The Transfer of Rights in a Digitalised Age

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DISSERTATION SUBMITTED 2023

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ENGLISH SUMMARY

The scope of this study is to explore the purposes and means of the UNCITRAL Model Law on Electronic Transferable Records (MLETR) and to contextualize its interplay with other legal regimes. The MLETR provides for the requirements an electronic transferable record must fulfil in order to be deemed the functional equivalent to a transferable document. A technical examination of the MLETR is required with the aim to both achieve an understanding of the MLETR as an enabler of the use of electronic transferable records and furthermore to assess the interplay of the MLETR with other legislative instruments.

One of the reasons as to why work on the MLETR was initiated in 2011, was the wish for an instrument to act as a support to the implementation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) adopted by UNCITRAL in 2008. It is demonstrated that the MLETR supplements the Rotterdam Rules on certain aspects of the use of electronic transport records. The study investigates how the issue of electronically replicating the functions of a transferable record is solved under current national law with the bill of lading acting as a case study. This requires first studying the peculiarities of the document if issued in paper. Denmark, Norway, and Sweden have been chosen as being subject to study as primarily one entity as their legislation in the legal field to a very large extend is similar. Where the laws significantly differ, this has been pointed out. The results from the study on the legislation facilitating the use of bills of lading in paper allows for assessing whether the current legislation facilitates the use of electronic bills of lading. It is demonstrated that the issue of possession is essential in order for the bill of lading to function as the key to the cargo. Seeing as the concept of possession plays a key role in Denmark, Norway, and Sweden, the study turns to investigating the concept of possession in England and Wales. Just as the case is in Denmark, Norway, and Sweden, possession of the bill of lading plays a key role in order for the bill to function as the key to the cargo and being a document of title. The study turns to investigating whether the current legislation caters for the use of electronic bills of lading. It is concluded that in Denmark, Norway, and Sweden it is uncertain whether the legislation facilitates the use of electronic bills of lading. It is concluded with certainty that the current legislation in England and Wales does not cater for the use of electronic bills of lading as such documents cannot be possessed in electronic form.

On these grounds, the study provides a look into the future of the use of electronic transferable records. The Rotterdam Rules adopted by UNCITRAL in 2008 contain provisions for the use of electronic transport records. The MLETR was adopted by UNCITRAL in 2017. In Sweden, the Supreme Court decided in 2017 that negotiable documents should be able to function in an electronic environment. In 2020 the Inter-

national Chamber of Commerce urged Governments to implement legislation on electronic trade documents as a response to challenges arising from the Covid-19-pandemic. At the G7 summit in England in 2021 it was suggested that jurisdictions adopt legislation on electronic transferable records and accordingly England and Wales have initiated a law reform in the field of electronic trade documents. It is concluded that we stand in the midst of a shift of paradigm, allowing documents which functions depend on their ability to being physically possessed to function solely in an electronic environment.

DANSK RESUMÉ

Denne afhandling har til formål at udforske FN's Kommission for Harmonisering af Handelsrettens (UNCITRAL) *Model Law on Electronic Transferable Records* formål og potentiale. *The UNCITRAL Model Law on Electronic Transeferable Records* (MLETR) angiver de krav som et elektronisk overførbart dokument skal opfylde for at anses at kunne fungere tilsvarende som et fysisk dokument udstedt på papir. MLETR blev adopteret af UNCITRAL i 2017 og er dermed en ny modellov, hvorfor en teknisk undersøgelse af modelloven er ønskelig. Dette både med henblik på at opnå en forståelse af modelloven som et retligt instrument, der opstiller de kriterier et elektronisk overførbart dokument skal opfylde for at kunne varetage de samme funktioner som et tilsvarende papir dokument og for at kunne bedømme samspillet mellem MLETR og andre lovgivningsinstrumenter.

En af grundene til, at UNCITRAL påbegyndte lovgivningsarbejdet med MLETR i 2011, var ønsket om et instrument, der kunne agere støtte i implementeringsprocessen af *the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Rotterdamreglerne), der blev adopteret af UNCITRAL i 2008. Det demonstreres i afhandlingen, at MLETR supplerer Rotterdamreglerne i visse aspekter af brugen af *electronic transport records.* Afhandlingen undersøger endvidere, hvordan problemstillingen vedrørende brugen af elektroniske overførbare dokumenter er håndteret i national ret. For at kunne vurdere dette, er det først essentielt at kende ejendommelighederne ved et overførbart dokument udstedt i fysisk format. Til brug herfor, er konnossementet (der er et velkendt dokument i handelsretten) anvendt som et casestudie. Danmark, Norge og Sverige er blevet inddraget i afhandlingen som primært én retlig entitet, idet deres lovgivning på området i høj grad er ens som følge af nordisk lovsamarbejde. Såfremt retstilstanden væsentligt differentierer, påpeges dette. Det konkluderes, at det retlige koncept *ihændehavelse* spiller en central rolle for konnossements evne til at være nøglen til at få udleveret godset og til at agere et negotiabelt dokument. England og Wales' lovgivning undersøges herefter med ihændehavelse af et konnossement som omdrejningspunkt. Det konkluderes, at i engelsk ret spiller ihændehavelse af konnossementet ligeledes en afgørende rolle i forhold til at dokumentet agerer nøglen til at få udleveret godset og i forhold til konnossementets egenskab som værende et *document of title*.

På baggrund af studiet af lovgivningen som den finder anvendelse på konnossementer udstedet på papir, vender afhandlingen sig herefter mod spørgsmålet om lovgivningen også faciliterer anvendelsen af elektroniske konnossementer. Det konkluderes, at det i Danmark, Norge og Sverige er usikkert om lovgivningen faciliterer anvendelsen af elektroniske konnossementer, idet det er uklart om et konnossement kan ihændehaves i elektronisk form. Det konkluderes med sikkerhed, at konnossementet i henhold til den nuværende lovgivning i England og Wales ikke kan udstedes i elektronisk form,

idet sådanne dokumenter i henhold til engelsk ret, ikke kan ihændehaves i elektronisk form.

På baggrund heraf ser afhandlingen ind i fremtiden for anvendelsen af elektroniske overførbare dokumenter, såsom et elektronisk konnossement. Rotterdamreglerne, der blev adopteret af UNCITRAL i 2008, men som ikke er trådt i kraft endnu på grund af manglende antal ratificeringer, muliggør anvendelsen af *electronic transport records.* MLETR, der blev adopteret af UNCITRAL i 2017, faciliterer anvendelsen af *electronic transferable records.* Den svenske højesteret afgjorde i 2017, at negotiable dokumenter, hvis funktion afhænger af ihændehavelse, skal kunne fungere i elektronisk form. I 2020 opfordrede *International Chamber of Commerce* kraftigt til, at regeringer implementer lovgivning, der muliggør anvendelsen af elektroniske handelsdokumenter, som et nødvendigt modsvar på de udfordringer, der har vist sig med papirsdokumentation i efterdønningerne af covid-19 pandemien. Ved G7-topmødet i England i 2021 blev der opfordret til, at lande implementerer harmoniseret lovgivning inden for det retlige område af elektroniske overførbare dokumenter. På baggrund heraf, har England og Wales initieret arbejde på en lovreform. Det konkluderes, at vi står midt i et paradigmeskifte, der tillader brugen af dokumenter, hvis retlige funktion afhænger af, at de fysisk kan ihændehaves, i elektronisk form.

THE TRANSFER OF RIGHTS IN A DIGITALISED AGE

CHAPTER 1. ENQUIRY AND FRAMING OF THE ISSUES

1.1. INTRODUCTION

On 6 April 2020 the International Chamber of Commerce (ICC) urged governments to immediately enable paperless trade and to remove all legal prohibitions on the use of electronic trade documentations in a memo marked "urgent".[1] ICC was worried of the impact of the corona virus on the global trade finance market as the market relies on paper documentation. Naturally, during a pandemic such a trade practice is to be considered impractical to say the least. Company staff was asked to work from home to minimise the degree of in-person contact. Postal services were stretched and as noted by ICC even suspended in some cases.[2] ICC considered it a serious risk that supply chains for essential goods such as medical equipment and food were disrupted.[3] The urgent message from ICC disclosed an issue that has long been debated in the shipping industry and that to this day remains unsolved, namely that transferable documents representing an underlying right may not function well in electronic form. In a world where everything relies on digitalisation there is one particular type of document that may not function in an electronic environment in international trade law. What characterises this type of document is that the holder of the document is entitled to claim the performance that is indicated in the document. Consequently, in order to claim the performance of the obligation indicated in the document you have to be in *possession* of the document. Replicating the notion of possession in an electronic environment has proven to be a continued saga through decades. This particular type of document may be referred to as a transferable document. An example of such a document is a bill of lading used in the carriage of goods by sea. The holder of a bill of lading is entitled to claim delivery of the goods indicated in the document. Through transfer of the document the right to claim delivery of the goods is transferred as well. As stated by Michael F. Sturley:

> "Customary trade practices could in theory fill the gap, much as they did for years before international conventions and domestic statutes appeared

[1] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, 6 April 2020

[2] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, 6 April 2020

[3] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, 6 April 2020

> on the scene. But a trade practice regarding electronic records cannot develop, let alone become customary, until those in the trade start using electronic records on a regular basis. Because the industry is unwilling to risk the success of transactions with third parties unless a sufficient legal basis ensures that electronic records will serve their intended purpose, the resulting chicken-and-egg problem can be predicted to keep the new technologies on the drawing board."[4]

Sturley refers to a chicken-and-egg problem: In order for the industry to rely on electronic trade records there must be legal certainty as to the use of such records.

UNCITRAL celebrated its 50th anniversary in 2017, which causes time for status and reflection as to where we are in the internationalisation and harmonisation wave of international private law. Through more than 50 years UNCITRAL has developed instruments to promote international trade alongside with numerous other international organisations such as the Hague Conference on Private International Law[5] and the International Institute for the Unification of Private Law.[6] Amongst the most successful works of UNCITRAL is the United Nations Convention on Contracts for the International Sale of Goods (CISG) from 1980 which currently has 95 ratifying parties[7], and furthermore the UNCITRAL Model Law on International Commercial Arbitration from 1985.[8] Not to mention the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958, which 171 parties have ratified.[9] Some of the works from UNCITRAL have indeed become global which must be seen as a wish and need for harmonisation and uniformity. However, not all the work of UNCITRAL has been a success, see for instance the UN Convention on International Bills of Exchange from 1988, which only five parties have ratified, and which requires

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[4] Sturley, *Can commercial law accommodate new technologies in international shipping*, p. 26

[5] See the webpage of the Hague Conference on Private International Law: https://www.hcch.net/ - last accessed 26 January 2023

[6] See the webpage of the International Institute for the Unification of Private Law: https://www.unidroit.org/ - last accessed 26 January 2023

[7] See ratification status of CISG: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status - last accessed 26 January 2023

[8] See adoption status of the Model Law on International Commercial Arbitration: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status - last accessed 26 January 2023

[9] See ratification status of the Convention on the Recognition and Enforcement of foreign Arbitral Awards: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 - last accessed 26 January 2023

10 parties to ratify in order to enter into force.[10] Furthermore, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea from 2008 (the Rotterdam Rules), which enables the use of electronic transport documents, only has 5 parties.[11] Some international legislation becomes a success, however other legislation never succeeds in entering into force.

In 2017 UNCITRAL adopted the UNCITRAL Model Law on Electronic Transferable Records (MLETR). As stated in the Explanatory Note to the MLETR:

> "In 2011, when the Commission decided to undertake work in the field of electronic transferable records, support was expressed for that work in light of benefits that the formulation of uniform legal standards in that field could bring to the promotion of electronic communications in international trade generally as well as to the implementation of the Rotterdam Rules and to other areas of transport business specifically."[12]

The model law enables the legal use of electronic transferable records. An electronic transferable record is functional equivalent to a transferable document or instrument. The holder of a transferable document or instrument is entitled to claim the performance that is indicated in the document. Through transfer of possession of the document, the right to claim the performance indicated in the document is transferred as well. Examples of transferable documents include bills of lading, promissory notes, and bills of exchange.

The MLETR is built on the principles of non-discrimination of the use of electronic means, functional equivalence, and technology neutrality. These are principles that underpin all the legislative instruments on electronic commerce from UNCITRAL. The model law sets that the electronic transferable record is functional equivalent to a transferable document or instrument if:

- the record contains the same information that is required to be contained in a transferable document,

[10] See ratification status of the United Nations Convention on International Bills of Exchange and International Promissory Notes: https://uncitral.un.org/en/texts/payments/conventions/bills_of_exchange/status - last accessed 26 January 2023

[11] See ratification status of Rotterdam Rules: https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status - last accessed 26 January 2023

[12] Explanatory Note to the MLETR, p 17, para 7

- a reliable method is used to identify the electronic record as *the* electronic record, retain the integrity of the electronic record ensuring that it is not subject to alterations, and render the record capable of being subject to control as the functional equivalent to possession.[13]

As stated in the Explanatory Note to the MLETR, previous legislative instruments from UNCITRAL have touched upon the use of transferable documents in electronic form.[14] Most lately the Rotterdam Rules contain a chapter on the use of what the convention defines as electronic transport records. However, the Rotterdam Rules have had difficulties in gaining ground. Consequently, as of today there exists no international legislative instrument in force that enables the use of transferable documents such as for instance bills of lading issued in electronic form. The MLETR does not affect existing substantive law. The model law sets out a framework enabling for the use of electronic transferable records in which the existing substantive law may function. Consequently, the MLETR enables the electronic use of transferable documents.

1.2. THE TRANSFER OF RIGHTS IN A DIGITALISED AGE

> "Why do we have commercial law? What do we as society seek to accomplish with commercial law? How should we evaluate how well commercial law achieves its goals? The short answer was that the purpose of commercial law is to facilitate commerce."[15]

Following the above, if the purpose with commercial law is to facilitate commerce this necessarily also means that commercial law must facilitate *electronic* commerce. However, as also has been stated:

> "Negotiable documents probably still stand among the most challenging phenomena that electronic commerce law has faced to date."[16]

[13] See Articles 8-11 of the MLETR

[14] Explanatory Note, p. 16, para 5

[15] Sturley, *Can commercial law accommodate new technologies in international shipping*, p. 22 with reference to how Elizabeth Warren, his former colleague, always initiated her classes with asking the students the fundamental purposes with commercial law.

[16] Alba, *The Use of Electronic Records as Collateral in the Rotterdam Rules: Future Solutions for Present Needs,* p. 805

ICC has estimated cost savings up to £224 billion in efficiency savings by digitalising certain trade documents.[17] The English Law Commission has in a recent study considered the potential impact of law reform in the field of electronic trade documents and has consulted with consultees in its work.[18] The consultees have estimated that law reform would mean cost savings, increased productivity, increased efficiency in trade processes and labour, increased transparency of supply chains, environmental benefits, not to mention benefits for small and medium-sized enterprises.[19]

The MLETR sets to ensure that an electronic transferable record may carry out the same functions as a transferable document. An example of a transferable document is the bill of lading. The bill of lading is used throughout the dissertation as an example of a transferable document. The origins of the bill of lading can be traced all the way back to the Middle Ages.[20] Originally, there was no written document. Instead, the owner of the goods would sail with the ship.[21] Trading practices began to change in the fourteenth century, so that the owner of the goods no longer was able to travel with the goods to their destination.[22] Thereby a need for a written document was identified and initially the document was issued as a receipt by the shipowner to the merchant for the goods received.[23] This caused grounds for disputes between the shipper or cargo owner and the carrier and therefore it was found appropriate to incorporate the terms of the contract into the bill of lading. In the eighteenth-century various methods of international transport were available. This caused availability of goods on roads in Europe, and eventually merchants were encouraged to sell their goods while the goods were still in transit on the sea.[24] The need for a document that could transfer physical possession of the goods was born, because in such sales, physical delivery of the goods was not possible. Thus, it occurred that a document that could transfer the functional possession of the goods was designed, and the bill of lading as a document bearing entitlement to claim delivery was born.

Traditionally a bill of lading is a physical document. In sale of goods the principle of simultaneously performance of the contract applies as expressed in the CISG Article

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[17] ICC, Aligning national laws to the UNCITRAL Model Law on Transferable Records, UK Business Case (2021)

[18] Law Commission, *Electronic trade documents: Report and Bill*

[19] Law Commission, *Electronic trade documents: Report and Bill,* p. 23, [2.52]

[20] McLaughlin, *The Evolution of the Ocean Bill of Lading,* p. 550

[21] Girvin, *Carriage of Goods by Sea,* p. 57, para 3.02

[22] Aikens, et al., *Bills of Lading,* p. 1. para 1.1

[23] Girvin, *Carriage of Goods by Sea,* para 3.02, p. 57, para 3.03

[24] Girvin, *Carriage of Goods by Sea,* para 3.02, p. 60, para 3.05

58 (1). This means that, as a starting point, the goods and payment are to be performed at the same time. Parties to an international sale of goods, however, will normally not meet to exchange the goods and the payment upon time of performance of the contract. At this point different interests come at play. The seller does not want to part way of the goods until the seller has received payment. The buyer, on the other hand, does not want to pay the purchase price until the buyer has received the goods and inspected that the goods comply with the contract. Furthermore, the buyer may be in a position where the buyer wants to resell the goods before the goods arrive at the agreed destination. Consequently, another way to ensure possession of the goods and payment of the purchase price of the goods must be established.[25] This is where the bill of lading may come at play as a document which effectively transfers possession of the goods. This *de facto* means that the document represents the goods. The buyer will not pay the purchase price against delivery of the goods, but instead against the transfer of a document that represents the goods. The parties will most likely have agreed that a third-party carrier will be used to transport the goods to the buyer, and the carrier will necessarily have entered a contract with the shipper of the goods. The bill of lading is a central document in international trade. It may help raising finance to the transaction, which may be relevant to both the seller and the buyer. Furthermore, the document may give the buyer the possibility to sell the goods while the goods are in transit. It also gives the buyer rights against the carrier, for instance the possibility to sue the carrier in case anything happens to the cargo while the cargo is in transit.

A bill of lading is called "the key to the warehouse"[26] and is used to obtain delivery of the goods at the destination port. By transferring a bill of lading, control of the goods is transferred as well. Accordingly, rights and obligations are transferred when a bill of lading is transferred. The party to whom the bill of lading is transferred thus becomes legitimated to claim delivery of the goods and legitimated to assert the rights in accordance with the contract of carriage of goods by sea, which the bill of lading evidence. The party is legitimated to assert rights but is also committed to perform possible obligations in accordance with the contract. Consequently, concepts such as possession and legitimation are central to establish.

Today, documents can be written digitally on a digital medium such as for instance a computer or a phone, or a program can even generate an electronic document with text itself. Documents can be issued digitally, documents can be signed electronically, and documents can be sent or transferred digitally, not to mention automatically. Today we can take for granted, that we live in a digital world, and every day more and more actions and things get digitalised. There are, however, some areas in which we

[25] These additional risks that occur when you do not exchange goods and payment simultaneously are the reason why the principle of 'concurrent performance' is the default principle for international sales contracts, see TransLex Principle V.1.4. and UNIDROIT Principles 6.1.4.

[26] Barber v Meyerstein, (1870) LR 4 HL 317

cannot take for granted that we can perform the same actions or functions digitally, and where the law still does not rely on the digitalisation. Consequently, the law cannot be characterised as being media neutral. There are areas where we have not found the electronic functional equivalence to the tangible world that allow us to modify the law by analogy, and which we have relied on for centuries. This is especially the case when it comes to the legal value given to the *possession* of a document, when the law gives legal value to the symbolic value of possession itself. A bill of lading is a transferable document that relies on it to be possessed to carry out its functions. The new MLETR sets out the legal standards for such a document to function electronically.

1.3. PURPOSE AND STRUCTURE

This dissertation explores the purposes and means of the MLETR and contextualises the MLETR in its interplay with current legal regimes. As the study takes its point of departure in international legislation adopted UNCITRAL, the present dissertation is oriented towards an international audience who has an interest in the potential legal impact of international law in national legislation and commercial law including electronic commerce.

The dissertation is handed in in the slipstream of the COVID-19 pandemic. At the G7 summit in 2021 in the United Kingdom it was decided that in the recovery from COVID-19 the goal for the G7 countries should be to build back a better and more resilient economy with digital technology at its heart.[27] The MLETR sets international standards that electronic transferable records must fulfil to carry out the same functions as transferable documents. By fulfilling these requirements, an electronic transferable record may be deemed truly functional equivalent to paper documents. The MLETR seeks to answer what requirements trade documents in electronic form, such as a bill of lading, must satisfy to be considered capable of performing the same functions as their paper counterparts. The purpose with the MLETR is not to affect the existing legal functions of a trade document but to identify the criteria that electronic documents must fulfil to work in a functional equivalent manner to its paper counterparts that rely on possession for their functionality. In many countries the legislation currently in force is based on the notion that only a physical bill of lading may be subject to being "possessed". New technology such as the distributed ledger technology has emerged which opens the possibility that documents that rely on possession for their functionality may exist only in electronic form.

We stand before a shift in paradigm. Documents that traditionally must be capable of being possessed may now function in an electronic environment. The MLETR sets an international standard for the requirements an electronic transferable document must meet so that it can fulfil the same functions as a corresponding paper document for which it is a requirement that it must be capable of being possessed. While the more

[27] Ministerial Declaration, G7 Digital and Technology Ministers' meeting, 28 April 2021

exact role of the MLETR is interesting and unexplored in itself, it is merely a sign that we are on the brink of a shift in paradigm. A new mindset is required for legislation on the electronic transfer of rights to gain widespread acceptance. This dissertation demonstrates the role of the MLETR and its interplay with other regulations. But it also finds that traditional understanding of the concept of possession is challenged by technological developments as the traditional perception is that you cannot possess documents only existing in electronic form. To the extent that this is true, it possibly explains why States may have shown reluctance in adopting instruments that touch upon well-established fundamental domestic concepts, such as possession. However, in the wake of the pandemic, it has become apparent that a shift in paradigm is required and possibly is unavoidable.

The MLETR may be seen as relevant to adopt now to ensure the necessary legislative infrastructure to support the use of electronic transferable records. Considering the novelty of the MLETR, the lack of experience in the field and the scarce scholarship, it is relevant and timely to conduct further legal enquiry. Through this dissertation the purposes and potentials of the MLETR as an enabler of the use of electronic transferable records are explored. By contextualising the model law and identify its interplay with other international legislation and domestic legislation, the potential impact of the MLETR is unravelled. This dissertation is a capture of the state of law regarding how an electronic transferable document may be functional equivalent to its paper counterpart through the adoption of new international legislative standards. It contributes to legal science and academic discussion to the further development of commercial law in an electronic context.

To achieve an understanding of the MLETR as a new legislative instrument and its potential impact on existing legal regimes, the following areas of enquiry have been selected. Initially, a technical examination of the MLETR is provided with the aim to achieve an understanding of the model law as an enabler of the use of electronic transferable records. The purpose with the technical examination is two-fold: First of all, the MLETR is a new model law why such a technical examination has never been conducted before, and second of all, such a study is required to assess impact of the MLETR and to demonstrate its interplay with other legislative instruments. It is demonstrated that the MLETR provides provisions on how an electronic transferable record may carry out the same functions as a transferable document and thereby be given the same legal value. The MLETR provides a legislative framework on the use of documents such as for instance bills of lading in electronic form.

One of the reasons as to why work on electronic transferable records in 2011 was initiated in the first place was, amongst other reasons, the wish for a legislative instrument to act as a support to the Rotterdam Rules' provisions on electronic transport records. The Rotterdam Rules is the first legislative instrument on carriage of goods to provide provisions on the use of electronic transport records. Accordingly, the interplay between the two legislative instruments is studied as to how the MLETR may

support the Rotterdam Rules' provisions on electronic transport records. It is demonstrated that the Rotterdam Rules have its shortcomings regarding the use of electronic transport records and that the MLETR may provide guidance as to how such records are to function.

It is then subject to study how the issue of electronically replicating the functions of a transferable document is solved under current national law. This initially requires studying the legislation that applies to a transferable document in order to understand the peculiarities of such a document. The bill of lading has here been chosen as a case study and an example of a transferable document. The results from this study allows for assessing whether the current law caters for the use of electronic transferable records. It has been chosen to study the laws of Denmark, Norway, and Sweden and the laws of England and Wales. Denmark, Norway, and Sweden are primarily treated as one legal entity as their Merchant Shipping Acts are the result of close cooperation. Consequently, the acts are to a large extend similar. Where the laws significantly differ, this is pointed out. The study demonstrates that the notion of possession is a key concept for the bill of lading to carry out its function as the key to the cargo and for the bill to bear its characteristic as a negotiable document. Furthermore, it is demonstrated that it is uncertain whether the current legislation facilitates the use of electronic bills of lading. Based on these findings, the law of England and Wales regarding the bill of lading is subject to scrutiny with the concept of possession as the turning point for the study. Just as the case is in Denmark, Norway, and Sweden, possession of the bill of lading is central in order for the bill to carry out its functions as the key to the cargo and being a document of title. It is concluded that the current legislation does not cater for the use of electronic bills of lading as such documents cannot be possessed in electronic form.

On these grounds, a look into the future of electronic transferable records is allowed. In England law reform in the field of electronic transferable records has been initiated. That work is intended aligned with the MLETR. The study for such law reform allows for knowledge and inspiration in other countries that have yet to implement legislation on the electronic use of transferable documents. Consequently, it provides a picture of how national law that is aligned with the MLETR may look.

The structure of the study is as follows: In chapter 2 methodology, terminology, and context of the MLETR are addressed. In Chapter 3 the principles and rules of the MLETR are explored. This exploration builds on sections in Chapter 2 that concerns previous legislative work on transferable documents and electronic commerce. Chapter 4 sets out to examine the interplay between the MLETR and the Rotterdam Rules regarding the transfer of rights under electronic transport records. To know whether a bill of lading may function in an electronic environment under the existing legal regimes, first it is important to know its peculiarities when issued in paper. Accordingly, in Chapter 5 the state of law in Denmark, Norway, and Sweden concerning bills of lading issued in paper is studied, followed by an investigation of the state of law on

bills of lading in England and Wales. Chapter 6 turns to scrutiny of the legislation in Denmark, Norway, and Sweden concerning whether the existing rules and principles cater for the use of an electronic bill of lading, followed by scrutiny of whether the existing rules and principles cater for the use of electronic bills of lading in England and Wales. Based on the findings in the previous chapters, Chapter 7 allows discussions on the future for the use of electronic transferable records.

CHAPTER 2. METHODOLOGY, TERMINOLOGY, AND CONTEXT

2.1. CRITICAL LEGAL ATTITUDE

The following section is initiated with the disclaimer that this is not a dissertation concerning legal philosophy as such. However, it is beneficial to the reader, and the author, when the approach to the research conducted rests on express choice. The choice of methods stems from a critical legal attitude. By "critical legal attitude" is not meant what is classically understood as the "Critical Legal Studies Movement". In the 1970s to the 1980s the Critical Legal Studies took form what by some has been defined as a "movement". Panu Minkkinen notes for his part that:

> "The modern story of critical research in law is often compressed into a Critical Legal Studies (CLS) movement that supposedly reflects what contemporary 'critiquing' is all about. But one could also well claim that the CLS movement was never really a proper 'movement'. It was, rather, a community of loosely affiliated individuals who worked mainly in North American law schools from the late 1970s to the mid-1980s representing various non-doctrinal approaches."[28]

Roberto Unger rounds off in his "The Critical Legal Studies Movement" stating that:

> "When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars, and found the mind's opportunity in the heart's revenge."[29]

Andrea Bianchi interprets that Unger with the above quote refers to the impact on fellow academics.[30] He notes that Unger with the above quote:

> "(…) capsulates some of the main features of the movement: its predominantly academic character; its radical critique of the intellectual and academic establishment (represented as priests serving a religion which is no

[28] Minkkinen, *Critical legal 'method' as attitude,* p. 148

[29] Unger, *The Critical Legal Studies Movement,* p. 675. See also Kennedy and Klare, *A Bibliography of Critical Legal Studies,* 1984 and Kennedy and Tennant, *New Approaches to International Law: A Bibliography,* 1994

[30] Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking,* p. 135

> longer able to command or justify belief); and an unconventional and often vehement way of expressing its critique in terms of both content and style."[31]

As a response to the critical legal methods, Minkkinen questions what "critical" really means and argues in that regard that all research at the doctoral level is expected to be "critical".[32] Minkkinen's starting point is, that all legal methods, whether they are conventional or "critical" impose limitations into the ways in which the researcher produces knowledge.[33] Furthermore, Minkkinen states that in scientific practice the personal and thereby the subjective views of the researcher are filtered out with the aim to produce objective knowledge.[34] Therefore:

> "'Methodologically' conducted research does not produce mere opinions, but, so the argument runs, scientifically valid knowledge.'"[35]

The research and results are objective by conducting research by using critical legal method. This because a method, that by its very definition must be conducted by an objective researcher, is used to produce knowledge, that thereby must be objective. And how can it then be argued that a critical legal method has been used to reach objective knowledge? Instead Minkkinen argues, that a critical perspective to law is more like an attitude, instead of a methodical approach, that creates naturally imposed limitations. On this ground it seems reasonable to argue that:

> "The centrality of the profession to the discipline of international law comes with the concern about the reflexivity of its members. If international lawyers can no longer hide behind the anonymity of the objectivity of the law for which they notionally act merely as impersonal agents, the *persona* of the members of the profession ought to be studied. To understand who we are, what we do, and the reasons why we do things in a certain way can now be understood as fundamental professional duty."[36]

Following this argumentation, having a critical attitude is a precondition for conducting research in the field of international law. However, it is not enough to have a critical legal attitude in one's research, one should also reflect on the reasons to why

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[31] Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking,* p. 135

[32] Minkkinen, *Critical legal 'method' as attitude,* p. 146

[33] Minkkinen, *Critical legal 'method' as attitude,* p. 149

[34] Minkkinen, *Critical legal 'method' as attitude,* p. 149

[35] Minkkinen, *Critical legal 'method' as attitude,* p. 149

[36] Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking,* p. 162

certain things are chosen to be done in a certain way. In order to be aware of why we do things, one must necessarily also be aware of *what* we do, and which alternatives may exist. Therefore, this dissertation relies extensively on comparative law as this is seen as a tool to both explain and understand legal systems, but also as a component in being critical or suggesting law reform in the field of electronic trade documents. This because:

> "The primary aim of comparative law, as of all sciences, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system."[37]

This dissertation takes its starting point in an exploration of new international law on such electronic documents. Bearing that outset in mind it is natural to include comparative law as a tool to study existing national law on electronic trade documents in order to assess whether national law caters for the use of such documents or whether law reform is required. Consequently, this choice of method stems from a critical perspective towards law.

2.2. UNCITRAL AS A GLOBAL LAWMAKER

This dissertation takes its point of departure in international law, namely a model law that has been adopted by an international organisation. A model law is characterised as being soft law. To comprehend the instrument at hand, it is found beneficial to address what characterises a model law and furthermore the maker behind.

On the 17th of December 1966 the United Nations General Assembly established the United Nations Commission on International Trade Law (UNCITRAL).[38] The aim of UNCITRAL is to promote harmonisation and unification of international trade by removing divergences arising from the laws of different states.[39] UNCITRAL prepares and promotes the use and adoption of legislative and non-legislative instruments in a

[37] Zweigert & Kötz, *Introduction to Comparative Law,* p. 15

[38] Establishment of the United Nations Commission on International Trade Law, Resolution 2205 (XX1)

[39] Establishment of the United Nations Commission on International Trade Law, Resolution 2205 (XX1)

number of key areas in commercial law.[40] The goal of UNCITRAL is to demolish barriers to globalisation and instead create a common denominator with the purpose to promote cross-border trade. Today more organisations work for harmonisation of international commercial law, among these the Hague Conference on Private International Law (HCCH), which is a global inter-governmental organisation, the International Institute for the Unification of Private Law (UNIDROIT), and the Comité Maritime International.[41] There are more global actors who act as global lawmakers in the field of commercial law than ever, which is also one of the reasons as to why international commercial law to some extend must be argued to be fragmented. This dissertation takes its point of departure in a model law adopted by UNCITRAL, namely the MLETR.

In relation to what makes a legislative or non-legislative instrument successful, one might argue that the important part is the need for reform and whether there is quality of the proposed rules, not to mention the importance in choosing a proper instrument.[42] It has been stated by the UNCITRAL Secretary-General, that the decisive factor for the proposed law's success, no matter whether it is a model law, a convention or something third, is the quality of the contents.[43] A convention establishes binding legal obligations, which also is the reason why a convention is chosen where the wish is to achieve the highest level of harmonisation of law.[44] The advantage is that the ratifying parties to the convention to some certain degree can rely on other parties to the convention to count on the same set of rules. In this way the road to do cross-border business is eased. A state is required to ratify in order to become party to a convention. The possibility of forming reservations to a convention is limited and only possible to the extent that it is permitted in the respective convention.[45] Model laws are alternatives to conventions and are traditionally chosen where there is a need for flexibility or where a high degree of harmonisation cannot be achieved through a convention. A model law may be described as "soft" law.

> "In its broadest scope, the formula "soft law" labels those regulatory instruments and mechanisms of governance that, while implicating some

[40] Establishment of the United Nations Commission on International Trade Law, Resolution 2205 (XX1)

[41] See the webpage of the Comité Maritime International: https://comitemaritime.org – last accessed 26 January 2023

[42] Wolff, *Model Laws as Instruments for Harmonization and Modernization,* pp. 10-11

[43] UNCITRAL Secretary-General, A/CN.9/207, para 26

[44] Guide to UNCITRAL, p. 14

[45] Guide to UNCITRAL, p. 24, see for instance CISG art. 92-99, see also the Vienna Convention on the Law of Treaties, art. 19-23 concerning the possibility of making reservations.

> kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions" [46]

A model law is a legislative text that states are encouraged to implement as becoming part of their national law.[47] This also means that states can choose to adjust the legislative text to their national law, with the consequence that the degree of harmonisation is not as high as if a convention had been chosen as the legislative instrument. However, states are still advised to adopt a model law to its full extent.[48] There is also the possibility of forming legislative guides and recommendations where states are not ready to agree to a common rule or where there are different approaches to subjects and how to address them.[49] Consequently, the most certain way to harmonisation and uniformity is to be achieved through conventions. It has been argued that soft law has been underestimated as a useful instrument in order to secure harmonisation.[50] It is a long and complicated process to ratify a convention and there is not much room for flexibility.[51]

2.3. THE ROAD TO HARMONISATION OF INTERNATIONAL COMMERCIAL LAW

> "The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner, the banker or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property and of civil wrongs is practically identical with that of his own country."[52]

Today, most transactions in the area of international commercial law take place in cross-border trade. Consequently, most transactions are of international character. In the field of international commercial law, there has been initiatives from international

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[46] Robilant, *Genealogies of Soft Law,* p. 499

[47] Guide to UNCITRAL, p. 14

[48] UNCITRAL Secretary-General, A/CN.9/207, para 26

[49] Guide to UNCITRAL, p. 16

[50] See for instance Wolff, *Model Laws as Instruments for Harmonization and Modernization,* p. 11

[51] Faria, *Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage,* pp. 8-9, and Gabriel, *the Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference,* p. 664

[52] Kennedy, *The Unification of Law,* p. 214. Lord Justice William Rann Kennedy was a British Justice of Appeal Board, born 1846 and died 1915.

organisations, legal scholars and practitioners that sought to assist in the unification and harmonisation legislative process.[53] The rationale behind is that through uniformity and harmonisation legal uncertainty and lack of predictability in the legal position of traders is prevented.[54] According to Lord Justice Kennedy, there were two ways by which unification of international commerce could be achieved and by which the complexities of international commerce could be simplified: one way was through a common language as a common denominator, and the other way was through law itself. [55]

Language barriers are not preventing internationalisation of law and cannot be said to be holding back an internationalisation process as such; however, implications of language barriers are seen.[56] Furthermore, technology has enabled new ways to conduct cross-border trade. Today it is difficult to argue, that the necessary supportive means to achieve international harmonisation in commercial law do not exist. Rather, the question is whether internationalisation and harmonisation of international commercial law is still desired. Private international law comes into play when two or more legal systems are involved. Private international law may be regulated through conventions or other legislative initiatives such as model laws or legislative guides. The beginning of legal harmonisation processes can be traced all the way back to the second half of the 19th century.[57] Jürgen Basedow argues that in a historical overview three legal phases in the 19th, 20th and 21st century in regard to internationalisation and regionalism of private law can be identified and that:

> "(…) the first may be referred to as regionalism in disguise, the second as the rise of universalism, and the third as the dawn of inter-regionalism."[58]

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[53] See for instance the CISG Advisory Council, Comité Maritime International (CMI), UNCITRAL, International Institute for the Unification of Private Law (UNIDROIT)

[54] Fogt, et al., *Unification and harmonization of international Commercial Law – Interaction or Deharmonization*, p. 3

[55] However, Lord Justice Kennedy was not confident and optimistic that this was likely to happen, given a presentiment/epiphany of that the two constructed languages, *Esperanto* and *Volapuk* would not last as successes, see *The Unification of Law,* p. 214.

[56] For instance, regarding interpretation of CISG, when seen to the fact that CISG has been translated into different languages

[57] Faria, *Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?*, p. 6

[58] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, p. 32

The first phase called "the regionalism in disguise*"* is argued to have taken place in the second half of the 19th century.[59] Basedow argues that a regional harmonisation took place parallelly in both Europe and in America, and thereby not universally.[60]

The second phase, called "the rise of universalism"[61], is argued to have taken place after World War II and forth.[62] One of the reasons to "the rise of universalism" was the increase in international trade and transportation of goods, which caused an increase in cross-border communication.[63] Furthermore, an increase in powers in other regions than Europe and America were to be seen as well as an increase in participation in diplomatic exchange.[64] This led to the birth of several international organisations working in the field of harmonisation of private law as a response to a universal need for universal legal co-ordination promoting universal legal standards.[65] Here can for instance be mentioned the UN General Assembly's appointment of the UNCITRAL in 1966, the Hague Conference on Private International Law, and the International Institute for the Unification of Private Law (UNIDROIT). In the last half of the 20th century an increase in the number of ratifications and implementations or enactments of international conventions was to be seen, where several conventions afterwards and today must be said to be major successes[66], see for instance the CISG, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and also soft law such the UNCITRAL Model Law on International Commercial Arbitration, and the UNIDROIT Principles of International Commercial Contracts.[67]

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[59] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, p. 32

[60] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration,* p. 32

[61] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, p. 32

[62] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration,* p. 32

[63] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration,* p. 32

[64] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration,* p. 32

[65] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, p. 32

[66] See an overview of number of ratifications to instruments from UNCITRAL, see https://www.uncitral.org/pdf/english/TAC/Status/Overview-Status-Table.pdf

[67] UNIDROIT Principles of International Commercial Contracts (PICC)

According to Basedow, we have now entered the third phase, defined as "the dawn of inter-regionalism".[68] In various regions around the world, regional organisations have emerged with the aim to ensure unified processes in their respective regions. El Mercado Común (MERCOSUR)[69] has emerged in South America, the Organisation for the Harmonisation of Business Law (OHADA) in Africa[70], the Association of Southeast Asian Nations (ASEAN) in Asia[71], the Caribbean Community (CARICOM) in Caribbean[72], the U.S.-Mexico-Canada Agreement (USMCA) in the North America[73]. In the US, there has also been focus on harmonisation between states. The increased focus has for instance resulted in the Uniform Commercial Code[74], which is federal soft law aiming at unifying law between the states of the United States.

At the European level there is to be seen an increase in private law initiatives followed by an increase in competence from the European Union. Private initiatives such as the Principles of European Contract Law[75], AQUIS Principles[76] and the Draft Common Frame of Reference[77] have emerged. Furthermore, the European Union as a supranational and intergovernmental organisation has a mandate to negotiate treaties at the universal level[78], which to some degree also may explain the lack of ratifications and implementations of international legislation. For instance, concerning electronic commerce, the EU Commission expressed hesitation to the matter of signing the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC), as it was found, that there potentially could be a risk of conflict between the ECC and the European Community Law. In a document submitted to UNCITRAL

[68] Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration,* p. 35

[69] See the webpage of Mercosur: https://www.mercosur.int/ - last accessed 26 January 2023

[70] See the webpage of Ohada: https://www.ohada.org/en/ - last accessed 26 January 2023

[71] See the webpage of Asean: https://asean.org/ - last accessed 26 January 2023

[72] See the webpage of Caricom: https://caricom.org/ - last accessed 26 January 2023

[73] The U.S.-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020 and replaced the North American Free Trade Agreement (NAFTA), see https://www.trade.gov/usmca - last accessed 26 January 2023

[74] A set of laws governing all commercial transactions in the United States

[75] Prepared by the Commission on European Contract Law (also known as the QLando Commission" as the initiative originated from Ole Lando)

[76] The ACQUIS Principles are drafted by the European Research Group on Existing EC Private Law

[77] The Draft Common Frame of Reference (DCFR)

[78] See Article 216 of the Treaty on the Functioning of the European Union

by the European Commission in 2005, UNCITRAL was asked to insert a "disconnection clause" in order to ensure that national measures taken by the European Union member states in their mutual relations might not in any event conflict with the existing or future European Commission law.[79] In the same document, the European Commission stressed that there was a need for wider participation to the convention and a wish to emphasise the importance of the ECC.[80] Consequently, the value and importance of the ECC was acknowledged. It has been argued that the argument concerning a risk of conflict is baseless, since there is no risk of conflict due to the fact, that the EU Community law and ECC are compatible.[81] Therefore, the reason is more likely that the European Commission wishes to preserve its own flexibility regarding legislation in the field of electronic commerce.[82]

An important factor that needs to be considered is the desire to harmonise legislation at a regional level and that there potentially can be a conflict between regional legislation and international legislation. However, regionalisation may be seen to assist in an internationalisation process regarding for instance building up infrastructures.[83] A disadvantage is the possible protectionism of regional economies[84] and an unwillingness concerning adoption and implementation of international legislation where regional legislation is preferred instead of international legislation.

There are many ways one can perceive success of an international instrument, but one fundamental element will often be recognition and ratification by States. The number of ratifications or implementations relates to the degree to which the convention contributes to unification and harmonisation in the legal area. Here it is important to note the importance of the political landscape. Johanna Hoekstra has identified that there are two stages to ratification of international commercial law conventions. The first stage is the "agenda setting", and the second stage is when the countries take the con-

[79] Draft Convention on the Use of Electronic Communications in International Contracts, Compilation of comments by Governments and International Organizations, A/CN.9.578/Add. 5, para 1

[80] Draft Convention on the Use of Electronic Communications in International Contracts, Compilation of comments by Governments and International Organizations, A/CN.9.578/Add. 5, para 2

[81] Kilian, *The Electronic Communications Convention: A European Union Perspective,* pp. 411 - 414

[82] Kilian, *The Electronic Communications Convention: A European Union Perspective,* p. 414

[83] Fazio, *The Harmonization of International Commercial Law,* p. 7

[84] Fazio, *The Harmonization of International Commercial Law,* p. 7

vention through the national legislative process towards ratification of the instrument.[85] The CISG was concluded in 1980 and entered into force in 1988. The Convention still receives ratifications.[86] The CISG is an example of a Convention which took years before getting momentum to enter into force after which it became a success. However, it may also very well be that a legal instrument never gets the required number signatures and accessions and consequently never enters into force.[87] This relates to the national policy process. As stated by Hoekstra:

> "Although the convention is developed in the transnational sphere, it needs to be ratified in the national/domestic (political) sphere. Therefore, the convention needs to have a place on the legislative agenda. Understanding the agenda-setting process is thus key to understanding how a convention can be ratified."[88]

Consequently, it is all about how the issue make it to the agenda.[89] Regarding agenda-setting:

> "A distinction should be made between the systematic agenda (all issues that could be potentially considered), the institutional agenda (issues/policies that are seriously considered by decision makers), and the decision agenda (issues that have made the agenda and on which a decision now needs to be made. For a policy to be enacted, the issue has to move from the systematic agenda to the decision-making agenda."[90]

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[85] Hoekstra, *Political barriers in the ratification of international commercial law conventions,* p. 45

[86] CISG still receives ratifications, the latest being Turkmenistan in 2022

[87] This is for instance the case regarding the United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988. The Convention requires 10 parties to enter into force, however, the instrument only has 5 parties.

[88] Hoekstra, *Political barriers in the ratification of international commercial law conventions,* p. 47

[89] Hoekstra, *Political barriers in the ratification of international commercial law conventions,* p. 47

[90] Hoekstra, *Political barriers in the ratification of international commercial law conventions,* p. 47, see also Thomas A. Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making,* pp. 210-215

Hoekstra refers in her work to John Kingdon that analyses the concept of policy windows.[91] Kingdon states that:

> "First is a stream of problems. People come to concentrate on certain problems rather than others and there is a process by which they decide on which problems they are going to concentrate. Second, there is a stream of policies. They propose policies and refine policy proposals. Third, there is a stream of politics. Political events come along, like changes of administration or in Congress, or shifts in national moods, or interest groups' campaigns, and that stream, the stream of politics, moves along on its own. The first thing you notice is that these three are separate streams, and they each have their own independent rules by which they run."[92]

On this ground it is concluded by Hoekstra:

> "From this, it can be gathered that, for an international commercial law convention to be ratified by a State, it should offer a solution to a perceived problem and there should be enough momentum to process this solution."[93]

The changes of hitting such a policy window suddenly seems slim and admittedly luck plays an important role for an issue or international legislation to hit a policy window. There also may be other reasons as to why an issue suddenly becomes top priority in the agenda-setting. One reason is "focusing events". As stated by Birkland:

> "Using natural disasters and industrial accidents as examples as examples, most focusing events change the dominant issues on the agenda in a policy domain, they can lead to interest group mobilization, and groups often actively seek to expand or contain issues after a focusing event."[94]

Following this, a focus event may cause some issues to be raised to the very top of the agenda caused by, for instance, a pandemic. On 6 April 2020, ICC stated that it was:

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[91] See Hoekstra *Political barriers in the ratification of international commercial law conventions,* p. 48 with reference to Kingdon, *A Model of Agenda-setting, With Applications.*

[92] Kingdon, *A Model of Agenda-setting, With Applications,* pp. 331-332

[93] Hoekstra, *Political barriers in the ratification of international commercial law conventions,* p. 48

[94] Birkland, *Focusing Events, Mobilization, and Agenda Setting,* p. 53

> "(…) increasingly concerned about the impact of the novel coronavirus (COVID-19) pandemic on the functioning of the global trade finance market."[95]

The ICC continued by stating that:

> "As a consequence of necessary public-health interventions to tackle the pandemic, banks are facing increased difficulties processing trade finance transactions. These operations typically require significant levels of in-person staffing to review hard-copy paper documentation, which is required as a matter of national law in many jurisdictions."[96]

On these grounds the ICC encouraged governments to act in order to remove all existing legal barriers on the use of electronic trade documentation.[97] Furthermore, the ICC encouraged governments to adopt the MLETR in order to ensure functional equivalence between electronic and paper-based documents.[98] Accordingly, the issue of electronic trade documents made it to agenda of the G7 Summit in 2021 in the United Kingdom. At the G7 summit a framework for G7 collaboration on electronic transferable records was agreed.[99] Amongst points in the roadmap ahead the G7+ should ensure that:

- their laws are technology neutral as in accordance with the MLETR Explanatory Note
- laws do not discriminate between foreign or domestic issued electronic transferable records
- laws on e-signatures do not exclude use in electronic transferable records
- facilitate the use of electronic transferable records and prevent cross-border barriers

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[95] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, 6 April 2020, p. 1

[96] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, p. 1

[97] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, p. 1

[98] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, pp. 2-3

[99] See the relevant documents here: https://www.gov.uk/government/publications/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records#summary-of-domestic-scoping-exercises – last accessed 26 January 2023. It should be noted that such a framework and roadmap is not legally binding for the G7 countries.

- through legislation guidance is given to the private sector in order to assess the reliability of electronic transferable records. [100]

In Chapter 7 it is demonstrated that such work on legal reform on electronic transferable records accordingly has been initiated by some countries. As demonstrated immediately below, the road towards paperless trade had up until this point been long and burdensome.

2.4. THE EVERGREEN PRINCIPLES AND CONCEPTS

The following two sections have as their main purpose to synthesise the principles and key concepts that the MLETR rests upon and identify through what lens the MLETR must be interpreted as a new legislative instrument. The rest of this chapter concerns concepts and terminology as well as interpretation and context of the model law.

During the last decades, an international need for law reform has evolved in line with an increase in the use of electronic means in international trade. UNCITRAL has for decades had focus on developments in the use of electronic means in international trade. The increase in the use of electronic means has led to the United Nations General Assembly's adoption of the UNCITRAL Model Law on Electronic Commerce (MLEC) (1996), UNCITRAL Model Law on Electronic Signatures (2001), United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) (2005) and latest the MLETR adopted by UNCITRAL in 2017. All is work undertaken by UNCITRAL's Working Group on Electronic Commerce. All address and correspond to the technological development and thereby new legal issues that comes with potential disruption of existing substantive international and domestic law.

The MLETR addresses the functional equivalence of transferable documents and instruments that are essential commercial tools, and which benefit business sectors such as transport and finance. In terms of the MLETR, a transferable document or instrument takes the form of trade documents such as promissory notes, bills of exchange, and bills of lading. These are examples of documents that the MLETR is to affect so that the documents can function digitally, or another media, as records. The documents are often referred to as bearing the characteristics of being documents of title, negotiable documents, and transferable documents. There are, however, diverging opinions on what constitutes such concepts of documents which depends on each legal system and jurisdiction. In the field of electronic commerce, UNCITRAL advocates

[100] See under Issue 2: Development of legal solutions: https://www.gov.uk/government/publications/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records#issue-2-development-of-legal-solutions – last accessed 26 January 2023

the adoption of technology neutral legislation.[101] Technology neutral legislation means legislation that is not dependent on or that does not presuppose the use of types of technology and that could be applied to communication and storage of all types of information. Thereby the legislation may accommodate future technological developments and will not be outdated. The approach by UNCITRAL regarding international legislation is a "functional equivalence" approach. The functional equivalence approach is based on analysis of basic functions fulfilled by form requirements in the world of paper documents to determine how those functions could be transposed, reproduced, or imitated in a dematerialised environment.[102] This could also be phrased as to how can these functions be carried out no matter what medium is being used to represent functions that the document carries. The reasoning behind the adoption of new legislation that takes the technologically development into consideration is the wish to give legal value to new electronic means[103], such as for instance technology that enables the use of electronic transferable records. Thereby potential barriers to electronic commerce, are removed.

The following section concerns the previous legislative efforts concerning transferable documents and instruments in order to comprehend the special inherent characters and features of the documents that the MLETR is set to affect. Previous international legislation in the field of transferable documents and instruments adopted by UNCITRAL is referred to as well as their *travaux préparatoires* when relevant. The aim is to synthesise the features and characteristics of the documents and instruments the MLETR applies to in order to ensure that the documents may function electronically. Furthermore, the origins of the MLETR in previous legislative work on transferable documents are traced. Section 2.4.2. follows with identifying previous international legislative work in the field of electronic commerce and electronic transferable records. This is carried out through a close examination of previous legislative work by UNCITRAL in the field of electronic commerce as well as their *travaux préparatoires*. Thereby previous legislative work that the MLETR rests upon is examined to understand the long march towards legislation on electronic transferable records and to trace down the origins of the MLETR.

2.4.1. PREVIOUS LEGISLATIVE WORK ON TRANSFERABLE DOCUMENTS

The focus of this section is the legislation adopted by UNCITRAL in the field of transferable documents. Section 2.4.2. concerns the work undertaken by UNCITRAL in the field of specifically electronic commerce and electronic transferable records.

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[101] Regarding the notion of *technology neutral legislation,* see Chapter 3, section 3.4

[102] Faria, *Electronic Transport Records*, p. 53

[103] Explanatory Note to the MLETR, p. 11

When work was initiated on the MLETR, the concept of an electronic transferable record was debated at the first Working Group session.[104] There were discussions concerning whether transferable records that were transferable documents should be dealt with separately from those documents that were characterised as documents of title.[105] Furthermore, it was 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.[106] Consequently, at the first Working Group session it was discussed and agreed that the distinctions of the concepts of *transferability* and *negotiability* should be clarified. However, it is also noted in the *travaux préparatoires* that it was discussed that the negotiability of an instrument depended upon both the applicable law and the contractual terms of the instrument.[107] This indicates that specifically defining at the international legislative level what constitutes a negotiable document is perhaps not as easy as such seeing as this may differ in each jurisdiction. At the following Working Group session:

> "(…) the Working Group discussed the distinction between transferability and negotiability. It was agreed that negotiability related to the underlying rights of the holder of the instrument under substantive law and that the discussion therefore should focus on transferability."[108]

Furthermore:

> "(…) it was emphasised that terminology should be carefully chosen so as to accommodate the substantive laws of all legal traditions."[109]

On these grounds it was decided that an electronic transferable record should refer to the electronic equivalent of any transferable document or instrument that in accordance with the United Nations Convention on the Use of Electronic Communication in International Contracts entitles the bearer or beneficiary to claim the delivery of goods

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[104] Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session, A/CN.9/737, pp. 4-5, paras 14-22

[105] Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session, A/CN.9/737, p. 4, para 19

[106] Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session, A/CN.9/737, p. 4, para 20

[107] Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session, A/CN.9/737, p. 5, para 24

[108] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, p. 5, para 21

[109] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, p. 5, para 20

or the payment of a sum of money.[110] It is clear that one cannot rely on the MLETR to provide a definition of what constitutes *negotiability* or a *document of title* as there is no universally accepted definition on such terms. Regarding the concept of *transferability,* the MLETR establishes what the MLETR understands by a transferable document or instrument. However, the MLETR does not define what universally is to be understood by transferability.

The same view is reflected in the Explanatory Note to the MLETR in which it is noted that the definition of an electronic transferable record does not aim to affect the principle that substantive law should determine the rights of the person in control.[111] In terms of the MLETR it is clear that there *is* a distinction between the notions of *transferability* and *negotiability*. This by stating that the MLETR focuses on the transferability of the record and not on its negotiability as it is argued that negotiability relates to the underlying rights of the holder of the instrument, which fall under substantive law[112] which the MLETR does not affect.[113]

The same approach is followed in the rest of this section. Reference is made to the legislative history of certain documents that in the eyes of the MLETR constitute a transferable document. However, it is not attempted to define whether each document bears the characteristics and features of being negotiable or a document of title as this depends upon the jurisdiction where each legislative instrument is implemented. What the documents all have in common is that they each bear a certain function as entitling the bearer to claim the delivery of goods or the payment of a sum of money and from that certain characteristics follow. Through transfer of the document or instrument the right to claim delivery or payment may be transferred.

The question now remains what kind of document a transferable document or instrument is and what it represents and consequently, what legislation the MLETR origins from and to what legislation the MLETR is set to affect. The use of international documents has been subject to attempts at uniform law. The history of unification efforts regarding the law of negotiable instruments goes farther than a century back.[114]

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[110] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, p. 5, para 22 with reference to Article 2 (2) of the United Nations Convention on the Use of Electronic Communication in International Contracts

[111] Explanatory Note to the MLETR, para 86

[112] Explanatory Note to the MLETR, para 20

[113] Explanatory Note to the MLETR, para 22

[114] Herrmann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes*, p. 519

The first successful attempt at unifying the law of negotiable instruments were at the two Hague Conferences held in 1910 and 1912. The conferences resulted in the adoption of the Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes.[115] However, as can probably be imagined the first world war interrupted further development and the convention was never ratified. But in 1930 an International Conference for the unification of laws on bills of exchange, promissory notes, and cheques was held in Geneva, and 6 conventions were adopted at the conference.[116] The work resulted in over 40 countries having introduced the Geneva uniform laws on bills of exchange and cheques either into their legislation or having taken the conventions as a model for their negotiable instruments law.[117] This includes the English Bills of Exchange Act of 1882 that countries that were, or still are, part of the British Commonwealth have used as a model for their legislation and is also the source of the United States Negotiable Instruments Law, and its successor, Article 3 of the Uniform Commercial Code.[118] Two major systems of negotiable instruments law are in force: the Geneva system and the Anglo-American system.[119]

Not all States that follow the civil law tradition had adopted the Geneva Uniform Laws, in fact only 21 States have adopted it.[120] In addition to the Geneva system and the Anglo-American system, there still exist other national laws and legal systems with different traditions and concepts.[121] Creating uniform law in the field of negotiable instruments is difficult.

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[115] Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes

[116] The text of the convention is to be located in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, Volume 1, pp. 129-150

[117] Willem C. Vis, *Unification of the Law of Negotiable Instruments: The Legislative Process,* pp. 508-509

[118] Explanatory Note to the United Nations Convention on International Bills of Exchange and International Promissory Notes, para 6

[119] Willem C. Vis, *Unification of the Law of Negotiable Instruments: The Legislative Process,* p. 509, Herrmann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes*, p.

[120] Herrmann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes*, p. 520

[121] Herrmann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes*, p. 520

UNCITRAL itself was first encouraged to follow the subject of harmonisation and unification of the law of negotiable instruments at its first session in 1968.[122] Here it was decided that work on negotiable instruments should be prioritised. It was decided in 1970 that the work should take its form as new uniform rules that should be applicable to a special negotiable instrument.[123] In 1969 the work began on preparatory studies concerning the laws relating to bills of exchange.[124] At first, focus was on bills of exchange, however, later it was decided to also include rules to international cheques to its work[125] and furthermore international promissory notes.[126] As stated in the Explanatory Note to the United Nations Convention on International Bills of Exchange and International Promissory Notes, the Convention was a culmination of more than 20 years of work by UNCITRAL.[127] The Convention applies to international bills of exchange and promissory notes. As of today, the Convention has only been ratified by 5 parties and it requires 10 parties to ratify it in order for it to enter into force.

The convention provides a definition of a bill of exchange and a promissory note. In accordance with the Convention's Article 3:

> "1. A bill of exchange is a written instrument which:
>
> (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
> (b) Is payable on demand or at a definite time;
> (c) Is dated;
> (d) Is signed by the drawer.
>
> 2. A promissory note is a written instrument which:

[122] Report of the United Nations Commission on International Trade Law on the work of its first session in 1968, A/7216, para 40 (5)(a)

[123] Report of the United Nations Commission on International Trade Law on the work of its third session in 1970, A/8017, para 118

[124] See the Draft uniform law on international bills of exchange and commentary: report of the Secretary-General, A/CN.9/67

[125] Report of the United Nations Commission on International Trade Law on the work of its fifth session in 1972, para 61 (1)(c)

[126] Report of the United Nations Commission on International Trade Law on the work of its fifth session in 1972, A/8717, para 61 (1)(b)

[127] Explanatory Note to the United Nations Convention on International Bills of Exchange and International Promissory Notes

(a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
(b) Is payable on demand or at a definite time;
(c) Is dated;
(d) Is signed by the maker."

