



# Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

## Uncitral Model Law on Electronic Transferable Records: Is It an Applicable Legal Framework for Bills of Lading Under Turkish Law?\*

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### Abstract

The purpose of the “Model Law on Electronic Transferable Records” adopted by UNCITRAL on July 13, 2017, is to provide a legal framework for the digitisation of paper-based transferable documents or instruments. For this purpose, it is recognised that “*functional equivalence*” must be achieved between a paper-based document and an electronic record. The law also adopts the principle of “*technological independence*”. In accordance with this principle, the law does not recommend or endorse the use of a particular technology, method or product for electronic transactions. Similarly, the choice of paper-based documents covered by the law is left to national law. The important thing is that the document is transferable. However, UNCITRAL states that the use of electronic bills of lading in particular, should be facilitated because of its importance in maritime trade among transferable documents. It is also important for our country to adopt the MLETR to ensure international harmonisation and the development of international trade. For this reason, this study analyses whether the bill of lading qualifies as an electronic transferable record, as stipulated in the MLETR under Turkish law. In this context, it is explained whether the conditions of writing, signature, transferability, and control can be achieved in an electronic environment.

### Keywords

UNCITRAL, Paperless Trade, Bill of Lading, Electronic Transferable Records, Model Law on Electronic Transferable Records, Functional Equivalence, Technological Neutrality

\* This study was supported by the Scientific and Technological Research Council of Turkey (TUBITAK) under Grant Number 223K518. The authors thank TUBITAK for their support.

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**To cite this article:** Senol AN, Ozer I, Meric G, “Uncitral Model Law on Electronic Transferable Records: Is It an Applicable Legal Framework for Bills Of Lading Under Turkish Law?”, (2024) 75 Annales de la Faculté de Droit d'Istanbul 255. <https://doi.org/10.26650/annaes.2024.75.0010>



## I. Introduction

Electronic commerce has been on the agenda of the United Nations Commission on International Trade Law (UNCITRAL)<sup>1</sup> since the 1990s. UNCITRAL has prepared conventions, model laws, legislative guides, and explanatory texts; with the purpose of facilitating the use of electronic means to engage in commercial transactions. In this regard, UNCITRAL adopted the Model Law on Electronic Transferable Records (MLETR) with Explanatory Notes<sup>2</sup> on July 13, 2017.

The main purpose of MLETR is to provide a legal framework for digitalisation of paper-based transferable documents or instruments. The UNCITRAL Working Group IV clarified that one of the main objectives of MLETR is to facilitate the use of electronic bills of lading<sup>3</sup>. A bill of lading is a negotiable instrument issued by a carrier or its agent in international trade to certify the receipt of goods for shipment. It serves as proof of the contract of affreightment and of ownership of the goods.

As is the case in many countries whose names are mentioned below, it is important and necessary to take the provisions of MLETR as an example to regulate the bill of lading as an electronic transferable record as well as to trade it electronically in Turkish law. Thus, it will be possible to achieve international harmonisation and improve trade between our country and the others.

In our study, the question of whether the bill of lading can qualify as an electronic transferable record, as stipulated in the MLETR, will be answered from a legal perspective and by taking into account the relevant rules in Turkish law. In this context, after briefly mentioning the definition and functions of the bill of lading under Turkish law, it will be explained whether the condition of writing, signature, transferability, and control can be achieved in an electronic environment. Finally, the electronic transfer of the bill of lading according to the forms of transfer are discussed.

On the other hand, since the MLETR has already adopted the principle of “*technological neutrality*” which we will further explain below, we will not specifically address technological means, such as *registry*, *token*, *distributed ledger*, or other ones that can be used for an electronic bill of lading, nor how they will be implemented.

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1 For detailed information on the establishment and objectives of UNCITRAL, see also Yüksel Bozkurt and Ebru Armağan, “UNCITRAL ve UNCITRAL Model Kanunu’na Genel Bir Bakış” [2011] 2(2) Türkiye Adalet Akademisi Dergisi 135-172., 138ff.

2 See “Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records”, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr\\_ebook\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf) accessed May 25, 2024. For a Turkish translation of the Model Law, see also Ahmet Said Ber, ‘Elektronik Olarak Devredilebilir Kayıtlara İlişkin UNCITRAL Model Kanunu’ [2019] 1(2) Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi 445-452., 446ff.

3 UN Commission on International Trade Law Working Group IV, ‘Legal issues relating to the use of electronic transferable records’ (*United Nations Digital Library*, 2012) <<https://digitallibrary.un.org/record/734248?v=pdf>> accessed 24 July 2024.

## II. The Need for the Use of Electronic Bill of Lading

As the landscape of global commerce is rapidly evolving, digitisation of trade documents has become necessary to accelerate and advance international trade. Maritime transport underpins the majority of international trade and hence stands at the front of this digital transformation. In order to facilitate digitisation of shipping industry, the world's largest shipping companies, MSC, Maersk, CMA CGM, Hapag-Lloyd, ONE, Evergreen, Yang Ming, HMM, and ZIM founded the Digital Container Shipping Association (DCSA) in April 2019, recognising the need for collaboration<sup>4</sup>.

The urgency of this digital shift was further emphasised in April 2020 when the International Chamber of Commerce (ICC) called on all governments to take immediate legislative or executive action to abolish any requirement for key trade documents, such as bills of lading, to be presented in paper format<sup>5</sup>. Bill of lading has been specifically mentioned in that call because it plays a pivotal role in international trade.

The call of ICC emphasised the importance of all states to rapidly adopt legal frameworks to clarify the functional and legal equivalence of electronic and paper-based commercial documents. As a legal framework, the ICC recommended that all states adopt the Model Law on Electronic Transferable Records (MLETR) of the United Nations Commission on International Trade Law. This is because the MLETR provides a legal framework for the electronic transfer of many negotiable instruments, such as electronic bills of lading, bills of exchange, bills of exchange, checks, and bills of exchange. In this Model Law, each negotiable instrument is not mentioned individually to facilitate and accelerate digital transformation; instead, the term "electronic transferable records" is preferred. The fact that negotiable instruments can be issued as electronic transferable records is important for removing legal barriers to electronic commerce<sup>6</sup>.

According to UNCITRAL data, the countries that have adopted the MLETR or adopted legislation influenced by the provisions of MLETR are Bahrain, Belize, France, Kiribati, Papua New Guinea, Paraguay, Singapore, Timor-Leste, the United Arab Emirates (Abu Dhabi Global Market), the United Kingdom of Great Britain, and Northern Ireland<sup>7,8</sup>.

4 For more information, please visit the DCSA official website at <https://dcsa.org/about-us>.

5 International Chamber of Commerce, "ICC Memo To Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations", April 6, 2020, <https://iccwbo.org/news-publications/policies-reports/icc-memo-to-governments-and-central-banks-on-essential-steps-to-safeguard-trade-finance-operations/> accessed May 25, 2024.

6 World Trade Organisation, "The Promise of TradeTech: Policy Approaches to Harness Trade Digitalisation", 12.04.2022, [https://www.wto.org/english/res\\_e/reser\\_e/book\\_launch\\_12april22\\_e.htm](https://www.wto.org/english/res_e/reser_e/book_launch_12april22_e.htm) accessed July 24, 2024. For an analysis of the concept of "electronic transferable record" from its origins in US law to its most recent definition by UNCITRAL, see Zvonimir Šafranko, "The Notion of Electronic Transferable Records" [2016] 3(2) *Intereulaweast* 1-31., 4ff.

7 For the status of MLETR, see [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records/status](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status) accessed 21 September 2024.

8 Gülfer Meriç and Tuğçe Tomrukçu, "Türk Hukukunda Konişmento Kavramı Kapsamında Elektronik Konişmento ve Elektronik Konişmento Girişimleri," [2022] 7(3) *REGESTA* 527-562., 556.

