

# ELECTRONIC TRADE DOCUMENTS BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Electronic Trade Documents Bill [HL] as introduced in the House of Lords on 12 October 2022 (HL Bill 57).

- These Explanatory Notes have been developed by the Department for Digital, Culture, Media and Sport (DCMS) in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Bill is concerned with certain types of documents used in trade and trade finance whose functionality depends on their being capable of being (physically) possessed. The current law in the United Kingdom does not recognise the possibility of possessing electronic documents; possession is associated only with tangible assets. These documents cannot therefore be used effectively in electronic form.
- 2 The Bill gives effect to the recommendations of the Law Commission for England and Wales to allow for the legal recognition of such documents in electronic form. It does so by providing that a trade document in electronic form that satisfies the criteria set out in the Bill (that is, an “electronic trade document”) is capable of possession. In providing for the possessability of electronic trade documents that fall within its scope, the Bill enables such documents to have the same legal recognition and functionality as their paper counterparts. Furthermore, the Bill sets out provisions relating to the use of electronic trade documents in practice, such as indorsement and change of medium between electronic and paper trade documents. It also repeals sections 1(5) and 1(6) of the Carriage of Goods by Sea Act 1992, and makes consequential amendments to section 89B(2) of the Bills of Exchange Act 1882.

## Policy background

- 3 International trade involves moving goods across borders in order to get them from the seller to the buyer. This process typically involves multiple actors, including those involved in transportation, insurance, finance and logistics. One trade finance transaction typically involves 20 entities and between 10 and 20 paper documents, totalling over 100 pages. In a transaction covered by a bill of lading, for example, it is common to find 50 sheets of paper in a package of shipping documents that must be exchanged between as many as 30 different parties.
- 4 Despite the size and sophistication of the international trade market, many of its processes, and the laws underlying them, are based on practices developed by merchants hundreds of years ago. In particular, international trade still relies to a large extent on a special category of document that entitles the holder to claim performance of the obligation recorded in the document, and to transfer the right to claim performance of that obligation by transferring (physical) possession of the document. The document is said to “embody” the obligation, which may be to deliver goods or to pay money, rather than merely to evidence it. For example, a bill of lading is a document used in the carriage of goods by sea which, when transferred to a buyer (or any subsequent lawful holder), gives that holder constructive possession of the goods described in the bill, and a right to claim delivery of them from the carrier.
- 5 The law governing these documents is premised on the idea that they can be physically held or “possessed”. For example, in the Bills of Exchange Act 1882 (which applies to promissory notes and bills of exchange), the terms “bearer”, “holder” and “delivery” are defined by reference to possession. The current law in the United Kingdom does not recognise the possibility of possessing electronic documents given their intangible nature; possession is associated only with tangible assets.<sup>1</sup>

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<sup>1</sup> 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.

- 6 Industries using these documents are therefore prevented by law from moving to a fully paperless process. To give a sense of the enormous amount of paperwork international trade generates, consider that the world’s largest containerhips can carry 24,000 twenty-foot containers at any one time on any one voyage. For each one of those cargoes, paper transport documentation has to be produced, and must be processed manually to go from the shipper of the goods to the ultimate buyer at destination, sometimes through numerous intermediaries. The effect of the current law is that much of the documentation needs to be in hard copy. The Digital Container Shipping Association (“DCSA”) has estimated that 16 million original bills of lading were issued by ocean carriers in 2020, and that more than 99% of these were in paper form.<sup>2</sup>

## Legal background

- 7 The Department for Digital, Culture, Media and Sport (DCMS) asked the Law Commission to make recommendations to solve the problems caused by the law’s approach to the “possession” and transfer of trade documents in electronic form. DCMS also asked the Law Commission to prepare draft legislation to implement those recommendations. The Law Commission consulted on provisional proposals and draft legislation in April 2021,<sup>3</sup> and published its final recommendations for reform, along with the Bill, in March 2022.<sup>4</sup>
- 8 The Law Commission’s recommendations extended only to England and Wales. DCMS, in discussion with the Territorial Offices and Devolved Administrations, has extended the extent of the Bill to the whole of the UK.
- 9 The policy objective of the Bill is to allow for certain trade documents in electronic form that satisfy specific criteria to be recognised in law as capable of possession, so that they can have the same legal treatment, effects and functionality as their paper counterparts. The Bill and these explanatory notes refer to these documents as “trade documents”, but in fact they are a subset of documents used in trade and trade finance, which are dependent on possession for their operation, as described above.
- 10 The Bill recognises that not every electronic document has the same functionality. As such, only trade documents in electronic form that satisfy particular criteria, designed to replicate the salient features of paper documents, are considered possessable under the Bill. These criteria include that:
- a. in order to prevent double spending, it must not be possible for more than one person (or persons acting together) to exercise control of the document at any one time; and
  - b. when the document is transferred, any person who was able to exercise control of the document before the transfer loses the ability to do so.
- 11 In addition, a reliable system must be used to allow any person who is able to exercise control of the document to demonstrate that fact, to protect the document from unauthorised interference, and to ensure the document can be distinguished from any copies.