The Convention's chapter IV[128] concerns the rights of a holder and of a protected holder. Awareness is given to the fact that there are different approaches at the civil and common law systems regarding the rights of the holder of an instrument and the limitations of those rights by the claims and defences of others.[129] In order to be defined as holder in the eyes of the Convention, it is a requirement that the person is in possession of the instrument.[130] In terms of Article 29 of the Convention, a "protected holder" means a holder who at the time of becoming the holder of an instrument was unaware of a valid claim to the instrument[131], was without knowledge of the fact that the instrument had been dishonoured by non-acceptance or by non-payment[132], and who did not obtain the instrument through fraud or theft.[133] A protected holder may in accordance with Article 31 through transfer of the instrument vest in any subsequent holder the rights to and on the instrument which the holder had. A party who is not a protected holder may be met with claims and defences but *only* if the holder was aware of such claims or defences or if it was involved in fraud or theft concerning the instrument.[134]

Consequently:

> "The rights of a protected holder are freed from the claims and defences at a greater extend than are the rights vested in the ordinary holder."[135]

Therefore, in accordance with the United Nations Convention on International Bills of Exchange and International Promissory Notes, a holder may have a better title to the instrument than a previous holder. Furthermore, the convention touches upon the

[128] Articles 27-32

[129] Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on International Bills of Exchange and International Promissory Notes, p. 44, paras 22-23

[130] In accordance with Article 5 (f) with reference to Article 15

[131] Article 29 (b)

[132] Article 29 (c)

[133] Article 29 (e)

[134] In accordance with Article 28 (1)(b), (1)(c), and (2)

[135] Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on International Bills of Exchange and International Promissory Notes, p. 44, para 22

functions that the MLETR refers to. A promissory note or a bill of exchange must be capable of being subject to possession as it is through possession of the document the rightful holder is defined. Furthermore, the document must arguably also be unique in order to ensure the debtor against the risk of multiple claims. As is to be seen in Chapter 3, the functional equivalence to *possession* is in the terms of the MLETR *control.* For the electronic transferable record to carry out the functions of a paper document a reliable method must be used.[136] However, it should be noted that the convention does not use the terminology "negotiable".

Through time, there has also been several attempts at unifying the law of bills of lading. The International Convention relating to the Unification of Certain Rules relating to Bills of Lading was adopted on 25 August 1924 at Brussels (the Hague Rules). The rules have been amended twice since they were adopted. The reason to this was that there through time was increasing dissatisfaction with the Hague Rules system as it was recognised that there were developments in the technology and practices relating to shipping.[137] The rules that were found appropriate in 1924 was not as appropriate as the years went by. The first time the rules was amended was in 1968. The rules were amended again in 1979. These amendments deal primarily with financial limits of liability under the Hague Rules.[138] The Hague-Visby Rules use the term "non-negotiable document" in its Article VI, but do not define what in the eyes of the convention is understood by such terminology.

At the first session of UNCITRAL in 1968, it was suggested by the delegation of Chile that the law governing the carriage of goods by sea was revised.[139] At the same time it was suggested by a working group of the United Nations Conference on Trade and Development (UNCTAD) that the rules and practices concerning bills of lading, including those contained in the Hague and Hague-Visby Rules, was revised and if deemed appropriate amended.[140] Furthermore, a new international convention should be prepared so that ambiguities in the existing law could be amended and so that a

[136] As is thoroughly elaborated in Chapter 3

[137] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), p. 22, 7

[138] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), p. 22, 7

[139] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), p. 22, para 8

[140] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), p. 22, para 9

balanced allocation of responsibilities and risks could be ensured between cargo interests and carriers.[141] Accordingly, in 1971 UNCITRAL took upon itself to prepare such a draft convention. The convention was finalised in 1976 and adopted in 1978 in Hamburg by the General Assembly, why the convention is known as "the Hamburg Rules". As of today, 35 parties have ratified the rules.[142] Denmark, Norway and Sweden have all signed the Convention, but have, however, not ratified it. England has not signed, nor ratified the Convention.

It follows from Article 1 (7) of the Hamburg Rules that a bill of lading is a:

> "(…) document which evidences a contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking."

In accordance with Article 14 of the Hamburg Rules, the carrier must issue a bill of lading if the shipper requests one. It is specifically stated in Article 14 (3) that:

> "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued."

Consequently, the provision prepares the ground for a media neutral provision meaning that as long as the bill of lading can be argued to be signed it does not matter on what media the signature is provided. In its Article 15 the Hamburg Rules provides a provision concerning the contents of the bill of lading regarding what information the bill must include. It also states in its Article 16 (3)(a-b) that:

> "(…) *(a)* the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and
>
> *(b)* proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein."

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[141] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), p. 22, para 9

[142] See the Hamburg Rules' ratification status here: https://uncitral.un.org/en/texts/transportgoods/conventions/hamburg_rules/status - last accessed 26 January 2023

This means that the bill of lading acts as *prima facie* evidence over the taking over or loading by the carrier of the goods as so described as well as it favours the potential third-party transferee who has acted in good faith on the description on the bill of lading.[143] It is not stated in the Hamburg Rules that the bill of lading is either a negotiable document or a document of title. However, as follows from scrutiny in Chapter 6, in Denmark, Norway, and Sweden the bill of lading is considered as having the legal effects as a negotiable document whereas in England it is safe to say that the bill of lading is considered as a document of title. It is, however, heavily debated in England whether the bill of lading is considered as being negotiable in the true sense of negotiability. This demonstrates that the legal effects of a bill of lading may differ domestically.

Years passed after the adoption of the Hamburg Rules, however, the Convention never succeeded in gaining wide support. In 2008 the Rotterdam Rules was adopted by UNCITRAL after years of preparation. As stated in the Rotterdam Rules, a transport document can be either negotiable or non-negotiable and thereby, the Convention uses the terminology of negotiability.[144] The crucial point in the assessment as to whether a document is negotiable, is whether the document includes the wording "to order" or "negotiable" or whether it in another way indicates that it is recognised as having the same effect without directly including such words.

In its 9th session report para 93 regarding the definition of a "negotiable transport document" it is stated that:

> "It was suggested that there be a clearer explanation of the differences between negotiability and non-negotiability. It was pointed out that the question as to what constituted a document of title differed between jurisdictions. It was suggested that there was a need for more precision in understanding core terms such as "negotiable" in order to provide for appropriate rules on negotiable electronic records. In response it was noted that whilst it was important to be more precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences."[145]

Again, it is chosen not to directly define what constitutes a negotiable document or a document of title as it is recognised that there are divergencies to this between jurisdictions. Consequently, where in the UNCITRAL Convention on Bills of Exchange

[143] Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), p. 27, para 37

[144] See the Rotterdam Rules Article 1 (15) and (16)

[145] Report of the Working Group on Transport Law on the work of its ninth session, A/CN.9/510, para 93

and Promissory Notes the legal effects of being considered a protected holder are regulated, in the Rotterdam Rules it is instead chosen to include provisions concerning procedures regarding the use of electronic transport records, such as the method for issuance or transfer, integrity of the record and identification of the one claiming to be holder.[146] One could argue that if it is chosen not to define the used terminology in the Rotterdam Rules, whether the terminology of negotiability should have been used at all. It has not been so in previous conventions on the carriage of goods and the use of the terminology seems unnecessary as it is not elaborated what legal effects there are attached to what the Rotterdam Rules understand by the concept of negotiability.

In UNCITRAL's preparation for the fifty-second session of the Commission in 2019, the Government of the People's Republic of China submitted to the Secretariat a proposal in support of the Commission's future work regarding railway consignment notes.[147] The suggestion has led to Working Group VI of UNCITRAL to prepare work in the field of negotiable multimodal transport documents. The work is in its preliminary phase, and the first Working Group Session of Working Group VI was held in Vienna from 28 November-2 December 2022. In the Note by the Secretariat to the Working Group it is stated regarding the form of the new instrument that the central purpose of the new instrument would be to clearly provide that a document issued by agreement of the parties to a contract for the international carriage of goods may also serve as a document of title in respect of the goods it represents irrespective of the actual modes of transportation used for the carriage.[148] It is also recognised that the effect of transfer of the bill of lading as a means of conveying property to goods is not recognised by law in all jurisdictions.[149] The Secretariat of UNCITRAL has in its preparatory work consulted experts who has suggested that legislation would be needed in order to extend the negotiability function of the bill of lading to also be applied to other documents issued in the field of carriage of goods.[150] Consequently, it seems as the same approach is taken by UNCITRAL regarding the new instrument regulating negotiable multimodal transport documents as on its work with the United Nations Convention on International Bills of Exchange and International Promissory Notes

[146] The Rotterdam rules, Article 9 concerning the procedures for the use of negotiable transport records.

[147] See Proposal by the Government of the People's Republic of China, Note by the Secretariat, A/CN.9/998, 14 June 2019

[148] Negotiable Multimodal Transport Documents, Note by the Secretariat A/CN.9/WG.VI/WP.96, p. 2, para 5

[149] Negotiable Multimodal Transport Documents, Note by the Secretariat, A/CN.9/WG.VI/WP.96, p. 2, para 5

[150] Negotiable Multimodal Transport Documents, Note by the Secretariat, A/CN.9/WG.VI/WP.96, pp. 2-3, para 5

that specifically attempted at regulating what the Convention understood by negotiability. It will be interesting to follow UNCITRAL's work in this field in the future.

In conclusion, the transferable documents that the MLETR refers to have been subject to attempts at uniform and harmonised international legislation with various success. The MLETR does not define what constitutes a negotiable document or a document of title. Nor does the MLETR attempt at outlining a universally accepted definition on what constitutes a transferable document. The model law defines what in the eyes of the model law constitutes a transferable document or instrument. In the eyes of the model law, a transferable document or instrument is issued on paper and entitles the holder to claim the performance of the obligation indicated in the document or instrument. That right to performance of the obligation indicated in the document or instrument may be transferred through transfer of the document or instrument itself. Consequently, as to the terminology used in the following it should be noted that it is not feasible to define what universally constitutes a negotiable document or a document of title. Instead, upon closer examination of the legislation of bills of lading as implemented in Denmark, Norway, Sweden, and England it is specifically referred to whether the bill of lading domestically is considered as being negotiable or a document of title.[151]

2.4.2. PREVIOUS LEGISLATIVE WORK ON ELECTRONIC COMMERCE

The first time UNCITRAL discussed possible work in the field on the negotiability and transferability of rights through electronic commerce was at the Commission's twenty-seventh session, in 1994.[152] It was noted that:

> "(…) preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment (…)".[153]

It was also suggested that future work should be undertaken in the field of negotiability in securities.[154] However, this suggestion was objected to on the ground that it

[151] See Chapters 5 and 6

[152] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17, A/49/17, para. 201

[153] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17, A/49/17, para. 201

[154] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 A/49/17, para. 201

would be difficult to obtain legislative uniformity as there to a very high degree was regulation at the national level that governed the issue of negotiability in securities.[155]

However, already in 1985 UNCITRAL had focus on the potential issue of legal value of computer records.[156] With the background in form of a report prepared by the UNCITRAL Secretariat, UNCITRAL noted that there were serious legal obstacles and issues to the use of "computer-to-computer telecommunications" in international trade, and that these issues and identified obstacles were caused by requirements as to signature and paper form.[157] Hence, UNCITRAL recommended governments to review legal requirements as to whether rules on admission of computer records were consistent with the developments in technology. This in order to ensure that courts were in possession of the necessary means in order to be able to assess the credibility contained in computer records and to review legal requirements that documents should be in writing, no matter whether the requirement of writing was in regard to enforceability or validity of the document.[158] Furthermore, UNCITRAL endorsed international organisations to elaborate and modify legal texts to ensure consistency with the developments in technology.[159]

In line with the recommendations UNCITRAL itself made to international organisations working in the field of international trade, concerning ensuring consistency with developments in technology, the UNCITRAL Working Group on Electronic Data Interchange was in 1996 in the midst of preparation of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communications.[160] In relation to the issues of negotiability and transferability in goods, it was

[155] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17. A/49/17, para. 201

[156] United Nations Commission on International Trade Law, eighteenth session, A/CN.9/265

[157] United Nations Commission on International Trade Law (UNCITRAL), eighteenth session, *Recommendations on the Legal Value of Computer Records,* (1985), p. 1, with reference to United Nations Commission on International Trade Law, eighteenth session A/CN.9/265

[158] United Nations Commission on International Trade Law (UNCITRAL), eighteenth session, *Recommendations on the Legal Value of Computer Records,* (1985), p. 1, with reference to United Nations Commission on International Trade Law, eighteenth session A/CN.9/265

[159] United Nations Commission on International Trade Law (UNCITRAL), eighteenth session, *Recommendations on the Legal Value of Computer Records,* (1985), p. 1, with reference United Nations Commission on International Trade Law, eighteenth session to A/CN.9/265

[160] See the UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69

specifically noted that the functions of bills of lading that might be affected by the use of electronic data interchange communications were:

> "(…) those of serving: (1) as a receipt for the cargo by the carrier; (2) as evidence of the contract of carriage with regard to its general terms and the particular details of vessel, loading and discharge ports, and nature, quantity and condition of the cargo; and (3) as a document giving the holder a number of rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit."[161]

It was stated that the first two functions easily could be managed through the use of electronic data interchange.[162] The real problem, however, was the third function concerning the transfer of rights through electronic data interchange. The reason to this specific concern about the third function was that it was found that it would be difficult to establish the identity of the exclusive holder of the bill of lading to whom the carrier could deliver the goods. It was stated that thereby the carrier might be in risk of being faced with a claim by another party for mis-consigned delivery.[163] Furthermore, it was stated that it especially was the issue of guaranteeing the singularity or the uniqueness of the bill of lading that might be difficult, and that a possible solution to this might be found in the establishment of a central registry in which the holder could register its rights.[164] It was noted, that electronic data interchange was only used in the North Atlantic maritime routes, and that developments on the use of electronic data interchange depended on a legal regime that would give legal value to the use of electronic transport documents.[165]

What started as a focus on bills of lading, led to suggestions concerning work in the field of not only bills of lading but also other negotiable or transferable documents in general. It was also suggested that the Working Group should address all documents of title covering tangible and intangible goods, or all negotiable and perhaps also non-

[161] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 3-4

[162] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 4

[163] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 5

[164] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 5

[165] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 8

negotiable instruments.[166] In the end it was agreed that the focus should be on electronic data interchange documents with the focus on electronic bills of lading and issues that might arise in that regard. One of the issues mentioned was the issue of how to ensure uniqueness of an electronic bill of lading, so that the holder of the bill of lading could dispose of the goods in transit.[167] Furthermore, it was discussed how to communicate electronically and how to ensure rights in an electronic environment. Multiple technical solutions were mentioned, amongst these a potential use of registries. In that regard it was specified that a use of registries would require a legal regime addressing registration, liability issues, to whom the registration could produce effects amongst here what effect the register should have on third parties.[168] A need for a definition of a "holder" was also mentioned. This was because a holder would be in physical possession of a paper bill of lading. However, if the bill of lading only existed electronically, a new way to define the holder had to be ensured, such as for instance through registration.[169] It was also addressed that the disadvantages in using paper bills of lading were that often did the goods and papers not arrive at the same time at the destination port, there were high costs, and also the risk of fraudulent issuance of bills of lading was considered.[170] Consequently, already in the middle of the 1990's the issues concerning paper bills of lading were addressed and the lack of legal value given to electronic bills of lading was considered. It was emphasised that a modernisation of the shipping industry had led to early arrival of the goods at the destination port, however, this led to the arrival of the goods overtaking the arrival of the relevant papers, amongst these the bill of lading.[171]

As stated in section 2.4.1., the United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) Article 14, paragraph 3 may be interpreted as implying the possible use of electronic bills of lading. It is stated in the paragraph that:

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[166] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 9

[167] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 10

[168] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 11

[169] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 12

[170] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 41

[171] UNCITRAL Working Group on Electronic Data Interchange, thirtieth session, A/CN.9/WG.IV/WP.69, para 42

> "3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued."

However, no guidance is given as to how an electronic bill of lading could carry out the functions in an equivalent manner as a paper-based bill of lading.

The UNCITRAL Model Law on Electronic Commerce adopted by UNCITRAL in 1996 (MLEC) had as its main purpose to provide a model for how existing rules that require paper documentation or written signatures as conditions for the validity or enforceability of a transaction can be modernised and renewed.[172] Thereby legal obstacles for the use of messages in another media than paper was to be removed and given legal effect and validity.[173] The MLEC refers throughout its provisions to "data messages". A definition of a data message is provided in Article 2(a) which states that data message means information that is generated, sent, received, or stored by electronic, optical, or similar means. In the MLEC Guide to Enactment paragraph 30 this is elaborated as to also meaning computer-generated records that are not intended for communication. The notion of "message" therefore includes the notion of "records".[174]

Article 16 and 17 of the MLEC concern the possibility of the dematerialisation of transport documents that has incorporated a claim to delivery of goods. Part 1 of the MLEC concerns electronic commerce in general and the second part of the MLEC addresses issues of electronic commerce in specific areas. As of today, Part 2 of the MLEC consists of one chapter that concerns the carriage of goods. It was the wish to make the MLEC flexible to keep open the possibility of adding additional chapters to Part 2 of the MLEC.[175] Article 16 of the MLEC concerns "Actions that are related to contracts of carriage of goods" and Article 17 concerns "Transport documents". Article 16 specifically refers to actions such as:

> "(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
>
> (g) acquiring or transferring rights and obligations under the contract."

Article 17 (1) and (2) states that:

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[172] MLEC Guide to Enactment, para 2

[173] MLEC Guide to Enactment, para 2

[174] MLEC Guide to Enactment, para 30

[175] MLEC Guide to Enactment para 108

> "(1) (…) where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.
>
> (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document."

It is to be seen that the requirement of issuing a paper document is fulfilled if using one or more data messages.[176] Furthermore, the requirements of endorsements and transfer of possession of a bill of lading are also fulfilled if using a data message.[177] Article 17 (1) ensures that the actions referred to in Article 16 can be carried out using one or more data messages. Thereby the equivalence of electronic communications to the written medium is ensured. In Article 6 (1) and (2) that are to be found in Part 1 that concerns general provisions on the functional equivalence between the written medium and data messages it is also stated that a data message meets the requirements of the law where the law requires information to be in writing. In the MLEC Guide to Enactment it is specifically noted that Article 17 paragraphs (1) and (2) are derived from Article 6.[178] It clarifies that regarding specifically transport documents such as bills of lading it is not sufficient to ensure the functional equivalents of the written information regarding the actions referred to in Article 16.[179] It is also underlined that the functional equivalents are needed of the performance of such actions through the use of paper documents, particularly for the transfer of rights and obligations by transfer of written documents.[180] Therefore Article 17 paragraphs (1) and (2) refers to both the functional equivalents for a written contract of carriage and the requirements for endorsements and transfer of possession of a transport document, such as a bill of lading.

Article 17(3) of the MLEC concerns the issue of "singularity". It provides that:

> "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique."

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[176] MLEC Guide to Enactment, para 113. As explained above, a "message" includes the wording "record".

[177] MLEC Guide to Enactment, para 113

[178] MLEC Guide to Enactment, para 113

[179] MLEC Guide to Enactment, para 113

[180] MLEC Guide to Enactment, para 113

The MLEC Guide to Enactment explains what is meant with the wording "uniqueness". In paragraph 117 it is elaborated that the reliable method referred to should be interpreted as a use of a reliable method to secure that data messages:

> "(…) purported to convey any right or obligation of a person might not be used by or on behalf of, that person inconsistently with any other data messages by which the right or obligation was conveyed by or on behalf of that person."

This leaves open what should be understood by the standard of reliability. Article 17(4) elaborates on what is to be understood by the standard of reliability by stating that the standard shall be assessed in the light of the purpose for which the right or obligation was conveyed and in light of the circumstances, which includes any agreement. The purpose with Article 17 paragraphs (3) and (4) is to ensure that only one person at a time is entitled to assert a right in accordance with a transport document. The effect of the two paragraphs is to introduce the requirement of "guarantee of singularity".[181] This requirement goes to the core of the characteristics of a bill of lading meaning that the holder of the bill of lading is entitled to the goods by the virtue of being the holder of the bill of lading. Therefore, it is necessary to ensure the requirement of singularity to make sure that an electronic bill of lading cannot be altered or be subject to duplication. Article 17 paragraph (5) provides that if one or more data messages have been used to effect actions in subparagraphs *(f)* and *(g)* of Article 16, no paper document used to affect any such action unless the use of data messages has been terminated. After the data message's termination, it can be replaced by a paper document. The purpose with paragraph 5 is to ensure that two media cannot be used simultaneously for the same purpose in order to avoid the risk of duplication of transport documents.[182] The same rights cannot at the same time be embodied both in a data message and on paper. The paragraph ensures that there are requirements set in place so that the parties may switch communication form from electronic communication to paper communication.

Finally, Article 17(6) concerns the application of rules governing paper bills of lading. Article 17(6) provides that a contract of carriage of goods that is evidenced by a paper document shall not be deemed inapplicable if instead evidenced by one or more data messages. The Hamburg Rules provides legislation concerning contracts for the carriage of goods by sea. The MLEC Guide to Enactment explains in its paragraph 121 that laws such as the Hamburg Rules and the Hague-Visby Rules that apply where a paper bill of lading is being used also are applicable if an electronic equivalent to a

[181] MLEC Guide to Enactment, para 115

[182] MLEC Guide to Enactment, para 118

bill of lading is being used. Those rules would normally not automatically apply when an electronic bill of lading is being issued instead of a bill of lading issued in paper.[183]

The United Nations Convention on Electronic Communications in International Contracts adopted by UNCITRAL in 2005 (ECC), specifically excluded the use of:

> "(…) bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer of beneficiary to claim the delivery of goods or the payment of a sum of money."[184]

The exclusion of transferable documents should be found in the risk of potential consequences of unauthorised duplication of these types of documents and instruments. In order to find a solution to this, the Working Group to the convention recognised that a combination of legal, technological, and business solutions had to be developed and tested.[185] Specific mechanisms in order to ensure the singularity or originality of such documents had to be in place. As the main aim of the Working Group to the Convention on Electronic Communications was to ensure the equivalence between paper and electronic form it was found that the special issues concerning negotiable instruments and documents were beyond the scope of the convention.[186]

The increased focus on electronic transport records was amongst the reasons to the commencement of the work on what would later be known as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules). At the General Assembly in 1996, based on the discussions in the Working Group on Electronic Data Interchange[187], it was discussed whether work in the field of electronic bills of lading, should be taken upon UNCITRAL. [188] It was argued that there were serious gaps in existing national and international legislation concerning, amongst other things, the functioning of an electronic

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[183] MLEC Guide to Enactment, para 121

[184] United Nations Convention on the Use of Electronic Communications in International Contracts, Article 2, paragraph 2

[185] Official Records of the General Assembly, Sixtieth Session, Supplement No. 17, A/60/17, para 27

[186] Report of the Working Group on Electronic Commerce on the work of its forty-fourth session, A/CN.9/571, para 137

[187] See Report of the Working Group on Electronic Data Interchange (EDI) on the work if its thirtieth session, A/CN.9/421 para 104 - 108

[188] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, A/51/17

bill of lading.[189] It was specifically noted that even though some States already had provisions on such legal matters, the fact that many States lacked such provisions constituted an obstacle to the free flow of the goods – and noted that obstacles to the free flow of goods *de facto* means an increase in the cost of transactions.[190] The Commission thus recognised that due to fragmented laws in the area of electronic transport documents and the development of new technology the existing legislation was arguably outdated and the Secretariat was put to work. Views from governments and relevant intergovernmental and non-governmental organisations that represented the various interests in the international sector of carriage of goods were bid welcome.[191] Information gathering on the subject was thus initiated. The Comité Maritime International (CMI) initiated work and were able to present to the Commission of UNCITRAL a draft convention in December 2001. The organisation works to contribute to the unification of maritime law. UNCITRAL had already in July 2001 established a working group who were to prepare a working document considering possible solutions for a future legislative instrument.

A Working Group III was revived by UNCITRAL, a working group that last had been active in the 1970's when the latest convention on carriage of goods by sea had been negotiated, namely the United Nations convention on the Carriage of Goods by Sea (the "Hamburg Rules") in 1978. From April 2002 until January 2008 the Working Group III met twice a year in a formal two-week session that amounted into a draft convention. In January 2008 the Working Group III submitted the result to the General Assembly for adoption. The result is a Convention on Contracts of International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"). The substance of the provisions concerning electronic transport records is subject to close scrutiny in Chapter 4. However, after the finalisation of the Rotterdam Rules in 2008 it was clear that there was still room for international regulation in the field of electronic transferable records. So far none of the previous instruments had solved the legal issue of ensuring singularity of an electronic data message. Nor had any of the previous instruments provided actual guidance as to *how* functional equivalence of a transferable paper document and an electronic transferable record could be ensured. On this ground it was agreed to initiate work on electronic transferable records.

[189] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, A/51/17, para 210

[190] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, A/51/17, para 210

[191] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, A/51/17, para 210

CHAPTER 3. A NEW MODEL LAW

3.1. THE UNCITRAL MODEL LAW ON ELECTRONIC TRANSFERABLE RECORDS

The purpose of this chapter is two-fold. First, the aim is to carry out a technical examination of the UNCITRAL Model Law on Electronic Transferable Records (MLETR). The purpose is to understand and define its rules, concepts, and principles. Second, the aim is to, on the basis of the technical examination of the MLETR, to place the MLETR in context and interplay with other international and national legislative instruments in the subsequent chapters. In order to assess potential impact on and interplay with the Rotterdam Rules and domestic legislation in the chapters to come, first it is required to study the model law itself. Consequently, this chapter also acts as a prelude to placing the MLETR in the context of the Rotterdam Rules in Chapter 4 and domestic legislation in Chapters 5 and 6.

The MLETR is a new model law. This far, legislation based on or adopted on the MLETR has been implemented in 7 countries.[192] There has been conducted relatively little research on the MLETR, as seen in this chapter. Consequently, the research conducted below and in the following chapters is ground-breaking in its field. A systematic account of the model law and its principles is in itself a novelty. The following chapter initially provides an overview of the provisions as well as an examination of the sphere of application of the MLETR. It is clarified what an "electronic transferable record" constitutes in terms of the MLETR after which the principles that the MLETR stand upon namely "technology neutrality", "functional equivalence approach", and "non-discrimination against electronic means" are properly scrutinised.

It is concluded that the MLETR acts as a legislative framework setting out the requirements that an electronic transferable record must fulfil in order to be considered the functional equivalent to a transferable document or instrument, for instance a bill of lading. Thereby, the MLETR facilitates the use of electronic transferable records.

[192] Status of legislation based on or influenced by the MLETR: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status - last accessed 27 January 2023. The countries are Bahrain (2018), Belize (2021), Kiribati (2021), Papua New Guinea (2022), Paraguay (2021), Singapore (2021), United Arab Emirates (unknown), Abu Dhabi Global Market (2021)

3.2. DECISION TO UNDERTAKE WORK ON THE MLETR

At UNCITRAL's General Assembly at the sixtieth session in 2011, it was decided to revive the UNCITRAL Working Group IV on Electronic Commerce.[193] At that time, the Working Group on Electronic Commerce had been laying low since its finalisation of the United Nations Convention on the Use of Electronic Communications in International Contracts in 2004. In 2011 the General Assembly agreed that the Working Group on Electronic Commerce should prioritise legal issues relating to the use of electronic transferable records. One of the intentions was to form legal standards as a support to the, at that time, recently adopted Rotterdam Rules. Furthermore, it was intended to form general standards concerning the use of electronic transferable records as a support to, amongst others but in particular, the transport business and the finance sector.[194] As investigated in the previous chapter, such an initiative had been on its way for quite a while.[195] The underpinning reason was the wish to give legal value to new electronic means[196] but also to promote the use of electronic communications in general in international trade.[197] Also, one of the purposes with initiating the work on the MLETR was to facilitate the cross-border use of transferable documents and instruments in electronic form.[198] Furthermore, no national legislation that concerned the use of electronic transferable records addressed the issue of cross-border recognition and cross-border use of electronic transferable records.[199] Consequently, after years of preparation and work, UNCITRAL adopted the MLETR in July 2017. Thus far, the process of preparation of the model law had involved numerous state actors, and the result was based on a considerable amount of comparative work which also involved inputs from the industry and other international organisations.[200]

In the Working Group it was discussed what form the outcome of the work should take. Awareness was given to the fact that the level of harmonisation desired was

[193] Report of the United Nations Commission on International Trade Law, supplement No. 17, A/66/17, paragraphs 232 - 240

[194] Report of the United Nations Commission on International Trade Law, supplement No. 17, A/66/17, para 235

[195] See Chapter 2, sections 2.4.1. and 2.4.2.

[196] Explanatory Note to the MLETR, para 7

[197] Explanatory Note to the MLETR, para 7

[198] Explanatory Note to the MLETR, paras 8-9 8

[199] Explanatory Note to the MLETR, paras 8-9

[200] CMI observed many of the Working Group Sessions, as well as the European Union (EU) and the World Customs Organization (WTO)

relevant to the choice of instrument.[201] Some delegates in the Working Group supported that the work should take the form of a legislative guide.[202] It was also mentioned that the work might lead into a binding instrument of treaty nature.[203] Eventually, the MLETR took its final form as a model law, which means that it is to be characterised as soft law. This means that the model law is non-binding until it has been implemented into domestic legislation. This cause limitations as to the degree of certainty and harmonisation in the field.[204]

3.3. OVERVIEW OF PROVISIONS IN THE MLETR

The MLETR consists of four Chapters and 19 provisions. Chapter I of the model law provides general provisions on the scope of application of the model law, clarifications of definitions of certain terms used, and guidance as to how the model law is to be interpreted. Chapter 1 also contains a provision concerning the possibility of the parties to a contract to derogate from the model law, information requirements in relation to information concerning the parties to the contract, and additional information in an electronic transferable record. The last provision in Chapter 1 concerns the legal recognition of an electronic transferable record stating that an electronic transferable record shall not be denied legal effect on the sole ground that it is electronic. Chapter II provides provisions on the principle of functional equivalence in relation to writing, signature, transferable documents or instruments, and control of an electronic transferable record. Chapter III provides provisions concerning the use of electronic transferable records. This in relation to a general reliability standard, indication of time and place in an electronic transferable record, place of business, endorsements, amendments, and the possibility to replace a transferable document or instrument with an electronic transferable record and vice versa. Chapter IV concerns the cross-border recognition of electronic transferable records in relation to non-discrimination of foreign records.

[201] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, para 91

[202] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, para 92

[203] Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session, A/CN.9/761, para 92

[204] See also Chapter 2, section 2.2. on this.

For the benefit of overview of the model law's provisions, below a table is added with the headline of each article.[205]

Chapter I. General provisions

- Article 1. Scope of application
- Article 2. Definitions
- Article 3. Interpretation
- Article 4. Party autonomy and privity of contract
- Article 5. Information requirements
- Article 6. Additional information in electronic transferable records
- Article 7. Legal recognition of an electronic transferable record

Chapter II. Provisions on functional equivalence

- Article 8. Writing
- Article 9. Signature
- Article 10. Transferable documents and instruments
- Article 11. Control

Chapter III. Use of electronic transferable records

- Article 12. General reliability standard
- Article 13. Indication of time and place in electronic transferable records
- Article 14. Place of business
- Article 15. Endorsement
- Article 16. Amendment
- Article 17 Replacement of a transferable document or instrument with an electronic transferable record
- Article 18. Replacement of an electronic transferable record with a transferable document or instrument.

Chapter IV. Cross-border recognition of electronic transferable records

- Article 19. Non-discrimination of foreign electronic transferable records

[205] The same table appears in the official publication of text and explanatory note published by UNCITRAL and which is to be located at UNCITRAL's webpage. See under the headline "Additional Resources" https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records - last accessed 6 February 2023

3.4. THE PRINCIPLE OF "TECHNOLOGY NEUTRAL" LEGISLATION

It appears from the Explanatory Note to the MLETR that the MLETR is built upon the principle of "technology neutrality".[206] The terminology must be distinguished from the often-used term "media neutral". However, both the term "media neutral" and "technology neutral" are generally used when referring to legislation adopted that may encompass the use of new technology. Sometimes there seems to be inconsistency regarding the terminology used when referring to legislation that aims at facilitating the use of new technology, as is demonstrated in the following. What must be considered crucial in the assessment as to whether legislation may be considered as being "media neutral" or "technology neutral" must arguably depend upon the aim with the legislation. Is it legislation that may apply no matter what medium is being used, meaning no matter whether paper or technology has been used? Or is the aim to adopt legislation that may apply no matter what specific technology has been used or no matter the technology that may be developed in the future?

The starting point for development must be media neutral legislation that may apply no matter whether a document has been issued in paper or in electronic form taking the shape of an electronic record. Before turning fully to an electronic environment, the use of the paper-medium must be somehow irrelevant. However, if legislation can "only" be argued to be "technology neutral" this means that the legislation is not neutral to any possible *medium* in its very essence. The use of either the concept of media neutral or technology neutral should depend upon what the aim is with the legislation and the approach taken in the adoption process.

Regarding the concept of "technology neutral" Amelia Boss notes in a comparison of the US' Uniform Electronic Transactions Act (UETA[207]) and the UNCITRAL Model Law on Electronic Commerce that:

> "In addition to eliminating discrimination between paper and ***electronic*** communications, both the Model Law and the UETA adopted the principle that there should be no discrimination made in the statutory provisions between the various types of ***electronic*** technologies that might be utilized. (…) This principle of "technology neutrality" gives the statutory provisions the flexibility needed to accommodate a variety of existing technologies as well as both foreseeable and unforeseeable technology developments."[208]

[206] Explanatory Note to the MLETR, para 7

[207] The US Uniform Electronic Transactions Act (UETA) of 1999

[208] Boss, *The Uniform Electronic Transactions Act in a Global Environment*, p. 292

Boss uses the principle of technology neutrality in relation to that there should be no discrimination between the various types of electronic technologies. Thereby she states that the legislation should accommodate both the existing technology as well as the technology that may be developed in the future. Jane K. Winn also uses the term "technology neutral" when referring to the transferable record provisions in the UETA.[209] Also scholars such as Manuel Alba and Miriam Goldby use the terminology "technology neutral" in their works. [210]

In the UNCITRAL Model Law on Electronic Commerce Guide to Enactment it is stated that:

> "By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment."[211]

Consequently, the aim was a "media neutral environment". The wording "media neutral" was used in the Guide to Enactment of the MLEC as it was noted that:

> "It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules."[212]

In the UNCITRAL Model Law on Electronic Signatures Guide to Enactment para 5 it is stated that:

> "The words "a media-neutral environment", as used in the UNCITRAL Model Law on Electronic Commerce, reflect the principle of non-discrimination between information supported by a paper medium and information communicated or stored electronically. The new Model Law equally reflects the principle that no discrimination should be made among the various techniques that may be used to communicate or store information electronically, a principle that is often referred to as "technology neutrality."

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[209] Winn, *What is a Transferable Record and Who Cares,* p. 210

[210] See Alba, *Order out of Chaos: Technology, Intermediation, Trust, and Reliability as the Basis for the Recognition of Legal Effects in Electronic Transactions,* pp. 403 and 404 and Goldby, *Electronic Documents in Maritime Trade,* p. 16, para 2.03, and p. 38, para 2.44

[211] MLEC Guide to Enactment, para 6

[212] MLEC Guide to Enactment, para 24

From the above it seems that UNCITRAL equates "media neutral" with "technology neutrality". However, after the finalisation of the model law on electronic signatures it seems that UNCITRAL took the stand that the term "technology neutral" was to be preferred. In the Guide to Enactment of the ECC it is stated that:

> "The principle of technological neutrality means that the Electronic Communication Convention is intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used. For that purpose, the rules of the convention are "neutral" rules; that is, they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information."[213]

Above, the explanatory note to the ECC explains what is to be understood by the term "technology neutral" in the eyes of the Convention. It is stated that the rules are neutral, meaning that they are neutral regarding what technology used to communicate and storage information *or* medium. However, it should be noted that the Convention is not neutral regarding what media is being used to communicate and store information. This is because, in the view of the Convention:

> "(…) technological neutrality encompasses also "media neutrality": the focus of the Convention is to facilitate "paperless" means of communication by offering criteria under which they can become equivalents of paper documents, but the Convention is not intended to alter traditional rules on paper-based communications or create separate substantive rules for electronic communications."[214]

Thereby, the Convention differs between the medium used to communicate stating that the Convention is mainly intended to facilitate "paperless" means of communications.

In the MLETR, that is this dissertation's focal point, it is to be seen that the use of the terms "technology neutral" and "media neutral" are quite intentional. It is stated in the Explanatory Note to the instrument that:

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[213] Explanatory Note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, para 47

[214] [214] Explanatory Note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, para 49

> "The Model Law does not affect the medium-neutral substantive law applicable to electronic transferable records."[215]

Furthermore, it is stated that:

> "The Model Law provides generic rules that may apply to various types of electronic transferable records based on the principle of technological neutrality and a functional equivalence approach."[216]

Consequently, in the eyes of the MLETR, the MLETR is technology neutral and *not* media neutral as the fear is that by being media neutral the model law would somehow interfere with the underlying substantive law. It is here stressed that in the following sections it is deducted that interfering with the underlying substantive law is something that lies far outside the scope of the model law. However, the confusion is total when it is investigated what constitutes "technology neutrality" in the Rotterdam Rules. It appears from the *travaux préparatoires* to the Rotterdam Rules that the Working Group also refers to that the aim regarding certain provisions is "technological neutral".[217] As is demonstrated in the following Chapter 4, the Rotterdam Rules both regulate transport documents *and* electronic transport records. Following the argumentation above, the Rotterdam Rules must arguably be considered as being "media neutral" rather than "technological neutral" as the Rotterdam Rules *also* provides for provisions that cater for the use of transport documents. Consequently, the Rotterdam Rules are *set* to affect substantive domestic law.

Another take on what constitutes technology could be that:

> "Writing, printing and each new method of electronic communication – e.g., telegram, telex, radio, television, facsimile, electronic mail and electronic data interchange – are each, in effect, separate information technologies. Each is a different tool for satisfying the diverse requirements of business and governments to engage in the process of moving information."[218]

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[215] Explanatory Note to the MLETR, para 10

[216] Explanatory Note to the MLETR, para 18

[217] UNCITRAL – Consolidated Official Reports on the Preparation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules), p. 116, para 197

[218] Ritter, *Defining International Electronic Commerce,* p. 6

Following this, writing as well as new methods of electronic communication all constitute information technology. This would arguably make the terminology "technology neutral" if understood narrowly as only encompassing the electronic technology a misnomer as writing would also be understood as a technology.

The Secretariat from UNCITRAL in the new Working Group on negotiable multimodal transport documents so far uses the terminology "medium neutrality"[219] and states that:

> "(…) pure medium neutrality (that is, establishing the equivalence between paper documents and electronic records)"[220]

Without going further into details with the new work from UNCITRAL on negotiable multimodal transport documents (as the work *is* at its very preliminary stage) it can, however, tentatively be concluded that UNCITRAL again is working on legislation that is media neutral as opposed to technology neutral. From this it should be understood that the intention with the legislation is to establish functional equivalence between the paper documents and electronic records and not only neutrality regarding the technology used. It could be argued that before taking the step to simply adopt legislation that is *only* technology neutral, developments in the use of electronic transferable records should be at a quite advanced stage. This especially when seen to that the use of electronic alternatives to bills of lading issued in paper have such difficulty in gaining ground. As stated by Miriam Goldby:

> "It should also be taken into account the fact that there is more likely to be an incremental transition from paper to the electronic medium, rather than a sudden clean break. The eventual end result should be a law that has broken away from the old rules, which are reflective of the paper medium, and which has developed in such a way as to accommodate the use of new technologies."[221]

It might be argued that the use of the terminology "technology neutral" suggests the use of documents in electronic form as the default option rather than being just an alternative to paper documents. The terminology media neutrality on the other hand seems appropriate to suggest the use of electronic records instead of paper documents as merely an alternative, thereby encompassing both the use of documents and electronic records. Consequently, there is a preference towards "media/medium neutral" legislation as a way of gaining the most impact and as a way of gaining the intended

[219] Negotiable Multimodal Transport Documents, Note from Secretariat, A/CN.9/WG.VI/WP.96, para 23

[220] Negotiable Multimodal Transport Documents, Note from Secretariat, A/CN.9/WG.VI/WP.96, para 23

[221] Goldby, *Electronic Documents in Maritime Trade,* pp. 16-16, para 2.03

impact of neutral legislation. If the legislation is media neutral it should mean that no matter whether the electronic transferable record is issued in paper or in electronic form it may fulfil a certain function if more specific requirements are fulfilled. Simply focusing on "technology neutral" legislation seem premature when casting a sidelong glance to the long march towards the use of paperless trade.

3.5. SPHERE OF APPLICATION OF THE MLETR

The MLETR sets out the requirements that electronic alternatives must satisfy in order to be recognised as being capable of achieving the same legal effects as transferable documents and instruments. This is also referred to as the principle of functional equivalence, as is subject to further examination below.[222] For now it is noted that the principle of functional equivalence means that if certain requirements are fulfilled, the legal status of alternatives to paper transferable documents and instruments is the same. Thereby the users of such electronic alternatives may use them with confidence as to their legal status. The MLETR may also function as guidance to system designers so that the system designers know what requirements the system needs to fulfil for electronic transferable records to have the same legal effect as their paper equivalent. The area of electronic transferable records is undergoing rapid developments these years in line with technological developments that allow for the use of such records.[223] Systems are being developed, however no international regulation applies. International standards for the requirements that an electronic transferable record must fulfil in order to be given the same legal value as paper transferable documents and instruments must arguably be seen as timely.

In Article 1 of the MLETR the scope of application of the model law is outlined. In accordance with Article 1(1), the model law applies to electronic transferable records. However, it is here pointed out, that the MLETR does not affect existing substantive law that is applicable to transferable documents or instruments, including rules on private international law.[224] This is also expressed in the model law's Article 1(2). Paragraph 10 of the Explanatory Note to the MLETR states that the model law:

> "(…) does not affect the medium-neutral substantive law applicable to electronic transferable records."

Paragraph 11 in the Explanatory Note to the MLETR states that the MLETR:

[222] See section 3.7

[223] For instance, Maersk's initiative Tradelens that is set to close in the Winter of 2023

[224] Explanatory Note to the MLETR, para 10

> "(…) does not aim to affect in any manner existing law applicable to transferable documents or instruments, which is referred to as "substantive law" and includes rules on private international law."

The MLETR does not provide new substantive rules, and it does not define which instruments are transferable or negotiable or not. That is for the underlying substantive law to decide, and which it was agreed, that the MLETR should not affect. The MLETR is a formal set of legal principles meant to address the fact that current substantive law and custom do not necessarily consider the fact that new technology has evolved and thereby that current substantive law potentially is out-dated. The MLETR can be said to be a legal framework within which existing domestic, substantive law is to work and to be applied with an aim to apply the legal framework in a harmonised way. The MLETR is an "enabler" of the use of electronic transferable records that have an equivalent transferable document or instrument.[225] The model law is not intended to be used to create an electronic transferable record that does not have an equivalent transferable document or instrument. This is in line with the general principle that the MLETR is not intended to affect underlying substantive law. In the Explanatory Note to the MLETR it is stressed that the model law is not capable of limiting the ability of the parties to derogate from or vary substantive law.[226] Phrased differently, party autonomy is not affected. The MLETR assumes that there is a paper equivalent to the electronic transferable record and therefore it is only intended to govern electronic transferable records that have a paper analogue.[227] Consequently, electronic transferable records that do not have a paper analogue are not covered by the MLETR. As it was decided to build the MLETR upon the principle of technology neutrality it is ensured that as long as the requirements as to the functional equivalence are ensured any technology may be used.

In accordance with the MLETR Article 3, the model law should be interpreted in accordance with its international origin and the need to promote uniformity in its application. It appears from Article 3 that:

> "1. This law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application.
>
> 2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

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[225] Explanatory Note to the MLETR, para 23

[226] Explanatory Note to the MLETR, para. 51

[227] Explanatory Note to the MLETR, para. 28 (c)

In many of the commercial law instruments adopted by UNCITRAL, the phrases "international character" and "the need to promote uniformity in its application" are to be found as requirements for the interpretation of the respective instrument. In all of the instruments on electronic commerce originating from UNCITRAL the two requirements applies.[228] Generally, the requirements are expressed in most of the UNCITRAL instruments.[229] Together they form the autonomous interpretation of the law that should be free from domestic traditions.[230] The phrasing "regard is to be had" is to be understood as a direct command directed at courts and arbitral tribunals that apply the Convention, rather than it is to be understood as a recommendation.[231] The reasoning behind this is explained immediately below, however, first should be mentioned that in the following, reference is made to several scholarly works on the CISG. This choice is made as the CISG refers to that:

> "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[232]

It is to be seen that the CISG itself refers to "international character" and to "the need to promote uniformity in its application". Furthermore, there is a large very well-developed amount of literature concerning the interpretation of the CISG. Reference is also made to other UNCITRAL texts that contain the same wording, their *travaux préparatoires,* and to scholarly work when appropriate.

Turning back to the notion of autonomous interpretation of the MLETR, phrased more directly, it means that the law should be interpreted independently on its own terms. This is referred to as the principle of *autonomous interpretation.*[233] The law has been

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[228] See United Nations Convention on Electronic Communications in International Contracts, Article 5, UNCITRAL Model Law on Electronic Signatures, Article 4, UNCITRAL Model Law on Electronic Commerce, Article 3

[229] See for example the United Nations Convention on Contracts for the International Sale of Goods, Article 7, the UNCITRAL Model Law on International Commercial Arbitration, Article 2 A, the Hamburg Rules Article 3, the Rotterdam Rules Article 2

[230] Schlechtriem & Butler, *UN Law on International Sales – The UN Convention on the International Sale of Goods*, p. 48, para 43, Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods,* p. 123

[231] Schlechtriem & Schwenzer*, Commentary on the UN Convention on the International Sale of Goods*, p. 123, see also Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have,* pp. 184-185

[232] See the CISG, Article 7 (1)

[233] Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods,* p. 122, Brunner and Gottlieb, *Commentary on the UN Sales Law, (CISG)* pp. 83-84

developed in an international context in negotiations between States facilitated by UNCITRAL and the UN. The autonomous interpretation of the legislative work is to act as a framework within which a domestic court is to interpret, apply, and develop uniform law.[234] The goal is uniformity which can only be observed if the legislation is interpreted in a uniform way. This means that the view to the origin of the instrument that is international is essential. Uniform interpretation of the legislative instrument could be at risk if the instrument is interpreted in a non-uniform way. This could for instance be the case if regard is not had to the fact that UN instruments exist in several equally authentic language versions and if one version is favoured.[235]

A UNCITRAL instrument which contains a provision concerning that "regard is to be had to the instruments international origin" means that the instruments legislative history, case law, and scholarly writings should be observed.[236] This includes having regard to foreign tribunals interpreting the same language. Scholarly work is relevant as an interpretation supplement when a country is not producing case law or if the existing case law is difficult to access, which is the risk when moving in the field of international law. The UNCITRAL Model Law on Electronic Commerce was the first instrument from UNCITRAL in the field of electronic commerce. It is stated in the Guide to Enactment of the MLEC that its Article 3[237], that is similar to Article 7 in CISG, is also inspired by CISG.[238] It is also stated that the Article is intended to provide guidance to courts, arbitral tribunals and national or local authorities.[239]

A difference in the wording in Article 3 of the MLETR from other UNCITRAL instruments that also refers to the observance of general principles should be pointed

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[234] Schlechtriem & Butler, *UN Law on International Sales – The UN Convention on the International Sale of Goods,* p. 48, para 43, Neumann, *How Domestic Courts May Shape International Commercial Law Norms,* pp. 190-191

[235] Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, p.122, para 8, see also Chapter 2, section 2.3 concerning harmonisation of international commercial law.

[236] Honka, *General Provisions*, p. 32

[237] Article 3 of MLEC reads:

"(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

[238] MLEC Guide to Enactment, para 41

[239] MLEC Guide to Enactment, para 41

out.[240] Where other UNCITRAL instruments refer to that in the interpretation of that respective legislative instrument regard also should be had to the observance of good faith in international trade,[241] the MLETR Article 3 leaves out the reference to the observance of good faith. The reasoning behind the choice is that the principle of good faith in relation to transferable documents or instruments is distinct from the general principle of good faith in international trade.[242] This is further explained and demonstrated below in Chapter 5.

However, that specific reference to good faith has been chosen to be left out of the model law, should not be taken as to necessarily mean that the general principle of good faith is not to apply to the MLETR. As stated in paragraph 2 of Article 3 in the MLETR questions concerning matters governed by the MLETR which are not expressly settled in it are to be settled in conformity with the general principles on which the MLETR is based. The Explanatory Note to the MLETR specifically states that:

> "The principle of good faith as a general principle of international law could be included in the general principles on which the MLETR is based."[243]

The fundamental principles underlying the MLETR are the principles of non-discrimination against electronic communications, technological neutrality, and functional equivalence.[244] It is also stated that what the exact content is and how the notion of the general principles are to be used, applied, and interpreted are to be clarified in light of the use of the MLETR.[245] This also includes whether the general principle of good faith is to be included in the general principles on which the MLETR is based.[246] The interpretation of the Model Law is intended to be flexible in order to ensure that the

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[240] The reference to "general principles" is also to be found in other UNCITRAL texts. See for instance the MLEC, United Nations Convention on the Use of Electronic Communications in International Contracts, UNCITRAL Model Law on Electronic Signatures. The provision that has been interpreted most by case law is to be found in the CISG in its Article 7 (2).

[241] See for instance Article 7(1) in the CISG that states that:

"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

[242] Explanatory Note to the MLETR, para 42

[243] Explanatory Note to the MLETR, para 43, see also A/CN.9/869, paras 28-31

[244] Explanatory Note to the MLETR, para 44

[245] Explanatory Note to the MLETR, para 45

[246] Explanatory Note to the MLETR, para 45 and Report of Working Group IV (Electronic Commerce) on the work of its fifty-third session, A/CN.9/869, paras 28-31

MLETR may accommodate emerging business practices and business needs.[247] Flexibility, however, must also be argued to cause risk of uncertainty. The MLETR is a relatively new legislative instrument that has yet to be tested before a tribunal as to how its provisions should be interpreted.

3.6. DEFINITION OF AN ELECTRONIC TRANSFERABLE RECORD

The MLETR is supported by an Explanatory Note, that is drawn by the *travaux préparatoires.* The Explanatory Note was intended to help legislators, academics, providers, and users of services related to electronic transferable records.[248] Furthermore, it is stated in the Explanatory Note that the intention always was that the MLETR would be accompanied by explanatory materials.[249] Certain issues were chosen not to be addressed in the model law but instead in explanatory materials. The reasoning behind this choice was that it was found crucial that States were given guidance in order to enact the MLETR.[250] The wish was also to provide explanatory materials to States so that States could make an informed choice when considering whether provisions in the MLETR had to be varied out of consideration to particular national circumstances.[251] Therefore, consultation of the Explanatory Note and necessarily also the *travaux préparatoires* is relevant when examining the provisions in the MLETR. In the following, a definition on an "electronic transferable record", which is a relatively new legal term originating from the United States, is provided.

An electronic transferable record in terms of the MLETR is to be functionally equivalent with a transferable instrument or document if certain conditions are fulfilled. Transferable documents or instruments are paper-based and entitle the holder to claim the performance of the obligation that is indicated in the document or instrument.[252] By transferring the transferable document or instrument, the claim, which is indicated in the document, is transferred as well. The claim may concern either a certain sum of money or entitlement to delivery of the goods in accordance with the document. Such a document or instrument may take the form of for instance a bill of lading, a promissory note, or a bill of exchange,[253] however it should also be noted that:

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[247] Explanatory Note to the MLETR, para 45 and Report of Working Group IV (Electronic Commerce) on the work of its fifty-third session, A/CN.9/869, paras 38-41

[248] Explanatory Note to the MLETR, para 1

[249] Explanatory Note to the MLETR, para 2

[250] Explanatory Note to the MLETR, para 2

[251] Explanatory Note to the MLETR, para 2

[252] Explanatory Note to the MLETR, para 10

[253] Explanatory Note to the MLETR, para 38

> "Applicable substantive law should determine which documents or instruments are transferable in the various jurisdictions."[254]

The term "electronic transferable record", is relatively new, and emerged originally in domestic substantive law in the United States at the initiative of the National Conference of Commissioners on Uniform State Laws.[255] The term "transferable record" was introduced by the National Conference of Commissioners on Uniform State Laws in the Uniform Electronic Transactions Act (UETA) in 1999.[256] In the UETA, section 16 it is stated, that a:

> "(…) transferable record" means an electronic record that (1) would be a note [under Article 3 of the Uniform Commercial Code] or document under [Article 7 of the Uniform Commercial Code] if the record were in writing; and (2) the issuer of the electronic record expressly has agreed it is a transferable record."[257]

In the US, a transferable record is an electronic equivalent of a negotiable instrument or document.[258] The reason as to why the provisions on transferable records was included in the UETA was:

> "(…) in response to the inability of secondary mortgage markets under existing law to eliminate paper promissory notes from the real estate lending process and adopt wholly electronic alternatives."[259]

Consequently, in order to remove unnecessary obstacles to the use of electronic media in commercial transactions, the UETA was drafted. There is no direct definition of an electronic transferable record in the MLETR. Regarding what is to be understood by an "electronic record" it is stated in Article 2 concerning relevant definitions, that an:

> "Electronic record" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;"

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[254] Explanatory Note to the MLETR, para 38

[255] See the Uniform Law Commission's webpage: https://www.uniformlaws.org/home - last accessed 27 January 2023. Works within the field of ensuring uniform law in the states in the U.S.

[256] Uniform Electronic Transactions Act (UETA), 1999

[257] UETA, Section 16, (a) Transferable Records

[258] Winn, *What is a transferable record and who cares?* p. 203

[259] Winn, *What is a transferable record and who cares?* p. 204

According to Article 2 (2) and (3) an:

> "Electronic transferable record" is an electronic record that complies with the requirements of article 10;
>
> Transferable document or instrument" means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument"

Based on the above, Article 10 must be consulted in order to comprehend what is meant with an "electronic transferable record". In Article 10 (1) (a) it is stated that if a transferable instrument or document is required by law, that requirement is met by an electronic record, if the electronic record contains the same information that would be required to be contained by a transferable document or instrument. Thereby the electronic version equals the physical transferable instrument or document. Furthermore, in accordance with Article 10 (1) (b) a reliable method must be used to: (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 that electronic record. It can be concluded that there are three immediate characteristics that need to be fulfilled for an electronic version of the physical transferable document to be recognised as being functional equivalent to a paper-based transferable document: It is crucial that the electronic transferable record can be specifically identified, the electronic transferable record needs to be "controllable", and furthermore, the integrity of the electronic record must be kept intact. The terms "identification", "control", and "integrity" are subject to closer examination further below.[260]

It is concluded that in the MLETR it is not directly defined what is meant with an "electronic transferable record". However, it is stated in the Explanatory Note to the MLETR that an electronic transferable record is set to be functionally equivalent with a transferable document or instrument.[261] This means that an electronic transferable record is functionally equivalent to a transferable document if more specific requirements are fulfilled. The holder of such transferable document or instrument may claim the performance that is indicated in the document or instrument. Through transfer of the document the right to claim performance of the obligation indicated in the document is transferred as well. A document that bears this function is for instance a bill of lading as is also demonstrated in the following Chapters. The MLETR sets out

[260] See sections 3.7.3.2., 3.7.3.3., 3.7.3.4.

[261] Explanatory Note to MLETR, para 10

requirements for an electronic transferable record to fulfil, in order to be deemed functional equivalent to documents such as bills of lading. Accordingly, if these requirements are fulfilled, the bill of lading may function in an electronic environment.

3.7. THE FUNCTIONAL EQUIVALENCE APPROACH

One of the cornerstone principles of the MLETR is that the MLETR is built on the "functional equivalence" approach. The term originates from the UNCITRAL Model Law on Electronic Commerce (MLEC) from 1996 and is an underlying principle in all UNCITRAL's legislative texts on electronic commerce that have followed.[262] Therefore, it causes the earlier works of UNCITRAL in the field of electronic commerce and their *travaux préparatoires* to be relevant when understanding the application of the principle of functional equivalence to electronic transferable records as regulated in the MLETR. The scope of the approach is to analyse the purposes and the functions of traditional paper-based requirements and to decide if and if so, how those functions and purposes can be fulfilled through electronic commerce techniques.[263]

Already in the CISG it was recognised that:

> "For the purposes of this Convention "writing" includes telegram and telex."[264]

Also, in the UNCITRAL Model Law on International Commercial Arbitration it was recognised that:

> "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another." [265]

Consequently, already in the 1980's focus was on establishing the functional equivalence of writing, whether it was in paper or it was recorded on a record. This developed

[262] MLEC, see also the UNCITRAL Model Law on Electronic Signatures and the ECC.

[263] MLEC Guide to Enactment para 16

[264] See Article 13 CISG

[265] See Article 7 (2) in the UNCITRAL Model Law on International Commercial Arbitration which was adopted by UNCITRAL in 1985 and amended in 2006

into the "functional equivalence approach" in the MLEC. In the Guide to Enactment of the MLEC it is stated that:

> "For example, among the functions served by a paper document are the following: to provide that a document would be legible to all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts."[266]

Following the abovementioned quotation, it is specifically noted in the Guide to Enactment that in regard to the abovementioned functions of paper, electronic records can provide *the same* level of security as the paper versions.[267] It is also noted, that in regard to speed and security, that can be secured through the use of electronic records to a much larger extend than by using paper versions.[268] Furthermore, it is stressed that adoption of the functional equivalence approach should not result in more strict standards of security than if the same documents had been issued in paper.[269] Consequently, there must also be argued to be taken into consideration a functional equivalence between the level of costs and security no matter on what medium the document or instrument is issued. Also, an underlying consideration is that paper-based documents are in risk of being forged or altered, and therefore that no approach can be said to be faultless. The effect of the functional equivalence approach is, that the legislation instead of focusing on and specifying what medium can be used, instead focuses on the purposes and the functions that the wish is to regulate. Consequently, the aim is to end up with legislation that can be characterised as being technology neutral rather than regulating the technology itself.

One might ask oneself why it then took so long before legislation was adopted concerning the use of electronic transferable records.[270] The explanation and answer should be found in the one and very most important catch of the functional equivalence approach. For an electronic record (in MLEC referred to as data message) to be considered as being equivalent to a paper document, an electronic record must perform the functions that a paper document performs.[271] In the Guide to Enactment of

[266] MLEC Guide to Enactment para 16

[267] MLEC Guide to Enactment para 16

[268] MLEC Guide to Enactment para 16

[269] MLEC Guide to Enactment para 16

[270] The long march towards legislation on electronic transferable records is addressed in Chapter 2, sections 2.4.1. and 2.4.2.

[271] MLEC Guide to Enactment para 18

the UNCITRAL Model Law on Electronic Commerce concerning the functional-equivalent approach it is stated, that

> "(…) when adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents."[272]

What is crucial to bear in mind is that the focus of the functional equivalence approach is to point out the *functions* of the paper-based form requirements. The purpose is to be able to single out the criteria that needs to be met, in order for electronic records to be recognised as a corresponding alternative to paper-based documents.[273] It has previously proven difficult to find and recognise that an electronic transferable record may function in an equal manner as a transferable document.[274]

Chapter II of the MLETR contains provisions concerning under what conditions an electronic transferable record will meet paper-based legal requirements in accordance with the principle of functional equivalence. These provisions are subject to closer examination in the following sections. Earlier works of UNCITRAL on electronic commerce are included when relevant.

