



Gemeinsame Stellungnahme zu den rechtlichen Hindernissen für die Verwendung elektronischer begebbarer Handelsdokumente

1. National Legal Issues

a) Domestic Legal Barriers

What are the domestic legal barriers to the use of electronic transferable records in your country? Please set out the relevant laws and how they prevent digitalization.

Where your jurisdiction already allows for electronic transferable records, or has implemented partial reform, can you share details of the existing legislative solutions in your national legislation?

I. General introduction

German law recognizes three documents of title: consignment note (*Ladeschein*, sec. 448 German Commercial Code – HGB), warehouse receipt (*Lagerschein*, sec. 475g HGB) and bill of lading (*Konnossement*, sec. 524 HGB). Although German autonomous law is mostly harmonized with international law, i.e. CMR in land carriage and Hague and Hague/Visby-Rules in the marine carriage,¹ it contains several particularities in regard to documents of title. The main difference between German and English law regarding documents of title is the differentiation between the underlying contract of carriage (*Frachtvertrag*)/warehousing agreement (*Lagervertrag*) and the contractual relationship arising from the document itself. As there is a difference in the legal concepts of what a document of title is in relation to the underlying contract, this text will use the German terms when the specific German concept is referred to.

This text will focus on the Konnossement (bill of lading), while the ideas discussed herein will also apply to the other two documents of title.

The shipper and the carrier agree on the *Frachtvertrag* (contract of carriage) and they may also agree that the carrier is to issue a *Konnossement* (bill of lading). The bill of lading incorporates the consignee's right to claim for delivery, claim for damages arising from loss, damages and delay.² The consignee's

¹ *Rabe/Bahnsen*, in: *Rabe/Bahnsen, Seehandelsrecht*, 5. Aufl. 2018, Vorbemerkungen, Rn. 32 und 36.

² *BT-Drs. 17/10309*, S. 94.

rights, however, are not transferred from the shipper to the consignee. Rather, the consignee has a right of its own, ipso iure, which is created by the Frachtvertrag and embodied in the Konnossement. The reason for this is that German law recognizes the contract for the benefit of a third party (sec. 328 et seq. BGB, German Civil Code). The contract concluded between the shipper and the carrier which provides that the carrier is to transport the goods to a certain place and hand them over to the person holding the bill of lading, ie. the Frachtvertrag, is such a contract. The beneficiary of the contract is the consignee who himself holds the right to demand delivery of the goods from the shipper. By accepting the bill of lading the consignee accepts its terms and might therefore be bound to make certain payments to the carrier.³

That means, if a bill of lading or other document of title has been issued, two contractual relationships exist about the specific carriage of goods. Therefore, there is a need to establish which relationship takes precedence over the other. According to sec. 519 HGB⁴ only the holder of the document of title may enforce the rights embodied therein. The document of title overrides the underlying contract.⁵ If the consignee under the bill of lading is different to the consignee under the contract of carriage, for example if the bill of lading has been transferred to a new consignee, only the new consignee is eligible to enforce the rights arising from the bill of lading. The issuance of a bill of lading “blocks” certain rights in relation to the goods from the underlying contract of carriage.

II. Digital opening clauses

German Law generally allows the usage of electronic documents of title. Digital opening clauses for electronic documents have been introduced into the law as a consequence of the review of the German Commercial Code in 2013.⁶ Germany intended to incorporate the Rotterdam Rules' attempt of digitizing international trade using the principle of functional equivalence and exclusive control.

The law allows the electronic form for bills of lading (sec. 516 (2) HGB), warehouse receipts (sec. 475c (4) HGB and consignment notes (sec. 443 (2) HGB. In addition, the usage of electronic waybills (sec. 408 (2) HGB) and sea-waybills (sec. 526 (4) HGB) is allowed; however, these are not documents of title.

The legislator chose the same wording for each document. All cited sections are worded alike:

*An electronic record having the same functions as the **document** shall be deemed equivalent to the **document**, provided that the authenticity and integrity of the record are assured (electronic **document**). [emphasis added]*

However, the German legislator has - up to now - failed to adopt statutory instruments specifying the details concerning the issuance, presentation, return of electronic documents in accordance with the relevant provisions authorizing such statutory instruments sec. 443 (3), sec 475c (4) and sec 516 (3) HGB.

