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Šafranko, Zvonimir

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## THE NOTION OF ELECTRONIC TRANSFERABLE RECORDS

Zvonimir Šafranko\*

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### ABSTRACT

*The UNCITRAL Model Law on Electronic Transferable Records is planned for adoption in the summer of 2017. The central term around which the Model Law builds up is electronic transferable record which is defined as a generic term which includes electronic equivalents for various documents of title and negotiable instruments. The complexity of this term arises from the fact that its notion is indirectly interfered by various jurisdictions providing different legal solutions in one hand and need for its uniform interpretation on the other hand.*

*The paper analyzes the notion of the electronic transferable record from its origins in the US law to its latest definition provided by UNCITRAL. Both, functional and substantive approaches are analyzed and discussed with an aim to provide the general and universal definition of electronic transferable record from the theoretical prospective.*

*KEYWORDS: electronic transferable record, Model Law, document of title, negotiable instrument, functional equivalence.*

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### 1. INTRODUCTION

It only remains to spice and to serve the new delicacy of the UNCITRAL cuisine from the Electronic Commerce menu. The Model Law on Electronic Transferable Records (hereinafter: MLETR)<sup>1</sup> is finally finished and should be

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\* Teaching and Research Assistant at Department of Law, Faculty of Economics and Business University of Zagreb; zsafranko@efzg.hr.

<sup>1</sup> The current text of the Draft MLETR is available in UN doc. A/CN.9/WG.IV/WP.139 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/051/96/PDF/>

included in the agenda for adoption during the UNCITRAL 50<sup>th</sup> session in the summer 2017.<sup>2</sup> The main ingredient of this delicacy is electronic transferable record (hereinafter: ETR).<sup>3</sup> Ingredient that is generally unknown, uncommon and untested but interesting and potentially very useful.

In the simplest manner ETR could be defined as a generic term which includes electronic equivalents for various documents of title<sup>4</sup> and negotiable instruments,<sup>5</sup> such as electronic bills of lading, electronic warehouse receipts,

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V1605196.pdf?OpenElement on 17 October 2016; UN doc. A/CN.9/WG.IV/WP.139/Add.1 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat) Addendum, 16 August 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/052/25/PDF/V1605225.pdf?OpenElement> on 17 October 2016; UN doc. A/CN.9/WG.IV/WP.139/Add.2 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat) Addendum, 17 August 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/052/61/PDF/V1605261.pdf?OpenElement> on 17 October 2016.

<sup>2</sup> UN doc. A/71/17 – Report of the United Nations Commission on International Trade Law, Forty-ninth session (27 June – 15 July 2016), p. 49, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/29/PDF/V1604829.pdf?OpenElement> on 17 October 2016.

<sup>3</sup> For legal literature that specifically deals with the electronic transferable records as a generic term see Alba, M., *Transferability in the electronic space at the crossroads: Is it really about the document?*, Creighton International and Comparative Law Journal, vol. 5, no. 1, 2013; Gregory, J., *Electronic Transferable Records*, Slaw Canada's online legal magazine, 1 March 2011, available at: <http://www.slw.ca/2011/03/01/electronic-transferable-records/> on 17 October 2016; Šafranko, Z., *Pravni aspekti korištenja elektroničkih prenosivih zapisa u trgovačkim transakcijama*, Doctoral thesis, University of Zagreb, 2016. See also Gabriel, H. D., *The New United States Uniform Electronic Transactions Act: Substantive Provisions, Drafting History and Comparison to the UNCITRAL Model Law on Electronic Commerce*, Uniform Law Review, vol. 5, no. 4, 2000; Whitaker, D., *Rules Under the Uniform Electronic Transactions Act for an Electronic Equivalent to a Negotiable Promissory Note*, The Business Lawyer, vol. 55, no. 1, 1999; Winn Kaufman, J., *What is transferable record and who cares?*, Association of American law schools 2001 annual meeting: Section on law and computers, San Francisco, 2001., available at: <http://www.bu.edu/law/central/jd/organizations/journals/scitech/volume72/winn.pdf> on 17 October 2016; Winn Kaufman, J., Witte, R., *Electronic Records and Signatures under the Federal E-SIGN Legislation and the UETA*, The Business Lawyer, vol. 56, no. 1, 2000, for the generic term “transferable record” within the U.S. legislature.

<sup>4</sup> The document of title is a written document issued by or addressed to a bailee, which evidences that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. See Dalhuisen, J. H., *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Vol. 2: Contract and Movable Property Law*, 5th ed., Oxford, 2013, p. 554; Pejović, Č., *Documents of Title in Carriage of Goods by Sea under English Law: Legal Nature and Possible Future Directions*, Poredbeno pomorsko pravo, vol. 43, no. 158, 2004, p. 45. See also the definitions of documents of title in UK Factors Act 1889, § 1 (4) and U.S. Uniform Commercial Code (hereinafter: UCC), § 1-201 (16).

<sup>5</sup> Negotiable instrument means an unconditional written promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a

electronic bills of exchange, electronic promissory notes *etc.*<sup>6</sup> The common features of aforementioned paper-based documents and instruments is the principle of incorporation – in general they represent the right (to claim the delivery of goods or to claim the payment) which is connected with the paper-based medium in such a manner that the right itself cannot originate, cannot be transferred and cannot be claimed without the paper document or instrument.

It should be noted that the above mentioned definition of the ETR is simplified as it could be. For legal experts it should be understood only as the introductory point to the generally new and much more complex legal institute. This paper analyses the notions of the ETRs in the U.S. legislature and in the UNCITRAL Working Group IV (Electronic Commerce) *travaux préparatoires* with an aim to give the general theoretical definition of the ETR. Both, functional and substantive approaches are considered in that sense.

Scope of application of the MLETR is *ratione materiae* determined by the notion of ETR.<sup>7</sup> Since the formula of ETR within the context of MLETR is open and practically dependent on the notions of transferable documents and instruments in national or international substantive applicable laws,<sup>8</sup> the practical significance of defining ETRs from the theoretical perspective is evident. The fact that MLETR refers indirectly to the substantive laws of different legal traditions when it comes to the definition of ETRs could lead to different understanding and interpretations of the legal institute and consequently result in its different and uneven application, which would be exactly the opposite

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holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor. See UCC, § 3-104 (a).

<sup>6</sup> UNCITRAL doc. A/CN.9/WG.IV/WP.115 – Legal issues relating to the use of electronic transferable records (Note by the Secretariat), 8 September 2011, p. 3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V11/855/64/PDF/V1185564.pdf?OpenElement> on 17 October 2016.

<sup>7</sup> See MLETR, Art. 1 (1).

<sup>8</sup> According to MLETR, Art. 9 (1), where the law requires a transferable document or instrument, that requirement is met by an electronic (transferable) record if certain prerequisites are met. In such a legal constellation the notion of transferable documents or instruments establishes the gateway to the applicable substantive law. Having that in mind, the notion of electronic transferable records will depend on how and to what extension the term transferable document or instrument will be interpreted in the context of specific legal system. *E.g.* in some, but not in all, legal systems “to order insurance policies” could fall under the notion of transferable instrument.

outcome to the one which should be achieved by a model law as an unification instrument. Therefore, the abstract definition of the ETR that sets the generally applicable criteria for inclusion or exclusion of the various electronic equivalents for paper based documents and instruments recognized in different legal systems is one of the key prerequisites for the uniform application of the MLETR.