3.7.1. WRITING

Article 8 of the MLETR establishes the requirements for the functional equivalence between electronic and written form, more specifically with respect to the information that is contained in or related to an electronic transferable record by stating that:

> "Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

It is emphasised that the provision refers to the notion of *information* rather than the notion of *communication*.[275] This is due to the reason that not all information may

[272] MLEC Guide to Enactment para 17

[273] MLEC Guide to Enactment para 17

[274] The long march towards legislation on electronic transferable records is addressed in Chapter 2, sections 2.4.1. and 2.4.2.

[275] Explanatory Note to the MLETR, para 73

necessarily be communicated, depending on the type of system used.[276] Consequently, the Article establishes the requirement that the electronic record must contain that information that would normally be required to be contained in a transferable document or instrument. In respect of a bill of lading this means that the information that would normally be required to follow from a bill of lading issued in paper would also be met by an electronic bill of lading if it is possible to retrieve the information throughout the life cycle of the electronic bill of lading. The Commentary to the MLETR introduces the term "life cycle" of an electronic transferable record.[277] As stated by Henry Gabriel, this includes the creation, transfer, and claim for performance of the electronic transferable record.[278] Consequently, it must be possible to access the information contained in an electronic bill of lading at the time of creation, transfer, and claim of performance of the bill.

Article 8 of the MLETR is inspired by Article 6(1) of the MLEC that states the same as Article 8 of the MLETR,[279] except that Article 6(1) of the MLEC writes "data message" instead of "electronic transferable record". In the *travaux préparatoires* to the MLETR it is also noted that Article 8 is based on earlier provisions adopted by UNCITRAL with the aim to establish minimum standards on form requirements.[280] During the Working Group Sessions, it was discussed whether it was necessary to include a definition of "writing" or whether that requirement was implied in the definition of an electronic transferable record. However, it was chosen to include such a provision for establishing the functional equivalence of writing requirements in substantive law.[281]

As the Explanatory Note to the MLETR does not go in depth with the meaning of the Article, this causes the MLEC Guide to Enactment to be relevant in the interpretation of the Article in the MLETR. Furthermore, the Commentary to the MLETR itself refers to the MLEC, stating that the Article in MLETR has been inspired by Article 6(1)

[276] Explanatory Note to the MLETR, para 73, see also Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session, A/CN.9/797, para 37

[277] See the Explanatory Note, paras 22, 63, 74, 102, 103, 118, 121, 144, 148, 161, 184

[278] Gabriel, *The UNCITRAL model law on electronic transferable records,* p. 267

[279] Explanatory Note to the MLETR p. 29, para 73, Article 8 is inspired by Article 6, paragraph 1 of the MLEC see the MLEC Guide to Enactment, paras 47-50

[280] Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session, A/CN.9/768, para 41, Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session, A/CN.9/797, para 36

[281] Report of Working Group IV (Electronic Commerce) on the work of its forty-ninth session, A/CN.9/804, para 18

in the MLEC.[282] In the MLEC Guide to Enactment it is stated that Article 6(1) is intended to define the basic requirements for a data message to meet requirements regarding certain information be in "writing."[283] As stated by the provision, these requirements may follow from substantive law. In the MLEC Guide to Enactment this is elaborated with mentioning of reasons as to why national laws may require the use of "writings", for instance legal rights and obligations being in writing for validity purposes.[284] Furthermore, regarding the functional equivalence approach, the requirement of "writing" should be considered as being the lowest layer in a hierarchy of form requirements regarding paper documents that provides for requirements as to reliability, traceability, and inalterability.[285] This means that just because something written on a paper document can be contained in a data message[286] there may be more stringent requirements that need to be fulfilled, for instance that the document has to be signed or be an original document.[287] The fact that the requirement of writing is the lowest layer in a hierarchy of form requirements must also be argued to be the case regarding electronic transferable records. Electronic transferable records require multiple form requirements to be fulfilled, which is also demonstrated in the following sections.

The Guide to Enactment furthermore elaborates on the requirement in Article 6(1) of the MLEC that information in a data message must be accessible so as to be usable for subsequent reference. As recalled, a similar requirement for electronic transferable records is stated in Article 8 of the MLETR. In the Guide to Enactment of the MLEC it is noted regarding "accessibility" of the data message that information in form of computer data should be readable and interpretable not to mention retained.[288] The same interpretation must be argued to apply to Article 8 of the MLETR.

3.7.2. SIGNATURE

Article 9 of the MLETR establishes the requirements for the functional equivalence approach under which an electronic signature meets the requirements of a written signature on paper by stating that:

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[282] Explanatory Note to the MLETR, para 73

[283] MLEC Guide to Enactment, para 47

[284] MLEC Guide to Enactment, para 48

[285] MLEC Guide to Enactment, para 49

[286] Referred to as "data message" in the MLEC and "electronic record" in the MLETR.

[287] MLEC Guide to Enactment, para 49

[288] MLEC Guide to Enactment, para 50

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

According to Article 9 of the MLETR where a signature may be required by substantive law or where there may be other reasons as to why it may become relevant to sign a transferable document, an electronic signature is functional equivalent to a signature provided that two conditions are fulfilled. First, a reliable method must be used to identify the person behind the electronic signature. Second, a reliable method must be used to identify the person behind the signature's intention. Thereby, the Article provides that there needs to be established a link between the signature and the person behind the signature and that person's intentions.

Article 9 of the MLETR is inspired by Article 7, paragraphs 1(a) and (b) of the MLEC.[289] Furthermore, the UNCITRAL Convention on the Use of Electronic Communications in International Contracts (ECC) refers to the "intention" of the party in relation to the different functions an electronic signature may represent depending on the type of document.[290] This causes the MLEC and the ECC to be relevant not to mention the *Guides to Enactment* of the MLEC and the ECC. Article 7 in the MLEC is to a large extend similar to the provision in the MLETR and initiates with stating that where the law requires a signature of a person, that requirement is met in relation to a data message. The provision then goes on to list requirements in its paragraphs 1(a) and 1(b). Paragraph 1(a) states regarding the method, that the method must be used to identify that person and to indicate that person's approval of the information contained in the data message. Paragraph 1(b) states that the method must be as reliable as appropriate for the purpose for which the data message was generated and communicated, and in the light of all relevant circumstances. The MLEC Guide to Enactment elaborates and notes the functions of a signature that were considered upon time of drafting the MLEC. This in form of identification of the person behind the signature, to provide certainty as to the personal involvement of that person in the act of signing and to make sure that the person behind the signature may be associated with the content of the document.[291] Thereby, Article 7 focuses on two basic functions of a signature. First, that it must be possible to identify the person who has authored a document.[292] Second, it must be possible to confirm that the author has approved the

[289] Explanatory Note to the MLETR, para 76, which refers to the MLEC Guide to Enactment, paras 53-56

[290] See the Explanatory Note to the MLETR, para 76, with reference to the ECC Article 9 (3)

[291] MLEC Guide to Enactment, para 53

[292] MLEC Guide to Enactment, para 56

content of the document.[293] Article 7, paragraph 1(a) establishes the principle that a method that identifies the originator of a data message and that ensures that the originator has approved the content of the data message must be established in order to be considered as being functional equivalent to the basic legal functions of a signature on a paper-document.[294] The method shall ensure the functional equivalence between the functions of a signature on paper and an originator of a data message. Paragraph 1(b) refers to the method in paragraph 1(a) and states that the level of security to be achieved by the method should be as reliable as appropriate for the purpose with the data message and that the level of security should be seen in the light of all relevant circumstances. The Guide to Enactment of the MLEC elaborates on appropriate, legal, technical, and commercial factors there may be considered in the assessment of the degree of security provided by the method.[295]

It is to be seen that the MLEC recognises the functions of a signature in a paper-based environment.[296] Furthermore, it is recognised that there may be multiple functions of a signature and that the function depends on the type of instrument that is being signed.[297] Article 7 1 (a) and (b) of the MLEC establishes the general conditions that must be fulfilled in order for data messages to be authenticated with sufficient credibility so that they would be considered enforceable.[298]

Interestingly the Guide to Enactment of the MLEC is quite specific regarding what should be understood by and recognised as a signature written on paper and what means that are sufficient in order to fulfil the signature requirement.[299] This is due to the reason that there are different practices depending on each country regarding what constitutes a signature, besides the traditional handwritten signature. In some countries for instance a stamp or a typewritten signature is recognised as a signature.[300] Thereby functional equivalents could be developed regarding the existing ways of signing a document not to mention the accompanying requirements. The point is

[293] MLEC Guide to Enactment, para 56

[294] MLEC Guide to Enactment, para 56

[295] MLEC Guide to Enactment, para 58

[296] MLEC Guide to Enactment, para 53

[297] MLEC Guide to Enactment, para 53

[298] MLEC Guide to Enactment, para 56

[299] MLEC Guide to Enactment, para 54

[300] MLEC Guide to Enactment, para 54

raised that depending on the type of signature different degrees of certainty is provided.[301] Rather than solving the issue of what constitutes a signature, the MLEC raises the issue, however it is chosen not to solve the issue. It is stated that:

> "However, the notion of signature is intimately linked to the use of paper. Furthermore, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Model Law to a given state of technical development."[302]

This underlines that the MLEC was intended to be neutral in its application to the relevant medium and by being too specific in the legislation, risk was that the legislation would not be considered as being neutral.

The Explanatory Note to the MLETR refers to Article 9 (3) of the ECC.[303] The provision states regarding "intention" of the party in relation to the different functions an electronic signature may represent that a method must be used to indicate the party's intention. In accordance with the ECC Guide to Enactment this should be taken as to mean that a party does not necessarily approve of the entire content of the communication to which the signature is attached.[304] This is relevant to the MLETR as Article 9 of the MLETR also states that it must be possible to indicate the intent of the person who has signed the electronic transferable record in respect to the information contained in the electronic transferable record.

From the above it is concluded that where the law requires a signature that requirement is fulfilled by an electronic transferable record in terms of the MLETR when the purpose of the signature is met. Furthermore, it must be possible to identify the person who has signed the document. This should be ensured by using a reliable method as expressed in Article 9 of the MLETR. The reliability standard in regard to signatures is to be assessed against the general reliability standard expressed in Article 12 of the MLETR. What constitutes the general reliability standard is subject to closer examination in section 3.8.

3.7.3. FUNCTIONAL EQUIVALENCE BETWEEN A TRANSFERABLE DOCUMENT AND AN ELECTRONIC TRANSFERABLE RECORD

Article 10 concerns the requirements to be met by an electronic transferable record in order to be considered as being functional equivalent to a transferable document or

[301] MLEC Guide to Enactment, para 54

[302] MLEC Guide to Enactment, para 55

[303] Explanatory note to the MLETR, para 75

[304] ECC Guide to Enactment, para 160

instrument. The provision concerns the requirements of uniqueness or singularity of an electronic transferable record. Furthermore, it concerns the need for preventing the circulation of multiple documents or instruments relating to the same performance, thereby avoiding the existence of multiple claims. A guarantee of absolutely uniqueness is not realistic to ensure no matter whether a transferable document or instrument is issued, or an electronic transferable record is issued. No method is to be regarded as being bulletproof. Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation multiple times. Therefore, Article 10 focuses on the two concepts of singularity and control with the aim to prevent multiple claims.[305]

The following is a quotation of Article 10 in its entirety.

> "1. 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 normally 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 that electronic record.
>
> 2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display."

Article 10 (1) of the MLETR establishes a functional equivalence rule concerning under what conditions a transferable document or instrument can be substituted by an electronic transferable record by setting forth specific requirements that needs to be met by the electronic record, by stating:

[305] Explanatory Note to the MLETR, para 83

> "Where the law requires a transferable document or instrument, that requirement is met by an electronic transferable record if: (…)"

Consequently, the Article establishes functional equivalence between a transferable record or instrument and an electronic transferable record provided that the following requirements are fulfilled. The requirements in Article 10 (1) are twofold: First, there is a requirement as to the information contained in the electronic record. Second, there are requirements regarding that a reliable method must be used in specific circumstances. These requirements and circumstances are examined below, starting with the information that must be contained in the electronic transferable record.

3.7.3.1 INFORMATION IN THE ELECTRONIC TRANSFERABLE RECORD

The first requirement in Article 10 is to be found in Article 10 (1)(a) where it is stated that:

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

This means that the information that normally is required to be contained in a transferable document or instrument should also be contained in an electronic transferable record. Therefore, any information that is to be included in the electronic record must comply with the requirements in Article 8 of the MLETR. In accordance with Article 8 the information in the electronic record must be accessible in order to be usable for subsequent reference, as earlier examined above.

3.7.3.2 IDENTIFICATION OF THE ELECTRONIC TRANSFERABLE RECORD

The second requirement concerns that a reliable method must be used to identify the electronic transferable record, to ensure that the electronic transferable record can be subject to control, and furthermore to retain the electronic transferable records integrity.

In Article 10 (1)(b)(i) it is stated that:

> "(b) A reliable method is used: (i) To identify that electronic record as the electronic transferable record; (…)"

In Article 17 of the MLEC it is stated regarding transport documents in paragraph 3 that:

> "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer,

> or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique."

Consequently, in the MLEC it is a requirement that data messages must be unique, however, that way of thinking is left in the MLETR. In the Guide to Enactment of the MLEC, there was awareness towards the fact that the notion of "uniqueness" might be misleading. Concerning the use of the term it was resonated that:

> "On the one hand, all data messages are necessarily unique, even if they duplicate an earlier data message, since each data message is sent at a different time from any earlier data message sent to the same person. If a data message is sent to a different person, it is even more obviously unique, even though it might be transferring the same right or obligation. Yet, all but the first transfer might be fraudulent. On the other hand, if "unique" is interpreted as referring to a data message of a unique kind, or a transfer of a unique kind, then in that sense no data message is unique, and no transfer by means of a data message is unique."[306]

Despite the awareness regarding the risk of misinterpretation, it was chosen to insert the term "uniqueness" of data messages. It was argued that the use of the concepts "uniqueness" and "singularity" were not unknown to the practitioners of transport law and the users of transport documents.[307]

In the ECC it was recognised that it was a critical requirement for the use of documents of title and negotiable instruments that the "singularity" or "originality" of such documents were ensured.[308] It was stated in the *travaux préparatoires* that in order to solve this problem a combination of legal, technological, and business solutions had to be developed.[309] Furthermore, it was agreed that this specific issue went beyond the issue of ensuring equivalence between paper and electronic form.[310] Methods had also to exist in order to ensure that it was possible to secure the originality and singularity of an electronic version of a document of title or a negotiable document. Therefore, it is to be seen that the use of transferable documents that may in domestic law bear the features of being considered documents of title or negotiable instruments are

[306] MLEC Guide to Enactment, para 117

[307] MLEC Guide to Enactment, para 117

[308] Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session, A/CN.9/571, para 136

[309] Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session, A/CN.9/571, para 136

[310] Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session, A/CN.9/571, para 136

excluded from the scope of the ECC. The *travaux préparatoires* use both the term "singularity" and "uniqueness".[311] It is stated that the singularity or originality must be ensured of such documents if made electronic.[312] It is also stated that the uniqueness must be ensured of such documents.[313]

The electronic record is required to contain that information that may be necessary in order to identify and thereby single out the electronic transferable record, as *the* electronic transferable record. The electronic transferable record must be identified as the functional equivalent of the transferable document or instrument.[314] Article 10 of the MLETR (1)(b)(i) establishes the "singularity approach".[315] The singularity approach could be understood as an expression of a requirement of uniqueness. This because it is required that steps must be taken so as to ensure, that only one creditor may claim the entitlement to the performance of the obligation embodied in the transferable document or instrument or in the electronic transferable record.

However, truth be said, the requirement of singularity must be said to be relative, and the use the notion of uniqueness may be misleading. Generally, uniqueness must be argued to be impossible to ensure no matter whether a transferable document or instrument is issued, or an electronic transferable record is issued.[316] The law may for instance allow for multiple originals to be issued. This is for instance the case in the Rotterdam Rules, that allow for multiple original bills of lading to be issued.[317] Furthermore, even though a transferable document is issued in paper, that does not guarantee uniqueness, nor does it guarantee or ensure that the transferable document is not subject to illegal duplication. The difference is that the business sector is aware, and has been aware for many years, of the issue with potential unauthorized duplication or fraud with paper-based transferable documents, whereas the same cannot be said to be the case with the use of electronic transferable records. By using electronic trans-

[311] See the Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, paras 80-81, and also Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session, A/CN.9/571, para 136

[312] See the ECC Guide to Enactment, paras 80-81

[313] See the ECC Guide to Enactment, para 81

[314] Explanatory Note to the MLETR, para 95

[315] Explanatory Note to the MLETR, para 94

[316] Explanatory Note to the MLETR, para 82

[317] The Rotterdam Rules, Article 36 (2)(d), see also Chapter 4, section 4.4.1.1.

ferable records, additional new challenges may arise, which needs to be given awareness. Fraud will always find its way.[318] As the use of electronic transferable records is relatively new, it may be difficult for the business sector to assess the risks that may come with the use of electronic transferable records. Therefore, it may also be difficult to establish the trust necessary in the use of electronic transferable records.

The aim with Article 10 of the MLETR has been to ensure that the goals of what the term uniqueness tried to achieve were fulfilled, by being able to establish singularity of the electronic transferable record, and by being able to establish control of the electronic transferable record; both with the view to prevent the risk of multiple claims.[319] By setting forth the singularity approach, requirements are being given to the electronic transferable record management systems, that must make sure that it is possible to identify a specific electronic transferable record. In the Explanatory Note to the MLETR it is also specifically stressed that the notion of "uniqueness" has been abandoned.[320]

All in all, it must be concluded that the thought of being able to ensure uniqueness or singularity in its true sense is not possible, as this is not possible to ensure even of a document issued in paper. The Working Group to the MLETR was aware of this. It should not be riskier to use an electronic transferable record than a transferable document or instrument. Ultimately, what is important is to prevent the risk of multiple claims for the same obligation. This is the goal that the notion of "uniqueness" aims at achieving. However, the use of the term is misleading, as it most likely is impossible to ensure a bulletproof method to ensure uniqueness of an electronic record in its very essence – just as it is impossible to ensure absolutely uniqueness of a transferable instrument or document. The issue as to what term to use is more a linguistic issue rather than an issue of what characteristics an electronic transferable record must possess. There can exist no more strict requirements towards the use of electronic transferable records than the corresponding transferable document or instrument. If that was the case, it would discriminate the use of the electronic medium which arguably cannot have been the intention. What is crucial is that the same degree of certainty that exists with the use of the paper medium must be ensured with the use of electronic records.

It should also be noted here, that the MLETR is silent on the issue of issuance of multiple originals. However, nor does the MLETR forbid the issuance of multiple

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[318] See the English Law Commission's Report and Bill on Electronic trade documents, pp. 24-25, para 2.55 where Professor Michael Bridge QC is quoted to have said that *"(...) fraud will always find a way. Computers can be hacked. Imaginary shipments can be concocted out of thin air."*

[319] Explanatory Note to the MLETR, paras 81-85

[320] Explanatory Note to the MLETR, para 97

originals. This is subject to further discussion in Chapter 4 concerning the Rotterdam Rules.

3.7.3.3 CONTROL EQUALS POSSESSION

Article 10 (b)(ii) embodies the "exclusive control" test. It is stated in the article that a reliable method must be used:

> "(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 (…)"

The Article expresses the requirement that the electronic transferable record must be able to be subject to control throughout its lifecycle, and thereby the article expresses and implements the "control" approach.[321] The control approach sets forth the requirement that the electronic transferable records management systems must be able to ensure, that the electronic transferable record is capable of being subject to control. The control approach refers back to the reliability assessment that needs to be held against each of the functions that the wish is to regulate.

The control approach means that the electronic transferable record must be capable of being subject to control throughout its lifecycle, which encompasses the creation and release, circulation, and the termination of the electronic transferable record. If control of the electronic transferable record is established, then it is also possible to establish who the person who has control of the electronic transferable record is. If the electronic transferable record circulates in a reliable manner, among parties that it is possible to identify, then it is also possible to ensure, that the request of performance of the obligation that is indicated in the electronic transferable record is being demanded by the person that is entitled to it. Thereby, the control approach refers to the fact, that a reliable method must be used to ensure, that a relationship between the electronic transferable record and the person who is in control can be established.

Where Article 10 (b)(ii) provides the requirement that the electronic transferable record must be subject to control throughout its lifecycle by stating that a reliable method in that regard must be ensured, Article 11 provides the functional equivalence rule for the possession of a transferable document or instrument. This means that a functional equivalent for possession of a transferable document or instrument must be identified regarding an electronic transferable record. It could be argued that an electronic transferable record cannot by its very definition be possessed as possess means:

> "To have or own something".[322]

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[321] Explanatory Note to the MLETR, para 98

[322] In accordance with the definition of "possess" in Oxford Advanced Learners Dictionary

Instead, an electronic transferable record must be able to be subject to "control". As stated in the *travaux préparatoires*:

> "It was widely felt that the notion of control should establish the functional equivalence of possession with respect to the use of an electronic transferable record […] and aim at reliably identifying the holder."[323]

Article 11 (1) sets forth two requirements for functional equivalence of control, by stating that:

> "Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:
>
> (a) To establish exclusive control of that electronic transferable record by a person; and
>
> (b) To identify that person as the person in control."

Article 11 specifies the requirements that need to be fulfilled in order to ensure that functional equivalence of the notion of "control" of an electronic transferable document in a digitalised environment equals the notion of "possession" of a paper-based transferable document or instrument. Thereby the provision provides a functional equivalence rule for the possession of a transferable document or instrument. The person who controls an electronic transferable record is in the same legal possession as a person who is in possession of a transferable document or instrument. First, exclusive control of the electronic transferable record must be established, which is also indirectly followed by the singularity requirement. This means that it must be possible to single out the specific electronic transferable record. Second, the person who is in control of the electronic transferable record must be identifiable. The result is that only the person who is able to dispose of the electronic transferable record is the person who can prove itself in control. This prevents the risk of others being able to dispose of the electronic transferable record unauthorised.

Article 11(1)(a) states that exclusive control over an electronic transferable record must be able to be established in order for control to be the functional equivalent to possession.

Article 11(1)(b) refers to the person who is in control of the electronic transferable record. However, the provision does not regulate whether that person is the rightful person in control. That is for the underlying substantive law to decide. The person in control may be a legal person or a person, as long as the person is able to possess a

[323] Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session, A/CN.9/768, para 77

transferable document or instrument under the applicable substantive law.[324] This, however, is not to be seen as a limitation of the possibility to issue an electronic transferable record to "a bearer", instead of to a specific person. The MLETR allows for electronic transferable records to be issued to "bearer" which implies anonymity.[325]

Article 11 (2) states, that:

> "Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record."

Article 11 (2) sets out that the transfer of control over an electronic transferable record is the functional equivalent to the transfer of possession over a transferable document or instrument. It should here be pointed out that:

> "Transfer of control implies transfer of exclusive control since the notion of "control", similarly to that of "possession", implies exclusivity in its exercise."[326]

This means that it must be possible to establish who has the exclusive control over an electronic transferable record. In the Explanatory Note to the MLETR it is stated that:

> "Functional equivalence of possession is achieved when a reliable method is employed to establish control of that record by a person and to identify that person in control."[327]

Because the notion of "control" is the chosen functional equivalent to "possession" it was decided not to define the term in the model law.[328] Furthermore, as recalled the MLETR does not affect substantive law. Therefore, the notion of control does not affect or limit the legal consequences arising from possession.[329] The provision simply states how the notion of control can be the functional equivalent to possession if it is chosen to issue an electronic transferable record instead of a transferable document or instrument. This means that:

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[324] Explanatory Note to the MLETR, para 115

[325] Explanatory Note to the MLETR, para 116

[326] Explanatory Note to the MLETR, para 119

[327] Explanatory Note to the MLETR, para 105

[328] Explanatory Note to the MLETR, para 106

[329] Explanatory Note to the MLETR, para 107

> "Consequently, parties may agree on the modalities for the exercise of possession, but may not modify the notion of possession itself."[330]

In the Rotterdam Rules concepts such as "right of control" and "controlling party" are referred to. However, as is demonstrated in Chapter 6, these are concepts that relates to the substantive rights of the holder of an electronic transport record in the eyes of the Rotterdam Rules.[331] The Rotterdam Rules lay out substantive law, whereas the MLETR sets out standards for how existing functions under substantive law can be performed in another medium.

Possession is a general requirement to claim the legal rights provided by transferable instruments and documents.[332] If a document is being possessed, then the person in possession of the document is entitled to assert the rights that the document represents. This is due to the reason that the function of possession is to determine who is entitled to the rights. When the transferable document or instrument is issued in another medium a functional equivalent to possession must be identified. In terms of the MLETR it has been chosen that the electronic transferable record must be subject to control. Thereby, control is the functional equivalent to physical possession, in order to keep track of the legal rights to the electronic transferable record. What is needed is to track the legal rights that are transferred and thereby, that it can be identified what party has the right.

The holder is the person entitled to enforce the electronic transferable record. The identity of the holder may, however, not be noted on the electronic transferable record itself. As the record is transferred from one person to another, the holder may change from time-to-time. Consequently, a mechanism must be set in place to identify that person who, at any point in time, is considered as being the holder of the record. In a paper-environment it is assumed that the person in possession of the unique transferable paper-document is the holder. However, in an electronic environment the concept of possession may need to be replaced with a functional equivalent to possession, such as control.

Here it is stressed that a functional equivalent to the *functions* of possession must be found, not a functional equivalent to the notion of possession in itself. The function of possession is to establish who is entitled to assert the rights in accordance with the transferable document or instrument. The Working Group considered to find an electronic equivalent to possession.[333] This meant that the uniqueness or the originality that one might have by being in possession of a paper document should be replicated.

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[330] Explanatory Note to the MLETR, para 107

[331] See the Rotterdam Rules Chapter 10, Articles 50 and 51, and Chapter 5 below

[332] See Chapters 5 and 6

[333] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records*, p. 273

The result was that there were early attempts to develop a draft provision for *de facto* control of an electronic transferable record.[334] This discussion in the Working Group goes to the very heart of what is to be understood by the "functional equivalence" approach. The confusion demonstrated the very most important catch of the functional equivalence approach. It is the *functions* that need to be replicated to another media. Had the MLETR instead sought to replicate the notion of *de facto* possession the MLETR would not have served as a model for technology neutral legislation. In that case the MLETR would have regulated the notion of possession meaning that the model law would have had to decide what constitutes possession in different media. The MLETR does not seek to replicate the notion on possession, but rather the functions of the notion of possession. This means that if a reliable method is used to establish who has control of the electronic transferable record, then that person is entitled to assert the rights incorporated in the document. Of course, this leads to the question what exactly constitutes a reliable method, which is subject to further examination in section 3.8.

How Articles 10 (1)(b)(i) and 11 of the MLETR exactly are to work together may be subject to discussion. In its definition of an electronic record in the MLETR Article 2 it is stated that:

> ""Electronic record" means information […] logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not."

In accordance with this definition an electronic record is to be seen as a repository of information.[335] The notion on control is, according to Henry Gabriel, confused with the fact, that there is no need for a singular object that one could identify as the electronic record.[336] Gabriel states that:

> "This great search for the singular, unreproducible 'electronic record' might be an efficacious approach if the electronic transferable records were actually some sort of electronic 'token' that could be transferred from party to party."[337]

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[334] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 273, with reference to Draft provision on electronic transferable records, Note by the Secretariat, A/CN.9/WG.IV/WP.128, para 21

[335] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 274

[336] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 274

[337] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

Gabriel lays down the assumption that the Explanatory Note to the MLETR assumes the existence of a discrete electronic object[338] with reference to the Explanatory Note where it is stated that:

> "The "singularity" approach requires reliable identification of the electronic transferable record that entitles its holder to request performance of the obligation indicated in it, so that multiple claims of the same obligation would be avoided. The "control" approach focuses on the use of a reliable method to identify the person in control of the electronic transferable record (…)."[339]

Gabriel states that the notion of "singularity" as used in the Explanatory Note to the MLETR actually means "unique".[340] This with reference to paragraph 85 of the Explanatory Note in which it is stated that one of the effects of the adoption of the notion of "singularity" and "control" is that this prevents unauthorised replication of an electronic transferable record by the system.[341] This is interpreted as to mean that there in the eyes of the Explanatory Note exists only one transferable record.[342] This has been criticised as being inconsistent with both registry and distributed ledger systems.[343] This is due to the fact, that as long as the registry is updated, it will be listed in the registry who has the right to the money or the goods. Gabriel is critical towards whether Article 10 (1)(b)(i) reflects the current technological developments as to how it is expected that the Article that concerns singularity is to work together with the requirement of control.[344] Furthermore, Gabriel argues that that the Explanatory Note does not reflect how the existing and potential future systems work.[345] He eventually concludes that this does not mean, though, that the notion of control is irrelevant to be included in the MLETR.[346] It should just not be confused with the need for a single or unique document, as is the case with a physical document.

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[338] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

[339] Explanatory Note to the MLETR, para 84

[340] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

[341] Explanatory Note to the MLETR, para 85

[342] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

[343] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

[344] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 275

[345] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records*, pp. 275-276

[346] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* pp. 275-275

Whichever the case, the connection between Articles 10(1)(b)(i) and 11 may be argued to seem unclear as the Explanatory Note may be interpreted to suggest the existence of a single object in form of an electronic transferable record in a literal sense. What must be considered crucial is that a system is developed which can assure in a reliable manner that the rights to an electronic transferable record can be tracked and thereby that it can be established who has the exclusive control over the electronic transferable record. What could have been interesting is if the MLETR or the Explanatory Note to the MLETR had commented on the issue of issuance of multiple originals of a transferable document or instrument or electronic transferable record, especially regarding the "singularity approach" and the "control approach". The answer to this question is to be found and solved in substantive law, and not in the MLETR that does not affect substantive law.

3.7.3.4 INTEGRITY OF THE ELECTRONIC TRANSFERABLE RECORD

In Article 10(b)(iii) of the MLETR the requirement of "integrity" of the electronic transferable record is expressed, by stating, that:

> "(b) A reliable method is used:
>
> (…)
>
> (iii) To retain the integrity of that electronic record."

In Article 10 (2) it is elaborated on the assessment of integrity, that:

> "The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display."

The Article sets down criteria for how it is to be assessed whether the electronic transferable record retains its integrity. In the Explanatory Note to the MLETR it is elaborated, that:

> "(…) an electronic transferable record retains integrity when any set of information related to authorized (as opposed to changes of purely technical nature) remains complete and unaltered from the time of creation of the electronic transferable record until it ceases to have any effect or validity."[347]

[347] Explanatory Note to the MLETR, para 101

A functional equivalence to the notion on "original" must be established in an electronic environment, as a record that only exists electronically may be copied. The function of "original" thus must be established in a technology neutral way. What is meant with "integrity" is that it must be ensured that the electronic transferable record is not subject to unauthorised alterations or changes during its lifecycle.[348] That could be achieved by ensuring that it is possible to establish that there is a connection between an electronic signature that is assigned to the electronic transferable record and the record itself from that point in time where the electronic signature was assigned to the record.[349] Thereby, integrity of the electronic transferable record would be ensured from a certain point of time; meaning from that point in time where the electronic transferable record was signed it can be ensured that the integrity of the record is kept intact.

The aim with the provision is to prevent unauthorised alterations to the record, such as for instance hacking, which naturally will compromise the integrity of the electronic transferable record. This, however, should not be confused with the possibility of making "authorised changes", meaning changes that have been agreed upon by the parties in relation to their respective contractually obligations.[350] It should also be noted, that electronic transferable record systems have rulebooks that may allow for alterations to the electronic transferable records.[351] This should also not be confused with changes that are of purely technical character. As stated in the article, normal changes which arise in the normal course of communication, storage, and display are not to be seen as alterations to the integrity of the record. Consequently, it must be assessed in each specific case what constitutes an authorised alteration.

The notion of "integrity" and the notion of "original" should not be confused. The UNCITRAL Model Law on Electronic Commerce refers to the notion of "original" in its Article 8(1) by stating requirements for a data message to meet in order for information to be presented or retained in its original form. It is elaborated in Article 8 (1)(a) in which it is stated that there has to exist a reliable assurance as to the integrity of the information in the data message from that point of time where it was first generated in its final form. What in the MLEC is to be understood by the notion of "integrity" is stated in Article 8 (3)(a), which expresses the criteria for assessing the integrity of information in a data message, which refers to the same criteria as in the MLETR Article 10(2), meaning it shall be assessed:

[348] Explanatory Note to the MLETR, para 101

[349] Explanatory Note to the MLETR, para 101

[350] Explanatory Note to the MLETR, para 103

[351] Explanatory Note to the MLETR, para 102

> "(…) whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; (…)"[352]

It is explained in the Guide to Enactment of the MLEC that:

> "If the notion of "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" data messages, since the addressee of a data message would always receive a copy thereof."[353]

It is explained that the use of the notion of "original" in Article 8 of the MLEC should be seen in a different context, as what perhaps is the most commonly understanding of the notion of original. If a paper document is being issued, then an original document would constitute a paper on which information was fixed. If this said document was subject to unauthorised duplication, then the copy would not be the original document, which would not be acceptable as there might be a risk that the copy had been subject to change or alterations. As pointed out in the Guide to Enactment of the MLEC what is important is that data messages are transmitted unchanged, in their "original" form so that the parties in international commerce may have confidence in its contents.[354] The intention behind Article 8 of the MLEC is that the article should provide the minimum acceptable form requirement to be met by a data message in order for the data message to be considered as being the functional equivalent of an original.[355] In order for data to be considered as being original it has to have retained its integrity and thereby the article states the requirements as to the functional equivalence of "original".

As stated by the Guide to Enactment, Article 8 of the MLEC:

> "It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement."[356]

The notions of "integrity" and "originality" are being linked, meaning that in order for a data message to be considered as being original it has to have retained its integ-

[352] MLEC Article 8 (1)(a)

[353] MLEC Guide to Enactment, para 62

[354] MLEC Guide to Enactment, para 63

[355] MLEC Guide to Enactment, para 64

[356] MLEC Guide to Enactment, para 65

rity. This is done by establishing a reliable technical method in order to enable authentication of data that can ensure that what appears on screen is the original data that has been produced by the creator of that data message.[357]

The MLETR Article 10 (2) is inspired by the MLEC Article 8 (1), however, it is important to note, that the MLETR does not refer to the notion of original. The fact that it was excluded to use the term "original" in the MLETR in the provisions that contain the requirements for establishing functional equivalence to the paper-based notion of "original" , which is opposed to what is the case in other UNCITRAL texts on electronic commerce, is specifically addressed and explained in the Explanatory Note to the MLETR.[358] However, here it should be pointed out that the relevance of the notion of original in regard to paper-based transferable documents and instruments refers to prevention of the risk of being met with multiple claims. The notion of original in regard to electronic data messages, including electronic transferable records, concerns the notion of integrity, meaning that the record is not subject to unauthorised changes. Therefore, in regard to the understanding of the notion of original concerning transferable instruments or documents:

> "(…) the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying a specific electronic record as the electronic transferable record that entitles the person in control to claim performance and as the electronic transferable record that is the object to control (…)"[359]

Consequently, the understanding of the term "original" depends on in what context the term is seen. The distinction is particularly important to note, when talking of transferable documents and instruments and electronic transferable records, because the notion of original can refer to both who is legitimated to claim the performance of the obligation indicated in the transferable document or instrument, but also to the integrity of the electronic record, and that is where the distinction lies.

Therefore, the explanation as to why the MLETR does not refer to the notion of original goes to the very heart of the characteristics of the functions of a transferable document or instrument, in an electronic environment referred to as an electronic transferable record, as opposed to the functions and characteristics of other data messages, such as for instant a contract only existing in electronic form. In the Explanatory Note to the MLETR it is stated that Article 8 of the MLEC refers to a "static" notion of

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[357] Goldby, *Electronic Documents in Maritime Trade*, p. 20 with reference to ECC Guide to Enactment, para 169

[358] Explanatory Note to the MLETR, however, very cryptically explained in paras 189-190

[359] Explanatory Note to the MLETR, para 190, with a reference to paras 83-84 in the Explanatory Note

"original".[360] The same understanding of the notion of "original" cannot be said to apply to electronic transferable records that given their very nature of being "transferable" are *meant* to circulate.[361] A contract may be subject to alterations. After the finalisation of a contract, the contract exists in its immediate form, whereby it is not found doubtful to use the term "original".[362] An electronic transferable record, on the other hand, is subject to change and modifications given that it by its very nature is meant to be transferred.

Consequently, what is to be seen is that the Explanatory Note differentiates between two understandings of the term "original": a static notion of original and a dynamic notion of original.[363] The static notion of original applies to data messages and the dynamic notion of original applies to electronic transferable records. The dynamic notion of "original" applies to the transferable document or instrument. By ensuring that an electronic transferable record can be said to be original, it is prevented that one can be met with multiple claims, which is dealt with by inserting requirements of "singularity" and "control". In order to achieve functional equivalence of the dynamic understanding of the notion of original, the MLETR refers to the integrity of the electronic transferable record as one of the requirements that needs to be fulfilled.[364]

3.8. THE NOTION OF RELIABILITY

To consider someone or something as being "reliable" means that the person or the thing can be trusted to do well[365] and thereby is being something or someone that can be relied or counted on. The MLETR Article 12 provides a "general reliability standard", that is referred to in articles 9, 10, 11, 13, 17 and 18 of the MLETR regarding that a reliable method must be used to secure the functions of those articles. It is stated in Article 12 (a) that the method that is referred to in the articles shall be:

> "(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:
>
> (i) Any operational rules relevant to the assessment of reliability;

[360] Explanatory Note to the MLETR, para 189

[361] Explanatory Note to the MLETR, para 189

[362] Explanatory Note to the MLETR, para 189

[363] Explanatory Note to the MLETR, paras 189-190

[364] Explanatory Note to the MLETR, para 190

[365] In accordance with the Oxford Advanced Learners Dictionary

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The security of hardware and software;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method; Any applicable industry standard; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence."

What must be assessed regarding reliability is whether a reliable method has been used to fulfil certain functions. Each of the provisions in the MLETR that refers to that a reliable method has to be used, aims at fulfilling different functions.[366] In practice it is the system used to implement the method that has to be able to be deemed reliable.[367] Consequently, as there are different purposes with the application of the reliability standard, the assessment whether a reliable method has been used should be carried out separately in light of the function specifically pursued by the use of that method.[368] As stated by the Explanatory Note:

> "That approach provides flexibility when assessing the application of the reliability standard in practice as it allows customization of the reliability assessment to each function fulfilled by the system."

This means that the application of the reliability standard should always be weighed against the function to which it is to apply. Therefore, it is called the "general" reliability standard, as the standard must be able to apply to different functions. Consequently, the reliability standard is a general standard that must be flexible in its application. This may, however, also cause insecurity as to what criteria that are relevant to consider in this assessment. The MLETR Article 12 (a)(i-vii) refers to more specific criteria that may be used in the assessment of the general reliability standard, however

[366] See Article 9 concerning signature, Article 10 concerning transferable documents or instruments, Article 11 concerning control, Article 13 concerning indication of time and place in electronic transferable records, Article 17 concerning replacement of a transferable document or instrument with an electronic transferable record, and Article 18 concerning replacement of an electronic transferable record with a transferable document or instrument

[367] Explanatory Note to the MLETR, para 122

[368] Explanatory Note to the MLETR, para 125

the list is not exhaustive.[369] The list consists of elements such as the assurance of data integrity and security of hardware and software. It is a fine balancing act when making such a list that is not intended to be exhaustive and that also needs to be dynamic in its application. The Explanatory Note raised awareness to this by stating that:

> "The list of circumstances aims at achieving a balance between providing guidance on the assessment of reliability and imposing requirements that may result in excessive costs for business, ultimately hampering electronic commerce and leading to increased litigation on complex technical matters. Additional possibly relevant circumstances include: quality of staff; sufficient financial resources and liability insurance; and the existence of a notification procedure for security breaches as well as reliable audit trails."[370]

In order to remove legal uncertainties regarding the use of electronic communications it must be ensured that the legislation carry the same weight as if another medium such as the traditionally used paper medium had been used.[371] The legislation must be characterised as being non-discriminative against the use of electronic communication. Furthermore, should a dispute arise, it must be ensured that the electronic communication will be deemed admissible as evidence before the court. Thereby the legislation must be technology neutral.[372] That the legislation must be non-discriminative was recognised by UNCITRAL already in its earliest work on electronic commerce. In Article 5 of the MLEC it is stated that:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message."[373]

This is elaborated concerning the evidentiary weight given to electronic communication in Article 9 (2) of the MLEC that provides that:

> "Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the message was generated,

[369] Explanatory Note to the MLETR, para 126

[370] Explanatory Note to the MLETR, para 127

[371] Goldby, *Electronic Documents in Maritime Trade,* p. 18

[372] Goldby, *Electronic Documents in Maritime Trade,* p. 18

[373] MLEC, Article 5

> stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor."[374]

It is also stated in MLEC Article 8, that also deals with the issue of "originality" that:

> "The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances."[375]

From the above it is to be seen that already in the earliest work from UNCITRAL on electronic commerce focus was given to the notion on reliability. The Guide to Enactment of the MLEC also elaborates on appropriate, legal, technical, and commercial factors there may be considered in the assessment of the degree of security provided by the method.[376]

Gabriel notes that Article 12 reflects the tension between whether the MLETR should be enabling and thereby leave choice and risk to the parties, or whether it should be regulatory.[377] What can be said in that regard is that the MLETR addresses the level of reliability necessary for a method that provides for the creation, transfer, and recognition of electronic transferable records.[378] The MLETR may be considered as a guideline as to how the systems should be developed, but the MLETR should not be taken as to interfere with development. It merely contains guidelines as to that a system should provide for a reliable method. It is the parties who have to assess potential risks in the use of systems, and it is the system-developer of the use of electronic transferable records that must ensure the requirement of a reliable system.

In the Explanatory Note it is stated that Article 12 provides a technology neutral general standard on the assessment of the notion of reliability.[379] The MLETR may be considered as being relevant now. This because currently electronic systems are being developed[380], and the MLETR provides legal standards for such technological developments. This means, that this sets a legal standard for that a reliable method must be used to secure the creation, transfer, and recognition of electronic transferable records and consequently, that developers of new technology have to keep that in mind. It

[374] MLEC, Article 9(2)

[375] MLEC, Article 8(3)(b)

[376] MLEC Guide to Enactment, para 58

[377] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 265

[378] Gabriel, *UNCITRAL Model Law on Electronic Transferable Records,* p. 265

[379] Explanatory Note to the MLETR, para 122

[380] See Chapter 7

may both act like a frame for future development and a guideline for current development. Consequently, it does not matter how, or on what medium a transferable document or instrument is issued, as long as a reliable standard method is being used. Legal standards and principles have been adopted within which the industry can develop systems.

Two interesting things may be noted in this regard. First, the point in time when it will be assessed whether a method used may be considered as being reliable. Second, how it is to be assessed whether a method can be deemed reliable. Regarding the first point concerning when it will be assessed whether a method used is reliable, this will first be assessed at that point in time where a case is taken to court. There a party must be able to argue whether a reliable method has been used. This answers the question as to when it will be assessed whether something is considered as being reliable. Regarding the second point, that relates to how a court will be able to assess whether a reliable method has been used and on what parameters a court will make that assessment. This relates to evidentiary aspects of authentication where the means for ensuring reliability must be identified. Christopher Reed noted in 2001 regarding legally binding electronic documents that:

> "Authentication of the record of an electronic communication requires that a court can, if necessary, be satisfied:
>
> - that the contents of the record have remained unchanged since it was sent (the integrity of the record);
> - that the purported sender of the communication is identifiable (the identity of the sender);
> - that the identified sender agreed to its contents (attribution of the communication to the sender); and
> - in some cases, that extraneous information, such as the apparent date of the transmission, is accurate."[381]

Reed also stresses that:

> "Additionally, it is important to remember that a legal dispute will not come to court until some years after the relevant messages were sent, and in the meantime, they will have been archived by the parties. Because they could, in theory, have been altered intentionally, corrupted accidentally, or simply invented for the purposes of litigation, it will also be necessary to

[381] Reed, *Legally Binding Electronic Documents: Digital Signatures and Authentication*, p. 90

> demonstrate an audit trail connecting the copy of message before the court to the copy as originally sent or received."[382]

The abovementioned must arguably also apply to the use of electronic transferable records and the requirement of the use of a reliable method. Evidentiary aspects of authentication and the use of a reliable method should be carried in mind. The means for ensuring reliability must be identified. This requires maintenance of logs, servers etc. Furthermore, developments in the way which data may be stored and accessed, for instance through cloud computing and distributed ledger technology, should be considered. It is concluded that the requirement of a reliable method must be weighed against the specific function to which the requirement apply. Furthermore, it should be noted that there are relevant evidentiary aspects of the use of a reliable method that should be taken into consideration.

3.9. CROSS-BORDER ASPECTS OF THE USE OF ELECTRONIC TRANSFERABLE RECORDS

Article 19 in the MLETR aims at ensuring non-discrimination of foreign electronic transferable records and thereby removing potential obstacles to the cross-border use and recognition of electronic transferable records.

Article 19 of the MLETR states that:

> "1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad.
>
> 2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument."

The purpose of this article goes to the core of the outset of the work on electronic transferable records as an international regime to facilitate the cross-border use of electronic transferable records was considered needed.[383] The intention was to develop a legislative regime that would work as a facilitator and an enabler of the cross-border use of electronic transferable records.[384] By providing that an electronic transferable record shall not be denied legal effect, validity, or enforceability on the sole ground

[382] Reed, *Legally Binding Electronic Documents: Digital Signatures and Authentication*, p. 90

[383] Report of the United Nations Commission on International Trade Law, supplement No. 17, A/66/17, para 83

[384] Explanatory Note to the MLETR, para 181

that it was issued or used abroad the MLETR aims at eliminating discrimination against electronic communication.

However, concern was raised that if such a provision was included in the model law a dual regime in form of a special set of conflict of law's provisions for electronic transferable records.[385] On the other hand it was felt that it was crucial for the model law's success to deal adequately with aspects that relates to the international use of the MLETR, and also to promote its cross-border application regardless of the number of enactments.[386] An example was referred to concerning that an electronic transferable record might be issued in a jurisdiction that did not recognise the use of such records and that recognition of its validity could be sought in a jurisdiction that allowed that use.[387] Therefore it was found useful to permit recognition of the validity of the electronic transferable record in the latter jurisdiction, even though the jurisdiction in which the record was issued did not recognise the use of electronic transferable records.[388] In this way the MLETR would enable the use of electronic transferable records no matter the number of jurisdictions that enacted the Model Law.[389]

Gabriel states that from Article 19(1) it would appear to be implicit that the place the electronic transferable record is created itself would otherwise acknowledge the legality of electronic transferable records.[390] Furthermore, Gabriel states, that in order to recognise an electronic transferable record from another jurisdiction it must be assumed that there is a valid electronic transferable record from the other jurisdiction to recognise.[391] Gabriel argues that this suggests that a jurisdiction can recognise legal rights created in another jurisdiction that does not allow for these rights, and states that he does not believe that domestic law can extend that far.[392]

Gabriel refers to the *travaux préparatoires* that reflects discussions in the Working Group concerning that a jurisdiction that has enacted the MLETR may recognise an

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[385] Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session, A/CN.9/768, para 111

[386] Explanatory Note to the MLETR, para 182

[387] A/CN.9/863, para 79

[388] Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session, A/CN.9/863, para 79

[389] Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session, A/CN.9/863, para 80

[390] Gabriel, *The UNCITRAL model law on electronic transferable records,* p. 277

[391] Gabriel, *The UNCITRAL model law on electronic transferable records,* pp. 277-278

[392] Gabriel, *The UNCITRAL model law on electronic transferable records,* p. 278

electronic transferable record that is issued or used in a jurisdiction that does not allow the issuance or use of electronic transferable records.[393] Here it is noted that:

> "(…) paragraph 1 aimed exclusively at preventing that the place of issuance or of use of the electronic transferable record could be considered in themselves reasons to deny legal effect, validity or enforceability of an electronic transferable record (…) and that it did not affect substantive law, including private international law. Thus, for instance, it was explained that paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that did not recognize the legal validity of electronic transferable records."[394]

The Explanatory Note to the MLETR reflects the same consideration and elaborates that nor should paragraph 1 prevent recognition in a jurisdiction enacting the model law of an electronic transferable record issued or used in a jurisdiction not allowing the issuance and use of electronic transferable records and that otherwise complies with the requirements of applicable substantive law.[395] Gabriel also refers to other Working Group discussions on the same subject that provides that:

> "(…) it was noted that an electronic transferable record might be issued in a jurisdiction that did not recognize the use of electronic transferable records, and that recognition of its validity could be sought in a jurisdiction that allowed that use. In that case, it was added, it could be useful to permit recognition of the validity of the electronic transferable record in the latter jurisdiction, provided legal requirements set forth in that jurisdiction were met."[396]

The question raised in the Working Group discussions concerning how far domestic law can extend and whether legal rights created in a jurisdiction that does not allow for these rights can be recognised in another jurisdiction is not solved in the MLETR. The discussions reflect the limitations of the MLETR. The MLETR may provide a framework for the non-discrimination of an electronic transferable record that is issued instead of a transferable document or instrument. However, the MLETR does not affect substantive law. This is illustrated by Article 19 (2) of the MLETR in which it is stated that nothing in the MLETR affects the application to electronic transferable

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[393] Report of Working Group IV (Electronic Commerce on the work of its fifty-third session, A/CN.9/869, para 125

[394] Report of Working Group IV (Electronic Commerce on the work of its fifty-third session, A/CN.9/869, para 125

[395] Explanatory Note to the MLETR, para 185

[396] Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session, A/CN.9/863, para 79

records of rules of private international law governing a transferable document or instrument.

This means that if an electronic transferable record is issued in a jurisdiction that does not recognise the legal value of an electronic transferable record and the electronic transferable record is being transferred to another jurisdiction, that jurisdiction may not deny the legal effect of the electronic transferable record on the sole ground that the electronic transferable record is electronic. This is in accordance with Article 19 (1) of the MLETR. The latter jurisdiction may not discriminate against the electronic transferable record on the ground that it is electronic and not issued on another medium. However, this is as far as the MLETR reaches. Whether a court in the latter jurisdiction may find that the electronic transferable record is valid must be decided using the relevant rules of private international law governing a transferable document or instrument, in accordance with Article 19(2) of the MLETR. This is also underlined by the Explanatory Note that states that paragraphs 1 and 2 of Article 19 operate on different levels and do not conflict with each other.[397] The MLETR avoids questions on conflicts of laws by stating that this is outside the scope of the Model law. This means that the MLETR does not govern paper transferable documents and instruments, nor is the MLETR intended to introduce a special set of private international law provisions for electronic transferable records which was found would lead to a dual private international law regime.[398] Law that applies to paper transferable documents and instruments cannot automatically be argued to apply to electronic transferable records.

3.10. CONCLUSION

The aim of this chapter was two-fold: to undertake a technical examination of the provisions in the MLETR and to provide basis for study the interplay of the MLETR with other legislation.

There are two distinct features of the MLETR. First of all, the MLETR sets up a legislative framework covering the use electronic transferable records. It sets out requirements that electronic alternatives to transferable documents and instruments must fulfil to be considered as being functional equivalent to transferable documents and instruments. An electronic transferable record is set to be functional equivalent to a transferable document or instrument. A transferable document or instrument is a document which entitles its holder to claim the performance of the obligation indicated in the document. Such an obligation may be either to pay a certain amount of money

[397] Explanatory Note to the MLETR, para 188

[398] Explanatory Note to the MLETR, para 187

or to deliver goods as in accordance with the document. This means that the MLETR may act as a legal framework providing for the electronic use of bills of lading.

Second of all, the MLETR sets out instrumental features. The MLETR is built on the principle of technology neutrality, the functional equivalence approach and the principle of non-discrimination. The principle of technology neutrality means that the legislation may apply no matter what technology is used. The functional equivalence approach means that through analysis of the purposes and functions of a paper-based document it may be decided how those purposes and functions may be fulfilled using electronic commerce techniques. Consequently, the MLETR provides for how an electronic transferable record may fulfil a requirement of writing, signature, information contained in the record, identification of the record and the integrity of the record. Furthermore, the MLETR states that "control" is set to be the functional equivalent to the requirement of possession. The MLETR provides for a "general reliability standard" meaning that a reliable method must be used to secure the functions above. The reliability standard is a dynamic standard that should be as reliable as appropriate for the fulfilment of the specific function. What more specifically constitutes reliability in relation to the specific function should be assessed in the light of the relevant circumstances.

Above is a technical examination of the MLETR, its rules, its concepts, and its principles. This previous part has acted as a prelude to placing the MLETR in the context of the Rotterdam Rules in the following Chapter 4 and national legislation in Chapters 5 and 6.

CHAPTER 4. THE ROTTERDAM RULES AND ITS INTERACTION WITH THE MLETR

4.1. INTRODUCTION AND METHOD

The overall aim with the following chapter is to comprehend the interplay of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) with the MLETR. The purpose of the Chapter is to examine the potential overlap in problems attempted solved by the rules in the Rotterdam Rules and the MLETR. The Chapter has as its turning point *how* the MLETR may support implementation of the Rotterdam Rules and the general provisions in the Rotterdam Rules concerning the use of electronic transport records.[399]

It has previously been recognised that an area of law where e-commerce rules were most needed was the area of carriage of goods.[400] This realisation was among the reasons as to why work on the Rotterdam Rules were initiated. The MLETR was negotiated in the backdrop of the finalisation of the Rotterdam Rules. When it was decided in 2011 to undertake work in the field of electronic transferable records, it was specifically pointed out that such work would, amongst other things, act as support to the Rotterdam Rules. [401] The MLETR covers aspects concerning the use of electronic documents not covered in full by the Rotterdam Rules, as is demonstrated in this chapter. This includes what constitutes control of an electronic record and potential parameters in assessment as to whether a reliable method has been used upon issuance and transfer of the electronic record. It has elsewhere been stated that the Rotterdam Rules provide limited guidance on the details of the use of negotiable electronic transport

[399] The Rotterdam Rules do not refer to bills of lading, instead the generic term "electronic transport record" is used

[400] MLEC Guide to Enactment, note 3, para 110, Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of goods Wholly or Partly by Sea*, p. 390

[401] Explanatory Note to the MLETR, para 7, Official Records of the General Assembly, Sixtieth Session, Supplement No. 17, (A/66/17), para 235

records, which are left for the party autonomy to decide.[402] Furthermore, the Rotterdam Rules have not (yet) gained widespread support and it is as of today uncertain whether the convention will ever enter into force. Therefore, legislation concerning the facilitation of electronic transferable records (that in the Rotterdam Rules are referred to as electronic transport records) is in somewhat of a limbo.

If a jurisdiction incorporates both the Rotterdam Rules and the MLETR, the provisions in the MLETR concerning electronic transferable records will supplement those provisions of the Rotterdam Rules.[403] As one of the purposes with the work initiated on electronic transferable records in 2011 was to adopt a legislative instrument that could support the Rotterdam Rules' provisions on electronic documents, adoption of the MLETR may be seen as a *support* to the Rotterdam Rules' provisions on electronic transport records where the Rotterdam Rules may lack clarity. It can be inferred from the *travaux préparatoires* of the MLETR that the MLETR was meant to function as a support to the Rotterdam Rules, however, nowhere is it clarified *how* the MLETR may support and supplement the Rotterdam Rules. The tendency towards building the UNCITRAL legislative instruments on electronic commerce on the same general principles are followed in the Rotterdam Rules, as demonstrated in this chapter.

The chapter is initiated with the background for and development of the Rotterdam Rules, after which it turns to a clarification of the concept of an electronic transport record as defined in the convention. An overview of the provisions in the convention is provided with the purpose to clarify which provisions in the wide-ranging convention that is subject to closer examination. The Rotterdam Rules are then approached from a dual perspective. First the general provisions are subject to scrutiny to comprehend the legislative framework for the procedures of the use of electronic transport records. This is followed by a study of the substantive provisions concerning the issuance, transfer, and control of the electronic transport record in order to demonstrate the connection of the substantive provisions with the general provisions. These are the features of the electronic transport record that are especially interesting when assessing whether an electronic transport record may function in an equivalent manner as a transport document. The results from the previous chapter that provided a technical examination of the MLETR, and its provisions are here included to demonstrate where and how the MLETR may support the Rotterdam Rules' provisions on procedures for the use of electronic transport documents.

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[402] Castellani, *Understanding the Long March Towards Dematerialisation of Bills of Lading*, p. 106, in his book review of Miriam Goldby's *Electronic Documents in Maritime Trade Law and Practice*, Oxford University Press, 2013

[403] Sturley, et al., *The Rotterdam Rules – the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* para 3-044, 2020

It is demonstrated that if a jurisdiction incorporates into national law both the Rotterdam Rules and the MLETR, the provisions in the MLETR concerning the use of electronic transferable records, will supplement those of the Rotterdam Rules concerning electronic transport records regarding issuance, transfer, and control. Consequently, there may be advantages by implementing both legislative instruments.

4.2. BACKGROUND AND DEVELOPMENT OF THE ROTTERDAM RULES

As stated by Professor Michael F. Sturley:

> "In today's legal environment, international shipments under a bill of lading are subject to a mosaic of legal regimes established by international conventions, domestic statutes, common-law doctrines, and customary trade practices".[404]

In order to understand why the current legislation is not sufficient to cover the developments with new technologies being used in international trade, and as the MLETR has been brought in as a facilitator of the use of electronic transferable records, it is found beneficial briefly to establish what the current legal regimes are.

The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules) entered into force in 1924 on August 25th.[405] This was the first international convention governing the carriage of goods by sea. In 1968 a protocol amended the Hague Rules. [406] The Hague Rules then became the Hague-Visby Rules and became widely popular.[407] In 1978 the United Nations adopted a new convention, namely the United Nations Convention on the Carriage of Goods by Sea, popularly known as "the Hamburg Rules". The Hamburg Rules were meant to supersede both the Hague Rules and the Hague-Visby Rules. However, the Hamburg Rules, never managed to become widely successful, as they did not receive the necessary support from strong commercial powers.[408] None of the conventions cover electronic

[404] Sturley, *Can Commercial Law Accommodate New Technologies*, p. 23

[405] The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules) 1924, August 25th

[406] The Hague Rules was amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, February 23, 1968, hereinafter known as the Hague-Visby Rules

[407] Sturley, *Can Commercial Law Accommodate New Technologies,* p. 24, Sturley, et al., *The Rotterdam Rules– the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* pp. 1-2

[408] Sturley, et al., *The Rotterdam Rules– the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* p. 2

commerce. In the Hague Rules and the Hague Visby Rules, it was most likely not found ever to be relevant to include provisions on electronic commerce. The Hamburg Rules though, address that telegrams and telexes should be recognised as having equal legal value and be recognised as "writings".[409] This may be taken as to imply that bills of lading may be issued in electronic form.