III. Principle of functional equivalence

The wording is technology neutral.⁷ It only requires equivalence between the electronic record and its

³ See *Eckardt*, The Bolero Bill of Lading under German and English Law, 2004, p. 63-64.

⁴ **Sec 519 HGB: Entitlement to claim under a bill of lading; legitimation**
Any claim under a contract for the carriage of goods by sea embodied in a bill of lading may be brought only by the person entitled to claim under the bill of lading. [...]

⁵ *Herber*, in: MüKo HGB, 4. Aufl. 2020, § 519, Rn. 10.

⁶ BT-Drs. 17/10309.

⁷ See for a detailed analysis: *Saive*, Das elektronische Konnossement, 2020.

paper-based predecessor. However, the relevant sections do not set out an explicit guidance as to what functions the electronic record must be able to perform. Thus, statutory law must be examined to identify the legal functions of these documents.

Taking the bill of lading as an example, it serves the following functions:

- **Evidence (sec. 514, 517 HGB⁸):** evidence, of the contract of carriage and that the goods have the described quality and quantity when they were handed to the carrier;
- **Legitimation (sec. 519 HGB⁹):** the consignee of the b/l is deemed to be its rightful holder;
- **Blocking/exclusivity (sec. 519 HGB):** only the rightful holder may exercise the rights incorporated into the b/l;
- **Document of title (sec. 524 HGB):** the transfer of the bill of lading has, for the purpose of the acquisition of ownership and other rights, the same effect as the physical handover, i.e. the transfer of possession of the goods;¹⁰ it should be noted that in order to transfer ownership/title of a moveable object under German law, the transferor is to pass (direct/indirect/constructive) possession to the transferee. According to sect 524 HGB: “the transfer of a bill of lading to the consignee identified therein shall have the same effects, in terms of the acquisition of rights to the goods, as does the delivery of the goods for carriage. The same shall apply to a transfer of the bill of lading to third parties.”

In addition, the electronic record of the b/l must provide authenticity and integrity – though the statute does not give further details about how this is to be done or about the level of IT-security. The German legislator left these questions open on purpose to create a “regulatory sandbox” for companies creating their own systems meeting these requirements.

However, the lack of clarity of the law on how these functional requirements are met, creates a hurdle, similar to the situation in the UK where the “how to” of e-b/l was left for a future (and not yet materialized) statutory instrument. Companies coming up with own systems for electronic documents of title bear the risk of a court decision dismissing functional equivalence of the used system, thus failing to meet the requirements of an electronic document of title. If a system fails functional equivalence, it cannot create valid documents of title. Thereby the companies’ investments would be wasted.

⁸ **Section 514 „Shipped“ bill of lading and „received-for-shipment“ bill of lading**

(1) A bill of lading shall be issued as soon as the Contractual Carrier⁶⁵ has received the goods. By virtue of the bill of lading, the Contractual Carrier confirms receipt of the goods and accepts the obligation to carry them to their destination and to deliver them to the person entitled to claim under the bill of lading against surrender of the bill of lading. [...]

Section 517 Evidentiary effect of the bill of lading

(1) A bill of lading shall establish the presumption that the Contractual Carrier has received the goods in the state described pursuant to Section 515 (1) numbers 7 and 8. If the description given therein refers to the contents of a closed load device, then the bill of lading shall establish the presumption set out in the first sentence only if the Contractual Carrier has inspected the contents and the results of said inspection have been recorded in the bill of lading. If the bill of lading does not provide any information regarding the apparent order and condition of the goods, then the bill of lading shall establish the presumption that the apparent order and condition of the goods were satisfactory at the time the Contractual Carrier received them.

⁹ **Section 519 Entitlement to claim under a bill of lading; legitimation**

[...] The legitimate holder of a bill of lading is, for his benefit, presumed to be the person entitled to claim under the bill of lading. [...]

¹⁰ It has long been disputed in jurisprudence how exactly the document of title-function is integrated into the existing structure of property law; see *Eckardt*, *The Bolero Bill of Lading under German and English Law*, 2004, p. 101 et seq. and *Saive*, *Das elektronische Konnossement*, 2020, p. 18-20 for an overview of the theories. However, the dispute is of little relevance to the question of digitization, so that it will not be presented here.