## **2. ORIGINS OF THE LEGAL INSTITUTE**

When it is spoken of ETRs, the concept of the legal institute and even the terminology derived from the U.S. law. The origins of the institute could be tracked back to 1999 when National Conference of Commissioners on Uniform State Laws introduced the concept of “transferable records” within the Uniform Electronic Transactions Act (hereinafter: UETA). In the context of UETA the term transferable record means an electronic record that would have the same legal effects and validity as a documents of title (bills of lading and warehouse receipts) under § 7 UCC and (promissory) notes<sup>9</sup> under § 3 UCC if their issuer expressly agrees with such effects.<sup>10</sup> The provisions on transferable records were included in UETA mostly to overcome the inability of secondary mortgage markets to eliminate the paper-based promissory notes from the real estate lending process and to wholly adopt electronic solutions in that industry.<sup>11</sup>

Before UETA established the transferable record as a generic category which included electronic equivalents for various types of transferable documents and instruments, comparative law and legal literature dealt only with the electronic equivalents for specific types of transferable documents and instruments, most notably with the electronic bills of lading.<sup>12</sup> Thus UETA was one of the first to introduce the generic legal institute in electronic environment which would be

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<sup>9</sup> The term includes only negotiable instruments that are based on promises. The negotiable instruments that are based on orders and that are three parties transactions, such as bills of exchange and cheques are excluded from the UETA notion of the transferable record. See Gabriel, H. D., *op. cit.* in ref. 3, p. 658.

<sup>10</sup> See UETA, § 16 (a).

<sup>11</sup> Winn Kaufman, J., *op. cit.* in ref. 3, p. 2. *Cf.* the notion of transferable record in UETA, § 16 (a) and federal Electronic Signatures in Global and National Commerce Act (hereinafter: ESIGN), 15 U.S. Code § 7021 (a). While UETA defines transferable record as a generic term which includes the electronic equivalents for various documents and instruments such as bills of lading, warehouse receipts and promissory notes, ESIGN defines transferable record as an electronic equivalent exclusively for promissory notes related to a loans secured by real property.

<sup>12</sup> *E.g.* 1990 CMI Rules for Electronic Bills of Lading (hereinafter: CMI Rules).

comparable with generic legal institutes existing in a paper-based environment such as documents of title and negotiable instruments in Anglo-American legal traditions, *les effets de commerce*<sup>13</sup> in French legal tradition or *die Wertpapiere*<sup>14</sup> in German legal tradition.<sup>15</sup>

Moreover, not only that UETA introduced the generic term of transferable records, it also established the concept of control as a functional equivalence for the possession thus enabling the transferability of rights in an electronic environment. A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.<sup>16</sup> As such, the concept of control satisfies two basic functions of the possession, the publicity function and the acquisitive function.<sup>17</sup> The notion of control is defined in technology neutrally expression, leaving the choice to use the various technical systems which enables the control as such. Howev-

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<sup>13</sup> The French concept of *effets de commerce* includes bills of exchange and promissory notes and as such it best matches the Anglo-American concept of negotiable instruments. See French *Code de Commerce*, Art. L. 511 and Art. L. 512.

<sup>14</sup> The term *Wertpapiere* (literally the paper of value) was crafted in a German legal theory by Heinrich Brunner as a generic legal institute which encompasses all the documents which incorporates rights in such manner that the right itself can't be claimed without the possession of a tangible document. Brunner, H., *Die Werthpapiere*, in: Endemann, W. (ed.), *Handbuch des deutschen Handels-, See- und Wechselrechts, Zweiter Band, Buch II*, Leipzig, 1882, p. 147 *et seq.* The term refers to the wide specter of documents including bills of lading, warehouse receipts, bills of exchange, promissory notes, cheques, certificates of deposit, certified shares and bonds etc. In legislature, the concept was introduced by Swiss *Obligationenrecht* (hereinafter: OR) providing the *lex generalis* for all the documents which embodied the private rights. See OR, Art. 965, according to which the paper of value (*Wertpapiere*) is any instrument to which a right attaches in such a manner that it may not be exercised or transferred to another without the instrument.

<sup>15</sup> The 2003 revision of § 7 UCC renewed the meaning of documents of title, defining it in a technology neutrally manner to cover both paper-based and electronic bills of lading and warehouse receipts. See Karshen, D. L., *Article 7: Documents of title – 2003 Developments*, *Business Lawyer*, vol. 59, no. 4, 2004, p. 1630. Furthermore the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter: the Rotterdam Rules) introduced the legal institute of electronic transport record which in substance includes the electronic equivalents for sea waybills and straight and negotiable bills of lading, depending on additional criteria such as negotiability, duties to “surrender” the record in order to claim the goods etc. See Reynolds, F., *Transport documents under the international conventions*, in: Rhidian, T. (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, London, 2010, p. 276. Both documents of title within the context of UCC and electronic transport records within the context of the Rotterdam Rules should be understood as generic categories, however in stricter sense than transferable records within the context of UETA.

<sup>16</sup> UETA, § 16 (b).

<sup>17</sup> Šafranko, Z., *op. cit.* in ref. 3, p. 191 *et seq.*

er to achieve the general trust in legal transactions with transferable records that would be equal to the one with paper-based documents and instruments, UETA sets the reliability criteria which the certain system must satisfy in order to provide the legal recognition of transferable records.<sup>18</sup>

Among the other initiatives in 2009, the USA proposed to UNCITRAL to engage in developing the rules on electronic transferable records as a possible future work in the field of electronic commerce.<sup>19</sup> The need for uniform and generally accepted rules on electronic transferable records was recognized as beneficial not only for the promotion of electronic communications in international trade but also for addressing some specific issues such as promoting the Rotterdam Rules. Therefore the UNCITRAL Working Group IV (Electronic Commerce) was mandated to carry on the project in 2011 which output would be MLETR in 2017.<sup>20</sup>

During the five years project, the Working Group IV discussed two different approaches in defining ETRs, the functional approach that was used to define transferable records within UETA and the substantive approach that was used in the Rotterdam Rules to define electronic transport records. In order to provide the general definition of electronic transferable record, both aforementioned approaches are considered and compared in this paper.

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<sup>18</sup> See UETA, § 16 (c). A system is deemed reliable and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that: (1) a single authoritative copy of the transferable record exists which is unique, identifiable and generally unalterable; (2) the authoritative copy identifies the person asserting control as the person to which the transferable record was issued or if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred; (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian; (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control; (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; (6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

<sup>19</sup> UN doc. A/CN.9/681/Add.1 – Possible future work on electronic commerce – Proposal of the United States of America on electronic transferable records, 18 June 2009, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V09/845/21/PDF/V0984521.pdf?OpenElement> on 28 October 2016.

<sup>20</sup> UN doc. A/66/17 – Report of the United Nations Commission on International Trade Law, Forty-fourth session (27 June – 8 July 2011), p. 45, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/846/34/PDF/V1184634.pdf?OpenElement> on 28 October 2016.

### 3. THE FUNCTIONAL APPROACH

The functional approach in defining ETR implies the notion that is constructed on two basic components: (1) electronic record, as a formal component through which the information is manifested and perceivable, and (2) material component which includes the reference to specific type or types of legal institutes *e.g.* document of title, bill of lading, promissory note *etc.*, regulated for and legally effective when in paper-based environment.

Basically, this approach addresses only electronic equivalents for those documents or instruments that are previously regulated as the paper-based legal institutes. Such a definition is heavily dependent on paper-based environment. *E.g.* if the substantive law doesn't recognize the bill of lading as a paper-based written document it certainly won't recognize it as an electronic record. The functional approach was clearly adopted by UETA which defines transferable records as follows:

*“Transferable record means an electronic record that: (1) would be a note under [Article 3 of the Uniform Commercial Code] or a document under [Article 7 of the Uniform Commercial Code] if the electronic record were in writing; and (2) the issuer of the electronic record expressly has agreed is a transferable record.”*<sup>21</sup>

The functional approach was also considered by the UNCITRAL for the needs of MLETR in certain stages of the project, resulting with following draft provisions on ETR definition:

*“Electronic transferable record means the electronic equivalent of any paper-based transferable document or instrument [that entitles the holder to claim the performance of obligation specified in the electronic transferable record].”*<sup>22</sup>

*“Electronic transferable record [is an electronic record that contains all of the information that would [make a transferable document or instrument effective] [be required to be contained in an equivalent transferable document or instrument] and that complies with the requirements of article 9].”*<sup>23</sup>

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<sup>21</sup> UETA, § 16 (a).