The Rotterdam Rules were officially signed at a signing ceremony in September 2009 in Rotterdam, why the convention became known as the "Rotterdam Rules".[410] One of the most important aspects of the Rotterdam Rules was to create a harmonised legislative framework concerning the use of electronic documents.[411] The idea of initiating work in the field of electronic documents in maritime trade happened in the backdrop of previous work on electronic commerce, namely MLEC that was adopted by the General Assembly in 1998.[412] For a long time the legislative regime governing the carriage of goods by sea had been criticised for being out of date with the modern contract practises as well as creating obstacles to the modern way of trading.[413] Notably, the Hague, Hague-Visby, and the Hamburg Rules were criticised for being out of date by not ensuring the possibility of electronic commerce or door-to-door commercial transport operations.[414] The already existing legislation was therefore said to be fragmented and did not accommodate the modern trade practices. International trade is predominantly maritime[415] and is subject to multiple relevant documents: bills of

[409] Hamburg Rules art. 1(8)

[410] See Report of the United Nations Commission on International Trade Law, forty-first session, A/63/17, para 298

[411] Rhidian, *The emergence and application of the Rotterdam Rules,* pp. 1-2, Sturley, et al., *The Rotterdam Rules – the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* pp. 2-4, Magklasi, *The Rotterdam Rules and International Trade Law,* p. 1

[412] See Chapter 2, section 2.4.2.

[413] Sekolec, *Foreword* to *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* p. xxiSturley et al., *The Rotterdam Rules– the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* pp. 1-2, Rhidian, *The emergence and application of the Rotterdam Rules,* p. 2

[414] Sekolec, *Foreword* to *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* p. xxi, Sturley, et al., *The Rotterdam Rules – the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* pp. 1-2

[415] Sturley, et al., *The Rotterdam Rules – the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* p. 1, Girvin, *Carriage of Goods by Sea,* p. 1, para 1.01

lading, the contract of carriage of goods, letter of credits, the sales contract, etc. Consequently, it is an international multi-contractual legal area which requires both national and international legislative frameworks to be efficient and predictable.

However, even though it was relatively easy to agree that there was need for revising the existing legislation, initiating work in the field in practice was another thing and turned out to be a long process. One of the reasons to this is that so many stakeholders have an interest in a legal regime governing this subject, and their interests have not been easy to reconcile.[416] As stated by Jernej Sekolec:

> "Those most directly interested include, in addition to sea carriers contracted by shippers, also sea carriers subcontracted by the sea carriers to perform the whole, or part of, the sea carriage, as well as various parties performing specialized services within port areas, such as warehouses, transport terminals, and stevedoring companies. Also interested are various inland carriers contracted or subcontracted to perform transport services before and after the sea leg. In addition, the transport regime also significantly affects the risks and contract practices of the exporters and importers of goods and of the banks financing such transactions. It is sometimes assumed that the interests of freight forwarders, cargo insurers, and liability insurers overlap with or follow the interests of the parties whom they represent or with whom they deal. Nevertheless, in practice, these enterprises seem to have their own views of how the transport regime affects their respective market positions."[417]

As Sekolec demonstrates in the above overview, the complexity is immense as many parties are involved either directly or indirectly in the transportation of carriage of goods. Each have its own respective market position and thereby each have an interest in and own views upon the legislative regime covering the area of transport of carriage of goods. For an international convention to enter into force a certain number of countries must ratify the convention. In the field of private law, it is crucial that the private

[416] Sekolec, *Foreword* to *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. xxi.

[417] Sekolec, *Foreword* to *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. xxii

sector is supportive of the implementation of a new legal regime. Therefore, the private industry also took a keen interest in the negotiation of the Rotterdam Rules.[418]

The Rotterdam Rules are built upon the Hamburg Rules and the Hague-Visby Rules. Furthermore, the provisions concerning electronic transport records in the Rotterdam Rules are also based upon the same legal principles as the previous legislative instruments developed within UNCITRAL which includes the previous work on electronic commerce. What is characterised by the legislative instruments concerning electronic commerce is that it is crucial to ensure that information that can be put on paper also can be given electronic form and still have equal legal value, also known as the functional equivalence approach, see Chapter 3, section 3.7. Electronic communications have gained widespread acceptance, however at the same time it is recognised that electronic communication has its shortcomings. Electronic communication may be altered or be subject to the risk of duplication or reproduction.[419] Electronic communication may also be in risk of being outdated if the necessary equipment no longer exists to "read" the electronic communication, whereas a paper can always be read, if the paper is kept physically intact.[420] Consequently, one does not simply legislate in the field of electronic records, without defining the conditions under which such electronic records may be regarded as being functional equivalent to paper documents.[421] One of the characteristics of the Rotterdam Rules is that UNCITRAL has continued its practice with not regulating the technology itself so that the parties may choose the technology appropriate to meet their needs, also known as the principle of technology neutrality, see Chapter 3, section 3.4.

Today, the Rotterdam Rules have been signed by 25 countries, ratified by 4 countries, and accessed by 1 country.[422] In order to enter into force, the Rotterdam Rules require

[418] see Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, A/51/17, para 215, where it appears that UNCITRAL also should gather information from international organisations from the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurers (IUMI), the International Federation of Freight Forwarders Association (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbours (IAPH)

[419] Faria, *Electronic Transport Records,* p. 51

[420] Faria, *Electronic Transport Records,* p. 51

[421] Faria, *Electronic Transport Records,* p. 51

[422] See signing, ratification, and accession status of the Rotterdam Rules here: https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status - last accessed 27 January 2023

20 ratifying countries. The legislative method chosen was a convention, just as previous legislation in the legal area were conventions.[423] When a convention is chosen as the legislative model, the intention is to unify law by establishing legal obligations to the parties that ratify the convention.[424] The intention was to create harmonised legislation that has a binding effect on the ratifying parties. That intention of creating harmonised binding legislation is clear when reading the preamble to the Rotterdam Rules:

> "Noting that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport."[425]

The disadvantage is that a legislative instrument such as a convention offers little flexibility to the ratifying countries. The degree of flexibility is different when the legislative instrument chosen for instance is a model law or a legislative guide. This relates to the discussion on whether it may be easier to legislate in this field by using a more flexible legislative instrument.[426]

There exists no case law as the Rotterdam Rules have not been tested in practice. It is here important to note that the purpose with the following chapter is not to establish the state of law in case of a conflict between parties to a contract of carriage of carriage of goods wholly or partly by sea. The purpose is to examine the provisions in the Rotterdam Rules in relation to the use of electronic transport records, thereby demonstrating the interaction with the MLETR in relation to how the MLETR may support the Rotterdam Rules.

In support of this the *travaux préparatoires* to the Rotterdam Rules is used to describe the provisions and the underlying purposes with the provisions. Furthermore, literature on the Rotterdam Rules which have been written by, among others, experts and delegates that participated in the process of negotiation of the Rotterdam Rules is included in the chapter. The relevant results and conclusions from the above technical examination of the MLETR in Chapter 3 are used as a tool in the interpretation of relevant provisions in the Rotterdam Rules in order to provide clarity as to how the MLETR may support the Rotterdam Rules' provisions on electronic transport records.

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[423] The Hamburg Rules and the Hague-Visby Rules

[424] Chapter 2, section 2.2.

[425] Resolution adopted by the General Assembly, 63/122

[426] Chapter 2, section 2.2.

4.1. OVERVIEW OF THE PROVISIONS IN THE ROTTERDAM RULES

The Rotterdam Rules is a convention that contains provisions on various subjects, amongst others the issue of electronic commerce. The focus in this dissertation is on electronic transferable records such as bills of lading that in the Rotterdam Rules bear the generic term "electronic transport records". However, because the relevant provisions on electronic commerce and electronic transport records are spread out in the Rotterdam Rules, it is found necessary to provide an overview of the chapters in the convention.

Chapter 1 concerns general provisions such as provisions on definitions of terminology used in the Convention and interpretation of the Convention. It is common in international conventions and model laws first to define the meaning of terms used to a certain extend as terms may have different meanings. This is especially known to be the case for United Nations instruments as these instruments are being translated into various languages.[427] Chapter 2 of the convention concerns the scope of application of the convention. Chapter 3 sets out the general provisions on electronic transport records that are electronic equivalent of transport documents. Chapter 4 regulates the obligations of the carrier. Chapter 5 regulates the liability of the carrier for loss, damage, and delay. Chapter 6 concerns additional provisions relating to stages of the carriage. Chapter 7 sets out provisions on the obligations of the shipper and the carrier. Chapter 8 concerns transport documents and electronic transport records regarding the issuance, context, and evidentiary effect of transport documents and electronic transport records. Chapter 9 concerns provisions on the delivery of the goods. Chapter 10 concerns the rights of the controlling party. Chapter 11 concerns the transfer of rights when a negotiable transport record or an electronic transport record is issued. Chapter 12 regulates the limits of liability of the carrier. Chapter 13 concerns provisions on the time for suit. Chapters 14 concerns jurisdiction and Chapter 15 concerns arbitration. Chapter 16 sets out provisions on the validity of contractual terms. Chapter 17 states the matters that are not governed by the Rotterdam Rules, and lastly Chapter 18 contains the final clauses.

[427] Berlingieri, *General Introduction*, p. 3, in *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, ed. Alexander von Ziegler, et al.

As this overview of the chapters in the Rotterdam Rules demonstrates, the Rotterdam Rules is a wide-ranging covering convention. It is not within the scope of this dissertation, to cover all aspects of the Rotterdam Rules.[428] Relevant provisions have been chosen in this dissertation for technical examination. These are provisions that concern important aspects of the use of electronic transport records. This is relevant to this dissertation that takes upon itself to provide an extensive examination of MLETR, its provisions and its relation and potential interplay with other legislative instruments. The provisions in Chapter 3 of the Rotterdam Rules authorise that anything that can be done with a paper transport document may be done using an electronic transport document. Thereby the provisions in Chapter 3 set out that an electronic transport record is functional equivalent to a paper transport document. The provisions specify that actions that are performed with an electronic transport record have the same effect as if the same action was performed with a paper transport document. Furthermore, procedures governing the use of electronic transport records are provided, specifically in relation to the issuance and transfer of the record, assurance that the record retains its integrity, and in relation to the legitimation of the holder. Chapter 3 also contains a provision concerning the possibility of replacing a negotiable transport record with a negotiable electronic transport record. Thereby, the chapter is the starting point in facilitating the transfer of an electronic transport record in form of an electronic bill of lading.

However, chapter 3 does not stand alone in facilitating the use of electronic transport records and electronic commerce. The chapter may clarify that the use of an electronic transport record has the same legal effect as if a paper transport document were to be used but the effect of transfer of a paper transport document and thereby an electronic transport record still must be subject to regulation. Why this is, is illustrated with an example. In order to claim delivery of the goods, a bill of lading must be presented. This to establish, that the person who claims delivery of the goods is actually legitimised hereto. Traditionally a physical paper bill of lading must be presented to the carrier in order for a holder to be deemed legitimised to claim delivery of the goods. This entails that the bill of lading must be "possessed" in order to be presented. If an electronic transport record in form of an electronic bill of lading is being used, it remains unclear how to possess an electronic bill of lading. The rules on electronic transport documents must be translated into how to be applied in an electronic version for a legal regime to truly not only accommodate but also facilitate the use of electronic commerce and enable electronic transactions. The result is that the rules must

[428] See ed. Rhidian Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules,* ed. Alexander von Ziegler, Schelin and Zunarelli, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* Yvonne Baatz et al., *The Rotterdam Rules: A Practical Annotation,* ed. Michael F. Sturley, Fujita and van der Ziel, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* Ioanna Magklasi, *The Rotterdam Rules and International Trade Law*

be technology neutral. On this ground it is also relevant to consider the substantive provisions in Chapter 9 that addresses delivery of the goods, Chapter 10 that addresses the right of control, and Chapter 11 that addresses the transfer of rights, to fully understand the interplay with the MLETR.

4.2. CLARIFICATION OF THE CONCEPT OF AN ELECTRONIC TRANSPORT RECORD

It is necessary to clarify the concept of an electronic transport record as regulated in the Rotterdam Rules and compare the term with the concept of an electronic transferable record as regulated in the MLETR. This to avoid confusion and to provide clarity seeing as the concepts are two different concepts that may refer to the same, as they both for example may embody an electronic bill of lading. First the concept of an electronic transport record as defined in the Rotterdam Rules is subject to closer examination and then the term is compared with the MLETR's definition on an electronic transferable record.

As recalled, the bill of lading is used as an example of a transferable document throughout this dissertation. A bill of lading records a contractual promise to delivery of the goods. The bill of lading is issued to the promisee who may transfer its rights to performance by transfer of the bill of lading that embodies the right to claim delivery. Consequently, the bill of lading is a symbol of the goods that is carried onboard a ship. The problem with dematerialising such a document as a bill of lading is how to virtually embody the right that the bill of lading represents. In order to dematerialise such a document, a method ensuring that the performance obligation cannot be duplicated must be sought of (also known as the singularity requirement[429]), and furthermore a method must be in place to ensure that only one holder of the document at a time may assert the rights the document represent (the requirement of that the document must be subject to exclusive control[430]). This also requires a method whereby the holder is able to demonstrate that it is the rightful holder.

A transport document is in accordance with Article 1(14) (a-b) in the Rotterdam Rules a document that is issued under a contract of carriage by the carrier and that (a) evidences the carrier's or a performing party's receipt of goods under a contract of carriage and (b) that evidence or contains a contract of carriage. In accordance with Article 1(15) a negotiable transport document is a transport document that indicates by its wording that it is "to order" or "negotiable" or that by another appropriate wording recognises as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, consignee, or to bearer and is not explicitly stated as being "non-negotiable" or "not negotiable". Consequently, a

[429] See Chapter 3, section 3.7.3.2.

[430] See Chapter 3, section 3.7.3.3.

"non-negotiable transport document" is a transport document that is not to be characterised as a negotiable transport document, see Article 1(16). If the document is not negotiable it is just a transport document. The term "transport document" is a somewhat generic neutral term. It ensures that the applicability of the Rotterdam Rules to a document does not depend on the name of the document, but on the functions of the document.[431]

Article 1(18) of the Rotterdam Rules defines what is to be understood by an "electronic transport record". An electronic transport record is the functional equivalent to a transport document. The Article states that an "electronic transport record" refers to information in one or more messages that is issued by electronic communication. This includes information that is associated with the electronic transport record by attachments or otherwise linked to the electronic transport record. The relevant information may perhaps not be contained in one single electronic transport record. The Rotterdam Rules foresees that situation where details of a contract may be saved at different locations and thus only appear as one electronic transport record upon retrieval of the electronic transport record.[432] Article 1 (19) defines what is to be understood by a negotiable electronic transport record. A negotiable electronic transport record is the functional equivalent to a negotiable transport document. The Article states that an electronic transport record is to be defined as a negotiable transport record if the record indicates by wording such as "to order" or "negotiable" or in another appropriate wording that is recognised to have the same effect by the law. Furthermore, an electronic transport record may be considered as being negotiable if the goods have been consigned to the order of the shipper or to the order of the consignee. This relates to Article 1(20) that states that a non-negotiable electronic transport record means an electronic transport record that is not a negotiable electronic transport record. Article 1(19) also links the use of a negotiable electronic record to the requirements in Article 9 that concerns the transfer of a negotiable electronic transport record. This is elaborated in 4.4.2.

It should also here be pointed out that the Rotterdam Rules use the wording "electronic transport record" and not "electronic transport document". However, the definition of an electronic transport record resembles the definition of a transport document.[433] It

[431] Debattista, *General Provisions*, Chapter 1 in *The Rotterdam Rules: A Practical Annotation*, ed. Baatz, et al., Goldby, *Electronic Documents in Maritime Trade,* pp. 188-189, para 6.89

[432] Faria, *Electronic Transport Records*, p. 57

[433] Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. 397

is not stated in the Rotterdam Rules that the record is a document but, as is later elaborated, that the record shall function as a document.[434] This has been seen as a step towards the recognition of an electronic negotiable document.[435] However, one might here imagine an electronic transport document that is printable as for instance a physical bill of lading. That may not exactly be the case. It may be a system where it is possible to access the information needed by browsing or accessing information.[436] This is in line with the definition in Article 18 where it is specifically stated that information must logically be associated with the electronic transport record by attachments or otherwise linked to the electronic transport record. A transport document presupposes the existence of a written document, whereas an electronic transport record relies on electronic communication and information.[437]

The use of the word "negotiable" was discussed during the drafting of the Rotterdam Rules.[438] Awareness was given to the fact that the use of the wording "negotiable" regarding bills of lading was inaccurate as it is not recognised as applying to bills of lading in all countries.[439] It was considered to use the word "transferable" instead as this word was thought more neutral.[440] However:

> "The draft instrument uses the expression "negotiable" on the grounds that even if in some legal systems inaccurate, it is well understood internationally (as is evidenced by the use of the word "non-negotiable" in article VI of the Hague Rules), and that a change of nomenclature might encourage a belief that a change of substance was intended."[441]

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[434] Sturley, et al., *The Rotterdam Rules – the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. 49, Magklasi, *The Rotterdam Rules and International Trade Law*, p. 93

[435] Magklasi, *The Rotterdam Rules and International Trade Law*, p. 93

[436] Magklasi, *The Rotterdam Rules and International Trade Law*, p. 93

[437] Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. 397

[438] Preliminary draft instrument on the carriage of goods by sea, Note by the Secretariat, A/CN.9/WG.III/WP.21, p. 12, para 13

[439] See Chapter 2, section 2.4, see also Goldby, *Electronic Documents in Maritime Trade,* p. 189, para 6.91

[440] Preliminary draft instrument on the carriage of goods by sea, Note by the Secretariat, A/CN.9/WG.III/WP.21, p. 12, para 13

[441] Preliminary draft instrument on the carriage of goods by sea, Note by the Secretariat, A/CN.9/WG.III/WP.21, p. 12, para 13, see also Chapter 2, section 2.4

Even though the Rotterdam Rules uses the wording "negotiable" this should not be taken as to mean that a negotiable document or record can be ascribed to features other than those specifically referred to in the Convention.[442] In the eyes of the Rotterdam Rules, through transfer of a negotiable transport document or record the rights which the document or record represents are transferred as well. Whether a negotiable document or record has such legal effects is assessed in light of and in accordance with domestic law.[443] As stated by Goldby:

> "Transport documents and electronic transport records may be 'negotiable' or not. The terminology thus refers to these instruments in terms of their functions: they contain data regarding what is being transported and terms applicable to the transport; and they are able to bind the carrier vis-á-vis either a specific named person (non-negotiable) or the holder in due course, whoever he may be (negotiable)."[444]

An electronic transferable record is not directly defined in the MLETR. However, as recalled from Chapter 3, the MLETR applies to both bills of lading that are negotiable and to bills of lading that can only be said to be transferable. The electronic record as defined in the MLETR is, as previously examined[445], information that is generated, communicated, received, or stored by electronic means, in accordance with Article 2 of the MLETR. As recalled, this is elaborated in Article 10 (1)(a) in which it is stated that where a transferable instrument or document is required by law, that requirement is being met by an electronic record, if the electronic record contains the same information that would be required to be contained in a transferable document or instrument. The MLETR sets up requirements in its Article 10 (1)(a) to state functional equivalence between the transferable document or instrument and an electronic record. This by stating that the electronic record must contain the same information as would normally be required to be contained in a transferable document or instrument. Furthermore, in accordance with Article 10 (1)(b) (i-iii) a reliable method must be used to identify the electronic record as the electronic transferable record and the electronic record must be capable of being subject to control from its creation until it ceases to have any effect or validity. Finally, a reliable method must be used to retain the integrity of that electronic record. Consequently, the electronic transferable record must be "controllable" and be able to be specifically identified. As explained in the Explanatory Note to the MLETR:

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[442] Goldby, *Electronic Documents in Maritime Trade,* pp. 189-190, para 6.91

[443] Goldby, *Electronic Documents in Maritime Trade,* p. 190, para 6.91

[444] Goldby, *Electronic Documents in Maritime Trade,* p. 188, para 6.88

[445] See Chapter 3, section 3.6

> "The definition of "electronic transferable record" reflects the functional equivalent approach and refers to electronic transferable records that are equivalent to transferable documents or instruments."[446]

Therefore, an electronic transport record in the understanding of the Rotterdam Rules and an electronic transferable record in the understanding of the MLETR may both embody the bill of lading no matter whether the bill of lading is negotiable or non-negotiable or in paper-form or only exists electronically. A transferable record as defined in the MLETR is a compendious term whereas the transferable record as defined in the Rotterdam Rules is a specific term that may embody various transport documents or records. Thereby, a transport document is an example of a transferable record.

4.3. GENERAL PROVISIONS ON ELECTRONIC TRANSPORT RECORDS

The focus of this dissertation is on electronic documents and electronic communications, more specifically the MLETR. The Rotterdam Rules address transport law and have an international scope. The provisions on electronic commerce coexist with provisions on non-electronic commerce and substantive rules on the contract of carriage.[447] As stated by Alba:

> "It is important to bear in mind that the development of the Draft has focused both on drafting the "substantive" rules and simultaneously introducing e-commerce rules in order to facilitate the use of electronic means for any purpose potentially covered by the paper medium."[448]

This requires an understanding of how the general electronic commerce rules and the substantive provisions on the issuance, transfer, and control of electronic transport record interact. The provisions on electronic transport records are spread throughout the convention. This also explains the construction of some of the concepts upon which the electronic commerce rules are founded in the convention seeing as the general provisions on electronic commerce are heavily influenced by the substantive rules.[449] As noted by Alba this requires that the convention is approached from a dual

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[446] Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records, para 86

[447] Alba, *Electronic commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of goods Wholly or Partly by Sea*, p. 394

[448] Alba, *Electronic commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of goods Wholly or Partly by Sea*, p. 394

[449] Alba, *Electronic commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of goods Wholly or Partly by Sea*, p. 394

perspective.[450] The following concerns the general provisions concerning functional equivalence and procedures of the use of electronic documents in the Rotterdam Rules. The general provisions concerning the use of electronic transport records are, as is recalled from above[451], to be found in Chapter 3 of the Rotterdam Rules. The Chapter sets out the basic requirements a negotiable electronic transport record must fulfil in order to function as an equivalent to a negotiable transport document. Phrased differently, the Chapter regulates the preconditions for equivalence of electronic alternatives to paper documents.[452]

Article 8 (a) of the Rotterdam Rules establishes that any information that is in or on a transport document under the Rotterdam Rules may be recorded in an electronic transport record.[453] Thereby equivalence between information in or on a transport document and information contained in an electronic transport record is ensured. One of the preconditions for the use of electronic transport records is consent.[454] If consent between the carrier and the shipper is present, an electronic transport record is deemed equivalent to a paper document.

Article 8 (b) gives the issuance, exclusive control, or transfer of an electronic transport record the same effect as the issuance, possession, or transfer of a transport document. Issuance, exclusive control, and transfer are the three elements used to create general functional equivalence between a transport document and an electronic transport record. Here it should be noted that the Article uses the wording "possession" when referring to a transport document and "control" when referring to an electronic transport record. Such change in terminology touches upon the fundamental question as to whether something only existing digitally may be subject to possession.[455] The change of terminology in Article 8 (b) indicates that in accordance with the Rotterdam Rules,

[450] Alba, *Electronic commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of goods Wholly or Partly by Sea*, p. 394

[451] See Chapter 3, section 3.6

[452] Goldby, *Electronic alternatives to transport document and the new Conventions: a framework for future development?*, p. 587

[453] Sturley et al., *The Rotterdam Rules– the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* p. 49, para 3.008. The authors define this as the "equalisation method"

[454] Goldby, *Electronic alternatives to transport document and the new Conventions: a framework for future development?*, p. 587

[455] As is also discussed in the following Chapters 5 and 6 concerning the national rules on "possession".

an electronic transport record cannot be subject to possession, as it is electronic. Thereby, Article 8 establishes the use and effects of electronic transport records.

Where Article 8 (b) establishes that issuance, exclusive control, and transfer of an electronic transport record have the same effects as issuance, possession, and transfer of a transport document, Article 9 sets the procedures for the use of negotiable electronic transport records in order to be deemed equivalent to negotiable transport documents. Consequently, in order to be deemed equivalent it is not enough that there is consent on the use of negotiable electronic transport records. Further requirements must be fulfilled.

Regarding the use and transfer of an electronic transport record, Article 9 sets up certain requirements to procedures that a system or a computer technology must meet. This is done by stating that there shall be procedures that provide for the method for the issuance and the transfer of that record to an intended holder, in accordance with Article 9(1)(a). Article 9(1)(a) states that a method for the issuance and the transfer of the negotiable electronic transport record to an intended holder must be ensured. The wording of the Article may by first glance appear to be vague. However, to ensure the issuance and transfer of the negotiable electronic transport record are not necessarily as easy or simple in practice.

It is also stated in Article 9(1)(b) that an assurance must be in place to ensure that the electronic transport record retains its integrity. Consequently, the electronic record must be generated and kept in such a way that the information the record contains has been kept intact and has not been subject to alterations. Article 9(1)(c) states that the manner in which the holder is able to demonstrate that it is the holder shall be subject to procedures. In accordance with Article 1(10)(b) of the Rotterdam Rules, the "holder" of a negotiable electronic transport record is:

> "The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in Article 9, paragraph 1".

The person who claims to be the holder must be able to demonstrate that it has exclusive right over the electronic record. A system handling negotiable electronic transport records must be capable of ensuring such technical procedures. If a registry system is being used the registry system will recognise the holder as the person who has exclusive control of the electronic transport record.[456] This requires the holder to have access to the system in some way to which the holder needs some kind of "authentication" or "signature" or in another way be able to proof its identity.[457]

[456] Faria, *Electronic Transport Records*, p. 68

[457] Faria, *Electronic Transport Records*, p. 68

Consequently, Article 9 states that procedures must be set in place for the use of the negotiable electronic transport records and states the procedures must ensure a method. But the Article does not elaborate on how such procedures should be set in place and what is meant by such a method and what such a method should precisely entail. The requirements imposed in Article 9 are result-oriented, however, the manner in which the results are to be achieved are left for the system-designers to decide.[458]

There may arise need for an electronic negotiable transport record to be replaced with a negotiable transport document and vice versa. Article 10 of the Rotterdam Rules concerns the replacement of the negotiable transport document or negotiable electronic transport record. The requirement of uniqueness applies no matter whether a negotiable transport document is issued, or a negotiable electronic transport record is issued.[459] The consequence is that if a negotiable electronic transport record is being replaced by a paper document that document still must be able to be characterised as being unique. This also relates to the question of what happens to a negotiable electronic transport record if it is being replaced by a transport record in another media. The negotiable electronic transport record will then cease to have any effect out of the consideration of the risk of circulation of parallel transport documents and records, in accordance with Article 10(1)(c). In accordance with the MLETR, an electronic transferable record may also replace a transferable document or instrument, as long as a reliable method for the change of medium is used.[460]

It is to be seen from the above that Articles 8 and 9 of the Rotterdam Rules set up requirements that negotiable electronic transport records have to fulfil in order to be considered as being negotiable as negotiability is understood in terms of the Rotterdam Rules. However, as noted the Rotterdam Rules do not provide guidance as to how such procedures are ensured. Articles 8 and 9 are general provisions that are followed by more substantive provisions. The interplay between the general provisions on electronic transport records and the substantive provisions are subject to analysis in the following section alongside with the interaction of the provisions with the MLETR.

4.4. SUBSTANTIVE PROVISIONS ON ELECTRONIC TRANSPORT RECORDS

Above the general provisions on electronic transport records as regulated in the Rotterdam Rules have been subject to closer examination. It was evident that functional equivalence between information in or on a transport document and information contained in an electronic transport record is ensured by means of Article 8 (a). Issuance,

[458] Goldby, *Electronic alternatives to transport documents and the new Convention: a framework for future development?,* p. 588

[459] Faria, *Electronic Transport Records*, p. 69

[460] The MLETR, Article 17

exclusive control, or transfer of an electronic transport record each has the same effect as issuance, possession, or transfer of a transport document. Article 9 provides that the use of negotiable electronic transport records must be subject to procedures that provide for (a) the method for the issuance and transfer of the record to an intended holder, (b) assurance that the negotiable electronic transport record retains its integrity, (c) the holder must be able to demonstrate that it *is* the holder, and (d) procedures to the manner of providing confirmation that delivery to the holder has been effected, or that the electronic transport record has ceased to have effect or validity.

The following concerns the substantive provisions in the Rotterdam Rules concerning the issuance, transfer, and control of a negotiable electronic transport record. The issues are treated one by one. It is here stressed that the issues are each other's prerequisites and that they are closely interwoven. Therefore, trying to separate the issues of issuance, transfer, and control of a negotiable electronic transport record is difficult. The analysis is supplemented with the general provisions on negotiable electronic transport records as regulated in the Rotterdam Rules and relevant provisions in the MLETR concerning the use of electronic transferable records.

4.4.1. ISSUANCE OF AN ELECTRONIC TRANSPORT RECORD

Article 1(21) of the Rotterdam Rules concerns the issuance of an electronic transport record. The Article states that in relation to the "issuance" of a negotiable electronic transport record, the issuance of the record must be in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have effect or validity. This Article relates to the notion of "control" of an electronic negotiable transport record, a notion that requires that certain requirements are fulfilled from the time of creation of the record until the record ceases to have any effect.[461] A source to this provision was found in the US' Uniform Electronic Transactions Act (UETA).[462]

As recalled from section 4.3, Article 9(1)(a) of the Rotterdam Rules states that a method for the issuance and the transfer of the negotiable electronic transport record to an intended holder must be ensured. However, in Article 1 (21) or Article 9(1)(a) it is not elaborated *how* such procedures are to be ensured. That is left for the industry to decide. The provision dictates the result but does not give any guidance as to how the result in form of exclusive control is to be achieved. Consequently, it is to be seen that the Rotterdam Rules refers to that the issuance of the record must be in accordance with procedures in order to ensure that the record is subject to exclusive control. However, nowhere is it elaborated what these procedures specifically must entail.

[461] Faria, *Electronic Transport Records*, pp. 58-59

[462] Faria, *Electronic Transport Records*, p. 58

Article 35 of the Rotterdam Rules concerns the issuance of the transport document or the electronic transport record and the duty to issue a transport document or an electronic transport record. In the provision's paragraph (a) it is stated that if the parties have agreed not to use a transport document or an electronic transport record, or if it is the custom, usage, or practice of the trade not to use one, the shipper is entitled to either obtain from the carrier, upon the shipper's choice, either a non-negotiable transport document or a non-negotiable electronic transport record. In paragraph (b) it is stated that at the shipper's choice a negotiable transport document or a negotiable electronic transport record may be issued, unless the parties have agreed otherwise, or unless it is against the custom, usage, or practice of the trade not to use one. From the provision it is to be seen that the parties may have agreed not to use any transport document whether in electronic form or not, and whether negotiable or not. It may also be the custom, usage, or practice not to use any kind of transport document or electronic transport record. Should that be the case, the carrier has no obligation to issue such one.[463] It may also have been agreed or being the custom, usage, or practice not to use a negotiable transport document or negotiable electronic transport record. In that case the shipper is entitled to a non-negotiable transport document or a non-negotiable electronic transport record.[464] It may also be the situation that there is no agreement between the parties or custom, usage, or practice regarding the use of either transport documents or electronic transport records. In that case the carrier shall issue either a negotiable or a non-negotiable transport document or a negotiable or non-negotiable electronic transport record upon the shipper's request.[465] The result is that there must be consent between the shipper and the carrier in order to use an electronic transport record instead of a transport document.

The MLETR states in its Article 11 that where the law requires or permits the possession of a transferable document or instrument that requirement is met by an electronic transferable record if a reliable record is used to establish exclusive control of the electronic transferable record by a person and to identify that the person is in control of the electronic transferable record. Article 12 elaborates on what a reliable method specifically entails and specifies that the method must be as reliable as appropriate of the function for which the method is being used in the light of all of the relevant circumstances. Thereby the MLETR supplements the Rotterdam Rules regarding what

[463] Fujita, *Transport Documents and Electronic Transport Records*, p. 163. See also Sturley et al. *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods*, pp. 216-217, paras 7-015-7-017

[464] Fujita, *Transport Documents and Electronic Transport Records,* p. 164. See also Sturley et al. *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods*, pp. 216-217, paras 7-015-7-017

[465] Fujita, *Transport Documents and Electronic Transport Records,* p. 164. See also Sturley et al. *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods*, pp. 216-217, paras 7-015-7-017

procedures must be set in place in order for exclusive control to be established throughout the lifetime of an electronic transport record. Article 11 of the MLETR states the functional equivalence between possession and exclusive control of the electronic transferable record if a reliable method is used. Article 12 gives certain guidance by giving examples on relevant circumstances. These relevant circumstances may for instance include any operational rules relevant to the assessment of reliability, the assurance of data integrity, the ability to prevent unauthorised access to and use of the system and the security of hardware and software.[466]

The general and substantive provisions on issuance of an electronic transport record in the Rotterdam Rules provide that the electronic transport record must be "controllable", however without specifying what "control" actually means in that context. The MLETR elaborates on the concept and provides that the requirement of possession of a transferable document or instrument is met by an electronic transferable record if the record is capable of being subject to exclusive control. Furthermore, the MLETR provides that a reliable method must be used to ensure that the electronic transferable record is "controllable" and specifies with examples.

4.4.1.1 ISSUANCE OF MULTIPLE ORIGINALS

Article 36 of the Rotterdam Rules concerns the contract particulars, meaning what information must be included in the transport document or the electronic transport record. The list of requirements is extensive and not exhaustive. The provision is not examined further here, other than it should be noted that the information in the transport document also must appear some way electronically if an electronic transport record is used.[467]

Article 36(2)(d) concerns the issuance of multiple original negotiable transport documents and states that if the transport document is negotiable the document should state the number of originals if more than one original document has been issued. In practice there has been a tradition of issuance of multiple original paper transport documents to the consignor, the consignee and to the carrier respectively.[468] However, it is worth noticing that the provision does not refer to *electronic* negotiable transport records. In fact, there is no provision in the Rotterdam Rules that concerns the issuance of multiple original negotiable electronic transport records. Whether a provision concerning the issuance of multiple original electronic transferable records should also

[466] In accordance with Article 12 (b)(i-vii).

[467] See for instance Lorenzon, *Transport Documents and Electronic Transport Records*, pp. 101-108 and Fujita, *Transport Documents and Electronic Transport Records*, pp. 166-171, Sturley et al., *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, pp. 220-227, paras 7-024 – 7-043,

[468] Rose and Reynolds, *Carver on Bills of Lading,* p. 401, para 6-075

be included in the MLETR was debated during the negotiations of the model law.[469] CMI argued that by including such provision in the MLETR, there might be a risk of inconsistency between the Rotterdam Rules and the MLETR. CMI argued that based on the full equalisation approach, the Rotterdam Rules included parallel provisions for transport documents and electronic transport records – except regarding the issuance of multiple originals.[470] And true it is that in early drafts of the Rotterdam Rules the carrier was not required to include such information as to number of originals issued.[471] However, it was later in the drafting process of the Rotterdam Rules suggested that such a provision should be included.[472] It was argued that third party holders thereby would be protected against the circulation of multiple originals. This even though it was also stated that issuing multiple originals was an undesirable practice and that such practice should be discouraged.[473] It should still here be noted that this provision apparently does not also apply to negotiable electronic transport records as there is no parallel provision concerning such application. On this ground CMI argued upon time of adoption of the MLETR that it had never been thought during the drafting process of the Rotterdam Rules that a situation would occur where multiple electronic transport records would be issued and consequently it would be irrelevant to include such a provision.[474] Furthermore, CMI argued that the provisions on the right of control and delivery of the goods in the Rotterdam Rules would not work properly if more than one negotiable electronic transport record were issued.[475] CMI referred to Article 51(3) of the Rotterdam Rules that requires the holder to present all original negotiable transport documents when it wishes to exercise the right of control.[476] CMI

[469] See Draft Model Law on Electronic Transferable Records, Note by the Secretariat, A/CN.9/WG.IV/WP.139/Add.2, p. 4, where a draft of the provision concerning the issuance of multiple originals can be found.

[470] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 8

[471] See Draft Convention A/CN.9/WG.111/WP.56, Art. 38 from 2005, however in Draft Convention A/CN.9/WG.111/WP.81 such a provision had been included.

[472] Report of Working Group III (Transport Law) on the work of its seventeenth session, A/CN.9/594, para 230

[473] Report of Working Group III (Transport Law) on the work of its seventeenth session, A/CN.9/594, para 230

[474] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

[475] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

[476] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

also referred to that Article 51(4) is the parallel provision applying to negotiable electronic transport records does not include such a requirement.[477] Instead, the provision simply requires that the holder should prove that it is the holder according to the method that Article 9(1) provides. On that ground CMI argued that if more than one original electronic transport record were issued, the holder of each original would be entitled to exercise control.[478] Thereby if more than one original is being issued that would, in the eyes of CMI, prevent compliance with central provisions in the Rotterdam Rules.[479] Fact is that it is not stated in the *travaux préparatoires* to the Rotterdam Rules why a parallel provision to Article 36(2)(d) was not inserted to apply to negotiable electronic transport records and therefore it is not directly clear what the underlying intention was.

The comments from CMI are relevant to include as they illustrate where there might be interpreted inconsistency between the provisions in Rotterdam Rules and the MLETR. In the very last draft of the MLETR a provision concerning issuance of multiple original electronic transferable records was included.[480] However, upon time of final adoption of the MLETR the provision was deleted. There were arguments against both deleting and not deleting the provision.[481] In the very end, the Commission agreed to delete the provision, as there were expressed broad support for that no matter whether the provision was included or not, issuance of multiple originals was possible under article 10 of the model law.[482] Article 10 concerns the requirements for the use of an electronic transferable record. It was therefore decided to deal with the matter of issuance of multiple originals electronic transferable records in the Explanatory Note to the MLETR.[483] In the Explanatory Note to the MLETR it is stated that the

[477] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

[478] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

[479] Draft Model Law on Electronic Transferable Records, Compilation of comments by Governments and international organizations, A/CN.9/921/Add.1, p. 9

[480] Draft Model Law on Electronic Transferable Records, Note by the Secretariat, See A/CN.9/WG.IV/WP.139/Add.2, p. 4

[481] Report of the United Nations commission on International Trade Law, Fiftieth session A/72/17, paras 91-92

[482] Report of the United Nations Commission on International Trade Law, Fiftieth session A/72/17, paras 93-94

[483] Report of the United Nations Commission on International Trade Law, Fiftieth session A/72/17, para 94

MLETR does not affect practice of issuing multiple originals.[484] Nor does the MLETR prevent the possibility of issuing multiple originals on whatever chosen media.[485] The MLETR does, however, warn against such practice as it may lead to multiple claims for the same performance based on presentation of each original.[486]

As demonstrated, there is tension between the interpretation of the provisions in the Rotterdam Rules and the MLETR regarding the possibility of issuing multiple original electronic transport records. There are no requirements in the Rotterdam Rules concerning issuance of multiple original negotiable electronic transport records. From the *travaux préparatoires* and the Explanatory Note to the MLETR it is to be seen that the MLETR does not prohibit the issuance of multiple original electronic transferable records.

A remark is here made regarding whether the issuance of multiple electronic originals is not to be considered as a more philosophical issue. In practice, why would it be necessary to issue multiple original electronic transport records? Furthermore, the issuer must be very well aware of that there are risks if multiple original electronic transport records are being issued. That risk must arguably be the same as if paper transport documents were being issued in multiple original versions. If multiple original electronic transport records are issued that means running the same risk as if the practice continues with issuing multiple original paper transport documents. The only way of eliminating that risk would be to stop the practice of issuance of multiple originals no matter on what media the transport document or record are issued and that would be for the industry or domestic legislation, that the MLETR as recalled does not affect, to decide.

4.4.1.2 SIGNATURE

Turning to the issue of signature, Article 38 states in its para (1) that a transport document must be signed by the carrier or the person who may act on behalf of the carrier. In Article 38 (2) it is stated that an electronic transport record also must be signed electronically by the carrier or the person who may act on behalf of the carrier.

Regarding the issue of electronic signature, the MLETR Article 9 concerns the functional equivalence of a signature, where the law requires a signature. It is stated in the Article that if the law requires a signature that requirement is met by an electronic transport record if a reliable method is used to identify that person and to indicate that person's intention. Consequently, the Rotterdam Rules Article 38 requires that the electronic transport record is signed by the carrier or by a person who may act on

[484] Explanatory Note to the MLETR, para 191

[485] Explanatory Note to the MLETR, para 191

[486] Explanatory Note to the MLETR, para 191

behalf of the carrier. The MLETR further requires that a reliable method is used to identify the person and that person's intentions in order for the electronic signature to be functional equivalent to a signature. Consequently, the MLETR add a "reliable method" to the equation as a parameter in the assurance of functional equivalence between the paper document and the electronic record.

4.4.2. TRANSFER OF AN ELECTRONIC TRANSPORT RECORD

The "transfer" of a negotiable electronic transport record relates to the transfer of exclusive control over the record, in accordance with Article 1 (22) of the Rotterdam Rules. This means that an electronic transport record that can be held by more than one person or entity at a time does not live up to this requirement. As previously noted, to constitute exclusive control of the electronic transport record only one person or entity at a time may be able to control the record, see Chapter 3, section 3.7.3.3.

Chapter 11 of the Rotterdam Rules addresses some of the practical problems that arise regarding the transfer of the rights deriving from the contract of carriage. Article 57 concerns the transfer of rights incorporated in the negotiable transport document, in case a negotiable transport document or negotiable electronic transport record is issued. For the sake of clarity, as this provision is quite central in relation to the functional equivalence approach, the provision is quoted below. The Article states that the holder may transfer the rights incorporated in the document by transferring it to another person:

> "1. When a negotiable document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
>
> a) Duly endorsed either to such other person in blank, if an order document; or
>
> b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
>
> 2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1".

It is to be seen that paragraph 2 of Article 57 concerning the transfer of rights incorporated in a negotiable electronic transport record must be read in conjunction with Article 9(1) (a-d). There are ambiguities in relation to the use of negotiable electronic transport records as opposed to the use of negotiable transport documents. It is very specifically regulated how a negotiable transport document may be transferred, depending on the type of negotiable document. However, regarding the transfer of rights

incorporated in a negotiable electronic transport record, reference is made to Article 9(1) (a-d) (again) which as earlier recalled states that the use of such records shall be subject to procedures regarding (amongst others) methods for issuance and transfer of the record. The principle of functional equivalence is laid down and it is clear that a negotiable electronic transport record is given the same legal value as an equivalent document. But regarding the practical use, the convention provides little guidance as to *how* such procedures are to be ensured and what that exactly entails. It is simply stated that there must be procedures in place.

The provision establishes general principles by stating that there must be laid down certain procedures. This must be said to be the very legal basis for the use of electronic transport records. The legislators may have found themselves balancing between wanting to negotiate clear regulation but at the same time having to adopt legislation that would be able to accommodate future technological developments. However, by not taking a stand on issues that in reality have caused practical difficulties, an opportunity for addressing matters that could also help to provide guidelines to the industry on *how* to develop such technology to accommodate the use of electronic transport records was missed. As Article 57 stands, the provision does not (even when read in conjunction with Article 9(1)) provide guidance as to how a negotiable electronic transport record should be transferred with all the rights that the record represents to another person or entity.

G.J. van der Ziel notes that the two provisions contained in Chapter 11 are:

> "(…) based on non-contentious parts of the general law of documents of title and each of the two provisions deals with matters that in bill of lading practice have created difficulties. Why not take the opportunity to address these matters?"[487]

The short answer to this may be that at the time of creation of the Rotterdam Rules, technology was under rapid development.[488] At that time, many did not believe that it would be possible to use an open-source token-system to transfer of electronic negotiable records. Therefore, it may have been difficult setting up requirements to what procedures must be in place in order to carry out its functions.

Where the Rotterdam Rules lack in clarity, the MLETR may here come at aid. The MLETR states in its Article 10 (1) (a-b) that where the law requires a transferable

[487] Van der Ziel, *Delivery of the Goods, Rights of the Controlling Party and Transfer of Rights*, p. 604, footnote 25

[488] Zunarelli, *Transfer of Rights,* pp. 240-241, see also Goldby, *Electronic Documents in Maritime Trade,* p. 198, para 6.110 stating that the Article allows for future development

document or instrument, that requirement is met by an electronic record if the electronic record contains the information that would be required to be contained in a transferable document or instrument. Furthermore, it is a requirement that (i) a reliable method is used to identify the electronic record as *the* electronic transferable record, (ii) that the electronic record is capable of being subject to control from its creation until it ceases to have effect, and (iii) to retain the integrity of that electronic record. Consequently, there is an issue of identification, control, and integrity of the electronic transferable record. These requirements to the use of electronic transferable records are somewhat similar requirements as to the requirements to the use of negotiable electronic transport records in Article 9 of the Rotterdam Rules. What the MLETR introduces in its Article 10, that is not dealt with in the Rotterdam Rules, is the notion of "reliable method". As recalled from Chapter 3, section 3.8, the MLETR elaborates on what such a method more specifically entails, by setting up a general reliability standard in its Article 12. The general reliability standard can arguably be called a dynamic standard. In Article 12 (a) it is stated that the method shall be as reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, and then goes on to give examples on such relevant circumstances. What more specifically constitutes a reliable standard must be measured against the function for which the reliable method is being used. When supplementing the Rotterdam Rules Article 9 concerning procedures for the use of negotiable electronic transport records with the MLETR Article 10 concerning the use of electronic transferable records that refers to a general reliability standard, guidance is given to the actual use of electronic transport records. A reliable method must be used to ensure that a negotiable electronic transport record retains its integrity. Furthermore, a reliable method must be used to ensure that the holder is able to demonstrate that it *is* the holder, and that delivery to the holder has been affected or that the electronic transport record has ceased to have any effect or validity.[489]

However, it should be noted that first in court will it be assessed whether a procedure can be deemed as being reliable. All that developers of systems can do is to bear in mind that whatever procedures that must be set in place in order to ensure a given function, that procedure must be as reliable as the circumstances require the procedure to be. This is an expression of that "one procedure fits all" is impossible. The procedure has to be assessed against the function that the procedure has to ensure and fulfil.

4.4.3. CONTROL OF AN ELECTRONIC TRANSPORT RECORD

Article 1(12) of the Rotterdam Rules defines the meaning of the term "right of control" of the goods. In accordance with the article this refers to the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with Chapter 10. It is important to be able to establish who can assert the rights

[489] All in accordance with Article 9 (1) a-d) of the Rotterdam Rules

over the goods. Often while the goods are in transit, the goods are being sold. A consequence is that the original consignee to the bill of lading is no longer consignee. There may be a chain of consignees and therefore it is important to be able to establish who can assert the rights in accordance with the transport document.

In Article 1 (21) it is stated that procedures must be set in place to ensure that the electronic transport record is subject to control from the time of its creation until it ceases to have effect or validity. Thereby the electronic transport record must only be able to be held by one person at a time. The person who has exclusive control of the electronic transport record is also the person who should be the rightful holder.[490] The person to whom the record is transferred must be assured that only she or he holds the record and that no identical record may have been sent to another person. This is to be ensured by an electronic system upon issuance and transfer of the electronic transport record. Ensuring a method for the issuance and the transfer of the negotiable electronic transport record is a comprehensive work.

Article 50 concerns the exercise and extent of right of control. The provision states that:

> "1. The right of control may be exercised only by the controlling party and is limited to:
>
> (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
>
> (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and
>
> (c) The right to replace the consignee by any other person including the controlling party.
>
> 2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires."

The provision regulates the rights of the person who may be defined as the "controlling party". The provision states that it is the "controlling party" who has the right to obtain delivery of the goods and the right to replace the consignee by another person.

Article 51 establishes the criteria for identification of the controlling party and transfer of the right of control. It is to be seen from the provision that the criteria as to who is to be identified as the controlling party depends on the type of transport document issued and whether the document is issued in electronic form or not. The provision states that the shipper is the controlling party unless the shipper designates another

[490] Faria, *Electronic Transport Records*, p. 66

person to be the controlling party, see Article 51(1)(a). The article establishes that the controlling party may transfer the right of control to another person. This transfer will become effective when the carrier has received notification of the transfer by the transferor, in accordance with Article 51(1)(b). Furthermore, the controlling party must identify itself when it exercises the right of control, in accordance with Article 51(1)(c). This means that when the controlling party asserts the right to obtain delivery of the goods at the destination port, the controlling party must be able to identify itself as having the right to obtain delivery of the goods.

Article 51(2) concerns the situation where a non-negotiable transport document has been issued. If the transport document indicates that it must be surrendered in order to obtain delivery of the goods, the shipper is, in accordance with Article 51(2)(a), the controlling party. The shipper may transfer the right of control to the consignee that is named in the transport document, by transferring the document to that person without endorsements. If more than one original document was being issued, then all the original documents must be transferred, see Article 51(2)(a). In accordance with Article 51(2)(b), the controlling party shall produce the document and be able to identify itself in order to exercise its rights of control. This also entails that the controlling party must be able to present all the original transport documents, see Article 51(2)(b).

If the transport document issued is to be defined as being negotiable, the holder of the original document is the controlling party, in accordance with Article 51 (3) (a). If more than one original negotiable transport document has been issued, the controlling party must hold all the originals. If the holder wishes to transfer the right of control to the goods, the holder must transfer the negotiable transport document, in accordance with paragraph 51(3)(b) of the provision. In case more than one original negotiable transport document has been issued, all of the original documents must be transferred in order to affect the transfer of control, see Article 51(3)(b). The holder must, to exercise the right of control, produce the negotiable transport document to the carrier, in accordance with Article 51(3)(c). In case more than one negotiable transport document has been issued, the holder must be able to produce all the original documents to the carrier, see Article 51(3)(c). Consequently, regarding physical documents the provision is rather clear regarding identification of the controlling party and how the right of control may be transferred through the transfer of the transport document.

Turning to the issue of an electronic transport record, if a negotiable electronic transport record is issued, the holder is the controlling party in accordance with Article 51(4)(a). The holder may, in accordance with article 51(4)(b) transfer the right of control to another person, if in accordance with the procedures in Article 9(1). Furthermore, it is stated in Article 51(4)(c) that the holder must, in order to exercise the right of control, be able to demonstrate that it is the holder, in accordance with the procedures laid out in Article 9(1). It is to be seen that in relation to negotiable electronic transport records, the provision is rather vague with the simple reference to Article 9(1). As recalled Article 9(1) states that procedures must be set in place regarding the

method for issuance and transfer of the record, assurance of the records integrity, and that the holder is able to demonstrate that it is the holder.

However, no guidance is given in any of the provisions concerning what more specifically constitutes "control" of a negotiable electronic transport record. The function of "control" is clear: to determine the condition of the holder and the holder's entitlement to exercise of rights including the entitlement to delivery of the goods.[491] How control is to be achieved in practice is unclear. Again, here the MLETR comes at aid. As recalled from Chapter 3, section 3.7.3.3., the MLETR Article 11 concerns the notion of "control" of an electronic transferable record. The provision states that where the law requires or permits the possession of a transferable document or instrument, that requirement is met by an electronic transferable record if a reliable method is used to (a) establish exclusive control of the record by a person and (b) to identify that person as the person in control. In accordance with paragraph 2 of Article 11, where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met by an electronic transferable record through the transfer of control of the electronic transferable record. Article 12 of the MLETR, that concerns the general reliability standard, refers back to Article 11 regarding what constitutes a reliable method and what may be emphasised in the assessment as to whether a reliable method has been used in order to establish procedures.

By supplementing the Rotterdam Rules' provisions with the application of a general reliability standard as laid down in the MLETR Article 12, guidance as to procedure is given at least to some extend to the industry.

In accordance with Article 47 (1) of the Rotterdam Rules:

> "1. When a negotiable transport document or a negotiable electronic transport record has been issued:
>
> (a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:
>
> (i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10(a)(i), upon the holder properly identifying itself; or

[491] Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. 410

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record; (…)"

The Article deals with the issue of who can claim delivery. Article 47(1)(a)(ii) deals specifically with the rights of the holder of the negotiable electronic transport record. The holder of such a record is entitled to claim delivery of the goods if the holder demonstrates in accordance with the procedures referred to in Article 9(1) that it is the actual holder. As recalled, the procedures in Article 9(1) refer to (a) the method for the issuance and the transfer of the record to an intended holder, (b) an assurance that the record retains its integrity, (c) the manner in which the holder is able to demonstrate that the holder is the rightful holder, and (d) the manner of providing confirmation that delivery to the holder has been effected and that the transport record has ceased to have any effect or validity.

An electronic transport record that satisfies the exclusive control requirement, and that is transferred in accordance with the procedures for the use of negotiable electronic transport records as set out in Article 9, may transfer the right to claim delivery of the goods. Consequently, such a record may transfer symbolic or constructive possession of the goods.

4.5. CONCLUSION

The question this chapter set out to answer was *how* the MLETR may support the Rotterdam Rules. Above, in order to answer this question, a study of the interplay between the Rotterdam Rules' provisions on electronic transport records and the MLETR has been carried out.

It seems safe to say that if a jurisdiction chooses to incorporate the Rotterdam Rules and the MLETR into national law, the provisions of the MLETR concerning electronic transferable records will supplement those of the Rotterdam Rules. The provisions in the Rotterdam Rules are drafted in such a way as to dictate the result to be achieved rather than the way to achieve it. Articles 8 and 9 of the Rotterdam Rules provide general provisions on the use of electronic transport record regarding the issuance, transfer, and control. Article 8 establishes that any information that is in or on a transport document may be recorded in an electronic transport record. Furthermore, Article 8 provides that the issuance, exclusive control, and transfer of an electronic transport record has the same effects as issuance, possession, and transfer of a transport document. Article 9 sets out the procedures for the use of negotiable electronic transport records by providing that there shall be procedures that provides for the issuance and transfer of the record to an intended holder. Furthermore, Article 9 states stat assurance must be in place to ensure that the electronic transport record retains its integrity. These provisions coexist with the substantive rules on electronic transport records. However, not much guidance is given as to how such procedures

are to be set in place. It is stated that the requirement of control and the requirement of singularity must be fulfilled for a negotiable electronic transport record to be deemed the functional equivalent to a transport document. It appears from the provisions in the Rotterdam Rules that procedures must be set in place as to ensure the methods of ensuring control and singularity, however, the convention does not specify how these procedures are to be set in place. The MLETR also states that the electronic transferable record must fulfil the requirement of control and of singularity but has also focus on the manner to achieve the result. The MLETR focuses on the end-result in form of singularity and control, however, also on the process to achieve the result by way of applying a reliable method.

This means that if a jurisdiction ratifies the Rotterdam Rules, it may be an advantage to implement the MLETR as well. The Rotterdam Rules and the MLETR complement each other. The Rotterdam Rules provide for substantive rules on the use of electronic transport records. As recalled, the MLETR does not affect substantive rules. The MLETR provides a legislative framework for the use of electronic transferable records (that may take the form of electronic transport records) and it provides for instrumental features such as the principle of technology neutrality, functional equivalence, and the principle of non-discrimination of electronic means. Both the legislative framework and the instrumental features may assist in the incorporation of substantive rules on electronic transport records.

CHAPTER 5. PAPER-BASED TRANSFER OF RIGHTS

5.1. INTRODUCTION AND METHOD

The previous two chapters concerned the MLETR as international legislative framework on electronic transferable records. Afterwards its interplay with the most recent adopted convention on the carriage of goods was subject to scrutiny, thereby illuminating how the MLETR may supplement the Rotterdam Rules. The following part takes as its point of departure the legal framework on bills of lading in Denmark, Norway, Sweden, and furthermore England and Wales.[492]

As demonstrated in Chapter 2, the bill of lading acted as a catalyst for initiating work on electronic commerce facilitating the use of such a document in electronic form.[493] The bill of lading is a prime example of a document that demonstrates the issues with replicating its legal functions in electronic form. Therefore, the bill of lading acts in the following as a case study in order to observe the potential interplay between the model law and national law and to identify where and how the MLETR may supplement national law. Phrased differently, national regulation of the bill of lading is chosen as a case study to assess the potential of the MLETR as internationalised harmonised legislation on electronic transferable records. The MLETR works in tandem with international legislation and national law. Hence to show its potential value it is also necessary to show the interplay with national law.

The internationalisation of transactions, cross-border activities, and the use of new technology makes it relevant to determine how different legal jurisdictions observe the use of bills of lading in both paper and electronic form. A court decision was passed in Sweden in 2017 concerning whether the requirement of possession of a promissory note could be carried out using an electronic promissory note which it was decided it could not.[494] It was decided that under current national law the electronic promissory note could not be considered as being negotiable as it could not be "possessed" in electronic form. The characteristics of a promissory note and a bill of lading resemble one another. For this reason, Sweden has been chosen to be included in the study of interplay between the MLETR and national law as it seems that under current national law there is no legal value attached to electronic promissory notes. Denmark has a long tradition as a great seafaring nation which, amongst other reasons, is owed

[492] Hereafter referred to as England.

[493] See Chapter 2, section 2.5

[494] Swedish Supreme Court Decision Ö 5071-16

to the fact that Maersk is Danish owned and has its headquarters in Copenhagen. As is demonstrated in the following section, Sweden, Norway, and Denmark have to a large extend similar legislation in this legal field as a result of Nordic common legislative work. If one look into the legislation in Sweden, the findings may be of similar relevance in Norway and Denmark. Furthermore, due to common legal heritage the national laws of the countries may inform each other. Consequently, the rules in Sweden, Norway, and Denmark are chosen as subject to study as one entity. Where the legal position differs significantly, this is pointed out. The law of England has been chosen as subject to study of the interplay between MLETR and national law, as English law allegedly is often chosen as the applicable law of contracts.[495] Furthermore, as is demonstrated in Chapter 7, England is currently in the midst of reforming their legislation on the electronic use of documents such as for instance bills of lading. This work is set to be aligned with the MLETR. Following this, the impact of English law in this legal field is substantial. Hence, the law of England has been chosen as being subject to scrutiny with main focus of the notion of possession in relation to the bill of lading.

The aim is to study the functions of bills of lading as a document that represents the goods. Thereby, the legal phenomenon of *possession* in Denmark, Norway, Sweden, and England is the most important feature as it enables the document to transfer the right to claim delivery of the goods. Involving one or more legal systems in an analysis without these systems being an integral mandatory part of each other in a legal dogmatic sense may be labelled comparative law approach. Comparative law is a critical method of legal science.[496]

> "Comparative law not only shows up the emptiness of legal dogmatism and systematics but, because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules, it develops a new and particular system, related to those demands in life and therefore functional and appropriate. Comparative law does not simply criticize what it finds, but can claim to show the way to a better mastery of the legal material, to deeper insights into it, and this, in the end, to better law."[497]

However, the aim with the following Chapters 5, 6, and 7 is not *only* to interpret the relevant provisions, principles, and texts within a national law system, which in this study is Denmark, Norway, Sweden, and England. Comparison always has an aim and a purpose. Hence, the value added to the study by using such a method must be considered. Comparison of the law in different jurisdictions is a way of obtaining

[495] The discussions concerning this is elaborated in Chapter 7, section 7.2.

[496] Zweigert & Kötz, *An Introduction to Comparative Law,* p. 15 and pp. 33-34, see also Chapter 2, section 2.1.

[497] Zweigert & Kötz, *An Introduction to Comparative Law,* pp. 33-35

knowledge. The results from such studies may be used to formulate theories and find new legal solutions.

> "The primary aim of comparative law, as of all sciences, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system."[498]

This quote has also been used in Chapter 2, section 2.1. concerning critical legal attitude; however, it deserves to be highlighted again. The aim of this part of the study is to obtain knowledge of the state of law in Denmark, Norway, Sweden, and England. These countries have been chosen after careful considerations and not just from the criteria that they belong to different legal families.

Through this study it is assessed what legal value is given to a bill of lading in electronic form. Such a comparative study provides the necessary grounds for discussion, inspiration, and solutions as to potential law reform in the field of electronic transferable records, such as for instance bills of lading.