While UNCITRAL has been working on MLETR, to provide a legal framework for electronic transferable records, recent actions taken by the industry have further emphasised the urgent need to implement digital solutions in maritime trade. Building on this momentum, the Future International Trade (FIT) Alliance was launched in February 2022. This coalition, comprising five founding members: Baltic and International Maritime Council (BIMCO), DCSA, International Federation of Freight Forwarders Associations (FIATA), ICC, and Society for Worldwide Interbank Financial Telecommunications (SWIFT), aims to raise awareness and accelerate the adoption of a standards-based electronic bill of lading<sup>9</sup>.

The potential impacts of this digital transformation are substantial. A research conducted by the McKinsey Global Institute revealed that adoption of electronic bill of lading would result in savings of \$6.5 billion in direct costs<sup>10</sup>. However, the benefits extend far beyond. Electronic issuance of a bill of lading accelerates payment movements; ensures the accuracy of documents and facilitates their storage. It also ensures that bills of lading are stored in encrypted digital systems and that fraud and forgery are prevented; provides transparency in supply chains; protects the environment and nature by reducing the use of paper; and increases the competitiveness of our country against foreign countries<sup>11</sup>.

### III. General Principles Adopted in the MLETR

The MLETR is based on three fundamental principles<sup>12</sup>:

(i). *Non-discrimination against the use of electronic communications* ensures that there should be no disparity of treatment between paper-based documents and electronic records<sup>13</sup>. This principle is expressly stipulated in Article 7/1 of MLETR. According to this article, “*an electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form*”. Thus, the MLETR aims to eliminate the barrier between transferable documents and electronic transferable records by recognising the transfer of rights through electronic

9 For more information, please visit the FIT Alliance official website at <https://www.fit-alliance.org/>.

10 Didier Casanova and others, ‘The multi-billion-dollar paper jam: Unlocking trade by digitalising documentation’ (*McKinsey & Company*, 4 October 2022) <<https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/the-multi-billion-dollar-paper-jam-unlocking-trade-by-digitalizing-documentation#/>> accessed July 24, 2024.

11 UK Law Commission. “Electronic Trade Documents: Report and Bill” (*Electronic Trade Documents*, 2023) <<https://www.lawcom.gov.uk/project/electronic-trade-documents/>> accessed July 24, 2024. Also see United Nations Economic Commission for Europe (UNECE), ‘White Paper on Transfer of Model Law on Electronic Transferable Records - Compliant Titles’ (September 2023) <[https://unece.org/sites/default/files/2023-09/WhitePaper\\_Transfer-MLETR.pdf](https://unece.org/sites/default/files/2023-09/WhitePaper_Transfer-MLETR.pdf)> accessed 21 September 2024, 7-8; Göker Tataroğlu and Pınar Çağlayan Aksoy, *Karşılaştırmalı Hukukta Tokenize Edilmiş Konişmentolar* (1st edn, On İki Levha Yayıncılık 2023), 28 ff; Pınar Çağlayan Aksoy, Meral Şengöz and Menekşe Hüryaşar, ‘Tedarik Zincirlerinde Kağıtsız Ticaret Dönemine Doğru: Dijital Dünyadaki Gelişmeler ve Blokzincir Teknolojisi Elektronik Ticaret Dokümanları Bakımından Neler Getirecek?’ [2023] XXXIX(1) BATİDER 67-125., 69; Ahmet Said Ber, *Elektronik Konişmento* (1st edn, Seçkin Yayınları 2018), 61.

12 Časlav Pejović and Unho Lee, “UNCITRAL Model Law on Electronic Transferable Records as a Potential Legal Regime for the Use of Electronic Bills of Lading” [2022] 57(1) *European Transport Law: Journal of Law and Economics* 13-32., 15.

13 *Ibid.*, 16.

records, which allows electronic bills of lading to enjoy the same treatment as bills of lading<sup>14</sup>.

(ii). *Technological neutrality* refers to non-discrimination between various technologies that may be used for electronic transferable records. This principle ensures that electronic transferable records can be used in any technology<sup>15</sup>. The reason for this is to prevent the rules of law from becoming incompatible with future technological developments<sup>16</sup>. In fact, legislative procedures take a very long time, whereas technology develops very rapidly. If legislation focuses only on a particular type of technology, when it evolves, the legislation will become outdated and ineffective sooner than expected. This is related to the sustainability of specific legal regulations. The aim is to avoid cumbersome and confusing repeated legislative changes<sup>17</sup>.

On the other hand, this does not mean that any technology can be used for electronic transferable records for legal recognition; an electronic transfer of rights using such technology must meet the requirements under the MLETR. In recent years, various technologies have been developed to enable the transfer of interests through electronic records: registry, token, and distributed ledger. If the requirements of MLETR are met, rights can be legally transferred by such technologies<sup>18</sup>.

(iii). *Functional equivalence* is the primary mechanism used to recognise the legal effects of electronic records<sup>19</sup>. This principle allows the implementation of electronic transactions according to existing domestic laws without eliminating the legal requirements and procedures of paper-based negotiable instruments<sup>20</sup>. The legal effect is given to an electronic record if it serves the same purposes and functions as the corresponding paper-based document. The principle of functional equivalence therefore requires that the same functions of a paper-based document be available in electronic records. Thus, MLETR thus applies to electronic transferable records that are functionally equivalent to transferable documents<sup>21</sup>.

14 Ibid., 16.

15 Jung-Ho Yang, "Applicability of Blockchain based Bill of Lading under the Rotterdam Rules and UNCITRAL Model Law on Electronic Transferable Records" [2019] 23(6) Journal of Korea Trade 113-130., 121-122; Pejović and Lee (n 13), 16; Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84; Ber, Konişmento (n 12), 88. See also Explanatory Note, para. 18.

16 For the same opinion, see Zeynep İstemi, "Devredilebilir Elektronik Kayıtlar Hakkında UNCITRAL Model Kanunu" [2020] 5(1) ÇÜHFD 1771-1797., 1776; Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84.

17 Chris Reed, 'Taking Sides on Technology Neutrality' [2007] 4(3) Journal of Law, Technology and Society 263-284., 283-284.

18 Pejović and Lee (n 13), 16.

19 Ibid., 16.

20 Pejović and Lee (n 13), 16; Yang (n 16), 122; Guo Yu, "Functional Equivalence to a Piece of Paper: A Comment on the UNCITRAL Model Law on Electronic Transferable Records" [2022] XXVI Dispute Resolution, Digital Economy And Contemporary Issues In Harmonisation Of International Commercial Law 1-27., 2-3; Ryan Harrington, "News from the United Nations Commission on International Trade Law (UNCITRAL): the Work of the Fiftieth Commission Session" [2017] 22(4) Uniform Law Review 996-1009., 997; İstemi (n 17), 1784.

21 Pejović and Lee (n 13), 16.

The second chapter of MLETR regulates the principle of functional equivalence. In this chapter, functional equivalence rules are provided for “writing” (art. 8), “signature” (art. 9), “transferable document or instrument” (art. 10), and “control” (art. 11). These provisions will be explained in detail below when analysing whether the MLETR applies to paper-based bills of lading under Turkish law.

## IV. Bill of Lading under Turkish Law

### A. Definition and Content

Bills of lading are regulated by article 1228 and the rest in the Turkish Commercial Code (TCC), numbered 6102. Article 1228/1 of the TCC defines the bill of lading. According to this article, “*a bill of lading is a bill that proves that a contract of carriage has been made, shows that the goods have been received by the carrier or loaded on the ship, and that the carrier is obliged to deliver the goods only in return for its presentation*”.

