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Electronic bills of lading – is their time now?

Over the past couple of decades, many industries have come to rely increasingly on technology to enhance operations and improve productivity. However, the shipping and commodity industry has been slow to adapt to technological changes, to its detriment. Theoretically at least, many issues experienced during the course of the pandemic (delays in the arrival of paper bills of lading (BLs), difficulties in presenting due to closures of agents' offices, vessel quarantines and restrictions imposed on human to human contact) might have been avoided if physical delivery had been conducted using electronic bills of lading (eBLs).

The use of eBLs has been touted for years, without significant uptake, but changes are in progress. As of 24 March 2021 the International Group approved seven e-bill providers.¹ This would suggest that trades using eBLs should become more widespread. However, the law hasn't kept up with the pace of change and is arguably limiting developments in this area.

How do eBL systems replicate the functions of a BL?

To overcome the current legal obstacles, most, if not all, eBL systems ask users to sign a multi-party contract to replicate the legal formalities behind a BL, commonly using attornment and novation to achieve contractually an outcome that is analogous to an indorsement.

However, applying ordinary principles, those contracts are only binding on the parties that sign up to them, which limits the usability of eBLs because

the agreement cannot bind a third party non-user. As a result, where a party in the chain does not have access to the technology, or is signed up to a different system, a paper BL will still need to be issued, which somewhat negates the benefits of using an electronic system at all.

Legal challenges to address

The challenge with electronic transferable records ("ETRs"), such as the eBL, has been the recognition of an authoritative copy and the transfer of rights accompanying the transfer of possession. Where the legal holder of a bill is conferred the right to physical delivery of goods, that holder wants the certainty that their rights are unique and that there isn't a second holder with a competing claim to the same goods. However, electronic documents are by their very nature replicable, and the sending of a document (e.g. an email) is in fact a process of making a copy of the originating document elsewhere.

Any law must, accordingly, address the requirements of functional equivalence, i.e. the electronic document must be:

- 1 in writing;
- 2 capable of being signed electronically;
- 3 capable of being confirmed to be an authoritative copy;² and
- 4 capable of being held exclusively and for exclusive possession to be transferred.

Where does the law stand globally?

The current global proposition is the UNCITRAL model law on ETRs. Under the Model Law, ETRs have a functional equivalence to transferable documents

¹ essDOCS, Bolero, E-title, edoxOnline, WAVE, CargoX and TradeLens

² i.e. it must be capable of being subject to control from the time of its creation to the time it ceases to have any effect or validity whilst also retaining its integrity, with all information remaining complete and unaltered.

or instruments. Although the Model Law was adopted in 2017, until this year only Bahrain had adopted it (in 2018), reflecting a reticence to modernise among those countries with long established norms and practices.

However, in 2021 Bahrain was joined by the Abu Dhabi Global Market and in March 2021, significantly, Singapore's Electronic Transactions (Amendment) Bill came into effect, essentially adopting the Model Law on functional equivalence. Given the rivalry between England and Singapore, with each vying to be seen as the governing law of choice in sale contracts and their ancillary shipping contracts, it seems only a matter of time until English law follows suit.

Currently, English law does not recognise "indorsement, delivery or other transfer" of a BL, sea waybill or ship's delivery order by way of an electronic system and therefore an eBL does not have the same function as a conventional BL.

Developments in English law

The position is, however, changing, with the government requesting an urgent review by the Law Commission so as to make recommendations to allow for the possession of trade documents in electronic form. The first consultation paper has recently been issued on that subject.³ The guiding principles are:

- 1 adopting the least interventionist solution;
- 2 technological neutrality; and
- 3 international alignment.

In addition, the Law Commission is clear that any legislation will be designed with a "*keen awareness*" of the Model Law, and will seek, as far as possible, to align the principles while being cognisant of the peculiarities of English law.

It is important to note that the initial project is not all-encompassing. The documents that it is projected to consider are:

- i. bills of exchange;
- ii. promissory notes;
- iii. bills of lading;
- iv. ship's delivery orders;
- v. warehouse receipts;
- vi. marine insurance policies; and
- vii. cargo insurance certificates.

Exceptions are sea waybills and air waybills, bearer bonds and other documents of title. In the next stage of the process, the Law Commission is seeking comments on its consultation paper and draft bill.⁴ Watch this space ...

Final thoughts

Aside from steps being taken, both in England and Wales and in other jurisdictions, one of the biggest barriers to widespread adoption is interoperability. Both buyers and sellers will want to ensure that whatever system they are using is either (1) the same as the system all other keys players are using; or (2) capable of communicating with other systems seamlessly. This requires high levels of co-operation among global players, to agree standards for e-documents that allow different networks to understand them.

This is a hurdle that a change in the law cannot necessarily address, but it is an essential step on the journey to ubiquity.

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³ <https://www.lawcom.gov.uk/project/electronic-trade-documents/>

⁴ Copy available: [Electronic-trade-documents-CP.pdf](#) [see appendix 4]