

REPORT ON WORKSHOP 1

IMPLICATIONS OF ELECTRONIC TRADE DOCUMENTS LAW REFORM FOR SCOTLAND

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The first workshop of the RSE-funded 'Digital Assets in Scots Private Law: Innovating for the Future' project was held at the University of Aberdeen on 29 February 2024 to examine implications of electronic trade documents (ETDs) law reform for Scotland.¹ The focus of the workshop was Scottish perspectives on the Electronic Trade Documents Act 2023 (ETDA 2023), which applies across the United Kingdom (UK), with insights into its application in practice. The workshop was conducted under the Chatham House Rule with participants from academia, the Law Commission of England and Wales (LCEW), legal practice, and industry.

¹ For the workshop programme, see the project website at <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/digital-assets-in-scots-private-law-innovating-for-the-future-1850.php>.

The workshop was divided into three panels, each including a round-table discussion, on law reform concerning ETDs, the legal application of the ETDA 2023, and industry perspectives on the ETDs law reform.

Panel 1: Overview of Electronic Trade Documents Law Reform

In the first panel, the participants discussed the background of ETDs law reform, the LCEW's work resulting in the draft ETDs Bill, the Bill's subsequent expansion to Scotland, and the inter-relationship between the ETDA 2023 and the Moveable Transactions (Scotland) Act 2023 (MTA).

The participants first discussed the importance of documents in trade, trade documents that are commonly issued in paper form, and issues associated with the use of paper documents. It was noted that:

- The most commonly used trade documents include: bills of lading, enabling the transfer of property in the goods they represent by delivery (and, where necessary, by indorsement); bills of exchange, functioning as payment and finance instruments being transferred by delivery; and marine insurance policies allowing, by indorsement, the transfer of the right to claim against the insurer from the seller to the buyer for loss or damage insured under the relevant policy when the goods are sold. Other relevant documents include promissory notes, ship's delivery orders, warehouse receipts, mate's receipts, and cargo insurance certificates.
- Paper documents are inefficient in many respects, causing significant delays, increased costs and bureaucracy and raising sustainability concerns. Although efforts had been made to enable electronic versions of some types of trade documents prior to the ETDA 2023, they had varying degrees of success. This was mainly due to the legal obstacles requiring (physical) possession of documents by the holder for the fulfilment of their functions. The COVID-19 global pandemic brought the demand for ETDs into sharp focus and accelerated the law reform attempts to remove legal obstacles in using electronic documents.

The participants continued the discussion with reference to the LCEW's work resulting in the draft ETDs Bill and the Bill's subsequent expansion to Scotland. It was noted that:

- ETDs law reform was a project of the LCEW which can make recommendations only for England and Wales and not for Scotland or Northern Ireland. Although the LCEW and the Scottish Law Commission have undertaken joint law reform projects, the ETD project was not one of them. One of the reasons for this was understood to be the pressing need for the commencement of the project urgently due to increased difficulties in using paper documents during the COVID-19 pandemic. However, at the consultation stage of the project, the LCEW had received responses from consultees in Scotland, including the Centre for Commercial Law at the University for Aberdeen, and had taken them into consideration in the project.
- Only tangible things are recognised as possessable under the law of England and Wales. Prior to the ETDA 2023, this meant that certain trade documents whose functionality depends on being possessed must be in paper form. This requirement was the 'key blocker' to making those documents in electronic form accepted in law and created legal risk for parties who had been using them in electronic form regardless.
- Some consultation responses indicated security concerns in relation to ETDs. However, there was no policy objection to reforming the law to allow for possession of trade documents in electronic form to give them the same effect as their paper counterparts and make them subject to the same treatment as their paper counterparts. It was noted that this would not have been technically possible to achieve before the introduction of blockchain/distributed ledger technology (DLT). The LCEW's work concluded with a draft Bill widely drawn, giving a non-exhaustive list of trade documents, providing that their electronic and paper forms have the same legal status and permitting change of form from electronic to paper and vice versa. (In)tangibility of trade documents therefore does not matter. Rather, what matters is certain legal features.

- The LCEW's draft Bill extended to England and Wales only under section 7(1). Unlike the LCEW's version, the ETDA Bill that progressed through Parliament extended to Scotland and provisions relating to Scotland were included. The ETDA Bill was introduced under special procedure for Law Commission Bills on 12 October 2022. It commenced its parliamentary passage in the House of Lords, before proceeding to the House of Commons. A legislative consent motion was passed by the Scottish Parliament on 27 June 2023 and the Bill received Royal Assent on 20 July 2023, coming into force on 20 September 2023 in the UK. Extension of the ETDA 2023 to Scotland was a welcome development. Although there are differences between Scots and English property laws, the Carriage of Goods Act (COGSA) 1992 and the Bills of Exchange Act 1882, affected by this law reform, apply in Scotland as well as England and Wales.