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<sup>2</sup> DCSA, Streamlining international trade by digitalising end-to-end documentation (February 2022) p 3, [https://go.dcsa.org/ebook-ebf/?utm\\_source=dcsa&utm\\_medium=display&utm\\_campaign=ebook-ebf](https://go.dcsa.org/ebook-ebf/?utm_source=dcsa&utm_medium=display&utm_campaign=ebook-ebf)

<sup>3</sup> Digital assets: electronic trade documents (2021) Law Commission Consultation Paper No 254 <https://www.lawcom.gov.uk/project/electronic-trade-documents>

<sup>4</sup> Electronic trade documents: Report and Bill (2022) Law Com No 405, <https://www.lawcom.gov.uk/project/electronic-trade-documents>

- 12 The intended effects of the Bill are to:
  - a. reduce transaction costs associated with paper trade documents by reducing resourcing and operational costs, and increasing productivity;
  - b. increase efficiency and encourage business growth by facilitating the development of digital products and services;
  - c. deliver environmental benefits due to a reduction in paper documents; and
  - d. increase security and transparency in documentation.
- 13 Further policy and background to the Law Commission's recommendations is provided in its final report and the consultation paper that preceded it.<sup>5</sup>

## Territorial extent and application

- 14 Clause 7(1) sets out that the Bill extends to England and Wales, Scotland and Northern Ireland, save for clause 3(4) which extends only to Scotland.
- 15 The Sewel Convention states that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned. The Bill falls outside the legislative competence of the Northern Ireland Assembly and Senedd Cymru, but the majority of the provisions in the Bill are considered to fall within the devolved competence of the Scottish Parliament. In line with the Sewel Convention, the UK Government will seek the legislative consent of the Scottish Parliament for the provisions that engage the legislative consent motion process.
- 16 See Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

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<sup>5</sup> Both available at <https://www.lawcom.gov.uk/project/electronic-trade-documents>

# Commentary on provisions of Bill

## Summary of the Bill

17 The Bill contains seven clauses, which can be summarised as follows.

- a. Clause 1 contains a definition of “paper trade document”. It sets out the criteria that a document must satisfy in order to qualify as a “paper trade document”. It also sets out a non-exhaustive list of trade documents that are commonly used in connection with trade in, or transport of, goods, or financing such trade or transport. This clause effectively sets the scope for the types of trade document that could be caught by the Bill.
- b. Clause 2 contains a definition of “electronic trade document”. It sets out the criteria that a trade document in electronic form must satisfy in order to qualify as an “electronic trade document”, and to therefore be capable of possession under the Bill.
- c. Clause 3 provides for the possession and indorsement of electronic trade documents. It also provides that an electronic trade document has the same effect as an equivalent paper trade document, and that anything done in relation to an electronic trade document has the same effect (if any) as it would have in relation to an equivalent paper trade document. It further provides that electronic trade documents are to be treated as corporeal moveable property for the purposes of any Act of the Scottish Parliament relating to the creation of a security in the form of a pledge over moveable property.
- d. Clause 4 provides for a change of medium or form; that is, the conversion of a paper trade document into an electronic trade document, or an electronic trade document into a paper trade document.
- e. Clause 5 contains an “opt-out” provision which, if applicable, will mean that clauses 3 and 4 of the Bill will not apply to the relevant electronic trade document. It also excludes uncertificated securities from the scope of clauses 1 to 4 of the Bill, and provides a power to amend clause 5 so as to amend or remove the uncertificated securities exception, or to add to the list of documents or instruments excluded (subject, where relevant, to prior consultation with the Scottish Ministers).
- f. Clause 6 is the consequential amendments clause. It sets out an amendment to the Bills of Exchange Act 1882, and provides for the repeal of certain provisions of the Carriage of Goods by Sea Act 1992.
- g. Clause 7 sets out the territorial extent of the Bill, the commencement date and the short title.

## Commentary on clauses of the Bill

### Clause 1: Definition of “paper trade document”

- 18 Clause 1(1) defines the types of trade documents which may fall within the scope of the Bill. It does this by setting out three criteria that a document must satisfy in order to qualify as a “paper trade document” for the purposes of the Bill.
- 19 Clause 1(1)(a) requires the document to be in paper form. This is because the Bill is concerned with electronic forms of trade documents that are currently used in paper form.
- 20 Clause 1(1)(b) requires the document to be of a type commonly used in connection with trade in or transport of goods, or financing such trade or transport of goods. The purpose of this

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clause is to narrow the ambit of the documents that fall within the scope of the Bill. Its purpose is to exclude documents not of a type commonly used in connection with trade in or transport of goods (or financing thereof) but which may otherwise fall within the scope of the Bill because they satisfy the remaining requirements in clause 1. To provide certainty and clarity, and to prevent potential arguments that a broader range of documents fall within the scope of the Bill (such as stock transfer forms, provisional allotment letters and other documents routinely used in financial or money markets) the Bill is limited to documents of a type commonly used in connection with trade. In addition, the document need only be commonly used in trade in at least one part of the United Kingdom to satisfy clause 1(1)(b). This wording prevents the situation from arising whereby a document is of a type commonly used in trade in England and Wales, for example, but not in Scotland (and would otherwise fall outside the scope of the Bill).