<sup>22</sup> UN, doc. A/CN.9/WG.IV/WP.122, Draft provisions on electronic transferable records Note by the Secretariat, 4 March 2013, p. 3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/813/10/PDF/V1381310.pdf?OpenElement> on 2. November 2016.

<sup>23</sup> UN, doc. A/CN.9/WG.IV/WP.137 Draft Model Law on Electronic Transferable Records Note by the Secretariat 23 February 2016, p. 5, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/011/49/PDF/V1601149.pdf?OpenElement> on 2. November 2016.



The UETA definition and the second UNCITRAL definition are conceptually identical, both defining ETRs through the notion of electronic record and the reference to the paper based documents and instruments.<sup>24</sup>

The other definition by UNCITRAL, cited above, is somehow different, since it isn't expressly based on the notion of electronic record. The functional approach is even more conspicuous in that definition than in other two because it is not only present in the material component reference, but also in the formal component through the diction "electronic equivalent". As it will be discussed later, the notion of electronic record as a formal component of the definition is a ground point for both functional and substantive definitions of ETR. On the other hand, by wording "electronic equivalent" it is presumed that certain legal institute to which is referred already exists in a paper-based environment.

### *3.1. ELECTRONIC RECORD AS A FORMAL COMPONENT*

Traditionally transferable documents and instruments are understood as written documents in which a right is incorporated in such a manner that it may not be claimed or transferred to another person without the document. From the historical perspective such a perception is justified since at the time when institutes like bills of lading and bills of exchanged appeared in practice, the piece of paper served the conceptual purpose best, it was suitable to restrain the information and practical to circulate from hand to hand. However, the emergence of the electronic communication technologies, their progressive development and wider usage in the past three decades is gradually changing that traditional perception.

Some jurisdictions have already adapted these changes. Perhaps the best example is revised notion of documents of title within the context of UCC which was prior to 2003 revision defined as a written (paper-based) document and after the changes as record.<sup>25</sup> The renewed definition of documents of title, based on a technology neutral term "record", includes information that is inscribed on a tangible medium as well as the information that is stored in an electronic

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<sup>24</sup> However, the MLETR definition of ETR is wider as it is not limited in substance to the electronic equivalents of documents of title and promissory notes regulated by UCC but of the transferable documents and instruments, which term may be interpreted differently, depending on its notion within the context of applicable law. See *infra* for discussion on transferable documents and instruments.

<sup>25</sup> See National Conference of Commissioners on Uniform State Law and American Law Institute, Proposed Revisions to Uniform Commercial Law, Article 7 – Documents of Title with Prefatory Note and Preliminary Comments, Appendix I., 2003, p. 85.

or other medium and is retrievable in perceivable form.<sup>26</sup> Such a notion of document of title encompasses both electronic documents of title and tangible paper-based documents of title.<sup>27</sup> In that context the electronic record which is retrievable in perceivable form may be recognized as an alternative medium for a written document.

The legal notion of electronic record is more or less the same in different jurisdictions and international instruments. In substance, it is information generated, communicated, sent, received or stored by electronic means.<sup>28</sup> The notion of electronic record should not be interpreted as a new type of form of legal transaction but rather as new medium that generates the traditional forms of legal transactions. It can appear as written, oral, symbolic or even conclusive declaration of consent.<sup>29</sup> As well it could be fleeting or permanently accessible, variable or invariable information. *Vice versa* the paper-based documents are suitable exclusively for written expressions which are by the nature permanently accessible and generally unalterable. For the named reasons the electronic record in general can't be referred as to be the functional equivalence for a paper-based document.<sup>30</sup>

However, the same practical functions that are usually achieved with the use of written paper-based documents can be achieved with the electronic record if certain standards are met. It should be noted that those standards does not focus on a form itself but on the functions that are achieved by prescribing certain formal requirements. Since the electronic record by itself is nothing more than information stored by electronic means, to qualify it as the functional

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<sup>26</sup> UCC, § 7-102 (10).

<sup>27</sup> Karshen, D. L., *loc. cit.* in ref. 15.

<sup>28</sup> Cf. UETA, § 2 (7); Electronic Transactions Act of Singapore, Art. 2; Croatian Electronic Signatures Act, Art. 2; eUCP Version 1.1 Supplement to UCP 600, Art. e3 (b) (i). See also the notion of electronic record in UN doc. A/CN.9/WG.IV/WP.139, p. 8. Contemporary legal definition of electronic record is modeled on the notion of "data message" within the context of UNCITRAL Model Law on Electronic Commerce 1996 (hereinafter: MLEC).

<sup>29</sup> The evidentiary function of paper-based written documents is probably best expressed by a notorious Caius Titus phrase "*Verba volant, scripta manent*". However, the original meaning of the cited phrase has lost its significance in electronic environment since verbal manifestations of consent can also be electronically recorded in a manner to be unaltered and permanently available for evidentiary needs.

<sup>30</sup> See United Nations, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998, New York, 1999, p. 21, available at: [http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf) on 4. November 2016. "A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document."

equivalent for the paper-based document it has to be able to perform the same functions in electronic space as those that are achieved by the paper-based document in the tangible environment.

Briefly, the main functions that are usually accomplished by the paper-based document, that are critical for the concept of transferable documents and instruments are: permanent accessibility to the information, ability to preserve the original information, uniqueness, transferability, ability to identify the holder and the ability to authenticate the issuer.<sup>31</sup> Thus, only the electronic record which is capable to reliably perform all the listed functions could be regarded credible alternative to the paper-based written document.

### 3.2. TRANSFERABLE DOCUMENTS AND INSTRUMENTS AS THE MATERIAL COMPONENT

As it was already mentioned, through the functional approach MLETR defines the ETRs as the electronic equivalents for transferable documents and instruments. In the same manner UETA defines transferable records as the electronic equivalents for documents of title under § 7 UCC and (promissory) notes under § 3 UCC.<sup>32</sup> Such a determination of ETRs implies two important characteristics.

Firstly, previous or at least simultaneous legal recognition of paper-based documents is *condico sine qua non* for the legal recognition of ETRs. To simplify, if something does not exist, it cannot be replicated. Thus, functional notion of ETRs excludes those transferable records which only exist in the electronic environment or which could develop in future exclusively as electronic records (assuming that electronic medium will completely suppress currently predominant paper medium).<sup>33</sup> The good example of such transferable record is Japanese legal institute of electronically recorded monetary claims (hereinafter: ERMC). ERMC is not built upon its paper-based model even though

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<sup>31</sup> In that context see UETA, § 16 (c); UCC, § 7-106 (b); MLETR, Art. 9; Rotterdam Rules, Art. 9; eUCP Art. e3 (b) (i) etc. See *infra* for the more detailed discussion on the listed functions.

<sup>32</sup> Perhaps the notion of transferable record as the electronic equivalent for documents of title within the context of UETA deserves a criticism from a logical point of view since the revised notion of document of title within the context of UCC, by itself, includes both paper-based and electronic forms. This legal construction, among the others, practically sets the electronic equivalent for the electronic transferable record. The cause of this controversy derives from the fact that UETA was enacted at the time when the UCC notion of documents of title referred only to paper-based written documents.