IV. Transfer of title under German law

For each of the three different documents of title (Ladeschein, Lagerschein, Konnossement) German Law recognizes three different forms. A document of title may either be issued in favour of a named person (Rektapapier; "straight bill of lading"), to the possessor of the document (Inhaberpapier) or to the order of a named or unnamed person (Orderpapier).¹¹

If the document has been issued in favor of a named consignee ("straight bill of lading"), a transfer of title to a third party by virtue of an endorsement of the document is not possible, but a normal assignment of the incorporated rights is. The difference between an endorsement and an assignment is that the assignee does not become legitimized holder of the document but has to prove the assignment. To transfer the incorporated right, the consignee must assign these rights to a new consignee and hand over the document itself. In this case, the document still contains the name of the old consignee which must not be altered.

If the document has been issued in favor of the possessor, transfer of title is achieved by following the ordinary rules of Germany's property law. One could say, that the incorporated rights in the document follow the rights to the paper.¹² To transfer the ownership of the paper (and the incorporated rights) parties must agree on the transfer of ownership and pass over the document physically so that the old consignee loses all possessory rights and the new consignee receives possessory rights on the document itself.

If the document has been issued to the order of the shipper or the consignee – which is the most common way – sec. 363 ff. HGB apply which say that the rights under the document can be transferred by endorsement. However, these provisions do not contain own rules about the technical aspects of the transfer by endorsement but refer to the Art. 13, 14, 15 and 40 of the German Bills of Exchange Act (Wechselgesetz – WG).

V. Formal requirements

Documents of title do require a hand-written and signed document, but not necessarily an individual signature of the carrier or warehouse operator. In accordance with the specific rules for letters of credit in international trade (Art. 17 UCP 600), facsimile signatures or stamps are sufficient to accelerate modern mass transportation.¹³ In addition, the German legislator made clear that an electronic signature did not have to be a qualified electronic signature in the meaning of Art. 3 Nr. 12 eIDAS-Regulation, as the procedure was considered too complex and cost intensive and thus would counteract the acceleration of international trade.¹⁴

VI. Lack of specific rules for the electronic transfer of title

The referral to Germany's Bills of Exchange Act for the transfer of documents of title issued "to order" creates uncertainties in the digital world. The digital opening clauses allow the usage of electronic documents of title if the electronic record is deemed to be functionally equivalent. As the title-function is part of the functions to be recreated, the transfer of title must also be possible. However, neither the German property law nor the German Bills of Exchange Act has been amended accordingly in 2013 or thereafter. Given that the legislator did not want to preempt technological development and thus only stipulated the

¹¹ See sec. 443 (3); 475d (3) and 519 HGB.

¹² *Rabe*, in: *Rabe/Bahnsen*, § 519, Rn. 12.

¹³ BT-Drs. 17/10309, S. 93.

¹⁴ BT-Drs. 17/10309, S. 93.

opening clause discussed above, not amending the Bills of Exchange Act was a logical step. However, the un-amended act is a hurdle to the use of electronic documents of title issued to order. Therefore, an analogous application of the Bills of Exchange Act is necessary for “to order”-electronic documents of title to function under current German law.¹⁵

Key part of the analogous application is the replacement of “possession” of the physical paper by “exclusive control” over the electronic record and the replacement of the written form of the endorsement by advanced electronic signatures.¹⁶

Herein lies the second source of uncertainty. Companies using electronic documents of title must rely on an analogous application of the relevant sections of Germany’s Property and Securities Law (as yet untested in court).

b) UNCITRAL Gap Analysis

Using the responses above, could you identify compliance with the corresponding 19 articles of the UNCITRAL Model Law on E-transferable Records (see 19 articles in Annex A)? If domestic legislation departs from the Model Law, please explain how and why the law has been adapted?

