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17 February 2023

INT2023/01832/DC

My Lords,

Electronic Trade Documents Bill

I would like to renew my thanks to you for your work on the Special Public Bill Committee, and for your constructive and insightful scrutiny of the Bill. At our last meeting on 2 February a number of issues were raised which were identified as requiring further clarification ahead of the debate. As promised, I am writing to address these.

Clause 1(2) list of documents / waybills / mates' receipts

Clause 1(2) sets out a non-exhaustive list of documents which are commonly used in trade or trade finance. The documents listed in clause 1(2) are the ones which were most frequently referred to by respondents to the Law Commission's consultation as documents commonly used in trade to which possession is – or may in some circumstances be – relevant. That is, they are examples of documents which may satisfy all three requirements of sub-clauses 1(1)(a), (b) and (c).

It is not – and is not intended to be – a list of "documents of title". Documents of title are an important sub-category of the documents with which the Bill is concerned; they are documents which function as proof of the possession or control of goods, or which authorise the possessor of the document to transfer or receive goods thereby represented. Bills of lading, for example, are documents of title. But the Bill is also intended to cover a broader range of documents used in trade, including negotiable instruments such as bills of exchange (which are orders to pay money) and transport documents such as ships' delivery orders.

Air and sea waybills are not included in the list because the Law Commission's research concluded that possession of these documents is never required in order for them to function as intended; indeed they are already widely used in electronic form with no legal blocker. That said, if it were found that, in a particular situation, possession of a sea or air waybill were necessary as a matter of commercial usage, then that document would satisfy all the requirements of clause 1(1) and would fall within the scope of the Bill, notwithstanding that it is not expressly listed.

In short, excluding waybills from the list is not damaging, but to include them could be confusing and could potentially throw doubt on the existing practice of using waybills in electronic form.

In relation to mates' receipts, however, possession is relevant to the functioning of a mate's receipt if transferring it results in property in the shipped goods passing. While not a document of title under common law, it was accepted by the Privy Council in *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 that mates' receipts could constitute documents of title as a matter of local commercial custom in Singapore in some circumstances. It is not therefore incorrect to include mates' receipts among the list of documents; they are included, along with other documents such as ships' delivery orders, as an example of a document which is used in trade and in respect of which possession may be relevant in particular circumstances.

The list differs slightly from that included in the explanatory document to the MLETR due to the emphasis placed by consultees on certain trade documents and their importance in English law. Nothing material turns on this distinction; both lists are indicative and non-exhaustive.

Possession and exclusive control

At several points during the Committee process, questions have arisen regarding the Bill's approach to possession and exclusive control, particularly in comparison to the MLETR / Singaporean approach.

At the outset, it is worth remembering that the MLETR is an international attempt to provide a legal framework for electronic trade documents. It is intended to be adapted and tailored by individual jurisdictions to align with their own domestic laws. States enacting legislation based upon the MLETR therefore have the flexibility to depart from the text where it is considered necessary and appropriate to ensure better harmonisation with their own existing legal frameworks.

With that in mind, the Bill reflects a UK-focused solution to the possession problem. It provides that a document which satisfies certain criteria (including being capable of exclusive control) qualifies as an electronic trade document, and that an electronic trade document can be possessed. The MLETR and Singapore's legislation, in contrast, provide that if an electronic document can be exclusively controlled by a person (and that person can be identified as the person in control) the document can satisfy a possession requirement.

The main distinction between the two approaches is that the Singaporean / MLETR approach conceptualises exclusive control as a functional equivalent to possession, whereas this Bill provides expressly and directly that a document which can be exclusively controlled can be possessed.

The approach taken in the Bill was deliberate, and was consciously chosen for several reasons. First, explicitly stating that electronic trade documents are possessable directly removes the legal blocker that currently prevents these documents from functioning in the same way as paper trade documents. Since the issue is the lack of legal recognition that such documents can be possessed, removing this legal blocker expressly and clearly in statute addresses the issue head on.

Second, the main policy objective underpinning the Bill is that paper and electronic trade documents are subject to the same legal rules and laws, and are treated in the same way. This equivalence in legal treatment and functionality, in the Government's view, necessitates making electronic trade documents possessable. This is especially important because the Bill provides for a change of medium of a trade document from paper to electronic and from

electronic to paper. It risks causing confusion and disruption if the same document were subject to slightly different legal treatment depending on its form. Importantly, extending possession directly to electronic trade documents ensures that possessory concepts (including pledge and conversion) undoubtedly apply to electronic trade documents in the same way as they do to paper trade documents. It is crucial for market certainty that electronic trade documents are able to plug directly into the existing legal framework applicable to paper trade documents.

