

ICC SUBMISSION IN RESPONSE TO PROPOSED LEGAL REFORMS TO RECOGNIZED ELECTRONIC TRANSPORT DOCUMENTS IN THE NETHERLANDS

On 25 May 2022 the Ministry of Justice and Security ('Ministry') of the government of The Netherlands published a bill ('the Bill') that would add a new section to Book 8 of that country's Civil Code and provide for the use of electronic bills of lading for freight transport by sea (Wet invoering elektronisch vervoerbestand).

The Ministry has opened a public consultation period, until 24 July 2022, for public comment on this new legal development.

This submission forms the response of the International Chamber of Commerce (ICC) to the proposed Bill. The submission is informed by cross-industry expertise within ICC and the ICC Digital Standards Initiative and is motivated by a desire to develop a harmonised legal regime for the recognition of electronic transferable records in trade.

1. Consideration of legislative approaches to the digitalisation of commercial trade documents

The issue of digitisation of electronic transport documents, especially bills of lading, has been pursued for decades. Despite unprecedented digital transformation across many sectors of the global economy, international merchandise trade remains stubbornly wedded to paper. One major obstacle has been the absence of an enabling legal environment for the use of electronic transferable records. The United Nations Commission on International Trade Law (UNCITRAL) has made several attempts at the creation of an enabling legal environment, most recently with the development of the UNCITRAL Model Law on Electronic Transferable Records (MLETR).

a. Model Law on Electronic Commerce

The first attempt is reflected in articles 16 and 17 of the [UNCITRAL Model Law on Electronic Commerce, 1996](#) (MLEC). While the MLEC is a very successful model law that has been enacted in more than 80 States and 160 jurisdictions, these two articles have been seldom enacted and there is no evidence of their use in business practice.

b. Rotterdam Rules

The second attempt is reflected in the [United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008](#) (the "Rotterdam Rules"). The Rotterdam Rules form a comprehensive treaty that aims at modernising the law of the carriage of goods by sea (or multimodal, with a maritime leg). Among other things, the Rotterdam Rules treat transport documents on a medium-neutral basis, i.e., apply the same rules regardless of their paper or electronic medium.

c. Model Law on Electronic Transferable Records

The third attempt is reflected in the UNCITRAL [Model Law on Electronic Transferable Records](#). MLETR

deals with the general issue of the digitisation of transferable documents and instruments, including bills of lading but also including, inter alia, bills of exchange, letters of credit and warehouse receipts.

This general approach allows, among other things, alignment in the same ecosystem of logistics and trade financing.

d. Relationship between the Rotterdam Rules and MLETR

Since both the Rotterdam Rules and MLETR were prepared by UNCITRAL and rely on pre-existing UNCITRAL texts and their underlying principles, they have elements in common. UNCITRAL itself has indicated that MLETR may be used for implementing the Rotterdam Rules. Hence both texts are technology neutral and aim at enabling digitisation. There are however significant differences. The Rotterdam Rules are a comprehensive treaty on rights and obligations of the parties to a contract of carriage of goods by sea. While it adopts a medium-neutral approach that places paper-based and electronic documents on the same plane, it contains only three articles on the use of electronic transport documents (and two of them are on change of medium).

MLETR deals exclusively with the use of electronic transport records and is much more detailed in that regard. It adopts a functional equivalence approach that “adds on” to the paper rules needed to operate in an electronic environment, and therefore does not affect the rights and obligations of the parties. It applies to all transferable documents and instruments, thus covering both logistics and trade financing needs.

2. The Bill – ICC’s perspective

The Bill introduces the possibility of using electronic transport documents by adding several provisions to the Dutch Civil Code. Though the Bill is well-intentioned, it suffers from three key deficiencies. First, the Bill introduces a dual regime for the regulation of bills of lading – one regime for paper-based bills of lading, another for electronic bills of lading. Second, the Bill is designed as an “emergency regime”, to be put in place until the entry into force of the Rotterdam Rules, yet current political realities would suggest that this is unlikely both in the near or medium-term. Third, and most important, the Bill departs from international best practice, as reflected in MLETR.

a. Dual regime

The Bill introduces the regime of the Rotterdam Rules just for electronic bills of lading (called electronic transport documents). This means that there will be a dual legal regime that applies depending on the medium chosen, and that in case of change of medium there will be also a change of applicable legal regime. It may even be that one party may ask for change of medium to benefit from the change in legal regime. The reasons behind the urgency of adopting a dual regime (which is not necessary to enable the electronic use of bill of lading) are not clear from the explanatory note.

Entry into force of the Rotterdam Rules may address the matter. However, given uncertainty both as to the timing and likelihood of entry into force, the temporary dual regime may apply for a significant period.