- 21 Clause 1(1)(c) provides that possession of the document must be required for a person to claim performance of an obligation. Possession may be required as a matter of law, commercial custom, usage or practice. This clause is an “umbrella” provision and allows for a broad range of documents to fall within the scope of the Bill. The intention behind this clause is to ensure that (subject to the remaining clauses of the Bill) any document whose functionality requires it to be possessed falls within the scope of the Bill, regardless of its precise legal or commercial nature.
- 22 For example, warehouse receipts and ship’s delivery orders are not documents of title at common law, but possession is generally an important part of how these documents operate in practice. Possession of these documents may be required in certain circumstances as a matter of practice for a person to claim performance of an obligation, or for certain effects to follow under statute (for example, the Sale of Goods Act 1979). Whether possession is required for the operation of such documents depends on the manner in which they are made out, and the context in which they are used. When possession is relevant as a matter of practice for a person to claim performance of an obligation, these documents fall within the scope of clause 1(1)(c). The umbrella provision also ensures flexibility insofar as certain documents may not fall within its scope today, but could do so if a commercial custom or practice were to develop requiring possession of those documents in order for them to fulfil their legal and commercial functions. For example, although consignment notes are already used in electronic form and so are not generally required to be possessed, they would be covered by the umbrella provision if there were circumstances in practice where they were required to be possessed in order for a person to claim performance of an obligation.
- 23 Clause 1(2) sets out a non-exhaustive list of documents that are commonly used in connection with trade in or transport of goods, or financing such trade or transport. The documents listed in clause 1(2) are key trade documents in widespread use, and have therefore been specifically listed for the sake of certainty and clarity. A particular document on the list will only be caught by the Bill if it nevertheless satisfies the remaining requirements in clause 1(1).
- 24 For example, the term “bill of lading” is broad and encompasses various types of document, including, for example, “shipped” or “on-board” bills of lading, “straight” bills of lading (usually marked as “non-negotiable”) and multimodal bills of lading (which can classify as “received for shipment” bills of lading). The reference to “a bill of lading” in clause 1(2)(c) of the Bill is intended to cover all of these types of bill of lading, meaning that such documents are commonly used in connection with trade for the purposes of clause 1(2)(b), and will therefore fall within the scope of the Bill, provided possession is a necessary aspect of their functionality.

## Clause 2: Definition of “electronic trade document”

- 25 Clause 2 sets out the criteria that a document in electronic form must satisfy in order to qualify as an “electronic trade document” for the purposes of the Bill.

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### **Same information as the equivalent paper trade document**

- 26 Some paper trade documents that fall within the scope of the Bill have requirements as to the information they must contain in order to qualify as that trade document. These requirements may derive from statute, common law, custom or practice. In order to qualify as an “electronic trade document” for the purposes of the Bill, a document in electronic form must contain the same information as would be required to be contained in the paper equivalent. Clause 2(1) effectively provides for this requirement.
- 27 The purpose of this requirement is to establish the link between the document in electronic form and its paper counterpart. It means that, for example, not every electronic payment instruction will become a bill of exchange and therefore subject to the requirements of the Bills of Exchange Act 1882. An electronic promissory note would need to include an unconditional promise to pay the bearer a sum certain in money in order to fall within the scope of the Bill. Importantly, this clause does not introduce any new requirements as to the information that a document in electronic form should contain. Rather, it requires information that must be contained in a paper trade document to also be contained in any electronic form of that document for it to fall within the scope of the Bill.

### **Concept of “document” in electronic form**

- 28 Clause 2(2) sets out the concept of “document” in electronic form for the purposes of the Bill. It provides that the information in electronic form, as well as any other information with which it is logically associated that is also in electronic form, constitutes an “electronic trade document” for the purposes of the Act (emphasis added), provided a reliable system is used to achieve certain functionality in relation to that document.
- 29 In practice, a document in electronic form may have 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 (for example, a .pdf file or other type of data that can be accessed and displayed in a human readable way by a computer). Depending on the technology being used, this could be a unique cryptographic “token” allocated to a system user. The data string or data structure is recorded on or across one or more ledgers, structured records or registers.
- 30 Clause 2(2) ensures that the various components of a trade document in electronic form are regarded as a single document, even though they may perform different functions. For example, the requirement that an electronic document must contain the same information as its paper counterpart will likely be fulfilled by the human readable component of the document. This component is logically associated with the controllable data structure. On the other hand, it is likely that control of the document will be exercised by means of the document’s underlying data structure (such as the token).
- 31 “Logically associated” in clause 2(2) is intended to mean electronically connected to, linked to, or otherwise cross-referenced to. This wording enables the use of different models for electronic trade documents’ management systems.

### **Reliability of an electronic trade document system**

- 32 Clause 2(2) requires that a reliable system is used to ensure that the document in electronic form has certain features or functionality designed to replicate the salient features of a paper trade document. “Reliable” in this context means that an electronic system meets certain standards in the way that it operates.
- 33 Clause 2(5) sets out a list of non-exhaustive factors (based loosely on article 12 of the UNCITRAL Model Law on Electronic Transferable Records) that a court may take into



account when considering whether an electronic trade document system is reliable. In requiring a system to be reliable, and in setting out various factors that may be taken into account when assessing reliability, the Bill does not prescribe or endorse any particular type of technology. It simply provides a non-exhaustive list of factors that a court may take into account when assessing the reliability of a particular electronic trade document system.

### **Distinguishable from copies**

- 34 Clause 2(2)(a) requires the document in electronic form to be identifiable so that it can be distinguished from any copies. The purpose of this requirement is to be able to determine which is “the document”, and which is a copy, in order to ensure that double spending does not occur and that the copy is not used as the original.
- 35 Many of the existing systems in development allow users to retain access to copies of documents for their records. This may be particularly useful where parties wish to retain a copy after they have transferred or disposed of the electronic trade document itself. This is equivalent to a party being able to take a photocopy or scan of a paper document before it is transferred or disposed of, which does not interfere with possession of the original. Clause 2(2)(a) does not prevent parties from holding copies of electronic trade documents if they so wish. Instead, it requires the document in electronic form to be distinguishable from any copies of it.

### **Integrity of an electronic trade document**

- 36 Clause 2(2)(b) requires the document in electronic form to retain its integrity. “Integrity” in this context means that the document has not been interfered with or altered without the requisite authority. Integrity is important for establishing that a document is original or authentic.
- 37 The purpose of the reliability and integrity requirements is to promote users’ trust in systems which host electronic trade documents. This trust is essential for electronic trade documents to be used widely, especially given the potential risk of cybercrime.