The contents of the bill of lading are listed in fifteen paragraphs pursuant to article 1229 of the TCC. This provision provides that the absence of any one or more of the elements listed in the fifteen paragraphs shall not affect the validity of the bill of lading. In other words, the bill of lading will continue to be valid even if one or more of the elements listed under article 1229 of the TCC are missing, provided that the bill of lading complies with the definition stipulated under article 1228 of the TCC. Therefore, the bill of lading is not a document strictly bound by form<sup>22</sup>; which makes it easier to digitise in this respect.

In conclusion, if the bill of lading proves that the contract of affreightment has been concluded, if it shows that the goods have been received by the carrier or loaded on board the ship, and if the carrier is obliged to deliver the goods only upon presentation of the bill of lading, even if the elements stipulated under article 1229 of TCC are not included in the bill of lading, it will be considered a valid bill of lading<sup>23</sup>. Certainly, this also applies to the electronic bill of lading. Therefore, for an electronic bill of lading to be valid, it is sufficient that it meets the conditions stipulated under article 1228 of the TCC.

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22 Hakan Karan, *Elektronik Konişmento* (1st edn, Turhan Kitabevi 2004) 40; Ber, *Konişmento* (n 12), 32. Karan asserts that the bill of lading is not strictly prescribed in format; however, its essential functions implicitly dictate certain key elements that must be present, making it functionally bound by form. See Karan (n 23), 40.

23 The legal effectiveness of a bill of lading is not subject to the explicit inclusion of the term “bill of lading” within the document itself. If a document incorporates all the requisite substantive elements stipulated under TCC, it shall be deemed a valid bill of lading, regardless of whether it is explicitly labelled as such. See Emine Yazıcıoğlu, *Kender - Çetingil Deniz Ticareti Hukuku* (17th edn, Filiz Kitabevi 2022) 367.

## B. Functions of the Bill of Lading

The bill of lading serves various functions. The electronic bill of lading must also maintain these functions. In this regard, these functions should be examined individually.

### 1. Function as Evidence

The first function of the bill of lading is the function of evidence. The bill of lading primarily identifies the carrier, as the carrier is the person entitled to issue the bill of lading<sup>24</sup>. However, it should be clarified that the carrier is deemed as the carrier not because he issues the bill of lading but because he undertakes the carriage<sup>25</sup>. On the other hand, the carrier must issue the certificate upon request of the shipper<sup>26</sup>.

In addition to identifying the carrier, the bill of lading proves the carrier. Pursuant to article 1238/1 of TCC, “*the person who signs the bill of lading as the carrier or the person on whose behalf and on whose account the bill of lading is signed shall be deemed to be the carrier*”. The legislator provides a presumption here, and it is not possible to prove the contrary of this presumption<sup>27</sup>. In this respect, a person who signs a bill of lading as the carrier, or who signs a bill of lading by a representative on his/her own behalf as the carrier, is legally deemed to be the carrier.

Article 1238/2 of the TCC provides for the presumption that the shipowner shall be deemed to be the carrier in cases where the carrier cannot be identified from the bill of lading, but the shipowner may prove the contrary by documenting the identity of the carrier. Article 1238/3 of the TCC, on the other hand, stipulates that if the bill of lading is issued by the master or another representative of the carrier and the carrier cannot be identified from the bill of lading, the master or representative issuing the bill of lading shall be deemed to be the carrier together with the shipowner. Therefore, even if the bill of lading fails to identify the carrier, the shipowner, master, or other representative who issued the bill of lading shall be deemed to be the carrier to prevent any damage to the rights of the bearer.

Article 1230 of TCC stipulates that “*the legitimate bearer of the bill of lading is authorised to take delivery of the goods. If the bill of lading is issued in more than one copy, the goods shall be delivered to the legitimate bearer of a single copy*”. Therefore, the consignee is the legitimate bearer of the bill of lading. The right of the bearer of a bill of lading to take delivery of goods arises from the bill of lading as a

24 The master or any other representative of the shipowner is a representative acting on behalf and for account of the carrier when issuing the bill of lading. See Karan (n 23), 36.

25 Yazıcıoğlu, Deniz Ticareti (n 24), p. 375.

26 Tahir Çağa and Rayegân Kender, *Deniz Ticareti Hukuku – II: Navlun Sözleşmeleri* (9th edn, On İki Levha Yayıncılık 2009) 67-68; Karan, (n 23) 36.

27 Yazıcıoğlu, Deniz Ticareti (n 24), 375.

document of title<sup>28</sup>. However, for the bearer of the bill of lading to demand delivery of the goods, the bill of lading must have been duly transferred to him. The person who becomes the bearer by duly transferring the bill of lading is the consignee<sup>29</sup>. Identification of the consignee is an important function of the bill of lading.

One of the most important functions of a bill of lading is to prove the existence of a contract of affreightment between the parties<sup>30</sup>. Article 1228/1 of the TCC, which contains the definition of the bill of lading, begins with the words “*a bill of lading is a document which proves that a contract of affreightment has been concluded...*”. As explained above, according to article 1229 of the TCC, the absence of one or more of the elements of the bill of lading does not affect the validity of the bill of lading; however, the bill of lading must comply with the definition stipulated under article 1228 of the TCC. In this respect, the bill of lading shall prove that a contract of affreightment has been concluded.

The relationship between the carrier and bearer of a bill of lading shall be determined according to the bill of lading<sup>31</sup>. Article 1237 of the TCC provides for this principle. The article also provides that the relationship between the carrier and the shipper shall be subject to the provisions of the contract of affreightment<sup>32</sup>. Where a separate written agreement is not concluded between the parties, the relationship between the carrier and the shipper is subject to the bill of lading.

The relationship between the carrier and the consignee is determined according to the principles stipulated in the bill of lading and is not subject to the contract of affreightment<sup>33</sup>. However, in practise, “incorporation clause” is used in the bills of lading to refer to the charter party to incorporate the terms and conditions contained in the charter party into the contents of the bill of lading<sup>34</sup>. This issue is regulated by article 1237/3 of the TCC. Accordingly, if there is a reference to the voyage charter party in the bill of lading, a copy of the charter party must be given to the bearer of the bill when it is transferred. Therefore, the condition for the provisions of the charter party to apply to the bearer of the bill of lading is the presentation of these provisions to the bearer. In this respect, for the provisions of the charter party to

28 Paul Todd, *Principles of the Carriage of Goods by Sea* (1st edn, Routledge 2015) 238; Meetalı B. Shambarkar, ‘Ambiguous Status of Electronic Bill of Lading in the Era of Digitalisation: An Overview’ (2020) 3 Int’l JL Mgmt & Human 475.

29 Yazıcıoğlu, Deniz Ticareti (n 24), 376.

30 However, the bill of lading is not the contract of affreightment itself; it is only a means of evidence. See Karan (n 23), 43.

31 This principle applies to both charter and liner contracts. Therefore, the relationship between the carrier and the bearer of a bill of lading is subject to the bill of lading in both charter and liner carriage. However, in the case of charter carriage, the relationship between the carrier and the shipper is subject to the affreightment contract. See Çağa and Kender (n 27), 83.

32 Beyond its function regarding the contract of affreightment, the bill of Lading has significant implications. It plays a crucial role in sales contracts between sellers and buyers, as well as serving as a crucial document in credit arrangements involving banks and other parties. In addition, the bill of lading is of vital importance in customs procedures between governmental authorities and those engaged in import-export activities. See Karan (n 23), 41.

33 See H Murat Demirkıran, *Taşıyanın Konışmento İçeriğinden Sorumluluğu* (1st edn, Arıkan Yayınları 2008) 20.

34 Çağa and Kender (n 27), 71-72.



be asserted against the bearer of the bill of lading, a copy of the charter party must be given to the bearer of the bill of lading. In this case, the legislator has stipulated that the provisions of the charter party may be asserted against the bearer of the bill of lading if their qualifications allow. In addition, it is regulated that mandatory provisions shall be applied in the relationship between the bearer of the bill of lading and the carrier, as stipulated in article 1243 of the TCC. As a result, the bill of lading determines the relationship between the carrier and the consignee. It is also taken as the basis for the relationship between the carrier and the shipper in cases where the contract of affreightment is not in writing.

