



**Law
Commission**
Reforming the law

Electronic Trade Documents

Summary

INTRODUCTION

International trade is worth around £1.266 trillion to the UK, according to the latest figures from the Department for International Trade. The process of moving goods across borders often comprises multiple actors, including those involved in transportation, insurance, finance, and logistics. A single trade finance transaction typically involves 20 entities and between 10 and 20 paper documents, totalling over 100 pages.

Despite the size and sophistication of this market, many of its processes, and the laws underlying them, are based on practices developed by merchants hundreds of years ago. A chief example of this is the continued use of paper documents, despite recent developments in technology which would allow for secure, reliable, and non-fungible electronic documents to have the same effect as their paper counterparts. The emergence, over the past two decades, of central registry systems and more recently of technologies such as distributed ledger technology (“DLT”) has made paperless trade increasingly feasible. The push for digitalisation became particularly acute during the COVID-19 pandemic, which required businesses to develop rapid technical solutions in response to global restrictions on movement and human-to-human contact.

Despite this, the law continues to lag behind. The legal rules governing paper trade documents, including bills of lading, bills of exchange and warehouse receipts, are premised on the idea that they can be physically held or “possessed”. The current law in England and Wales does not recognise the possibility of possessing electronic documents; possession is associated only

with tangible assets. Industries using these documents are therefore prevented by law from moving towards a fully paperless process. It has been estimated that the international trade industry generates four billion paper documents per year.

We think this legal position is archaic, inefficient, and wholly unsuited to a world in which processes and transactions are increasingly in digital form. Allowing for electronic versions of certain trade documents could lead to significant cost savings and efficiencies, together with improvements in information management and security. In addition, the law of England and Wales currently enjoys a pre-eminent status as the law of choice in global commerce. If it fails to evolve to reflect new technological possibilities, it risks losing this pre-eminence.

This summary document accompanies our report, where we make recommendations for law reform to allow for certain documents in electronic form to be recognised in law as possessable, so that they can have the same legal recognition and functionality as their paper counterparts. We include a bill (the “Bill”) which would implement those recommendations, and provide commentary on the Bill.

Our work on electronic trade documents forms the first phase of our work on digital assets. We began our work on cryptoassets and other digital assets in March 2021, and published a call for evidence in April 2021. We plan to publish a consultation paper with proposals for reform in summer 2022. More information on our work on digital assets can be found at <https://www.lawcom.gov.uk/project/digital-assets/>.

THE CASE FOR REFORM

The possession problem

The functionality of certain documents used in trade depends, as a matter of law or commercial practice, on their being possessed. This is because the right to claim performance of an obligation recorded in the document (such as the right to claim payment of a sum of money, delivery of goods, or an insurance pay-out) pertains to the person in possession of the document. The right is embodied in the document and can be transferred by the (physical) transfer of possession of the document.

The recognition that something can be possessed as a matter of law determines much about the legal treatment that it subsequently receives, and has implications for its legal functionality. For instance, only things that can be possessed are capable of being subject to a bailment, or to a lien. As a result, things that can be possessed have a broader range of functions than those which cannot.

Because the law of England and Wales (like that of many other significant international trade jurisdictions) does not recognise intangible things as being amenable to possession,¹ electronic trade documents cannot be possessed and cannot therefore function in the same way as their paper counterparts. We refer to this as the “possession problem”.

We make recommendations for reform which would address the possession problem, and allow for documents in electronic form which meet certain criteria to have the same functionality as their paper counterparts.

Multipartite contractual frameworks

Only a relatively small number of jurisdictions currently recognise trade documents in electronic form as having the same legal effects as paper trade documents. In response to the possession problem, the industry has developed several contractual workarounds to enable trade documents in electronic form to be used in the same way as their paper counterparts. Under such contractual frameworks, parties agree that transferring a trade document in electronic form will put the transferee in a similar position to that of the holder of a paper trade document. Multipartite agreements therefore generate contractual rights that are broadly equivalent to the rights that follow from the possession of the relevant paper trade document.