### **Exclusive control**

- 38 Clause 2(2)(c) requires that it must not be possible for more than one person to exercise control of the document at any one time. Clause 2(3)(a), discussed below, provides that a person exercises control of a document for the purposes of the Bill when they use, transfer or otherwise dispose of it.
- 39 Requiring that it must not be possible for more than one person to exercise control of the document at any one time is not the same as precluding multiple people from having control at the same time. 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 use, transfer or dispose of the document). However, what is important for the document in question to qualify as an electronic trade document is that, even if multiple people have the private key or other means of control, only one person can utilise that key or means of control at any one time. The question of who actually has control is therefore separate and distinct from the question of the features that a document in electronic form must have in order to qualify as an electronic trade document for the purposes of the Bill. The exclusive control requirement contained in clause 2(2)(c) is aimed at addressing the double spend issue so that, for example, two people with the relevant private key cannot both transfer the same document to two different transferees independently of each other.
- 40 A system is not excluded from the scope of the Bill simply because the system operator or administrator, as well as the user, is able to exercise control of the document in electronic form. Since clause 2(2)(c) focuses on exercising control, rather than having control, this

removes any concern that such a system would be excluded. Systems where the system operator or administrator is able to exercise control of the document fall within the scope of the Bill (assuming they meet the other criteria). The requirement that it must not be possible for more than one person to exercise control of the document at any one time ensures that where, for example, the user is transferring or otherwise using the document (thereby exercising control), the system administrator cannot also do so.

### **Identification of the persons who are able to exercise control**

- 41 Clause 2(2)(d) requires that any person who is able to exercise control of the document in electronic form is able to demonstrate their ability to do so. The electronic trade document system must be capable of allowing for the identification of any person who is able to exercise control of the document, regardless of whether any person is in fact exercising that control.
- 42 This requirement reflects the association between the document in electronic form and the person or persons who are able to exercise control of that document. It ensures that, for a document to be an electronic trade document, the document must be capable of being uniquely associated with the person or persons who are able to exercise control of it. Depending on the underlying technology, this association could be achieved by the system linking the document with a particular address or security credentials, and a person being able to demonstrate that they have the relevant security credentials or other means of control.
- 43 This clause does not mean that, by looking at the system itself, it must be possible to see who is able to exercise control. Instead, it requires 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 must allow each of those three persons to identify themselves as persons who are able to exercise control by showing or using their private key.

### **Divestibility**

- 44 Clause 2(2)(e) requires the document in electronic form to be divestible. This means that transfer of the document must necessarily entail a transfer both of the document and of the ability to exercise control of it (unless the 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 – the double spend problem. Divestibility singularises the right to claim performance of the obligation recorded in the document.
- 45 Suitable objects of property rights are necessarily divested on transfer. For physical objects, this is inherent in their material nature. For example, in the paper world, if Alice gives a paper bill of lading to Bob, Bob then has the bill of lading and Alice does not. The bill of lading is no longer in Alice's physical possession, nor does she have factual control over it. Alice has been divested of the paper trade document and cannot purport to transfer it to Charlie. Similarly, if a paper bill of lading is in a vault and Alice and Daisy both have the passcode to the vault (and therefore concurrent control and possession of the bill of lading), if Alice were to take the paper bill lading out of the vault and give it to Bob, both Alice and Daisy would lose factual control and possession of the document.
- 46 The divestible nature of a paper trade document is crucial to its ability to be possessed. Clause 2(2)(e) aims to replicate this feature in the electronic context by requiring that when an electronic trade document is transferred, the transferor (and any person who was able to exercise control concurrently with the transferor) is fully divested of the document. How divestibility will work in practice will largely depend on the type of electronic trade document system in question.
- 47 Importantly, the word "transfer" in clause 2(2)(e) is being used in a factual rather than a legal sense. It is intended to mean the electronic equivalent of handing over a piece of paper. It is

not intended to refer to the legal process by which the transferee becomes the valid holder of the document, which may require additional elements (such as acceptance or indorsement) to be satisfied.

- 48 The ability to retain a copy of the electronic trade document after transfer or disposal would not, in and of itself, prevent the divestibility requirement from being satisfied, and would not constitute retention of control of the document.

### **What it means to exercise control**

- 49 Clause 2(3)(a) sets out what it means to exercise control of a trade document in electronic form for the purposes of the Bill. A person exercises control when they use, transfer or otherwise dispose of the document (regardless of whether they have a legal right to do so). The concept of control within the meaning of clause 2(3)(a) is a factual rather than a legal or rights-based enquiry.
- 50 “Use” of a trade document in electronic form constitutes an independent and separate exercise of control, in addition to transferring or disposing of the document. There may be situations where a party is able to use the document without also being able to transfer or dispose of it. This would be the case where, for example, a party is able to hold or retain the document in order to prevent any dealings in the document by anyone else. In such a case, the party who is able to retain the document has the ability to use the document. For example, where a pledge is granted, the pledgee, to whom the document is transferred, may be precluded by the system from further transferring or disposing of it until the debtor has either repaid the loan or defaulted. This does not, however, change the fact that the document has been transferred to the pledgee. The pledgee retains the document, and can thereby prevent any dealings in the document by anyone else. In this case, the pledgee is using the document, notwithstanding that they cannot transfer or otherwise dispose of it.
- 51 Other examples of acts that constitute “use” of the document include requesting a change of medium, requesting an amendment of the document, adding an indorsement or an acceptance to the document, and presenting or surrendering the document.