The bill of lading also serves as proof for the goods. When the carrier takes delivery of the goods or when the goods are loaded on board, a bill of lading is issued for these goods, and records on the type, quantity, value, mark, and external condition of the goods are also recorded in this bill of lading<sup>35</sup>. These records are important in terms of the carrier's liability<sup>36</sup>. The carrier shall report the condition of the goods in the bill of lading<sup>37</sup>. The consequences of failure to do so are stipulated in article 1239/2 of the TCC, which presumes that the goods have been received or loaded in good condition. This is because, by Article 1239/1 of the TCC, the legislator entitles the carrier to make a reasoned reservation if he knows or suspects that the declarations regarding the goods stated in the bill of lading do not reflect the truth. Without prejudice to these reservations, article 1239/3 of the TCC presupposes that the cargo has been received or loaded as declared in the bill of lading. The contrary of this presumption cannot be proved against the consignee who takes over the bill of lading in good faith. However, if a reasoned reservation is made, the records in the bill of lading shall not constitute a presumption.

## 2. Function as a Document of Title

A bill of lading functioning as a document of title means that the bearer of the bill of lading can dispose of the goods even if the goods are in transit<sup>38</sup>. In this way, goods can be sold or pledged while in the possession of the carrier<sup>39</sup>. For a bill of lading to fulfil its function as a document of title, all of the conditions stipulated under article 1234 of the TCC must be met. First, the goods must have been received by the master

35 In essence, a bill of lading serves two functions. It acts as an official receipt confirming either the cargo has been loaded onboard or has been delivered to the carrier for subsequent shipment, while providing a record of the nature, quantity, and condition of the goods. This allows the seller to collect the fee by establishing that he or she has fulfilled the obligation of delivery. On the other hand, the buyer can then place the goods on the market or obtain credit on the bill of lading. See Karan (n 23), 50.

36 Todd (n 29), 38.

37 In practice a record such as "in apparent good order and condition" is written to demonstrate that the cargo is in good condition. A bill of lading containing this record is called a clean bill of lading. See Yazıcıoğlu, Deniz Ticareti (n 24), 379; Ecehan Yeşilova Aras, *Konşimentonun İspat Kuvveti* (1st edn, Güncel Hukuk Yayınları 2006) 195.

38 Yeşilova Aras (n 38), 45-46; Demirkıran (n 34), 15.

39 Karan (n 23), 58; Yazıcıoğlu, Deniz Ticareti (n 24), 382; Yeşilova Aras (n 38), 45-46.

or another representative of the carrier. In addition, the bill of lading must have been duly transferred. It is also necessary for the carrier or master to possess the goods during the transfer of the bill of lading<sup>40</sup>.

If these conditions stipulated under article 1234 of the TCC are fulfilled, the person who takes over the bill of lading has indirect possession of the goods by taking over the bill of lading<sup>41</sup>. Further, as stated above, the person who duly takes over the bill of lading shall acquire ownership of the goods, and the person who lends the bill of lading against a pledge shall acquire the right to pledge over the goods<sup>42</sup>.

### **3. Function as Documentation of Carrier Undertaking to Carry and Deliver Goods When the Bill of Lading is Presented**

Bill of lading documents that the carrier undertakes to carry and deliver goods to the legal bearer at the port of destination upon presentation of the bill of lading. The cargo can only be legitimately released upon presentation of the original bill of lading<sup>43</sup>. Upon receipt of the cargo at the designated port, a bill of lading must be appropriately annotated to indicate that the goods have been duly received. In cases where multiple original copies of a bill of lading are issued, the bearer of the original copy is entitled to claim the goods without presenting other copies. It is important to note that once the goods are delivered to the legitimate bearer of a single original copy, the carrier's obligation arising from the bill of lading is considered fulfilled with respect to all other copy holders<sup>44</sup>. This legal framework highlights the bill of lading's role not just as a receipt or contract of carriage but also as a document of title that confers upon its holder the right to claim the goods.

## **V. Applicability of MLETR to the Bills of Lading**

### **A. Requirement of Transferability**

The MLETR focuses on the transferability of documents and instruments<sup>45</sup>. According to the MLETR, "*transferable documents or instruments*" are described as paper-based documents that entitles the bearer to claim the performance of the

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40 For discussions on this condition, see Çağa and Kender (n 27), 100-114; Demirkıran (n 34) 21-23.

41 Çağa and Kender (n 27), 100 and 120; Karan (n 23), 58. For discussions on this subject, see Çağa and Kender (n 27), 100-123.

42 As a result of the bill of lading's function as a document of title, a description of the goods is essential. This obligation arises naturally from the fact that the bill of lading is a delivery or loading receipt. See Karan (n 23), 58.

43 This consideration is a direct consequence of the bill of lading's status as a negotiable instrument. See Demirkıran (n 34), 19.

44 However, it should be noted that an electronic bill of lading cannot and does not need to be issued in multiple originals. See Časlav Pejović, 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' [2001] *Journal of Business Law* 461-488., 484.

45 Explanatory Note, para. 20.

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 (art. 2/para. 3 of MLETR).

As understood from the provision, a transferable document or instrument must authorise the bearer to “claim the right included in the document or instrument” and to “transfer that right by the transfer of the document or instrument”. The determination of which documents have these characteristics and fall within the scope of the MLETR is left to national law. The Explanatory Note lists bills of exchange, cheques, promissory notes, consignment notes, warehouse receipts, insurance certificates, air waybills, and bills of lading as examples of transferable documents or instruments that may be covered by the MLETR<sup>46</sup>. However, the MLETR has already excluded certain types of instruments. As stated in article 1/3 of MLETR, “*this law does not apply to securities such as shares and bonds and other investment instruments*”.

Under Turkish law, qualifications specified in article 2, paragraph 3 of MLETR define negotiable instruments<sup>47</sup>. According to article 645 of the TCC, which is one of the general provisions of negotiable instruments, the right contained in a negotiable instrument cannot be asserted separately from the document nor can it be transferred to other parties. Unlike other documents or instruments, for a document to qualify as a negotiable instrument, three elements are required: First, the document must be in writing, including the legal requirements stipulated in the law. Thus, the right contained in the negotiable instrument becomes tangible upon the issuance of the document. However, as we discuss below, the condition for the document to be written should not prevent it from being issued in an electronic environment<sup>48</sup>. Second, the rights contained in the document must be transferable<sup>49</sup>. Third, interdependence should be set between the document and the right<sup>50</sup>. This last element prevents the right embodied in the negotiable instrument from being claimed and transferred separately from the document (art. 645 of TCC). The issuance of the document in a manner that includes the formal requirements stipulated in the law according to the type of negotiable instrument indicates that this interdependence has been established.

TCC regulates the legal nature of the bill of lading in articles 1230 et seq. under the subheading “*its nature as a negotiable instrument*”. The most decisive feature distinguishing bill of lading from other transport documents is that it is a negotiable instrument. The carrier’s ability to deliver goods is conditional upon the presentation

46 Explanatory Note, para. 38.

47 For the same opinion, see İstemi (n 17), 1781.

48 Abuzer Kendigelen and İsmail Kırca, *Kıymetli Evrak Hukuku, Genel Esaslar; Kambiyo Senetleri* (1st edn, On İki Levha Yayıncılık 2019) 5.

49 Kendigelen and Kırca (n 49), 7.

50 Hasan Pulaşlı, *Kıymetli Evrak Hukukunun Esasları* (10th edn, Adalet Yayınevi 2023) 4; Kendigelen and Kırca (n 49), 8; Fırat Öztan, *Kıymetli Evrak Hukuku* (25th edn, Yetkin Yayınları 2021) 13ff.

of a bill of lading (art. 1228/1 of TCC), which is a result of the fact that a bill of lading is a negotiable instrument. Therefore, the bill of lading contains an undertaking that the goods will be delivered to the person who appears as the legitimate bearer in the document upon presentation of the bill of lading<sup>51</sup>.

