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The Application of UNCITRAL Model Law on Electronic Transferable Records in Kuwait: A Comparative Study

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Abstract

The existing requirements in national and international law for the use of written documents or manual signatures in international trade transactions are considered to constitute major obstacles to the development of electronic commerce at global level. Other obstacles also include questions and uncertainties concerning the validity, legal effect and enforceability of transactions regarding electronic bill of lading conducted via electronic means, in a legal environment based on paper. The Law No 20/2014 excluded promissory notes and negotiable bills of exchange from the scope of application of this law. The law also does not apply to any event that the law requires to be expressed in a written document or to be documented or when it is subject to a specific provision in another law, e.g. the bill of lading where the Kuwaiti Maritime Law states that the maritime contract of carriage shall be made in a form of bill of lading, and shall be written. The law says that the bill of lading shall be drawn on two originals; one shall be handed over to the shipper and the other to the carrier and shall be stamped by a non-negotiable seal. This research aims to investigate the applicability of negotiable electronic instruments and documents (mainly the bill of lading) in Kuwait. The research shall examine whether the Kuwaiti Law No 20/2014 should be Expanded to Include Transferable Instruments. The research analysed the three jurisdictions (Bahrain, Singapore, and

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Abu Dhabi Global Market, and compared them with the Kuwaiti law in terms of adopting the Model Law on Electronic Transferable Records.

Keywords: Commercial law, Electronic commercial law, Electronic transferable records, Bill of lading, Negotiable instruments.

Introduction

Transferable documents or instruments are paper-based documents or instruments that give the right to the holder to claim the performance of the obligation indicated and that allow the transfer of the claim to that performance by transferring possession of the document or instrument. i.e. any transferable document or instrument that entitles holder to claim delivery of goods (e.g. bill of lading, Warehouse receipts and Dock warrants) or payment of sum of money e.g. bills of exchange, promissory notes and cheques.

The modern world is dominated by the microchip and instantaneous telecommunication networks which have allowed the development of electronic payment systems capable of transferring sums around the world at the touch of a button. Negotiable instruments on the other hand need to be tangible (a piece of paper). i.e., transfer of the right to payment requires physical delivery of the instrument itself(1). Negotiable instruments are still used as a method of making payment in the commercial transactions, especially in the area of international trade. Bills of exchange and the bills of lading are popular types of negotiable instruments. Their popularity derived from the fact that they combine the characteristics of negotiability.

Transferable instruments are essential commercial tools, especially when they are electronically formed may be greatly beneficial for facilitating electronic commerce by achieving speed and security of transmission, allowing the reuse of data and automating certain transactions through smart contracts. In addition, electronic transferable records are essential brick of constructing paperless trade environment, which may greatly contribute to trade facilitation.

Research problem

(1) Ewan McKendrick, Good on Commercial Law, Penguin Group, London, 2016.

The problem of this research arises from the fact that the Kuwaiti Law No 20/2014 states that it shall govern all the electronic transactions including the electronic records, messages, documents and signatures related to the civil, commercial and administrative transactions excluding the promissory notes and negotiable bills of exchange(2).

Also the Law No. 20 of 2014 Concerning Electronic Transactions "shall not apply to any event that the law requires to be expressed in a written document or to be documented or the making of which is subject to a specific provision in another law"(3). For example, the Kuwaiti Maritime Law No 28 1980 (Article 176) states that the maritime contract of carriage shall be made in a form of bill of lading and must be written. Moreover, Article 177 states that the bill of lading shall be drawn on two originals, one shall be handed over to the shipper and the other to the carrier and shall be stamped by a nonnegotiable seal(4). Thus, it can be argued that by insisting on written forms of documents may negatively impact the Kuwaiti economy through reducing the number of international investments that can be brought to the country. By adopting the electronic transferable records, and following the steps of the Kingdom of Bahrain, Kuwait can have great benefits that could be achieved by using these records.

This paper is divided into three sections, the first section deals with the problem of not adopting Model Law on Electronic Transferable Records (MLETR) and its functional equivalent in terms of writing, signature, its reliability as well as the possession or transfer of possession. The second section discusses the cost of not using MLETR in general and in Kuwait in particular. Cost in this research refers to the advantages of applying this law in the State of Kuwait. Discussing the cost shall include, among other things, the main functions of the bill of lading as a receipt of the goods, document of title of the and as a contract of carriage. The third section of this paper deals with proposing solutions for the research problem by deeply analysing the electronic bill of lading, from three perspectives: e bill of lading-receipt, e bill

(2) Article (2) (C), The Law No. 20 of 2014 Concerning Electronic Transactions
(3) Article (2) (D), The Law No. 20 of 2014 Concerning Electronic Transactions
(4) Article (176) & (177), Kuwait Law of Maritime Commerce 1980

of lading- contract of carriage and e bill of lading- document of title. Finally the research discusses the future of electronic bill of lading and ETRs in the State of Kuwait.

1. The MLETR (Functional Equivalence):

The Model Law on Electronic Transferable Records (MLETR) aims to allow the use of electronic transferable records nationally and across borders. The MLETR applies to electronic transferable records that are functionally equivalent to transferable documents or instruments. The provisions of MLETR are based on the principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality supporting all UNCITRAL texts on electronic commerce

The UNCITRAL Model Law on Electronic Transferable Records, states that "electronic transferable records should be treated equally to paper based transferable instruments if those records contain the information required to be contained in a transferable document or instrument, and a reliable method is used to identify that electronic record as the electronic transferable record; render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity and to retain the integrity of that electronic record"(5).