<sup>33</sup> Alba, M., *op. cit.* in ref. 3, p. 21; Šafranko, Z., *op. cit.* in ref. 3, p. 39 *et seq.*

it was designed to fulfill all the economic functions and legal effects of the paper-based promissory note.<sup>34</sup>

Secondly, all the substantive legal provisions that are applicable to the referred paper-based transferable documents and instruments are *mutatis mutandis* applicable to the equivalent ETRs.<sup>35</sup>

When it comes to UETA no space is left for misinterpretation. UETA clearly refers to the documents of title and promissory notes as regulated by UCC. Further, UCC exhaustively regulates all the substantive legal issues regarding documents of title and promissory notes. Thus there is no legal uncertainty regarding the notion and the effects of transferable records.

On the other hand the reference provided by MLETR is much more complex. The ETR definition refers to transferable documents and instruments, which is not generally accepted and well known legal institute. So far the term was only used in 2005 UN Convention on the Use of Electronic Communications in International Contracts (hereinafter: ECC) to point out the exclusions from the application of ECC.<sup>36</sup> Though the ECC is not authoritative legal act for the interpretation of the term transferable document and instrument, it indirectly defines transferable document and instrument as the paper-based document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money, such as bills of exchange, promissory notes, consignment notes, bills of lading and warehouse receipts. Actually, the description of transferable documents and instruments as provided in ECC was used as the ground point for determination of ETRs.<sup>37</sup>

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<sup>34</sup> The reason for enacting totally new legal institute constructed for electronic environment, instead of simple referring to paper-based bills and notes lies in the fact that Japan is a party to the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, which does not recognize instruments being in any form other than paper. See Goldby, M., *Electronic Documents in Maritime Trade, Law and Practice*, Oxford, 2013, p. 86. For more detailed discussion on the obstacles arising from 1930 and 1931 Geneva Conventions for applying MLETR regarding bills of exchange, promissory notes and cheques see UN doc. A/CN.9/WG.IV/WP.125, Legal issues relating to the use of electronic transferable records (Note by the Secretariat), 27 September 2013, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/868/26/PDF/V1386826.pdf?OpenElement> on 9 November 2016.

<sup>35</sup> E.g. the provisions on *essentialia negotii*, the moment when the obligation becomes effective or ceases to exist, transfer of the rights by assignment, endorsement and/or physical surrender, causes and consequences of voidness, legitimation of the holder, holder in due course status, determination of maturity, guaranties, pledges, joint and several liability, limitation periods, conflict of laws etc.

<sup>36</sup> ECC, Art. 2 (2).

<sup>37</sup> UN doc. A/CN.9/761, Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session (Vienna, 29 October-2 November 2012), 5 November 2012, p. 5, availa-

So, what are actually transferable documents and transferable instruments? The terminology clearly indicates that they originate from Anglo-American legal institutes documents of title and negotiable instruments.<sup>38</sup> Furthermore it is possible to rise a question how comes that UNCITRAL crafted totally new legal term instead of relying on a good old documents of title and negotiable instruments. Well, there are at least two persuasive arguments to justify such a modus.

First of all, MLETR aims to be adaptable as a legislative model to any national law and legal tradition. As such it cannot rely on concepts that are only exclusively known to the Anglo-American legal tradition. If MLETR would refer to documents of title likewise UETA, there would be a huge gap in the applicable substantive laws of the countries that are unfamiliar with the legal institute documents of title.<sup>39</sup> Even if this fact is disregarded there are still differences in the notion of documents of title in different legislations under Anglo-American legal tradition.<sup>40</sup>

The other argument is that the notion of transferable documents does not perfectly match the notion of documents of title in all jurisdictions. E.g. the straight bill of lading could be regarded as document of title in some jurisdictions although it is not transferable document in essence.<sup>41</sup> Same goes for transferable instruments and negotiable instruments. Not all transferable instruments are necessarily negotiable.<sup>42</sup>

Currently, MLETR defines transferable document or instrument as a document or instrument issued on paper that entitles the holder to claim the performance

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ble at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/571/34/PDF/V1257134.pdf?OpenElement> on 9 November 2016.

<sup>38</sup> See ref. 4 and ref. 5.

<sup>39</sup> Similar reasons influenced the abandonment of the traditional terms bill of lading and sea waybill and their replacement with the generic term transport document within the Rotterdam Rules. See Sturley, F. M., Fujita, T., Van der Zeil, G., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, London, 2010, p. 204.

<sup>40</sup> Probably the most controversial legal institute in this regard is straight bill of lading. See Pejović, Č., *op. cit.* in ref. 4, p. 60 *et seq.*

<sup>41</sup> *Ibid.* See also UN doc. A/CN.9/WG.IV/WP.139, p. 7.

<sup>42</sup> Even though negotiability and transferability are often used as synonyms, negotiable instrument is in fact a subcategory of transferable instrument. "Negotiable instrument means a writing that not only is readily transferable, but also is governed by the rule that a good faith transferee for value takes it free from any claims and free from most defenses." See Rogers, J. S., *The End of Negotiable Instruments – Bringing Payment Systems Law Out of the Past*, Oxford, 2012, p. 9.

of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.<sup>43</sup> The given definition expressly focuses on the principle of incorporation and transferability. As such it perfectly outlines the definition of *Wertpapiere* provided in Swiss OR.<sup>44</sup> However, the term *Wertpapiere* encompasses much wider circle of paper-based document including certified shares, bonds and even recta papers.<sup>45</sup> Thus, the grammatical interpretation of the MLETR definition won't be sufficient to determine the real meaning of transferable instrument and document. In order to reveal further characteristics of transferable documents and instruments the historical and theological interpretations of the definition should be utilized. As it will be discussed later within the context of substantive definition of ETRs, the nature of incorporated obligations and exclusions should be taken into account to determine the substantive meaning of both ETRs and transferable documents and instruments.

Even though MLETR contains the definition of transferable documents and instruments, it does not solve much by itself. The notion of transferable documents and instruments doesn't make a conclusion of a logical syllogism but rather just a major premise. There is no general substantive law for transferable documents and instruments as such that would govern ETRs.<sup>46</sup> Instead, the notion of transferable documents and instruments as provided by MLETR should be considered within the context of each jurisdiction or international convention separately in order to determine which national or international legal institutes do comply with the MLETR definition of transferable documents and instruments. Generally, the one could conclude that bills of exchange, promissory notes, cheques, bills of lading, negotiable waybills and consignment notes and warehouse receipts would always fit under the notion transferable documents and instruments.<sup>47</sup> Nevertheless, some jurisdictions

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<sup>43</sup> MLETR, Art. 2.

<sup>44</sup> OR, Art. 965.

<sup>45</sup> See ref. 14.

<sup>46</sup> *Vice versa*, when UETA refers to the documents of title and notes provided by UCC, it basically refers to the complete set of substantial rules that are *mutatis mutandis* applicable to the transferable records.

<sup>47</sup> See ECC, Art. 2 (2). Earlier versions of Draft MLETR contained the indicative lists of transferable documents and instruments. See UN doc. A/CN.9/WG.IV/WP.135, Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 27 August 2015, p. 6, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/061/63/PDF/V1506163.pdf?OpenElement> on 10 November 2016. Later it was agreed to dismiss the list from the official text and to include it in explanatory materials. See UN doc. A/CN.9/863 - Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session (Vienna, 9-13 November 2015),

allows the issuance of recta bills of exchange by inserting the clause “not to order” in which case the bill won’t be regarded as a transferable instrument.<sup>48</sup> Furthermore, some jurisdictions may regulate certain legal institutes that are exclusive to these jurisdictions and that would fit under the notion of transferable document or instrument. Anyway, there is no exhaustive list of specific transferable documents and instruments. In such a legal constellation the term transferable document or instrument should be primarily understood as a legal standard that sets criteria for a getaway from electronic to paper-based environment and *vice versa*.