Contractual workarounds provide many of the benefits of digitalisation. However, they also increase the complexity of transacting, and their legal treatment (unlike that of paper trade documents) remains to be tested in court. Crucially, contractual frameworks are only binding on those parties who have agreed to the arrangement. As such, parties have (personal) rights only against those persons who have agreed to the terms of the system. Any proprietary rights obtained depend on whether the intended effects of transactions occurring over the system are legally recognised as providing such rights. In contrast, possession of a paper trade document gives the holder (proprietary) rights which are enforceable against all the world.

¹ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1; *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41.

New possibilities from new technologies

The emergence of new technologies has been accompanied by increased industry calls for digitalisation. For example, DLT offers the prospect of creating viable electronic documents for use in shipping, trade, and trade finance that mimic the salient properties of their paper counterparts. DLT-based electronic documents can be transferred between participants without the need for a central authority, with transfers recorded on a secure ledger which is for all practical purposes permanent. The data recorded on the ledger is said to be “immutable”.

DLT systems generally place control of an electronic document in the hands of the person with knowledge of the relevant “private key”. They also offer the possibility of making the content of electronic documents invisible to all but the relevant parties, thereby safeguarding commercially sensitive information.

However, not all systems hosting trade documents in electronic form are DLT-based, nor do they need to be to satisfy our recommended criteria for electronic trade documents. Many of the systems already in use, underpinned by multipartite contractual arrangements, are central registry systems which, unlike a distributed or decentralised ledger, are administered centrally. Users sign up for accounts which are accessed with a password or other security credentials. Documents with unique identifiers are allocated to a particular user account upon issue or transfer, and the relevant user can hold or transfer the document.

The potential impact of reform

There are several benefits associated with the digitalisation of trade documents, including significantly lower resourcing and operational costs, increased efficiency, increased transparency, increased security, reduced errors, environmental benefits, and greater resilience to the impact of sudden shocks such as COVID-19. At the same time, we acknowledge that there are also costs. The most immediate costs would be transitional, arising from the need to train staff on new systems, to develop and refine new internal processes, and from the time spent negotiating with trading partners. We were told that the potential for reducing or eliminating fraud through the use of electronic documents should not be overstated. We also consider that any environmental impacts of the use of DLT should also be carefully evaluated.



Least interventionist approach

The law of England and Wales functions highly effectively in relation to paper documents, and is trusted globally by commercial entities engaging in cross-border trade. We intend that, if our recommended reforms are implemented, industry could continue to operate in accordance with the same rules and practices as they currently do, but with the choice as to whether to use electronic or paper trade documents.

Our approach to electronic trade documents is to create a facilitative, rather than mandatory, regime. Our recommendations, if implemented, will not affect the validity or operation of contractual systems, provided the electronic document does not fall within the scope of the Bill.

Allowing for possession of trade documents in electronic form

Central to this least interventionist approach is our view that trade documents in electronic form should be capable of being possessed, and that the same laws and practices should apply to trade documents whether in paper or electronic form. We think that using possession as the operative concept in respect of trade documents in electronic form is the best approach. As discussed below, possession has a core role in the current functionality of paper trade documents, both at common law and in domestic statutes, in terms of establishing who may have certain rights and entitlements. In order to achieve equivalence between paper and electronic trade documents, we think it is desirable to maintain the same language and substantive legal characterisation in relation to both.

Using possession as a determinative concept allows electronic trade documents to be plugged directly into an existing legal framework of commercially useful concepts, with which the international trading community is already familiar. This is an especially important consideration given that the law of England and Wales underpins a significant amount of international trade. We think this approach allows for the least disruption to existing legal arrangements and analyses.

We therefore recommend that trade documents in electronic form should be capable of being possessed as a matter of law, provided that they meet certain criteria which ensure that they can replicate the salient features of paper trade documents.

The implementation of our recommendations will mean that parties can use the law that currently applies to paper trade documents when transacting with electronic trade documents. There will be no need for separate regimes with equivalent effects. We think this approach allows for the least disruption to existing legal arrangements and analyses. We note however that a different approach may be justified in relation to cryptoassets and other digital assets, which we are considering separately.

