

INTEREULAWEAST

European and International Law Master Programme Development in Eastern Europe

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ELECTRONIC TRANSFERABLE RECORDS

The step toward
negotiability in
electronic environment

Traditional Course of Trade

- Basic principle: **NO FORM REQUIRED**
- Still, to carry out the complete commercial transaction a loads of paper based documentation will be necessary (e.g. commercial invoices, certificates of origin, transport documentation, insurance policies etc.)
- It is said that paperwork costs reaches up to 10% of the transaction total value
- The aim: **elimination of the paper based documentation**

What has been done so far?

- Introduction to the **NON-DISCRIMINATION PRINCIPLE**: „Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form electronic record”
- The contractual formalities have been satisfied in electronic environment through the **FUNCTIONAL EQUIVALENCE** approach (e.g. written form, signature, original)
- Evidentiary function of the electronic record has the same value as of the paper based documents

Negotiability in Electronic Space?

- Art 2 (2) ECC 2005.
 - *„ECC does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.“*
- The concept of negotiability goes far beyond of simply ensuring the equivalence between paper and electronic forms.

Enabling Negotiability in Electronic Environment

- Early attempts are focused on a Bill of Lading
 - 1990 CMI Rules on Electronic Bills of Lading
 - 1996 UNCITRAL MLEC Art 16 & Art 17
 - 1998 The Bolero project
 - 2008 The Rotterdam Rules
- Contemporary legal infrastructure
 - USA – UETA, ESIGN, UCC §7, 7 US CFR
 - Japan – ERMCA
 - Korea – CC
 - Germany – HGB...

The UNCITRAL Recent Work

- UNCITRAL IV. Working Group (Electronic Commerce)
- Rules on **ELECTRONIC TRANSFERABLE RECORDS**
- Started in 2011 / Expected end 2016
- The output: **Model Law on Electronic Transferable Records(MLETR)**

What is ETR?

- **GENERIC TERM COVERING ELECTRONIC EQUIVALENTS FOR:**
 - **DOCUMENTS OF TITLE** (Transferable documents)
 - Documents which in the regular course of business or financing are treated as adequately evidencing that the person in possession of such document is entitled to receive, hold, and dispose of the document and the goods indicated therein
 - e.g. Bill of Lading, Warehouse receipt, Negotiable waybills & consignment notes
 - **NEGOTIABLE INSTRUMENTS** (Transferable instruments)
 - Financial instruments that may contain an unconditional promise to pay a fixed amount of money to the holder of the instrument, or an order to a third party to pay the holder of the instrument
 - e.g. Bill of Exchange (Draft), Promissory Note, Cheque

Substantive Law Remarks

- Transferable document & instrument common features:
 - A promise or an order in writing to perform the incorporated obligation which may consist of delivery of goods or payment to the lawful holder of the document
 - Transfer of incorporated rights always requires the delivery of the document whether it is bearer, order or straight document (token function)
 - The person claiming the incorporated rights must always identify themselves by presentation of a document

The Functional Equivalence

PAPER BASED ENVIRONMENT	ELECTRONIC ENVIRONMENT
Transferable document & instrument	ETR
Writing form	Information is accessible so as to be usable for subsequent reference
Handwritten signature	Electronic signature
Incorporated right/obligation	Contained right/obligation
Uniqueness	Authoritative record
Possession	Control

MLETR: Scope of Application

- Electronic transferable records
 - only equivalents for paper based transferable documents & instruments
- Securities such as shares and bonds are excluded
- Does not override law applicable to consumer protection

MLETR: Basic Principles & Interpretation

- Party autonomy
- Non-discrimination
- Functional equivalence / No substantive rules
- Technology neutrality
- International origins & need to promote uniformity in application

MLETR:

Legal Recognition of ETRs

- **Art 6 MLETR**

- An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

- **Art 9 MLETR**

- Where the law requires a transferable document or instrument, that requirement is met by an electronic record if
 1. The electronic record contains the information that would be required to be contained in an equivalent transferable document or instrument; and
 2. A reliable method is used:
 - a) To identify that electronic record as the [authoritative] record constituting the electronic transferable record;
 - b) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and
 - c) To retain the integrity of the electronic transferable record.

MLETR: The Concept of Control

- **Art 17 MLETR**

- Where the law requires 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:
 1. To establish exclusive control of that electronic transferable record by a person; and
 2. To identify that person as the person in control.
- Where the law requires 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.

MLETR: The safeguard - What is a reliable method?

- Technology neutrality - no specific method is preferred
- The Reliability standard
 - The method referred to shall be:
 - **As reliable as appropriate for the fulfillment of the function for which the method is being used, in the light of all relevant circumstances**, which may include: the operational rules relevant to the assessment of reliability governing the system; the assurance of data integrity; the ability to prevent unauthorized access to and use of the system; the quality of hardware and software systems; the regularity and extent of audit by an independent body; 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 standards;
 - **Or proven in fact to have fulfilled the function agreed to by itself or together with further evidence.**
 - Ex post evaluation of reliability

CONCLUDING REMARKS

- global success of MLEC & MLES
- The form of Model Law (not mandatory / soft law nature)
- Complete legal framework for ETRs applicable both to closed and open systems, different industries
- Providing the rules governing the subject that is poorly regulated so far – the uniformity could be achieved
- Parallel system – non discrimination rule includes paper based documents & ETRs
- Technology neutrality - legal framework remains open for the future technologies
- Promoting legal certainty

THANK YOU!

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