The existing requirements in national and international law for the use of written documents or manual signatures in international trade transactions are considered to constitute major obstacles to the development of electronic commerce at global level. But the MLETR found a solution for this issue, by stating, 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(6). The law also says in case the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable

(5) Article 10 (1), The UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

(6) Article 8, UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

method is used to identify that person and to indicate that person's intention in respect to the information contained in the electronic transferable record(7).

The Bahraini Legislators adopted the MLETR and enacted the Law No 55 2018, which they found to be applicable to Electronic Transferable Records. Other than as provided for in this Law, nothing affects the application of any electronic transferable record to any rule of law governing a transferable document or instrument including rules of law applicable to consumer protection(8). This law shall be interpreted by the United Nations Commission on International Trade Law (UNCITRAL), on the Model Law on Electronic Transferable Records produced by UNCITRAL in 2017. Article 5 of this law states clearly that any electronic transferable record may not be denied legal effect, validity or enforceability on the ground that it is in electronic form. The law also includes that no person shall be obliged to use any electronic transferable record without his/her consent(9).

Singapore is one of the few jurisdictions which followed Bahrain in adopting, with some modifications, the UNCITRAL Model Law on the Electronic Transferable Document ETRs and provided for a new regime to be applied to Transferable Instruments, allowing for the use of electronic and digital versions of Transferable Instruments and reducing the necessity of reliance on physical hard copies(10). This new law is not intended to affect any other laws that may govern Transferable Instruments, except as expressly provided. It is up to the parties to choose or refuse the use of (in whole, but not in part) ETRs in relation

(7) Article 9, UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

(8) Article 1, Law No 55 2018 with respect to Electronic Transferable Records, available online at: https://bahrainbusinesslaws.com/laws/electronic-transferable-records-law

(9) Article 5, Law No 55 2018 with respect to Electronic Transferable Records, available online at: https://bahrainbusinesslaws.com/laws/electronic-transferable-records-law

(10) Elizabeth Cole and SushmaJobanputra, Singapore: Singapore's Electronic Transactions Act Expanded To Include Transferable Instruments, Mondaq, 2021, available online at: https://www.mondaq.com/technology/1051624/singapore39s-electronic-transactions-act-expanded-to-include-transferable-instruments

to a Transferable Instrument. It is also possible for the parties to change from an ETR back to a paper instrument if they wish. Giving the parties the right to choose whether they use ETRs or hard copy documents in Bahraini law could be considered similar to this approach adopted by the Singapore legislators.

The third jurisdiction in the world to enact legislation to allow the use of transferable documents and instruments after The Kingdom of Bahrain and Singapore is Abu Dhabi Global Market (ADGM) which is an International Financial Centre located in Abu Dhabi, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Laws on: Electronic Commerce (1996); Electronic Signatures (2001); and Electronic Transferable Records (2017)(11)enacted the Electronic Transactions Regulations 2021. The objective of these Regulations is not only to confirm that electronic signatures, contracts, records and documents are legally enforceable in ADGM as the traditional non-electronic versions, but also to allow the use of transferable documents and instruments, such as promissory notes and cheques, in electronic form. Thus, according toAbu Dhabi Global Market (ADGM), which enacted the Electronic Transactions Regulations 2021, all electronic documents, electronic signatures, and electronic transferable records have legal effect, validity, and enforceability even if they are produced, or implemented outside of ADGM. An electronic record may be used as evidence of a record in any ADGM court proceedings.

Thus, this research will discuss the functional equivalent rule and writing, signature, integrity and reliability, and control as a functional equivalent of possession (Requirement for possession or transfer of possession), as will be discussed in detail in the following sections.

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(11) Abu Dhabi Global Market ADGM Green Lights Electronic Negotiable Instruments, 2021, Available online at: https://enigio.com/post/abu-dhabi-global-market-adgm-greenlights-electronic-negotiable-instruments/ ;Ikigai Law, United Arab Emirates: Comments To The Abu Dhabi Global Market's Electronic Transactions Regulations, 2020, United Arab Emirates, available online at: https://www.mondaq.com/fin-tech/1002406/comments-to-the-abu-dhabi-global-market39s-electronic-transactions-regulations-

1.1. Functional equivalent Rule and (Writing):

According to the MLETR, in the case where the law requires that the information should be written, that requirement is met regarding to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference. i.e. the electronic transferable documents must be retrieved, readable, printable and accessible and thus there should not be any discrimination between those electronic transferable documents and any other paper documents(12).

1.2. Functional equivalent Rule and (Signature):

Generally, the main purpose of the signature is to identify the person who signs the document and also to indicate that person's intention regarding the information contained in the document. According to MLETR 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 to the information contained in the electronic transferable record(13). Examples of these reliable methods may be left to those who are specialized in such developing electronic methods, so that they fulfill those requirements. The present research, on the other hand, is meant to deal with the legal aspects as mentioned in the abstract.

The Kuwaiti legislator is advised to look for and consider Adobe electronic signature to use as an authorised form of signature which could be equivalent to the traditional written one. Adobe electronic signature is a digital signature technology that allows users to electronically sign documents and authenticate the identity of the signer. This technology is widely used in a variety of industries, including shipping and logistics, where it can be used to sign and authenticate bills of lading. Overall, Adobe electronic signature and other digital signature technologies can provide a secure, efficient, and cost-effective way to sign and exchange bills of lading in the shipping and logistics industry.