The role of the courts

Our recommendations are for a statutory “framework” to allow trade documents in electronic form that satisfy certain criteria to be amenable to possession, and therefore to be legally equivalent to paper trade documents. If our recommendations are implemented, the courts will be central in interpreting and applying the provisions of such legislation in light of the existing common law applicable to paper trade documents, adapted for digital subject matter.

Where the Bill is silent on how certain concepts apply to electronic trade documents (for example, timing of transfer of possession, delivery, rejection, and acceptance), the role of the courts will be to apply the existing principles of those concepts to electronic trade documents, subject to any necessary adaptations of the common law to cater for their digital nature.

For example, although the Bill provides that electronic trade documents can be possessed, it does not say what constitutes possession of an electronic trade document. Possession is a common law concept that is infinitely flexible and highly fact specific. It comprises two elements, being factual control and an intention to exercise such control, both objectively assessed. What constitutes sufficient control in respect of a particular asset will depend on the type of asset. It will be for the courts to make this assessment, assisted by existing case law, which we think can be extrapolated to electronic trade documents.

Technological neutrality

Our recommendations and the Bill are not predicated on the functionality of a particular technology. Instead, we ask: as a matter of law, what features must trade documents in electronic form have in order to be equivalent to paper documents, and therefore amenable to being possessed? We do not suggest that any requirements of the Bill can only be met with one particular type of technology. We aim for our recommended reforms to be able to accommodate future technologies. We consider that our approach will foster innovation and allow more flexible commercial arrangements to be reached. It will also circumvent the risks of referring to particular technologies which may quickly become outdated or obsolete, and of excluding other potential existing or future solutions.

International compatibility

We note that possession is central to the use of trade documents across various jurisdictions. Efforts to address the possession problem and digitalise trade documents are reflected in various initiatives in both international frameworks and individual jurisdictions that aim to legally recognise the use of electronic documents. The principal initiatives include the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea 2008, the Model Law on Electronic Transferable Records (“MLETR”) produced by the United Nations Commission on International Trade Law, developments in Singapore, and the US Uniform Commercial Code.

We are conscious of the importance of international compatibility insofar as this is possible. It is vital that electronic trade documents can move between different jurisdictions and be recognised worldwide as legally equivalent to paper versions.

In developing our recommended reforms, we have been mindful in particular of the MLETR, given its international significance. The MLETR provides a prototype for law reform initiatives at a national level. It aims to enable the use of electronic transferable records by establishing legal equivalence between control of an electronic transferable record (such as a bill of exchange) and possession of a transferable paper document or instrument. Our recommendations align with the aims and policy of the MLETR, but are tailored specifically to the law of England and Wales.



CURRENT LAW ON TRADE DOCUMENTS

Our recommendations concern documents which are widely used in trade and finance, and which rely on possession to fulfil their commercial functions.

Trade documents

Normally, documents which record obligations and rights are simply evidence of them. The obligations and rights, and the documents which evidence them, are two independent things and are treated as such. Commercial practice has, however, resulted in certain types of documents being used as symbols (or embodiments) of the right to claim performance of the obligations recorded in them. Simply put, the right to claim performance of the relevant obligation “travels” with the document.

In the report, we consider the current law applicable to the following trade documents in detail, although the scope of our recommendations is not limited to them.

1. Bills of exchange
2. Promissory notes
3. Bills of lading
4. Ship’s delivery orders
5. Warehouse receipts
6. Mate’s receipts
7. Marine insurance policies
8. Cargo insurance certificates

In practice, these documents may, among other things, be used between buyers and sellers in cross-border sales of goods to perform, or to evidence performance of, contractual obligations. They may also be used by banks, who act as service providers in international trade transactions by (i) processing payments, (ii) collecting documents for the buyer, and/or (iii) financing transactions. A bank may, for example, obtain possession of a bill of lading pursuant to a valid transfer to become its holder, and thereby have a possessory security over the goods relevant to the bill of lading.

Use of the term “trade documents”

Various terms such as “document of title”, “negotiable instrument”, and “documentary intangible” have been used to refer to these documents over time. However, our intention is not to become bogged down in terminology. As a general, catch-all term, we use the term “trade documents” in our recommendations and the Bill to capture the documents with which we are concerned.