Third, if the MLETR approach were adopted wholesale into UK law without any adaptation or refinement, questions may arise as to whether *animus possidendi* (the intention to possess; a necessary element of possession) is still required, and how this fits with exclusive control as a functional equivalent to possession. To flesh this out in a bit more detail, if exclusive control is a functional equivalent to possession, we understand this to mean that the person with exclusive control is in the same legal position as the person with possession. If the person with exclusive control is in the same position as the person with possession, it is unclear if intention is still required, or if intention is presumed or implied from exclusive control.

At worst, this risks changing the existing law of possession as it applies to electronic trade documents. At best, it leaves residual doubt as to the role of intention, and how it is satisfied in the context of functional equivalence. We agree with the witnesses who spoke during the final oral evidence session that intention is unlikely to be an issue in practice. However, this does not mean that intention should be presumed in all cases or implied from exclusive control. The possibility of someone having exclusive control but not the intention necessary for possession must follow from the fact that there are two elements to possession.

Richard Hay helpfully provided the example of a system which transfers exclusive control of an electronic trade document to a person in a manner equivalent to thrusting a letter in a person's hand. In such a case, it should be open to the person to say they do not have possession of the electronic trade document because they do not intend to possess it, even though it may be in their exclusive control. Indeed, given the frequency with which non-fungible tokens are airdropped into people's wallets without their consent, such a situation is not inconceivable.

There is no justification for creating residual uncertainty regarding the role of intention in the electronic context, or for changing the role of intention so that it is presumed or implied. Intention plays an important role in the context of possession under UK law, and the legislation should not be worded in a way that might raise doubts as to its continued relevance.

Fourth, it is arguable that the Singaporean approach risks excluding legal or constructive possession, to which Professor Gullifer referred during the final oral evidence session. Neither the Singaporean legislation nor the explanatory statement contains wording which limits exclusive control to be a functional equivalent to the fact of possession (whereas there is such wording in the explanatory document to the MLETR). Even though the Singaporean legislation is to be interpreted having regard to the MLETR, this inconsistency illustrates the uncertainty that can arise from use of this terminology. Since it is possible for someone to be in actual or factual possession of an electronic trade document, and for someone else to have legal or constructive possession of the document, providing for exclusive control as a functional equivalent to possession more broadly risks collapsing this distinction.

Fifth, even though Singapore is a common law jurisdiction, it has diverged from the UK in the context of electronic communications and electronic commerce. In particular, Singapore has adopted other UNCITRAL texts into its laws (unlike the UK) including the Model Law on Electronic Commerce (1996), and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). The language of the MLETR might therefore be more compatible with Singapore's existing law than it is with the UK's, and

its implementation without adaptation may raise fewer difficulties of interpretation than it would in this jurisdiction.

Finally, the MLETR and the Singapore legislation are premised entirely on a functional equivalent approach. Reverting to this approach now is not only undesirable for the reasons provided, but it would require a fundamental reworking of the Bill.

Despite the differences in drafting, we do not consider there to be any material distinction between the two approaches. Even so, in order to benefit from the existing law on possession and to ensure that there is no difference in legal treatment between documents in different forms, we think it is clearer and more direct to extend the application of the concept of possession itself. Possession is a common law concept with a significant and hugely valuable pedigree. The Bill aims to avoid diluting or questioning that concept itself, and instead to make it clear that possession is applicable, as it stands, to electronic forms of documents. In essence, the Bill is carefully worded so as to make an important and necessary change without risking the integrity of a well-established and foundational common law concept.

During the evidence sessions, the Committee mentioned two related (albeit slightly different) approaches to the issue of possession or control. The first is that the person with exclusive control is presumed to be the person with possession (the "**presumption**" approach). The second is that the person with exclusive control has possession (the "**definitional**" approach). The latter in particular was mentioned by Lord Lansley during the final oral evidence session.

It is worth noting that the presumption approach and the definitional approach are different to the functional equivalent approach, and neither can therefore be justified with reference to the Singaporean / MLETR approach. In any event, both of these approaches are, in the Government's view, broadly subject to the same criticisms as the functional equivalent approach.