Initially, justification of considering Denmark, Norway, and Sweden mainly as one entity is provided. This is followed by scrutiny of the bill of lading as regulated in Denmark, Norway, and Sweden[499] regarding the issuance, transfer, and possession of the document. The study then turns to the bill of lading as a document representing the goods in England with main focus on the notion of possession. In Chapter 6 the same exercise is carried out regarding whether the legislation in Denmark, Norway, and Sweden and England also caters for the use of electronic bills of lading as well on an equal footing as bills of lading issued in paper. The rationale behind the choice of first examining the rules applying to paper bills of lading is that in order to assess whether the law also applies to electronic bills of lading it is necessary first to identify the peculiarities of the bill of lading issued in paper.

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[498] Zweigert & Kötz, *An Introduction to Comparative Law,* p. 15

[499] Denmark, Norway, and Sweden have been chosen as representatives of the Nordic countries. It should be noted that Finland and Iceland also form part of the Nordic countries.

5.2. NORDIC SOURCES OF LAW AND COMMON NORDIC LEGISLATIVE WORK

Denmark, Norway, and Sweden are considered to form part of a Nordic legal family with strong uniting factors and distinctive features.[500] The Nordic laws are in general considered to belong within the civil legal system,[501] however, they have also borrowed some features of their procedural and contract law from the common law.[502]

In Denmark, Norway, and Sweden, the private law is regulated by few statutes where the legislators have left open the possibility of judicial discretion. This means that the legislation to a certain degree is flexible in its application as the judiciaries have tradition for a certain amount of interpretation of the statutes. Cases are dealt with on a case-by-case basis and the courts are not bound by precedent. There is, however, a tendency towards following the decisions of the Supreme Courts. Denmark, Norway, and Sweden all have a three-tiered court system. This consists of District Courts, where a case normally starts, Appellate Courts, and then a Supreme Court.[503]

The choice has been made to include Denmark, Norway, and Sweden as one legal entity at least to a very large extend. The reasoning behind is that the countries have roots in the same legislation, which is a result of extensive Nordic legislative cooperation. The extend of this close cooperation is demonstrated in the following. Where the legal position significantly differs, which is the case regarding the countries legal position on electronic bills of lading, awareness is raised to that fact and pointed out.[504] As this dissertation takes its stand in international law, where there are no differences or where there are minor nuances in the state of law it is more suitable to treat Denmark, Norway, and Sweden as one legal entity. The law in general of Denmark, Norway, and Sweden is heavily influenced by the Nordic legislative cooperation. The

[500] Zweigert & Kötz, *An Introduction to Comparative Law,* pp. 276-285, Lando, *Nordic Countries, a Legal Family? A Diagnosis and a Prognosis,* p. 4, Neumann, *Denmark,* pp. 5 – 15, see also Letto-Vanamo and Tamm, *Nordic Legal Mind,* pp. 1-17, Smits, *Nordic Law in a European Context: Some Comparative Observations,* pp. 55-64, Husa, *Legal Families and Research in Comparative Law,* p. 5. The countries normally attributed to belong to the Nordic legal family are Denmark, Norway, Sweden, Finland, and Iceland.

[501] Lando, *A Short Survey of the Laws of the Nordic Countries – the Laws in General and Contract Law in Particular,* p. 14, Zweigert & Kötz, *An Introduction to Comparative Law,* p. 277

[502] Lando, *Nordic Countries, a Legal Family? A Diagnosis and a Prognosis,* p. 4, Neumann, *Denmark,* p. 18

[503] Webpage of the Danish courts: https://www.domstol.dk/ - last accessed 27 January 2023

[504] See Chapter 6

legislation in the Nordic countries in the field of private law is to a large extend similar as a result of coordinated Nordic legislative efforts.

The Nordic countries are deeply intertwined in culture and heritage. As the industrialisation made its entry it became easier to visit one's neighbours and thus there was an increase in cross-border activities. The Nordic Lawyers' Meetings was established in 1872 and is still going today.[505] The first meeting was held in Copenhagen in 1872 and was deemed a grand success.[506] In the years to come productive work resulted in harmonised legislation in the Nordic region. The first 100 years, focus area of the meetings was on fundamental law areas, such as sales law, contract law, maritime law and civil procedures. Participants to the meetings are lawyers from the administration, courts, academia, and lawyers from private practices. Themes are discussed, and reflections and experiences are shared upon the issues of relevance to the interpretation, application, and making of the law in the Nordic region. The meetings inspired the establishment of cross-Scandinavian law commissions with the aim to adopt uniform legislation in several areas, as demonstrated below.

The Nordic Council was established in 1952 and is also still going.[507] The Council's members are elected parliamentarians from the five Nordic countries respectively.[508] The Council may agree on recommendations for the solution of common problems however, it may render no binding decisions. In 1971 the Nordic Council of Ministers was established. The Nordic Council of Ministers is the official body for inter-governmental cooperation in the Nordic region.[509] The Council may follow up on the Nordic Council recommendations and make binding decisions. This has led to the right to free movement of Nordic citizens passed in 1952 and a joint Nordic labour market in 1954. Some of the policy areas of today are digitalisation and innovation, environment and sustainability, energy, freedom of movement, just to mention a few. Today it is safe to say, that the countries have a long and splendid tradition for cooperation in the field of common Nordic legislative work which to a very far extend has resulted in harmonised legislation.

One of the first legal areas where the Nordic Lawyers Meetings made attempts to seek harmonised legislation were bills of lading. The Danish Professor Andreas Aagesen suggested already in 1878 that legislation in the legal field of bills of lading should be

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[505] In Danish known as "de nordiske juristmøder".

[506] Tamm, *De Nordiske Juristmøder*, p. 49

[507] Webpage of the Nordic Council: https://www.norden.org/en/nordic-council - last accessed 27 January 2023

[508] Denmark, Norway, Sweden, Finland, and Iceland.

[509] Webpage of the Nordic Council of Ministers: https://www.norden.org/en/information/about-nordic-council-ministers - last accessed 27 January 2023

sought harmonised in the Nordic region.[510] In 1883 law commissions in Denmark, Norway and Sweden respectively initiated the necessary preparatory work. As a result, the Merchant Shipping Law was adopted in Denmark in 1892[511], Norway in 1893[512] and Sweden in 1891.[513] However, the need for international harmonisation of legislation on bills of lading has long been recognised. International harmonisation efforts in the legal area of shipping law have caught up on these early regional legal initiatives in the Nordic region. The Nordic Merchant Shipping Acts have now incorporated international conventions why upon doubt as to how to interpret national laws, one must also turn to international conventions and their *travaux préparatoires* where the origins of a provision stem from international legislation. Chapter 13 of the Merchant Shipping Acts was amended in 1994 by a joint Nordic legislative initiative.[514] It was decided to include as much of the Hamburg Rules as possible without breaching the international obligations under the Hague-Visby Rules. Consequently, Chapter 13 incorporates the Hague-Visby Rules but also parts of the Hamburg Rules. Furthermore, Chapter 13 incorporates a number of provisions which are not convention-based and that are rooted in national and the Nordic region legislation.[515] This means that in the following sections references is made to the Hamburg Rules and the Hague-Visby Rules where national law implements a rule from either of the conventions in order to identify the origins of the respective provision.

The first time it was mentioned to seek the possibility of harmonising the laws in the Nordic region in the field of promissory notes was in 1925.[516] The Swedish Professor Martin Fehr found that despite the differences between the Danish and Norwegian laws and Swedish and Finnish laws it ought to be investigated to what extend harmonisation in this particular legal field could be achieved.[517] In 1932, it was decided to appoint law commissions in Denmark, Norway, Sweden, and Finland respectively, to prepare draft legislation. The aim was to the widest possible extend to harmonise the legislation. The law commissions finished their work in 1935 and on this ground harmonised legislation was adopted in each of the Nordic countries in the following

[510] Tamm, *De Nordiske Juristmøder*, p. 122

[511] In Denmark, Lov nr. 56/1892

[512] In Norway, Sjøloven av 20 July 1893 nr. 1

[513] In Sweden, Sjölagen den 12 juni 1891

[514] Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 33

[515] Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 33

[516] Tamm, *De Nordiske Juristmøder*, p. 119

[517] Tamm, *De Nordiske Juristmøder*, p. 120

years.[518] The collaboration between the countries was deemed a success, as the countries had succeeded in creating legislation that, even though not fully identical, to a very large degree was harmonised.[519] As is demonstrated in the following sections, the Promissory Notes Act supplements the Merchant Shipping Acts provisions on bills of lading regarding the negotiability effect of the document.

The Nordic countries have cooperated in the work of their respective Merchant Shipping Acts and Promissory Notes Acts, which also means that the acts to a large extend are similar. Consequently, the *travaux préparatoires* to the acts, case law, and scholarly literature from the Scandinavian countries can be used to assist in the legal interpretation of the respective statutes. The following takes as its point of departure the issuance, transfer, and possession of bills of lading in the Danish legislation. These are important issues when contractual, legislative, and technological responses to the problems are to be raised. The issuance of the bill of lading concerns the criteria a bill of lading must fulfil in order to be recognised as a bill of lading. For instance, a relevant criterion is that a bill of lading must be signed. The transfer of the bill of lading relates to the rules concerning transfer of the bill. This includes that in order to be recognised as the rightful holder of the bill of lading, the holder must be in possession of the document. These are the legal effects of a negotiable bill of lading that is a document that is meant to be easily transferable – all of which are important in relation to whether the same legal effects and the symbolic function of such a document can be inferred from an electronic bill of lading.

In the following, lines are drawn to the Norwegian and Swedish regulation on the matter, as the Norwegian and Swedish legislation to a large extend are similar to the Danish regulation. The relevant rules on issuance, transfer, and possession of the bill of lading are being described before turning to potential analogously application of rules in the Promissory Notes Acts. *Travaux préparatoires* to the Merchant Shipping Acts and Promissory Notes Acts are included to clarify the purposes and means of the provisions. Scholarly work is referred to, to assist in the interpretation. Furthermore, some of the provisions origin from implementation of international conventions on the carriage of goods, why reference is made hereto when relevant.

5.3. TRANSFER OF RIGHTS IN DENMARK, NORWAY, AND SWEDEN

The following part concerns the legislation concerning issuance, transfer, and possession of the bill of lading. In order to assess the legal effects of an electronic bill of lading, first it is important to understand the peculiarities of bills of lading issued in

[518] In Sweden the Promissory Notes Act was adopted on the 27th of March 1936, Lagen om skuldebrev 1936:81, in Denmark on the 13th of April 1938, lov nr. 146, in Norway on the 17th of February 1939, lov 17. februar 1939 nr. 1

[519] Tamm, *De Nordiske Juristmøder*, p. 121

paper. There are three core issues in relation to transfer of rights and obligations under bills of lading: 1) issuance of the bill of lading regarding what requirements the document must fulfil in order to be considered a bill of lading, 2) legitimation, which relates to, to whom the carrier, who in this case is the debtor, may deliver the goods to, in order to be discharged from its obligation of delivery, and furthermore the situation of competing rights that concerns issues of transfer of rights, including 3) what act of security the transferee must attend to, to safeguard its right to claim delivery of the goods. As noted above, these are all legal effects of a bill of lading that is meant to be easily transferable. An electronic bill of lading must fulfil the same legal effects, as is demonstrated in Chapter 6.

The Merchant Shipping Act is supplemented by the Promissory Notes Act[520] regarding the negotiability of the bill of lading. The most important and central rules concerning assignment of claims and change of creditors are to be found in the Promissory Notes Act. The Promissory Notes Act was prepared by the Nordic countries as a common legislative effort and which soon after its finalisation was implemented by each of the Nordic countries. It appears from the *travaux préparatoires* that the Promissory Notes Act to a large extend is a codification of already existing common Nordic legal principles relating to legal obligations.[521] On that ground it is assumed in the legal literature that the common provisions in the Promissory Notes Act Chapter 1 and the provisions concerning non-negotiable promissory notes in Chapter 3 of the Act apply to claims even though no promissory note has been issued or will be issued.[522] This is to be seen in the Danish *travaux préparatoires* to the Promissory Notes Act*,* in which it is stated that even though the law only regulates the use of promissory notes, many of the provisions may be applied by analogy to documents that though they may not be defined as promissory notes.[523] The same can be argued to be the case regarding the provisions concerning negotiable promissory notes that also have been argued to apply to other negotiable documents by analogy.[524] Consequently, the scope and extend of application of the Promissory Notes Act reaches far, further than just to the application of promissory note. Instead of merely having the character of provisions applying to a specific document, the provisions become general principles.

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[520] In Danish "Gældsbrevsloven", LBKG 2014-03-31 nr. 333

[521] See the Danish *travaux préparatoires* to the Danish implementation of the Joint Nordic Promissory Notes Act, *Udkast til Lov om Gældsbreve,* pp. 17 and 47

[522] Lynge Andersen et al, *Gældsbrevsloven med kommentarer,* pp. 173-174

[523] *Udkast til Lov om Gældsbreve,* p. 17

[524] See Anders Møllmann, *Delivery of Goods under Bills of Lading,* p. 163, as elaborated in Chapter 6, this is more doubtful as to what extend the Promissory Notes Act may apply by analogy to other negotiable documents, amongst these electronic negotiable documents.

A transfer of the bill of lading refers to the situation where a new creditor replaces the original creditor entitled to assert the documentary rights. This transfer may happen through sale, gift, or pledge. Thereby a person may become entitled to the goods if it purchases the bill of lading from a transferor. The bill of lading represents the goods but also it binds the carrier to deliver only to the person who holds the bill of lading. Such a document acts both as security, as it ensures delivery of the goods to the rightful holder, and as an instrument of sale, because it gives the buyer and the holder the possibility to sell the goods while the goods are in transit.[525]

The bill of lading functions as a receipt for goods shipped or received by the carrier, it contains or evidences the contract of carriage of the goods by sea, and it gives an exclusive right to claim delivery of the goods. Furthermore, a bill of lading acts as a document which represents the goods and is the bearer of the claim to delivery of the goods. Thereby, the document is the bearer of rights and obligations, meaning such as for instance the pay of the freight. Through possession of the bill of lading, the transferee is legitimised to obtain delivery of the goods. The creditor is the person that is entitled to the goods under the bill of lading and the debtor is the carrier of the goods. The carrier must perform the transport and deliver the goods to the creditor in accordance with the contract of carriage. In accordance with the Merchant Shipping Act[526] § 304 (1) the original bill of lading must be presented at the place of delivery for the buyer to obtain the goods. The carrier must be presented to the bill of lading to be discharged from its obligation to deliver the goods and not be met with claims concerning mis-delivery.

It is the function of the bill of lading representing the goods and being the bearer of the claim to delivery of goods that is the turning point in the following sections concerning issuance, transfer, and possession of the bill.

5.3.1. ISSUANCE OF THE BILL OF LADING

§ 292 in the Danish Merchant Shipping Act defines a bill of lading as a document, which evidences the contract of carriage by sea. In the earlier applicable Merchant

[525] Møllmann, *Delivery of Goods under Bills of Lading*, p. 11

[526] The Danish Merchant Shipping Act LBKG 2018-12-17 nr. 1505 Søloven

Shipping Act the provision was to be found in § 151 (1).[527] § 292 (2) of the Merchant Shipping Act corresponds to Article 1 (7) in the Hamburg Rules.[528]

§ 292 of the Merchant Shipping Act (see translation in footnote) states that:

> "§ 292 Ved et konnossement (Bill of Lading) forstås et dokument,
>
> 1) som er bevis for en aftale om søtransport og for, at transportøren har modtaget godset, og
>
> 2) som betegner sig som konnossement, eller som indeholder en bestemmelse om, at transportøren påtager sig kun at udlevere godset mod dokumentets tilbagelevering.
>
> Stk. 2. Et konnossement kan udstedes til en bestemt person eller ordre eller til ihændehaveren. Selvom konnossementet er udstedt til en bestemt person, anses det som ordrekonnossement, medmindre udstederen har taget forbehold mod overdragelse ved ordene >> ikke til ordre<< eller lignende.
>
> Stk. 3. I forholdet mellem transportøren og indehaver af konnossementet, som ikke er afsender, bestemmer konnossementet vilkårene for befordring

[527] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* pp. 77-78 and also the earlier applicable Merchant Shipping Act LBKG 1989-10-13 nr. 653 Søloven.

[528] Article 1 (7) in the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the Hamburg Rules), as also noted in the *travaux préparatoires* to the Merchant Shipping Law, see Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 77, see also for instance Mankabady, *The Hamburg Rules on the Carriage of Goods by Sea,* pp. 40-42 where he comments on Article 1 (7) in the Hamburg Rules

> og udlevering af godset. Bestemmelser i transportaftalen, der ikke er optaget i konnossementet, kan ikke gøres gældende over for sådan indehaver, medmindre konnossementet henviser til dem."[529]

The provision defines the bill of lading in its paragraph 1 as a document that evidences the contract of carriage by sea and that evidences that the carrier has received the goods. Furthermore, in accordance with section 2 of paragraph 1, the document must define itself as a bill of lading or alternatively contain a provision stating that the carrier undertakes only to deliver the goods against surrender of the document.

It appears from § 292 (2), that a bill of lading as a starting point is considered as being a bill of lading "to order". That the document is considered as being "to order" means that the bill of lading is issued to a specific person or to order.[530] If the bill of lading is issued to a specifically named person, the bill of lading is still considered as being to order, in accordance with § 292 (2) in the Merchant Shipping Act. Following this, it is stated in the paragraph, that if a bill of lading is not to be considered as a bill of lading to order, then the issuer must specifically make a reservation by stating "not to order" or similar. Thereby, a bill of lading is as a starting point transferable, meaning that the bill of lading can be transferred to a new holder, but it is not a requirement that the bill of lading is transferable to be defined as a bill of lading. § 296 specifies

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[529] Translation into English (my translation)

"§ 292 By a bill of lading […] is understood a document that

(1) is evidence of an agreement of a contract of carriage of goods and that the carrier has received the goods and

(2) that refers to itself as a bill of lading or that contains a provision concerning that the carrier undertakes only to deliver the goods against surrender of the document

Para 2. A bill of lading may be issued to one specific person or to order or to bearer. Even though the bill of lading is issued to one specific person it is considered as a bill of lading issued to order unless the issuer has taken reservations against transfer by writing >>not to order<< or similar.

Para 3. In the relation between the carrier and that holder of the bill of lading who is not the issuer of the document, the bill of lading decides the terms for the carriage and delivery of goods. Provisions in the contract of carriage of goods not included in the bill of lading cannot be asserted against such holder unless the bill of lading refers to such provisions."

The same provision is to be found in the Norwegian Merchant Shipping Act § 292 and in the Swedish Merchant Shipping Act Chapter 13, § 42.

[530] See Vestergaard Pedersen, *Transportret – introduktion til reglerne om transport af gods,* pp. 468 – 469. See also Bredholt, et al., *Søloven med kommentarer,* pp. 445-446 with comments to the provision and Falkanger et al, comment on the provision in *Søret,* pp. 285-286.

what information the bill of lading must contain. This includes information concerning the type of cargo, name of the shipper, the name and main address of business, number of original bills of lading issued, name of the receiver of the goods if named by the shipper, and whether the carriages are subject to the convention, in accordance with § 254 (3). Furthermore, it should be noted that in accordance with § 296 (3), a bill of lading should be signed either mechanically *or* electronically.[531] § 296 corresponds to Hague-Visby chapter 3, and Art. 14 and 15 in Hamburg Rules.[532]

Traditionally, bills of lading are issued in sets that consist of typically three originals, this allegedly, due to unstable postal services.[533] §§ 302 (2), 303 and 306 in the Merchant Shipping Act all refer to a situation where multiple bills of lading have been issued. The practice with issuing bills of lading in sets has received criticism throughout the years, as this practice increases the risk of the carrier being met by multiple claims. Attempts to change this practice, have, however, not been successful with the use of physical bills of lading. Consequently, the legislation still facilitates the possibility of issuance of multiple original bills of lading.

As previously mentioned, the Merchant Shipping Act's provisions on bills of lading are supplemented by the Promissory Notes Act. Both Acts contain similar provisions on certain matters and seeing as there are gaps regarding the rules on negotiability in the Merchant Shipping Act, it is necessary to consult with the principles in the Promissory Notes Act. Necessarily it is therefore also to be established what precisely is to be understood by a promissory note in order to understand why the provisions in the Promissory Notes Act may apply by analogy to the Merchant Shipping Act's provisions concerning bills of lading. The following takes as its points of departure the Danish Merchant Shipping Act and Danish Promissory Notes Act and the *travaux préparatoires* to these two Acts. References are also made to Swedish and Norwegian *travaux préparatoires* and to scholarly works from Norway and Sweden respectively. As previously stated, there are not substantially divergences in this legal area as the legislation in these three Nordic countries to a very large degree are similar. Where there are substantially divergences, which for instance is the case in Chapter 6 regarding the legal value given to electronic negotiable documents, awareness is drawn to this.

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[531] That a bill of lading may be signed electronically is subject to further examination in Chapter 6 that concerns electronic bills of lading

[532] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 79, See also Mankabady in his article-by-article comment, *The Hamburg Rules on the Carriage of Goods by Sea,* pp. 83-86

[533] See also Chapter 4, section 4.4.1.1. regarding the possibility of issuing multiple originals concerning the potential inconsistency between the Rotterdam Rules and the MLETR

What perhaps could seem puzzling, is that it is not defined in the Joint Nordic Promissory Notes Act what exactly is to be understood by the concept of a promissory note, and thus there is a lack of a clear definition in the law.[534] The consultancy with and focus on the *travaux préparatoires* to legislation is in line with the Nordic tradition for consulting the *travaux préparatoires* when doubt arises as to how statutes should be interpreted. In the *travaux préparatoires* to the Promissory Notes Act it is stated that the term promissory note should:

> "(…) denote to a written declaration that in the main contains an unconditioned, unilateral claim for a sum of money."[535]

Consequently, a promissory note is in writing, it contains a promise, and it amounts in a claim for a certain sum of money.[536] The consideration behind the choice of not inserting a specific definition on a promissory note in the act was, that a promissory note could only be defined as having the characteristics as stated in the above-mentioned quote. It is stated that if in doubt as to whether or not to interpret a written declaration as a promissory note, it would be for the court to decide whether or not the written declaration is to be defined as a promissory note, and that no definition would ever ensure that doubt as to what could be defined as a promissory note could arise.[537] Furthermore, it is stated in the *travaux préparatoires*, that consideration should also be given to potentially future new documents that might be included in the act, or to which the act might be applied analogically, why a definite definition would be unwanted.[538] Thereby, it is to be seen that the legislators in the 1930s were future orientated, as focus was on creating a law, that to some extend and arguably also to the widest possible extend would be flexible in its future application.

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[534] In Danish translated into *"gældsbrev"*, in Swedish *"skuldebrev"* and in Norwegian *"gjeldsbrev".* In this dissertation the terms are translated directly into "promissory note", however it should here be noted, that the translation into English differs in the Nordic literature. For instance, Møllmann has in *Delivery of Goods under Bills of Lading,* translated it into *"debt letter"*, see p. 19, whereas in *Restatement of Nordic Contract Law,* ed. by Ole Lando et al, it has been translated directly into *"promissory notes"*, Lyngsø, *Negotiable Dokumenter,* p. 22 has also translated the term into *"promissory notes".* In this dissertation the notion is translated directly into *"promissory note".*

[535] Danish *travaux préparatoires* to Danish implemented version of the Joint Nordic Promissory Notes Act, *Udkast til Lov om Gældsbreve,* p. 18 (*my translation)*, followed by the comments in *Gældsbrevslovene,* by Ussing and Dybdal, p. 5

[536] Hagstrøm, *Obligasjonsrett,* pp. 908-909

[537] *Udkast til Lov om Gældsbreve*, p. 18

[538] *Udkast til Lov om Gældsbreve*, p. 18

However, even though a clear definition of what is to be understood by a promissory note is not included in the act, the *travaux préparatoires* still set up certain criteria that characterises a promissory note and that a promissory note should meet to be defined as a promissory note.

There should be a text recorded in writing[539], which should be understood in a broad sense.[540] The text could be handwritten or written on a computer or iPad, or software could be programmed to generate the text automatically.[541] It should also be noted that the requirement that the promise must be expressed in writing, thus excludes the possibility of the existence of an oral promissory note. This distinguishes a promissory note from an ordinary claim, that does not necessarily have to be in writing. It is also clear, that the text should contain a promise made by the debtor or by the debtor's principal.[542] The promise must be a promise to pay a certain amount of money which is also why a bill of lading is not defined as being a promissory note. A bill of lading does not contain a promise to pay a certain amount of money instead it contains a promise to deliver goods.[543] Thereby, the promissory note acts like payment, as the debtor uses the issuance of a promissory note in replacement of payment. It is also a requirement, that the promissory note is signed by either the debtor or by the debtor's principal.[544] The promissory note may also be signed electronically, as is demonstrated in the following chapter 6. Furthermore, it is a requirement, that the promise is unconditional, meaning that counterclaims cannot be raised by the debtor in order

[539] Tiberg, and Lennhammer, *Skuldebrev, växel och check,* p. 18

[540] Walin and Herre, *Lagen om Skuldebrev m.m. – en kommentar*, p. 37

[541] Consequently, a promissory note may be generated by way of electronic means, however a difference between a negotiable and non-negotiable promissory note must be observed, as elaborated in Chapter 6

[542] Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 33, Manukka and Rosqvist, *Skuldebrevsrätten – En Introduction*, pp. 58-59

[543] Lyngsø, *Negotiable Dokumenter,* p. 23*,* However, still the Joint Nordic Promissory Notes Act must be argued to apply to the Nordic Merchant Shipping Acts, that regulates the use of bills of lading, analogously which is also why a bill of lading is argued to be negotiable

[544] Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 33, Manukka and Rosqvist, *Skuldebrevsrätten – En Introduction*, p. 59

for the payment to be paid.[545] This does not mean, however, that there cannot be certain conditions attached to the promissory note, in order for the payment obligation to be activated, for instance if certain events occur. [546]

In both the Norwegian and Swedish *travaux préparatoires* is it stated, that written statements can only be characterised as promissory notes, if a promise concerning paying a sum of money stands out separately.[547] Preben Lyngsø argues, that this must also be assumed to be the case in Denmark even though that is not to be found directly in the Danish *travaux préparatoires*. Lyngsø refers to an example concerning, that if a promise to pay a sum of money is written in a letter, then even though the letter mentions a promise to pay a sum of money, the letter does not constitute a promissory note.[548]

A promissory note can be either negotiable or non-negotiable.[549] There are different purposes with the use of respectively a negotiable document or a non-negotiable document. In this dissertation a non-negotiable promissory note is defined as a "simple promissory note".[550] Both types of documents are to be characterised as being transferable, meaning that the claim can be transferred to a transferee, but a promissory note that is not a negotiable promissory note is in its essence just an ordinary claim for which a promissory note has been issued, and to which no one can receive a better title to the claim. A document is characterised as a negotiable document if transfer of the document may give the transferee the right to extinguish objections to and rights over a document. A bill of lading may be issued to a specific person, to order or to bearer in accordance with § 292 of the Danish Merchant Shipping Act. The Merchant Shipping Act does not define the bill of lading as a negotiable document. However, the *travaux préparatoires* to the Merchant Shipping Act specifically state that the bill of lading is to be considered as being able to *function* as a negotiable document.[551]

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[545] Tiberg and Lennhammer, *Skuldebrev, växel och check,* p. 20, Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 33, Manukka and Rosqvist, *Skuldebrevsrätten – En Introduction*, p. 59

[546] Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 33, Manukka and Rosqvist, *Skuldebrevsrätten – En Introduction*, p. 59

[547] See the Swedish *travaux préparatoires*, NJA II 36, p. 15 and the Norwegian *travaux préparatoires, Utkast til lov om gjeldsbrev*, p. 13

[548] Lyngsø, *Negotiable Dokumenter*, p. 22

[549] Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 76, Lyngsø, *Negotiable Dokumenter*, p. 21

[550] In Danish referred to as *"simpelt gældsbrev"*, in Swedish referred to as *"enkla skuldebrev"*, in Norwegian referred to as *"enkelt gjeldsbrev"*

[551] Landstingstidende A 1891, column 2229, see specifically column 2496

Furthermore, it is stated in the *travaux préparatoires* to the Merchant Shipping Act that the Act must be supplemented by the general rules applicable to negotiable documents[552] that are to be found in the Promissory Notes Act.

The Merchant Shipping Act contains provisions on matters that are similar to the provisions in the Promissory Notes Act that regulate the effects of transfer of a negotiable promissory note. The Act must also be supplemented by the Promissory Notes Act, which rules are to be considered as being general principles that apply outside the scope of promissory notes. Consequently, the Promissory Notes Act applies analogously to assignment of claims and further, as it has been argued to apply by analogy to other negotiable documents.

Consequently, from the above, it can be concluded that there are similarities between a promissory note and a bill of lading. A bill of lading is a document that represents the goods and thereby the document is the bearer of rights and obligations. To claim delivery of the goods the bill of lading must be presented. A promissory note is a document which is the bearer of the claim to pay a certain amount of money. Both documents are bearer of an underlying claim and therefore both documents serve a symbolic function. Both documents can be either non-negotiable or negotiable. Regarding promissory notes the debtor is the person who owes a certain amount of money. The creditor is the person to whom the debtor must pay. The creditor may become the transferor if the creditor transfers the right to what rights the promissory note entails to a transferee. In the terminology of bills of lading, the carrier thus become the debtor as the carrier must deliver the goods upon presentation of the bill of lading. The holder of the bills of lading becomes the creditor who upon presentation of the bill of lading to the carrier is entitled to claim delivery of the goods. The creditor may become transferor if the creditor transfers the bill of lading to another person with all the rights and obligations that entails. The terminology is important to have established before the following section to understand what role the rules and principles in the Promissory Notes Act play regarding a situation of competing rights to a bill of lading and how a transferor performs its act of security to secure its right to the goods that the bill of lading represents.

The transfer of rights is in practice an agreement between the old creditor and a new creditor to sell and buy the rights to the cargo that the bill of lading represents. The following sections concern how a creditor may be considered entitled to the bill of lading, the situation of competing rights to the bill of lading, and how an act of security should be ensured in order for a person to be considered the rightful holder of the bill

[552] Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 86, see also Møllmann, *Delivery of Goods under Bills of Lading,* pp. 19-21, Lyngsø, *Negotiable Dokumenter,* pp. 279-295

of lading. The person who is deemed in possession of the bill of lading may control the goods and demand delivery at the destination port.

5.3.2. TRANSFER OF THE BILL OF LADING

That a document is to be characterised as being negotiable means that through transfer of the document a transferee who acts in good faith may extinguish objections to and rights over the document.[553] This means that the transferee may acquire a better right to the document than the transferor. Consequently, at least as a starting point the transferee cannot be met by claims.

§§ 302-306 concern legitimation of the rightful holder and the negotiability effects of the bill of lading. The provisions have no corresponding Articles in either the Hague-Visby or Hamburg Rules.[554] This is fully in line with analysis in previous chapters concerning that negotiability effects of documents are regulated in national law, why it is impossible to provide a uniform definition on negotiability.[555] It is stated in the *travaux préparatoires* that § 306 is supplemented by the Promissory Notes Act concerning the general effects of negotiability.[556] Therefore, references are also made in the following to the Promissory Notes Act, its *travaux préparatoires* and scholarly work on the transfer of rights and obligations under negotiable promissory notes.

[553] Tiberg and Lennhammer, *Skuldebrev, växel och check,* p. 82, Lynge Andersen et al, *Gældsbrevsloven med kommentarer,* p. 74

[554] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 84

[555] Chapter 2, section 2.5

[556] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 86 and also Lyngsø, *Negotiable Dokumenter,* p. 286 that states that the provisions concerning the transfer of bills of lading significantly amounts to the provisions concerning the transfer of negotiable promissory notes, and also Bredholt, et al, *Søloven med kommentarer,* p. 460

5.3.2.1 LEGITIMATION

The legitimation function concerns who appears to be legitimised to assert the rights in accordance with the bill of lading and to whom the debtor must perform its obligations.[557] This is referred to as the active and passive legitimation function respectively.[558] In terms of bills of lading, the passive legitimation function means that the carrier is discharged from its obligation to deliver the goods upon presentation of the bill of lading.[559] The active legitimation function entails that the person who appears to be legitimated to the goods can claim delivery.[560] Both are well-established terms in the field of transferable and negotiable documents[561] as these documents are meant to be transferred. The debtor has to know to whom it can pay or to whom it can deliver the goods in order to be discharged from its obligation. Therefore, it is central that the debtor can identify who is legitimised to claim performance of the obligation and that the creditor can legitimise itself as being the rightful creditor.

In terms of bills of lading this means that the carrier is the debtor who is in possession of the cargo and who must deliver the cargo to the rightful holder upon presentation of the bill of lading. The holder of the bill of lading is the creditor who wants delivery of the cargo. The relevant provision concerning entitlement to delivery of the goods is to be found in § 302 in the Merchant Shipping Act.[562] The provision expresses that the carrier can only be discharged from its obligation to deliver the goods against presentation of the bill of lading as well as a person is only entitled to claim delivery if the person is able to legitimise itself as having rightful entitlement to the goods. What is essential is the documentation and thereby how a person appears to be legitimised. § 302 as quoted below corresponds to the earlier applicable §§ 156-157 before the law amendment in 1994 led to adoption of a new applicable Merchant Shipping

[557] See Vestergaard Pedersen, *Transportret – introduction til reglerne om transport af gods*, pp. 490-492, see also Hessler, *Obehöriga förfaranden med värdepapper*, pp. 194-196, Tiberg and Lennhammer, *Skuldebrev, växel och check*, pp. 40-55 and pp. 90- 97, Lyngsø, *Negotiable Dokumenter*, pp. 87-90 and p. 286, Clausen & Jensen, *Sikkerhed i fordringer,* pp. 134-136

[558] Hessler, *Obehöriga förfaranden med värdepapper*, p. 194, Walin and Herre, *Lagen om Skuldebrev m.m. – en kommentar*, p. 127, Tiberg and Lennhammer, *Skuldebrev, växel och check*, pp. 41-55

[559] Møllmann, *Delivery of Goods under Bills of Lading*, p. 30

[560] Møllmann, *Delivery of Goods under Bills of Lading*, p. 30

[561] See Hessler, *Obehöriga förfaranden med värdepapper,* pp. 194-196, Tiberg and Lennhammer, *Skuldebrev, växel och check,* pp. 40-55 and pp. 90- 97, Walin and Herre, *Lagen om Skuldebrev m.m. – en kommentar*, p. 128

[562] See LBKG 2018-12-17 nr. 1505 Søloven

Act. [563] It is also here stressed that equivalent provisions in the Hague-Visby Rules and the Hamburg Rules are missing[564] why the conventions are not relevant to include in the following.

§ 302 in the Danish Merchant Shipping Act states that (see translation into English[565]):

> " **§ 302** Den, der foreviser et konnossement og ved dets tekst eller for så vidt angår ordrekonnossement ved en sammenhængende række overdragelser eller overdragelse in blanco fremtræder som retmæssig indehaver af konnossementet er legitimeret som modtager af godset.
>
> Stk. 2: Når konnossementet er udstedt i flere eksemplarer, er det for udlevering på bestemmelsesstedet tilstrækkeligt, at modtageren legitimerer sig med ét eksemplar. Udleveres godset andetsteds end på bestemmelsesstedet, må desuden de øvrige eksemplarer leveres tilbage eller sikkerhed stilles for de krav, som indehaveren måtte gøre gældende mod transportøren".

The provision states two conditions that must be fulfilled for a person to be entitled to claim delivery of the goods. 1) The person must be able to present the bill of lading, and 2) the person must appear to be entitled to claim delivery of the goods. These requirements are fulfilled if the person can present the bill of lading in accordance with § 302 (1). In accordance with § 302 (1) it will either appear from the text on the bill of lading that the person is legitimised to claim delivery of the goods, or it will appear from an uninterrupted series of endorsements or a blank endorsement.[566] In practice this means that the transfers are connoted meaning, the name of that person

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[563] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 84 and also the earlier applicable Merchant Shipping Act LBKG 1989-10-13 nr. 653 Søloven

[564] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 84

[565] My translation of § 302 of the Danish Merchant Shipping Act into English:

"§ 302 The one who presents a bill of lading and by its text or with regard to the bill of lading issued to order by a consecutive number of assignments or by transfer in blanco appears as the rightful holder of the bill of lading is legitimized as the receiver of the goods.

Para 2. When the bill of lading has been issued in multiple originals it is sufficient at the destination that the receiver legitimizes itself with one original. If the goods are delivered elsewhere than at the destination, also the other issued originals must be surrendered or alternatively security must be given for the claims the holder may assert against the carrier."

[566] See also Bredholt, et al., *Søloven med kommentarer,* pp. 457-458

to whom the bill of lading has been issued that the name of the transferee must correspond to the signature on the first declaration of transfer and so forth.[567]

If these conditions are fulfilled, then the person will be deemed legitimised to claim delivery of the goods. That a person who appears to be rightful holder of the bill of lading may claim delivery of the goods, expresses the concept of active legitimation.

The person who claims delivery must appear to be the rightful owner. Naturally, this leads to the question to what extend the carrier must check the identity of the person claiming delivery of the goods to make sure that the person is legitimised to claim delivery.[568] A considerable burden could be argued to be placed on the carrier. However, it seems that the carrier is not imposed a very active role in checking whether the person who claims delivery is rightful in its request.[569] § 302 that expresses that the person claiming delivery must appear to be the rightful owner, however there is no guidance as to what extend the carrier must check. As previously concluded, the Merchant Shipping Act must be supplemented by the Promissory Notes Act. In § 19 (1) of the Promissory Notes Act it is stated that a debtor is released from its obligation to pay even though the claimant was not entitled to payment, unless the debtor was aware of this or ought to be aware of this or did not exercise proper care and caution required. The provision states further that in case a negotiable promissory note has been issued "to order" and the claimant refers to previous endorsements then the debtor may assume that claimant is rightful holder of the promissory note and not investigate the matter further unless circumstances present require it. However, if the order bill of lading is indorsed to a named consignee or if it is to be defined as a recta bill of lading then the carrier must check that the person who claims delivery is in fact the person named as consignee or the person named consignee's agent.[570] If the carrier is aware of such circumstancing present that the person claiming to be consignee cannot be considered as being legitimised to receive the goods, or in case the endorsements on the bill of lading cannot be said to be uninterrupted or are invalid, naturally

[567] Lynge Andersen et al, *Gældsbrevsloven med kommentarer*, p. 92

[568] See SHD 2013-03-14 in which the carrier delivered the goods without presentation of an original bill of lading. See also U 2004.1142 H in which even though the receiver of the bill of lading were referred to as A c/o B in the order bill of lading, the carrier was not entitled to deliver to B. Furthermore, see U 1972.849 S in which the carrier delivered goods to B who were not able to present the original bills of lading. The carrier had to pay monetary damages to A, the rightful holder of the bills of lading.

[569] Møllmann, *Delivery of Goods under Bills of Lading*, p. 31, Grönfors and Gorton, *Sjölagens bestämmelser om godsbefordran,* p. 296

[570] Møllmann, *Delivery of Goods under Bills of Lading*, p. 31

the carrier cannot be discharged from its delivery obligation, if it nevertheless delivers the cargo.[571]

If more than one original bill of lading has been issued, it is sufficient if the creditor legitimises itself with only one of the original bills of lading if the goods are required delivered at the destination.[572] However, are the goods required delivered at another location than the destination point the person who claims delivery has to present all of the issued original bills of lading.[573] If more than one claims to be entitled to delivery of the goods and are able to present itself with an original bill of lading the carrier must ensure storage of the goods and give notice to the persons who have presented an original bill of lading claiming to be entitled to require delivery of the goods.[574]

A different scenario is if the present holder of the bill of lading who claims delivery of the goods from the carrier, holds a bill of lading and it turns out that one of the previous endorsements is invalid.[575] This raises the question whether the holder can extinguish the rights of previous holders. In § 306 (2) of the Merchant Shipping Act it is stated that a person who in good faith has acquired an order or bearer bill of lading is not obliged to give is back to a person from whom it has been stolen. § 14 of the Promissory Notes Act states that a transferee extinguishes any objections to the transferor's title to the instrument, provided that the transferee acts in good faith upon receiving the bill of lading from a legitimated transferee. It is furthermore stated in § 14 (2) that in the transferor supports his legitimation on previous endorsements then the transferee need not test their validity unless circumstances give reason to do so. This situation is elaborated on in the following sections.

5.3.2.2 COMPETING RIGHTS TO THE BILL OF LADING

If the buyer of the cargo chooses to transfer the bill of lading to another person, then that person becomes legitimised to assert the rights in accordance with the bill of lading, provided that relevant formal requirements are observed. A situation may occur where multiple holders of an original bill of lading claim to be entitled to the cargo and where there are competing rights between multiple holders. This is for instance the case where the transferor has transferred a bill of lading to more than one trans-

[571] Møllmann, *Delivery of Goods under Bills of Lading,* p. 31

[572] Vestergaard Pedersen, *Transport – introduktion til reglerne om transport af gods*, p. 491

[573] Vestergaard Pedersen, *Transport – introduktion til reglerne om transport af gods*, p. 491

[574] Vestergaard Pedersen, *Transport – introduktion til reglerne om transport af gods*, p. 491

[575] Møllmann, *Delivery of Goods under Bills of Lading*, pp. 31- 32

feree. That situation is illustrated in the figure below. The following concerns the situation of competing rights to the bill of lading in case multiple transferees claim to be entitled to receive the goods.

§ 306 of the Danish Merchant Shipping Act regulates the issue of competing rights between holders to a bill of lading that has been issued as a negotiable bill of lading by stating that:

> "§ 306 Overdrager den, som fremtræder som rette indehaver, jf. § 302, stk. 1, forskellige eksemplarer af et ordre-eller ihændehaverkonnossement til flere personer, får den erhverver, der i god tro har modtaget sit eksemplar først, ret til godset. Har indehaveren af et andet eksemplar i god tro modtaget godset på bestemmelsesstedet, er denne dog ikke pligtig til at levere det fra sig.
>
> Stk. 2. Den, som i god tro har erhvervet et ordre- eller ihændehaverkonnossement, har ikke pligt til at udlevere det til den, det er bortkommet fra."[576]

[576] My translation into English:

"§ 306 If that person that appears to be the rightful holder in accordance with § 302 (1) transfers different copies of a bill of lading issued to order or holder to multiple persons, that transferee that in good faith receives its copy first is entitled to the goods. If the holder of another copy acting in good faith has received the goods at the destination, that holder is not obliged to surrender the goods.

Para 2. That person whom in good faith has acquired a bill of lading issued to order or to holder is not obliged to surrender the document to that person to whom the document has been lost."

The same provision is to be found in the Norwegian Merchant Shipping Act § 306, and in the Swedish Merchant Shipping Act Chapter 13, § 57

The provision is similar to §§ 164 and 165 in the earlier applicable Merchant Shipping Act.[577] Consequently, this also causes literature from before the law amendment in 1994[578] to be relevant. The Hague-Visby Rules and the Hamburg Rules do not have similar provisions and therefore the conventions are not relevant to include in the following.

§ 306 of the Merchant Shipping Act expresses the principle, that the person who in good faith[579] first receives the bill of lading, is entitled to assert the rights in accordance with the document.[580] However, if a holder of another copy of the bill of lading has been formally legitimised and has received the cargo first, that holder is normally entitled to the goods, provided the holder acts in good faith.[581] Accordingly, the provision regulates the priority of competing rights, by stating that the holder who is first in time has the better right to the goods, if the holder can present itself as being legitimised and acts in good faith. Paragraph 2 of the provision states that that person who has obtained the bill of lading is not forced to return the bill of lading to that previous holder who may have lost the bill of lading, even though it turns out that the bill of lading has been stolen or gotten lost from its rightful holder. The provision regulates the issue of competing rights to the bill of lading in case several persons have received a bill of lading that has been issued in sets.[582] The provision thus states that a holder who has obtained a bill of lading acting in good faith may prevail over a previous holder's right. Thereby, the person who presents the bill of lading to the carrier and appears to be legitimised will in most situations be the one with the right to claim delivery of the goods. Such a situation could for instance occur if a holder of bills of lading issued in sets has sold the bills of lading to multiple buyers.

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[577] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* also the earlier applicable Merchant Shipping Act LBKG 1989-10-13 nr. 653 Søloven. See for instance Lyngsø, *Negotiable Dokumenter,* published in 1971 that not only features the provisions in the Promissory Notes Act that expresses general principles concerning the transfer of rights and obligations of negotiable documents, but which also features a specific chapter concerning bills of lading

[578] See the earlier applicable LBKG 1994-03-16 nr 170 Sølov

[579] It is here stressed that the Nordic doctrine of good faith should be distinguished from the principle of good faith that is expressed in the CISG. See section 5.3.2.3.

[580] See Bredholt, et al., *Søloven med kommentarer,* p. 460, Vestergaard Pedersen, *Transportret – en introduktion til reglerne om transport af gods*, p. 491

[581] See Bredholt, et al., *Søloven med kommentarer*, p. 460, Vestergaard Pedersen, *Transportret – en introduktion til reglerne om transport af gods*, p. 491

[582] See Bredholt, et al., *Søloven med kommentarer,* p. 460, Vestergaard Pedersen, *Transportret – en introduktion til reglerne om transport af gods*, p. 491

As recalled, § 306 of the Merchant Shipping Act is supplemented by the general principles concerning the general effects of negotiability as expressed in the Promissory Notes Act. [583] Therefore, the following sections take their point of departure in the Promissory Notes Act's provisions as these provisions express the general effects of negotiability and therefore support the interpretation of the provisions in the Merchant Shipping Act concerning the transfer of rights and obligations of the bill of lading.

5.3.2.3 THE TRANSFEREE'S EXTINGUISHMENT OF THE DEBTOR'S OBJECTIONS

In accordance with §§ 15-17 of the Promissory Notes Act, the transferee may obtain a better right to the negotiable promissory note than the transferor had itself. If the transferor of the promissory note was not the rightful owner of the promissory note the rightful owner of the promissory note will be prevented from requiring that the transferee hands back the promissory note if certain requirements are fulfilled.[584] This is also referred to as that by transfer of the negotiable promissory note, a transferee may extinguish other rights and objections to the promissory note.[585]

If the conditions for the transferee's extinguishment are not fulfilled, then the transferee may not extinguish the objections. In that case, the situation will be covered by the principal rule that is expressed in § 27 of the Promissory Notes Act, stating that the transferee will not obtain a better right than the transferor.[586] In accordance with § 15, objections that could not be raised towards a transferee of a simple promissory note, cannot be raised towards a transferee of a negotiable promissory note. Thereby, the transferee of a negotiable promissory note is given a favourable legal position. It is also a common principle that the transferee obtains the same rights towards the debtor and issuer of the promissory note as the transferor does.[587] If the issuer of the promissory note cannot assert an objection towards the transferor, nor can it assert the

[583] See Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 86 and also Lyngsø, *Negotiable Dokumenter,* p. 286, Bredholt, et al., *Søloven med kommentarer,* p. 460, Hagstrøm, *Obligasjonsrett,* p. 908

[584] Lyngsø, *Negotiable Dokumenter,* p. 81

[585] Lyngsø, *Negotiable Dokumenter,* p. 81, Tiberg and Lennhammer, *Skuldebrev, växel och check,* pp. 84-90, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, pp. 74-75, Clausen & Jensen, *Sikkerhed i fordringer,* p. 133, Hagstrøm, *Obligasjonsrett,* pp. 906-908

[586] Lyngsø, *Negotiable Dokumenter*, pp. 13-14, Lynge Andersen et al*., Gældsbrevsloven med kommentarer*, p. 74

[587] Clausen & Jensen, *Sikkerhed i fordringer,* p. 133, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 117, Hagstrøm, *Obligasjonsrett,* p. 907

objection towards the transferee.[588] Consequently, the transferee succeeds into the transferor's legal position and in such a situation it is not required that certain requirements for extinguishment in accordance with § 15 are fulfilled.

If the issuer of the promissory note claims that the promissory note has been issued on ground of fraud or claims that grounds for other weak objections are present, then the objections cannot be raised towards a transferor who acts in good faith and thereby not towards a later transferee. However, if the person to whom the promissory note was issued to, acts in bad faith, such an objection may also be raised towards a later transferee, if the conditions to this in accordance with §§ 15-17 are fulfilled. Extinguishment of a debtor's objections can in accordance with § 15[589] be pleaded by that person that by transfer has taken the right over the negotiable promissory note and thereby, that person that possesses[590] the promissory note.

In the following, each of these basic conditions for extinguishment is elaborated: 1) the transferee must have acquired the right and title to the promissory note, 2) the transferee must be in possession of the promissory note, and 3) the transferee must act in good faith.

For the transferee to extinguish the rights of a debtor's objections, it is a requirement, that the promissory note has been transferred to the transferee, either as a security or to ownership. Consequently, there must be a change of creditors, by transfer of the negotiable promissory note. For the transferee to extinguish the debtor's objections, the transferee's right and title to the negotiable promissory note must be valid.[591] If the transferor or the debtor can raise objections towards the title of the transferee, meaning, that the transferee's title to the negotiable promissory note is deemed invalid, the transferee will not be able to defeat the rights. This should be determined in the light of the relevant contract rules and is not subject to further analysis here.[592] For now it is stated that the agreement between the transferee and the transferor must be valid. That the transferee must have acquired the right and title must arguably also apply regarding transfer to bills of lading. It stated in the *travaux préparatoires* to §

[588] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 117

[589] In both the Swedish, Danish, and Norwegian version of the Promissory Notes Act, the provision is to be found in § 15

[590] Which should be understood as physical possession, as elaborated in section 5.3.3.

[591] von Eyben et al., *Lærebog i Obligationsret II*, p. 104, Lyngsø, *Negotiable Dokumenter*, p. 86

[592] The relevant contract rules are to be found in The Contract Act, see the Danish Contract Act LBKG 2016-03-02 nr. 193

306 of the Merchant shipping Act that the common principles regarding negotiable documents also apply to bills of lading.[593]

It is a requirement that the transferee has taken possession of the negotiable promissory note. As the notion of "possession" is a difficult concept to replicate electronically. the term is object to close analysis in section 5.3.3. concerning what "possession" means. For now, it is noted that the requirement of possession of the promissory note is caused by the consideration that that person who extinguishes the rights of another, itself must be ensured against extinguishment of its own rights to the negotiable document. The way to ensure this is through possession of the promissory note so that the transferor is no longer in a position where it has the promissory note at its disposal. The requirement of possession does also apply to bills of lading, as it is stated in § 306 (1) that *that* transferee who first receives the bill of lading while acting in good faith is entitled to claim delivery of the goods.

In order to prevail over the debtor's objections, it is a requirement that the transferee was not aware of such circumstances present that could cause ground for the debtor to raise objections. This is referred to as that the transferee must act in *good faith* concerning the transferor's entitlement to transfer the negotiable promissory note. It is here stressed that the Nordic doctrine of good faith should be distinguished from the principle of good faith that is expressed in the CISG.[594] The assessment as to whether someone has acted in good faith is a discretionary assessment.[595] What is crucial in the assessment is, whether the transferee knew or ought to have known that grounds existed on which objections could be raised, or whether such circumstances can be said to be present that the transferee should have investigated the matter further.[596] Phrased differently, the possibility of extinguishing objections is precluded if

[593] See the *travaux préparatoires* to § 306 in the Merchant Shipping Act, Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 86

[594] The principle of good faith as expressed in the CISG is a general contract law principle. See further on this Felemegas ed., *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International sale of Goods (1980) as Uniform Sales Law,* p. 45 and p. 268, Schwencer ed., *Commentary on the UN Convention on the International Sale of Goods (CISG),* pp. 119-142, Hannold, *Uniform Law for International sales under the 1980 United Nations Convention,* Brunner and Gottlieb, *Commentary on the UN Sales Law (CISG),* p. 20 and pp. 94-95

[595] Falkanger, *God Tro – en studie av kravet til god tro som vilkår for å erverve eller opprettholde privatrettslige rettigheter*, p. 31

[596] Hagstrøm, *Obligasjonsrett,* pp. 914-915, Lyngsø, *Negotiable Dokumenter*, p. 91, von Eyben, et al, *Lærebog i Obligationsret II*, p. 106, Clausen & Jensen, *Sikkerhed i fordringer,* p. 136-137

the transferee has not shown that degree of vigilance that could be argued that the circumstances required.[597]

The relevant point in time where the transferee must be in good faith, is when the transferee receives the negotiable promissory note. Even though the transferee later becomes aware of the transferor's lack of entitlement to dispose of the negotiable promissory note, the crucial point is, whether the transferee knew or ought to have known of such circumstances at the time of receiving the negotiable promissory note.[598] The requirement that the transferee must be in good faith also applies for that agent that may represent the transferee.[599] In case the transferee is represented by an agent, the agent must also act in good faith upon receiving the negotiable promissory note. Regarding bills of lading, it also applies that the transferee should act in good faith upon time of receiving the bill of lading. However, it should be noted that in accordance with § 306 not only does the transferee has to act in good faith upon receiving the bill of lading, but the transferee must also be in good faith at the time upon delivery of the goods.[600] It is stated in § 306 (2) that that person who has received a bill of lading to order is not obliged to transfer it back to the person to whom it has been lost.

The Promissory Notes Act differs between the so-called "weak objections" that may be raised by the debtor and the so-called "strong objections" that may be raised by the debtor. The weak objections may be defeated by the transferee, if the transferee acts in good faith about the existence of such objections, whereas it will be seen that the strong objections cannot be defeated by the transferee. The rationale behind is that an objection can be extinguished by the transferee if it is an objection that the debtor can hedge against.[601]

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[597] Lilleholt, *Allmenn formuerett – Fleire rettar til same formuesgode*, pp. 256-259, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 105

[598] von Eyben, et al., *Lærebog i Obligationsret II*, p. 106, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 124

[599] Lilleholt, *Allmenn formuerett – Fleire rettar til same formuesgode*, p. 259, Von Eyben, et al., *Lærebog i Obligationsret II*, p. 107

[600] § 306 (1) of the Merchant Shipping Act, second sentence of the provision.

[601] Lyngsø, *Negotiable Dokumenter,* p. 101

The following concerns the so-called weak objections. The provision concerning the weak objections is to be found in § 15 of the Promissory Notes Act[602], in which it is stated (see translation in footnote):

> "**§ 15** Over for den, der ved overdragelse har erhvervet ret over et omsætningsgældsbrev og fået det i hænde, kan udstederen ikke gøre gældende,
>
> at gældsbrevet var ugyldigt efter reglerne i lov nr. 242 af 8. maj 1917 om aftaler of andre retshandler på formuerettens område §§ 29-33, eller at det efter at være underskrevet af ham er udgivet uden hans vilje,
>
> at han ikke har modtaget det aftalte vederlag eller har andre indsigelser fra det retsforhold, som gav anledning til gældsbrevets udstedelse,
>
> at betaling var sket før overdragelsen, eller at skyldforholdet i øvrigt var opført eller ændret ved aftale, modregningserklæring, opsigelse eller dom
>
> Stk. 2. En indsigelse går dog ikke tabt, når erhververen vidste, at der forelå omstændigheder, hvorpå indsigelsen kunne støttes, eller havde grund til mistanke derom.
>
> Stk. 3. Har gældsbrevet fået en påtegning, der ikke let kan fjernes, om betaling eller andet forhold, hvorpå der kan støttes en indsigelse, bevares indsigelsen, selvom påtegningen var fjernet inden overdragelse. [603]

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[602] In the Swedish version of the Promissory Notes Act a similar provision is to be found in § 15, and in the Norwegian version of the Promissory Notes Act a similar provision is to be found in § 15

[603] My translation into English:

"§ 15 That person that by transfer of the promissory note has acquired the right and title to a negotiable promissory note and has received it into possession cannot be met with objections by the issuer of the promissory note that,

the promissory note was invalid in accordance with the provisions in the Contract Act §§ 29-33 or that the promissory note after having been signed by the issuer has been issued without the will of the issuer,

the issuer of the promissory note has not received the agreed money consideration,

the issuer had paid the money consideration before the transfer of the promissory note or has other objections to that legal contract upon which the promissory note has been issued.

As objections that the transferee may prevail over, § 15 refers initially to non-violent, compulsive force, fraud, abuse, misconception as to declarations and against common integrity[604], by way of referring to the Contract Act §§ 29-33. All these weak objections can normally, from a contractual point of view, not be raised towards a promisee who acts in good faith, in accordance with § 15 (1). Those objections that from a contractual point of view normally can be prevailed over by an assignee, can thereby also be prevailed over by the transferee when in relation to the transfer of negotiable promissory notes.

Furthermore, it is stated in § 15 (1) (1) that an objection may also be raised by the debtor if the promissory note, after having been signed, is being issued against the debtor's will. This concerns the situation where the debtor has signed the promissory note and then regrets having signed the promissory note. However, if the promissory note has been transferred to the creditor anyway, for instance by the debtor's agent, it is assumed, that normally the debtor will be in a situation, where the debtor by taking appropriate means into use, will be able to prevent the transfer of the negotiable promissory note after it has been signed.[605] As a main rule, such an objection will therefore be an objection, that the transferee will be able to prevail over, if the transferee acts in good faith.[606] Consequently, the consideration given to a transferee whom acts in good faith is higher than the consideration given to the debtor who acts carelessly and allows a negotiable promissory note to be issued against the debtor's will.

If the debtor has not received the agreed amount of money from the creditor, for instance if not the whole loan has been paid by the creditor to the debtor, this is also an objection that the transferee may prevail over if raised by the debtor. This assuming the transferee acts in good faith upon receiving the promissory note.

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(2) An objection cannot be prevailed by the transferee, when the transferee knew that such circumstances occurred upon which the objections could be raised, or if the transferee has suspicions that such circumstances might occur.

(3) If the promissory note has an endorsement, that cannot easily be removed, concerning payment or other circumstances upon which objections can be raised, so forth that the endorsement was removed before the transfer of the promissory note." My translation of the Danish version of the Promissory Notes Act § 15"

[604] See the Contract Act §§ 29-33, see also Hagstrøm, *Obligasjonsrett,* p. 917, and Clausen & Jensen, *Sikkerhed i fordringer,* pp. 138-139

[605] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 124, von Eyben et al., *Lærebog i Obligationsret II*, p. 108

[606] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 124

The debtor can regarding negotiable promissory notes ensure that its objections can still be raised by endorsing the promissory note with the relevant information, for instance, that the money consideration, or parts of the money consideration, has already been paid to the relevant creditor. If done so, the debtor should ensure, that the endorsement is not one that can be easily removed, to keep the possibility to object.[607] If the debtor has paid the full amount owed, the debtor can also demand the negotiable promissory note returned, to ensure, that the debtor will not be met by another demand by a new transferee. The provision is not exhaustive in its mentioning of potential weak objections.

The Promissory Notes Act §§ 16 and 17 concern the so-called "strong objections" that may be raised by the debtor. What characterises the strong objections is, that a strong objection may be raised towards the transferee, even though the transferee has acted in good faith upon receiving the promissory note.[608] § 16 of the Promissory Notes Act states, that in case that the debtor has paid interests that were due before the transfer of the promissory note, the debtor will also be able to plead such an objection even to a transferee who acts in good faith. It is furthermore stated that the debtor may plead other objections as to interests that in accordance with the promissory note has been paid prior to the transfer of the promissory note.[609] § 17 concerns under what circumstances a debtor may raise strong objections that the transferee cannot prevail over, even though the transferee acts in good faith about the existence of such obligations.