Consequences of rights being embodied in trade documents

There are several consequences of a right being embodied in a document.

1. Delivery (and, where necessary, indorsement) is sufficient to transfer the right to claim performance of the obligation embodied in the trade document. The consequent ease with which rights may be transferred promotes efficiency and convenience in commercial dealings.
2. If the law recognises that something is possessable, it is capable of being the subject of legal concepts such as bailment, possessory security interests, and wrongful interference (conversion).
3. A person in possession of the trade document has their right in that document protected from interference in the same way as they would with any other tangible asset. This is because these documents are treated as tangible assets in themselves, meaning they are covered by the strict liability property torts of trespass and conversion, as well as by negligence. In contrast, interference with purely intangible rights is not covered by the property torts, leaving claimants to resort to the economic torts (such as inducing breach of contract or causing loss by unlawful means), which require establishing a certain type of intention on the defendant's part.
4. In terms of remedies for interference, trade documents are treated differently from other paper documents. For example, for ordinary documents that merely evidence the right, the measure of damages in conversion would be the nominal value of the paper, whereas for trade documents that embody the right, the measure of damages is the value of the obligation or right embodied in the document.
5. To discharge the obligation contained in the trade document, the person who owes the obligation must render performance to the holder of the document. Rendering performance to anyone else will not discharge the obligation.



TYPES OF DOCUMENTS COVERED BY OUR RECOMMENDED REFORMS

Our recommendations and the Bill are concerned only with those documents in relation to which possession is relevant for a person to claim performance of an obligation. They cover any paper document used in trade to which possession is relevant (as a matter of law or commercial practice) for a person to claim performance of an obligation, regardless of its precise legal nature. We recommend that this “umbrella provision” is set out in legislation.

We also recommend including a list of documents that function on the basis of possession and which we know are routinely used in trade, as we think this will provide certainty to the industry. This list is illustrative, rather than exhaustive, and a document which falls within the list should nevertheless only be caught by our recommendations if possession is required for its operation. We recommend that the list includes the documents listed above.

An exclusion for certain documents

We recommend excluding certain types of documents that may otherwise fall within the scope of the Bill. These are instruments which are entered under a “relevant system” under the Uncertificated Securities Regulations 2001, and bearer bonds (debt securities held in physical form). These instruments are principally used in financial markets. They are better dealt with separately rather than in this Bill aimed at international trade.

Power to add, remove, or amend an entry in the list of documents excluded

We think our reforms could lead to significant change in practice, and are conscious that the list of exclusions in the Bill may have to be added to or amended in the future. To cater to this, we recommend that legislation should contain a power to make secondary legislation, subject to the affirmative procedure, to add to, remove from, or otherwise amend the list of the documents which are excluded from the scope of the Bill.

THE GATEWAY CRITERIA

The starting point for our approach has been to consider what requirements a trade document in electronic form must satisfy in order to replicate the salient features of a paper trade document, such that it could be considered capable of performing the same functions as its paper counterpart. We recommend certain “gateway criteria” that a document in electronic form must satisfy in order to constitute an “electronic trade document” for the purposes of our recommendations and the Bill.

First criterion: information contained in an electronic trade document

Some paper trade documents which fall within our recommended reforms have requirements as to the information they must contain in order to qualify as that trade document. These requirements may derive from statute, the common law, or from custom or practice.

We recommend that the Bill should contain a criterion that in order to qualify as an electronic trade document, a document in electronic form must contain the same information as would be required to be contained in the paper equivalent. This recommendation will provide certainty as to the content requirements that documents in electronic form must satisfy to qualify as electronic trade documents.

It is also important to establish the link between the document in electronic form and its paper counterpart. Such a requirement would only apply to the extent that a paper trade document must contain certain information in order to qualify as such. Our recommendations would not introduce any new requirement as to the information that a document in electronic form should contain.