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(12) Article 8, The UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

(13) Article 9, The UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

1.3 Functional equivalent Rule and integrity (reliability):

Regarding the integrity and reliability, the Law No 5 2021 (the Singapori Law relating to Electronic Transaction) states that "if a rule of law requires a transferable document or instrument, that requirement is met by an electronic record it must contain the information that would be required to be contained in the transferable document or instrument; and a reliable method is used to identify that electronic record as the authoritative electronic record constituting the electronic transferable record; to render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and to retain the integrity of that electronic record"(14). Thus, if those conditions are met, according to the Singapori Law, there will be no discrimination against electronic transferable records, and therefore, these instruments shall be treated equally as the written documents.

The Bahraini legislator, on the other hand, adopted the UNCITRAL Model Law on Electronic Transferable Records prior to Singapore and also stipulated in Law No 55 2018 with respect to Electronic Transferable Records that any electronic negotiable document or record shall be recognized where the electronic record contains the information that would be required to be contained in a transferable document or instrument as the case may be. The law also states that a reliable method must be used to identify that electronic record as the authoritative electronic transferable record; to render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity and to retain the integrity of the electronic record. The law stipulates that the criterion for assessing integrity shall be whether information contained in the electronic transferable record, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage or display(15). The Law No 55 2018 which was developed by the Bahraini Legislators, seems to be the one adopted in Singapore later on; and it is obvious that both relied on the UNCITRAL Model Law on Electronic Transferable Records.

(14) Article 10 16 H, Electronic Transaction Act No 5 2021

(15) Article 6, Law No 55 2018 with respect to Electronic Transferable Records, available online at: https://bahrainbusinesslaws.com/laws/electronic-transferable-records-law

Abu Dhabi Global Market (ADGM) also undertook a similar approach to the Bahraini and the Electronic Transaction Law of Singapore to clarify the position of the law regarding the reliability and the integrity of the electronic transferable instruments where the law states that there must be a reliable method to retain the integrity of that electronic record. This is clear by Article 5 of the Electronic Transactions Regulations 2021[16]which states that the electronic transferable record has the same legal effect, validity and enforceability as that in tangible written form. However, the law pointed several conditions in order to accept the use of a transferable document or Instrument. The Electronic Record shall contain the Information that would be required to be contained in a transferable document or instrument. The law also states that there must be a reliable method to retain the integrity of that electronic record and to identify that Electronic Record as the electronic transferable record as well as rendering it capable of being subject to control from its creation until it ceases to have any effect or validity.

Looking at the three laws of Bahrain, Singapore and Abu Dhabi Global Market, it could be noticed that, for the functional equivalence in reliability of the electronic transferable documents, the three systems share the same ideas and conditions that allow for adopting any electronic transferable document. This may be attributed to that fact that all three systems rely mainly on the UNCITRAL Model Law on Electronic Transferable Records. It is hoped that in the near future many states shall join Bahrain, Singapore and Dhabi Global Market, including the State of Kuwait, in adopting the UNICITRAL Model Law.

1.4. Functional equivalence of possession:

Regarding the possession or transfer of possession, The UNCITRAL Model Law on Electronic Transferable Records says that where the law requires or permits the possession of a transferable document

(16) Part 5 (16) (17) The Electronic Transactions Regulations 2021, available online at: https://adgmen.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_23197_VER2021.pdf ; See also The use of a negotiable electronic transport record shall be subject to procedures that provide for the method for the issuance and the transfer of that record to an intended holder; (b) An assurance that the negotiable electronic transport record retains its integrity; (c) The manner in which the holder is able to demonstrate that it is the holder; and (d) The manner of providing confirmation that delivery to the holder has been effected.

or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used to establish exclusive control of that electronic transferable record by a person and to identify that person as the person in control. Moreover, where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record[17]. And this exactly what the Bahraini legislator enacted in the law No 55 2018 with respect to Electronic Transferable Records[18].

Singapore legislators also adopted a similar approach to the Bahraini and stipulated that if a rule of law requires the possession of a transferable document or instrument, or provides for certain consequences if a transferable document or instrument is not possessed, that requirement is met with respect to an electronic transferable record if a reliable method is used to establish exclusive control of that electronic transferable record by a person; and, as is the case in Bahraini law, to identify that person as the person in control[19].

Moreover, Abu Dhabi Global Market (ADGM), enacted the Electronic Transactions Regulations 2021 and the law specified several conditions to control the transferable electronic documents or instruments. For instance, a reliable method must be used in an electronic record or document to insure an exclusive control of that Electronic Transferable Record by a person, and to identify that person as the person in control[20].

(17) Article 11, UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

(18) Article 7, Law No 55 2018 with respect to Electronic Transferable Records, available online at: https://bahrainbusinesslaws.com/laws/electronic-transferable-records-law

(19) Article 7, Law No 55 2018 with respect to Electronic Transferable Records, available online at: https://bahrainbusinesslaws.com/laws/electronic-transferable-records-law

(20) Part 5 (18) (1) Electronic Transactions Regulations 2021; Part 5 (18)(2) also states that “Where an Enactment requires or permits transfer of possession of a Transferable Document or Instrument, that requirement is met with respect to an Electronic Transferable Record through the transfer of control over the Electronic Transferable Record”. Available online at: https://adgmen.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_23197_VER2021.pdf

These two conditions regarding the assurance of exclusive control of electronic transferable records and the identification of the person in control, seem to form the cornerstones of any functional equivalence of position that confers validity, legal effect and enforceability on the electronic transferable records. This argument may constitute an important rationale for carrying out the present piece of research, which discusses the legal possibility of adding the State of Kuwait to other countries that adopted the UNCITRAL Model Law on Electronic Transferable Records.