### **Reading or viewing a document**

- 52 Clause 2(4) provides that reading or viewing a trade document in electronic form does not, of itself, constitute “use” of the document for the purposes of the Bill. Reading or viewing a trade document could arise both where a person does not otherwise have factual control of the document (and therefore the ability to exercise control), and where they do. For example, a person could have read-only access to a document, allowing them to view and read the document but nothing more. Such a person does not have the ability to use that document for the purposes of the Bill. This means that they do not have control (or the ability to exercise control). For example, a stevedoring service provider (who loads and offloads cargo to or from a ship) might need to check the information in a bill of lading in the course of unloading the goods. If the service provider is only given access to the document over the system for this limited purpose, and simply views the document, this does not constitute “use” of the document for the purposes of the Bill.
- 53 In other cases, a person who has the ability to use, transfer or otherwise dispose of the document (and therefore the ability to exercise control) would ordinarily also be able to access the document to read or view it. If, however, the person only reads or views the document in a particular instance, that does not constitute “use” of the document and, as such, the person cannot be said to be exercising control of the document for the purposes of the Bill. This is the case notwithstanding the fact that the person would otherwise have control of the document that they could exercise (because, for example, they could transfer or otherwise dispose of it). In theory, this means that someone could exercise control of a document while another party with control is simply reading or viewing it.

- 54 To “use” a trade document in electronic form is, therefore, to utilise or retain the document to achieve a particular purpose. It includes causing something to happen (or preventing something from happening) to the document. Merely reading or viewing the document does not, in and of itself, constitute “use” of the document in a particular instance.

### **Persons acting jointly**

- 55 Clause 2(3)(b) of the Bill covers the situation where a group of persons acting jointly can exercise control of the trade document in electronic form. This could arise, for example, in a multi-signature arrangement, where several people have different (fragments of) keys, with a certain combination or number of them being necessary to effect a transfer of the document. In this case, the persons who can exercise control jointly over the document are treated as one person for the purposes of clause 2(2)(c). As such, even though multiple persons (acting jointly) can exercise control of the document, these arrangements are still capable of satisfying the exclusive control requirement in clause 2(2)(c).

## **Clause 3: Possession, indorsement and effect of electronic trade documents**

### **Possession and indorsement of an electronic trade document**

- 56 Clause 3(1) provides that a person may possess, indorse and part with possession of an electronic trade document. This clause is intended to remove the legal blocker that currently prevents trade documents in electronic form from being possessed. As a result of this clause, electronic trade documents are capable of possession.
- 57 The Bill does not set out what constitutes possession of an electronic trade document. Since possession is a relative and fact-specific concept, what constitutes possession of an electronic trade document in any particular context will be assessed as a matter of common law. The common law approach to establishing possession as a matter of fact considers two elements: factual control and intention (see for example *The Tubantia* (No 2) [1924] P 78; *Mainline Private Hire Ltd v Nolan* [2011] EWCA Civ 189; [2011] CTL 145). Who has possession of something at any one time will therefore depend on the type of control they have in respect of it and their intentions in relation to it, assessed against the control and intentions of other people who may also have a claim. Although existing case law concerning possession relates to tangible assets, many of the principles are capable of application to electronic trade documents.
- 58 Although possession is often described in terms of exclusive control, the existing common law admits many situations in which more than one person has control of a tangible asset. Exclusivity means one person, or group of persons acting in concert, can exclude others from having control of that object. Exclusive control is not the same as singular control. Control may be consensually shared (for example, where multiple people acting together all have knowledge of the relevant private key and any one of them may use it in furtherance of mutual objectives). In other cases, control may be concurrent but the persons who have control are acting independently (for example, where multiple people have knowledge of the relevant private key or security credentials facilitating control of an electronic trade document). Control may also be joint (for example, in a multi-signature arrangement as described above). The important feature of exclusive control is the ability it provides to limit access and use; it is not nullified simply by virtue of being widely shared on any given set of facts.
- 59 Intention is an integral part of the enquiry whether a document is in fact possessed by a particular person. Whether a person with the ability to control an electronic trade document has the requisite intention to possess it will depend on the facts of the case and the evidence available as to their state of mind. Their intention may also need to be assessed relative to that of others.

- 60 Parties may also have other possessory interests in electronic trade documents, including legal possession (being the right to possess rather than possession in fact). The range of potential relationships between persons and electronic trade documents is analogous to that between persons and paper documents (or indeed any other tangible object).
- 61 Clause 3(1) provides that a person may part with possession of an electronic trade document. The Bill does not specify what amounts to a transfer of possession. However, clause 2(2)(e) (the divestibility criterion) ensures that when a person transfers an electronic trade document (meaning the electronic equivalent of handing over a piece of paper), the transferor necessarily loses the ability to exercise control of the document. So too do all the people who shared the ability to exercise control of the document with the transferor (unless they are themselves a transferee). Transfer of (factual) possession of an electronic trade document therefore entails a loss of control by the transferor. To gain possession, the transferee(s) must have the requisite intention to possess the electronic trade document. Depending on the circumstances, the transferor may retain some rights over the document, for example, if the document is released to a debtor subject to a trust in favour of the creditor.
- 62 Clause 3(1) further provides that a person may indorse an electronic trade document. Indorsement is an essential part of the transfer of many trade documents and any rights which attach to them. Indorsement is an annotation in writing on a document of title instructing that the obligation recorded therein be performed to the order of a named person or simply “to order”. There is a business practice of indorsing paper documents on their reverse, which reflects the origins of the word “indorsement”: the Latin “dorsus”, meaning “back”. Unlike a paper document, an electronic document may not have a “back”. The purpose of providing expressly for indorsement of an electronic trade document is to ensure that an electronic indorsement will be valid regardless of where it is located on the document.