Meaning of “document” in the electronic context

A document in electronic form may comprise multiple components. One component will always be the particular instance of a data string or data structure consisting of functional code, which is logically associated with (and specifically identifies) the human readable part of the document. There might also be other components made up of human readable text, such as a .pdf file. For our recommendations to be workable, the various components of an electronic trade document must be regarded as a single document. For example, when we refer below to an electronic trade document being amenable to exclusive control, and therefore possessable, it is likely that control will be exercised by means of the document’s underlying data structure. On the other hand, the requirement that a trade document in electronic form must contain the same information as would be required to be contained in the equivalent paper trade document will likely be fulfilled by the human readable component of the document. This component is logically associated with the controllable data structure. Existing definitions of “document” in the law of England and Wales may not capture this. We therefore recommend that where a trade document in electronic form comprises separate, but linked elements – a data structure consisting of functional code, and a human readable part of the document which contains or specifies certain rights – these elements together should comprise “the document”.

Second criterion: reliability of an electronic trade document system

We recommend that the Bill should include a requirement that an electronic trade document system be reliable. By “reliable” we mean that an electronic system meets certain standards in the way that it operates. It is essential that users are able to “trust” systems for electronic trade documents to be used widely, especially given the potential risk of cybercrime. Although we expect that commercial parties will consider questions of security and risk when choosing an electronic trade document system, this trust would be more likely to arise if the Bill contained a provision in relation to reliability. We also recommend that the Bill should include a non-exhaustive list of factors which may be taken into account when assessing whether a system is reliable. This approach is in line with the MLETR.

We do not however think the Bill should make separate provision for an accreditation process, which would guarantee a certain level of objectivity in the assessment

of the reliability of the system used. Requiring specific systems to be accredited by a national regulator or state-appointed regulator would be burdensome, and could lead to delays in a move to electronic trade documents while such an accreditation system was set up. We think that such issues are better dealt with by means of industry standards which can reflect the dynamic development of technology in this area.

Third criterion: integrity of an electronic trade document

We recommend that there should be a requirement as to the “integrity” of an electronic trade document; that is, it must be protected against unauthorised interference or alteration. Integrity is important for establishing that a document is original or authentic. We think that a requirement for integrity will encourage trust in electronic trade documents, and combat the risk of cybercrime and related scams.



Fourth criterion: capable of exclusive control

Concept of control

Control is fundamental to our recommendations in two different ways:

1. First, control is one of the two elements which are required at common law in order for someone to be in possession of something (the other being intention).
2. Second, we recommend that amenability to exclusive control should be a necessary criterion for a trade document in electronic form to qualify as an electronic trade document. We include a concept of control in the Bill for this purpose alone (although the concept is based on common law assessments of control/possession).

Exclusivity of control as part of the gateway criteria

In the paper world, it is possible for multiple people to have control (and possession) of an asset at the same time. Similarly, in the electronic world, multiple persons can have control of the document at the same time because, for example, they all know the relevant password or the private key to the document. However, the question of who “has control” is separate from the question of the features a document must have in order to qualify as an electronic trade document. The function of the exclusive control criterion is to address the “double spend” problem so that, for example, two people with the private key could not both transfer the document to two different places independently of each other. By “exclusive control”, we mean that it must not be possible for more than one person (other than joint actors) to *exercise* control at any one time.

For the purposes of our recommendations, the concept of control is a factual, rather than a legal enquiry. Because the concept of control is used in different ways in the law of England and Wales, we recommend including a concept of control in legislation for the purposes of the gateway criteria to provide clarity as to the requirements that must be met for a document to qualify as an electronic trade document. We recommend that a person is taken to exercise control of a trade document in electronic form when the person uses, transfers or otherwise disposes of the document. “Use” of a trade document in electronic form should comprise utilising or retaining the document to achieve a particular purpose. It should include causing something to happen (or preventing something from happening) to the document, but should not include merely reading or viewing the document.

Our policy on control is as follows.

1. A document in electronic form must be capable in fact of being subject to exclusive control.
2. Multiple people could have control of a document in electronic form (because, for example, they all have the security credentials or private key necessary to transact).
3. Even though multiple people could have control of a document in electronic form, only one person (or persons acting jointly) must be capable of exercising that control at any one time.

