



HOUSE OF LORDS

Electronic Trade Documents Bill [HL] Special Public Bill Committee

Oral evidence: Electronic Trade Documents Bill [HL]

Thursday 26 January 2023

9.10 am

Watch the meeting

Members present: Lord Thomas of Cwmgiedd (The Chair); Lord Bassam of Brighton; Lord Clement-Jones; Lord Davies of Brixton; Lord Harlech; Lord Holmes of Richmond; Lord Lansley; Lord Parkinson of Whitley Bay.

Evidence Session No. 4

Heard in Public

Questions 1 – 14

Witnesses

[I](#): Professor Sir Roy Goode KC, Emeritus Professor of Law St John's College, Oxford; Professor Louise Gullifer KC, Professor of English Law at the University of Cambridge; Professor David Fox, Chair of Common Law, University of Edinburgh; Professor Alex Mills, Professor of Public and Private International Law, UCL.

Examination of witnesses

Professor Sir Roy Goode, Professor Louise Gullifer, Professor David Fox and Professor Alex Mills.

Q1 **The Chair:** Good morning, and welcome to the Electronic Trade Documents Special Public Bill Committee. We have two sessions this morning, taking evidence in relation to the Bill. Professor Sir Roy Goode is present here in the committee room and the other witnesses—Professor David Fox, Professor Louise Gullifer and Professor Alex Mills—are present online.

Before we ask the questions that we wish to address, I declare that I am president of the London Shipping Law Centre, vice-president of the British Maritime Law Association, and chair of the London Financial Markets Law Committee. I am also chair of the steering committee of the Standing International Forum of Commercial Courts, and I sit as an arbitrator.

I will begin by asking each of you a very general question, and ask you to preface it by saying a bit about your background and experience. The evidence we have received so far indicates that the UNCITRAL model law on electronic trading records—I prefer to call it the MLETR, but others have more exotic names for it—marked a turning point and moved towards the use of electronic trading documents in shipping and finance by establishing a common legal regime. Do you agree with the drift of the evidence we have heard, and could you each say a little in turn? Sir Roy, as you are present in the room, could you start?

Professor Sir Roy Goode: I am emeritus professor of law at the University of Oxford; retired and degenerating fast, in the view of my colleagues, I think. I am a commercial lawyer. I was a solicitor for a long time, then I became a barrister and then I took silk. I have gone back to teaching at the ripe old age of 89. The students are great, but what impact I am having on them I do not know.

Coming to the question, my answer is that MLETR has been very influential. It has been adopted in Singapore and, as I understand it, it has very much influenced the content of the Bill. It does not follow it exactly, but it has been a great influence and a beneficial one.

The Chair: Thank you. Professor Gullifer, could you say a bit about yourself and then answer the question I posed?

Professor Louise Gullifer: I am the Rouse Ball professor of English law at the University of Cambridge. I have been teaching and writing in the area of commercial law for a very long time, and I have written a number of books on finance and commercial law. I should also mention that, although I was not involved in the model law on electronic trading records, I have been heavily involved in formulating another model law at UNCITRAL—UNIDROIT, the model law of factoring. So I have some experience of model laws and how they are often adopted by states, particularly in the secure transactions area, and I would like to say a bit about that.

I absolutely agree that the model law is a turning point and a really good thing. It is a very important move towards the use of electronic trading documents in a global sense. Model laws are wonderful and are carefully drafted, so that if a state wishes to adopt a model law verbatim, it can, but often it also needs to be adapted to local law and local circumstances.

The Chair: Thank you. Professor Fox, could you say a bit about yourself and answer the first question?

Professor David Fox: My background is that essentially I am a private lawyer with strong interests in private law as it relates to money and, by extension, I have done a lot of work related to the translation of traditional property and monetary concepts to a digital medium. I work with Professor Gullifer on the drafting committee for the UNIDROIT project on digital assets. Most of my legal background has been in England, at Cambridge. For the past five years, I have been in Edinburgh. I have taken on the learning of quite a bit of Scots law. I have been a member in particular of Lord Hodge's expert reference group, convened by Scottish Ministers, to consider the place of Scots private law in digital assets more generally and in relation to the other trade documents Bill.

Turning to the question, I can only endorse what Sir Roy and Professor Gullifer have already said. It was a turning point, and there has been a concern at all stages to ensure the general international compliance of UK rules, with due sensitivity to matching them with internal private law standards already in place.