I. Compliance with MLETR regarding documents of transport

Regarding bills of lading, warehouse receipts and consignment notes, the German principle of functional equivalence is in line with the provisions of the UNCITRAL Model Law on E-transferable Records (MLETR). Without expressly saying, it covers all requirements set out in Art. 10 and 11 MLETR:

- First, the German approach is as technology neutral, as the MLETR itself.
- Second, all electronic records under German law must contain the **relevant information** as it would be required in a transferable document, Art. 10 lit. a MLETR. If they fail to do so, the electronic record does not meet the minimum requirement of German law.
- Third, the **reliable method** described in Art. 10 lit. b and Art. 11 MLETR corresponds with the German requirement of authenticity and integrity of the record. In this context, it must be always ensured, in accordance with the current state of the art, by means of advanced electronic signatures as defined in Art. 26 of the eIDAS Regulation, that only one legal entity or natural person is authorized to use the electronic bill of lading and that the information contained therein cannot be changed without authorization.¹⁷
- Fourth, **electronic endorsement** of bills of lading, warehouse receipts and consignment notes as it is required by Art. 15 MLETR is allowed under German law.
- Fifth, German law does not forbid the **change of medium** (switch from electronic record to paper and vice versa) if it is ensured, that only one legally valid and binding copy of the document exists.

¹⁵ See *in detail*: Saive, Das elektronische Konnossement, 2020, S. 59 ff; cf. Eckardt, The Bolero Bill of Lading under German and English Law, 2004, p. 159.

¹⁶ See *in detail*: Saive, Das elektronische Konnossement, S. 59 ff and Eckardt, The Bolero Bill of Lading under German and English Law, p. 140-162.

¹⁷ Saive, Das elektronische Konnossement, S. 39.

II. Non-compliance regarding transferable electronic cargo insurance certificates

The cargo insurance certificate is to certify that cargo insurance is granted under a policy open cover and serves as evidence for the existence and the content of the cargo insurance contract. A letter of credit transaction usually requires to give proof of the cargo insurance contract, which renders the cargo insurance policy commercially relevant in trade transactions.

German law does not expressly allow the issuance of transferable electronic cargo insurance certificates. In general, insurance certificates (or insurance policies) fall under the scope of sec. 55 (1) of the German Insurance Contract Act (Versicherungsvertragsgesetz – VVG) and are also treated in the respective non-binding recommendation of the German Insurance Association (GDV) for cargo insurance (inter alia no. 11 DTV Cargo Insurance Conditions 2000/2011).

Pursuant to § 363 (2) HGB, only the transport insurance certificate, which comprises the cargo insurance certificate, may be issued to order, thus being transferable. However, the German Commercial Code lacks specific rules corresponding to the aforementioned digital opening clauses for the transport documents of title which would allow the digitalization of cargo insurance certificates. Sec. 363 (2) HGB provides an exhaustive list of documents which may be issued to order. This stipulates the numerus clausus of transferable documents of transport:¹⁸ Bills of lading, consignment bills, warehouse receipts and transport insurance policies can be issued to the order. It is noteworthy that in the course of the reform of the maritime trade law in 2013, the legislator introduced the electronic issuance of consignment notes in § 443 para. 3 HGB, warehouse receipts in § 475c para. 4 HGB and bills of lading in § 516 para. 2 HGB as well as waybills and sea-waybills (§ 408 para. 3 HGB and § 526 para. 4 HGB). The lack of a special regulation for electronic cargo insurance certificates therefore speaks for a deliberate decision by the legislator to forego their digitalization. An (overall) analogy of sections 443 (3), 475c (4) and 516 (2) of the German Commercial Code (HGB) is probably ruled out for the simple reason that these are special provisions that cannot be used by way of analogy. Thus, in a first step it could be discussed whether it is feasible to amend sec. 363 HGB with an opening clause for the electronic insurance certificate issued to order. Further consideration can be given to which legal framework is available - or is required to be established - for the use of electronic cargo insurance certificate, which is not issued to order.

III. Non-compliance regarding bills of exchange and promissory notes

German law does not permit the usage of electronic bills of exchange and promissory notes. These documents must still be produced in writing. Both documents fall under the scope of the German Bills of Exchange Act (Art. 3 (1) and (2) Bills of Exchange Act).

Art. 1 Nr. 1 WG requires a deed, (“Urkunde”) to be issued. German statutory law does not further define this term, but it is agreed that a deed requires written form and excludes the usage of electronic means.¹⁹

c) Legislative Mechanism/Implementation

Please describe the legislative mechanism used in your country for consolidation of applicable laws, process and timelines. At a high level, could you describe the process (work plan) for implementing model law reform in your country?

¹⁸ Moussa, in: BeckOK BGB, Stand: 15.7.2021, § 363, Rn. 1.