The provision states that (see translation in footnote):

> "§ 17 Udstederen kan selv over for en erhverver i god tro påberåbe sig,
>
> at gældsbrevet var falsk eller forfalsket, underskrevet på hans vegne uden fuldmagt dertil, eller ugyldigt på grund af voldelig tvang (…), umyndighed som følge af mindreårighed og tinglyst værgemål med fratagelse af den retlige handleevne (…), eller manglende evne til at handle fornuftsmæssigt (…) ,

[607] Lyngsø, *Negotiable dokumenter*, p. 108, von Eyben et al., *Lærebog i Obligationsret II*, p. 111, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 134

[608] See Hagstrøm, *Obligasjonsrett,* p. 919, and Clausen & Jensen, *Sikkerhed i fordringer,* pp. 137-139

[609] The provision is similar in both the Danish, Swedish and Norwegian version of the Promissory Notes Act and is to be found in § 16.

> at gældsbrevet var erklæret dødt og magtesløst, eller at fordringen var ophørt eller forandret efter lovgivningens regler om deponering, forældelse, præklusion, tvangsakkord eller gældsanering."[610]

§ 17 of the Promissory Notes Act concerns those objections that, even if the issuer acted in good faith, cannot be extinguished. These the strong objections, such as fraud, no power of attorney, duress, legal incapacity, and minority. The provision is not exhaustive.

From the above, it is concluded that a bill of lading is a document that evidences the contract of carriage by sea and that the carrier has received the goods. The Merchant Shipping Act' provisions are supplemented by the Promissory Notes Act regarding the bill of ladings effect as a negotiable document, as there are similarities between a bill of lading and a promissory note. A bill of lading represents the goods and thereby the document is the bearer of rights and obligations. A promissory note is the bearer of the claim to pay a certain amount of money. That a document is to be characterised as being negotiable means that through transfer of the document a transferee who acts in good faith may extinguish objections to and rights over the document. For a person to be deemed legitimised to claim delivery of the goods, the person must be able to present the bill of lading and the person must appear to be entitled to claim delivery of the goods. This entails that the person must be able to present the bill of lading. In case of competing rights to the bill of lading, the person who has received the copy first and who is in good faith is entitled to the goods. Furthermore, if certain requirements are fulfilled, the transferee may extinguish certain of the debtor's objections.

As demonstrated a central requirement is that the transferee must be in *possession* of the bill of lading. In the following, the concept of possession is subject to further clarification and discussion as to what the concept actually means.

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[610] My translation into English:

"§ 17 The issuer can, even if the transferee acts in good faith, object to

that the promissory note was false or forged, signed on his behalf with no authority given, or invalid due to actual violence (…), a legally incapable person due to being underage or by having been deprived the legal capacity (…), or lacking the ability to act sensible (…),

that the promissory was declared dead and powerless, or that the claim had ceased to exist or was changed in accordance with legislation concerning deposit, limitation of time, barring of claims, compulsory arrangements with creditors or debt relief."

My translation of § 17 of the Danish version of the Promissory Notes Act. In the Swedish version of the Promissory Notes Act a similar provision is to be found in § 17, and in the Norwegian version of the Promissory Notes Act a similar provision is also to be found in § 17.

5.3.3. POSSESSION

Above the requirements for the transferee's extinguishment of competing rights have been examined. A central requirement in order to protect one's interests is that the transferee must *possess* the negotiable document.

It must be established who is in control of the bill of lading to establish possession of the bill of lading. The transferee must ensure an act of perfection of the bill of lading. In the Merchant Shipping Act § 306 it is simply stated that that transferee who in good faith has received the bill of lading is entitled to claim delivery of the goods that the bill of lading represents.[611] However, it is not elaborated in the Merchant Shipping Act what possession of the bill of lading entails, apart from the fact that the transferee must have received the bill of lading in good faith.

In the Promissory Notes Act, that supplements the Merchant Shipping Act, it is stated that:

> "**§ 13** Ved ihændehavergældsbreve formodes den, der har gældsbrevet i hænde, at have retten til at gøre fordringen gældende. Ved andre omsætningsgældsbreve formodes retten at tilkomme den, der har gældsbrevet i hænde, når det enten er stilet til ham eller er overdraget til ham eller til ihændehaveren ved skriftlige overdragelser, der fremtræder som en sammenhængende række."[612]

Here it is specifically stated that the person who possesses the promissory note is assumed entitled to assert the rights that the promissory note represents in case the promissory note is issued to holder. It is important to note that the provision specifically states that it is an assumption that the holder is entitled to assert the rights in the document, just on the mere ground that the holder is in possession of the document.[613] Thereby, the provision concerns the external circumstances that relates to being legitimised to assert the rights in the promissory note[614] that relates to being in possession

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[611] See the text and translation into English in 5.3.2.2.

[612] My translation of § 13 into English:

"By a promissory note issued to holder that person who has the promissory note in its possession is assumed to be entitled to assert the claim. By other negotiable promissory notes, the right is assumed to be entitled the person who has the promissory note in its possession, or to the holder by written endorsements that appears connoted."

The same provision is to be found in § 13 of the Swedish version of the Promissory Notes Act and the Norwegian version of the Promissory Notes Act.

[613] See also Hagstrøm, *Obligasjonsrett,* pp. 913-915.

[614] Walin and Herre, *Lagen om Skuldebrev m.m. – en kommentar*, p. 128

of the document. The person who formally appears legitimised is also assumed to be materially entitled to the promissory note.[615]

> "**§ 14** Når et ihændehavergældsbrev er overdraget til eje eller pant af den, der sad inde med det, og erhververen har fået gældsbrevet i hænde, hindrer det ikke hans ret, at overdrageren var umyndig eller manglede ret til at råde over gældsbrevet, medmindre erhververen vidste dette eller ikke har udvist den agtpågivenhed som forholdene krævede."[616]

The purpose with the provision is two-fold. First, the provision regulates certain types of collision of rights.[617] Transferees may easier be able to ensure their legal position, by securing that they are entering into agreements with assignees, that formally claims to be legitimised and entitled to dispose of the promissory note. This by ensuring that the transferee receives the promissory note into its possession.[618] Second, a transferee who has the promissory note in its possession will prevail over the right of a transferee who claims also to be entitled to the promissory note, but who does not have the promissory note in its possession. If the transferor is formally legitimised to dispose of the promissory note, and has the transferee received the promissory note into its possession acting in good faith about the existence of a third party's entitlement to the promissory note, the transferee will prevail over a third party's right and entitlement to the promissory note.[619] The person who can present the promissory note is as a main rule entitled to the claim in accordance with the promissory note. The consequence is that if transferee A holds the promissory note, transferee B will not at the same time be able to present the promissory note to the debtor and demand payment in accordance with the promissory note. Thereby, the debtor is secured against being met by multiple claims.

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[615] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 91, Walin and Herre, *Lagen om Skuldebrev m.m.* – en *kommentar*, p. 128

[616] My translation of § 14 into English

"§ 14 When the promissory note has been transferred either to ownership or as a security by the person who possessed the promissory note, and the transferee has the promissory note in its possession, it does not hinder the transferee's right, that the transferer was underaged or was in lack of right to dispose of the promissory note, unless the transferee knew this or ought to have known this considering the circumstances."

The same provision is to be found in § 14 of the Norwegian and Swedish version of the Promissory Notes Act.

[617] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 98

[618] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 99

[619] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 99

§ 14 also states how a transferee may ensure one's legal position by undertaking an act of perfection to ensure its interests. The important thing to established is: Who is in possession of the promissory note? For transferee to ensure its legal position against other potential later transferees, the transferee must ensure that the transferor no longer is legitimised to control the promissory note, by taking possession of the promissory note. Thereby, the transferee is not in risk of being met with claims by later transferees who claims to be entitled to the promissory note, by ensuring that later transferees will not be able to prevail over its right.

§ 14 states when the transferee of a negotiable promissory note may prevail over colliding rights, by expressing certain conditions that need to be fulfilled. If the conditions in § 14 are not fulfilled, then the situation will be covered by the main rule that the transferee will not achieve a better right than the transferor.[620] The transferee will, however, obtain the same right regarding colliding rights as the transferor. If a transferee cannot assert rights towards a transferor, then the transferee cannot assert rights towards another transferee, that succeeds in the transferor's legal position no matter whether the transferee fulfils the conditions in accordance with § 14 or other rights concerning prevailing. In such cases there exist no collision of rights and thereby there exists no question concerning prevailing of rights, as the transferor did not lack the right to control the promissory note.[621]

A transferee may only prevail over a right if the promissory note has been transferred either to ownership or as a collateral, if the transferor possessed the promissory note in a good title, and if the transferee has acquired the promissory note into his possession acting in good faith about the transferor's lack of entitlement to control the promissory note.[622] It is a condition, that the promissory note has been transferred either to ownership or as a collateral. It is a condition that the contract between the transferor and the transferee can be deemed valid for the prevailing of rights. For the transferee to claim a secure legal position, the transferee will himself has to have a secure legal position, by having entered into a legally valid agreement.[623] It is furthermore a requirement that the transferor (or someone on behalf of the transferor) possessed the promissory note, to establish legitimacy of the transferor's right to control the promissory note.[624]A transferee who claims to be able to prevail over the right of a third party must be ensured against such prevailing of rights. The transferor can in that regard no longer be legitimised to control the promissory note and therefore must be

[620] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 100

[621] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* pp. 100-101

[622] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 101

[623] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 102

[624] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 103

deprived of the promissory note, so that he does no longer appear to be legitimised to control the promissory note.

It is furthermore a requirement that the transferee acts in good faith concerning the transferer's lack of right and entitlement to control the promissory note. The transferee must show the attention needed and appropriate under the given circumstances. The conditions to prevail over a third party's rights must be fulfilled at that point of time where the transferee had the promissory note in his possession.[625] It can be difficult to assess when and whether the transferee acts in good faith. It is assumed that the transferee acts in good faith, unless circumstances present requires him to investigate the matter further.[626] That may, for instance, be the case, if suspicious circumstances present itself.[627] If the transferee does not take the initiative to investigate the matter further upon the discovery of suspicious circumstances, the transferee will act in bad faith, the consequence thereof being, that the transferee cannot prevail over a legitimate right and claim to the promissory note. Consequently, normally the transferee can receive a promissory note without having to investigate the right of the transferor further as the transferee can assume that the debtor has the proper entitlement to control the promissory note. The burden of proof that the transferee acted in bad faith lies upon the party that claims that the transferee did not act in good faith.[628]

However, a question remains regarding what "possession" of the promissory note means, and thereby, what "possession" of the bill of lading means. What demands there specifically are to the notion of "possession" is central in the assessment whether it is possible to possess an electronic promissory note. That question goes directly to the heart of what is to be understood by the notion of possession which for long has been debated.[629]

Among scholars the issue of what is to be understood by "possession" has also been debated and it is here asserted that the concept is not easy to define as such. Carl Torp writes about *possession* in general and states that it must constitute a relation between a person and a factual object and that the person must, at least to some extent, be able to have the object at its disposal or some influence over the object.[630] He then goes on

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[625] Lyngsø, *Negotiable Dokumenter,* p. 97, Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 105

[626] Lynge Andersen et al., *Gældsbrevsloven med kommentarer*, p. 105

[627] von Eyben et al., *Lærebog i Obligationsret II,* p. 106

[628] *Travaux préparatoires* to the Danish Promissory Notes Act, *Udkast til Lov om Gældsbreve,* s. 32

[629] Lilleholt, *Digitale omsetningsgjeldsbrev,* pp. 57-58

[630] Torp, *Dansk Tingsret – Tredje Forkortede Udgave ved Vinding Kruse,* p. 33

to note that concerning a definition on the notion of possession there is some disagreement.[631] Bo von Eyben, Peter Mortensen and Ivan Sørensen states that the dispossession of the promissory note can *and should* be seen as a physical dispossession of the document that contains the promissory note.[632] Lynge Andersen, Peter Møgelvang-Hansen, Anders Ørgaard state perhaps a bit more unclear that the requirement concerning dispossession is definitely fulfilled when the transferee physically possesses the promissory note.[633] Kåre Lilleholt argues in 2018 in *Digitale omsetningsgjeldsbrev?* that it is simply not possible to be in possession of or hold an electronic negotiable promissory note[634] with a reference to Mads Bryde Andersen that in *IT-retten* written in 2005 that states that when the law attaches legal effects to the document, typically because the document serves some sort of symbolic effects, then the digital medium fails.[635] Lilleholt states further that it for long has been debated what possession actually entails but establishes that possession has to do with the physical control.[636] It seems that a general opinion is that being in possession of a negotiable promissory note is only possible if the promissory note exists physically. The issue of possession of an electronic negotiable document and whether it is possible to possess an electronic negotiable document is elaborated in Chapter 6 that concerns the possibility of issuing electronic bills of lading. For now, it should be noted, that there are divergences as to how the state of law is in Denmark, Norway, and Sweden respectively regarding the assessment on whether an electronic negotiable instrument is to be considered as being valid, or whether it instead must be considered as being a simple electronic document as a negotiable document cannot be possessed digitally.

From the above it is concluded that certain things are essential regarding the bill of ladings ability to function as a negotiable and transferable document.

It has been demonstrated that the bill of lading must be capable of being subject to possession. Through possession the transferee can legitimise itself as being the rightful holder of the bill of lading. Through possession of the bill of lading, the rightful holder may prevail over other's rights to the bill of lading, thereby giving the bill its characteristic as a negotiable document in Denmark, Norway, and Sweden. Furthermore, as the bill of lading functions as the key to the cargo, that holder who is in

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[631] Torp, *Dansk Tingsret – Tredje Forkortede Udgave ved Vinding Kruse,* p. 33

[632] von Eyben, et al., *Lærebog i Obligationsret II,* p. 123

[633] Lynge Andersen et al., *Gældsbrevsloven med kommentarer,* p. 104

[634] Lilleholt, *Digitale omsetningsgjeldsbrev,* p. 58

[635] Andersen, *IT-retten,* p. 688

[636] Lilleholt, *Digitale omsetningsgjeldsbrev,* p. 58

possession of the bill of lading is entitled to claim delivery of the goods. Consequently, there are legal effects by being in possession of the bill of lading.

As recalled from the introduction to this chapter, the law of England is often chosen as the governing law of contracts of carriages of goods. The following concerns how the issue of possession is handled in England and Wales. The focal point is on the notion of possession as it has proven to be a key issue in relation to the legal effects of a bill of lading.

5.4. THE TRANSFER OF RIGHTS IN ENGLAND AND WALES

The purpose with the following section is to examine the bill of lading as a document that in England signifies the right to claim possession of the goods from the carrier and the power to transfer that right through transfer of the bill. This relates to the method whereby the transferor and then the transferee exercises control over the bill of lading and thereby how control over the goods is established when the goods are in the possession of the carrier. Consequently, it all comes down to the notion of *possession.* The main purpose is to comprehend how the notion of possession in relation to the bill of lading legally is handled in England. Just as the previous section concerning transfer of the bill of lading in Denmark, Norway, and Sweden, this section is a build-up to the following chapter concerning the use of *electronic* bills of lading in both Denmark, Norway, and Sweden and England. Phrased differently, before turning to how an electronic bill of lading may carry out the same functions as a bill of lading issued in paper, it is deemed necessary to first provide an overview of the applicable law to paper bills. If we are to draw analogies from paper-based solutions, we must know them, and any caveats related to them.

As stated above, the reason as to why it is chosen to include England in this dissertation is that English law is very often chosen as the applicable law to contracts of carriage of goods.[637] Like Denmark, Norway, and Sweden, England is party to the Hague-Visby Rules[638] which was enacted through the Carriage of Goods by Sea Act 1971 (COGSA 1971)[639] that entered into force in 1977. Derivative rights and liabilities under contracts of carriage concluded on or after 16 September 1992 are governed by the Carriage of Goods by Sea Act COGSA 1992 (COGSA 1992).[640] It applies in conjunction with the COGSA 1971 under which the Hague-Visby Rules to the 1971 Act apply automatically to certain carriage contracts and thereby are given the force of laws. COGSA 1992 applies to various transport documents such as bills of lading, sea

[637] See the discussion in Chapter 7, section 7.2

[638] The Hague-Visby Rules

[639] Carriage of Goods by Sea Act 1971 (COGSA 1971)

[640] Carriage of Goods by Sea Act 1992 (COGSA 1992)

waybills and ship's delivery orders. It repealed the Bills of Lading Act 1855[641] and also repealed conflicting common law rules and principles.

It is concluded that, just as the case is in Denmark, Norway, and Sweden, it all comes down to the notion of *possession.* In order to claim possession of the goods from the carrier, and in order to transfer that right through transfer of the bill of lading the method as to how the holder demonstrates that it is in control of the bill of lading is crucial. In other words, the holder of the bill must be able to demonstrate that it is the holder and in control of the bill through possession of the document.

The bill of lading as a document that in England signifies the right to claim possession of the goods from the carrier and that has the power to transfer that right through the bill itself, is subject to closer examination. This includes the method whereby the transferor and a potential transferee exercises control over the bill of lading and thereby how control over the goods is established when the goods are in the possession of the carrier. Initially, there is brought clarity as to what the concepts of *transferability* and *negotiability* entail at common law. Subsequently, the bill of lading as a document of title that has the ability to transfer constructive possession and property in the goods will be subject to closer examination. This is followed by a section that concerns how the bill of lading may be transferred and presented.

5.4.1. TRANSFERABILITY AND NEGOTIABILITY

As there is no uniformly accepted definition of the terms, initially, it is desirable to bring clarity of the terminology used regarding *transferability* and *negotiability* of a bill of lading at common law.

The notion of a bill of lading has evolved in common law on the basis of the custom of merchants.[642] Originally, the first function of the bill of lading was to provide the shipper of the goods with a receipt, evidencing that the goods had been put on board the ship.[643] The receipt could be sent to the shipper's agent at the destination of the goods. Trade practices, however, developed and it became necessary to find a way to perform the receipt function. Merchants no longer travelled with their goods, and the goods were instead sent to their correspondents at the port of discharge.[644] Thereby, the first bill of lading provided evidence of what goods had been shipped and whereto, to a person who had not been present upon time of shipment and who was to take

[641] Bills of Lading Act 1855

[642] Bridge, et. al., *Benjamin's Sale of Goods,* p. 1280, para 18-025, Goldby, *Electronic Documents in Maritime Trade,* p. 108

[643] Goldby, *Electronic Documents in Maritime Trade,* p. 109

[644] Goldby, *Electronic Documents in Maritime Trade,* p. 109

delivery of the goods at the destination.[645] In the Bills of Lading Act 1855 it is stated that by custom of merchants the bill of lading is transferable by endorsement[646] but the Act does not otherwise define the term. The Factors Act 1889 refers to bills of lading but does not include a definition. The COGSA 1971 incorporated the Hague-Visby Rules into English law by giving them the force of law with some additional rules. The Hague-Visby Rules do not include a definition of a bill of lading. The COGSA 1992 that replaces the Bill of Lading Act 1855 includes a partial definition of bills of lading in its section 1(1-3). It is stated that the Act applies to any bill of lading, however, not to documents which are incapable of transfer either by endorsement or, as a bearer bill, by delivery without endorsement.[647]

Two adjectives are often used to describe the bill of lading, namely *transferability* and *negotiability.* As noted in Chapter 2, there are no universally accepted definitions of the two terms.[648] Furthermore, the two terms are often used interchangeably as referring to the same, which they do not. The concepts the words mask are relevant to different types of disputes.[649]

Regarding *transferability,* Charles Debattista expresses:

> "In common law, ´transferable´ documents enable the holder of that document to transfer: (1) constructive possession of goods (and the subsequent ability to demand delivery of those goods); and (2) the rights of suit that attach to that document, without assignment or novation (as would normally be required under a simple contract)."[650]

In common law, transferability means that that a document that is transferable can transfer the right to claim delivery of the goods and other rights of suit from the carrier from one trader to another without the carrier being involved in every transfer.

Only bills of lading bearing the explicit evidence of being transferable can be recognised as being documents of title[651] meaning that the document is capable of transferring the right to claim delivery and property of the goods. This means that the bill of

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[645] Goldby, *Electronic Documents in Maritime Trade*, p. 109

[646] Preamble to the Bills of Lading Act

[647] COGSA 1992 section 1(1) and 1(2)(a)

[648] See Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 77, para 3.1

[649] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 81, para 3.6

[650] Debattista, *Debattista on Bills of Lading in Commodities Trade*, p. 78, para 3.2

[651] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 79, para 3.3

lading should be issued to "order" or to "buyer or order".[652] In contrast, if the document does not refer to itself as being a bill of lading, or if it specifically refers to itself as being non-transferable, or if it is not issued "to order" or "to buyer or order" the document is not to be characterised as a document of title at common law.[653] The consequence of a document not bearing the characteristic of being a document of title is that the rights and obligations under the document cannot be transferred without assignment/novation[654] and hence the document is not transferable.

"Negotiability" means that a document, that is listed in the Factors Act 1889 as a document of title may under certain circumstances allow the transferee to obtain title to money or goods better than that of any pretender.[655] By some, the bill of lading is not recognised as *being* negotiable – "only" transferable.[656] It is argued that the bill of lading is not negotiable in a strict sense, meaning that the bill of lading does not give the transferee better title than the transferor.[657] However, others refer to the bill of lading as a document that is capable of bearing the feature of being negotiable.[658] In Benjamin's Sale of goods it is argued that when reference is made to that a bill of lading is negotiable, what in fact is meant is that it is transferable.[659] The Factors Act 1889 lists documents that are considered as a document of title. "Negotiability" refers to that feature of documents of title listed in the Factors Act 1889 whereby the transferee may, under certain circumstances, in accordance with the Sale of Goods Act 1979 (SOGA 1979) obtain a better right to money or goods.

Consequently, it is debated whether the bill of lading is considered as being negotiable.[660] The intention is not to compare with Denmark, Norway, and Sweden under what specific circumstances the bill of lading may function as a negotiable document in the respective legal systems. Rather the intention is to provide clarity over the terms

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[652] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.42

[653] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 79, para 3.3

[654] Debattista, *Debattista on Bills of Lading in Commodities Trade*, p. 79, para 3.3

[655] Debattista, *Debattista on Bills of Lading in Commodities Trade*, p. 81, para 3.5

[656] Aikens, et al., *Bills of Lading,* p. 28, para 2.38, Girvin, *Carriage of Goods by Sea,* p. 89, para 8.03

[657] Girvin, *Carriage of Goods by Sea*, p. 89, para 8.03

[658] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 89

[659] Bridge, et. al., *Benjamin's Sale of Goods,* pp. 1392-1393, para 18-225

[660] See Debattista's careful dissection of the difference between *transferability* and *negotiability* as well as his analysis of what specific bills of lading can be considered as being respectively transferable or negotiable or both in his *Debattista on Bills of Lading in Commodities Trade,* pp. 78- 91, paras 3.2-3.18

used. In order to assess and discuss whether the functions of a bill of lading may be carried out if the bill is issued electronically, it is first important to know the peculiarities of a bill issued in paper. Transferability, negotiability, and a document being characterised as being a document of title are three terms that often are used interchangeably, however, the three terms refer to different legal effects. For the purpose of the following, it should be noted that the bill of lading may, depending on the type of bill issued, be transferable, negotiable, and a document of title. Or phrased differently, a document of title may be transferable, can definitely function as a document of title as demonstrated in the following section, and is by some considered as being negotiable.

What is central to stress is that a bill of lading bearing the characteristics of being either, the bill may signify the right to claim delivery from the carrier. This right may be transferred to a transferee. This relates to how the transferor and the transferee may exercise control of the bill of lading and thereby over the goods that are in the hands of the carrier. In the following section 5.3.2., the function of the bill of lading as a document of title is studied. The bill of lading as a document of title represents the goods as indicated in the document. The right to claim delivery of the goods, may be transferred through transfer of the bill itself, which is subject to scrutiny in section 5.3.3. Both sections relate to that the bill of lading must be capable of being subject to possession.

5.4.2. THE BILL OF LADING AS A DOCUMENT OF TITLE

The bill of lading serves multiple functions. As stated by Sassoon:

> "The bill of lading enables the buyer or his agent to obtain actual delivery of the goods on their arrival at the port of destination. But the bill of lading has greater significance than that. Possession of the bill of lading is equivalent to possession of the goods, and delivery of the bill of lading to the buyer or to a third party may (if so intended) be effective to pass the property in the goods to such a person. The bill of lading is a document of title [as defined in s 1(4) of the Factors Act 1889] enabling the holder to obtain credit from banks before the arrival of the gods, for the transfer of a bill of lading can operate as a pledge of the goods themselves. In addition, it is by virtue of the bill of lading that the buyer or his assignee can obtain redress against the carrier for any breach of its terms and of the contract of carriage that it evidences. In other words the bill of lading creates a privity between its holder and the carrier as if the contract was made between them."[661]

[661] Sassoon, *CIG and FOB Contracts*, p. 113

Many central functions are at play by the virtue of being a document of title, such as possession, the right to claim delivery and the right to transfer the right to claim delivery, property, and the title to sue.[662] This has been categorised into three main functions of the bill of lading.[663] First, the bill of lading acts as a receipt that the goods have been shipped. The way in which the bill of lading carries out the function as a receipt depends upon who the holder is. Second, the bill of lading is a transferable document, that through time has developed the function of embodying the contract of carriage. Under statutory law it is stated in the COGSA 1992 that the holder of a bill of lading is given certain rights against the carrier regarding possession of the goods. It is stated in Section 2(1) that the person who is lawful holder of a bill of lading is entitled to assert contractual rights against the carrier.[664] Consequently, the holder of a bill of lading has the same rights of suit as if the holder had been a party to the original contract.[665] This also means that these rights are transferred to the new lawful holder upon transfer of the bill of lading. Just as the receipt function of the bill of lading, the way in which the bill performs its function as a contract of carriage depends upon who the holder of the bill is.

Third, the bill of lading is characterised as a document of title. It is this third function concerning the bill of lading's ability to function as a document of title at common law that is the focal point for the rest of this chapter. The document of title function is still relevant in international trade, in situations where the goods are sold while being in transit and in the hands of the carrier.[666] Furthermore, the bill of lading that functions as a document of title may also be used as security in order to obtain credit from a bank.[667] Historically, the bill of lading's function as a document of title emerged at a later stage than the two first functions as a receipt and a contract of carriage.[668]

Under English law, a bill of lading has to fulfil two requirements in order to be considered a document of title.[669] First, the bill of lading must be either a bearer bill or an

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[662] Schmitz, *The bill of lading as a document of title*, p. 260 with reference to amongst others Bell, *Modern Law of Personal Property in England and Ireland*, p. 59, see also Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 33, para 2.2

[663] Bridge, et. al., *Benjamin's Sale of Goods,* p. 1291, para 18-044

[664] Girvin, *Carriage of Goods by Sea*, p. 97, para 8.19

[665] Girvin, *Carriage of Goods by Sea,* p. 97, para 8.19*, Goldby, Electronic Documents in Maritime Trade,* p. 129, para 5.47

[666] Goldby, *Electronic Documents in Maritime Trade,* p. 125, para 5.40

[667] Goldby, *Electronic Documents in Maritime Trade,* p. 125, para 5.40

[668] Goldby, *Electronic Documents in Maritime Trade,* p. 123, para 5.36

[669] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.41

order bill. Phrased differently, the bill of lading must be transferable on its face.[670] Second, the bill must be a shipped or ocean bill of lading as opposed to a received for shipment bill. As for the first requirement, straight bills of lading cannot be considered as bearing the function of document-of-title as they are documents that makes the goods, they represent deliverable to a named consignee. As stated by Goldby:

> "'Straight bills' are bills that make the goods they represent deliverable to a named consignee and either contain no words importing transferability or contain words negativing transferability".[671]

The difference between an order or bearer bill of lading and a straight bill is that with a straight bill of lading, the carrier may only deliver to the person who is named consignee (however, the consignee still needs to present the bill upon request of delivery).[672] If an order or bearer bill of lading is issued, rights over the goods pass with the physical delivery of the goods, and therefore the carrier must only deliver the goods to the person who is in possession of the bill and thereby the rightful holder.[673] Consequently, the document embodies the right to claim delivery. As for the second requirement concerning that the bill of lading must be either a shipped or an ocean bill, such a bill is one which state that the goods have been shipped on board a named vessel.[674] A "received for shipment" bill of lading is a document that states that the goods have been received by a named person to be shipped at an unspecified date.[675]

There is no authoritative definition of what the term "document of title" more precisely constitutes.[676] As stated by Schmitz, it is unclear what "title" the bill of lading represents, as "title" may refer to a plurality of meanings.[677] Even though there is no

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[670] Schmitz, *The bill of lading as a document of title,* p. 267

[671] Goldby, *Electronic Documents in Maritime Trade,* p. 126

[672] Bridge, et al., *Benjamin's Sale of Goods,* p. 1294, paras 18-052-18-055, see See Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (the Rafaela S) 2005 UKHL 11, [1]

[673] Bridge, et al., *Benjamin's Sale of Goods*, p. 1292, paras 18-047-18-048

[674] Aikens, et al., *Bills of Lading,* p. 164, p. 6.2, Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.42

[675] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.42

[676] *Benjamin's Sale of Goods,* p. 1280, para 18-025, Girvin, *Carriage of Goods by Sea,* p. 141, para 8.02, Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 32, para 2.2, Schmitz, *The bill of lading as a document of title,* p. 259

[677] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 32, para 2.2, Schmitz, *The bill of lading as a document of title,* p. 259

exact definition of a "document of title" it is clear that the document serves multiple functions. In common law it has been recognised by court that:

> "(…) as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves (…)"[678]

Furthermore, it has been stated that:

> "(…) the instrument is in its nature transferable (…)"[679]

Thereby, the bill of lading's ability to transfer constructive possession or property of the goods was established.[680] Also, it was recognised that the instrument bears the characteristics as being transferable.

In the case of Barber v Meyerstein the bill of lading was described as:

> "(…) a symbol of possession and practically the key to the warehouse(…)"[681]

Also, it was noted that:

> "(…) when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself."[682]

Furthermore, it was stated that:

> "There has been adopted for the convenience of mankind a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea, being transmitted from one country to another, you cannot deliver actual possession of them; therefore, the bill of lading is

[678] Lickbarrow v Mason, (1987) 2 TR 63 [71], it should be noted that the case went back to the King's Bench as the House of Lords found that there was a defect in the pleading. The decision was upheld in 1794 5 TR 683, where it was stated that transfer of the bill of lading had the mentioned effect by the custom of merchant, see 1794 5 TR 683, [685-686]. See Goldby, *Electronic Documents in Maritime Trade,* p. 123, para 5.36, footnote 71.

[679] Lickbarrow v Mason, (1987) 2 TR 71

[680] See Bridge, et al., *Benjamin's Sale of Goods,* p. 1280, para 18-025

[681] Barber v Meyerstein, (1870) LR 4 HL 317

[682] Barber v Meyerstein, (1870) LR 4 HL 317

> considered to be a symbol of the goods, and its delivery to be a delivery of the goods."[683]

What can be concluded is that through transfer of the bill of lading, symbolic or constructive possession of the bill of lading is also transferred, thus also making the bill of lading transferable. This meet the practical need of transferring property in the goods that had been shipped before the goods arrived at their planned destination point[684] a need that has developed over the years. The bill of lading is a symbol of goods being carried on board of a ship. The holder of the bill of lading may then transfer the goods by selling or pledging the document.[685] The document-of-title function of the bill of lading allows to transfer symbolic or constructive possession of the goods.[686] If the transfer of the bill occurs with the appropriate intention, the bill can transfer property in the goods.[687] Aikens, Lord and Bools focus is in their definition on the right of the holder to demand possession[688], whereas in the definition of a document of title in Benjamin's Sale of Goods, a document of title comprises both the right to demand possession of the goods and of the property:

> "There is no authoritative definition of "document of title" at common law, but it is submitted that in its original or traditional meaning the phrase refers to a document, the transfer of which operates as a transfer of the constructive possession of the goods covered by a document and may, if so intended, operate as a transfer of property in them."[689]

Consequently, the definition in Benjamin's Sale of Goods seem most precise as it indirectly differentiates between the right to demand possession of the goods and of property, in other words meaning ownership of the goods. As stated by Debattista:

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[683] Barber v Meyerstein, (1870) LR 4 HL 317

[684] Schmitz, *The bill of lading as a document of title,* p. 259

[685] Aikens, et al., *Bills of Lading,* p. 165, para 6.5

[686] Aikens, et al., *Bills of Lading,* p. 12, para 1.40

[687] Aikens, et al., *Bills of Lading,* p. 10, para 1.33, Girvin, *Carriage of Goods by Sea,* p. 89, para 8.04, Goldby, *Electronic Documents in Maritime Trade,* p. 124, para 5.38. See Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (the Rafaela S) 2005 UKHL 11 [69] in which it is stressed that: *"(…) whether or not the transfer of a bill of lading transfers the property in the goods is always a question of fact, with the answer depending on the nature of the agreement under which the transfer takes place. In this case the relevant facts about the transaction between Coniston International and MacWilliams have not been established or agreed."*

[688] Aikens, et al., *Bills of Lading,* p. 164, para 6.2

[689] Bridge, et. al., *Benjamin's Sale of Goods,* p. 1280, para 18-025

> "The question of ownership tends to be asked where a particular rival, typically a third party to the sale contract, seeks to bring a stronger claim to the goods against the current pretender, the holder of the goods or of the documents, which holder *is* a party to the sale contract. The question of possession, on the other hand, tends to be asked by the buyer of the seller, where a buyer demands or wishes to transfer the right to claim physical delivery of the goods from the carrier. *Possession,* then, is about control of the goods as between the seller and the buyer; *ownership* is about the relative ranking of claims within a wider pool of rivals (…)"[690]

The distinction between *possession* and *ownership* is important. As a starting point it is reasonable to assume that the transfer of the bill of lading is also assumed to transfer property or ownership of the goods, *however,* if an agreement to the contrary is shown between the parties to the sale contract this presumption is rebuttable.[691] Goldby refers to the judgement with the popular name "the Delfini" that states that:

> "First, as to the status of the bill of lading as a "document of title". I put this expression in quotation marks, because it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between shipper and shipowner, the bill of lading fulfills two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable "key to the warehouse". 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed."[692]

Goldby notes in that:

> "(…) under English law, property in the goods will pass if the appropriate intention is present; the transfer of the bill of lading simply creates a prima facie presumption of that intention unless a contrary intention is shown. By contrast, it is the ability of the bill of lading to transfer constructive possession of the goods that allows it to be used by the holder not only to effect constructive ´delivery´ of the goods to a buyer while the goods are

[690] Debattista, *Debattista on Bills of Lading in Commodities Trade,* pp. 122-123, para 5.3

[691] Goldby, *Electronic Documents in Maritime Trade,* p. 124, para 5.38

[692] Enichem Anic SpA v Ampelos Shipping Co Ltd (the Delfini) [1990] Lloyd's Rep 252

> in the hands of the varier, but also to pledge such goods in return for credit."[693]

At common law, property in the goods will also pass alongside with constructive possession by virtue of transfer of the shipping documents.[694] However, as also noted, property in the goods does not pass by virtue of transfer of the bill of lading, but *rather* by virtue of the underlying contract of sale.[695] Therefore:

> "Although the seller's transfer of the bill of lading might raise a presumption of an intention to pass the property in the goods, if this presumption is rebutted as it often is (the condition of reservation being that the buyer pay the price or provide security for payment), the seller retains the property in the goods despite his having transferred the bill."[696]

Consequently, it is normally said that the bill of lading raises a *prima facie* presumption of an intention to pass the property in the goods to the transferee, because the presumption of intent to transfer property in the goods by virtue of transfer of the bill of lading may be rebutted. There are further conditions that must be fulfilled for the bill of lading to transfer property in the goods. First, the previous holder must have had a proprietary title to the goods. This means that if there are defects in the transferor's title to the goods, the transferee will not have had proprietary rights passed to it through transfer of the bill.[697] Second, the transferor must have intended to transfer property to the goods to the transferee.[698] In the absence of intend, property is not transferred.

Regarding possession, three factors have been identified that results in the bill of lading's ability to give its holder symbolic possession of the goods.[699] First, the bill of lading contains an undertaking by the carrier to deliver the goods only to holder of the bill.[700] Thereby, the holder is given the control of the goods. Second, by transfer of

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[693] Goldby, *Electronic Documents in Maritime Trade,* p. 125, para 5.39 with reference to Carlow Soto Sau v AP Møller-Maersk A/S 2015 EWCH 458, para 23 in which it is it is stated that the bill of lading creates prima facie evidence of transfer of property, however, it is not determinative of whether the bill actually transfers property

[694] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.44

[695] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.44

[696] Aikens, et al., *Bills of Lading,* pp. 174-175, para 6.30

[697] Goldby, *Electronic Documents in Maritime Trade,* p. 126, para 5.44

[698] Goldby, *Electronic Documents in Maritime Trade*, p. 126, para 5.44

[699] Aikens, et al., *Bills of Lading,* p. 165, para 6.6

[700] Aikens, et al., *Bills of Lading,* p. 165, para 6.6

the bill of lading the transferor can no longer exercise control of the bill.[701] Through transfer, the transferor is given control and constructive possession of the goods. Third, also through transfer of the bill of lading, the transferor exercises exclusive control of the goods, and excludes others from doing so.[702]

Consequently:

> "A bill of lading which states that goods have been shipped on board and which is either a bearer or an order bill is a document of title relating to those goods. It is regarded as the symbol of the goods, so that possession of the bill gives its possessor constructive possession of the goods. No doubt this position reflects the commercial need to provide a mechanism for dealing with cargoes afloat while they are "necessarily incapable of physical delivery". It follows from this characteristic of such a bill that the carrier must normally deliver the goods, and deliver them only to the person in possession of the bill, whether as original shipper or as transferee of the bill by indorsement (where necessary) and delivery."[703]

From the above it is concluded that the bill of lading may transfer constructive or symbolic possession of the goods that the bill represents. Furthermore, the bill of lading may create a *prima facie* assumption of an intention to pass the property in the goods by virtue of transfer of the bill. As also stated, that assumption may be rebutted.

5.4.3. TRANSFER OF THE BILL OF LADING

The rules concerning presentation and transfer of bills of lading are based on common law, recognition of the custom of merchants, and to a certain extend supplemented by statutory law. At common law, as a general rule, the holder of an original order bill of lading (that is characterised as being a document of title) is entitled to demand delivery of the goods.[704] This is being referred to as to as the "presentation rule".[705] This means

[701] Aikens, et al., *Bills of Lading,* p. 165, para 6.6

[702] Aikens, et al., *Bills of Lading,* p. 165, para 6.6

[703] Bridge et al., *Benjamin's Sale of Goods,* p. 1354, para 18-163

[704] Girvin, *Carriage of Goods by Sea,* p. 142, para 10.02

[705] Girvin, *Carriage of Goods by Sea*, p. 142, para 10.02, Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 46, para 2.20

that, as a starting point, the carrier may deliver the goods to the first person who presents to the carrier an original order bill of lading.[706] If a bill of lading is not presented to the carrier, the carrier will have no obligation to deliver the goods.[707]

The Hague and the Hague-Visby Rules do not regulate the delivery of the goods directly why it is not relevant to investigate COGSA 1971 further, as the COGSA 1971 implements the Hague-Visby Rules. Consequently, one turns to the COGSA 1992 that applies to bills of lading. If the holder is a lawful holder under COGSA 1992, the holder will have a contractual claim for delivery against the carrier.[708]

As stated, a bill of lading that is defined as a document of title, may transfer property of the goods. The question remains whether the bill of lading also transfers the rights and obligations in the contract of carriage. It appears from the Bills of Lading Act 1855 in the preamble:

> "WHEREAS by the Custom of Merchants a Bill of Lading of Goods being transferable by Endorsement the Property in the Goods may thereby pass,- to the Endorsee, but nevertheless all Rights in respect of the Contract contained in the Bill of Lading continue in the original Shipper or Owner, and it is expedient that such Rights should pass with the Property (…)"[709]

Furthermore, it is stated in Section 1 of the Bills of Lading Act 1855 that:

> "Every Consignee of Goods named in a Bill of Lading, and every Endorsee of a Bill of Lading to whom the Property in the Goods therein mentioned shall pass, upon or by reason of such Consignment or Endorsement, shall have transferred to it and vested in him all rights of suit, and be subject to

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[706] See Wolff v Trinity Logistics USA (2018) EWCA Civ 2765, para 37 in which it is stated that: *"In light of these emails it is clear that Mr Wolff was getting the goods released without documents and knew that it was, to say the least, "dodgy".* In para 38 it is stated that: *"There was undoubtedly an "existing and valid contractual obligation" at the time when the goods were delivered without production of the relevant documents."*, see also Deep Sea Maritime v Monjasa (2018) EWCH 1495 (Comm), para 64, and furthermore Glynn Mills Currie & Co v East and West India Dock Co (1882) p. 591. See also Motis Exports Ltd. V. Dampskibsselskabet af 1912 A/S (2000) 1 Lloyds Rep 211 stating that delivery to other person's than the holder of the bill of lading is wrongful delivery even though the bill of lading was forged, and this was not clear to the carrier.

[707] Girvin, *Carriage of Goods by Sea,* p. 144, para 10.05

[708] It should be noted that this is debated. See Debattista, *Debattista on Bills of Lading in Commodities Trade,* pp. 35-39 and Rose and Reynolds, *Carver on Bills of Lading,* p. 214, para 5-013

[709] Preamble to the Bills of Lading Act 1955

> the same liabilities in respect of such Goods as if the Contract contained in the Bill of Lading had been made with himself."[710]

Through this provision the transfer of rights and liabilities are linked with the passing of property or title in the goods.[711] In accordance with the provision, it is a requirement that the property in the goods shall pass upon or by reason of consignment or endorsement. The bill of lading acts as a new contract between the carrier and the transferee to the bill.[712] The Bills of Lading Act 1855 was repealed by the COGSA 1992.[713]

The COGSA 1992 is concerned with the acquisition of rights and liabilities by those holding, amongst other documents, the bill of lading. It is elaborated in its section 5 (1) that the "contract of carriage":

> (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and
>
> (b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given"

In the introduction to this section, it was stated that the bill of lading has three functions where the first is that the contract of carriage is contained in or evidenced by the bill of lading. This is reflected in section 5 (1) of the COGSA 1992 quoted above. Section 2 (1) of the COGSA 1992 provides that the lawful holder of the bill of lading shall have transferred to and vested in it all rights of suit under the contract of carriage as if it had been a party to that contract. Thereby the holder is provided with the same rights as if the holder had been party to the original contract.[714] Furthermore, in accordance with section 2 (5) the transfer of the bill of lading shall prevail over any entitlement to those rights which derives from a person who has been the original party to the contract of carriage in accordance with section 2(5)(a). This means that the shipper under a bill of lading ceases to have contractual rights when someone else becomes the lawful holder.[715]Also, the transfer of the bill of lading shall prevail over any entitlement to rights which derives from a previous intermediate holder of the bill

[710] Bills of Lading Act 1955, section 1

[711] Bridge, et al., *Benjamin's Sale of Goods*, p. 1415, para 18-262

[712] Aikens, et al., *Bills of Lading,* p. 258, para 9.15, Girvin, *Carriage of Goods by Sea,* p. 93, para 8.12, Goldby, *Electronic Documents in Maritime Trade,* p. 117, para 5.21

[713] The Carriage of Goods by Sea Act 1992, section 6(2)

[714] Girvin, *Carriage of Goods by Sea*, p. 97, para 8.19

[715] Girvin, *Carriage of Goods by Sea*, p. 97, para 8.20

of lading. That intermediate holder of the bill of lading will also cease to have contractual rights upon transfer of the bill of lading when someone else becomes the new lawful holder of the bill of lading.[716]

From the above, it is clear that it is crucial to define who the holder of the bill of lading is as there are legal effects by virtue of being holder. This is in accordance with section 5(2) (a-c) COGSA 1992 which reads that:

> "(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say
>
> (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates:
>
> (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
>
> (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;
>
> and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith."[717]

Consequently, a person is to be characterised as the holder of the bill of lading if the person is in possession of the bill. The person may be identified in the bill of lading as the consignee under section 5(2)(a) and thereby the person is to be defined as holder. Here the important thing to have established is the identity of the person claiming to be consignee in accordance with the bill of lading. A person may also be considered as being holder if it has possession of the bill of lading as a result of delivery of the bill through indorsement or if it is an order bill through transfer of the bill, as stated in section 5(2)(b) of COGSA 1992. Section 5(2)(c) was included to stress that once delivery of the goods had been made to the person that has a right under the bill

[716] Girvin, *Carriage of Goods by Sea*, p. 97, para 8.20

[717] Section 5 (2) (a-c) of the COGSA 1992

of lading to claim delivery of the goods, the document ceases to be an effective document of title that may transfer constructive possession of the goods.[718] The consequence of that provision is that possession of the bill of lading no longer gives a right against the carrier after delivery of the goods.[719]

At common law, the carrier must deliver the goods to that holder of the bill of lading who presents the bill of lading. If the carrier delivers the goods but against no presentation of a bill of lading, the carrier is, as a starting point, in breach of contract. If the contract of carriage falls under the COGSA 1992, Debattista argues that a person claiming to be entitled to delivery of the goods, still must present the bill of lading in order to obtain delivery of the goods.[720] Debattista bases his argument on the fact that section 2(1)(a) refers to a *lawful* holder of a bill of lading and section 5(2) which makes it clear that the person claiming to be entitled to obtain delivery of the goods has to be in possession of the bill. As initially stated, this is referred to as the "presentation rule", meaning delivery against presentation of the bill of lading. There are exceptions to the presentation rule which, however, are not subject to further scrutiny.

It can be concluded that the crucial element is the notion of *possession.* In order to transfer of the rights and obligations as in accordance with the bill of lading the person claiming to be entitled to assert the rights, must be considered as being the "holder" and thereby in possession of the document. In order for a holder to be deemed in possession of the bill of lading, it is a requirement that both the transferor and the transferee has *intended* that the person to whom endorsement of the bill is made is the designated holder of the document.[721] The designated holder has to come in possession of the bill of lading *and* accept the delivery of the bill before becoming holder.[722] Nor would the transferee become lawful holder if transfer of the document occurs on grounds of mistake or fraud, even though the transferee has accepted delivery of the bill.[723] As stated by Sir Richard Aikens et al.:

[718] Girvin, *Carriage of Goods by Sea*, p. 102, para 8.26

[719] Girvin, *Carriage of Goods by Sea*, p. 102, para 8.26

[720] Debattista, *Debattista on Bills of Lading in Commodities Trade,* p. 47, para 2.20

[721] Aikens, et al., p. 268, para 9.43 with reference to Aegean sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea) 2 Lloyd's Rep. 39 in which a bill of lading was delivered to a person in error

[722] Aikens, et al., *Bills of Lading,* p. 268, para 9.43

[723] Aikens, et al., *Bills of Lading,* p. 268, para 9.43

> "In our view it is clear that possession of the bill is necessary but not a sufficient condition for being a "holder" of the bill."[724]

Concerning what the requirement of "good faith" specifically entails is not elaborated further here, however, it should be noted that in accordance with the case Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea) one of the judges noted that "good faith" should be taken as to be:

> "(…) clear, capable of unambiguous application and be consistent with the usage in other contexts and countries. In my view, it therefore connotes honest conduct and not a broader concept of good faith such as "the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned"."[725]

The time upon judging whether the transferee acted in good faith would be upon the time of becoming holder and thereby in possession of the bill of lading.[726] If the holder after having come into possession of the document gets knowledge of problems with the bill this will not affect the holder's status as legal holder.[727]

In previous chapters, reference has been made to the tradition of issuing multiple original bills of lading. As this section has its main focus on the possession of the bill of lading it is found desirable to address the potential issuance of multiple originals here. There has been a long tradition for issuing bills of lading in sets that usually consist of three originals.[728] The practice has been criticised throughout the years as being way outdated, however nevertheless the tradition still persists.[729] The carrier is discharged of its delivery obligation against the presentation of one original bill of lading out of a set.[730]

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[724] Aikens, et al., p. 268, para 9.43

[725] Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea) 2 Lloyd's Rep. 39, p. 60

[726] Aikens, et al., *Bills of Lading,* p. 275, para 9.61, Girvin, *Carriage of Goods by Sea,* p. 104, para 8.27

[727] Aikens, et al., *Bills of Lading,* p. 275, para 9.62

[728] Girvin, *Carriage of Goods by Sea,* p. 63, para 5.06, see also *Lickbarrow v Mason,* p. 72, Aikens, et al., *Bills of Lading,* p. 68, para 3.35

[729] Aikens, et al., *Bills of Lading,* p. 68, para 3.35, Girvin, *Carriage of Goods by Sea,* p. 63, para 5.06

[730] Girvin, *Carriage of Goods by Sea,* p. 65, para 5.10, Møllmann, *Delivery of Goods under Bills of Lading,* p. 40

The situation, however, is different if the carrier has knowledge of the existence of multiple claims. However, the issue of priority of competing rights is not to be pursued further here. It is, however, noted that the carrier must not be aware of competing claims to the goods or have reasonable suspicion that the holder of the bill of lading is not entitled to the goods.[731] Even though a situation occurs where a set of bills of lading has been issued and only one bill is presented to the carrier, this is not in itself sufficient ground to state that the carrier should interplead. In order to investigate matters further before delivery of the goods to the holder of a bill of lading, the carrier must have notice of yet another claim or claim to title or in any other way knowledge thereof.[732] The bill of lading is a trade document and a document of title and is meant to be easily transferable.

It is concluded that at common law the general rule is that the holder of the bill of lading is entitled to claim delivery of the goods in accordance with the bill. The holder of the bill of lading is the person who is in possession of the bill. This also necessarily mean that in order to transfer the rights and obligations in accordance with the bill of lading the person that claims to be entitled to assert the rights must be considered as the holder of the bill. In order to be considered as being the holder of the bill of lading the person must be able to demonstrate that it is in possession of the bill. Consequently, it all comes down to the notion of possession.

5.5. CONCLUSION

In order to assess whether the legislation caters for the use of bills of lading in electronic form, first it is necessary to know the peculiarities of the bill if issued in paper. Denmark, Norway, and Sweden have cooperated in their work on the Merchant Shipping Act and the Promissory Notes Act that supplements the Merchant Shipping Act's provisions on bills of lading. It is concluded that in both the Merchant Shipping Act, and the Promissory Notes Act that supplements the Merchant Shipping Act, the notion of "possession" is central in order for the bill of lading to be given its legal effect as the key to the cargo and its legal effects as a negotiable document. The decision as to who is in possession of the document is central in the situation where there is a conflict of rights to the bill of lading and thereby a conflict of rights to the goods that the bill of lading represents. Furthermore, it is central in relation to the rules concerning the debtor's objections to a transferee's possession of the negotiable document and in relation to whom the debtor may pay or in terms of the bill of lading, to whom the debtor may deliver the goods. Consequently, it has been identified that the notion of possession of the bill of lading is a key concept.

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[731] See also on this Glyn, Mills & Cp. V. East and West India Dock Co. (1882) 7 App Cas 591, p. 599

[732] See Girvin, *Carriage of Goods by sea,* p. 143

As the concept of possession proved to be a key concept, it has been chosen to let "possession" be the focal point in study of the law on bills of lading in England. It is evident that just as the case is in Denmark, Norway, and Sweden, it is central for the bill of lading to be capable of being possessed. It can with certainty be said that the bill of lading is considered as being a document of title in England. It is more uncertain whether the bill of lading is to be characterised as having the feature of being negotiable. Through transfer of the bill of lading, transfer of the right to claim delivery of the goods is transferred as well. Furthermore, if the proper intention is present, the bill of lading may transfer property in the goods.

Based on the findings of this chapter, the following chapter concerns the electronic transfer of rights.

CHAPTER 6. ELECTRONIC TRANSFER OF RIGHTS

6.1. ELECTRONIC TRANSFER OF RIGHTS IN DENMARK, NORWAY, AND SWEDEN

The MLETR provides a legislative framework that enables the use of electronic transferable records. As recalled, electronic transferable records are the functional equivalent to transferable documents. A transferable document may for instance be a bill of lading. At the time of writing, there is no specific legislation regulating electronic bills of lading in Denmark, Norway, and Sweden. Therefore, the Merchant Shipping Act, its *travaux préparatoires,* the Promissory Notes Act, and its principles must be consulted in order to establish the state of law regarding electronic bills of lading. The question that must be raised is whether the current law caters for the use of electronic bills of lading.

In the following chapter it is examined whether the use of electronic bills of lading is compatible with the legislation as it stands. It is demonstrated that extending the provisions in the Merchant Shipping Act to also apply to electronic bills of lading seems premature as there is no guidance as to how the functions of the bill of lading are ensured to work in a purely electronic environment. There is no guidance as to what constitutes possession in an electronic environment regarding bills of lading as regulated in the Merchant Shipping Act. Even if one look to the general principles applicable to the Merchant Shipping Act's provisions concerning bills of lading is there guidance as to what constitutes possession in an electronic environment. Furthermore, it is highly debated amongst scholars whether electronic negotiable documents can be given any legal effect because they are not considered as being able to being possessed. To substitute the requirement of possession with an alternative, law amendments or legislative guidelines are required.

Legislation and various legal standards and principles have begun to develop internationally as demonstrated in Chapter 3 and 4 concerning developments in the field of electronic transferable records. This may eventually provide a basic legal framework to govern electronic alternatives to paper-based documents. If implemented by States it will also gain the benefit of being, if not uniform, then harmonised legislation.

6.1.1. ISSUANCE

Initially, it must be established whether electronic bills of lading fulfil the formal requirements that bills of lading have to in accordance with the Merchant Shipping Act. As examined in the previous chapter, the rules concerning bills of lading are located

in §§ 292-307 of the Danish Merchant Shipping Act.[733] The question remains whether these rules also apply to electronic bills of lading. It is not stated in any of the provisions regulating bills of lading that the rules apply to any other media than paper. However, nor does anything in the provisions indicate the opposite, that they do not apply to other media than paper. In § 296(3) it is in fact stated that:

> "Konnossementet skal underskrives af transportøren eller nogen, der handler på dennes vegne. Underskriften kan være fremstillet på mekanisk eller elektronisk måde."[734]

It is debatable what this specifically entails. It could mean that the bill of lading may be issued in electronic form.[735] However, it could also be understood as meaning that a signature may be printed on the bill of lading from a picture file.[736] Therefore, the *travaux préparatoires* to the Merchant Shipping Act must be consulted to comprehend the background to the provision and investigate whether the legislators intended the provision to apply to electronic bills of lading as well as to bills of lading. As recalled, in the interpretation of statutes in the Scandinavian law, emphasis is to a large degree placed on the *travaux préparatoires* and what the intention of legislators was upon time of drafting the law. It follows from the *travaux préparatoires* that "signed" should be understood in a non-restrictive way.[737] It follows directly from § 293 (3) that the signature may be made by either mechanical or electronical means. It also directly stated in the *travaux préparatoires* that it is not a condition that there is a physical document – it is even stated that the document may be electronic.[738] § 292 (2) specifically provides that as a rule, the bill of lading is to be considered as being "to order" unless the issuer specifically has noted that the bill of lading is "not to order". Therefore, it can be assumed that the legislators intend was that an electronic

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[733] Just as in the previous Chapter, this Chapter takes as its starting point the Danish version of the Merchant Shipping Act.

[734] My translation of § 296 (3):

"The bill of lading must be signed by the carrier or someone acting on behalf of the carrier. The signature may be made by mechanical or electronic means."

The same provision is to be found in the Norwegian Merchant Shipping Act § 296 (3) and in the Swedish Merchant Shipping Act Chapter 13, § 46

[735] See Vestergaard Pedersen, *Transportret – introduktion til reglerne om transport af gods,* p. 498

[736] Møllmann, *Delivery of Goods under Bills of Lading*, 160

[737] Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 78

[738] Sølovsudvalget, *2. Betænkning 1215 om Befordring af gods,* p. 78

bill of lading should function in an electronic form, no matter whether the bill of lading is to be characterised as negotiable or non-negotiable.

If a Danish court is being presented with an electronic document, that otherwise fulfils the requirements of § 292[739], it is therefore possible that the court will find that the document is to be characterised as a bill of lading with all that entails.[740] This because it is to be seen from the *travaux préparatoires* that it actually was the legislators intention that a bill of lading should be able to exist solely in electronic form. This could be taken as to mean that §§ 292-307 in the Danish Merchant Shipping Act concerning bills of lading, also are to apply to bills of lading that only exist in electronic form.

There is no mentioning of the use of electronic bills of lading in the *travaux préparatoires* to the Norwegian and Swedish Merchant Shipping Acts.[741] In the Swedish *travaux préparatoires* electronic alternatives to transport documents are described as "document-less carriages".[742] However, it is also stated that there is a need of the bill of lading as an international paper document, as this forms the starting point for translating the functions of the bill of lading into electronic functions.[743] This could be taken as to indicate that paper documents are to be considered as bills of lading in terms of Chapter 13 of the Swedish Merchant Shipping Law, whereas electronic alternatives are not.[744] It also seems to indicate that it is recognised by the Swedish legislator that there is a need for translating the functions of the bill of lading into functions that may be applied in an electronic environment. In the Danish *travaux préparatoires* it is simply stated that a bill of lading may be signed electronically or be issued in electronic form. However, no decision is made concerning *how* the functions of the bill of lading are to be replicated into an electronic environment. The Norwegian *travaux préparatoires* to the Merchant Shipping Act refers to carriages under electronic alternatives as "document-less carriages" and differs between that and situations where a bill of lading is issued.[745] This could indicate that in the eyes

[739] The requirements are that the bill of lading must be evidence of a contract of carriage, function as a receipt for the goods and is either called a bill of lading or contains an undertaking to only deliver against surrender of the bill of lading.

[740] Møllmann, *Delivery of Goods under Bills of Lading,* p. 160

[741] SOU 1990:13 13 Översyn av sjölagen 2 – Godsbefordran till sjöss,– slutbetänkande av sjölagsutredningen Stockholm 1990 and NOU 1993:36 Godsbefordring til sjøs – Utredning XV fra utvalget til revisjon av sjøfartslovgivningen (sjølavskomiteen)

[742] SOU 1990:13, p. 161

[743] SOU 1990:13, p. 161

[744] See Møllmann, *Delivery of Goods under Bills of Lading*, p. 160. See also Honka, *New Carriages of Goods by Sea – The Nordic Approach,* p. 115

[745] NOU 1993:36, p. 44

of the Norwegian legislator an electronic bill of lading cannot be argued to be a bill of lading in the terms of Chapter 13 of the Norwegian Merchant Shipping Act. As there is no proof of the legislator's intent of the rules in either the Norwegian or Swedish Merchant Shipping Act to apply to electronic bills of lading as well, it seems uncertain whether a court in either Norway or Sweden would deem an electronic bill of lading to have the same legal effect as a paper bill of lading. Furthermore, it seems doubtful whether an electronic bill of lading even is to be *considered* a bill of lading at all in terms of the Merchant Shipping Act.[746] In Denmark it is, on the contrary, directly stated in legislation and *travaux préparatoires* that bills of lading may exist in electronic form and that a bill of lading may be signed electronically. However, there is no guidance as to *how* an electronic bill of lading may fulfil the functions of the bill of lading regarding the transfer of rights and obligations, as is demonstrated in the following.