We therefore recommend that in order to qualify as an electronic trade document, a trade document in electronic form must be susceptible to exclusive control; that is, only one person (or persons acting jointly) must be able to exercise control of a document in electronic form at any one time.

Fifth criterion: divestibility

We recommend that in order to qualify as an electronic trade document, a trade document in electronic form must also be “divestible”. By this we mean that the transfer of an electronic trade document must necessarily entail a transfer both of the document and of the ability to control the document. After the document is transferred, any person who before the transfer was able to exercise control of the document is no longer able to do so (except to the extent that a person is able to exercise control by virtue of being a transferee). This feature prevents an electronic trade document from being transferred more than once by the same party, or by another party having concurrent control with the transferor. This is known as the “double spend” issue.

Sixth criterion: identification of the document

We understand that many of the existing systems in development allow users to retain access to copies of documents for their records. We think this is equivalent to taking a photocopy or scan of a paper document before it is transferred or disposed of, which does not interfere with possession of the original. We consider it necessary to include, as part of the gateway criteria, a requirement that a trade document in electronic form is identifiable so that it can be distinguished from any copies. This is particularly important to ensure that copies of electronic trade documents do not enable “double spending” or use of the copy as the original.

Seventh criterion: identification of the persons who could exercise control of a document in electronic form

We also recommend including an additional criterion that in order to qualify as an electronic trade document, the trade document in electronic form must be capable of being uniquely associated with the person or persons who are able to exercise control of it.

This criterion is intended to capture the idea that the system in question should be capable of allowing for the identification of any person who is able to exercise control of the document in electronic form, regardless of whether any person is in fact exercising that control. This requirement reflects the association between the trade document in electronic form and the person or persons who are able to exercise control of that document.

We do not mean that, by looking at the system itself, it should be possible to see who is able to exercise control. We mean that, if asked to evidence their ability to exercise control, a person could prove this on the system. For example, if three people have access to the private key to a document, the system should allow each of those three persons to identify themselves as persons who are able to exercise control by showing or using their private key.



POSSESSING ELECTRONIC TRADE DOCUMENTS

We recommend that documents in electronic form which satisfy the gateway criteria should be capable of being possessed, and that this principle should be explicitly set out in statute.

What is possession in the context of electronic trade documents?

The meaning of possession in the law of England and Wales is not a straightforward concept. It is a fact specific enquiry and, for this reason, we do not recommend setting out in legislation what constitutes possession of an electronic trade document. We consider that possession should be assessed as a matter of common law: a person (natural or legal) would be presumed to be in possession of an electronic trade document when they have a sufficient level and type of control over it, and when this control is accompanied by the necessary intention.

Possession is also relative. There may be a number of people who can claim that they are, or were at a particular time, in possession of an electronic document – such as where multiple people have knowledge of the relevant private key or security credentials. If there were to be a dispute on the matter, the court would determine, considering the relevant facts and based on existing common law principles, who has the best claim. This could equally arise in the tangible world, for example, if multiple people know the code to a safe or all have keys to a car or warehouse.

Moreover, in addition to possession as a matter of fact, parties may have other possessory interests in electronic trade documents, including legal possession (being the right to possess rather than possession in fact).

What constitutes a transfer of possession of an electronic trade document?

At its most basic level, transfer of possession as a matter of fact requires a transfer of control from the transferor. To have possession, the transferee(s) must also have the necessary intention. We think that, on a DLT-based system, this will generally be effected by the transferor using their private key to send the electronic trade document to the account of the transferee, thereby divesting themselves of the electronic trade document. On a central registry system, it will be similar: once the transfer is effected, only the transferee's security credentials (that is, login details) will provide the ability to transfer or otherwise exercise control over the document.

CONSEQUENCES OF AN ELECTRONIC TRADE DOCUMENT BEING POSSESSABLE

Using electronic trade documents in the same way as paper trade documents

We recommend that electronic trade documents and paper trade documents should have the same legal functionality in every respect, and anything that can be done to a paper trade document should have the same effect if done to an electronic trade document. The form of the document should make no difference to the ways in which the document can be used, or the remedies available in respect of it, other than where form necessarily dictates some slight difference of approach. For example, an electronic trade document cannot be subject to “physical” control and it may be difficult to determine its geographical location, so these matters, while helpful in establishing possession of a paper trade document, may not be relevant in the electronic context.