### **Equivalence between paper and electronic trade documents**

- 63 An electronic trade document should be the same in law as the equivalent paper trade document. Electronic and paper trade documents should have the same legal effect and functionality, and the same rules should apply to both. Further, anything done in relation to an electronic trade document should have the same effect (if any) as it would have in relation to a paper trade document. Clauses 3(2) and 3(3) are intended to give effect to these overarching policy intentions.
- 64 Clause 3(2) provides that an electronic trade document has the same effect as an equivalent paper trade document. This means that where, for example, a paper trade document can be said to “embody” an obligation (which may be to deliver goods or to pay money) the electronic equivalent has the same legal effect insofar as it also embodies the relevant obligation. The holder of the electronic trade document can enforce the obligation in the same way as a holder of the paper equivalent.
- 65 Clause 3(3) provides that anything done in relation to an electronic trade document has the same effect (if any) as it would have in relation to an equivalent paper trade document. For example, where the transfer or delivery of possession of a paper trade document is the means by which the right to claim performance of the obligation embodied in that document is transferred, then transfer or delivery of possession of the equivalent electronic trade document will similarly be required. In other words, the right to claim performance of the obligation embodied in the document, whether in paper or electronic form, is generally transferred by this means and not by assignment or assignation. This is so regardless of the fact that an electronic trade document is regarded as intangible (or incorporeal); as a result of the Bill it can nevertheless be possessed. What constitutes a transfer or delivery of possession of an electronic trade document will look different from handing over a physical paper trade document. The transfer of possession will be effected on the system – but the act is the same,

that is, transfer of possession rather than assignment/assignation. Assigning the right to claim performance of the obligation would not be sufficient where assignment in relation to the equivalent paper trade document would not be sufficient to transfer the document, and clause 3(3) ensures that the effect of assignment in relation to both the electronic and paper trade document is the same. Clause 3(3) therefore ensures that the same process of transferring the document applies in relation to a trade document, whether in electronic or paper form.

- 66 A similar result arises in the context of security interests. Certain paper trade documents can be subject to possessory securities (for example, pledge) or non-possessory securities (for example, charge). To effect a possessory security, there has to be a transfer of possession of the relevant paper trade document to the creditor. Because the Bill provides for electronic trade documents to be possessed, it will be possible to make them subject to possessory security arrangements. In order to effect a possessory security in relation to an electronic trade document, there has to be a transfer of possession. Anything less would not be sufficient because that action in relation to the equivalent paper trade document would not be sufficient. Clause 3(3) therefore entails a transfer of possession of the electronic trade document, and this has the same effect as a transfer of possession of the equivalent paper trade document.
- 67 In addition, any act which amounts to the electronic equivalent of delivery, presentment, amendment, acceptance or rejection, or surrender will have the same effect as it would have in relation to a paper trade document. For example, delivery of a bill of exchange is defined as “the transfer of possession, actual or constructive, from one person to another”.<sup>6</sup> Determining what constitutes delivery of an electronic bill of exchange will therefore entail assessing whether there has been a “transfer of possession” of the electronic document. At its most basic, transfer of possession as a matter of fact requires a transfer of control from the transferor. Determining what constitutes “delivery” of a particular electronic trade document will therefore require an assessment of the features of the electronic trade document system in question, and the evidence available.
- 68 These clauses are not intended to overcome or circumvent (statutory or other) requirements applicable to paper trade documents. Rather, they are intended to ensure that electronic and paper trade documents have equivalence in all respects, are dealt with in the same way, and that the same substantive law applies to “trade documents” whether in paper or electronic form.

### **Interaction with the Scots law relating to the creation of security in the form of a pledge over moveable property**

- 69 Clause 3(4) is intended to address the interaction between the Bill and the Moveable Transactions (Scotland) Bill (the “MT(S) Bill”)<sup>7</sup> which was introduced to the Scottish Parliament on 25 May 2022. The MT(S) Bill seeks to reform the Scots law relating to the assignation of claims and to security in the form of pledge over corporeal moveable property and certain incorporeal moveable property (specifically intellectual property or an application for, or licence over, intellectual property).
- 70 There is some crossover between the Bill and the MT(S) Bill in that certain paper trade documents which fall within the scope of the Bill (those which are not negotiable instruments) will also fall within the scope of the MT(S) Bill. The provisions of the MT(S) Bill will therefore apply to some of the trade documents that the Bill is concerned with.

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<sup>6</sup> Bills of Exchange Act 1882, s 2.

<sup>7</sup> <https://www.parliament.scot/bills-and-laws/bills/moveable-transactions-scotland-bill>

- 71 In light of the policy intention behind the Bill, which is to ensure that an electronic trade document is the same in law as the equivalent paper trade document, clause 3(4) is intended to ensure that the MT(S) Bill will have the same effect as regards an electronic trade document as it would have for the equivalent paper trade document.
- 72 The provisions in Part 2 of the MT(S) Bill specifically relate to the creation of possessory and statutory pledges over corporeal moveable property (and certain incorporeal moveable property such as intellectual property). These provisions are premised on corporeal and incorporeal moveable property being treated in different ways. It would therefore appear that paper trade documents within the scope of the MT(S) Bill could be the subject of such pledges, as corporeal moveable property, but the position is less clear in relation to electronic trade documents, as incorporeal moveable property.
- 73 Clause 3(4) is intended to ensure that electronic trade documents should be capable of being the subject of possessory and statutory pledges under the MT(S) Bill where the equivalent paper trade documents can be the subject of such pledges. It does so by providing that electronic trade documents should be treated as corporeal moveable property for the purposes of any Act of the Scottish Parliament relating to the creation of a security in the form of a pledge over moveable property.