The dual regime solution has been considered and discarded in UNCITRAL texts to avoid complexity and legal uncertainty. MLETR, based on the functional equivalence approach, does not amend

substantive law. The Rotterdam Rules, based on the medium neutral approach, provide a unique legal regime regardless of the medium. Both texts avoid the creation of a dual regime.

b. The need for a durable solution

The [explanatory note](#) to the Bill stresses that the goal of the Bill is to introduce an emergency regime for electronic bills of lading, which will apply until the Rotterdam Rules enter into force (*“Dit wetsvoorstel kan dus worden gezien als een noodverband, dat geldt zolang de Rotterdam Rules nog niet in werking zijn getreden.”* – explanatory note page 2). It cross-references each article of the Bill to the corresponding provision of the Rotterdam Rules.

The Rotterdam Rules have five States parties (Benin, Cameroon, Congo, Spain and Togo) and require 15 more States parties to enter into force. The latest ratification took place in 2017, and we have not seen appetite in recent years for further ratifications. As such, it is not easy to predict when entry into force may happen, but entry into force in the near or medium-term seems doubtful.

The Netherlands was very active in the negotiation of the Rotterdam Rules. It signed the Rotterdam Rules in 2009, together with 24 other States, but has not yet ratified them. It passed acts in 2019 to ratify the Rotterdam Rules (*de Goedkeuringswet Rotterdam Rules*) and to make consequential amendments to existing Dutch law, but those acts will not enter into force unless other major trading countries adopt the Rotterdam Rules. This was done to avoid denouncing the current regime, based on the [Hague-Visby Rules](#), which has broad global application, without replacing it immediately with a similar broadly accepted legal regime.

c. The need for a harmonized approach, and the virtues of MLETR

There is great commercial benefit in taking a harmonized approach to the legal recognition of electronic transferable records. While harmonised regulation is generally a good thing for business, cutting cost and complexity, this applies all the more so with respect to electronic transferable records given the cross-border nature of international merchandise trade.

In this connection, it is instructive to consider the strong support for MLETR among policymakers and business groups around the world.

MLETR has been adopted in seven jurisdictions (six States and one special economic zone, six of which occurred in 2021), is being actively considered by several other jurisdictions, and is being actively promoted by ICC through the Digital Standards Initiative and a host of other institutions.

MLETR has also twice been endorsed by Group of Seven (G7) Digital Ministers, in [April 2021](#) under the UK Presidency and in [May 2022](#) under the German Presidency. The G7 resolved to “promote the adoption of legal frameworks compatible with the UNCITRAL Model Law on Electronic Transferable Records” and has established a [framework for collaboration](#) on electronic transferable records. Both the United Kingdom and Germany are in the process of enacting legislation and regulations (respectively) which will provide for legal recognition of electronic transferable records.

The Bill does not consider these international and global efforts behind trade digitization. For instance, the approach in the Bill is different from the one taken in Germany where a uniform legal

regime was adopted for all bills of lading. It also does not consider the Proof of Concept between the Port of Rotterdam and Singapore's TradeTrust, etc., whose implementation based on MLETR may be hindered by the lack of certain basic MLETR requirements (e.g., singularity and reliability standards). Closer alignment with those ongoing initiatives and with MLETR is strongly recommended.

Further, MLETR takes a fundamentally different approach to the Bill, in that it seeks to apply to all 'transferable documents or instruments', which include, *inter alia*, bills of lading, bills of exchange, letters of credit, insurance certificates and warehouse receipts. It thus enables a coherent management of trade-related data regardless of the type of commercial document involved.

In other words, under MLETR the same ETR management system may handle a bill of lading and an electronic promissory note. There have been few attempts, as with this Bill, to deal with the digitisation of specific types of documents, and they have not been particularly successful, especially in the transport field. The prevailing view favours integration and interoperability. Legal fragmentation in this regard is neither technically required nor desirable.

While the Bill stresses its derivation from the Rotterdam Rules, the first part also contains provisions of MLETR. Draft articles 497b and 497c reproduce most functional equivalence requirements of MLETR (information, integrity, control – but not singularity) as requirements for substantive validity of the electronic transport document.

The Bill may thus be considered facially compatible with MLETR, and even inspired by the basic principles underlying MLETR. Further refining is necessary however, namely, to introduce a reference to a singularity requirement and to incorporate additional elements of MLETR such as the introduction of a general reliability standard.



ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 170 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, ICC promotes international trade, responsible business conduct and a global approach to regulation, in addition to providing market leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

ABOUT THE ICC DIGITAL STANDARDS INITIATIVE

The ICC Digital Standards Initiative (DSI) works towards the ambitious aim of establishing a globally harmonized and digitalized trading environment (also addressing disruptions experienced in the international supply chain during the COVID-19 crisis) as a result of the reliance of trade flows on paper documentation and diverging legal and technical standards.