The participants then discussed the inter-relationship between the ETDA 2023 and the MTA. It was noted that:

- Section 3(4) of the ETDA 2023 provides that 'an electronic trade document is 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'. The participants discussed the purpose of this provision and whether it was really necessary for bills of lading given the content of the MTA. Section 42 of the MTA permits a pledge to be created over corporeal moveable property either by delivery or by registration. For this purpose, section 44(1)(d) provides that delivery must be carried out 'by delivering a bill of lading representing the property to the relevant person...'. The participants queried whether this provision might have been needed for trade documents other than bills of lading and, if so, what those documents would potentially be.
- In written evidence to the UK Parliament Electronic Trade Documents Bill [HL] Special Public Bill Committee's inquiry, the Centre for Commercial Law at the University of Aberdeen had suggested different wording for section 3(4) of the ETDA 2023: 'An electronic trade document is capable of being encumbered by a possessory pledge or statutory pledge under the law of Scotland provided that an equivalent paper trade document can be encumbered by such a pledge'.²

It was asked whether the ETDA 2023 had been used in Scotland. No participant had knowledge of this, and they noted that it might be difficult to know unless such information was shared in the public domain.

Panel 2: Legal Application of the ETDA 2023 and Suggestions for Scotland for the Future

In the second panel, the participants discussed the legal application of the ETDA 2023 in shipping/transport and trade finance.

The discussion started with the legal application of the ETDA 2023 in shipping/transport. It was noted that:

- The ETDA 2023 gives statutory legal recognition to electronic bills of lading. This means a transition from a private contractual environment to being recognised under national law and is in line with the international trend that legal recognition of electronic bills of lading is growing. For example, the UNCITRAL Model Law on Electronic Transferable Records (2017) (MLETR) has been adopted by a number of countries including Singapore.

² B. Yüksel Ripley and A. MacPherson, 'Response to UK Parliament Electronic Trade Documents Bill [HL] Special Public Bill Committee's inquiry on Electronic Trade Documents Bill [HL]', on behalf of the Centre for Commercial Law at the University of Aberdeen (January 2023), <https://committees.parliament.uk/writtenevidence/115567/pdf/>.

- The MLETR and the ETDA 2023 seem to be aligned, even if the terminology they adopt differ in some respects, and they have the same fundamental principles.
- The ETDA 2023 should be seen as a plug in to the existing legal system, removing the need to individually amend the affected pieces of legislation (eg the COGSA) to ensure recognition of electronic trade documents.
- Although the ETDA 2023 gives legal recognition to electronic bills of lading, there are concerns for the use of electronic bills of lading in practice, such as security (including the risk of hacking, 'hostaging', or disabling platforms) and interoperability between platforms. Shipping documents and their status under the ETDA 2023 are important.
- The use of electronic bills of lading can raise private international law questions. Such questions will be discussed in more detail in workshop 3 of the project.

The participants then discussed the legal application of the ETDA 2023 in trade finance. It was noted that:

- Trade finance requires significant amounts of document dealing. From this perspective, the ETDA 2023 can be a "game-changer" for trade finance as it facilitates electronic versions of documentation which a trade finance transaction requires and it accommodates electronic versions of promissory note and bill of exchange as payment mechanisms.
- There remains a question of what a 'reliable system' is in section 2 of the ETDA 2023. It was discussed whether finding practical solutions based on parties' contractual agreement would be preferable for this question rather than waiting for the development of international standards where the validity or transferability of records is disputed by parties.
- Another notable issue is interoperability. The participants discussed whether interoperability matters that much in light of parties' agreement in club-based systems. They noted that, regardless of interoperability questions raised in practice, finance should go ahead as per parties' agreement.
- Although the International Chamber of Commerce's UCP (Uniform Customs & Practice for Documentary Credits) is widely used for letters of credit, that is not the case for eUCP which accommodates electronic presentation. This indicates a lack of trust in digitalised trade transactions.

Regarding section 4 of the ETDA 2023, on change of form, there was discussion as to whether there are any practical downsides to the ability given to parties to ETDs to convert them into paper trade documents and vice versa. For example, where one is dealing with an ETD, how would that person know that the ETD has not already been converted into a paper version and is now defunct? Alternatively, where one is dealing with a paper trade document created by conversion from an ETD, how would that person know that all conditions for conversion becoming effective have been complied with? The participants stated that they do not know how common a change of form is in practice, but this possibility exists in the rules of club-based systems and is therefore recognised in the ETDA 2023. They also noted that there are always risks regarding fraud and forged documents.

In relation to legal education, the participants noted the importance of teaching negotiable instruments and the effect of the ETDA 2023 on them at Scottish universities.