#### 4. SUBSTANTIVE APPROACH

The main difference between the functional and substantive approach in defining ETRs refers to a material component of the definition. While functional approach consists of the references to specific types of paper-based documents to reach the substantive law, the substantive approach reaches the substantive law more directly, through the basic characteristics of paper-based documents.<sup>49</sup> The reference to or any mention of paper-based documents is disregarded from the notion of ETR. Such a legal construction practically creates the autonomous, stand-alone definition of the ETR.

Most notably, the substantive approach was used within the context of Rotterdam Rules in order to define (negotiable) electronic transport records.<sup>50</sup> Indisputably, the electronic transport record as defined in Rotterdam Rules establishes the electronic equivalent for (paper-based) transport document likewise the negotiable electronic transport record establishes the electronic equivalent for negotiable (paper-based) transport document. Both, definitions of transport document and electronic transport records are built upon the same substantive requirements.<sup>51</sup> They represent the information contained in paper-based or electronic medium that is issued under the contract of carriage by a carrier that: (1) evidences the carrier’s or a performing party’s receipt of goods under

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20 November 2015, p. 16, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/082/39/PDF/V1508239.pdf?OpenElement> on 10 November 2016.

<sup>48</sup> See Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, Art. 11 (2).

<sup>49</sup> Šafranko, Z., *op. cit.* in ref. 4, p. 41.

<sup>50</sup> See Rotterdam Rules, Art. 1 (18) and (19).

<sup>51</sup> Alba, M., *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Texas International Law Journal, vol. 44, issue 3, 2009, p. 397; Sturley, F. M. *et al.*, *op. cit.* in ref. 39, p. 206.

a contract of carriage; and (2) evidences or contains a contract of carriage.<sup>52</sup> Practically, the same effect could have been achieved if Rotterdam Rules used the functional approach when defining electronic transport records by means of simple reference to the transport documents.<sup>53</sup> However, such dependence of the definition of electronic transport records on the concept of transport documents would significantly restrict the notion of electronic transport records in the light of possible future development of maritime practices.

UNCITRAL did consider defining ETRs by the means of substantive approach as well. As follows, during the project, few variations of substantive formula were crafted:

*“Electronic transferable record means a record used in an electronic environment that is capable of transferring the right to performance of obligation incorporated in the record through the transfer of that record.”*<sup>54</sup>

*“Electronic transferable record means [an electronic record] that entitles the holder to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.”*<sup>55</sup>

*“Electronic transferable record means [an electronic record] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.”*<sup>56</sup>

*“Electronic transferable record means [an electronic record] [containing authoritative information] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable*

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<sup>52</sup> Cf. Rotterdam Rules, Art. 1 (14) and (18).

<sup>53</sup> One of the strong arguments that electronic transport records intended to be electronic equivalents for transport documents arises from the possibility to replace the electronic transport record with the transport document and *vice versa*. Rotterdam Rules, Art. 10.

<sup>54</sup> UN, doc. A/CN.9/WG.IV/WP.124 - Draft provisions on electronic transferable records (Note by the Secretariat), 30 September 2013, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/868/43/PDF/V1386843.pdf?OpenElement> on 22 November 2016.

<sup>55</sup> UN, doc A/CN.9/WG.IV/WP.128 - Draft provisions on electronic transferable records (Note by the Secretariat), 14 February 2014, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/010/60/PDF/V1401060.pdf?OpenElement> on 22 November 2016.

<sup>56</sup> UN doc. A/CN.9/WG.IV/WP.130 - Draft provisions on electronic transferable records (Note by the Secretariat), 29 August 2014, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/055/70/PDF/V1405570.pdf?OpenElement> on 22 November 2016.



*of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.”<sup>57</sup>*

The constitutive components of aforementioned definitions of ETRs suggest that the definitions rely on substantive requirements of transferable document and instrument rather than on transferable document and instrument itself. Both, the concept transferable documents or instruments and the concept of ETRs are expressly based on the principles of incorporation of rights and transferability.<sup>58</sup> Such a legal construction could, at first sight, lead to conclusion that there is no significant difference between the substantive and functional approach in defining ETRs. However the difference between two approaches is not only in legal techniques but as well in very substance of the notion of ETRs.

While the functional approach definition depends on the notion of transferable documents and instruments and requires their pre-regulation, the substantive approach definition is autonomous and thus creates the *ipso facto* notion of ETRs. In that sense, the notion of ETR does not only include electronic equivalents for paper-based transferable documents and instruments but also the electronic records (to which the right is attached in such a manner that it couldn't be claimed or transferred without the electronic record) which does not match any pre-defined type of paper-based transferable document or instrument.<sup>59</sup> Thus Japanese ETRs would definitely fall under such a notion of ETRs. Moreover, the substantive definition is much more adaptable to the progressive development of technologies since it leaves the doors open for possible future electronic instruments which would not necessarily have their paper-based equivalent.

It should be noted that the UNCITRAL abandoned the substantive definition of ETRs from the scope of MLETR for pragmatic reasons.<sup>60</sup> Nevertheless, it never questioned the wide concept of ETRs which includes both electronic equivalents for paper-based transferable documents and instruments and electronic records to which the right is attached in such a manner that it couldn't be claimed or transferred without the electronic record which does not match any

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<sup>57</sup> UN doc. A/CN.9/WG.IV/WP.135 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 27 August 2015, p. 5, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/061/63/PDF/V1506163.pdf?OpenElement> on 22 November 2016.

<sup>58</sup> Šafranko, Z., *loc. cit.* in ref. 49.

<sup>59</sup> *Ibid.* See also Alba, M., *op. cit.* in ref. 3, p. 20.

<sup>60</sup> See UN doc. A/CN.9/863 - Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session (Vienna, 9-13 November 2015), 20 November 2015, p. 4 and 16, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/082/39/PDF/V1508239.pdf?OpenElement> on 22 November 2016.

pre-defined type of paper-based transferable document or instrument. In this regard the analysis of basic substantive requirements of the ETRs is of great importance to complement the notion of ETR from the theoretical prospective.

#### 4.1. THE PRINCIPLE OF INCORPORATION

The concept of transferable documents and instruments is built upon the principle of incorporation (reification, embodiment).<sup>61</sup> In the most rigid sense it means that the right to claim the performance, which is otherwise abstract, is inseparably attached to the piece of tangible paper in a way that it cannot originate, be transferred or claimed without the paper.<sup>62</sup> In such a legal concept the tangible piece of paper does not only serves as a medium for preservation of information for evidentiary purposes but also has the role of outmost importance for the publicity the acquisitive functions.<sup>63</sup>

The principle of incorporation as such is unattainable when it comes to ETRs. In fact, quite the opposite, the ETRs are basically the result of dematerialization of transferable documents and instruments. The electronic record cannot serve as a physical token of the right to performance the way paper-based document does since it isn't a tangible entity. Therefore, in order to replicate the concept of transferable documents and instruments in electronic environment the principle of functional equivalence needs to be applied. In that regard, purposes and functions that are traditionally achieved through the principle of incorporation should be analyzed in order to determine how those purposes or functions could be fulfilled by electronic means.<sup>64</sup>

The problem here is not how to achieve the storage and preservation of information for evidentiary purposes in electronic environment but how to achieve those purposes and functions which are traditionally achieved through the

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<sup>61</sup> See Rogers, J. S., *op. cit.* in ref. 42, p. 45 *et seq.*

<sup>62</sup> Šafranko, Z., *op. cit.* in ref. 4, p. 27 *et seq.*

<sup>63</sup> The publicity function is achieved through the rebuttable presumption that the person who physically holds the tangible paper (possessor) is the rightfully entitled to claim the right to performance indicated in the paper document. The presentation or physical surrender of the paper-based document to the obligor will therefore serve as a *prima facie* evidence of entitlement. The acquisitive function logically derives from the publicity function. Since the transferee is not in position to legitimize himself as a person entitled to claim the performance unless he possesses the paper document, in order to complete the transfer of right transaction, the transferor will have to surrender the paper document to transferee. In contemporary law the concept of possession and the registries are used to achieve both publicity and acquisitive functions.