It may be worth mentioning in this context the major reform of the Uniform Commercial Code (UCC) in the United States which was just adopted last year and is being marketed to the states now to incorporate Controllable Electronic Records (CER)in the US Commecial Law.

In 2022, the Uniform Commercial Code (UCC)was amended to provide specific guidance on the use of Controllable Electronic Records (CERs). The amendments were designed to address the challenges associated with electronic records, such as the difficulty of establishing a clear chain of ownership and the risk of fraud and tampering. Under the UCC amendments, parties can use CERs to create and transfer electronic documents that serve as evidence of a transaction. The amendments also provide rules for the creation and transfer of CERs, including requirements for the format of the record, the method of transmission, and the identity of the parties involved.

Controllable electronic records (CERs) are electronic records that are subject to the control of a single person or entity. This means that the person or entity has the ability to restrict access to the record and make changes to it as needed. In the context of the Uniform Commercial Code (UCC), CERs are important because they provide a way for parties to control and transfer ownership of electronic documents that serve as evidence of a transaction.

One of the key benefits of using CERs is that they can help streamline transactions and reduce the time and costs associated with traditional paper-based records. Because CERs can be transferred electronically and accessed from anywhere with an internet connection, they can help speed up the process of transferring ownership and completing transactions. However, the use of CERs also raises some important legal and practical considerations. For example, parties must ensure that they have appropriate security measures in place to protect the integrity and authenticity of the records. They must also ensure that they comply with all applicable laws and regulations regarding the creation and transfer of electronic records[21].

Overall, the UCC amendments provide important guidance for the use of CERs in commercial transactions. By establishing clear rules and requirements for the creation and transfer of electronic records, the amendments can help increase efficiency, reduce costs, and improve transparency and accountability in commercial transactions.

The term “control” in the context of controllable electronic records (CERs) refers to the ability of a single person or entity to restrict access to an electronic record and to make changes to the record as needed. In other words, the person or entity that controls the record has the authority to determine who can access it and to what extent, and who can modify or transfer the record.

In the context of the Uniform Commercial Code (UCC) amendments, control is an important concept because it establishes the legal framework for the creation and transfer of electronic records, including bills of lading and other commercial documents. The UCC amendments define control as the ability to:

“Restrict access to the electronic record to a single person or entity,

Create or acquire a uniquely identifiable record that is capable of being authenticated,

Use agreed-upon procedures to ensure the integrity and reliability of the record,

(21) Byung-Soo Ahn, Tae-Ho Park, A Study on the Clause of Uniform Commercial Code for Electronic Bills of Lading, International Commerce and Information Review, Volume 11, Number 2, Jun, 2009: pp. 281~300, available online at:file:///C:/Users/WELCOME/Downloads/A%20Study%20on%20the%20Clause%20of%20Uniform%20Commercial%20Code%20for%20Electronic%20Bills%20of%20Lading.pdf

Retain sole control of the record, or transfer control to another person or entity according to agreed-upon procedures”[22].

1.5 Why ETRs are recommended for Kuwait:

Electronic transferable records possess significant advantages over traditional paper-based systems. They improve efficiency, security, accessibility, transparency, and compliance, making them an attractive option for businesses that want to streamline their operations and reduce costs. ETRs reduce the time and cost associated with physical paperwork; i.e., the transfer of ETRs can be completed instantly and securely, eliminating the need for physical transportation and storage of documents. This saves time and reduces the risk of loss or damage of documents. Moreover, ETRs are tamper-proof and provide a high level of security. They can be digitally signed to ensure the authenticity and integrity of the document, which reduces the risk of fraud, forgery, and unauthorized access.

Those records can also be accessed and transferred from any place in the world that has an internet connection, thus allowing for faster and more efficient transactions, especially in international trade. In addition to that, ETRs provide a clear and transparent record of transactions, and improve the visibility and traceability of goods and payments, which can help in preventing disputes and errors. Those records also help businesses comply with regulations and standards; for instance, the use of ETRs can help companies comply with the US Electronic Signatures in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act (UETA), as well as the Kuwaiti Law No 20/2014 relating to electronic transactions. Consequently, it was logical for states like the Kingdom of Bahrain and Singapore adopt MLETR to improve their economy. Thus, the State of Kuwait is strongly advised

(22) Ryan Laity, Donald G. Bird, UCC Article 12 – A sensible framework for secured transactions involving cryptocurrencies or other digital assets, 2022,available online at: https://www.blg.com/en/insights/2022/12/ucc-article-12-a-sensible-framework-for-secure-transactions-involving-cryptocurrencies : A Summary of the 2022 Amendments to the Uniform Commercial Code, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 2022, available online at: file:///C:/Users/WELCOME/Downloads/23_9335_01000appendixb.pdf

to adopt this model law in order to enhance their international trade with other countries of the world. As a practical example of the above detailed discussion, I will turn now to speak about the (MLETR) on the bill of lading as a transferable document or instrument that entitles holder to claim delivery of goods.

