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Embracing the next chapter: The Electronic Trade Documents Bill and its importance for the future of international trade

Erasing the paper trail: The Bill's objectives

On 12 October 2022 the Electronic Trade Documents Bill (the "Bill") was introduced to the House of Lords and received a first reading. The Bill was drafted by the Law Commission, after a detailed consultation process on the legal recognition of certain trade documents in electronic form.

The result is what is widely considered as the first attempt by English law to move beyond the "Possession Problem" (discussed below), and to recognise qualifying electronic documents as capable of having the same legal function as paper trade documents.

For international maritime trade – in which each transaction involves a complex matrix of contractual obligations (insurance, finance, carriage, customs etc.), and currently requires the transfer of large amounts of physical paperwork – this is nothing short of revolutionary: think (1) improvements in speed of document transfer and cost efficiency; (2) a reduction in delay, human error and fraud; and (3) more resilience in the event of another COVID-like scenario.

The Possession Problem

The principles of English law that underpin the legal and commercial functions of international trade documents originate in old mercantile practices. One such practice was the recognition of a special category of documents, which gave persons who possessed them rights to: (a) demand performance of the obligations contained in the document; and (b) transfer those rights by physical transfer of the documents.

As electronic storage and transfer of information is a (relatively) recent development, English law still presumes that for a document to be capable of possession it must be tangible. Accordingly, holding,

transferring, or disposing of an electronic trade document will not have the same legal consequences as its paper equivalent. Instead, digital platforms (e.g., Bolero, CargoDocs and Tradelens) currently rely on participants agreeing that possession and transfer of electronic trade documents will have the same legal consequences as if they were paper.

A clean sheet

The Bill is harmonious with UNCITRAL's Model Law on Electronic Transferable Records ("MLETR") (described as a "*suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation*") and takes a "least interventionist" approach, to avoid disturbing underlying principles of English law (e.g., transferability or possession).

Instead, it identifies key characteristics of paper trade documents and grants the same legal functions to electronic documents, which satisfy those criteria. The criteria include:

1. **Information** – the electronic document must contain information that, if contained in a paper document, would lead to the document being a paper trade document (as defined in the Bill).
2. **Amenability to exclusive possession** - it must not be possible for more than one person to exercise control of the document at any one time.
3. **Divestibility** – the transfer of the document must involve the transferor being deprived completely of the ability to exercise control over that document.

Unless an electronic document satisfies the criteria in the Bill, it will not be considered an "electronic trade document", for the purposes of the Bill.

Bridging the gap

An interesting feature of the Bill is clause 4 ("change of form"), which permits a paper trade document to be converted into an electronic trade document and vice versa.

This allows a holder to transfer the document into a paper medium when, for example, seeking to exercise its rights in a jurisdiction that does not recognise the legal validity of electronic trade documents¹.

The inclusion of clause 4 hints at a broader issue: that international trade is by its nature cross-border, and yet, with the exception of a handful of countries (including Singapore, the USA, Australia, Germany, South Korea and Abu Dhabi), adoption of national laws recognising electronic trade documents remains piecemeal. From a dispute resolution perspective, the issue may be academic, insofar as the applicable law and jurisdiction can be determined by reference to a law and jurisdiction clause included in the document or underlying contract. However, the practical consequence is likely to be that market participants, investors and technologists, will remain hesitant to transition to electronic trade documents.

Comment

It is hoped that, with key trading jurisdictions, including England and Wales and Singapore², beginning to recognise electronic trade documents, eventually other jurisdictions will follow suit, resulting in a "tipping point", and providing the level of legal certainty needed to encourage a full transition to electronic trade documents.

Once the Bill passes into force, users of electronic trade documents should ensure that electronic trade documents include clear law and jurisdiction clauses, to avoid disputes as to their legal validity. Users should also ensure that the system chosen to record possession and transfer of documents constitutes a "reliable system", as required by the Bill.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

¹ For example, where a vessel is forced unexpectedly to discharge goods at an alternative port, in a jurisdiction that does not recognise the legal validity of electronic bills of lading.

² Amendments to the Singapore Electronic Transactions Act 2010 were adopted in 2021, implementing reforms in line with MLETR.