It is not unproblematic to reach the conclusion that the provisions in the Danish Merchant also apply *per se* to electronic bills of lading. First, the Nordic Merchant Shipping Acts, that have been developed in a joint Nordic legislative effort, can no longer be argued to be interpreted in a harmonised way. This is due to the reason that it seems that there are divergences as to the legal value given to electronic bills of lading. Second, if it is submitted that the relevant rules in the Danish Merchant Shipping Act also apply to electronic bills of lading, then it is a reasonable assumption that the rules in the Promissory Notes Act may be interpreted as being extended to also apply to electronic bills of lading. This must arguably require the Promissory Notes Act to apply to *electronic* promissory notes, which, as is demonstrated in the following sections, there are different views upon in Denmark, Norway, and Sweden respectively.

As recalled, the bill of lading has three main functions. First, the bill of lading acts as a receipt for the goods shipped or received by the carrier. Second, it contains or evidences the contract of carriage by sea. Third, it acts as the key to the goods and may in that regard serve as a negotiable document. It seems unproblematic to replicate the first two functions. The legal value of electronic contracts and electronic evidence has for long been recognised. However, replicating the third function electronically concerning the function of the bill of lading as the key to the goods and its ability to serve as a negotiable document in that regard is more uncertain as it required the bill of lading to be subject to *possession.* The issue of the third function, is the turning point for the following sections.

6.1.2. TRANSFER OF RIGHTS AND OBLIGATIONS

A bill of lading acts as a legitimation, presentation- and redemption paper. The bill of lading possesses these functions because it is a document that in accordance with customs and legislation is the bearer of the rights in the documents. An electronic bill of

[746] Møllmann, *Delivery of Goods under Bills of Lading*, p. 160

lading does not have these features or characteristics *per se* because it is not a paper document. Nor can it be argued to be considered the same as a paper document in a legislative sense, because an electronic bill of lading is not a physical object that can be transferred in the same manner as a paper document. An electronic bill of lading cannot be equated with a bill of lading because they do simply not have the same form. However, today an electronic document may *carry* the same functions that corresponds to the functions that a paper document may perform. This functional equivalence between electronic bills of lading and paper bills of lading is important when the legal effects of an electronic bill of lading must be decided and when the Merchant Shipping Act and other applicable legislation must be interpreted in this regard.

A bill of lading may be issued to holder or to a certain person or to order in accordance with § 292 (2) of the Merchant Shipping Act. The starting point is that the bill of lading is issued "to order" unless the issuer specifically has made reservations towards this. The bill of lading is a document that is bearer of rights and obligations. As demonstrated, these characteristics and functions of the bill of lading are based on longstanding legal traditions in international trade. Both Scandinavian national legislation and international legislation have traditionally been based upon a bill of lading that is issued in paper. The question therefore remains whether rights and obligations may be transferred using an electronic bill of lading.

As also demonstrated, the relevant provisions concerning the transfer of rights and obligations of bills of lading are not only to be found in the Merchant Shipping Act.[747] The Promissory Notes Act that expresses general principles in the field of negotiable documents applies by analogy and thereby supplements the Merchant Shipping Act. This is mainly relevant concerning the negotiability of bills of lading where a transferee may have acquired a better title to the bill of lading than the transferee's transferor and where the transferee has to possess the bill of lading in order to safeguard its interests. Furthermore, the debtor is protected against performing its obligation twice. Therefore, regarding transfer of the bill of lading, both the Merchant Shipping Act and the Promissory Notes Act must be applied. As recalled the Promissory Notes Act lays down general principles in the field of negotiable documents. However, regarding the use of certain types of promissory notes or instruments of debt in electronic form, these has become subject to specific legislation. This is to be seen regarding the use of dematerialised securities and digital mortgage deeds.[748] However, still the Registry of Title to Land and Property Act refers to the Promissory Notes Act for some of the effects of digital mortgage deeds.[749] Thereby it is to be seen that concerning the use of some negotiable documents it has been chosen to develop document

[747] See Chapter 5

[748] Dematerialised securities and digital mortgage deeds

[749] In Danish called "Tinglysningsloven", see LBKG 2014-09-30 nr. 1015 that refers back to the Promissory Notes Act

specific legislation do facilitate their use in electronic form. That specific legislation on certain types of negotiable documents refers back to the Promissory Notes Act stresses that the Act provides legal principles concerning the transfer of rights and obligations of negotiable documents. The question remains whether these legal principles also apply to electronic negotiable documents such as electronic bills of lading that are regulated in the Merchant Shipping Act. The use of bills of lading are not by legislation build upon a registry-system or platform as is the case with digital mortgage deeds, in Denmark and Norway.

It is debatable if it is relevant to this specific question whether the Promissory Notes Act in itself allows for the use of electronic instruments when the Act only applies by analogy to the relevant provisions in the Merchant Shipping Act. Møllmann states that the Promissory Notes Act applies to electronic negotiable instruments of debt to a certain extend.[750] Møllmann argues that the types of instruments of debt most relevant for electronic form have become subject to specific legislation that establishes the legal effects of their negotiability.[751] In his argumentation he furthermore refers to the fact that the Registration of Property Act, that regulates digital mortgage deeds. The Registration of Property Act refers back to the Promissory Notes Act for some of the legal effects of their negotiability. On this ground Møllmann concludes that it is not *im*possible for the rules of the Promissory Notes Act to function in relation to dematerialised instruments of debt, but that it only does so in limited circumstances in practice.[752]

Møllmann then goes on to differ between promissory notes and bills of lading. Bills of lading are not to be characterised as promissory notes within the meaning of the Promissory Notes Act. As bills of lading are not promissory notes within the meaning of the Act, the rules on promissory notes and the principles in the Act supplement the Merchant Shipping Act. Møllmann argues and concludes that:

> "Therefore, it is submitted that the general applicability of the Act on Instruments of Debt to electronic instruments of debt is not decisive in respect of whether the rules and principles that supplement the Merchant Shipping Act in relation to paper bills of lading will also supplement the same rules in relation to electronic bills of lading. Instead, the decisive point should be whether the merchant Shipping Act envisages the same rules to apply to paper and electronic bills of lading (with the necessary amendments). […] With some uncertainty it is therefore submitted that the

[750] Møllmann, *Delivery of Goods under Bills of Lading,* p. 163

[751] Møllmann, *Delivery of Goods under Bills of Lading,* p. 163, with reference to registration of property act that regulates digital mortgage deeds

[752] Møllmann, *Delivery of Goods under Bills of Lading*, p. 163

> rules of the Act on Instruments of debt applicable by analogy to paper bills of lading also apply by analogy to electronic bills of lading."[753]

This argumentation seems to indicate that it is irrelevant to the discussion whether the Promissory Notes Act gives legal effects to electronic negotiable instruments as the Act "only" applies by analogy to the Merchant Shipping Act and thereby "only" supplements the Merchant Shipping Act. However, it is here submitted that it must be argued as being doubtful whether the Promissory Notes Act may supplement the Merchant Shipping Acts provisions on bills of lading if the Promissory Notes Act itself does not give legal effect to electronic negotiable instruments. In any case, careful consideration should be given before adopting this conclusion. In the following it is demonstrated why. It is demonstrated that finding the answer as to how the function of possession is to be replicated in an electronic environment is not possible in either the Merchant Shipping Act or the Promissory Notes Act.

6.1.2.1 WHAT OBJECTIONS MAY BE RAISED

In accordance with § 306 (2) a person that has acquired the electronic bill of lading is not obliged to give up the bill of lading to the person from whom it has been lost, as long as the person has acted in good faith.[754] This means that a person from whom the bill of lading has been stolen will not be able to vindicate the bill of lading.[755] To steal an electronic bill of lading must be argued to be difficult given the fact that the bill of lading does not exist physically. However, just as well as a physical bill of lading may be subject to fraud or abuse, an electronic bill of lading may be subject to abuse. This could for instance happen in a situation of fraud with the electronic signature.[756] No media is bulletproof. What is crucial is that whatever media is used to issue a bill of lading, that media provides the same level of security as the traditionally used bills of lading issued in paper.

The consequence is that if a person has been deprived of the electronic bill of lading cannot claim to have the bill of lading transferred back to him.[757] However, what this specifically entails in terms of an electronic bill of lading must be argued to be unclear – because *how* to return a document that only exists in a dematerialised version?

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[753] Møllmann, *Delivery of Goods under Bills of Lading*, p. 163

[754] Møllmann, *Delivery of Goods under Bills of Lading*, p. 164

[755] Møllmann, *Delivery of Goods under Bills of Lading*, p. 164

[756] Møllmann, *Delivery of Goods under Bills of Lading,* p. 164

[757] Møllmann, *Delivery of Goods under Bills of Lading,* p. 164

The Promissory Notes Act supplements and applies by analogy to the Merchant Shipping Act's provisions concerning the bill of lading, regarding the bill of lading's characteristic as being a negotiable document. §§ 15 and 17 of the Promissory Notes Act establish the "strong" and "weak" objections respectively, as elaborated in Chapter 6. As recalled, the debtor which in relation to bills of lading would be the carrier, can only object to the validity of the bill of lading on the grounds that it is forged, falsified, signed without the required authority or that the bill of lading is signed under threat or use of violence, in accordance with the Promissory Notes Act § 17. § 15 states the weak objections, meaning objections which cannot be asserted by the debtor (i.e., the carrier). These objections include for instance fraud and non-violent coercion. Any such obligations will be extinguished. In terms of a paper bill of lading this means that giving up the document must be understood as the passing of possession of the document. However, what this specifically entails in relation to an electronic bill of lading is unclear. This, again, regarding how possession is established in relation to a document that does not exist physically.

6.1.2.2 LEGITIMATION

In § 302 (1) of the Merchant Shipping Act it is stated that the transferee can only claim the goods delivered upon surrender of the bill of lading. Upon surrender of the bill of lading, the transferee legitimises itself as being entitled to claim delivery. At the time of delivery, the bill of lading has to be returned to the carrier, so that the carrier is not in risk of being met with multiple claims, in accordance with § 302 (2). However, there is no explanation in either the Merchant Shipping Act or the *travaux préparatoires* to the Act concerning how an electronic bill of lading is to be surrendered and thereby indirectly how an electronic bill of lading is to be possessed.

These rules derive directly from the Merchant Shipping Act. However, the Merchant Shipping Act must be supplemented by those rules and principles of the Promissory Notes Act which have analogous application to the Merchant Shipping Act, as demonstrated in Chapter 6. The question remains whether this is also the case regarding electronic bills of lading.

§ 13 of the Promissory Notes Act establishes the notion of legitimation, meaning that the holder of the bill of lading is assumed to be entitled to assert the claim indicated in the document. However, it remains unclear what is to be understood by "holder" in relation to an electronic bill of lading. How does one "hold" an electronic bill of lading that by its very definition does not exist physically? For bearer documents in paper form possession is enough to establish the necessary requirement of legitimation. For documents that have been issued to order, the document must either have been issued to the person who is in possession of the document or if the document have been transferred to the person by endorsements that appear to be uninterrupted. This rule

has analogous application to bills of lading, as earlier established.[758] Thereby it supplements the Merchant Shipping Act § 292 (3) which states that as between the carrier and a holder who is not the shipper, the bill of lading determines the condition for the carriage and delivery of the goods and also § 302 which states that the holder is legitimated as consignee.[759] Nor in the Promissory Notes Act is there any guidance as to how these functions are to be fulfilled by an electronic document.

6.1.2.3 COMPETING RIGHTS TO THE BILL OF LADING

There may occur the situation where both the holder of the bill of lading and another transferee claims to be entitled to the bill of lading. This is regulated in § 306 (1) and (2) of the Merchant Shipping Act. § 306 (2) states that the person who has received a bill of lading acting in good faith is not required to surrender the bill of lading to whom it has been lost.

This is also regulated in § 14 of the Promissory Notes Act. The potential right of another person who claims to be entitled to assert the rights in accordance with the electronic bill of lading depends on whether the transferee has acquired the bill of lading from a person who is legitimated, as in accordance with § 13 of the Promissory Notes Act. It also depends upon whether the transferee itself has received the bill of lading acting in good faith. Any right that another person may claim to be entitled to can be extinguished if the transferee has acted in good faith and received the bill of lading from a person who had legitimation to be entitled to the bill. This means that if a person claims that the bill of lading was stolen from him, such claim will be extinguished by a transferee that has acted in good faith. Again, the question must be raised as to how it should be established who holds an electronic bill of lading and how an electronic bill of lading is to be surrendered. There is no explanation or any guidance as to how these requirements are to be fulfilled by an electronic bill of lading.

6.1.2.4 PROTECTION OF THE DEBTOR

§ 304 of the Merchant Shipping Act states that the transferee can only claim delivery of the goods upon surrender of the bill of lading. This is to protect the debtor against being met with multiple claims of delivery of the goods. As recalled, the bill of lading bears the characteristic of being a negotiable document which makes the document easy to resell. That is also why it is necessary to protect the debtor against the risk of being met with multiple claims. In the Promissory Notes Act § 21 there is a similar provision stating that the debtor is only obligated to pay its debt against surrender of

[758] See Chapter 6

[759] Møllmann, *Delivery of Goods under Bills of Lading,* pp. 164-165

the promissory note. However, nowhere is there given any guidance as to how either an electronic bill of lading or an electronic promissory note is to be surrendered.

Consequently, it can be concluded that there is no specific legislation concerning electronic bills of lading in Denmark. It is stated in the Merchant Shipping Act that a bill of lading may be electronically signed, and in the *travaux préparatoires* to the Act it is noted that a bill of lading may exist in electronic form. Apart from this there is no mentioning or function specific regulation on electronic bills of lading concerning *how* the electronic document is to fulfil the functions of a bill of lading. Consequently, one is forced to interpret the existing rules on paper bills of lading in the light of if another media is used to issue an electronic bill of lading. The existing rules applicable to paper bills of lading are the Merchant Shipping Act, its *travaux préparatoires* and the Promissory Notes Act that applies by analogy regarding the bill of lading's function as a negotiable document.

The question is whether the use of electronic bills of lading is compatible with the existing regulation regarding transfer of rights and obligations through the document. It is to be seen that the legislator has not formed specific legislation that may be applied specifically to electronic bills of lading. Instead, it is a simple extension of the already existing rules that with certainty can be said to apply to paper bills of lading. It seems reasonable to argue that this statement does not leave much guidance as to how the functions of a negotiable document are ensured to apply on an equal footing electronically.

The functional equivalence approach is not being followed, as it is not ensured that the existing provisions in the Merchant Shipping Act can function in an electronic environment. There is not given any guidance as to how an electronic bill of lading is to fulfil the functions of a bill of lading in order to function in an equal manner as paper-based bills of lading. This is specifically obvious regarding the requirement of possession of bills of lading. There is no guidance in applicable legislation or *travaux préparatoires* as to how the notion of possession is to be replicated in an electronic environment. Nor is there any guidance to be found in the legislative principles as expressed in the Promissory Notes Act which are to support the provisions in the Merchant Shipping Act regarding the negotiability of the bill of lading. In the following, focus is on the notion of possession which leads to a discussion as to whether the requirement of possession can be replicated electronically.

6.1.3. THE NOTION OF POSSESSION

The results from the analysis above concerning the transfer of rights and obligations under electronic bills of lading give rise to asking a fundamental question as to whether electronic bills of lading *may* fulfil the same functions as paper bills of lading and if so *how*. Can the notion of possession be replicated electronically? As demonstrated in the Section above and in Chapter 6, there are legal effects attached to the

physical possession of the bill of lading. This is important regarding guidance as to how to hold and thereby possess and how to surrender the bill of lading. In the following it is demonstrated that possession is the function that traditionally has been considered the most difficult to replicate electronically, in any case the most controversial.

For the provisions in the Merchant Shipping Act to apply to electronic bills of lading, some way of establishing "possession" in an electronic environment must be established. In its current form it is unclear how the transferee receives the electronic bill of lading and thereby how the transferee may establish that it is in possession of the bill. Furthermore, the debtor (in terms of bills of lading the carrier) requires the surrender of the bill of lading in exchange for delivery of the goods.

There are certain legal effects by law attached to the physical possession of a negotiable document such as a bill of lading or a promissory note. When an electronic bill of lading has been issued, it raises the issue that no physical document exists, why there is nothing to take physical possession of. An alternative to taking physical possession over a document therefore must be identified in order to perfect the transfer of an electronic bill of lading. There is no guidance in either legislation or *travaux préparatoires* concerning what an alternative procedure to physically possession could entail. It must be argued that whatever procedure chosen it must be able to provide the same level of certainty as the physical handing over of a document. However, it should here be noted, as has also been previously stated, that no method is bullet proof. Just as a paper bill of lading may be subject to unauthorised duplication or fraud, that is also a risk with the use of electronic bills of lading. An alternative procedure to possession as a perfection of transfer should provide at least the same level of certainty.

In this dissertation it is asserted to be relevant for closer examination whether the Promissory Notes Act itself gives legal effect to electronic instruments. Above, the legal effects of transfer of rights and obligations using an electronic bill of lading have been subject to closer examination. The results lead to more principal discussions as to whether negotiable documents may exist solely in electronic form. As earlier established the Promissory Notes Act acts as *lex generalis* in the field negotiable documents and applies by analogy and supplements the Merchant Shipping Act's provisions on the negotiability of bills of lading. As demonstrated supplementing the Merchant Shipping Act's rules on bills of lading with the rules and principles established in the Promissory Notes Act is not unproblematic if the bill of lading is issued in electronic form. It raises the question as to whether the Promissory Notes Act may supplement the Merchant Shipping Act's provisions on the negotiability of bills of lading. On these grounds it seems suitable and desirable to draw on legislation, literature, and case law regarding the legal effects of electronic promissory notes.

The answer to whether the Promissory Notes Act in itself applies to electronic promissory notes in Danish legislation, differs as this depends on whether the electronic promissory note issued is non-negotiable or negotiable.

It is not stated in the Promissory Notes Act whether the Act applies to either electronic negotiable promissory notes or electronic non-negotiable promissory notes. Nothing in the Promissory Notes Act states anything concerning that other than the paper media may be issued, apart from the fact, that it refers to other legislation in which negotiable documents may be digital. This by stating in § 11 (3) that the provisions in Chapter 2 of the Act does not apply to digital mortgage deeds as regulated in the Registry of Title to Land and Property Act.[760] Nor is there any mentioning in the *travaux préparatoires* to the Promissory Notes Act that it may apply to electronic bills of lading.

In 2014 a case was presented to the Danish courts concerning the enforcement of electronic non-negotiable promissory notes. It was decided by the court[761] that a promissory note that had been signed with a digital signature could not be subject to enforcement. A promissory note had been signed with a digital signature. The creditor requested the Bailiff's [762] execution on the ground of the digitally signed promissory note. The Enforcement Court dismissed the case on the ground that in accordance with the at that time applicable Administration of Justice Act[763] § 488 (2), cf. § 478 (2)(5) an original document must accompany the request for execution.[764] The Enforcement Court stressed that the creditor had informed the Court that it was not possible to hand in an original document. The High Court confirmed the decision. The High Court referred to that it follows from the Administration of Justice Act § 478 (4) (1) that enforcement on the grounds of a promissory note may be executed if the debtor has signed the document and thereby obligated oneself as debtor.

Awareness was thereby raised towards the fact that a promissory note that existed in electronic form could not be enforced. The Ministry of Justice[765] came up with a draft

[760] Tinglysningsloven LBKG 2014-09-30 nr. 1075

[761] See U.2014.52 V

[762] U.2014.52 V

[763] The at that time applicable Administration of Justice Act LBKG 2013-24-09 nr. 1139. The current applicable Administration of Justice Act is LBKG 2022-12-25 nr. 1655

[764] U.2014.52 V

[765] In Danish called "Justitsministeriet"

legislation as a reaction to the court decision. In the commentary to the draft legislation[766] awareness was raised towards the fact that the form of communication generally had developed to mainly be in electronic form.[767] It was stated that the legislation on enforcement should reflect the increased digitalisation in society and the fact that citizens and businesses enter into agreements in digital form.[768] On that ground it was argued that it should not be the form of signature that should decide whether a promissory note could be enforced or not.[769] A digital signature should be considered equal to a written signature. Furthermore, it was argued that it ought to be possible to enforce such a legal claim even though it may not be possible to present an original document in the traditional sense.[770] The practice had thus far been that a copy of the promissory note was issued alongside the request of enforcement. The presentation of the original document made it possible to ensure that the creditor was the rightful person to dispose of the claim. The original document thereby legitimises the person who claims to be entitled to the money that the documents represent.

This led to law amendments in the Administration of Justice Act, so that a non-negotiable promissory note may be enforced at the court, even if the promissory note only exists in electronic form. Thus, it is stated in the Act § 478 (1) (5) that promissory notes may be enforced when specifically stated in the document. In accordance with § 478 (4) a document may be enforced if a person by signature has committed itself as debtor. It is furthermore stated that the signature may be digital. This indicates that the Promissory Notes Act apply to electronic non-negotiable promissory notes as these types of promissory may be enforced in court. Consequently, the creditor has valid security for its claim. Had non-negotiable promissory notes not been able to be subject to enforcement, the situation would be somewhat different. That would mean that the creditor had no security for its claim, as the claim could not be subject to enforcement. The consequence would be that the claim was to be considered as being worthless, as the creditor would not be able to force through its claim against the debtor.

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[766] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014

[767] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 3

[768] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 3

[769] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 4

[770] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 4

Regarding the enforcement of negotiable promissory notes, the commentary to the draft legislation on the Administration of Justice Act specifically stresses that that it is not possible to enforce such documents that only exist electronically.[771] It is argued that in order to enforce negotiable promissory notes as regulated by the Promissory Notes Act it is a requirement that the document is issued in paper form or in another media that exists in physical form.[772] The reason to this is that there are legal effects attached to the negotiable promissory note regarding the physical *possession* of such a document.[773] The provisions in the Promissory Notes Act referred to, are the provisions in the Act's Chapter II. As recalled, the possession of a negotiable promissory note both legitimises the person who claims to be entitled to the money the promissory notes represents with all that entails. Otherwise, there is a risk that the debtor may be faced with multiple claims at the same time if it cannot be ensured that there only exists one promissory note.

It is to be seen that the case from 2014 concerning enforcements of non-negotiable promissory notes did not cause amendments to the Promissory Notes Act, however amendments to the Administration of Justice Act. If a promissory note can be enforced, it seems reasonable to conclude that such a document existing only in electronic form may be defined as a promissory note even though the Promissory Notes Act does not itself specifically state that such a document can exist in electronic form. However, only electronic non-negotiable promissory notes may be enforced in accordance with the Administration of Justice Act. Electronic negotiable promissory notes may not be enforced because they do not exist in physical form. As an electronic negotiable promissory note does not exist in physical form it cannot be subject to being possessed.

The contention that electronic negotiable promissory notes cannot be enforced because they do not exist in physical form and that they thereby cannot be asserted to exist in an original form goes hand in hand with the general perception amongst legal scholars.

Mads Bryde Andersen states in his book *IT-retten* from 2005 that the digital media fails when the law attaches value to the notion of *possession* of a document.[774] The legal effects are attached to the document, typically because it serves a symbolic function. The one that possesses the document, possesses the rights the document entails.

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[771] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 5

[772] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 5

[773] Udkast: Forslag til Lov om ændring af retsplejeloven of kreditaftaleloven (Tvangsfuldbyrdelse på grundlag af digitale dokumenter), 12 January 2014, p. 5

[774] Andersen, *IT-retten,* p. 688. It should be noted that the book has not been updated since 2005.

This means that the person i.e., the transferee, may identify itself as being legitimised as the rightful holder. The transferee may be deemed as having a potential better title to the rights than the transferor of the document. Bryde Andersen argues that these effects cannot be attached to an electronic document because the electronic document cannot be possessed.[775] If that is indeed the case that means that if the law attaches legal effect to the possession of a document that document would not be able to function in an electronic environment because it is arguably not able to being possessed. Consequently, according to Bryde Andersen neither a bill of lading nor a promissory note may exist electronically outside a contractual framework whenever the law gives the documents legal effect because of their capability of being possessed in physical form. It should be noted that Bryde Andersen made this argument in 2005 and that technology has developed in rapid speed since. However, even still it seems that in Denmark it is the general opinion that an electronic negotiable promissory note cannot be possessed or in any case there is not any debate as to whether an electronic bill of lading or an electronic negotiable promissory note may exist solely in electronic form. Bo von Eyben, Peter Mortensen, and Ivan Sørensen argue that the dispossession of the promissory note can *and should* be seen as a physical dispossession of the document that contains the promissory note.[776] They do not specifically refer to electronic promissory notes. Lynge Andersen, Peter Møgelvang-Hansen and Anders Ørgaard argue that the requirement concerning dispossession is definitely fulfilled when the transferee physically possesses the promissory note[777], however they do not consider whether the requirement of possession may be fulfilled electronically.

It should also be stressed that is not possible to find recent sources that concerns the issue of electronic negotiable instruments, and consequently it does not seem to be a discussion that is given much attention in Denmark. In the book *IT-RET* from 2021[778] that concerns IT-law there is for instance no mentioning of the issue. From the discussions on the subject, it seems that it is not relevant to discuss the issue, as possession is a function that cannot be replicated electronically, or that such a technology has not yet been made available so that the issue is relevant to discuss.

In Norwegian literature it has been debated whether a promissory note can exist in electronic form. Trygve Bergsaker argues in 2011 that the rules in the Promissory Notes Act Chapter 2 concerning negotiable promissory notes presupposes that there is a document that the relevant persons may possess in accordance with the Promis-

[775] Andersen, *IT-retten,* p. 688

[776] von Eyben, et al., *Lærebog i Obligationsret II,* p. 123

[777] Lynge Andersen et. al., *Gældsbrevsloven med kommentarer,* pp. 104-105

[778] Udsen, *IT-RET,* published in 2021 in its 1st edition

sory Notes Act §§ 13,14,15 and 18 and that may be returned to the debtor upon redemption in accordance with § 21.[779] He also states that it seems bold to conclude that an electronic text may be interpreted as being a promissory note in the understanding of the Promissory Notes Act.[780] Kåre Lilleholt is more direct and argues in 2018 that the provisions in the Promissory Notes Act require the negotiable document to be issued in paper.[781]

In 2017 the Swedish Supreme Court passed a decision concerning an electronic promissory note.[782] It is the first time that the Swedish Supreme Court passed a decision on the matter. A principal question was raised, whether an electronic promissory note could establish grounds for enforcement, as the claimant could not be argued to possess the electronic promissory note in its original form. The Supreme Court raised several precedent issues and questions. Can an electronic negotiable promissory note be considered as being negotiable? How to handle electronic, negotiable promissory notes legally, when the promissory note is not registered in a specific system, or if it has not also been issued in a physical version? What is demanded of the technical solution for possession of the electronic negotiable promissory note to be established? What is required of the electronic negotiable document to be considered as being functional equivalent to a negotiable document?

Furthermore, it should be noted that the case must be given certain precedent value, as the court decided on the matter as to whether the electronic signature on a dematerialised instrument could be seen as a negotiable document, when no original document could be presented to the court, as such an original, physical document had never been issued.

Facts of the case were that a person (in the following called HL) obtained a credit in a bank called Collector Bank AB. A loan-document was signed electronically by HL, and the document was specified as being a "loan-application/promissory note".[783] The debtor was obliged to pay to "Collector" or to "order". Eventually, HL breached the contract, and therefore Collector Bank AB wanted to enforce the promissory note. Both the Swedish Enforcement Authority[784] and the first court decided that the promissory note was to be considered as being a negotiable promissory note, and that the

[779] Bergsåker, *Pengekravsrett,* p. 25

[780] Bergsåker, *Pengekravsrett,* p. 25

[781] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 66

[782] Supreme Court Decision Ö 5071-16

[783] Supreme Court Decision Ö 5071-16

[784] The Swedish Enforcement Agency (Kronofogden) is a government agency that registers, monitors, and collects debts, see www.kronofogden.se – last accessed 27 January 2023

promissory note could not be enforced as there existed no original version of the promissory note. What is relevant to point out here is that it was recognised by the court that the promissory note, even though it was in electronic form, was recognised as a negotiable promissory note. However, still both the Enforcement Authority and the first court's view a promissory note that could not be enforced as it only existed in electronic form.

Ultimately, the case reached the Swedish Supreme Court. The Supreme Court initiated its decision with some general remarks concerning, that an electronic document can be considered as being negotiable if the law states, that the document is negotiable.[785] The Supreme Court noted that the parties to a contractual agreement can agree that an electronic document is considered as being equal to a negotiable document issued on paper. The Court also points out that it should not be ruled out that an electronic document could be considered as being on equal footing with a corresponding negotiable document through contractual agreements with reference to the Rotterdam Rules that build upon this possibility.[786]

What remains unanswered is, how to handle electronic negotiable documents that are not registered in a specific system or regulated by law if it is not also issued in a physical version. The Supreme Court gave some general remarks concerning conditions for electronic promissory notes to be given the same legal value as promissory notes issued in paper. The provisions in the Promissory Notes Act build upon the underlying requirement that it must be possible to possess the promissory note and thereby to control the claim.[787] This is a requirement in order for the promissory note to be considered as a negotiable promissory note. However, the Court also pointed out that even though the starting point was that it should be possible to possess and control the promissory note in a paper-based form, it should not be considered as a general requirement that the document should be paper-based or exist in another physical media.[788] The Promissory Notes Act should be adjusted to function in a technology neutral manner.[789]

The Supreme Court gave a landmark ruling when it stated that the Promissory Notes Act should be able to be interpreted in a technology-neutral way, as long as the handling of information fulfils the requirements that the law places upon the instrument. The consideration behind is that a debtor should not risk being met with yet another claim when the debtor has already paid its debt in accordance with the promissory

[785] Supreme Court Decision Ö 5071-16, pp. 3-4

[786] Supreme Court Decision Ö 5071-16, p. 5, para 9

[787] Supreme Court Decision Ö 5071-16, p. 5, para 10

[788] Supreme Court Decision Ö 5071-16, p. 4, para 8

[789] Supreme Court Decision Ö 5071-16, p. 4, para 8

note. When the debtor has paid its debt, the debtor should be in the same legal position as if the document had been in physical form. Control of the promissory must be able to be established, to ensure and prove who has control of the claim. Consequently, a functional equivalence to physical possession must be established.

In this case the Court decided that the electronic document as such fulfilled the requirements a promissory note must fulfilled. However, it was found that the electronic document did not correspond to a document as bearer of the rights. Furthermore, the Court noted that control of the document had not been ensured. Consequently, the promissory note could only be considered as a non-negotiable promissory note.[790]

Judge Stefan Lindskog gave a separate comment for his own part.[791] He pointed out that the Court's decision paved the way for negotiable promissory notes in accordance with the Promissory Notes Act can have electronic form.[792] However, electronic negotiable promissory notes require an alternative to the traditional requirement concerning possession. The debtor must in an information technology way be placed in the same secure position as when a promissory note is surrendered to the debtor. He argues that in order for an electronic promissory note to be considered as a negotiable promissory note it must be ensured that it is in fact unique and capable of being subject to control as an alternative to being possessed.[793] Otherwise, the promissory note cannot be characterised as being negotiable. Judge Lindskog goes on stating that the Rotterdam Rules builds upon this possibility. He also argues that Utdökningsbalken[794] kap. 2 and 13 kap. 21 § utsökningsförordningen[795] must be adapted to claims based on electronic negotiable instruments.

Mikael Mellqvist comments on the Supreme Court decision and notes that an electronic negotiable promissory note must be capable of being subject to exclusive possession.[796] Furthermore, he notes that it must be ensured that such an electronic promissory note does not exist in multiple copies.[797] It must also be possible to prevent that

[790] Supreme Court Decision Ö 5071-16, p. 6

[791] Individual comment to the Supreme Court Decision Ö 5071-16 by Judge Stefan Lindskog, Bilaga til Protokoll

[792] Individual comment to the Supreme Court Decision Ö 5071-16 by Judge Stefan Lindskog, Bilaga til Protokoll, para 1

[793] Individual comment to the Supreme Court Decision Ö 5071-16 by Judge Stefan Lindskog, Bilaga til Protokoll, para 1

[794] Utdökningsbalken 1981:774

[795] Utsökningsförordningen 1981:981

[796] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 865

[797] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 865

an electronic promissory note can be transferred without the holder's knowledge.[798] He notes that these are requirements that must be fulfilled in order for a promissory note to function in electronic form.[799] Mellqvist recognises that he does not have the technological qualifications to say with certainty that these requirements can be fulfilled through the electronic media, however, he thinks that this is possible.[800] He also refers to that the Supreme Court thinks this to be possible.[801]

Johnny Herre and Gösta Wallin refer to the Swedish Supreme Court decision on electronic negotiable notes in their commentary to the Swedish edition of the Promissory Notes Act.[802] They refer to the Supreme Court Decision which states, that it should be possible to create an electronic promissory note with the same qualities, characteristics, and legal effects, as a physical negotiable promissory note.[803] Furthermore, they refer to the fact, that the Supreme Court refers to the Rotterdam Rules in which it is possible to use electronic transport documents by stating that "the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document", and that procedures have been established to ensure the conditions regulated in the Rotterdam Rules Art. 9.[804] They also point out that Judge Lindskog states that for an electronic negotiable promissory note to have the same legal effect, the debtor should in an information-technical way be ensured the same safe legal position as when the promissory note is endorsed or when the promissory note is surrendered to the debtor.[805]

Jori Manukka and Erik Rosqvist also refer to the possibility of using electronic promissory notes in their book concerning promissory notes published in 2016 which was one year prior to the Supreme Court Decision.[806] They also note that there is an issue regarding the Enforcement Act that requires the surrender of the original promissory note and state that therefore an electronic promissory note cannot be enforced.[807]

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[798] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 866

[799] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 866

[800] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 866

[801] Mellqvist, *Elektroniska skuldebrevs rättliga karaktär,* p. 866

[802] Walin and Herre, *Lagen om Skuldebrev, m.m. – En kommentar,* pp. 119-120

[803] Walin and Herre, *Lagen om Skuldebrev, m.m. – En kommentar,* p. 119

[804] Walin and Herre, *Lagen om Skuldebrev, m.m. – En kommentar,* p. 119

[805] Walin and Herre, *Lagen om Skuldebrev, m.m. – En kommentar,* pp. 119-120

[806] Manukka & Rosqvist, *Skuldebrevsrätten – en introduktion*, p. 104

[807] Manukka & Rosqvist, *Skuldebrevsrätten – en introduktion,* p. 104

Kåre Lilleholt comments on the Swedish Supreme Court decision and argues that it is not desirable nor appropriate that *control* is set to be equalled by something that does not mean physical control.[808] He criticises that the Supreme Court refers to rules concerning registered financial instruments and states that the legislator is free to say that the registration of rights in a register will have the same legal effect as possession and transfer.[809] He argues that this is something else than arguing that the provisions concerning *possession* and transfer in the Promissory Notes Act does not apply.[810] By using the "*lova om kontoføring av finansielle instrument"*[811] this does not mean that the Promissory Notes Act may be interpreted in a technology neutral way.[812] Regarding the Supreme Courts reference to the Rotterdam Rules, Lilleholt argues that the convention will have to be implemented in domestic law by amending the existing Merchant Shipping Acts (Denmark, Norway, and Sweden have all prepared legislation implementing the Convention in case the Rotterdam Rules enter into force).[813] He stresses that the Rotterdam Rules do not build upon a presupposed condition that the existing rules in the Shipping Acts will be applied to digital transport documents.[814] He also states that there is no reason as to why the Nordic Promissory Notes Acts should be interpreted as being "technology-neutral".[815] Lilleholt points out that the consequences of the Promissory Notes Act's lack of ability have been taken. Lilleholt elaborates and explains that Denmark and Norway have implemented legislation concerning "registration" of digital mortgage deeds[816] why the discussion as to whether the Promissory Notes Act may be interpreted in a technology neutral way seems irrelevant.[817]

As stated by Lilleholt, it is clear that a negotiable document may be electronic if stated in legislation that it can exist only in an electronic version. The Danish Promissory Notes Act no longer regulates registered mortgage deeds. Instead, provisions concerning negotiable mortgage deeds are to be located in the Registry of Title to Land or

[808] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 59

[809] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 59

[810] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 59

[811] Lag om värdepapperscentraler och kontoföring av finansiella instrument 1998:1479

[812] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 59

[813] Lilleholt, *Digitale omsetningsgjeldsbrev?,* pp. 59-60

[814] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 60

[815] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 60

[816] In Danish and Norwegian called "tinglysning".

[817] Lilleholt, *Digitale omsetningsgjeldsbrev?,* p. 60

Property Act.[818] The provisions are not to be subject to closer examination in this dissertation except for the following comments, as it has otherwise been found without the scope of this dissertation. However, it is relevant to mention that the Registry of Title to Land or Property Act is built upon a registry system[819] where registration supersedes the physical possession of a mortgage deed. Thereby, the rules in the Act are not to be characterised as being either medium- or technology neutral, as the provisions are bound to the technology of and the act of registration. In Danish it is called *tinglysning*. The perfection of security interests in form of registration has been known in Danish law for more than 800 years.[820] There are rules that dates back to 1241 that concerns *tinglysning.*[821] What is meant with the notion of *tinglysning* is that the sale of property should be witnessed by the courts in order to ensure proof that transfer of property had taken place.[822] In 2006 digital registration as method of perfection of security interest entered into force. Previously there were 82 registration offices in the district courts. They were all gathered to one court, in Danish referred to as the *Tinglysningsret.* Directly translated into English, it is called the Registration Court. It is here important to stress that the material rules concerning the legal effects of registration were to a very large degree identical to rules that applied before digital registration entered into force.[823] This means that all documents have to be registered electronically. This either through the internet or an electronic system-to-system communication between the registration system and the professional users such as lawyers, real estate agents, financial institutions, etc.[824] The rights will be made public in the Danish Land Charges Register.[825] In that way it is made public who is entitled to a right. Thereby, it is possible to determine the *priority* between competing rights, meaning who undertook one's perfection of security interest first. It is also made public so that new right holders can be aware of competing rights. There is not physically *possession* but a functional equivalence to possession can be established. Indirectly the digital registration implies that it is difficult to have at one's disposal something

[818] Tinglysningsloven LBKG 2014-09-30 nr. 1075

[819] Webpage of the Danish Registrations Court: https://www.tinglysning.dk/tinglysning/landingpage/landingpage.xhtml - last accessed 27 January 2023

[820] Mortensen, *Digital Tinglysning – rettigheder over fast ejendom,* p. 21

[821] Jyske Lov from 1241 contains a rule in 1-37 concerning *tinglysning*.

[822] Mortensen, *Digital Tinglysning – rettigheder over fast ejendom*, p. 21

[823] Mortensen, *Digital Tinglysning – rettigheder over fast ejendom,* p. 23

[824] Mortensen, *Digital Tinglysning – rettigheder over fast ejendom,* p. 23

[825] https://www.tinglysning.dk/tinglysning/landingpage/landingpage.xhtml - last accessed 27 January 2023

that goes against already electronically registered rights. The provisions in the Registry of Title to Land or Property Act cannot be argued to be technology neutral, as they are tied to a digital registration system.

In Norway there is a double-track system regarding registered mortgage deeds. In 2017 it was made possible to electronically register as being holder to or owner of a mortgage deed. If wished to electronically hand in the registration, an agreement with the register office of the *Norwegian Mapping Authority* must be entered.[826] Lilleholt may very well argue that Denmark and Norway have implemented legislation concerning registration of digital mortgage deeds as opposed to Sweden. However, still this does not change the fact that this registry-system cannot be argued to be either technology or media neutral.

In relation to electronic bills of lading, Møllmann argues that the requirements of possession of such documents must be substituted with a requirement of exclusive control.[827]

> "Such adjustments seem warranted to fulfil the legislative intention that bills of lading may be in electronic form."[828]

Adjusting the requirement of possession with a requirement of control seems premature when taken into consideration the existing legislation and the *travaux préparatoires* to the current legislation. It may be stated in the *travaux préparatoires* that a bill of lading can be in electronic form. However, there is absolutely no guidance as to how possession is established, what constitutes possession in an electronic environment or even a principal decision upon whether an electronic negotiable document may be subject to possession or some electronic form of possession in either the Merchant Shipping Act or the Promissory Note Act. The Merchant Shipping Act is *lex specialis* and the Promissory Notes Act must be characterised as being *les generalis* that establishes principles and thereby fallback legislation for the *lex specialis.* In other words, the functional equivalence between possession and control is not ensured, nor is there given any guidance to the industry. The industry is going to use electronic bills of lading in practice and thereby has to develop a standard for the use of electronic bills of lading. Control may very well act as the functional equivalence to possession. However, it seems premature to substitute the requirement of possession with a requirement of control with basis in the existing legislation in its current form. There is no facilitation of what constitutes possession in an electronic environment and consequently there is no certainty as to the legal status of electronic bills of

[826] *Statens kartverk (the Norwegian Mapping Authority)* https://www.kartverket.no/en - last accessed 27 January 2023

[827] Møllmann, *Delivery of Goods under Bills of Lading,* p. 165

[828] Møllmann, *Delivery of Goods under Bills of Lading,* p. 165

lading. Thereby it is not being said that the notion of control cannot be the functional equivalent to possession. However, it is argued that it is not possible to interpret the notion of control as a substitute for the notion of possession into the legislation in its current form. Amendments to the law or legislative guidelines must be argued to be required in order for the bill of lading or the promissory note to function in an electronic environment.

Summing up, both the promissory note and the bill of lading bear the character of being a negotiable document. Both documents carry a symbolic function, meaning that the person who is in possession of the document is entitled to assert the claim in accordance with the document. Furthermore, it is a requirement for asserting the claim in accordance with the document, that the document is returned to the debtor upon time of redemption. Accordingly, it is central to be able to establish who is in possession of the document. It is stated in the Danish Merchant Shipping Act that a bill of lading may be signed electronically. In the *travaux préparatoires* to the Merchant Shipping Act it is noted that a bill of lading may be in electronic form. The legal status of electronic bills of lading is unclear in both Norway and Sweden.

How an electronic bill of lading is to carry the functions of a bill of lading is, however, unclear in Denmark. The Promissory Note Act supplements the Merchant Shipping Act's provisions concerning the negotiability of bills of lading. Nor in the Promissory Notes Act is there given any guidance as to how a negotiable document may function in an electronic environment. In fact, it seems that there is a difference of opinion in Denmark, Norway, and Sweden as to whether the Promissory Notes Act may be interpreted in a technology-neutral way. In Denmark and Norway, the general opinion is that the Act cannot be interpreted in a technology-neutral way meaning that the functions of an electronic promissory note cannot be replicated electronically. This is due to the requirement that a negotiable promissory note must be able to be possessed. A requirement that as recalled does also apply to bills of lading.

The Swedish Supreme Court has relatively recently decided that the Promissory Notes Act should be able to be interpreted in a technology-neutral way. As a support for the Court's argumentation, reference is made to the Rotterdam Rules that Sweden (as well as Norway and Denmark) has signed, however has yet to ratify. It is argued that if it is possible to give legal status to electronic bills of lading under the Rotterdam Rules, it should be able to interpret the Promissory Notes Act in a technology-neutral way. If the Promissory Notes Act can be interpreted in a technology-neutral way so that the functions of a negotiable promissory note can be carried by an electronic document, it should also be possible to interpret the Merchant Shipping Act as being able to apply to electronic bills of lading.

The reason as to why scholars find that electronic promissory notes have no legal effect is perhaps that it is not found possible to find a functional equivalence to "possession" with the available technology in mind. Traditionally, the notion of possession

has been seen as something that can only be ensured in paper. In international legislation the idea that something may be possessed digitally has just started to be formed with the Rotterdam Rules as the starting point that are supported by the MLETR adopted by UNCITRAL in 2017. Møllmann is ahead of his time by stating in 2016 that control may be functional equivalent to possession in terms of an electronic bill of lading. However, there is no guidance in either legislation or *travaux préparatoires* as to what requirements must be fulfilled in order to establish control over an electronic negotiable document.

In Chapter 4 it was concluded that the MLETR may supplement the Rotterdam Rules and that implementation of the two instruments may be seen as a "package deal". As recalled the Rotterdam Rules introduce new concepts such as "control" of an electronic transport record in its Article 50. Furthermore, Article 8 sets out that the issuance, exclusive control, and transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document thereby stating the functional equivalence approach. Article 9(1)(a-d) also introduces that the use of negotiable electronic transport records shall be subject to procedures that provide for the method for issuance and transfer of the record to the intended holder, an assurance that the record retains its integrity and the manner in which the holder is able to demonstrate that it is the holder. As the Rotterdam Rules introduce new concepts and also refers to that functions shall be subject to procedures. However, as also previously concluded, the Convention does not elaborate on what more specifically constitutes such procedures. As also concluded, the Rotterdam rules could benefit from guidance and the MLETR may provide such guidance.

The Rotterdam Rules are signed and implemented into national law in Denmark, Norway, and Sweden.[829] Consequently, if the convention enters into force the Convention becomes part of national law. As noted in Chapter 4 the Rotterdam Rules have not entered into force and it is not certain that the convention will ever enter into force as this depends upon numbers of ratifying States. In Denmark and Norway apparently, the Promissory Notes Act is not to apply by analogy to the Merchant Shipping Act that, as demonstrated in Chapters 5 and 6, as has otherwise this far been the case. It appears from the *travaux préparatoires* to legislation that enables implementation of the Rotterdam Rules into Danish legislation that the Commission suggests that the bill of lading as regulated in the Rotterdam Rules should not be given the negotiability effects that they this far have been given.[830] This means that the Promissory Notes Act no longer is to apply by analogy to the Merchant Shipping Law so forth the Rotterdam

[829] Denmark signed 23 September 2009, Norway 23 September 2009, and Sweden 20 July 2011

[830] 4. Betænkning afgivet af Sølovsudvalget – Aftaler om transport af gods helt eller delvist til søs (Rotterdam-reglerne), p. 49, and NOU 2012:10 Gjennomföring av Rotterdamreglene i sjøloven, p. 38

Rules enter into force. The consequence is that the transferee is no longer in a position where it may be given a more favourable position than the transferer upon time of transfer of the bill of lading. As demonstrated in Chapters 5 and 6 the Promissory Notes Act has this far supplemented the Merchant Shipping Act regarding the negotiability effects of the bill of lading. There is given no explanation as to this sudden change of state of law. As also concluded in Chapter 5 concerning paper-based transfer of bills of lading the Promissory Notes Act applies by analogy to the Merchant Shipping Act regarding the negotiability effects of the bill of lading.

Concerning transfer of rights through electronic documents it is concluded that it is uncertain whether the Promissory Notes Act applies by analogy to electronic negotiable bills of lading. Furthermore, it is concluded that there are divergencies in Denmark, Norway, and Sweden respectively as to what legal value electronic negotiable promissory notes may be given. If the Promissory Notes Act still was set to apply by analogy to an updated Merchant Shipping Act that implements the Rotterdam Rules this would mean that the Promissory Notes Act would suddenly cater for the use of electronic negotiable bills of lading. This even though it is doubtful that the Promissory Notes Act itself caters for the use of electronic negotiable promissory notes. The reason to this is that it is uncertain whether an electronic negotiable promissory note is found capable of being subject to possession. As also previously concluded, there are divergencies in Denmark, Norway, and Sweden respectively as to whether the Promissory Notes Act applies to electronic negotiable promissory notes. All three countries intend to implement international harmonised legislation in the field of electronic bills of lading, however no such legislation is in force in either country. On this ground it seems that the intention of the countries is to ratify international legislation that gives legal effects to electronic bills of lading, however the ratification depends upon whether the Rotterdam Rules enter into force. Until the Rotterdam Rules enter into force, the state of law concerning electronic bills of lading is subject to unclarity, as there is no legislation that directly gives legal value to electronic bills of lading. Nor does any legislation provide guidance as to how electronic bills of lading may carry the same legal functions as paper bills of lading.

If the Rotterdam Rules do not enter into force, the existing legislation is outdated as it does not properly cater for the use of electronic bills of lading. In that case there still is a need for legislation that supports the use of electronic bills of lading why it may be beneficial to adopt legislation that caters for the use of electronic trade documents. However, if the Rotterdam Rules do at some point enter into force there are unsolved business to attend to, seeing as the Rotterdam Rules do not solve all matters. On the contrary, the Rotterdam Rules introduce new concepts that arguably could benefit from support as to how they are to function.

6.2. THE ELECTRONIC TRANSFER OF RIGHTS IN ENGLAND AND WALES

As previously concluded[831], at common law, the bill of lading is a document which signifies the right to claim possession of the goods from the carrier and the power to transfer that right through transfer of the bill of lading. This relates to the method whereby the holder and a potential transferee exercises control over the bill of lading and thereby indirectly how control over the goods is established when the bill of lading is in the possession of the carrier. Consequently, it all comes down to the notion of *possession*. If possession of the bill of lading is established, its holder may claim possession of the goods from the carrier and the holder has the power to transfer that right through transfer of the bill. The question now remains whether a bill of lading only existing in electronic form may be subject to possession or a functional equivalent to possession at common law in England.

As demonstrated in the previous chapter, the bill of lading has three functions. It acts as a receipt for received cargo, it acts as a contract of carriage and furthermore, if certain requirements are fulfilled, the bill is a document of title. This means that the bill of lading may transfer constructive possession of the goods the bill represents and furthermore also property of the goods, so forth intention of such transfer is present.

In the following, it is assessed whether a holder of an electronic bill of lading may claim possession of the goods from the carrier through presentation of the bill and whether the holder may transfer that right to a transferee. This necessarily relates to how the holder may exercise control over the electronic bill of lading and how control is transferred to a transferee. This is due to the reason that the current law is not intended to cater for the use of electronic alternatives. The consequence is that the parties need to address certain matters contractually if they wish to make use of electronic alternatives. It is, however, not within the limits of this study to provide an analysis of the existing contractual platforms that cater for the use of electronic bills of lading, furthermore these studies are already accessible.[832]

6.2.1. TRANSFER AND PRESENTATION OF AN ELECTRONIC BILL OF LADING

Initially it must be assessed whether the electronic bill of lading may be seen as a document of title if issued in form of an electronic record. Whether the bill of lading in form of an electronic record may be characterised as a document of title depends

[831] Chapter 5, sections 5.4.-5.5.

[832] See Goldby, *Electronic Documents in Maritime Trade,* pp. 164-166, Aikens, et al., *Bills of Lading,* pp. 47-58 to which Goldby has contributed.

on whether the record can be said to perform the two subfunctions of the bill of lading. Consequently, it must be assessed whether the record may transfer constructive possession of the goods and whether it may be used to transfer property in the goods.

As previously concluded, by virtue of being a document of title, the bill of lading may transfer constructive possession of goods.[833] The same status cannot, however, be said to have been obtained by an electronic bill of lading. COGSA 1992 does not apply to electronic bills of lading, as this will require regulation to facilitate this issued in accordance with s 1(5).[834] Such regulation has simply not yet been facilitated. The consequence is that a transferee of an electronic bill of lading will not acquire rights of suit against the carrier under the Act.[835] As recalled, the COGSA 1992 entails that a person who becomes the lawful holder of the bill of lading has all rights of suit under the contract of carriage transferred to it in accordance with section 2(1). Under certain conditions the holder also becomes subject to the same liabilities under the contract as if the holder had been an original party to the contract in accordance with section 3(1) under the Act.

In order for constructive possession to pass, attornment is therefore necessary.[836] The principle of attornment means that the carrier undertakes to a holder of the bill of lading that the carrier will deliver the goods to the holder, and thereby give the holder constructive possession of the goods.[837] To transfer constructive possession of the goods is no problem *if* the transfer is achieved through contractual agreements. There are multiple registry systems that through its rulebooks links every user of the system to each other.[838]

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[833] See Chapter 5, section 5.4.-5.5.

[834] COGSA 1992 s 1(5) reads:

> "The Secretary of State may by regulations make provision for the application of this Act to cases where an electronic communications network or any other information technology network or any other information technology is used for effecting transactions corresponding to
>
> (a) the issue of a document to which this Act applies;
>
> (b) the indorsement, delivery or other transfer of such a document; or
> (c) the doing of anything else in relation to such a document"

[835] Goldby, *Electronic Documents in Maritime Trade,* p. 159, para 6.34

[836] Goldby, *Electronic Documents in Maritime Trade,* p. 159, para 6.34

[837] Goldby, *Electronic Documents in Maritime Trade,* p. 127, para 5.43

[838] See Goldby, *Eelctronic Documents in Maritime Trade,* pp. 158-166, and pp. 327-357

Transfer of the electronic bill of lading therefore may happen by using a system that the parties to the contract of carriage have agreed to use. Thereby, each holder is given an undertaking that the carrier holds the goods. The consequence is that every endorsee must be party to the system and subscribe to its rulebook. Contractually, the bill of lading's third function as a document of title thereby can be replicated. However, in the legislation attornment of the electronic bill of lading is not recognised and there is no legal validation of the possibility of replicating the function. In short, it is possible to replicate the function concerning transfer of constructive possession of the goods, but only if the parties have agreed to the same system and that said system's rulebook. The legal treatment of multipartite agreements remains to be tested in court.[839]

Alas an electronic bill of lading is unlikely to be recognised at common law as a document of title.[840] Transfer of property is dependent on the contract of sale and the intention of the parties to transfer such ownership.[841] Regarding the bill of lading's ability to transfer of property this may also be achieved using a third-party system. It all depends on what the parties to the contract of sale have agreed to. It is possible to replicate this function by using private third-party systems.[842] It should here be noted that even though contractual workarounds provide the possibility of using electronic trade documents such as an electronic bill of lading, such an agreement are only binding on the parties who have agreed to the agreement.

Thereby, the answer to the initially raised question as to whether a holder may through presentation of an electronic bill of lading claim possession of the goods from the carrier and whether the holder may transfer that right to a transferee, is no. The reason to this is that in accordance with COGSA 1992 legislation is required to facilitate the use of electronic bills of lading as a way of acquiring rights of suit against the carrier. Until recently, such initiative had not been taken. On this ground it is concluded that in the legislations current form the notion of possession cannot be replicated electronically. The law does not facilitate the use of electronic bills of lading and consequently, one must turn to platforms providing contractual frameworks.

That an electronic bill of lading cannot be considered as being a document of title under the current English law is in line with the general principle that documents of title cannot be possessed in electronic form. As recalled from the introduction, the bill of lading belongs to a category of documents that embody obligations and that are

[839] UK Law Commission, *Electronic Trade Documents,* Summary, p .1

[840] Goldby, *Electronic Documents in Maritime Trade,* p. 160, para 6.36

[841] Goldby, *Electronic Documents in Maritime Trade,* p. 160, para 6.36

[842] See Goldby, *Electronic Documents in Maritime Trade,* pp. 160-163

characterised as being transferable. Such documents are also referred to as documentary intangibles.[843]

> "A document of this type is distinct from one that merely records the existence of intangible property, such as an acknowledgement of indebtedness or a share certificate. All documentary intangibles are therefore documents of title, whether they relate to money or to securities or to goods."[844]

It should be noted that under English law:

> "These documents must take a tangible form; they cannot take the abstract form of a cryptoasset."[845]

Consequently, such documents cannot be possessed in electronic form under the current law. The Law Commission published in 2001 advice regarding whether an electronic bill of lading was to be considered as being a bill of lading as regulated by COGSA 1971.[846] The issue of electronic bills of lading was already discussed in England in the early century. As recalled, the COGSA 1971 implements the Hague-Visby Rules. The Law Commission stated that an electronic bill of lading could not be argued as being a bill of lading.[847] The reason to this conclusion was that it was found that an electronic bill of lading does not fall within the common law definition of a document of title. The Law Commission states that the three functions that the bill of lading serves, i.e., it functions as a receipt, it evidences or contains the contract of carriage, it acts as a document of title, may be achieved electronically. This however using the International Maritime Committee's (CMI) Rules for Electronic Bills of Lading[848] or the Bolero system.[849] Both function as a contractual solution to give electronic bills of lading legal value as a bill of lading on equal footing. However, a true electronic equivalent to a bill of lading would not require a contractual solution. The Law Commission also stated that in the future, if the technology would develop to be

[843] Bridge, et al., *The Law of Personal Property,* p. 111. Para 5-001

[844] Bridge, et al., *The Law of Personal Property,* p. 111. Para 5-001

[845] Bridge, et al., *The Law of Personal Property,* p. 111. Para 5-001

[846] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission,* para 4.9

[847] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission*, para 4.9

[848] See Goldby, *Electronic Documents in Maritime Trade,* pp. 177-183 on the CMI Rules for Electronic Bills of Lading

[849] See Goldby, *Electronic Documents in Maritime Trade,* pp. 335-338 explaining about electronic systems on transfer of rights over goods in transit.

capable of providing the commercial world with a true electronic equivalent of a paper bill of lading, could law reform be considered.[850] In the meantime it was thought that a bill of lading could not be electronic, and was instead referred to as an electronic contract for carriage.[851] The core case of possession means a factual relationship between a person and an object from which certain legal consequences follow. It is crucial to identify the criteria that the documents must fulfil in order to be capable of possession and to ensure that this is also recognised in law. If the relevant criteria are identified, then it should be possible to enable trade documents in electronic form to function in an equal way as to their paper counterparts. In order to claim possession, a person needs to be able to establish a certain type of control over the document. This control must be proven to be exclusive.

In 2008 the Rotterdam Rules were adopted by UNCITRAL, providing legislation to facilitate the use of *electronic transport records.* This has been followed by the MLETR that provides general principles in order for electronic transferable records to carry out the same functions as paper documents such as bills of lading. There has since the Law Commission's report published in 2001 been movement in the field of the use of electronic transport documents such as bills of lading. Furthermore, as is demonstrated in the following chapter, it is clear that there is no longer ground to argue that the technology cannot cater for the use of a true electronic equivalent of a paper bill of lading. Consequently, it is time to consider law revision.

England has put in motion a law reform to cater for the use of electronic trade documents. This legislative initiative is the turning point in the following chapter. As stated by the Law Commission in its Consultation paper:

> "We are aware of calls for international harmonisation of laws and of the need for global recognition of electronic documents. While our proposals relate to domestic law and are designed to fit within the existing ecosystem of the law of England and Wales, we do not make them in a vacuum: our work is informed by the activities and initiatives elsewhere and intended to be compatible with them."[852]

[850] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission,* para 4.10

[851] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission,* para 4.7

[852] Law Commission, *Digital assets: electronic trade documents - a consultation paper,* p. 6, para 1.29

It is also intended to be compatible with the MLETR.[853] Chapter 7 that concerns the future for electronic transferable records has the Law Commission's work on law reform as its turning point.

6.3. CONCLUSION

The bill of lading is a document which signifies the right to claim possession of the goods from the carrier and the power to transfer that right through transfer of the bill of lading. This relates to the method whereby the transferor and then the transferee exercises control over the bill of lading and thereby indirectly how control over the goods is established when the goods are in the possession of the carrier. The question this chapter set out to study was whether the legislation caters for the use of such a document in electronic form. The answer to this differs.