<sup>64</sup> See United Nations, *op. cit.* in ref. 30, p. 20.

material and tangible nature of the piece of paper.<sup>65</sup> Concretely, the tangible nature of the piece of paper provides that it is capable of being the object of possession as a *de facto* power of a person, and that it is unique object that can be only in one place at the time.

Within the concept of transferable documents and instruments, the possession over the paper document has a significant role in exercising publicity and acquisitive functions. The possession is externally visible fact. Since the concept of transferable documents and instruments is such that the right to claim the performance is inseparably attached to the material paper document, the person who physically possesses the document is deemed to be the person who is entitled to claim the performance (holder). Therefore the person who purposes to claim the right will have to identify himself as entitled by demonstrating the possession over the paper document to the obligor.<sup>66</sup> On the other hand, physical surrender of a document is a formal requirement for acquiring the right to claim incorporated in the document and therefore the transfer of possession brings the acquisitive function to the fore.<sup>67</sup> The aforementioned functions of the possession with regard to paper-based transferable documents and instruments are achieved, regarding the ETRs, through the concept of control.<sup>68</sup>

The other relevant characteristic of a paper-based transferable documents and instruments deriving from their material nature is their uniqueness (singularity). This feature is important as it prevents the multiple claims of the very same right. Since the technical uniqueness of the ETRs is not feasible at this point,<sup>69</sup>

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<sup>65</sup> The functional equivalents for the writing, signature and original form were established by MLEC 20 years ago and as such were widely accepted in various jurisdictions. *See* MLEC, Art. 6 – Art. 8. Nevertheless, ECC excluded transferable documents and instruments from its scope of application providing that the functional equivalents for writing, signature and original do not suffice an electronic equivalent of paper-based negotiability. *See* explanatory note in: United Nations, *United Nations Convention on the Use of Electronic Communications in International Contracts*, New York, 2007, p. 14, available at: [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf) on 23 November 2016. *See also* Boss A., Kilian W., *The United Nations Convention on the Use of Electronic Communications in International Contracts*, Alphen aan den Rijn, 2008, p. 77.

<sup>66</sup> Šafranko, Z., *op. cit.* in ref. 4, p. 191.

<sup>67</sup> *Ibid.*, p. 192.

<sup>68</sup> *See* Art. 7 CMI Rules, Art. 1 (21) Rotterdam Rules, § 7-106 UCC, § 16 (d) UETA *etc.*

<sup>69</sup> *See* Boss A., *Becoming Operational: Electronic Registries and Transfer of Rights*, in: United Nations, *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on international Trade Law held on the Occasion of the Fortieth Session of the Commission Vienna, 9-12 July 2007*, New York, 2011., p. 5; Gabriel, H. D., *Uniform Law of Electronic Commerce in Private International Law: Where Have we Been*

contemporary legal solutions focuses on establishing the functional equivalence of uniqueness through ensuring the integrity and availability of at least one copy of the ETR by designating an authoritative copy which identifies the holder (person in control).<sup>70</sup>

#### 4.2. THE CONTENT OF THE INCORPORATED RIGHT

Neither UETA nor MLETR expressly determines what may be the content of the right incorporated in the ETR.<sup>71</sup> It is the case because ETR is generic term that aims to cover electronic equivalents for various types of transferable documents and instruments that could embody different rights. However, it certainly does not mean that ETR could embody any right.

If the one takes a look at the origins of the legal institute within the context of UETA it will become clear that term ETR refers to the electronic equivalents for the negotiable instruments and documents of title. Therefore it could embody: (1) the right to claim the payment of the monetary obligation specified in the record from the obligor (issuer), or (2) the right to claim the delivery of the goods specified in the record from the bailee (e.g. carrier, warehouse operator).<sup>72</sup>

The same philosophy was accepted by UNCITRAL for the needs of MLETR, although the notion was additionally extended to the three party instruments such as bills of exchange and cheques. Nevertheless the content of the incorporated rights remained untouched. For an illustration, at one point the Draft MLETR contained the definition of performance of obligation as the delivery

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*and Where are we Going?*, International Trade and Business Law Review, vol. 14, 2011, p. 401; Bons, R., Lee, R., Wagenar, R., *Obstacles for the Development of Open Electronic Commerce*, in: Hoogeweegen, M., Varmeer, B. (ed.), *Proceedings of the Second EDispuut' Workshop 1995 the Netherlands: "Bridging Worlds"*, Rotterdam, 1995, p. 133. See also Khan, R., Lyons, A., *Representing Value as Digital Objects: A Discussion of Transferability and Anonymity*, Journal on Telecommunications & High Technology Law, vol. 5, issue 1, 2006, p. 195, where it is stated that the technical uniqueness of the electronic record could be achieved through the technology of digital objects.

<sup>70</sup> UN doc. A/CN.9/WG.IV/WP.115 – Legal issues relating to the use of electronic transferable records (Note by the Secretariat), 8 September 2011, p. 11.

<sup>71</sup> UETA determines the incorporated right indirectly by defining transferable records as electronic equivalents for documents of title and promissory notes. Same goes for the MLETR when defining ETRs as electronic equivalents for transferable documents and instruments. See supra for the meaning of documents of title, negotiable instruments, transferable documents and transferable instruments.

<sup>72</sup> UN doc. A/CN.9/WG.IV/WP.115 – Legal issues relating to the use of electronic transferable records (Note by the Secretariat), 8 September 2011, p. 3.

of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.<sup>73</sup>

Keeping in mind these boundaries regarding the content of the incorporated rights becomes critical when ETRs are defined using the substantive approach. Unlike the functional definition which refers to specific types of transferable documents and instruments, the substantive definition, if interpreted extensively, encompasses all electronic records that entitles the person in control to claim the performance of the obligation embodied in the record and that is capable of transferring the right to performance of the obligation embodied in the record through the transfer of that record. Namely, it wouldn't only cover electronic equivalents for negotiable instruments and documents of title but also for the securities such as shares embodying specific corporate rights (*e.g.* right to vote at shareholders meeting).

There are several persuasive arguments why electronic records embodying right other than monetary claims and claims to delivery of the goods, should be excluded from the notion of ETRs. Firstly, securities such as shares have been dematerialized for a while now and their electronic form is legally recognized and well regulated in most jurisdictions and therefore there is no reason to redefine and re-regulate them. Secondly, the term transferable record was originally introduced by UETA to encompass the electronic equivalents for documents of title and promissory notes (negotiable instruments). Thirdly, during the UNCITRAL work on MLETR bills of lading, negotiable consignment notes and waybills, warehouse receipts, bills of exchange, cheques and promissory notes were mentioned to indicate the meaning of transferable document and instrument, respectively only the papers incorporating claims to delivery of the goods or monetary claims.<sup>74</sup>

Therefore, even though the content of the incorporated right is not explicitly stated in the substantive definitions of ETR it should be taken into account in order to discover the true meaning of the ETR.