¹⁹ Baumbach/Hefermehl/Casper, in: Baumbach/Hefermehl/Casper, Wechselgesetz, Scheckgesetz, Recht des Zahlungsverkehrs, 24. Aufl. 2020, Art. 1 WG, Rn. 1; Werner, in: Hoeren/Sieber/Holzner, Handbuch Multimedia-Recht, 56. Ergänzungslieferung Mai 2021, Teil 13.5, Rn. 121; Peters, in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 5. Aufl. 2017, Rn. 1.

There are several ways on implementing the MLETR into German Law. However, the general legislative process will not be presented below. Instead, the specific opportunities in connection with the documents of title of the transport law will be addressed.

All digital opening clauses for the electronic documents of title are followed by another paragraph – again with identical wording – granting the Federal Ministry of Justice and Consumer Protection the right to issue delegated legislation to determine the details of electronic documents of title:

*The Federal Ministry of Justice and Consumer Protection is hereby empowered to determine by regulation, issued in agreement with the Federal Ministry of the Interior and not requiring the consent of the Federal Council (Bundesrat), the details of issuing, presenting, returning and transmitting an electronic **document**, as well as the particulars of the process of posting retroactive entries to a **document**. [emphasis added]*

This Regulation should contain practical recommendations as to which processes and technologies are suitable for the digitization of documents of title and which minimum IT security requirements should be met. The regulation should be designed in such a way that it is possible for users of electronic documents of title to simply prove in court that they have considered the aforementioned procedures of the regulation and that the electronic record is thus functionally equivalent. In addition, such a regulation could explicitly reference to the MLETR or simply adopt the 19 articles of the MLETR.

d) Further legal solutions

Please consider whether any further UNCITRAL work is required to solve additional legal issues relevant to use of electronic transferable records? (For example, bespoke solutions on smart contracts or even agreed liability regimes, such as those considered for the draft Model Law on Identity Management and Trust Services).

It would be helpful if UNICTRAL could provide minimum requirements or technical solutions as examples which do comply with MLETR. This would provide some general guidance especially to judges in assessing certain software solutions presented in court as being functional equivalent.

2. Subnational legal issues

Do you have a federal structure where subnational laws take precedence over national laws in their respective jurisdiction with implications for the UNCITRAL Model Law?

Not in this specific area of law.

3. Consultations

Please indicate whether you have an obligatory external consultation process and a potential list of implicated parties (this may be useful for international comparison, consolidated messaging by industry sector, and propagation of buy-in by stakeholders). Please also share any important reflections from these consultations - what is the level of private sector support?

There is no obligatory external consultation process. However, several consultations between private sector and the Federal Ministry of Justice and Consumer Protection have taken place. A private sector paperless.trade initiative (formerly the eDocs inTrade initiative) was launched in 2016 at the instigation of Commerzbank, with ICC Germany as the patron. Today a total of 27 representatives of banks, companies, insurance companies, associations and research institutions are part of the initiative. Its main focus is to ensure that the legal requirements for the use of electronic documents are created in Germany and

beyond and that "paper constraints" are removed. Furthermore, initial steps were taken at the beginning of this year to implement a proof of concept.

4. Regulatory

The Annex identifies some core areas for further exploration and cooperation - does the group agree that these are priority areas and are there any further important issues that should be added to this list?

The following areas of law are touched by electronic documents of title and trade:

- **German Civil Code**
- **German Commercial Code**
- **German Bills of Exchange Act**
- **German Insurance Contract Act**

At the same time, it should be borne in mind that these commercial documents not only serve civil law purposes, but are also used as evidence vis-à-vis the authorities, e.g. customs and transport authorities. The European Union has enacted its own directive on electronic freight transport information, the so-called eFTI Regulation, which requires fully digital information transfer between private and public transport operators. Digitization would be facilitated if a software for creating documents of title could also meet the requirements of the eFTI Regulation, so that companies could use one software for each individual transport and trade document.

Please consider, and provide details of, how the transition to digital transferable records may affect the following regulatory areas in your jurisdiction:

- *data protection regulations;*
- *capital requirements regulations;*
- *know-your customer and anti-money laundering regulations; and*
- *regulations concerning electronic signatures and electronic trust services.*

The transition to digital transferable records does not necessarily affect the mentioned regulatory areas. However, digitization is likely to also have very considerable impact on all regulatory areas and will require a more comprehensive approach to ensure that the regulatory framework is adjusted to market and technical developments.