appreciation for the work of UN/CEFACT aiming at facilitation of trade and harmonization of business practices. The Working Group welcomed the referral of the draft Recommendation from UN/CEFACT in light of the complementarities of the work of the two organizations. The Working Group also looked forward to future cooperation with UN/CEFACT, including through its involvement in future deliberations of the Working Group, with a view, in particular, to clarifying the text and underlying policy choices of the

draft Recommendation. It was agreed to have a more detailed review of the draft Recommendation at future sessions.

## **VI. Other business**

### **A. Technical assistance and cooperation**

92. In the framework of the strategy for technical cooperation endorsed by the Commission at its forty-fourth session (A/66/17, paras. 254, 255 and 257), the Working Group heard updates on technical cooperation activities in the field of electronic commerce. In particular, initiatives at the regional level to promote the adoption of UNCITRAL texts on electronic commerce were illustrated, as well as resulting legislative enactments. The desirability to promote broader formal adoption of the Electronic Communications Convention was also stressed. The Working Group expressed appreciation for the work undertaken by the Secretariat in the field of technical cooperation and highlighted the importance of that work in furthering the mandate of UNCITRAL.

### **B. Future meetings**

93. The Working Group engaged in a preliminary discussion about its future work. It was generally agreed that discussions at the next session would benefit from working documents encompassing and addressing the various issues that were identified at this session and compiling information about relevant legislation in different jurisdictions and current practices in various industries.

94. In that context, it was recognized that the dates assigned for the next session of the Working Group (13-17 February 2012, New York, or 9-13 January 2012, Vienna) might not provide sufficient time for Member States to consult with industry and for the Secretariat to collect the information needed for the preparation of the necessary working documents.

95. The Secretariat was first requested to inquire into the possibility of finding alternative dates for the next session, possibly later in spring 2012, to allow for additional time for preparation. It was further suggested that, while maintaining the option of having the next session in spring 2012, various forms of inclusive consultations, including expert group meetings, video conferences, or regional workshops, should be explored to assist the Secretariat in preparing the working documents and to maintain a channel of communication between Member States of the Working Group. Member States were also urged to provide relevant information to the Secretariat at the earliest time possible to assist the Secretariat in preparing the working documents. In the circumstances, the Secretariat was requested to also consider convening the next session, subject to the Commission's approval, in fall 2012, in light of the progress made in preparing that meeting.