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<sup>73</sup> UN doc. A/CN.9/WG.IV/WP.135 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 27 August 2015, p. 8. Later, the Working Group agreed to delete the definition of performance of obligation from Draft MLETR since that definition was a matter of substantive law. See UN doc. A/CN.9/863 - Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session (Vienna, 9-13 November 2015), 20 November 2015, p. 16.

<sup>74</sup> UN doc. A/CN.9/WG.IV/WP.139 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 8.

### 4.3. TRANSFERABILITY

Transferability is one of the key attributes of the ETR. At first sight it seems obvious to what the term transferability within the very name of the legal institute refers, however it demands detailed explanation. The fact that the attribute of transferability might be interpreted differently within the different jurisdictions and that is often mixed with the attribute of negotiability could consequently lead to misunderstanding of the ETRs meaning.

When it comes to the rights incorporated in paper, generally there are three levels of transferability which are highly dependent on the indication of the obligee in the paper.<sup>75</sup> In that respect there are: (1) bearer instruments in which case the incorporated right is transferred by a simple physical surrender of the paper medium, (2) order instruments in which case the incorporated right is transferred by endorsement and (3) recta papers which demands the assignment in order to transfer the incorporated rights.<sup>76</sup> The first and the second aforementioned categories are often regarded as negotiable instruments though such classification is actually incorrect.<sup>77</sup>

Although the attribute of negotiability is often used in conjunction with documents of title, namely the bills of lading,<sup>78</sup> it should be clear that the notion of negotiability in that context differs from the notion of negotiability in the context of negotiable instruments. Unlike a bill of exchange or promissory note, the bill of lading is not a negotiable instrument which is able to pass a good title to a bona fide transferee, regardless of the title of the transferor.<sup>79</sup> Thus the attribute of negotiability in conjunction with the bill of lading and other docu-

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<sup>75</sup> Perhaps the best example to illustrate this relations is provided by 1931 Convention Providing a Uniform Law for Cheques. According to Art 5. of the Convention, A cheque may be made payable: (1) to a specified person with or without the express clause “to order”, or (2) to a specified person, with the words “not to order” or equivalent words, or (3) to bearer. In the first scenario the right to claim the payment indicated in the cheque may be transferred by the means of endorsement. If the cheque contains the “not to order” clause (recta clause), the right may be transferred according to the form and with the effects of an ordinary assignment. See Art. 14 of the Convention.

<sup>76</sup> Šafranko, Z., *op. cit.* in ref. 4, p. 59.

<sup>77</sup> Unlike the concept of transferability which practically refers to the formal method of transfer of the rights, the concept of negotiability is much more complex as it interferes in substantive law. Negotiability as such is conditioned by the status of a holder in due course and ultimately can provide the better title to transferee than the one that transferor had, thus denying the legal principle *nemo dat quod non habet*. See Rogers, J. S., *op. cit.* in ref. 42, p. 11.

<sup>78</sup> E.g. Art 1 (15) Rotterdam Rules.

<sup>79</sup> Pejović, Č., *op. cit.* in ref. 4, p. 48.

ments of title *de facto* refer to transferability of incorporated right by physical delivery of the document or by endorsement.<sup>80</sup>

Putting aside the concept of negotiability, the attribute of transferability in the context of the transferable documents and instruments, and consequently ETRs, should be understood as a possibility of transferring the incorporated rights by physical delivery of the paper document or by transfer of the control over electronic record with or without endorsement. This characteristic is in fact the essential transferability in the sense that only the documents and instruments which fulfill their primarily purpose through the transfer of rights should be regarded as transferable. Undeniably, the rights incorporated in recta papers could be transferred by the means of assignment; however their essential purpose, when issued, is not to circulate but to be claimed by the first holder. Thus the recta papers would not fall under the notion of transferable documents and instruments as they are not transferable in essence. This argument has been confirmed by the UNCITRAL Working Group through conclusion that electronic equivalents for documents such as straight bills of lading would not fall under the notion of ETR.<sup>81</sup>

However, the expounded classification on essentially transferable and non-transferable documents and instruments as one of the main criterion in defining ETRs, is hiding some doubts. Namely, some jurisdictions provide so called recta endorsement, which basically converts the initially transferable documents and instruments to non-transferable documents and instruments. Ultimately it means that the electronic record which was originally issued as ETR would *de facto* stop being ETR which could emerge the question of applicability of MLETR in such cases.

#### 4.4. EXCLUSIONS

MLETR applies to ETRs. On the other hand it explicitly excludes the securities such as shares and bonds from its application.<sup>82</sup> Such a phrasing provided

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<sup>80</sup> In that sense, to point out the difference between bills of lading and traditional negotiable instruments such as bills of exchange or promissory notes, some authors qualify bills of lading as a quasi-negotiable instrument. See Dalhuisen, J. H., *op. cit.* in ref. 4, p. 555; 1. Murray, C., Holloway, D., Timson-Hunt, D., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11. ed., London, 2007, p. 309; 18. Schmitz, T., The bill of lading as a document of title, *Journal of International Trade Law and Policy*, vol. 10, issue 3, 2011, p. 263.

<sup>81</sup> UN doc. A/CN.9/797, Report of Working Group IV (Electronic Commerce on the work of its forty-eighth session (Vienna, 9-13 December 2013), 17 December 2013, p. 7.

<sup>82</sup> UN doc. A/CN.9/WG.IV/WP.139 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 3.

in Art. 1 MLETR could lead to two opposite conclusions: either the electronic equivalents for securities such as shares and bonds would fall under the notion of ETR, however not regulated by MLETR or they would simply be excluded from the very notion of ETRs. Neither the text of MLETR nor Working Group preparatory documents provides the explicit solution to this issue. Securities such as shares and bonds are mentioned only within the context of the scope of application but not within the context of the definition of ETR.

If the one relied on a substantive definition of ETR, there is no doubt they would have a strong argument to state that the electronic equivalents for certified shares and bonds would fall under the notion of ETR.<sup>83</sup> In a paper based environment, both shares and bonds incorporate specific rights which are transferable through the physical transfer of the paper certificate. Moreover, in German legal tradition both shares and bonds are encompassed by the notion of *wertpapiere* just like bills of lading or bills of exchange.<sup>84</sup> The only fact that practically differs them from the bills of lading or bills of exchange is that they are issued in large series.

On the other hand, if the argument that the contents of incorporated right constitute the notion of ETR is admissible, shares would definitely fall out of the notion of ETRs. This criteria, however doesn't solve the status of bonds which are incorporating the monetary claims, very much alike promissory notes. Thus, to specify which categories are excluded from the notion of ETR, the most reliable method would be historical and teleological interpretation.

From historical point of view the term transferable record and later ETR was crafted to encompass the electronic equivalents for documents of title and negotiable instruments.<sup>85</sup> *Ocassio legis* of both UETA and MLETR is to regulate and enable the practical usage of bills of exchange, promissory notes, cheques, bills of lading and warehouse receipts in the paperless environment. At the very beginning of the work on MLETR, the Working Group determined the subject matter as follows: "the term electronic transferable record is used in this note as a general term to refer to the electronic equivalent of a transferable instrument (negotiable or non-negotiable) or a document of title."<sup>86</sup> From the teleological prospective, MLETR is explicit when it comes to its scope of application. If it applies to ETRs but excludes securities such as shares and bonds from its application, the conclusion would be that electronic equivalents

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<sup>83</sup> See the structures of substantive definitions *supra*.

<sup>84</sup> See *supra* in ref. 14.

<sup>85</sup> UN doc. A/CN.9/WG.IV/WP.115 – Legal issues relating to the use of electronic transferable records (Note by the Secretariat), 8 September 2011, p. 3.

<sup>86</sup> *Ibid.*



for financial instruments that are issued in series do not fall under the notion of ETR.