2. The bill of lading as an example:

There are two types of Commercial transferable documents: the first is a transferable document or instrument that entitles holder payment of sum of money, such as bills of exchange, Promissory notes and cheques. The second is a transferable document or instrument that entitles holder to claim delivery of goods such as the bill of lading. This paper is going to focus only on the applicability of the bill of lading in Kuwait as an electronic transferable instrument, as based on several legal regimes; e.g. the UNCITRAL Model Law on E-Commerce 1906, the UNCITRAL Model Law on Electronic Transferable Records and the Rotterdam Rules 2008.

A bill of lading is a document that a carrier of goods by sea issues to the person who has presented the goods for shipment i.e. the shipper. Each bill will normally be signed by the Master of the vessel and lists certain basic information - in particular, the name of the carrying vessel, the fact that the goods have been received on board, the condition of the goods at time of receipt, and the name of the consignment i.e. where and to whom the goods are to be delivered(23).

In a British example, the rule was expressed in the case of Smith v Bedouin Steam Navigation, by Lord Watson as follows: “The master of a ship has no authority to grant bills of lading for goods which were not put on board the vessel; but when he signs a bill acknowledging the receipt of a specific quantity of goods, the ship owner is bound to deliver the full amount specified, unless he can show that the whole or some part of it was in fact not shipped”(24). Kuwaiti Maritime Law No 28 1980 (Article 176), on the other hand, states that the maritime

(23) Wilson John, Carriage of Goods by Sea, Sixth Edition, Pearson Education Gate, London, 2008

(24) Bedouin Steam Navigation Co., Ltd v. Smith & Co. [1895] UKHL 96

contract of carriage shall be made in a form of bill of lading and must be written. Moreover, Article 177 states that the bill of lading shall be drawn on two originals, one shall be handed over to the shipper and the other to the carrier and shall be stamped by a nonnegotiable seal.

The bill of lading can be a straight bill that is issued to a specified consignee for the delivery of the goods and cannot be endorsed to another party (not negotiable). So the bill of lading should be directed only to one specific consignee indicated on the bill of lading, or it can be an order bill of lading, which is the opposite from a straight bill of lading which has no specific or named consignee. Therefore, it can be negotiated (transferred) to a third party, and this form of the bill of lading will be the focus of the present research since it represents the transferable form of bill of lading.

2.1 Functions of the bill of lading:

The bill of lading achieves three main functions which include being a document of title, a receipt of the shipped goods and evidence of the contract of carriage of goods by sea(25).

2.1.1. Document of title

The bill of lading is a document of title. In modern international trade and shipping this is probably the most important characteristic of this document. A document of title is a document that enables the holder to deal with the goods described in it as if he was the owner. Thus, the cargo owners are required to offer a document of title in order to take advantage of an opportunity if they wish to sell the cargo in transit. This function (document of title) entitles the holder of the bill of lading, who at the same time is the owner of the goods, to sell the goods while they are still in transit to any third party simply by indorsing the bill of lading and delivering it to the third party(26).

(25) Daniel Murray, History and Development of the Bill of Lading, 1983, 37 U. Miami L. Rev. 689 (1982-1983), available online at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/umialr37&div=34&id=&page=

(26) Wilson John, Carriage of Goods by Sea, Sixth Edition, Pearson Education Gate, London, 2008

The bill of lading can be used as a document of title only if it is negotiable, i.e. able to be transferred to any third party simply by delivery or endorsement. Thus, a bill of lading is considered a document of title only if it is drafted as an 'order' bill. But if the document makes a provision only for delivery to a named consignee, it is known as 'straight' bill of lading, and thus it can be transferred only once(27).

2.1.2. Contract of Carriage

The second function of the bill of lading is that it constitutes an evidence of the contract of carriage. The bill of lading, at least, so far as the shipper is concerned, does not represent the contract of carriage itself, but only provides an evidence of that contract. The reason for that lies in the fact that the contract of carriage is usually concluded before issuing the bill of lading, and thus if the goods are lost or damaged before the bill of lading is issued, the shipper will still be entitled of a remedy for breach of contract(28).

2.1.3. Receipt of goods

The third function of the bill of lading is that it works as a receipt of the goods. For example, it clarifies the quantity of the goods received, the condition of the goods and leading marks (i.e. the identification and description of the goods). So, the carrier is obliged under article III (3) of the Hague and Hague Visby Rules to issue a bill of lading including the full description of the goods, and also providing the quantity of the cargo e.g. the weight of the goods and the number of pieces or packages(29).

Traditionally, according to the Kuwaiti Maritime Law 1980, all bills of lading shall be written and stamped by a nonnegotiable seal. Also the law states that the bill of lading shall be drawn on two originals, one shall be handed over to the shipper and the other to the carrier. In recent years, many writers have argued that the time has come to replace

(27) Sir Richard Aikens, Bills of Lading, 3rd Edition, Informa Law from Routledge, London, 2021

(28) Wilson John, Carriage of Goods by Sea, Sixth Edition, Pearson Education Gate, London, 2008

(29) See also Article III (3) a,b,c the Hage (1924) and Hague-Visby Rules (1968)

the paper bill of lading with an electronic one. Shippers, consignees, carriers, and intermediaries all incur expenses due to the delays caused by the handling and transmittal of paper documents. It could be argued also that paper documents are less secure than electronic transmissions. However, some opinions concern about security and about how the controlling functions of the bill of lading can be retained in the electronic version[30].