Panel 3: Industry Perspectives on Electronic Trade Documents Law Reform and Suggestions for Scotland for the Future

In the third panel, the participants discussed the ETDs law reform from an industry perspective, focusing on shipping, banking, and trade.

The participants first discussed the ETDs law reform from the perspective of shipping. It was noted that:

- Despite the availability of established platforms approved by the International Group of P&I Clubs, less than 3% of seaborne world trade is carried on electronic bills of lading.³ This demonstrates that international trade is heavily based on paper bills of lading. There are however significant issues with paper bills of lading, including higher processing costs, practical issues with physical delivery of paper and reliance on letters of indemnity, and a high risk of fraud. Using electronic bills of lading, on the other hand, offers speed in transfer of bills of lading, lower administrative costs, easier processes to fix clerical errors, and reduced risk of fraud (although cyber risk remains).
- Despite their advantages, there is a very low volume of electronic bills of lading and the participants discussed the key obstacles to wider acceptance of them. One obstacle is legal, associated with the lack of legal recognition of electronic bills of lading. It was noted that the majority of bills of lading are subject to English law and giving electronic trade documents the same legal recognition as their paper equivalents with the enactment of the ETDA 2023 helps overcome this legal obstacle. However, in a broader perspective, a degree of uniformity among legal systems is also needed. Another obstacle is technical, associated with the lack of interoperability between platforms operating in different ways. It is currently not possible to easily transfer an electronic bill of lading from one platform to another.

The participants then discussed the ETDs law reform from the perspective of banking. It was noted that:

- Some aspects of banking are already digital, for example issuance of letters of credit, but the problem has been with presentation of documents. Before the ETDA 2023, the International Trade and Forfeiting Association (ITFA)'s Digital Negotiable Instruments (DNI) Initiative was launched and a white paper was published to bring negotiable instruments, such as bills of exchange and promissory notes, into the digital world by creating a functionally equivalent instrument referred to as an electronic payment undertaking (ePU).⁴ There are examples of digital negotiable instruments used in domestic transactions.
- The first digital trade transaction completed under the ETDA 2023 is believed to be a digital promissory note issued by a company to accept liability when settling a documentary collection for the purchase of goods from one of its suppliers, saving 2 days in comparison to an equivalent paper promissory note transaction.⁵
- In financial negotiable instruments, there is a difference between being the issuer of the financial instrument or being in the middle, like banks, to facilitate the transaction between the parties. The 'reliable system' elements in the ETDA 2023 may therefore be less of a question or concern for banks given their role in financial negotiable instruments. The main client interest remains to pay or to be paid and to make this simple.
- In digital transactions, saving time is a significant benefit. Many transactions could be digitalised, but there are also policy and customs issues to overcome. It is also possible that digital transactions can be rejected if a bank does not have the in-house capability or procedures to do that. The participants therefore noted that how practice will develop still remains uncertain.

The final discussion between the participants was the impact of ETDs law reform on trade. It was noted that:

- There is an increased focus in trade on provision of advanced supply chain data, attempting to simplify goods movements at the border (for example by reduced physical inspections). Electronic trade documents can be beneficial for importers and exporters by reducing time for

³ BIMCO, 'E-bills of lading', <https://www.bimco.org/ships-ports-and-voyage-planning/maritime-digitalisation/ebf>.

⁴ <https://itfa.org/bringing-negotiable-instruments-into-the-digital-world/>.

⁵ See the relevant press release at <https://www.lloydsbankinggroup.com/media/press-releases/2023/lloyds-bank-2023/lloyds-bank-completes-first-digital-trade-transaction-under-new-.html>.

trade at the border, for instance through electronic presentations of documents. Reduced cost of trade financing for importers and exporters is also another benefit of using electronic trade documents.

- Electronic trade documents combined with use of blockchain can create digital trade corridors which enhance transparency and improve efficiency in the international sale of goods.
- The participants discussed opportunities for digital trade corridor movements involving Scotland and Scottish businesses, simplifying trade and reducing costs to trade. They commented that this can link in with more direct trade lanes between Rosyth (Scotland) and Dunkirk (France), and also support supplies of critical minerals which are very important in achieving green energy and net zero targets. It was noted that work is taking place globally at United Nations level on identifying critical mineral supply chains including copper, lithium, nickel, cobalt, and rare earth elements, which is, inter alia, looking to strengthen international co-operation through harmonisation of existing norms, standards, and initiatives.⁶ It would be positive for Scotland to obtain some benefit through its facilitation of digital and electronic trade mechanisms.

The workshop closed with concluding remarks and thanks to the participants.

⁶ See the UN Secretary-General's Panel on Critical Energy Transition Minerals at <https://www.un.org/en/climatechange/critical-minerals>.