#### Clause 4: Change of form or medium

- 74 Clause 4 allows for change of form or medium of a trade document from electronic to paper form, and from paper to electronic form. It uses the word “converted” to describe the act of changing the medium of a trade document; it does not refer to the tort of conversion. The purpose of clause 4 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 to provide for the consequences thereof. Many of the documents that the Bill covers are used in cross-border transactions spanning multiple jurisdictions and involving contracts governed by different laws. 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. For the sake of completeness, a paper trade document may also be converted into an electronic trade document.
- 75 Upon a change of medium, it is only the medium or form of the document that changes. If there is any substantive change to the content of the document upon the purported change of medium, this would constitute a fresh issue, not a change of form or medium. Where it is only the medium of the document that is changing (rather than the document being re-issued), the date and place of issue of the document in its new medium would be the same as that of the document in its old medium.

#### **Requirements for a valid change of form**

- 76 Clause 4(1) provides for the change of medium (or conversion) of a trade document from electronic to paper form and from paper to electronic form, provided two conditions are met.
- 77 Clause 4(1)(a) requires a statement that the document has been converted to be included in the document in its new form. For example, a document converted from paper to electronic form must contain, in that electronic form, a statement that it has been converted from paper. The statement need only specify that the document has been converted or changed from paper to electronic form; it need not contain additional details. The purpose of this requirement is to ensure that the transferee of a trade document, the medium of which has been changed or converted, is aware that the document was originally issued in a different form or medium. This puts the transferee on notice of a change of medium, helps maintain an audit trail of the document, and enables the transferee to ascertain the document’s genuineness and compatibility with any specific requirements.

78 Clause 4(1)(b) requires any contractual or other requirements relating to the conversion of the document to be complied with. Systems currently in use, which provide electronic alternatives to paper trade documents, generally operate in accordance with underlying contractual provisions governing a change of medium. The issuer, as well as the person in possession, would generally need to agree to the change of medium. The purpose of this requirement is to ensure that such arrangements are not rendered redundant or overridden. The intention is to ensure that a change of medium is permissible at law, but not to establish how or by whom it may be done.

### **Consequences of compliance with the requirements for a change of form**

- 79 Clause 4(2) sets out the consequences of a valid change of form in accordance with the provisions of clause 4(1). It provides that when a document is converted in accordance with clause 4(1), the document in its old form ceases to have effect, and the rights and liabilities relating to the document continue to have effect in relation to the document in its new form.
- 80 This clause ensures that, upon a change of form or medium in accordance with the requirements set out in the Bill, there is no duplication of the performance obligation because the old form of the document ceases to have effect. In addition, the continuation of the rights and liabilities ensures that a change of medium is precisely that – a change of the form of the document, rather than any substantive change to the rights or liabilities pertaining to the document.

### **Consequences of non-compliance with the requirements for a change of form**

- 81 Since the requirement to include a statement on the trade document in its new medium 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. Similarly, failure to comply with any contractual or other requirements necessary for a change of medium will result in an invalid change of medium for the purposes of the Bill.
- 82 While failure to comply with either of the requirements set out in clause 4(1) would result in an invalid change of medium for the purposes of the Bill, the document created as a result of the purported conversion may nonetheless constitute a newly issued trade document in its own right, with its own date and place of issue. For example, if the purported change is from paper to electronic, but the parties forget to include a statement that the document has been converted, the electronic document could still qualify as an electronic trade document if it satisfies the requirements of the Bill. However, since the document is not validly converted under the Bill, this could lead to a duplication of the promisor's obligation. This is because, in the absence of a valid change of medium, the document in its old (paper) form will not automatically cease to have effect. It would need to be separately cancelled and taken out of circulation in order to no longer bind the obligor.

## **Clause 5: Exceptions**

- 83 Clause 5(1) provides that clauses 3 and 4 of the Bill do not apply in relation to an electronic trade document if an intention that clause 3 should not apply appears in, or can reasonably be inferred from, the document or terms that have effect in relation to it. The purpose of this sub-clause is to ensure that the Bill is facilitative insofar as parties do not have to rely on possessory concepts in relation to their electronic trade document if they do not wish to. That is, parties can, if they so choose, “opt-out” of the effects of the Bill. This means they can continue to rely on other contractual workarounds or mechanisms for using documents in electronic form, rather than relying on the possessory concepts in the Bill. This clause is drafted broadly so as to include a situation where the terms of issue, or the terms otherwise governing the manner of holding and transferring the document, contemplate or provide for an arrangement other than one based on possession.



- 84 Clause 5(2)(a) excludes documents or instruments entered in a relevant system under the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) from the scope of clauses 1 to 4 of the Bill. The purpose of this exclusion is to avoid potential confusion that could result from the fact that two statutory regimes in relation to electronic documents or instruments could apply. For example, a type of debt security known as “commercial paper” (which is technically a promissory note) could meet the requirements of the Uncertificated Securities Regulations 2001, and also fall within the scope of the Bill. Since the Uncertificated Securities Regulations 2001 provide for a different statutory regime entirely from one based on possessory concepts, it is preferable for documents or instruments falling under that regime to fall outside the scope of the Bill.
- 85 Clause 5(2)(b) provides a power to further exclude a type of document or instrument from the scope of clauses 1 to 4 of the Bill by specifying that document or instrument in regulations made by the Secretary of State. This power may be exercised in circumstances where it is determined that a type of document or instrument which falls within the scope of the Bill requires more bespoke provisions to allow for its digitalisation, or where a type of document or instrument should not be capable of being used in electronic form. Given that the Bill could lead to a significant change in practice for certain types of documents, it is important that the legislation includes a power to make further carve-outs if it proves necessary or desirable. Any regulations made pursuant to clause 5(2)(b) would not amend clause 5 of the Bill, and could themselves be amended or revoked by further regulations made under that sub-clause. Clause 5(4) provides that the Secretary of State must consult the Scottish Ministers before making regulations under clause 5(2)(b) containing provision with effect in relation to Scotland.
- 86 Clause 5(3) provides that the exception in sub-clause (2)(a) may be amended or removed by regulations made by the Secretary of State. This power may be exercised in circumstances where the Uncertificated Securities Regulations 2001 are amended, thereby necessitating consequential amendments to the exception provision in the Bill.
- 87 Clause 5(5) provides that any regulations made under clause 5 are to be made by statutory instrument, and may include incidental, consequential, transitional or saving provision. Clause 5(6) provides that a statutory instrument containing regulations under clause 5 is subject to the affirmative rather than negative parliamentary procedure.