The electronic bill has successfully replicated the function of paper bill of lading and can be said to be the functional equivalent of the paper bill of lading, though with different nature and procedural characteristics[31]. Electronic bill of lading in the nearest future will acquire the status of negotiability of paper bill of lading and become the mercantile custom by its acceptance, duration and intensity of usage. We turn next to discussing the functional equivalence of electronic bill of lading to paper ones.

3. Electronic Bills of Lading and Functional Equivalence:

Merchants are increasingly using computers to facilitate international transactions, and many observers believe that full-fledged electronic commerce is nearing reality. At present, the business community uses a system known as electronic data interchange (EDI), which refers to the concept of electronically communicating information that was traditionally communicated on paper, such as purchase orders, advance ship notices and bills of lading, which require communication among carriers, shippers, banks etc. Because EDI is both quick and efficient, the shipping industry is expected to benefit greatly from its adoption, particularly in the areas of bills of lading. Unfortunately, numerous technical and legal obstacles have slowed the introduction

(30) Mark L. Shope, The Bill of Lading on the Blockchain: An Analysis of its Compatibility with International Rules on Commercial Transactions, The Minnesota Journal of Law, Science & Technology, Volume 22 issue 1 2021, available online at: file:///C:/Users/t.alawneh/Downloads/The%20Bill%20of%20Lading%20on%20the%20Blockchain_%20An%20Analysis%20of%20its%20Compatib.pdf

(31) Rev.Fr Stephen C Chukwuma, Can The Functions Of A Paper Bill Of Lading Be Replicated By Electronic Bill Of Lading?, IISTE, ISSN 2224-5731(Paper) ISSN 2225-0972(Online) Vol.3, No.8, 2013, P 108.

of EDI, with the chief impediment being the law's insistence on paper-based documentation[(32)].

3.1. E-bill of lading – Receipt

The receipt function of electronic bills of lading can be easily replicated in the electronic systems. The quality of, and therefore the ability to rely on the data confirmed is linked to the degree of the security in the electronic system used. In order to rely on this receipt as a legal function of the bill of lading, some sufficient measures must be in place to ensure the identity of the issuer (the carrier) and the authenticity of the data. This argument could be supported by the UNCITRAL Model Law on E-Commerce 1996 which specified an article for this issue which states that the electronic law shall apply to issuing a receipt for goods carried by sea[(33)].

3.2. E-bill of lading – Contract of Carriage

The contract function is also easily replicated in the electronic world. It was proved that replicating the receipt and the contract of carriage electronically do not cause any major problems in the world of business. It gets a bit more complicated when the eBL is transferred to a new holder, but if the communication is restricted to parties who share the same society, there will be no major complications, as is the case in Bolero which is a trade finance digitization platform that connects corporate clients with their trade partners and banks. However, if these electronic bills of lading are to be transferred to another body who is not part of the society, complications may arise. There is no universal law relating to how the rights and obligations in a traditional bill of lading contract are transferred, since this varies from jurisdiction to jurisdiction.

(32) Livermore, J and Euarjai, K, Electronic Bills of Lading and Functional Equivalence, Journal of Information, Law and Technology (JILT), 1998, (2) pp. 1-13. ISSN 1361-4169 (1998); Časlav Pejovic, Block chain Bills of Lading: A New Generation of Electronic Transport Documents, PPP god. 61 (2022), 176, str. 31–62, available online at: file:///C:/Users/t.alawneh/Downloads/02_Pejovi%C4%87,%20Lee.pdf

(33) Article 16 (a) III UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf

The contract of carriage as a bill of lading will include the data specific to that carriage such as the port of loading and the date of shipment etc and also the data that set out the terms and conditions of the carriage. This could be founf in the UNCITRAL Model Law on E-Commerce that which ascertains this argument(34).

3.3. E-bill of lading – Document of Title

This function is the most difficult to reproduce in an electronic format. The answer again is found in the Rulebook that characterises precisely the nature of the rights that the new holder gets when it receives the transfer of the eBL. At the moment of transfer, the right of control over the goods passes to the new holder. The new holder becomes the only party entitled to give instructions to the carrier. By meeting with the UNCITRAL Model Law on Electronic Transferable Records which states that a reliable method must be used in an electronic record or document to insure an exclusive control of that Electronic Transferable Record by a person, and to identify that person as the person in control(35), the function of the bill of lading as a document of title will become probable.

4. Additional Kuwaiti Criteria (Bill of Lading)

As mentioned earlier, according to the Kuwaiti Maritime Law

(34) Article 16, UNCITRAL Model Law on E-Commerce, (b) (i) notifying a person of terms and conditions of the contract; (ii) giving instructions to a carrier;

(35) Article 11, UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf ; See also Chapter 3 of the Rotterdam Rules states that Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document; Jung-Ho Yang, Applicability of Blockchain based Bill of Lading under the Rotterdam Rules and UNCITRAL Model Law on Electronic Transferable Records, Journal of Korea Trade Vol. 23, No. 6, 2019, 113-130, available online at: file:///C:/Users/t.alawneh/Downloads/Applicability%20of%20Blockchain%20based%20Bill%20of%20Lading%20under%20the%20Rotterdam%20Rules%20and%20UNCITRAL%20Model%20Law%20on%20Electronic%20Transferable%20Records.pdf

1980, all bills of lading shall be written and stamped by a nonnegotiable seal. Also the law states that the bill of lading shall be drawn on two originals, one shall be handed over to the shipper and the other to the carrier. A detailed discussion of these criteria follows herein:

4.1. Writing

Most national laws and international conventions including the State of Kuwait, shall include provisions requiring certain transactions to be written. A writing may be required for a variety of reasons; If it is required as a condition of validity of the contract (which is the case in the bill of lading), failure to comply with this requirement would render the transaction to become null and void. However, the UNCITRAL Model Law states that requirement is met regarding to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference(36). i.e. the electronic transferable documents must be retrieved, readable, printable and accessible and thus there should not be any discrimination between those electronic transferable documents and any other paper documents

4.2. Signature

A signature or other form of authentication is normally required to establish the identity of the signatory and his intention to associate himself with or be bound by the contents of the document. The most common form of authentication required by law is a manual signature. The main forms of signature are: stamp, Hand written signature and Fingerprint. According to MLETR 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 to the information contained in the electronic transferable record(37).