In this case, the bill of lading, which is a negotiable instrument under Turkish law, can be converted into an electronic record under the MLETR and subject to electronic transactions provided that the other conditions to be examined below are also met.

On the other hand, it is also necessary to consider whether the sea waybill, which is frequently encountered in practise, should be included in the scope. Since the development of technology enables ships to travel faster, in some cases, cargo arrives at the port before the consignee receives a bill of lading transmitted by mail<sup>52</sup>. However, if the consignee cannot present a bill of lading, he/she is not entitled to take delivery of the cargo. In response to this problem, nowadays, sea waybills are used as an alternative to the bill of lading<sup>53</sup>. Sea waybills are non-negotiable transport documents<sup>54</sup> and hence do not qualify as negotiable instruments. As a result, they do not fall within the scope of the MLETR under Turkish law.

## B. Requirement of Functional Equivalence

As briefly mentioned, the purpose of the principle of functional equivalence is to ensure that the provisions and consequences recognised in domestic law for paper-based negotiable instruments are also applicable to electronic transferable records<sup>55</sup>. As for the bill of lading, to achieve functional equivalence, the electronic bill of lading shall satisfy the functions of the bill of lading under Turkish law, which are functioning as evidence, as documentation of carrier undertaking to carry and deliver goods when the bill of lading is presented and as a document of title. The first two functions pose minimal challenges for electronic bills of lading because they must be fulfilled efficiently. Yet the bill of lading's function as a document of title may introduce important challenges because this function controls the transfer of specific legal rights, such as possession<sup>56</sup>, which will be dealt with below.

51 Meltem Deniz Güner Özbek, "Yeni Türk Ticaret Kanunu'nda Konışmento ve Konışmentonun İspat Kuvveti" [2012] 18(3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 233-254., 236; Feyza Çalık, 'Konışmento', (LL.M. thesis, Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü 2018) 21; Ber, Konışmento (n 12), 38.

52 Emine Yazıcıoğlu, 'Deniz Yük Senedi ve Deniz Yük Senedi ile Belgelenen Taşımalara İlişkin Bazı Sorunlar'. in Rayegan Kender and Samim Ünán (eds), *Prof Dr Tahir Çağa'nın Anısına Armağan* (Beta Yayınları 2000) 652-653.

53 Yazıcıoğlu, Deniz Ticareti (n 24), 384-385.

54 A common feature of the existing sea waybill forms is the inclusion of the "non-negotiable" record. See Yazıcıoğlu, Deniz Yük Senedi (n 53), 657-658.

55 Pejović and Lee (n 13), p. 16; İstemi (n 17), 1786.

56 For the same opinion, see Pejović (n 45), 16; Yang (n 16), 123.

In the second chapter of the MLETR, under the subtitle “*Provisions on Functional Equivalence*”, the conditions for “*writing*” (art. 8), “*signature*” (art. 9), “*transferable documents or instruments*” (art. 10) and “*control*” (art. 11) are regulated. In the following, it will be analysed whether the bill of lading can be included within the scope of the MLETR, considering the provisions of Turkish law. Thus, the question of whether a functional equivalence can be established between a paper-based bill of lading and a bill of lading as an electronic record under Turkish law will be discussed.

## 1. Writing

MLETR aims to provide equivalence between paper-based instruments, documents, and electronic records by stating in article 7/1 that “*an electronic transferable record shall not be deprived of legal effect, validity or enforceability solely on the grounds that it is in electronic form*”<sup>57</sup>.

Article 8 of MLETR states 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*”.

Under Turkish law, the requirement of a document to be in writing does not necessarily entail the text to be on paper. It is also possible for a document to be issued in the form of an electronic record; in other words, it can be created electronically<sup>58</sup>. In fact, the Turkish Code of Civil Procedure (CCP) recognises the concept of “*instrument*” in a broader sense. Article 199/1 of the CCP accepts that data such as written or printed text, documents, drawings, plans, sketches, photographs, films, images or sound recordings, data in electronic media and similar information carriers that are capable of proving the facts of the dispute are instruments to provide evidence. Importantly, the information contained in the electronic form of the document is accessible so that it can be referred to later, as stipulated in article 8 of MLETR.

It should be noted that, the fulfilment of the written form requirement stipulated in article 8 of MLETR depends upon the bill of lading fulfilling the formal requirements stipulated in article 1229/1 of the TCC. However, as explained above, even if one or more of these elements are not present, at least the elements stipulated under article 1228/1 of the TCC must be present.

57 Henry D. Gabriel, ‘The UNCITRAL Model Law on Electronic Transferable Records’ [2019] 24(2) Uniform Law Review 261-280., 272.

58 Reha Poroy and Ünal Tekinalp, *Kıymetli Evrak Hukuku Esasları* (19th edn, Vedat Kitapçılık 2010) 21; Pulaşlı (n 51), 3; Kendigelen and Kırca (n 49), 4-5; Karan (n 23), 119; Çalık (n 52), 41-42.

Article 6 of MLETR provides that nothing in the Model Law prevents the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument. Therefore, there are no obstacles to the voluntary inclusion of additional information into an electronic transferable record<sup>59</sup>.

## 2. Signature

In accordance with article 9 of MLETR, “*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*”.

The general rule under Turkish law is that where the law requires a contract to be in writing, the signatures of the parties to the contract must be affixed by hand. However, there are provisions that allow this signature to be made electronically. The reliable method required to indicate the identity and intention of a person in an electronic environment is “*secure electronic signature*”.

Article 15/1 of the Turkish Code of Obligations (TCO) states that “*a secured electronic signature also has all the legal consequences of a handwritten signature*”. In 2004, Electronic Signature Law numbered 5070 entered into force, which replicated this rule. Article 4 of the Electronic Signature Law defines secure electronic signature. According to this article, “*secure electronic signature is an electronic signature that a) depends exclusively on the signatory, b) is created with a secure electronic signature creation tool that is only at the disposal of the signatory, c) provides the identification of the signatory based on the qualified electronic certificate, d) enables the determination of whether any subsequent changes have been made to the signed electronic data*”. For texts to be sent through secure electronic signature to replace the written form, they must be sent in accordance with the Electronic Signature Law and must be saved and stored by the recipients in a computer environment.

In TCC, it is allowed to issue the bill of lading both electronically and to add the signature on it electronically. Article 1526/2 of the TCC states that “*the signature of the bill of lading, the waybill, and the insurance policy can also be signed by hand, facsimile printing, staples, stamps, or any mechanical or electronic means in the form of symbols. To the extent permitted by the laws in which they are issued, the records to be included in these bills can be written, created and sent by handwriting, telegram, telex, fax and other electronic means*”.

In addition, according to article 205/2 of CCP, “*electronic data duly created with a secure electronic signature shall have the force of a paper-based document*”. Thus, it

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59 İstemi (n 17), 1787. See also Explanatory Note, paras. 56 and 57.

is stipulated that electronic data created with a secure electronic signature must also be of the quality of a document in terms of the power of proof<sup>60</sup>.

### 3. Bill of Lading as Transferable Document

The MLETR applies to “*electronic transferable records*” (art. 1/1). An electronic transferable record is defined in the MLETR as “*an electronic record that meets the requirements of Article 10*” (art. 2/para. 2). Article 10/1 of MLETR stipulates that “*where the law requires a transferable document or instrument, that requirement is met by an electronic record if:*

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

(b) *A reliable method is used:*

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

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

(iii) *To retain the integrity of that electronic record”.*

Therefore, for an electronic record to be considered an electronic transferable record, it must contain the information required for a transferable document or instrument, and a reliable method must be used for this purpose<sup>61</sup>.