## 5. THE MOST RECENT DEFINITION OF THE ETR BY UNCITRAL

The most recent definition of the ETR within the context of Draft MLETR is a product of Working Group deliberations at fifty-third session of the Working Group held in New York from 9<sup>th</sup> to 13<sup>th</sup> of May 2016.<sup>87</sup> It should be noted that the definition should not be taken as a final, however it deserves an analysis as the approach in defining ETRs therein is completely new and unseen in the previous preparatory documents. Draft MLETR currently defines ETRs as follows:

*“Electronic transferable record is an electronic record that complies with the requirements of article 9.”*<sup>88</sup>

Specificity of the cited definition in relation to the definitions which were previously discussed consists in the fact that material component was totally abandoned from this one. For itself, it doesn't reveal much on what ETR is. It doesn't describe the ETR substantively nor does it contain the reference to specific types of transferable documents and instruments. It is obvious that the most recent definition is not self-sufficient and must be interpreted in conjunction with the Art. 9 (1) MLETR which provides as follows:

*“Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:*

*(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and*

*(b) A reliable method is used:*

*(i) To identify that electronic record as the electronic transferable record;*

*(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and*

*(iii) To retain the integrity of the electronic transferable record.”*<sup>89</sup>

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<sup>87</sup> UN doc. A/CN.9/869 - Report of Working Group IV (Electronic Commerce) on the work of its fifty-third session (New York, 9-13 May 2016), 20 May 2016, p. 5.

<sup>88</sup> UN doc. A/CN.9/WG.IV/WP.139 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 7.

<sup>89</sup> UN doc. A/CN.9/WG.IV/WP.139/Add.1 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 2.

In this extended context the notion of ETR is clarified and implies the several conclusions on the nature of ETRs. First of all, ETR is defined as electronic equivalent for transferable document and instrument by wording: “Where the law requires a transferable document or instrument, that requirement is met by an electronic record if...”. Thus, the functional approach is used, although indirectly.

The similar conclusion may be drawn from the following paragraph (a), which requires the minimal content (*essentialia negotii*) of the ETR outlined by the minimal content of the corresponding transferable document or instrument.<sup>90</sup> The context of the provision, furthermore implies the pre-existing regulation of certain transferable document or instrument as a prerequisite for the issuance of corresponding ETR. In this respect the legal institutes that would fall under the general substantive definition of ETR, but which are provided only for the electronic environment such as Japanese ERMC would not fall under the notion of ETR in the context of MLETR.<sup>91</sup>

Paragraph (b) outlines the formal requirements to which the electronic record must comply in order to have the same legal effect and validity as a corresponding paper based transferable document or instrument. The basic functions of the concept transferable documents and instruments were traditionally achieved through the written and signed document as a physical token of incorporated right. Considering the immaterial nature of electronic records, MLETR requires the application any method which would reliably provide the functions of uniqueness (singularity), ability to be the object of possession through the concept of control, and the ability to retain the integrity of incorporated data.<sup>92</sup> The functional equivalents for the written format and signature are provided by the separate articles.<sup>93</sup>

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<sup>90</sup> In practice it means that if ETR is to be issued instead of paper-based bill of lading provided by German Commercial Code (*Handelsgesetzbuch*, hereinafter: HGB) it should include the following information: (1) place and date of issuance; (2) name and address of the shipper; (3) name of the ship; (4) name and address of the carrier; (5) port of loading and destination; (6) name and address of the consignee and special address, if any, for notification; (7) nature of the goods along with their externally apparent condition and characteristic features; (8) quantity, number or weight of the goods and their permanent, legible leading marks; (9) freight owed at delivery, costs incurred up to the time of delivery as well as a note concerning payment of the freight; (10) Number of original, executed copies and (11) signature of the carrier. *Arg. ex* § 515 and § 516 HGB.

<sup>91</sup> UN doc. A/CN.9/863 - Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session (Vienna, 9-13 November 2015), 20 November 2015, p. 16.

<sup>92</sup> UN doc. A/CN.9/WG.IV/WP.139/Add.1 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 3 et seq.

<sup>93</sup> UN doc. A/CN.9/WG.IV/WP.139 - Draft Model Law on Electronic Transferable Records (Note by the Secretariat), 15 August 2016, p. 15 et seq.

## 6. CONCLUSION: WHAT IS, WHAT COULD AND WHAT SHOULD BE ETR?

The main objective of this paper is to structure the definition of ETRs from the theoretical prospective. The definition which would be general and universal, applicable in every context not only in the context of a certain legal source such as UETA or MLETR. The practical significance of such a task will come to the fore once the MLETR is accepted, which is presumably to happen at the 50<sup>th</sup> session of the UNCITRAL in summer 2017. Once it happens, the Model law will be ready for the implementation in various jurisdictions based on different legal traditions. The outcome should be more or less unified law and the only way to achieve that aim is to outline plain and precise designation of the ETRs. Otherwise, there is a risk of different interpretations of the term which determines the scope of application that could cause the legal pluralism in the end. That risk is even greater if we take into account the fact that the notion of the ETR is highly dependent on the legal institutes which are not uniformly regulated in different jurisdictions. Therefore the success of the MLETR will depend on the accurate understanding of the legal institute of transferable documents and instruments and its proper and unified application within the scope of each implementing jurisdiction separately.

Finally, the analysis of both functional and substantive approaches in defining ETRs provided by UETA and MLETR, with respect to the historical development of the legal institute, it is possible, with a great dose of certainty, to carry out the following findings:

1. Although both MLETR and UETA are defining ETRs explicitly as an electronic equivalents for certain types pre-regulated paper based transferable documents and instruments they do not deny the existence of the ETRs exclusively in electronic form. Moreover the substantive definitions are encompassing such ETRs. Therefore such electronic records should be considered the ETRs providing that their hypothetical paper-based form would fall under the notion transferable document or instrument.
2. The legal institute is a derivate of the documents of title and negotiable instruments of Anglo-American legal tradition and that fact should be kept in mind when determining the boundaries of a legal institute. In this respect, electronic equivalents for securities such as shares and bonds and other financial instruments that are issued *en masse* should be excluded from the notion of ETR.
3. ETR is a legal mechanism that fulfills its fundamental economic purpose by circulation in a legal trade. They are issued as such because of the presumption that they will be transferred and thus the electronic equivalents for recta papers are not to be considered as ETRs.

Having aforementioned guidelines in mind it is possible to generally define the ETRs as follows:

*Electronic transferable record is an electronic record, issued individually, to which the right to claim the delivery of the goods or to claim the payment attaches in such a manner, that right indicated in the electronic record cannot be claimed without the demonstration of control over the electronic record, nor it can be transferred to other person without the simultaneous transfer of control over the electronic record to that person.*

The given formula, although it is complex and possibly confusing outlines all the essential characteristics and functions of the ETRs.

Having structured the general formula, it only remains to specify what legal institutes are and what legal institutes should be considered to be ETRs in each jurisdiction, regardless of legal traditions and diversities. In that respect, the notion of ETR as a generic term includes:

1. Electronic equivalents for promissory notes, bills of exchange, cheques and other similar instruments, specific to some jurisdictions, which are issued individually and incorporate the monetary claim, unless their circulation is restricted by recta clause or other similar means.
2. Electronic equivalents for bills of lading, waybills, consignment notes, warehouse receipts and other similar instruments, specific to some jurisdictions, which are issued individually and incorporate the right to claim the delivery of the goods, providing that they are transferable by endorsement or the physical surrender of the paper medium.
3. Other electronic records which are exclusive to electronic environment, which are issued individually and incorporate the monetary claim or the right to claim the delivery of the goods, providing they are transferable in essence.

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