(36) Article 8, The UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

(37) Article 9, The UNCITRAL Model Law on Electronic Transferable Records 2018, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

4.3. Original

The requirement is often for a written, signed, original paper document. An original may be required in order to ensure the integrity of a document and that the information presented in a document has not been altered. The UNCITRAL Model Law on E-Commerce, states that where the law requires that a contract or communication should be retained in their original form, that requirement is met if there is a reliable assurance as to the integrity of the communication and the information is capable of being displayed to the person whom it is to be made available[(38)].

5. Future prospective of e-bill of lading

After a lengthy incubation period, electronic bills of lading (eBLs) are at last taking their first tentative steps in the shipping world. Systems currently in operation, however, are closed; only traders, carriers and banks who are members can participate. These closed schemes are not, therefore, true replacements for traditional paper bills of lading (pBLs), which can be used by anyone. Open eBL implementations are very difficult, which is no doubt why practical schemes so far have been closed. While blockchains and smart contracts make no difference to what is possible, they do to what is practicable. In particular, they may render feasible eBL implementations more open than those that have existed until now. They can obviate the need for distrusted central registries, and resolve the digital islands problem which can plague closed schemes[(39)].

A bill of lading, by its nature, must be a unique document throughout its life cycle. Until recently, it had been thought that in an electronic environment, the guarantee of uniqueness was possible only by means of a central registry administered by a trusted entity. Now, the blockchain technology, which was invented to avoid double spending,

(38) Article 8, The UNCITRAL Model Law on E-Commerce, available online at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf

(39) Paul Todd, Electronic bills of lading, blockchains and smart contracts, International Journal of Law and Information Technology, Volume 27, Issue 4, Winter 2019, Pages 339–371

could provide the guarantee of uniqueness. Blockchain technology has the potential to herald a long-awaited breakthrough in the digitisation of bills of lading, since it could provide the guarantee of uniqueness, an essential function of bills of lading, without the requirement of membership subscription. A blockchain-based bill of lading would not, however, take off unless it is given sufficient support from the legal infrastructure. Of particular relevance are the Rotterdam Rules and the draft UNCITRAL Model Law on Electronic Transferable Records. It should be possible to interpret the former and finalise the latter in a way compatible with blockchain technology[(40)].

A blockchain-based bill of lading would have advantages over the existing models of electronic bills of lading. Unlike the existing models, an open blockchain platform requires no prior subscription to membership. This will be a significant advantage since the membership requirement has been known to be a major obstacle to the spread of electronic bills of lading. There are also other advantages which stem from the decentralisation enabled by blockchain technology. While the holder of a blockchain-based bill of lading is pseudonymous, for instance, it should not prevent the holder from being able to demonstrate that he/she is the holder. Moreover, Finalising the Model Law in a way compatible with blockchain technology will facilitate the implementation of the technology and encourage its replacement of paper bills of lading and other transferable documents[(41)].

Conclusion & Recommendations

The world is witnessing a great development in the field of communications that are based on the exchange of information through modern communication network, especially those that pass through the international network (the Internet) or other means of communication

(40) Koji Takahashi, Blockchain technology and electronic bills of lading, The Journal of International Maritime Law Published by Lawtext Publishing Limited, (2016) 22 JIML, available online at: https://italab.doshisha.ac.jp/~tradelaw/PublishedWorks/BlockchainTechnologyElectronicBL.pdf

(41) Wang Feng, Block chain Bills of Lading and their Future Regulation, Centre for Maritime Law (CML), National University of Singapore, NUS Centre for Maritime Law Working Paper 21/01 NUS Law Working Paper 2021/008, available online at: file:///C:/Users/t.alawneh/Downloads/CML-WPS-2101.pdf

and electronic systems technically linked with computers as a means for the exchanging, broadcasting and archiving information. The access to such means has become available to the public. Transactions and exchange of information through these sophisticated electronic means has also become a broad concept that covers all the commercial, industrial, cultural, and legal activities and all areas of daily life. Electronic trade transactions, like other electronic transactions conducted through the modern means of communication, does not resort to paper documents, but, rather, rely on electronic messages.

Kuwait is one of the leading Arab countries in introducing modern systems for the development of economic and commercial aspects. It has recently been preparing to be a global financial center seeking to apply the electronic government system in support of its overall development and advance the development and modernization of all spheres of life.

We conclude from this paper that the legal systems in most world countries including the state of Kuwait have not adopted the UNCITRAL Model Law on Electronic Transferable Records (MLETR). Examples on the few legal systems that have adopted the MLETR may include Bahrain, Singapore and Abu Dhabi global market, and this might enhance the legal system in the state of Kuwait to follow the steps of those legal systems, when it develops the necessary valid and reliable tools.