Although it is beyond the scope of this paper, article 12 of MLETR sets out general standards concerning the reliability of a method. To protect technological neutrality, the MLETR does not define a “reliable method” is. This is left to market participants to choose and implement the digital models, platforms, or systems they wish to use and for courts to determine whether the standard of reliability has been met in the event of any disputes<sup>62</sup>.

Article 10 of MLETR was introduced into law as a result of discussions in the doctrine regarding the “*uniqueness*” approach of a transferable document or instrument. The uniqueness approach aims to prevent the circulation of multiple documents or instruments related to the same performance and thus avoids the existence of

60 Kendigelen and Kırca (n 49), p. 5.

61 Tataroğlu and Çağlayan Aksoy (n 12), 40; İstemi (n 17), 1787.

62 Theodora A Christou and John L Taylor, ‘Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records’ (*European Bank for Reconstruction and Development (EBRD)*, April 2023) <<https://www.ebrd.com/documents/legal-reform/blueprint-paper-on-digital-trade.pdf>> accessed 24 July 2024, 34. The electronic “methods” could range from email, text, or social media “methods” through to sophisticated block chain “methods” of communication, if hosted by reliable distributed ledger providers that employ cryptographically secure “hash”, or equivalent techniques to ensure secure, traceable, and auditable transactions. The electronic methods used also should be reliable for proving transfers between parties. See Blueprint Paper (n 70), 34 fn. 55.

multiple claims for the performance of the same obligation<sup>63</sup>. However, uniqueness is a relative notion that poses technical challenges in an electronic environment. This is because uniqueness is not compatible with the nature of electronic records, which are generally more vulnerable to duplication. In fact, practises relating to the use of electronic transferable records are not yet well established<sup>64</sup>.

For these reasons, the requirement of “*uniqueness*” was abandoned in the drafting process of the MLETR, a significant turn from the approach taken in the UNCITRAL Model Law on Electronic Commerce<sup>65</sup>.

Article 10 of MLETR highlights the need to avoid the possibility of the existence of multiple claims to perform the same obligation by combining two approaches “*singularity*” and “*control*”<sup>66</sup>. According to the Explanatory Note, article 10/1(b) (i) sets forth the requirement that implements the “*singularity*” approach and article 10/1(b)(ii) implements the “*control*” approach<sup>67</sup>. It is stated in the Explanatory Note that control is closely related to the requirement contained in article 10, paragraph 1(b)(ii)<sup>68</sup>. Hence, articles 10 and 11 that regulate the issue of “*control*” must be read together<sup>69</sup>. The question arises in the doctrine from article 10/1(b)(i) as to whether there is a single electronic transferable record as a separate object or an expression of a single right to performance<sup>70</sup>. It is also pointed out that an electronic-transferable record must be subject to control, same as a paper-based document, and article 10/1(b) (ii) provides a functional equivalence rule that sets the relationship between control and an electronic transferable record<sup>71</sup>.

#### 4. Control

According to article 11/1 of MLETR, any requirement for the possession of a paper-based document or instrument is met for an electronic transferable record if a reliable method is used to establish that the record is in the exclusive control of an identified person (11/1/a and b). The person in control may be a natural or legal person or another entity that is able to possess a transferable document or instrument<sup>72</sup>.

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63 Explanatory Note, para. 81.

64 Explanatory Note, para. 82; Pejović and Lee (n 13), 17-18; Yang (n 16), 123.

65 Unho Lee, ‘Assessment of Legal Instruments and Applicability to the Use of Electronic Bills of Lading’ [2020] 24(2) Journal of Korean Trade 31-52., 34; Pejović and Lee (n 13), 18. See also Explanatory Note, paras 96 and 97.

66 Explanatory Note, para. 83; İstemi (n 17), 1786.

67 Explanatory note, paras. 97 and 98.

68 Explanatory Note, para. 106.

69 Gabriel (n 58), 274; Pejovic and Lee (n 13), 20.

70 Gabriel (n 58), 274-275.

71 Pejovic and Lee (n 13), 20.

72 Explanatory Note, para. 115.



The title of article 11 refers to “control” and not to “possession”. Yu stated that the use of the concept of “control” is to emphasise the importance of the concept of “control” and the necessity to interpret the notion considering the international character of the Model Law<sup>73</sup>.

As stated in the Explanatory Note of MLETR, article 11 provides “*a functional equivalence rule for the possession of a transferable document or instrument*”<sup>74</sup>. The notion of “control” is not defined in MLETR.

Since documents or records in electronic form, which are not tangible, cannot as a matter of law be “possessed”, it was important to provide for a functional equivalent of “possession” and MLETR chose to adopt the concept of “control” over an electronic transferable record as the functional equivalent of possession.

Under Turkish Law, the special rights and protections granted to paper-based negotiable instruments and documents are subject to “*possession*”. The definition of possession may vary in each jurisdiction. In article 973 of Turkish Civil Code (Civil Code), possession is defined as the “*effective control over a thing*”. Possession has the function of publicity and is a presumption of ownership<sup>75</sup>. Due to the principle of publicity, the acquisition of real rights in chattel depends on the transfer of possession. For example, the transfer of chattel ownership requires the delivery of possession to the acquirer (art. 763/1 of Civil Code). Although there are exceptions, article 985 of the Civil Code states the presumption of ownership as follows: “*The possessor of a chattel is presumed to be its owner*”.

As noted above, one of the important functions of possession is to determine who is entitled to the rights. While examining MLETR, it is pointed out that this function of possession should be taken into account electronically and not possession itself<sup>76</sup>. According to article 11 of MLETR, the person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent paper-based transferable document or instrument and may transfer the electronic record by the transfer of control over that record. This final version of the article is accepted to be correct because when a reliable method is used to establish the party that has control, that party has the rights incorporated in the electronic transferable record, including the rights to transfer or claim performance under it<sup>77</sup>.

Under Turkish law, possession is transferred among parties present in person by the delivery of the object itself or by means by which the recipient can gain effective

73 Yu (n 21), 14. See also Explanatory Note, para. 109.

74 Explanatory Note, para. 105.

75 Kemal Oğuzman, Özer Seliçi and Saibe Özdemir, *Eşya Hukuku* (Filiz Kitabevi 2016) 45.

76 Gabriel (n 58), 273.

77 Ibid., 274.

control over it (art. 977 of Civil Code). Transfers among persons who are absent are completed upon delivery of the object to the transferee or his/her representative (art. 978 of Civil Code). Possession can also be transferred without physical transfer. If a third party or the transferor retains possession of the object in terms of a special legal relationship, possession of the object may be acquired without physical delivery (art. 978/I of Civil Code). Finally, delivery of documents of title to goods consigned to a carrier or warehouse is equivalent to the delivery of the goods themselves (art. 980 of Civil Code).

As will be seen below, the transfer of possession is a mandatory element for the transfer of registered bearer and payable to order bills of lading. The concept of “transfer of possession” covers all types of transfers.

The functions of possession in negotiable instruments are to ensure publicity and to transfer the ownership of the instrument and the rights contained in it in case of transfer of the instrument (with a written declaration of transfer if the instrument is registered, or with endorsement if the instrument is payable to order). These functions of possession are realised by “establishing control” over the bill of lading electronically. In other words, instead of the transfer of possession, the “transfer of control” creates a gaining effect<sup>78</sup>.

## **VI. Applicability of MLETR to the Transfer of Bills of Lading**

### **A. Forms of Transfer of Bill of Lading**

Under Turkish law, bills of lading should be issued in three ways according to the form of transfer: registered, bearer, or payable to order (art. 1228/3 of TCC).