The key consequence of electronic trade documents being capable of being possessed in the eyes of the law is that their possession will determine who is entitled to claim performance of the relevant obligation. Similarly, delivery of the document from one person to another will enable the transfer of relevant rights and entitlements to the latter, in the same way as occurs with paper documents. For example, novation will not be necessary to transfer contractual rights. Neither will attornment be necessary to transfer constructive possession of goods, unless it is also required when the document is used in its paper form. In short, depending

on the nature of the trade document, electronic trade documents may be used as negotiable instruments, documents of title, or assignable insurance documents.

The current existence of several electronic systems (albeit reliant on contractual arrangements) designed to replicate the functions of paper bills of lading and other trade documents demonstrates that it is perfectly possible to mirror paper processes in the electronic space. These systems enable the common processes of trade (such as the selling of goods while in transit) and trade finance (such as the pledging of goods on a ship or in a warehouse to a bank) to take place without the need to use paper. Our recommended reforms will ensure that users of documents which meet the criteria in the Bill are able to use them safely in the knowledge that they will have the same legal effects as their paper counterparts, without the need to engage legal workarounds.

Application of possessory concepts to trade documents

Paper trade documents are capable of possession and can be the subject of legal concepts such as bailment, possessory security interests, and wrongful interference (conversion). We intend for the same remedies, insofar as they apply to paper trade documents, to be available with respect to electronic trade documents. The material analysis or considerations remain the same regardless of whether the trade document is in electronic or paper form. For example, hacking into a system, taking control of an electronic trade document, and transferring it to a third party would be an obvious way of converting such a document if the interference was sufficient to deprive the dispossessed of their possessory rights.

Issues not explicitly provided for in the Bill

The analysis of different actions that may be performed with respect to a trade document, and their legal effects, is important for the purposes of clarifying the extent to which equivalence between paper and electronic documents may be achieved. This includes the concepts of delivery and the point-in-time at which a transfer may be said to have taken place, as well as rejection and amendment of a trade document.

We think there is no need to include express provisions on these issues in the Bill, either because current principles would be applied by the courts in this respect, or because the systems/platforms would adopt explicit protocols on these matters, which would be applicable as a matter of contract. For similar reasons, we do not think it is necessary to provide expressly for the discharge, surrender or accomplishment of an electronic trade document. Explicitly mentioning these actions in the Bill may impact technological neutrality, as we would necessarily also have to include provisions on how these actions would be accomplished.

Private international law

International trade involves the transfer of goods, money, and supporting documents across borders. There is an existing set of complex private international rules that determine which courts have jurisdiction over a dispute, and which country's law should be applied to resolve it. These rules are complex and fact specific, and electronic trade documents may give rise to novel issues that require further consideration. For instance, there are inherent difficulties in ascertaining the geographical location of digital assets, including electronic trade documents. Similarly, questions may arise as to how an electronic trade document issued in England and Wales would be treated by a country that does not recognise the validity of electronic trade documents. We think private international law aspects of electronic trade documents should be dealt with in a separate project that deals with digital assets more broadly. We do not think we can satisfactorily consider these issues within the context of this project. In that regard, as part of our 14th programme of law reform, we hope to begin work on conflict of laws and emerging technology in mid-2022.



RECOMMENDATIONS – OTHER ISSUES

Formalities

“in writing”

Documents that fall within the scope of our proposals for reform may have a requirement that they must be “in writing”. Unlike the MLETR, we do not include an explicit provision in the Bill allowing for electronic documents to satisfy “in writing” requirements. This is because the law of England and Wales defines “writing” in broad terms. For example, schedule 1 to the Interpretation Act 1978 defines writing as “typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form”. In addition, statutes are generally, unless otherwise indicated, construed by the courts so as to respond to societal developments, including changes in technology. Our further research suggests that electronic displays are likely to be considered to satisfy an “in writing” requirement. As such, we think that the position in domestic law is already clear: a trade document in electronic form can satisfy a requirement to be in writing.