There is one final point to be made regarding the definitional approach. In its draft Bill, the Law Commission attempted to define possession with reference to control. This caused immense confusion among consultees for the reasons set out above. The Law Commission therefore deliberately moved away from this approach, and any other approach which risked causing the same confusion (such as the functional equivalent approach).

Conversion / change of medium

In response to the question regarding a change of medium and how this operates where the document in its new form does not satisfy the requirements in clause 4, the Bill sets out certain requirements that must be met for there to be a valid change of medium or form.

While failure to comply with either of the requirements set out in clause 4 will result in an invalid change of medium, the document created as a result of the purported change of medium 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.

Even though we acknowledge the possibility of this duplication where the requirements for a change of medium are not satisfied, the approach in the Bill is favourable for two reasons. First, it avoids the consequence that if, upon a purported change of medium, the old form of the document is removed from circulation but the requirements in clause 4 are not met there is no valid trade document *at all*. We think this is particularly problematic. In the context of bills of lading, for example, this could lead to questions regarding who has constructive possession of the goods. Second, it is consistent with the least interventionist principle and stays true to the primary purpose of the Bill, which is to remove the legal blocker to the possessibility of electronic trade documents.

There is no reason for the Bill to regulate the consequences of failing to comply with the requirements for a valid change of medium beyond the fact that the conversion would not be valid. Rather, we think these are concerns that will be addressed by the parties using electronic trade documents, and associated system designers. Industry users have advised that a purported change of medium ordinarily requires the consent of the issuer. On giving their consent, the issuer has an incentive to remove the document in its old (pre-converted) form from circulation to avoid disputes arising from a duplication of documents. Practically, therefore, we do not foresee concerns arising from the approach in the Bill.

Time and place indications

A question was raised about why a provision similar to that contained in Article 13 of the MLETR, dealing with time and place, is not included in the Bill.

Article 13 of the MLETR provides that “where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record”.

Such a provision is not included in the Bill for several reasons.

First, the Bill adequately covers time and place indications. To explain, before a document in electronic form can qualify as an electronic trade document, the document must contain the same information as would be required to be contained in the paper equivalent. Clause 2(1) mandates this. As such, if a particular type of paper trade document is required to contain time or place indications, the electronic version would similarly need to do so in order to qualify as an electronic trade document. Nothing further is needed beyond this – there is no existing legal blocker to electronic trade documents containing time and place indications, if this is required or deemed desirable.

Second, the reliability requirement in the Bill operates in relation to certain features or functionalities a document in electronic form must satisfy in order to qualify as an electronic trade document. These features (the items listed in clause 2(2) of the Bill) are intended to replicate the salient features of paper trade documents. Beyond this, adding more gateway criteria would make it increasingly and disproportionately more difficult for users of these documents to create electronic trade documents for the purposes of the Bill. Article 13 of the MLETR is one such provision that should not operate as a gateway criterion (which is where the reliability requirement is relevant). In other words, it should not be the case that something can only be an electronic trade document if a reliable system ensures time or place indications are met.

Third, Article 13 is permissive insofar as it reassures users that a particular thing can be achieved in relation to an electronic trade document. However, this is not necessary in relation to the Bill because clause 3(3) already provides that anything done to a paper trade document can be done to, and has the same effect for, an electronic trade document.

Furthermore, there will be mechanisms within the relevant systems to ensure that time and place indications are securely recorded; the Bill does not need to provide for this expressly. Similar issues likely arise in other electronic contexts – for example, in relation to contracts concluded online where timing and place is relevant to determine when and where the relevant agreement was concluded. The law does not prescribe *how* indications of time or place are to be achieved because it assumes that, to the extent these questions are commercially relevant, system designers will incorporate them into their systems. The Bill reflects the least interventionist approach to legislation, meaning that beyond securing that an electronic trade document can function as a paper trade document, the Bill does not intend to be a comprehensive code in relation to electronic trade documents.

With regard to how time and place operates when trade documents change form, this was addressed in Professor Green's further written submissions addressed to the Committee.

Scotland

You will hopefully have seen my correspondence with Professor Andrew Steven on the purpose of clause 3(4). His response indicated that clause 3(4) should remain in the Bill, with the reasoning for it set out in the explanatory notes, which we shall amend accordingly.

I hope that this letter provides a helpful explanation on the outstanding areas. I look forward to the satisfactory conclusion of the Committee's work at our debate on Monday.

With best wishes,

Lord Parkinson of Whitley Bay
Minister for Arts & Heritage