As for the E bill of lading, it still faces serious legal and technical challenges all over the globe, which makes its application awkward and un-recommended so far. Nonetheless, some legal systems originated a collective platform and successfully overcame the challenges that face parties who are members in this platform. Otherwise, systems who do not initiate such collective platforms still face many challenges, mainly the problem of the conflict of laws.

Recent studies focus on block chain that allows the application of the E bill of lading individually, with minimum or no challenges whatsoever. The block chain unfortunately, is still not applied, and it is hoped that it will soon be applied in order to encourage all legal systems adopt the MLETR.

The following are the major recommendations that could be proposed based on the findings of this paper:

Thus, Kuwait is urged to adopt the UNCITRAL Model Law on Electronic Transferable Records, following the path of Bahrain, Singapore and Abu Dhabi Global Market, after, of course, establishing a reliable and trustworthy technical systems and platforms that promote the achievement of such goals.

The State of Kuwait, in collaboration with other Gulf States, should meditate the idea of establishing a unified platform that is run by Electronic Data Interchange EDI, such as the one originated by Bolero platform. These Ideas might lead to prosperous trade systems and communications between the states of the gulf themselves (Intra-communication), as well as between gulf states and other countries of the world (Inter-communication).

The Kuwaiti Law No 20/2014 is recommended to be expanded to include the electronic transferable documents and records, alongside the other electronic messages, documents, contracts, signatures and so on. This might be achieved either by incorporating those electronic transferable records in the Law No 20/2014 or by issuing a new law to govern the ETRs. Bahrain, for instance, as the first country in the world who adopted the UNCITRAL Model Law regarding Electronic Transferable Records improved its economy by attracting foreign investments, in addition to supporting digital economy in the Gulf states. These ideas were also recognized by the legal consultant of the United Nation Committee on International Commercial Law. After applying the law of ETR, the investments in the country increased by more that 13% compared to the year before, which made the Bahraini economy one of the best economies in the region in terms of the speed of growth. These positive results of the electronic transferable records also supported the aims and objectives that were specified by the initiatives of partnership between the public and private sectors(42). There is no doubt that the Kuwaiti economy also could benefit from applying ETR,

(42) Bahrai News Agency, 2019, available online at: https://www.bna.bh/BahrainisfirstnationtoenactUNCITRALmodel.aspx?cms=q8FmFJgiscL2fwIzON1%2BDmh8iFe1CBD615tq4a6fMg4%3D

although its economy is already strong, since it is one of the most petrol producing countries, but still looking for new and alternative sources of economy may be a good economical policy.

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تطبيق قانون الأونسيترال النموذجي بشأن السجلات الإلكترونية القابلة للتحويل في الكويت: دراسة مقارنة

الدكتور/ طارق شفيق علاونة*

ملخص الدراسة

الهدف: يهدف هذا البحث إلى تناول إمكانية تطبيق المستندات الإلكترونية القابلة للتداول في الكويت (وبشكل خاص سندات الشحن). وسوف يدرس البحث إمكانية شمول القانون رقم ٢٠/ ٢٠١٤ للسندات الإلكترونية القابلة للتداول. كما أن البحث سيتناول تحليل القانون الكويتي ويقارنه ببعض القوانين في دول أخرى كالبحرين وسنغافورة والولايات المتحدة الأمريكية وسوق أبو ظبي العالمي (ADGM). **المنهج**: اعتمد البحث على الطريقة الوصفية التحليلية المقارنة لتحقيق الأهداف المحددة في مشكلة البحث. **النتائج**: لقد استبعد القانون الكويتي رقم ٢٠/ ٢٠١٤ السندات الإذنية والكمبيالات القابلة للتداول من نطاق تطبيق هذا القانون، كما أن هذا القانون لا ينطبق على أي معاملة تجب كتابتها صراحة، أو تخضع لنص خاص من قانون آخر. ومثال على ذلك أن القانون البحري الكويتي ينص على أن سندات الشحن البحرية يجب أن تكون مكتوبة على نسختين أصليتين، تسلم إحداهما للشاحن والأخرى للناقل. **الخاتمة**: تعد متطلبات القوانين المحلية والدولية اللازمة لوجوب كتابة الوثائق والتوقيعات من العوائق الرئيسة التي تواجه تطور التجارة الإلكترونية على المستوى العالمي. ومن العوائق الأخرى التي يمكن أن تضاف إلى ذلك، عدم وضوح بعض القوانين المتعلقة بصلاحية سندات الشحن الإلكترونية وأثرها القانوني وإمكانية تنفيذها.

الكلمات المفتاحية: القانون التجاري الإلكتروني، السجلات الإلكترونية القابلة للتحويل، سندات الشحن.

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للاستشهاد بهذا البحث انظر ص٥١٤

د. طارق علاونة، حاصل على درجة الدكتوراة في القانون التجاري من جامعة هدرزفيلد في المملكة المتحدة ودرجة الماجستير في القانون التجاري من الجامعة ذاتها ودرجة البكالوريوس في القانون من جامعة اليرموك في المملكة الأردنية الهاشمية. وحاصل على شهادة مزاولة المحاماة من نقابة المحامين الأردنيين. يعمل حالياً أستاذاً مساعداً في كلية القانون الكويتية العالمية. تتركز اهتماماته البحثية على موضوعات التجارة الإلكترونية والقانون البحري والعقود التجارية الدولية.
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