In the Danish Merchant Shipping Act, it is stated that a bill of lading may be signed electronically. However, whether this can be extended to saying that a bill of lading may be issued in electronic form is uncertain. There is no guidance as to how an electronic bill of lading may undertake the same functions as a paper bill of lading. The Promissory Notes Act applies by analogy to the Merchant Shipping Act regarding the negotiable effects of the bill of lading. Regarding promissory notes it has been specifically stated that a negotiable promissory note that also is to be characterised cannot be enforced if issued in electronic form. As the Promissory Notes Act applies by analogy to the Merchant Shipping Act it seems inconsistent if a negotiable bill of lading can exist in electronic form if a promissory note cannot. In either the Norwegian or Swedish Merchant Shipping Acts' *travaux préparatoires* is it stated that the bill of lading function electronically, why it is uncertain what legal effect can be given to an electronic bill of lading. In Sweden a case concerning a promissory note issued in electronic form reached the Swedish Supreme Court in 2017. It was decided that the electronic promissory note could not be considered as being negotiable but "only" non-negotiable as the law did not cater for the issuance of electronic negotiable promissory notes. It was, however, stated that the Promissory Notes Act should be able to be interpreted as being technology neutral. Furthermore, it was stated that the Rotterdam Rules, that Sweden has also signed, cater for the use of electronic bills of lading. It is debated amongst scholars whether a negotiable document issued in electronic form may be subject to possession. Under the current law in force, the answer is most likely no. Denmark, Norway, and Sweden have all signed the Rotterdam Rules, however, the convention has not entered into force, and it is currently uncertain whether it ever will enter into force. It seems reasonable to argue that a legislative framework providing for the use of such documents in electronic form should be bit welcome.

[853] Law Commission, *Digital assets: electronic trade documents - a consultation paper,* p. 6, para 1.29

In England it can with certainty be said that the law does not cater for the use of electronic bills of lading as such a document cannot be possessed in electronic form under the current legal regime. England has initiated law reform in the field of such documents that entitle their holder to claim the performance of the obligation indicated in the documents. Consequently, England is preparing the ground for enabling the use of bills of lading in electronic form. The work of the Law Reform Commission, that is intended to be aligned with the MLETR, is the turning point for the following chapter.

CHAPTER 7. THE FUTURE FOR ELECTRONIC TRANSFERABLE RECORDS

7.1. INTRODUCTION

The previous chapters concerned the long march towards dematerialised documents in international trade. In the following chapter the future of electronic transferable records is considered. One year into the pandemic of COVID-19 discussions on electronic transferable records were initiated at a global level.[854] This is interesting, as up until this point in time the need for electronic bills of lading has been discussed for three decades.[855] Willingness to consider revising regulation, however, has at the global level been slow. It has taken a global pandemic and the repercussions that have followed to initiate work on a more resilient digital international economy. This is in line with the discussions in Chapter 2, section 2.3 concerning what it takes for international legislation to achieve "success". In the case of electronic transferable records, it may have taken a global pandemic with all that entailed including national lockdowns on all continents. Suddenly, it was clear that digitalising physical documents was very convenient as company staff was working from home to the widest degree possible and where there were restrictions on movement and human-to-human contact. Businesses were thereby forced to push for increased digitisation.

It is estimated that a single trade finance transaction typically involves 20 entities and between 10 and 20 paper documents, totalling over 100 pages.[856] It is also estimated by the Digital Container Shipping Association (DCSA) that in a transaction covered by a bill of lading it is common to find 50 sheets of paper in a package of shipping documents that must be exchanged between as many as 30 different parties.[857] However, as demonstrated above, the law does not support for the use of electronic trade

[854] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, 6 April 2020

[855] See Chapter 2, section 2.4

[856] Ramachandran, et al., *SIBOS 2017: Digital Innovation in Trade Finance: Have We Reached a Tipping Point?* p. 3, https://www.swift.com/news-events/news/digital-innovation-trade-finance-have-we-reached-tipping-point - last accessed 7 February 2023

[857] Digital Container Shipping Association (DCSA), *Streamlining international trade by digitalising end-to-end documentation,* p. 3, https://go.dcsa.org/ebook-ebl/?utm_source=dcsa&utm_medium=display&utm_campaign=ebook-ebl – last accessed 7 February 2023

documents such as bills of lading as these documents traditionally have to be possessable. In order to give legal value to such documents only existing in electronic form it requires the law to recognise that electronic documents can be possessed or recognise a functional equivalent to possession. Global trading barriers have partly been caused by lack of legislation. There are countries that have adopted legislation to facilitate the use of electronic transferable records.[858] In 2020 the International Chamber of Commerce made aware of the need to remove legal requirements for hard-copy trade documentation and called upon governments.[859] ICC also encouraged governments to adopt MLETR to clarify the functional and legal equivalence of electronic and paper-based documents.[860] The digital and technology agenda were discussed in April 2021 by the G7 Digital and Technology Ministers under the theme "build back better". It was agreed that in the recovery from the effects of COVID-19, focus should also be to build a better, more productive not to mention resilient global economy with the digital technology at heart.[861] Physical documents were suddenly found inconvenient. A collective work on framework for G7 collaboration on electronic transferable records was agreed.[862] It was recognised that:

> "Paper-based transactions, which still dominate international trade are a source of cost, delay, inefficiency, fraud, error and environmental impact. It is our shared view that by enabling businesses to use electronic transferable records we will generate efficiencies and economic savings. This will strengthen the resilience of our global economic system and play a crucial role in trade recovery across the G7."[863]

On these grounds a framework for G7 collaboration on electronic transferable records was agreed in 2021. The aim was to initiate a dialogue between experts to achieve compatible domestic reforms and provide collective support to other international in-

[858] Bahrain, Kiribati, Abu Dhabi Global Market, Belize, Singapore, Papua New Guinea, Paraguay, United Arab Emirates

[859] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations

[860] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, pp. 2-3

[861] G7, Ministerial Declaration, *G7 Digital and Technology Ministers' meeting,* p. 1, 28 April 2021, United Kingdom

[862] G7, Digital and Technology Track – Annex 4, *Framework for G7 Collaboration on Electronic Transferable Records,* p. 1

[863] G7, Ministerial Declaration, *G7 Digital and Technology Ministers' meeting,* p. 5, 28 April 2021, United Kingdom

itiatives seeking to facilitate and enable the adoption of electronic transferable records.[864] The wish was to promote adoption of legal frameworks compatible with the UNCITRAL Model Law on Electronic Transferable Records from 2017.[865] It was stated in the G7 Ministerial Declaration that:

> "This should support open societies in the digital and data-driven age, and be guided by our shared democratic values of open and competitive markets, strong safeguards including for human rights and fundamental freedoms, and international cooperation which drives benefits for our citizens, economies and global well-being."[866]

The aim would be to: 1) address domestic legal barriers, 2) promote and support legal reform internationally, 3) bridge technical and interoperability issues, and 4) cooperate on cross-cutting regulatory issues.[867]

The following sections concerns the future prospects for the use of electronic transferable records. It is demonstrated that England has initiated work on a legislative reform enabling the use of electronic documents that bear the characteristics of embodying a claim to a certain amount of money or delivery of goods. Furthermore, it is demonstrated that other jurisdictions as well are revising their legislation so as to enable the use of such electronic documents just as the industry is taking innovative steps towards the use of electronic transferable records. This cause grounds for discussion as to whether or not it seems timely to adopt legislation that enables the use of electronic transferable records.

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[864] G7, Ministerial Declaration, *G7 Digital and Technology Ministers' meeting,* pp. 5-6, 28 April 2021, United Kingdom

[865] G7, Ministerial Declaration, *G7 Digital and Technology Ministers' meeting,* pp. 5-6, 28 April 2021, United Kingdom

[866] G7, Ministerial Declaration, *G7 Digital and Technology Ministers' meeting,* p. 1, 28 April 2021, United Kingdom

[867] See the policy paper for the UK G7 Presidency: Roadmap to reform for electronic transferable records: https://www.gov.uk/government/publications/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records/uk-g7-presidency-roadmap-to-reform-for-electronic-transferable-records - last accessed 27 January 2023

7.2. LAW REFORM IN ENGLAND AND WALES

In December 2020 the Law Commission in England[868] started preparing recommendations to solve the problems caused by the law's approach to "possession" and transfer of electronic documents. The Law Commission was also asked to prepare draft legislation to implement those recommendations.[869] In April 2021 the Law commission published a consultation paper.[870] As recalled from above, the International Chamber of Commerce in 2020 made aware of the need to remove legal requirements for hard-copy trade documentation and called upon governments.[871] ICC also encouraged governments to adopt MLETR to clarify the functional and legal equivalence of electronic and paper-based documents.[872] Furthermore, the work in the field of electronic trade documents was supported and encouraged at the G7 which the United Kingdom hosted in 2021. As demonstrated in Chapters 5 and 6 the current legislation has forced the industry to rely on paper documents, which is highly unpractical and very inefficient. Consequently, the Commission's work is in line with international developments and recommendations on the use of electronic trade documents. The Law Commission has a policy objective that is to remove the legal blocker to the electronic conduct of trade.[873] As stated by the Commission,

> "The intended effects are to: (1) make England and Wales the jurisdiction of choice for electronic commerce; (2) reduce transaction costs for parties; and (3) encourage business growth by facilitating the development of digital products and services."[874]

The Law Commission refers to the United National Conference on Trade and Development's estimate from 2013 where it is estimated an average customs transaction

[868] The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law

[869] Law Commission, *Electronic trade documents: Report and Bill,* p. 4, para 1.13

[870] Law Commission, *Digital assets: electronic trade documents - a consultation paper*

[871] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations

[872] ICC Memo to Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations, pp. 2-3

[873] Law Commission, *Electronic trade documents: Report and Bill,* p. 212, [10.2]

[874] Law Commission, *Electronic trade documents: Report and Bill,* p. 212, [10.2]

involves 20-30 different and 40 documents.[875] A more recent study from ICC estimates that there are 4 billion paper documents circulating in international trade.[876] A significant percentage of global trade and shipping documentation is conducted under the law of England and Wales however, it is unclear to what specific extend. As stated by the Law Commission who asked for consultees views on this:

> "Vale International SA said more than 80% of trade and shipping documentation is governed by the law of England and Wales. The Centre for Commercial Law at the University of Aberdeen said that maritime trade is "predominantly" governed by the law of England and Wales, while DCSA gave a lover estimate of 20% to 40%. The Mining and Metals Digitalization Forum emphasized the importance of our reforms "as English law is the governing law of many of the documents used in international trade" (..)"[877]

To what precisely extend the law of England and Wales is used in global trade and shipping documentation is unclear as only estimates are to be found. However, it must with some certainty be concluded that the law of England and Wales plays a predominant role. Consequently, if the law of England and Wales caters for the use of electronic trade documents, this might be considered as an important enabler of the use of electronic trade documents. Accordingly, 15 March 2022 the Law Commission published its report on the possibility of reforming the law on electronic trade documents.[878] The intention is to make recommendations to legislation that would allow documents that only exist in electronic form, to have the same legal status as the equivalent paper-documents. The documents concerned are documents whose functionality depends on them being possessed as a matter of law.[879] This means that the category of trade documents involved are:[880]

- Bills of exchange

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[875] See World Trade Organization, *Briefing note: Trade facilitation – Cutting "red tape" at the border,* https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm, however it is stressed that these numbers and estimations are from 2013 – last accessed 27 January 2023

[876] See ICC, 2018, *Global trade – Securing Future Growth* https://iccwbo.org/content/uploads/sites/3/2018/05/icc-2018-global-trade-securing-future-growth.pdf - last accessed 27 January 2023

[877] Law Commission, *Electronic trade documents: Report and Bill,* p. 214, [10.13]

[878] Law Commission, *Electronic trade documents: Report and Bill*

[879] Law Commission, *Digital assets: electronic trade documents – a consultation paper,* p. 8, [2.1]

[880] See the draft Bill proposed by the Law Commission, clause 1(2)

- Promissory notes
- Bills of lading[881]
- Ship's delivery orders
- Warehouse receipts
- Marine insurance policies; and
- Cargo insurance certificates

The common thread linking the abovementioned documents is that in England and Wales such documents are defined as "documentary intangibles". As a normal rule, what is written on a paper is evidence of a right, but it does not embody that right.[882] If a paper is handed over, a party does not also hand over the right of which the paper evidence. Consequently:

> "Most of the time, therefore, there is a distinction to be made on such facts between the transfer of the tangible property (the piece of paper) and the transfer of the intangible property (the legal right)."[883]

However, there is a category of documents to which this distinction does not apply, and this category of document is in England and Wales referred to as "documentary intangibles".[884] As recalled from the previous chapter, such documents bears the feature of being "documents of title". As also recalled, the law of England and Wales does not recognise documentary intangibles in electronic form to be able to be possessed.[885] This means that, for instance, electronic bills of lading cannot be possessed and therefore are excluded from functioning in the same way as their paper counterparts.

The Law Commissions work has been built upon three general principles.[886] First, to adopt the least interventionist approach. Second, the aim is technology neutrality. Third, focus should be on the importance of international compatibility, which allows for the relevance of internationally developed standards. Regarding the least interventionist approach, the intention with the Law Commission's proposals is that the same

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[881] This does not include sea waybills, air waybills, bearer bonds, and other documents of title, as stated in the Law Commission, *Digital assets: electronic trade documents – a consultation paper,* p. 27, paras 3.18-19

[882] Law Commission, *Digital assets: electronic trade documents – a consultation paper*, p. 23, [3.4]

[883] Law Commission, *Digital assets: electronic trade documents – a consultation paper*, p. 23, [3.4]

[884] See Chapter 6, section 6.2.

[885] See Chapter 6, section 6.2.

[886] Law Commission, *Electronic trade documents: Report and Bill,* p. 25, [2.58]

rules shall apply in accordance with the same practices used by the industry.[887] However, the industry will have a choice as to whether to use electronic or paper trade documents.[888] The reasoning is that trade documents in electronic form should be capable of being subject to possession and that there should be non-discrimination against whether the rules apply to electronic or paper trade documents. Regarding the principle of technology neutral legislation, it is recognised that today it is possible to create a true electronic equivalent of a paper trade document[889], as opposed to in 2001 where the Law Commission stated that creating such a document was not possible.[890] The law, however, has not kept up with the technological developments. The Law Commission has chosen to build its recommendation and draft legislation upon the principle of technology neutrality, instead of the functionality of a single technology or medium.[891] The question the Law Commission seeks to answer in its work is what features an electronic trade document will have to have in order to be equivalent to paper documents and thereby being amenable to possession.[892]

Regarding the wish for international compatibility, trade documents are used for the performance of cross-border transactions. This means that for instance a bill of lading may be transferred by and to multiple parties in various jurisdictions. The law of England and Wales is often chosen as the governing law of transactions.[893] Regarding the MLETR, the Commission considers the overall approach of the MLETR to be sound in principle, but stresses also that the recommendations are directed and form specifically to the law of England and Wales.[894]

The intention with the Commission's work is to ensure that electronic documents that fulfil certain requirements can have the same functionality as their counterparts in paper. By fulfilling certain criteria, electronic trade documents will be able to be possessed. In its recommendations the Law Commission has formed "gateway" criteria. This refer to the criteria that a trade document in electronic form must fulfil in order to be considered as a trade document on an equal footing as a paper trade document. If the criteria are not satisfied, the electronic trade document will not qualify as a trade

[887] Law Commission, *Electronic trade documents: Report and Bill,* p. 25, [2.59]

[888] Law Commission, *Electronic trade documents: Report and Bill,* p. 25, [2.59]

[889] Law Commission, *Electronic trade documents: Report and Bill,* p. 33, [2.100]

[890] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission,* see also Chapter 6, section 6.2.1. on this.

[891] Law Commission, *Electronic trade documents: Report and Bill,* p. 33-35, [2.99-2.109]

[892] Law Commission, *Electronic trade documents: Report and Bill,* p. 34, [2.101]

[893] Law Commission, *Electronic trade documents: Report and Bill,* p. 25, [2.110]

[894] Law Commission, *Electronic trade documents: Report and Bill,* p. 36, [2.112]

document, and parties are instead left with the possibility of forming or joining a contractual arrangement. In the following, the relevant criteria that the Law Commission has identified must be fulfilled in order for electronic trade documents to be able to function in an equal manner as trade documents issued in paper are investigated. As recalled, in its current existing form, the law of England and Wales does not recognise the legal validity of electronic trade documents.[895] Hence, we are looking into what may possibly be future regulation in England and law reform and inspiration elsewhere. It should also here be noted that the proposed legislation is aimed at being harmonised with the MLETR.

7.2.1. THE GATEWAY CRITERIA

It is clear, that just as the case is in Denmark, Norway, and Sweden, the concept of "possession" is considered as being at least equally complex in England and Wales. The Commission has chosen to consult the industry and has also called upon experts in its work. Concerning the notion on "possession" the Commission is of the view that the term should be the operative concept regarding trade documents in electronic form.[896] The reasoning is that it is desired to maintain the same language and substantive legal characterisation in relation to both paper documents and electronic documents.[897] However, it is also noted that some experts disagree. Professor Michael Bridge QC is quoted as having said that he was:

> "(…) not in favour of introducing possession into the equation: it will have to be defined in terms of control anyway."[898]

Professor Sir Roy Goode is said to have suggested to the Law Commission that it is unnecessary to expand the concept of possession, and that the concept of control would be more suitable, as it does not imply physical custody or control.[899] Others have stated that the concept of possession is already a complex concept, indicating that it would be further complex and burdened if it were to apply to digital assets.[900] The notion of "control" will then be a fundamental element in the assessment of what constitutes possession of an electronic trade document.[901] What is crucial is the wish

[895] See Chapter 6, section 6.2.1.

[896] Law Commission, *Electronic trade documents: Report and Bill,* p. 27, [2.70]

[897] Law Commission, *Electronic trade documents: Report and Bill,* p. 27, [2.70]

[898] Quotation of a quote from Professor Michael Bridge QC in the Law Commission, *Electronic trade documents: Report and Bill,* p. 26, [2.64]

[899] Law Commission, *Electronic trade documents: Report and Bill,* p. 26, [2.66]

[900] Law Commission, *Electronic trade documents: Report and Bill,* p. 26, [2.63]

[901] Law Commission, *Electronic trade documents: Report and Bill,* p. 27, [2.72]

that paper documents and electronic documents are treated equally. Regarding the application of MLETR the Law Commission notes that that in the view of MLETR "control" is a functional equivalent to the concept of "possession", as stated in MLETR Article 11.[902] It should here be noted that MLETR is not intended to affect substantive law, more specifically regarding control as it does not affect or limit the legal consequences arising from possession.[903] As stated in the MLETR:

> "Consequently, parties may agree on the modalities for the exercise of possession, but may not modify the notion of possession itself."[904]

The Law Commission proposes that the concept of possession is extended to being able to apply to documents in all forms and thereby to benefit from the existing law on possession.[905] What is required is to define what criteria must be fulfilled for an electronic trade document to be possessable. The Law Commission considers what requirements documents in electronic form must satisfy to be considered capable of performing the same functions. This has formed into the so-called "gateway" criteria.[906] The Law Commission suggests that each of the following criteria must be fulfilled in order for an electronic document to be "possessable" and thereby carry out the same functions as its paper counterpart. In the following, each of these criteria is subject to closer examination and reference to the MLETR, its provisions, and principles is made when relevant.

7.2.1.1 FIRST CRITERION: THE INFORMATION CONTAINED IN AN ELECTRONIC TRADE DOCUMENT

The Law Commission proposes that the information contained in a paper trade document must also be contained in any electronic form of such a document.[907] Thereby, a link between a paper document and an electronic document is established. The intention is to:

> " (…) provide certainty as to content requirements for documents in electronic form to qualify as electronic trade documents; (…)"[908]

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[902] Law Commission, *Electronic trade documents: Report and Bill,* p.28, [2.74]

[903] Explanatory Note to the MLETR, paras 106 and 107

[904] Explanatory Note to the MLETR, para 107

[905] Law Commission, *Electronic trade documents: Report and Bill,* p. 28, [2.74]

[906] Law Commission, *Electronic trade documents: Report and Bill,* p. 98, [6.2]

[907] Law Commission, *Electronic trade documents: Report and Bill,* p. 99, [6.13]

[908] Law Commission, *Electronic trade documents: Report and Bill,* p. 100, [6.13]

and furthermore, the intent is to increase the parties' confidence in electronic trade documents.[909] It is argued to reduce the risk of conflicts and disagreements[910], and it is also thought to make the transition into a possible change of medium smooth.[911] Thereby, Clause 1(3) states that a trade document in electronic form must contain the same information as is required to be contained in the paper equivalent.

As recalled, the MLETR also provides in its Article 10 that an electronic record must contain the same information that would be required to be contained in a transferable document or instrument.

7.2.1.2 SECOND CRITERION: THE RELIABILITY OF AN ELECTRONIC TRADE DOCUMENT SYSTEM

In the Law Commissions report it is debated whether a provision on reliability should be included in the draft bill. Reference is made to the Commission's consultation paper, in which it is discussed whether a bill on electronic trade documents should include a provision on reliability requirements for an electronic document.[912] Preliminary in the Consultation paper it was decided not to include such a provision, as the view was that the existing law of England and Wales dealt with the questions concerning reliability of a system.[913] Therefore, such a system was deemed irrelevant. However, the view on this has changed in the Commission's report from March 2022. After having received inputs from consultees, both legal experts and the industry, the Law Commission recommends such a provision on reliability. It is recognised that the users of the enabling systems would have to be able to trust the respective system.[914] Interestingly, the industry was also asked whether it would find it difficult to fulfil the non-exhaustive list of requirements for reliability in Article 12 of the MLETR. As recalled from Chapter 3, section 3.8, in accordance with the MLETR Article 10(1)(b)(i-iii), a reliable method must be used to identify the electronic record, to render that record capable of being subject to control, and to retain the integrity of the record. Article 11 also requires a reliable method to establish control of the electronic record. The MLETR provides a general reliability standard in its Article 12, with a

[909] Law Commission, *Electronic trade documents: Report and Bill,* p. 100, [6.13]

[910] Law Commission, *Electronic trade documents: Report and Bill,* p. 101, [6.13]

[911] Law Commission, *Electronic trade documents: Report and Bill,* p. 101, [6.13]

[912] See Law Commission, *Digital assets: electronic trade documents – a consultation paper*, pp. 99-102, [6.14-6.27]

[913] See Law Commission, *Digital assets: electronic trade documents – a consultation paper*, pp. 100-102, [6.18-2.27]

[914] Law Commission, *Electronic trade documents: Report and Bill,* p. 107, [6.43]

non-exhaustive list of factors that may be considered in the assessment of reliability.[915] The answer from the industry was that it would not be difficult to fulfil such requirements.[916] It should also be thought implicit that a system developed to handle electronic trade documents would be thought designed reliable, especially considering the potential risk of cybercrime. Furthermore, an argument for including a provision on reliability is to provide guidance factors for a court to use in the assessment whether a reliable method has been used in the system. Here it should be emphasised that whether a system can be deemed reliable will be assessed in court. Up until that point, inserting a provision on reliability will prove to the users that in accordance with the law a system handling electronic trade documents should be reliable. It furthermore provides the developers of a system with guiding factors regarding what reliable actually means and what demands the system in that regard should accommodate. However, the actual assessment whether a system *is* in fact reliable will first be made in court. The Law Commission recommends that a provision is inserted in the bill that to a very large extend is similar to MLETR Article 12.[917] The reliability requirement is contained in the proposed Bill's clause 2(1).

7.2.1.3 THIRD CRITERION: INTEGRITY OF AN ELECTRONIC TRADE DOCUMENT

By integrity is meant that a document cannot be interfered with or altered without the proper authorisation.[918] This in order to ensure that the document is original. Just as the case was with the notion of reliability, the Law Commission initially was of the opinion that a specific provision concerning integrity should not be included in the bill.[919] This was again due to the reason that it was felt that the existing law of England and Wales already deals with the question of integrity of documents. However, it has been decided by the Law Commission to include a provision in its draft Bill on integrity of electronic documents in its clause 2(1)(b). This despite the fact that the majority of the consultees that the Commission consulted were against such a provision and thought it not necessary to include.[920] Just as the case was with reliability, it was rec-

[915] See Chapter 6, section 3.8.

[916] Law Commission, *Electronic trade documents: Report and Bill,* p. 107, [6.44]

[917] Law Commission, *Electronic trade documents: Report and Bill,* p. 109, [6.50]

[918] See Law Commission, *Digital assets: electronic trade documents – a consultation paper*, pp. p. 97 [6.4]

[919] See Law Commission, *Digital assets: electronic trade documents – a consultation paper*, pp. 97-99 [6.4-6.13]

[920] Law Commission, *Electronic trade documents: Report and Bill,* p. 111, [6.57]

ognised that there is a need for ensuring trust in the use of electronic trade documents.[921] As recalled, the MLETR also deals with integrity of an electronic record in its Article 10(2).[922] Amongst other things this proves what change of regime it is when introducing law on electronic trade documents, that trust and how to create trust is a general relating to electronic trade documents. This despite the fact that the industry sees no problems with developing trustworthy solutions to handle electronic trade documents.

7.2.1.4 FOURTH CRITERION: CAPABILITY OF BEING SUBJECT TO EXCLUSIVE CONTROL

Two elements are required at common law for someone to be considered as being in possession of something. The first element is control, and the second element is intention.[923] This is in line with the conclusion reached in Chapter 5, section 5.4 and Chapter 6, section 6.2 regarding bills of lading. What more specifically constitutes control, depends on the type of asset in question.[924] The Law Commission recommends that capability of being subject to exclusive control should be a necessary criterion for a trade document in electronic form to qualify as an electronic trade document.[925]

In the Law Commission's consultation paper, it was provisionally proposed that in the context of the "gateway" criteria, the concept of control:

> "(…) should be defined as the ability […] to "use, and transfer or otherwise dispose of the document."[926]

Furthermore, the Law Commission proposed that:

> "(…) in order to be amenable to possession, an electronic document must be capable of being the subject of exclusive occupation or use"[927]

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[921] Law Commission, *Electronic trade documents: Report and Bill,* p. 112, [6.59]

[922] See Chapter 3, section 3.7.3.4.

[923] See Law Commission, *Electronic trade documents: Report and Bill,* pp. 78-97, [5.1.-5.75] and p. 113, [6.63]

[924] Law Commission, *Electronic trade documents: Report and Bill,* p. 113, [6.63]

[925] Law Commission, *Electronic trade documents: Report and Bill,* p. 113, [6.63]

[926] Law Commission, *Digital assets: electronic trade documents – a consultation paper*, p. 88, [5.90]

[927] Law Commission, *Digital assets: electronic trade documents – a consultation paper*, p. 82, [5.63]

After having heard the consultees' responses to the Commission's provisional proposals, the Commission still is of the opinion that it is necessary to include a concept of control to stress what control means in the context of electronic trade documents. However, the Commission finds it unnecessary for the concept of control to refer specifically to "exclusivity" as it is found that this is being covered by the requirement that no more than one person can exercise control at a time.[928] Accordingly, Clause 2(1)(c) of the proposed Bill provides that a reliable system must be used to secure that only one person at a time may exercise control of the electronic trade document. Clause 2(2)(b) of the proposed Bill states that persons may jointly exercise control of the electronic trade document. In that case the persons acting jointly together are to be treated as one person so that the requirement that only one person at a time may exercise control of the document is still fulfilled.

As recalled, the MLETR also refers to the concept of control in its Article 11. It is stated in the Article that where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used to (a) establish exclusive control of that electronic transferable record by a person *and* b) to identify that person as *the* person in control. The Article has been subject to close analysis in Chapter 3, Section 3.7.3.3, however, it is here chosen to highlight the provision in the MLETR again. It is underlined, that in the MLETR, the notion of possession is being referred to as a concept that can only be used regarding something existing physically. The notion of "control" is then the functional equivalence to possession *if* a reliable method is used to establish control and identification of the person in control. In terms of the MLETR this means that a physical bill of lading can be subject to possession whereas an electronic bill of lading can be subject to control which is deemed the functional equivalence to possession. The Law Commission, however, is preparing the ground for *extending* the reachability of the notion of possession to also being able to apply to something "only" existing electronically. The Commission defines the concept of control as when a person exercises control, when the person uses, transfers, or otherwise disposes of the document.[929] As recalled, the gateway criteria has been laid out as criteria that the electronic trade document has to fulfil in order to be able to be possessed and thereby be given legal value. The notion of possession is being stretched as to also apply to electronic trade documents. This is elaborated separately in 7.2.2, as the requirement is essential.

7.2.1.5 FIFTH CRITERION: "DIVESTIBILITY"

By "divestibility" is meant that:

[928] Law Commission, *Electronic trade documents: Report and Bill,* p. 116, [6.79]

[929] See Law Commission, *Electronic trade documents: Report and Bill,* p. 119, [6.92]

> (…) when A transfers to B, A must be divested both of the document and of the ability to control the document."[930]

Phrased differently, transfer of the document entails a transfer of control of the document. This necessarily means that the transferor must be deprived the ability to control the document. The requirement should prevent the "doble spend" issue, meaning that an electronic trade document can be transferred more than once by the same party, or that another party has concurrent control with the transferor.[931] The Law Commission suggests that the divestibility criterion is phrased to as to "exercise control" rather than "has control".[932] Furthermore, the Law Commission is of the view that:

> "(…) the divestibility criterion should provide for the fact that when a transfer occurs, the transferor can no longer exercise control of the document; and neither can any of the persons who were also able to do so. We think it is important that both the person who is actually exercising control, as well as any of the persons who shared the factual ability to exercise control (because, for example, they had the relevant private key), are no longer able to do so. This ensures that, following a transfer, the electronic trade document is fully divested."[933]

What the Law Commission emphasises is that it is crucial that the transferor, who up until the point of transfer of the document can control the document, no longer is able to control the document after this point in time. Furthermore, if any persons shared with the transferor the ability to control the document, they must also be deprived of the ability to control the document. This is expressed in the proposed Bill's clause 2(1)(e). As recalled from Chapter 3 and also the previous section, this relates to the issue of "control" as regulated in the MLETR Article 11. Only one person at a time can control the electronic trade document. Necessarily this means that upon transfer of the document the ability to control the document is transferred as well. Consequently, the transferor is deprived of the ability to control the document upon transfer.

7.2.1.6 SIXTH CRITERION: IDENTIFICATION OF THE DOCUMENT

The issue of identification of the document concerns the possibility of users to retain access to copies of documents for their records. The situation may occur if a party wishes to retain a copy after the party has transferred or disposed of the electronic

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[930] Law Commission, *Digital assets: electronic trade documents – a consultation paper*, p. 89, para 5.97

[931] Law Commission, *Electronic trade documents: Report and Bill,* p. 123, [6.111]

[932] Law Commission, *Electronic trade documents: Report and Bill,* p. 125, [6.120]

[933] Law Commission, *Electronic trade documents: Report and Bill,* p. 125, [6.120]

trade document.[934] The Law Commission states that taking a photography or scan of a paper document before it is transferred or disposed of does not interfere with possession of the original.[935] It is agreed that there is no need to specifically address the issue of retaining copies as this it thought useful in practice.[936] However, it is thought necessary to include a provision as part of the gateway criteria that a trade document in electronic form was identifiable so that it can be *distinguished* from any copies.[937] Consequently, it is acknowledged by the Commission that it is important to be able to identify which document is *the* document in order to avoid the risk of double spending. Accordingly, in the proposed Bill clause 2(1)(a) provides that *the* electronic trade document must be capable of being distinguished from copies. It should be noted that also the MLETR contains a provision concerning that it must be possible to identify the electronic record as *the* electronic transferable record.[938]

7.2.1.7 SEVENTH CRITERION: IDENTIFICATION OF THE PERSONS WHO COULD EXERCISE CONTROL OF A DOCUMENT IN ELECTRONIC FORM

Not only does the Law Commission find it necessary to include a provision concerning identification of the original electronic document. It is also thought necessary to identify the person who is able to exercise control of the document.[939] The Commission specifies that:

> "This requirement reflects the association between the trade document in electronic form and the person or persons who are able to exercise control of that document. It ensures that, for a trade document in electronic form to qualify as an electronic trade document, the document is capable of being uniquely associated with the person or persons who are able to exercise control of it."[940]

The Commission stresses that it is not meant that by looking at the system itself, it should be possible to see who could exercise control, however if *asked* to evidence their ability to exercise control, a person must be able to prove this on the system. The Commission mentions the example that if three people have access to the private key

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[934] Law Commission, *Electronic trade documents: Report and Bill,* p. 129, [6.139]

[935] Law Commission, *Electronic trade documents: Report and Bill,* p. 129, [6.139]

[936] Law Commission, *Electronic trade documents: Report and Bill,* p. 131, [6.150]

[937] Law Commission, *Electronic trade documents: Report and Bill,* p. 131, [6.151]

[938] See the MLETR, Article 10(1)(b)(i)

[939] Law Commission, *Electronic trade documents: Report and Bill,* p. 132, [6.154]

[940] Law Commission, *Electronic trade documents: Report and Bill,* p. 132, [6.155]

to a document, the system must be able to allow each of the three persons to identify themselves as persons who are able to exercise control of the document.[941] As earlier demonstrated, the MLETR does also contain an Article that states that a reliable method must be used to identify that person as *the* person in control.[942]

In the previous seven sections, the gateway criteria have been considered. The Law Commission suggests that each of these criteria must be fulfilled in order for the electronic document to qualify as an electronic trade document. However, it is also relevant to consider the situation where an electronic trade document does not fulfil the requirements as set out in the gateway criteria. If an electronic trade document does not fulfil the requirements in the gateway criteria it does not qualify as an electronic trade document for the purposes of the suggested Bill. However, this does not necessarily mean that the document has no validity. It is still possible for the parties to enter into a contractual arrangement, giving the electronic trade document validity. Outside of the contractual arrangement, however, the document cannot be considered to have the same legal effect or carry the same functions as a paper trade document.[943]

7.2.2. "POSSESSABILITY" OF AN ELECTRONIC TRADE DOCUMENT

The Law Commission recommends that an electronic trade document that fulfils the abovementioned so-called gateway criteria should be capable of being possessed, and that this principle is set out in statute.[944] However, it is not the intention to set out in legislation what specifically constitutes and defines the notion of possession. This is due to the reason that it is found to be a fact-specific concept that is difficult to define.[945] The common law approach to establishing possession consists of two elements, which are factual control and relevant intention.[946] The Commission has chosen not to let the draft Bill define or explain what possession of an electronic trade document more specifically constitutes. Instead, this is left for the court and to the common law to apply to electronic transport documents.[947]

Possession is a relative and fact-specific concept. Who has possession of something at a specific time depends on the type of control of the electronic trade document and the intention with the control. This must then be held up against others that may also

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[941] Law Commission, *Electronic trade documents: Report and Bill,* p. 132, [6.156]

[942] The MLETR, Article 11 (1)(b)

[943] See Law Commission, *Electronic trade documents: Report and Bill,* pp. 98-99, [6.3]

[944] Law Commission, *Electronic trade documents: Report and Bill,* p. 136, [7.3]

[945] Law Commission, *Electronic trade documents: Report and Bill,* p. 136, [7.4]

[946] Law Commission, *Electronic trade documents: Report and Bill,* p. 136, [7.5]

[947] Law Commission, *Electronic trade documents: Report and Bill,* p. 136, [7.56]

have a claim and argue to be in control with the proper intention. Regarding what constitutes possession, the Law Commission's intention is not to provide a definition of possession. Rather the intention is to remove the legal blocker that currently prevents electronic documents from being possessed.[948] It is also recognised that it is difficult to frame legislation concerning what constitutes control in relation to electronic trade documents, as technology develops in rapid speed. It is difficult to legislate in this area because it may and most likely will depend on the technology used. The court must adapt the existing understanding of what constitutes possession and control to electronic trade documents.[949] By not specifying what exactly constitutes possession in an electronic environment the same approach is chosen as in the MLETR.[950] However, in the MLETR, the functional equivalence to possession is sought defined as control. The MLETR does not seek to extend the notion of possession to also apply to electronic trade documents. Rather the intention is to identify the functional equivalence to possession. The Law Commission states that regarding:

> "(…) the type of exclusive control that (when combined with the requisite intention) can constitute possession is assessed by reference to the types of control to which the relevant object is amenable. Different types of objects will be amenable to different types of control. This is a fundamentally factual assessment."[951]

Consequently, the Law Commission states that having control of an electronic trade document and having the requisite intention constitutes possession, leaving the electronic document to be amenable to being possession. The consequence of electronic trade documents being amenable to being possessable is that they in law should be treated in an equal manner as their paper counterparts.[952] This necessarily means that an electronic trade document should have the same effects and be treated in the same manner as its paper counterpart. Whatever can be achieved through the use of a trade document can also be achieved through the use of an electronic trade document. This dissertation's focal point is the transfer of rights through the use of electronic trade documents such as for instance a bill of lading. Entitlement to claim performance of the obligation indicated in the bill of lading depends on who is in possession of the bill. This proposed Bill states that transfer of the right to claim performance of an obligation can be achieved through transfer of an electronic document by stating in its proposed clause 3(2) that:

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[948] Law Commission, *Electronic trade documents: Report and Bill,* p. 144, [7.44]

[949] Law Commission, *Electronic trade documents: Report and Bill,* p. 147, [7.58]

[950] See MLETR, Article 11 on "control" as the functional equivalence to "possession"

[951] Law Commission, *Electronic trade documents: Report and Bill,* p. 148, [7.67]

[952] Law Commission, *Electronic trade documents: Report and Bill,* p. 165, [8.1]

> "An electronic trade document has the same effect as the equivalent paper trade document."

Furthermore, it is stated in clause 3(3) that:

> "Anything done in relation to an electronic trade document that corresponds to anything that could be done in relation to the equivalent paper trade document has the same effect in relation to the electronic trade document as it would have in relation to the paper trade document."

As concluded by the Law Commission:

> "In short, depending on the nature of the trade document, electronic trade documents may be used as negotiable instruments, documents of title or assignable insurance documents, and they should be capable of being dealt with in exactly the same way as those documents in paper form."[953]

Consequently, the proposed Bill provides a legislative framework for the use of documents bearing the characteristics of being transferable documents, negotiable documents, or documents of title.

It was concluded in Chapters 5 and 6 that the law of England and Wales does not cater for the use of electronic trade documents such as bills of lading in electronic form. If the proposed Bill is implemented, England has a modern and up-to-date legislative framework facilitating the use of electronic trade documents. The current state of law is that intangible documents existing in electronic form may not be possessed. As possession is a requirement in order for documents such as bills of lading to function, the current law does not cater for the use of electronic trade documents. However, the Law Commission proposes that electronic documents that are to be considered as "intangibles" may now be subject to "possession", meaning that such documents may function in an electronic environment. As the law of England and Wales allegedly often is chosen as the appliable law it could cause ground for other jurisdictions to be consider whether harmonised legislation with England and Wales is desirable.

7.3. THE CONTINUED SAGA TOWARDS PAPERLESS TRADE

In 2014, Maersk followed a refrigerator container filled with roses and avocados from Kenya to the Netherlands with the purpose to review the current process.[954] Maersk found that 30 people and organisations were involved in processing the box on its

[953] Law Commission, *Electronic trade documents: Report and Bill,* p. 165, [8.5]

[954] Park, *Blockchain is about to revolutionize the shipping industry,* 23 April, 2018, https://www.bloomberg.com/professional/blog/blockchain-revolutionize-shipping-industry/ - last accessed 7 February 2023

journey to Europe. The shipment took about 34 days to get from the farm to the retailers. 10 of those days were spent waiting for documents to be processed. One of the critical documents went missing, only to be found later in a pile of paper documents. It has been stated about the blockchain technology that:

> "Blockchain technology has the potential to herald a long-awaited breakthrough in the digitalization of bills of lading, since it could provide the guarantee of uniqueness, an essential function of bills of lading, without the requirement of membership subscription."[955]

Blockchain is a technology that first appeared in 2008. The technology is conceptualised by an unidentified individual or group of individuals under the alias Satoshi Nakamoto.[956] Nakamoto referred to that commerce on the internet almost exclusively relied on financial institutions that serves as trusted third parties to process electronic payments and identified weaknesses to this trust-based model.[957] Nakamoto identified that an electronic payment system based on cryptographic proof instead of a trusted third party would allow two parties to transact directly causing the third party unnecessary.[958] The model that Nakamoto suggests solves the issue of double spending meaning that a digital file may be subject to duplication, causing a problem ensuring that a digital file is unique. This by using a peer-to-peer distributed timestamp server to generate computational proof of the chronological order of transactions.[959] Traditionally, the blockchain technology has been linked to the use of bitcoins and other cryptocurrencies. Nakamoto refers in its paper specifically to electronic cash.[960] It is true that blockchain technology underpins bitcoins as the underlying technological infrastructure, however the blockchain technology may be used to more than to facilitate cryptocurrency.[961] More recently the fintech industry has discovered the virtues of the blockchain technology.[962]

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[955] Takahashi, *Blockchain technology and electronic bills of lading*, p. 202

[956] Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2008

[957] Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, p. 1

[958] Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, p. 1

[959] Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, p. 1

[960] Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System,* p. 1

[961] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 3, Takahashi, *Blockchain technology and electronic bills of lading*, p. 204

[962] See for instance Baker and Werbach, *Blockchain in Financial Services,* pp. 123-147

A blockchain is a digital record of transactions that is decentralised. This means that as a starting point no single entity controls the network.[963] The managers of the blockchain are computers or servers, leaving the need of a trusted third party unnecessary.[964] The term "blockchain" is often referred to as distributed technology ledgers.[965] However, blockchain is only one type of distributed ledger technology.[966] Blockchains are – as the name indicates – build on blocks.[967] Transactions are compiled in blocks and then the blocks are chained to each other.[968] The data in each block cannot be deleted or in any way amended.[969] Consequently, each transaction is part of a chain. The output of one transaction becomes the input of the next transaction.

> "A blockchain-based bill of lading would not, however, take off unless it is given sufficient support from the legal infrastructure. Of particular relevance are the Rotterdam Rules and the draft UNCITRAL Model Law on Electronic Transferable Records. It should be possible to interpret the former and finalise the latter in a way compatible with blockchain technology."[970]

It is stated in a report from WTO from 2018 that the UNCITRAL Model Law on Electronic Transferable Records may facilitate the use of blockchains.[971] This does not mean, however, that there are no legal issues regarding the use of blockchain:

> "The wide-scale deployment of Blockchain requires a conducive regulatory framework that recognizes the legal validity of blockchain transactions, clarifies the applicable law and liabilities, and regulates the way data can be accessed and used. The most critical issue relates to the legal status of blockchain transactions. Legislation that recognizes the validity of e-

[963] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 5

[964] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 5

[965] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 7

[966] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 7

[967] Ganne, *Can Blockchain revolutionize international trade*, WTO, pp. 5-7

[968] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 6

[969] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. 6

[970] Takahashi, *Blockchain technology and electronic bills of lading,* p. 202. The article was published in 2016 and therefore before the finalisation of the MLETR in 2017 why the MLETR in the article is referred to as a "draft" model law.

[971] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. xiii

> signatures, e-documents and e-transactions, in particular blockchain transactions, is crucial."[972]

José Angelo Estrella Faria stated in 2011, before the blockchain technology became widely known, that:

> "At least in theory, the same result could also be achieved if computer technology were able to create a "unique" electronic record that could be exclusively held by a holder and transferred to another without replication at some point down the negotiating chain."[973]

Faria actually came very close at describing the blockchain technology. He goes on philosophising:

> "One conceivable model, for instance, might rely on a technical device that would assure the uniqueness of an electronic record to allow the record itself to be "passed" down a negotiation chain".[974]

He even states in a footnote that:

> "So far, however, computer technology has not yet been able to create such a "unique" electronic record, which means that electronic negotiability systems continue to rely essentially on electronic registries."[975]

International trade transactions still rely on paper to a very large extend. However, blockchain may help facilitating paperless trade, including solving the issue of electronic trade documents. As recalled, the issue with transferable documents is that such a document must be able to be possessed or a functional equivalent to possession must be identified for an electronic record to function on equal terms as a paper document. Some companies have found that the blockchain technology allows for just that. The function of the blockchain technology to avoid double spending the same coin can provide the guarantee of uniqueness and originality that the bill of lading requires. Private actors have begun to develop platforms that facilitate paperless trade, such as IBM and Maersk that have teamed up working on the platform TradeLens, built on

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[972] Ganne, *Can Blockchain revolutionize international trade*, WTO, p. xiii

[973] Faria, *Uniform law and functional equivalence: diverting paths or stops along the same road? Thoughts on a new international regime for transport documents*, p. 31

[974] Faria, *Uniform law and functional equivalence: diverting paths or stops along the same road? Thoughts on a new international regime for transport documents*, p. 32

[975] Faria, *Uniform law and functional equivalence: diverting paths or stops along the same road? Thoughts on a new international regime for transport documents*, p. 32, footnote 136

the blockchain technology.[976] TradeLens, however, is set to close in the Winter of 2023. The reason to this is, in accordance with TradeLens, that:

> "TradeLens was founded on a bold vision for global supply chain digitization as an open and neutral industry platform. (…) Unfortunately, such a level of cooperation and support has not been possible to achieve at this point in time and A.P.Moller – Maersk (Maersk) and IBM have announced the discontinuation of the TradeLens platform."[977]

TradeLens was a data and document-sharing platform.[978] It was a permission-based system that allows parties to the system to view, edit, and use data. The system had a permission structure that ensured that only the necessary parties were able to see specific types of information that is related to a shipment. Only the relevant parties had access to the information. Members to the platform were known to the network based on cryptographic identities. However, access to the platform did require membership.

The industry may develop new innovative technology that ensures the functional equivalence to possession. The question is whether legislation supports the use of such new electronic technology. Also, scholars have argued that the blockchain technology may give the much-needed breakthrough of the digitisation of bills of lading and other trade documents. Koji Takahashi argues that the technology could provide the guarantee of uniqueness, and that this can be done without the requirement of membership subscription.[979] This, however, must arguably require support from the legal infrastructure by contributing with legal certainty.

There have been attempts at digitising bills of lading over the years. There are functioning member-only systems based on a central registry, that requires a trusted intermediary to administer the transactions. All who wish to participate in a transaction must be registered member to the registry. Consequently, if a non-member to the platform is involved, an electronic bill of lading must be replaced by a paper bill of lading, which naturally must be argued as being impractical.[980] A report from UNCTAD from 2003 documents through a survey that the lack of readiness of trading partners was

[976] Webpage of Tradelens: https://www.tradelens.com/ - last accessed 17 December 2022

[977] Webpage of Tradelens: https://www.tradelens.com/ - last accessed 17 December 2022

[978] Concerning the underlying technology: https://www.tradelens.com/technology - last accessed 7 February 2023

[979] Takahashi, *Blockchain technology and electronic bills of lading*, p. 202

[980] See Rule 10 (option to receive a paper document) of the CMI Rules for Electronic Bills of Lading (1990)

among the biggest obstacles to the use of electronic bills of lading, which must include the requirement of membership.[981]

Ideally, transactions take place on an open platform where no prior subscription to membership is required. The blockchain technology has made it possible to ensure the characteristic functions of a bill of lading in a decentralised system. In such a system membership is not required and the uniqueness of a bill of lading in dematerialised form can be ensured. As there often in international trade are involved numerous acters such as in trading, banking, and transport, it must be argued to be beneficial that prior membership to a platform is not required. Sufficient legal infrastructure must support the use of electronic bills of lading. Koji Takahashi gives the example that:

> "(…) suppose that the parties to a sale contract have agreed on the use of an electronic bill of lading and the seller has concluded a carriage contract under which the carrier has agreed to issue such a bill of lading. Their arrangements will work amongst themselves. If any of them fails to honour their arrangements, normal remedies for breach of contract will be liable. However, their agreements have no effect on third parties in the absence of support from the applicable legal systems. Thus, such agreements may not be sufficient to enable the buyer to assert his title against third parties such as a creditor of the seller seizing the goods, the trustee of the seller's bankruptcy estate, or another buyer who has bought the same goods from the seller."[982]

The point here is not to praise the blockchain technology, but rather to raise awareness towards the fact that the industry *is* taking innovative initiatives towards paperless trade. It is also to be seen that the industry sometimes fails. There may be many reasons to this, and most likely there are. However, it must be agreed that if the law itself does not cater for the use of electronic trade documents this does not help to provide legal certainty as to the legal value given to such documents. If the technology exists so as to ensure the required uniqueness of such documents that embodies the right to claim performance of the obligation indicated in the document, then why not implement legislation that enables use of such documents in electronic form. It must arguably be concluded that today there is technology in place that may replicate the notion of possession in a functional equivalent manner. The MLETR may act as general legislative guideline regarding transferable documents that in domestic law function as

[981] UNCTAD, The use of transport documents in international trade, 2003, (UNCTAD/SDTE/TLB/2003/3, para 79)

[982] Takahashi, *Blockchain technology and electronic bills of lading*, p. 206

negotiable documents or documents of title and that are not bound to a specific national registry-system. Or the model law may be implemented as law. No matter what it seems timely to revise outdated existing domestic legislation.

Gabriel states regarding the MLETR that:

> "The Model Law lays out a basic legal structure for electronic transferable records. The success of the Model Law will ultimately depend on whether there is a business model that provides enough economic incentive to warrant the costs necessary to create viable technological systems to support electronic transferable records."[983]

Of course, that is one viewpoint. However, as is to be seen the industry is taking innovative steps towards developing technological systems. Therefore, another point of view is that it is time for the legislators to provide legal certainty as to the use of such documents in electronic form.

[983] Gabriel, *The UNCITRAL model law on electronic transferable records,* p. 280

CHAPTER 8. CONCLUSION

The outset for this dissertation was curiosity on the UNCITRAL Model Law on Electronic Transferable Records and what makes a legislative instrument "successful". The pandemic might have provided for a policy-window allowing for new legislation to be adopted in the field of electronic transferable records causing the MLETR to be exposed and put on the map. But in fact, we stand on the brink of a shift in paradigm: It must be recognized that a document that solely exists digitally can be possessed or alternatively that a functional equivalent to possession can be established in an electronic environment.

The MLETR is a model law that identifies how an electronic transferable record is set to be functional equivalent with a transferable document. The use of transferable documents has proven to reveal one very important aspect of the use of such a transferable document. One very important catch of the use of such a document is that it must be capable of being subject to possession. The relevant documents that the MLETR concerns are documents in which a claim or an obligation is indicated. The holder of the document is entitled to assert the claim in accordance with the document. The claim may concern either a promise to pay an amount of money or an obligation to delivery of goods. Naturally, this requires that it is established who the holder of the document is. Furthermore, it must be ensured that only one person or entity at a time can hold the document to protect the debtor against being met by multiple claims to the same obligation. In order to ensure the originality and singularity of the document, the law has this far relied on that the document must be physically possessed. The holder must surrender the document to the debtor upon claiming the performance of the obligation. Thereby, the debtor is in possession of the document and is assured that another will not present itself with a document claiming the double-performance of the same obligation. This far, the law has relied on paper documents – the law as it stands does not trust in the digitalisation.

This dissertation set out to provide a technical examination of the MLETR, its provisions, and its principles. The MLETR concerns the functional equivalence approach as to what functions an electronic transferable record must fulfil in order to be deemed the functional equivalent to transferable documents. A transferable document is for instance a bill of lading. Digging into the history of legislative instruments on such documents provided knowledge of the fact that it for many years has been debated whether it is possible to enable the electronic use of such documents. This is due to multiple reasons. It is a difficult legal area to adopt international harmonised legislation. Transferable documents are heavily regulated by national legislation. Furthermore, in national law there are different legal effects of a transferable document. For instance, in Denmark, Norway, and Sweden a bill of lading is considered as being negotiable and therefore a transferee may achieve a better title to the document than a transferor. The holder of a bill of lading is entitled to claim delivery of the goods. In

England and Wales, a bill of lading is not considered as being negotiable but a document of title. This means that through transfer of the bill of lading the right to claim delivery of the goods is transferred as well. Furthermore, if the proper intention is present, through transfer of the document, property to the goods may be transferred as well. What is similar in both Denmark, Norway, and Sweden and the law of England and Wales is that the document must be capable of being possessed. The key concept in order for the bill of lading to act as the key to the cargo is that the holder is in possession of the bill of lading.

For long it has been debated and remained unsolved how the bill of lading and other such documents could function in an electronic environment. It has simply not been found possible to rely on a digital record to fulfil the same functions as a paper document. For many years it has been recognised that it would be desirable if such documents could be used in electronic form. However, it has not been thought possible to replicate the key concept of the bill of lading, namely possession. The concept of possession was for long thought unable to be stretched to the electronic environment. The legislative build-up by UNCITRAL to adopt a legislative framework for the use of electronic trade documents has been examined. In Chapter 2 it is seen that before UNCITRAL's adoption of the Rotterdam Rules and the MLETR, it was not considered possible to use electronic transferable documents in electronic form outside party-agreements.

The MLETR, adopted in 2017 by UNCITRAL, is destined for facilitating the use of electronic transferable records. The model law sets out the requirements for electronic transferable records to fulfil in order to be considered functional equivalent to transferable documents and instruments, such as bills of lading. The MLETR is a legislative framework concerning how electronic transferable records may fulfil the same functions as transferable documents. The MLETR is built on three fundamental principles. First of all, it is set to be technology neutral. This means that the legislation may apply no matter what technology is used. Second of all, it provides for the functional equivalence approach. It is identified in the model law what requirements an electronic transferable record must fulfil in order to be deemed the functional equivalent to a transferable document. Being functional equivalent to a transferable document means that by fulfilling these requirements an electronic transferable record may fulfil the same functions as a transferable document. Third of all, it sets out the principle of non-discrimination against electronic means. This means that an electronic transferable record should not be denied legal value on the sole ground that it is electronic.

The MLETR was, amongst other reasons, intended to support implementation of the Rotterdam Rules that was adopted by UNCITRAL in 2008. The convention has yet to enter into force and it is uncertain whether it ever will enter into force. This dissertation set out to study *how* the MLETR may supplement the Rotterdam Rules' provisions on electronic transport records.

The MLETR uses the terminology “electronic transferable record”, and the Rotterdam Rules use the terminology “electronic transport record”. The concept of an electronic transferable record is broader in its scope than an electronic transport record however, both concepts may refer to the same type of records. Consequently, an electronic transferable record in terms of the MLETR may encompass an electronic transport record as regulated in the Rotterdam Rules. Articles 8 and 9 of the Rotterdam Rules provide for general provisions on the issuance, transfer, and control of an electronic transport record. These provisions work in tandem with the substantive provisions on electronic transport records. However, not much guidance is given as to what more specifically constitutes control or how singularity of the electronic transport record is to be ensured. It is simply stated that such actions are to be subject to procedures. The provisions in the Rotterdam Rules are result-oriented, but do not elaborate on how such procedures are to be ensured. The MLETR also states that the electronic transferable record must fulfil the requirements of control, singularity, and integrity, however, also adds “a reliable method” to the equation and provides examples on what constitutes a reliable method. It has been demonstrated that the MLETR supplements the Rotterdam Rules and that the two with advantage could be considered as being a package deal. The MLETR elaborates on concepts that the Rotterdam Rules introduce and provides further guidelines that can assist in the implementation of the Rotterdam Rules. From both the technical examination of the MLETR and the study of the interplay between the Rotterdam Rules’ provisions on electronic transport records and the MLETR, it is to be seen that the notion of possession and the functional equivalence to possession plays a key role in ensuring that an electronic transferable record may be deemed functional equivalent to a transferable document.

The legislation in Denmark, Norway, and Sweden and the legislation of England and Wales have been scrutinised as to whether the law already caters for the use of transferable documents in electronic form. Denmark, Norway, and Sweden stem from the Nordic legal family. The Merchant Shipping Acts are a result of close legislative cooperation, why the acts to a very large extend are similar. In Denmark, Norway, and Sweden, the bill of lading is considered as being a negotiable meaning that a transferee may obtain a better title to the document than the transferor. A key concept is that the bill of lading must be capable of being possessed.

It is debatable and very uncertain whether the current legislative framework in Denmark, Norway, and Sweden caters for the use of electronic bills of lading. A decision was passed by the Swedish Supreme Court in 2017 that states that it should be possible to interpret the Promissory Notes Act in a technology-neutral way thus enabling the use of electronic negotiable promissory notes. The crucial point here is that the electronic negotiable promissory note must be capable of being possessed or in a similar way. The Supreme Court refers to that this is possible under the Rotterdam Rules and through contract agreements. However, the issue is not given very much attention in

Denmark and Norway. The tendency probably is towards recognising that a negotiable document should be able to function in an equal manner if it is issued electronically.

England has until now relied on very old legislation on bills of lading. England has not even implemented the Hamburg Rules or signed the Rotterdam Rules. However, it has been recognised that the issue of electronic bills of lading relates to the very core of personal property law in England. A documentary intangible, such as a bill of lading, cannot be possessed in the digital environment under the current law. A bill of lading is in England considered as being a document of title. This means that through transfer of the bill of lading, the right to claim delivery of the goods is transferred as well. Furthermore, if it is established that the proper intention is present, the bill of lading may also transfer property in the goods. It can be said with certainty that the law in England does not facilitate the use of electronic bills of lading and other documents that is the bearer of an obligation and thereby is required to be "possessed" by its holder. This is because the law does not recognise that intangibles may be possessed digitally. Under the current law, documents of title cannot be possessed in electronic form.

There are multiple indications that suggest that we stand in the midst of a paradigm shift. For many years it was not thought possible to replicate the functions of a transferable document such as a bill of lading so that the document could function solely in electronic form. However, there are indications that it is recognised that a type of document that this far has relied on physical possession in order for the document to function now can be subject to possession or control in an electronic environment. The Rotterdam Rules was adopted in 2008 and provide for the use of electronic transport records, a concept which may encompass a bill of lading. Work on the MLETR was initiated in 2011 as it was thought that the Rotterdam Rules could need aid in the implementation of its provisions on electronic transport records. Accordingly, the MLETR was adopted in 2017. ICC has pushed for law reform in the field of electronic trade documents with specific reference to the MLETR in 2020. At the G7 Summit in 2021, awareness was also raised towards the fact that a more resilient infrastructure in the field of electronic trade documents was desirable. The probably most important actor in the shipping-industry, Maersk, has taken initiative to develop a platform catering for the use of electronic trade documents, but have, however, failed in its attempt. The English Law Reform Commission has proposed a bill, allowing for such documents to be issued in electronic form. Already in 2017, the Swedish Supreme Court recognised that it should be possible to establish a functional equivalence to "possession" in the electronic environment, thus catering for the use of electronic negotiable documents outside of party-agreements or registry-systems.

The study has demonstrated that the MLETR touches upon fundamental concepts in the field of commercial law, most notably the notion of "possession".

It seems reasonable to suggest that sooner or later all jurisdictions should implement legislation to facilitate the use of electronic transferable documents. The real question is not *if* jurisdictions should implement such legislation, but rather *why not*.

The industry is taking innovative steps to develop systems that cater for the use of electronic trade documents. In international trade it would be advantageous to the industry if the legislation in the field of electronic trade documents is harmonised. Furthermore, as the issue of digitalisation of trade documents, most notably digitalisation of the bill of lading, has been debated for decades, it also seems reasonable to argue that it is time to recognise that actions that previously have relied on paper documentation can be carried out digitally. Today it is difficult to argue that the technology does not cater for the use of such documents that rely on the notion of possession to carry out their functions. In any case, the legislation should not impose restrictions on the electronic use of such documents. The legislation should enable the use of electronic transferable records by regulating the requirements that such records should fulfil in order to be deemed functional equivalent to transferable documents.

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