#### **1. Registered Bills of Lading**

Registered bills of lading are issued in the name of a particular person. Because they do not contain the word “to order”, they are not legally acceptable as commercial papers that are payable to order. A registered bill of lading is only payable to the person or entity named in the document or to their order. In other words, by a registered bill of lading, the ownership of the goods is determined by the named purchaser or his/her agent, and the goods can only be claimed by the person whose name is written on the bill of lading or who proves to be its legal successor.

In order to transfer a registered bill of lading, the transfer of possession of the bill of lading is necessary in any case (art. 647/1 of TCC). In addition, a written declaration of transfer is also required in the registered bill of lading (art. 647/2

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<sup>78</sup> İstemi (n 17), 1789.

of TCC). This declaration of transfer should be understood as the agreement of the assignment of claims regulated in article 183 and the following provisions of the TCO. A creditor may assign a claim to which he is entitled to a third party without the debtor's consent, unless the assignment is forbidden by law or contract or prevented by the nature of the legal relationship. Under the TCO, the validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law (art. 12 of TCO). However, as regulated by Article 184 of TCO, the agreement of the assignment of claims is valid only if it is made in writing.

This declaration can be written on a negotiable instrument or on separate pieces of paper (art. 647/2 of TCC). In addition, the declaration of a transfer must contain the signature of the transferor, and the identity of the transferee must be understood<sup>79</sup>. The person who takes over the bill of lading in this way must prove that he/she is the legitimate bearer of the goods to be delivered<sup>80</sup>.

*İstemi* states that registered negotiable instruments do not have the “transferability” characteristic accepted in the MLETR; although it is possible to transfer them by way of assignment of claims, registered negotiable instruments are not actually issued for the purpose of transfer and therefore should not fall within the scope of the MLETR<sup>81</sup>. In Explanatory Note paragraph 21 on the scope of application of the MLETR, it is stated that certain documents or instruments, which are generally transferable but whose transferability is limited due to other agreements, do not fall under the definition of “transferable document or instrument” contained in the MLETR. Therefore, the MLETR would not apply to those documents or instruments. However, this conclusion should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system because such prohibition is likely to result in unnecessary multiplication of systems and increased costs<sup>82</sup>. The requirement of a written agreement of assignment of claims for the transfer of registered negotiable instruments may lead to the conclusion that this type of negotiable instrument is not covered by the MLETR because of MLETR Explanatory Note paragraph 21. This is because, unlike an endorsement, an agreement of assignment of claims is not a special form of transfer under negotiable instrument law. However, this agreement does not limit the transfer of registered negotiable instruments; on the contrary, the agreement enables the transfer. A registered bill of lading is less transferable than a registered bill of lading and a bearer one<sup>83</sup>, but we cannot agree with the view that it does not have the characteristic of “transferability”

79 Poroy and Tekinalp (n 59), 70; Pulaşlı (n 51), 58; Kendigelen and Kırca (n 49), 39; Ersin Çamoğlu, *Kıymetli Evrak Hukukunun Temel İlkeleri* (2nd edn, Vedat Kitapçılık 2023) 12; Çalık (n 52), 31.

80 Karan (n 23), 63; Çalık (n 52), 31.

81 İstemi (n 17), 1781. For the view that the MLETR excludes registered negotiable instruments from its scope, see Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84.

82 Explanatory Note, para. 21.

83 Çalık (n 52), 30.

at all. This is because the main reason for issuing negotiable instruments is to provide the right in the document with the ability to be “transferred” in a fast and secure manner. In addition, in cases where a declaration of transfer is made on a registered negotiable instrument, there is no significant difference between this declaration and the endorsement, which we will examine below. The differences between the two arises in their provisions and consequences<sup>84</sup>.

## 2. Bearer Bills of Lading

Bearer bills of lading are bills of lading in which the bearer is deemed the legitimate bearer from the text or form of the bill (art. 658/1 of TCC). Unlike a registered bill of lading, a right arising from a bearer bill of lading can be claimed by the person in possession at the time of presentation. This means that the person who holds the paper-based bill of lading has the right to claim the goods listed on it, regardless of whether he/she is the rightful owner or not. According to article 646/2 of the TCC, unless there is fraud or gross fault, the carrier is relieved of his obligation by delivering goods to the bearer of the bill of lading.

Bearer bills of lading are transferred only upon delivery of the document (art. 647/1 of TCC), without the need for endorsement or assignment of claims. Therefore, they are the most transferable types of negotiable instruments.

## 3. Payable to Order Bills of Lading

Negotiable instruments payable to order are regulated under article 824 of the TCC. These instruments can be written as payable to order voluntarily, or they can have this character from the law. The negotiable instruments, which constitute the second group, are deemed to be written to order by law even if they do not contain the word “to order”. In the case of negotiable instruments that may be issued voluntarily to the order, the issuer of the document must clearly write “to order” in the document’s text<sup>85</sup>. Article 1228/3 of the TCC regulates that a bill of lading may be issued in registered, bearer, or payable to order; therefore, a bill of lading is a negotiable instrument that may be issued in payable to order form at will. In other words, no bill of lading is considered to be payable to order legally<sup>86</sup>.

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84 Kendigelen and Kırca (n 49), 39.

85 Poroy and Tekinalp (n 59), 75-76; Pulaşlı (n 51), 69; Kendigelen and Kırca (n 49), 34-35; Öztan (n 51), 42-43; Ali Bozer and Celal Göle, *Kıymetli Evrak Hukuku* (5th edn, Banka ve Ticaret Hukuku Araştırma Enstitüsü 2016) 32; Mehmet Bahtiyar, Nihat Taşdelen, Levent Biçer and Esra Hamamcıoğlu, *Kıymetli Evrak Hukuku* (1st edn, Beta Yayıncılık 2022) 20; Çalık (n 52), 34.

86 Pulaşlı (n 51), 69; Çamoğlu (n 80), 14; Öztan (n 51), 43; Bahtiyar, Taşdelen, Biçer and Hamamcıoğlu (n 86), 22; Çalık (n 52), 35; Ber, Konişmento (n 12), 39; Yazıcıoğlu, Deniz Ticareti (n 24), 374. Regarding that the bill of lading is legally a negotiable instrument payable to order due to article 831/2 of the TCC, see Poroy and Tekinalp (n 59), 76.

Endorsement and transfer of possession are required for the transfer of a bill of lading payable to order (art. 648/2 of TCC). According to article 831/2 of the TCC, the provisions of the bill of exchange regarding the form of endorsement and the rights of the bearer shall also apply to the bill of lading.

An endorsement is a written declaration of an intent to transfer rights contained in the negotiable instruments payable to order<sup>87</sup>. This declaration of intent must be written on the bill of lading or on a paper called “*allonge*” attached to the bill of lading and signed by the endorser (art. 683/1 of TCC). The endorsement may include the person in whose favour the endorsement is made, or it may consist only of a signature without indicating the person in whose favour the endorsement is made (art. 683/2 of TCC).

The endorsement of the bill of lading fulfils only the functions of “*transfer*” and “*identification*”; but not the function of “*guarantee*”<sup>88</sup>. The function of transfer of the endorsement ensures that all rights arising from the bill of lading pass to the transferee (art. 684/1 of TCC). The second function of endorsement is to identify the legitimate bearer regulated under article 686 of the TCC. For a bearer of a bill of lading to be accepted as a legitimate bearer, he/she must have the possession of the bill of lading and be entitled in form. According to article 686/1 of the TCC, the legitimate bearer of a bill of lading is the person who holds it through a proper chain of endorsement. For a proper chain of endorsement, the first endorsement must be made by the beneficiary, and the endorser of each endorsement must be the person endorsed in the previous endorsement. This chain of endorsement must go all the way to the last bearer. Therefore, the last bearer who claims on the basis of the bill of lading shall be considered the legitimate bearer only if he proves his entitlement in this way through a proper chain of endorsement<sup>89</sup>. The last function of the endorsement is guarantee. This means that each endorser is liable to the subsequent endorser and the bearer if the bill is not paid (art. 685/1 of TCC). However, since there is no reference to the function of guarantee of the endorsement among the provisions regarding the bill of lading in the TCC, the endorsement does not have this function in the bill of lading. Therefore, the issuer of the bill of lading, i.e. the carrier, is the only person liable for the bill<sup>90</sup>.