## Clause 6: Consequential provision

- 88 Clause 6(1) provides for consequential amendments to section 89B(2) of the Bills of Exchange Act 1882 (“Instruments to which section 89A applies”). It effectively provides that section 89A of the Bills of Exchange Act 1882 (“Presentment of instruments by electronic means”) does not apply to anything that is an electronic trade document within the meaning of the Bill. Sections 89A and 89B of the Bills of Exchange Act 1882 envisage a different type of electronic presentment from that provided for by the Bill, which does not involve a physical document. It is appropriate therefore that anything constituting an electronic trade document within the meaning of the Bill is excluded from the scope of these provisions.
- 89 Clause 6(2) repeals sections 1(5) and 1(6) of the Carriage of Goods by Sea Act 1992 (“COGSA 1992”). Sections 1(5) and 1(6) of COGSA 1992 give a power to make regulations to enable bills of lading, sea waybills and ship’s delivery orders to be issued, indorsed, delivered or otherwise transferred by electronic means. Given that bills of lading and ship’s delivery orders fall within the scope of the Bill, the powers provided for in these provisions become redundant with respect to those documents. In addition, even though the Bill does not apply to sea waybills, sea waybills are not transferable, and possession of them is not (either as a matter of law or commercial practice) relevant to the determination of rights and entitlements. As such, the inability to possess sea waybills is not an obstacle to their use in electronic form.

If it were ever the case that possession was relevant to a sea waybill in a particular situation, it would fall within the umbrella provision in clause 1(1)(c) of the Bill.

### Clause 7: Extent, commencement and short title

- 90 Clause 7(1) sets out the territorial extent of the Bill. The Bill extends to England and Wales, Scotland and Northern Ireland, except for clause 3(4) which extends only to Scotland.
- 91 Clause 7(2) makes provision about the coming into force of the Bill. The Bill comes into force at the end of the period of two months beginning with the day on which it is passed.
- 92 Clause 7(3) effectively provides that the Bill has prospective effect only. It achieves this by providing that clauses 3 and 4 of the Bill do not apply in relation to a paper trade document or an electronic trade document issued before the day on which the Bill comes into force. The Bill uses the word “issue” as all the documents with which the Bill is concerned need to be issued before they can be used in the ordinary course of business to achieve certain effects at law. When a particular trade document can be said to be issued will depend on the facts, and the type of document in question. For example, the word “issue” could be said to describe the moment in time when a trade document (where relevant) becomes a document of title.
- 93 Clause 7(3) entails that an electronic trade document issued before the Bill comes into force cannot be possessed or indorsed, and cannot be converted into a paper trade document. It also entails that it is not possible to effect a change of form or medium under the Bill from paper to electronic, if the relevant paper trade document was issued prior to the Bill coming into force. In order to promote certainty and clarity, clause 4 of the Bill only applies to paper trade documents or electronic trade documents issued after the Bill comes into force. Since the documents falling within the scope of the Bill are generally issued, transferred, and accomplished in a relatively short space of time, the period during which such documents exist which cannot be converted to electronic or paper form in accordance with the Bill will be relatively short.
- 94 Clause 7(4) sets out the short title of the Bill. The Bill may be cited as the Electronic Trade Documents Act 2022.

## Commencement

- 95 The Bill comes into force at the end of the period of two months beginning with the day on which it is passed.
- 96 Clauses 3 and 4 do not apply in relation to a paper trade document or an electronic trade document issued before the day on which the Bill comes into force.

## Financial implications of the Bill

- 97 There are no financial implications of the Bill. This is a permissive and facilitative piece of legislation which does not mandate the use of electronic documents.

## Parliamentary approval for financial costs or for charges imposed

- 98 This section will be updated when the Bill transfers to the House of Commons.

## Compatibility with the European Convention on Human Rights

- 99 The Government considers that the Bill is compatible with the European Convention on Human Rights. Lord Kamall, Parliamentary Under-Secretary of State for Digital, Culture, Media and Sport, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

## Compatibility with the Environment Act 2021

- 100 Lord Kamall, Parliamentary Under-Secretary of State for Digital, Culture, Media and Sport is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

## Related documents

101 The following documents are relevant to the [Bill/Act] and can be read at the stated locations:

- Law Commission for England and Wales consultation paper - Digital assets: electronic trade documents: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf>
- Law Commission for England and Wales report and draft Bill - Electronic Trade Documents: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/03/Electronic-Trade-Documents-final-report-ACCESSIBLE-1.pdf>

## Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	No	Yes	Yes	Yes	No
Clause 2	Yes	Yes	No	Yes	Yes	Yes	No
Clause 3	In part	In part	No	Yes	Yes	In part	No
Clause 4	Yes	Yes	No	Yes	Yes	Yes	No
Clause 5	Yes	Yes	No	Yes	Yes	Yes	No
Clause 6	Yes	Yes	No	Yes	No	Yes	No
Clause 7	Yes	Yes	No	Yes	Yes	Yes	No

# **ELECTRONIC TRADE DOCUMENTS BILL [HL]**

## **EXPLANATORY NOTES**

These Explanatory Notes relate to the Electronic Trade Documents Bill [HL] as introduced in the House of Lords on 12 October 2022 (HL Bill 57).

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