“signed”

Trade documents may be required to be signed in order to be validly issued. The MLETR makes specific provision to allow for the signing of electronic documents. However, as we discuss in detail in our Electronic Execution Report, the law of England and Wales is already sufficiently flexible to accommodate electronic signatures. What is important is not the form of signature (unless this is prescribed by law), but whether it was applied in a manner which indicates the parties’ intention to authenticate the document. We think that electronic signatures can be used to sign electronic trade documents without the need for an express statutory provision.

Indorsement

Indorsement is an essential part of the transfer of many trade documents and any rights which attach to them. There is a business practice of indorsing paper documents on their reverse. Unlike a paper document, an electronic document may not have a “back” and, accordingly, we think it is important to ensure that an electronic indorsement will be valid regardless of where it is located on the document. Accordingly, we recommend that legislation provides that an electronic trade document can be indorsed.

Accessibility of information

We think there is no need for a provision in the Bill requiring that information contained in an electronic trade document be accessible. As a matter of practicality, unless parties are able to access and show that their document satisfies the other requirements of the Bill, they cannot prove that the document in question qualifies as an electronic trade document. We think other recommended criteria given in the Bill (such as those relating to “use”, “transfer” or “otherwise dispose of”) which require a person in factual control to interact with an electronic document in some way, ensure that a person would have access to the information in the document.

Sets of documents

It remains common practice for some trade documents, such as bills of lading and bills of exchange, to be drawn in sets of three. However, there is no requirement for these documents to be drawn in sets, and we therefore do not consider it necessary to include a requirement that the system on which an electronic trade document exists must make this possible. If this practice continues in the context of electronic trade documents, we think technology providers are likely to develop their platforms to enable electronic trade documents to be issued in sets, and neither the law nor our recommendations prohibit this.

Change of form or medium

Given, that many of the documents that our recommended reforms will cover are used in cross-border transactions, it is inevitable that different jurisdictions will recognise electronic trade documents to varying extents. It may therefore be necessary in some situations to replace an electronic trade document with a paper substitute.

To address this, we recommend including a provision allowing for change of form of a trade document from electronic to paper form, and vice versa. Our intention is to provide that a change of form or medium is permissible, to set out clearly the requirements that must be met for a valid change of medium, and the consequences thereof.

Upon the change of medium, it is only the medium of the document that changes, and all other things (such as the place of the document’s issue and the rights and liabilities associated with it) remain the same.

In order to constitute a valid change of medium, we recommend that the document in its new medium or form should contain a statement that it has been converted, and any contractual or other requirements relating to the conversion of the document are complied with.

Provided that these requirements are complied with then, where a document is converted, the document in its old form should cease to have effect, and all rights and liabilities relating to the document should continue to have effect in relation to the document in its new form.

Since the requirement to include a statement on the converted trade document imposes a mandatory formality requirement, failure to include such a statement will result in an invalid change of medium for the purposes of the Bill.

Application of the Bill to existing trade documents

We recommend that documents issued before the day on which the Act comes into force should not be capable of being electronic trade documents within the meaning of that legislation. These documents are likely to be governed by private contractual frameworks. We do not consider that parties who have entered into these contractual arrangements should have to determine whether their existing documents are electronic trade documents within the meaning of the Act. Similarly, we think that the change of medium of a paper trade document issued before the Act comes into force should not be permitted. When a particular trade document can be said to be issued will depend on the facts, and the type of document in question.

Amending other legislation

We recommend the repeal of sections 1(5) and 1(6) of the Carriage of Goods by Sea Act 1992, which gives a power to make regulations to enable bills of lading, sea waybills and ship's delivery orders to be issued by electronic means. In light of our recommended reforms, the powers given in these sections are redundant. We also recommend amending section 89B(2) of the Bills of Exchange Act 1882 to exclude electronic trade documents within the meaning of the Bill. Currently, this section envisages the electronic presentment of physical trade documents by electronic means. Our recommendations do not involve a physical document. It is appropriate therefore that electronic trade documents within the meaning of the Bill are excluded from the scope of these provisions.

