

Negotiable Electronic Cargo Records: Lessons from MLETR and RR

11th Asia-Pacific Trade Facilitation Forum

LEVERAGING DIGITALIZATION FOR SUSTAINABLE SUPPLY CHAINS

Samarkand, Uzbekistan

Side Event: Enabling Legal Environment for Digital Transport and Trade

Wednesday, 3 April 2024

UNCITRAL Draft Instrument on Negotiable Cargo Documents (NCDI)

- The NCDI is a draft instrument currently under discussion in UNCITRAL WG VI.
- Its purpose is to create a new document of title to goods being transported other than by sea, because goods transported by sea can already be covered by a transport document which is negotiable.
- As part of the project, the WG is considering the inclusion of provisions enabling its use in electronic form.
- UNCITRAL has in the past adopted other instruments that address the same issues.

RR and MLETR: Scope

- Both the UNCITRAL Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea 2008 (the Rotterdam Rules – RR) and the UNCITRAL Model Law on Electronic Transferable Records 2017 (MLETR) provide for the use of documents in electronic form.
- As the purpose of the RR is to regulate a certain type of contract, they focus exclusively on electronic transport records and articulate the contractual rights deriving from their use.
- The MLETR's focus is on enabling the use of all transferable documents in electronic form (including documents of title to goods, and negotiable instruments) with equivalent legal effect to their use in paper form. The MLETR does not articulate what these effects are.

RR and MLETR: Requirements

- The RR and MLETR differ in their articulation of the criteria to be met by information in electronic form before it is capable of functioning as a negotiable electronic transport document (RR) or an electronic transferable record (MLETR).
- The RR adopt a regime based on consent and contractual freedom, setting out the minimum aspects of issue and use for which the contract between the parties must provide.
- The MLETR articulates clear minimum criteria that must be met by an electronic record for it to be recognised as an electronic transferable record and to have equivalent effect to its paper counterpart.

RR Art 1, Definitions

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

- (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and
- (b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

- (a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and
- (b) The use of which meets the requirements of article 9, paragraph 1.

RR Art 9, Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:
 - (a) The method for the issuance and the transfer of that record to an intended holder;
 - (b) An assurance that the negotiable electronic transport record retains its integrity;
 - (c) The manner in which the holder is able to demonstrate that it is the holder; and
 - (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

MLETR, Art 2 Definitions

“Transferable document or instrument” means a document or an 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.

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

“Electronic transferable record” is an electronic record that complies with the requirements of article 10;

Criteria to be met by an ETR under MLETR

Art. 10, Transferable documents or instruments

10.—(1) Where a rule of law requires a transferable document or instrument, that requirement is met by an electronic record if —

- (a) the electronic record contains the information that would be required to be contained in the transferable document or instrument; and
- (b) a reliable method is used —
 - (i) to identify that electronic record as the authoritative electronic record constituting 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) For the purposes of subsection (1)(b)(iii), the criterion for assessing integrity is whether information contained in the electronic record, including any authorised change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change that arises in the normal course of communication, storage or display.

RR and MLETR: Approach

- The RR and MLETR differ in their approaches to enabling digitalization.
- The RR adopt a regime for electronic transport records based on “control” that operates in parallel to the regime for transport documents, based on possession. This parallel regime does not explain what constitutes “exclusive control”, however, it articulates the legal effects of having “exclusive control” between carrier and holder.
- The MLETR integrates electronic transferable records into the regime that applies to paper documents, using the functional equivalence approach. It does not articulate what the legal effect of establishing control is, as this depends on the regime governing possession of the equivalent paper document.

Meaning and Effect of “Control”: RR

Article 1 Definitions

10. “Holder” means:

...

(b) 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.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

Meaning and Effect of “Control”: RR

Article 12, Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

Article 47, Delivery when a negotiable transport document or negotiable electronic transport record is issued

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 ... to the holder:

...

(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;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met....

Meaning and Effect of “Control”: RR

Article 50, Exercise and extent of right of control

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.

Article 51, Identity of the controlling party and transfer of the right of control

4. When a negotiable electronic transport record is issued:
 - (a) The holder is the controlling party;
 - (b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and
 - (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Meaning and Effect of “Control”: MLETR

Art.11, Requirement for possession or transfer of possession

(1) 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.

(2) Where the law requires or permits the 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.