Payable to order bills of lading provide a more secure method for transferring ownership than bearer bills of lading because they require endorsement by the named party. This helps prevent unauthorised individuals from claiming the goods.

87 Kendigelen and Kırcı (n 49), 200; Poroy and Tekinalp (n 59), 154; Pulaşlı (n 51), 172; Çalık (n 52), 36.

88 Yazıcıoğlu, Deniz Ticareti (n 24), 374; Karan (n 23), 61.

89 Poroy and Tekinalp (n 59), 166; Kendigelen and Kırcı (n 49), 212; Pulaşlı (n 51), 186-187; Çamoğlu (n 80), 77; Öztan (n 51), 112; Bozer and Göle (n 86), 98; Bahtiyar, Taşdelen, Biçer and Hamamcıoğlu (n 86), 98; Çalık (n 52), 37.

90 Yazıcıoğlu, Deniz Ticareti (n 24), 374; Karan (n 23), 62; Çalık (n 52), 37.

## B. Electronic Transfer of a Bill of Lading

Article 15 of MLETR provides an explicit provision on how to ensure functional equivalence in the electronic environment regarding endorsement. According to this article, “*where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9*”. In other words, if the electronic transferable record contains the information necessary for the endorsement and this information complies with the characteristics of the writing (art. 8) and signature (art. 9) that we have examined above, the requirements of the endorsement are also fulfilled in terms of the electronic transferable record.

Article 15 of MLETR uses the term “*endorsement*”. Under Turkish law, “endorsement” is only mandatory for the transfer of negotiable instruments payable to order. However, Explanatory Note paragraph 152 states that exclusion of other conditions for transfer from the scope of the article is contrary to the purpose of the article. Therefore, article 15 of MLETR does not refer to any specific type of requirement but includes all of them<sup>91</sup>. As a matter of fact, functional equivalence should be ensured when electronically transferring registered and bearer bills of lading. Therefore, under this heading, an evaluation is made not only for endorsement but also for all forms of transfer under Turkish law.

In that case, the written declaration of transfer in a registered bill of lading and the endorsement in a payable to order bill of lading must be fulfilled electronically. For this purpose, the electronic transferable record (bill of lading) must contain the information necessary for the transfer, and this information must comply with the characteristics of writing (art. 8 of MLETR) and signature (art. 9 of MLETR).

First, the question of whether a written declaration of transfer or endorsement can be signed electronically should be answered. We have stated above that the provisions of the bill of exchange regarding the form of endorsement also apply to the bill of lading (art. 831/2 of TCC). Article 756/1 of the TCC rules that statements on a bill of exchange must be signed by hand. Any mechanical means or an approved sign or official document cannot be used instead of a handwritten signature (art. 756/2 of TCC). However, this provision is excluded from the provisions for the form of endorsement. Therefore, it does not apply to bills of lading. Since article 1526/2 of the TCC allows the bill of lading to be signed by any mechanical or electronic means, it should be possible to affix the signatures required for the transfer of the bill of lading electronically<sup>92</sup>.

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<sup>91</sup> Explanatory Note, para. 152.

<sup>92</sup> Çalık (n 52), 40. For the view that endorsement can be signed electronically, see Karan (n 23), 172.

Second, it is important to consider whether the assignment of claims required for the transfer of a registered bill of lading can be established electronically. We previously discussed that the transfer statement required for the assignment of claims in a registered bill of lading is considered a contract subject to the requirement of a written form, whether on the instrument itself or on a separate document. Therefore, the question of whether this contract can be established in electronic form under Turkish law should also be addressed.

Article 1/1 of the TCO rules that the conclusion of a contract requires the mutual expression of intent by both parties. As previously stated, the validity of a contract is not subject to compliance with any particular form unless the law prescribes that form. Where a contract must be in writing, it must be signed by all the persons on whom it imposes obligations. For a written form to be fulfilled, it is necessary to have the parties' intentions materialised in a tangible document and signed by the parties. It does not matter on which material the text is written; however, it is important that the text is durable, continuous, and signed by the parties<sup>93</sup>. Assignment of claims is subject to written form; thus, these requirements should be met<sup>94</sup>. It does not matter which tools are used; in other words, assignment of claims can be formed in an electronic environment. As it is also stated above, a secured electronic signature has all the legal consequences of a handwritten signature, and both the TCO and Electronic Signature Law allow a document to be signed in an electronic environment.

## VII. Conclusion

As worldwide trade has been gradually shifting towards electronic commerce, the need for an efficient legal framework to facilitate the use of electronic bills of lading has become evident. The UNCITRAL Model Law on Electronic Transferable Records constitutes a crucial step for digitising trade documents, particularly bills of lading. The MLETR has been adopted by various countries and crucial organisations such as the International Chamber of Commerce have highlighted its importance in facilitating digital transformation in maritime trade.

The MLETR adopts three fundamental principles: non-discrimination, technological neutrality, and functional equivalence. The principle of functional equivalence adopted in the MLETR ensures that electronic bills of lading have

93 Arif Barış Özbilen, *Sözleşmelerin Şekli ve Şekil Yönünden Hükümsüzlüğü* (1st edn, On İki Levha Yayıncılık 2016) 56ff.; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (25th edn, Yetkin Yayınları 2020) 308ff.; Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt-1*, (20th edn, Vedat Kitapçılık 2022) 146ff.; Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1* (2nd edn Seçkin Yayıncılık 2019), 534ff.; Haluk Nomer, *Borçlar Hukuku Genel Hükümler* (19th edn, Beta Yayınları 2023), 126-128.

94 Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt-2* (20th edn, Vedat Kitapçılık 2022) 585; Eren (n 94) 1368; Hatice Tolunay Ozanemre Yayla, *Alacağın Devri İşleminin Geçerliliği ve Sebeple Olan İlişkisi (İlliliği)* (1st edn, Turhan Kitabevi 2019) 225ff.; Mustafa Alper Gümüş, 'Alacağın Temliki Sözleşmesinin Şekli' [2011] 10 (2) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 9-34., 9ff.

the same legal status as paper-based bills of lading. The principle of technological neutrality allows technological innovations by not preferring any specific technology. Technology is advancing rapidly; therefore, legal frameworks should be flexible and adaptable, and these principles ensure this.

In the final analysis, bills of lading can be issued electronically under Turkish law. This paper provided potential implications of adopting the MLETR under Turkish law regarding digitisation of the bills of lading. Considering the above evaluations, we conclude that the MLETR is a convenient legal framework for electronic bill of lading regulations under Turkish law. However, MLETR often refers to substantive law on several issues. Therefore, adapting the MLETR to Turkish law and making it applicable under Turkish law would require the enactment of new legislation. This legislation should provide for the signing of bills of lading by electronic signature and other similar methods, regulate the establishment of control in the electronic environment, and allow electronic transactions on bills of lading. Provisions should also be laid down to permit electronic transfer and presentation of bills of lading.

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**Peer-review:** Externally peer-reviewed.

**Conflict of Interest:** The author has no conflict of interest to declare.

**Financial Disclosure:** The authors declared that this study was supported by Scientific and Technological Research Council of Turkey (TUBITAK) under the Grant Number 223K518. The authors thank to TUBITAK for their supports.

**Author Contributions:** Conception/Design of study: A.N.Ş, I.Ö., G.M.; Drafting Manuscript: A.N.Ş, I.Ö., G.M.; Critical Revision of Manuscript: A.N.Ş, I.Ö., G.M.; Final Approval and Accountability: A.N.Ş, I.Ö., G.M.

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