The Chair: Thank you. Professor Mills.

Professor Alex Mills: Good morning, and thank you for the opportunity to contribute to the work of the committee. Before I respond, I should note that I have been assisting the Law Commission with some of its work on trade documents, digital assets and the conflict of laws, although I was not involved in drafting this Bill.

I am a professor of public and private international law at University College London. My particular interest is in the international context for these interoperability questions and their co-ordination. Among other things, I am part of the editorial team for *Dicey, Morris & Collins on the Conflict of Laws* with special responsibility for work on choice of law in property, so that is part of my background as well.

The short answer to your question is, yes, the model law is potentially a very important turning point; I agree with my colleagues. It is essential that the law is changed in different jurisdictions to facilitate making electronic trading documents work and that it is done in a way that is highly consistent. The model law offers a standard which states can adopt to validate this.

It is also important to emphasise that one reason for adopting a model law approach rather than, for example, negotiating an international treaty with fixed rules is that it allows for a degree of flexibility for states

to decide how best to adopt the proposed rules, given the characteristics of their legal systems. So although the Bill aligns itself with the model law, it is also an adaptation of that law. As the Law Commission has suggested, the Bill presents an opportunity for the UK to provide leadership internationally, particularly in common-law states, on how best to adopt the model law domestically. The Bill if adopted could itself become a kind of model law for how to adopt the UNCITRAL model law.

Q2 The Chair: Thank you very much indeed, Professor Mills. I turn to the next, slightly more detailed question. We would like to look at the position taken by Singapore, which is another common-law jurisdiction with great international influence in shipping. It has implemented the MLETR using the concept of exclusive control rather than the concept in this Bill, which is possession. Would you be able to explain any distinction between these approaches, as you see it, and the benefits of using possession?

A more technical question: is the requirement of intention to possess—*animus possidendi*—likely to cause any difficulty in practice, or will the determination in the Bill of the requirement of exclusive control in effect deal with all these questions as a matter of practical reality?

Professor Sir Roy Goode: May I just say that there is a paragraph in the Law Commission report that ascribes to me a statement that we should use control and not possession? I did not actually say that—well, I did say it, but it was in relation to a separate digital assets project. I see absolutely no problem with applying possession to electronic trade documents.

On the question of Singapore using control, that would work for most purposes. There is one factor that it does not really work for. The law commissioner Professor Sarah Green was very keen to ensure that a wrongful dealing with an asset would be susceptible to the tort of conversion and that you could recover damages. It has been ruled by the highest court that that does not apply to intangible property; it applies only to tangible property—goods. Therefore, the advantage for us of having possession rather than control is that if there is a wrongful interference with somebody's right, it is susceptible to the tort of conversion and damages can be claimed. Apart from that, I think the two things could do equally well.

Professor Louise Gullifer: The main point to emphasise is that the idea of the Bill is to create as much equivalence as possible between paper trade documents and electronic trade documents. We have a very long-established body of law related to paper trade documents, and the idea is that that body of law will apply as seamlessly as possible to electronic trade documents, rather than having to start a whole process of formulating new law on electronic trade documents.

The thinking behind this, of which I totally approve, is to use the idea of possession in relation to trade documents, because it brings in all kinds of statutory and common-law rules and principles in relation to paper

documents that will apply to electronic trade documents—not just conversion, as Professor Goode said, but other concepts such as bailment and therefore pledge. Paper trade documents are used to an enormous extent in pledges in international trade. The advantage of being able to pledge electronic trade documents will be considerable. The main feature of pledges in this regard is that they do not need to be registered, which is particularly important, as such pledges are often short term and registration would be a great friction in the use of security interests in international trade. That is the most important point.

Exclusive control is a concept that, as Professor Goode said, has been and is still being developed in relation to digital assets generally. One thing that I perhaps did not say, but which Professor Fox referred to, is that I chair the drafting committee on the UNIDROIT project on private law of digital assets. As I am sure you are all aware, the Law Commission has a project on digital assets much more widely. I very much believe that the relevant concept for digital assets more widely is control. There is an open question as to whether conversion should apply to digital assets more widely and whether pledges and so on should apply there.

Having looked at the Bill in detail, I am pleased that there is a clear line between electronic trade documents and all other digital assets. I was a bit concerned that by using possession in this context it would somehow bleed into digital assets more generally using the concept of possession. I do not think that will be a danger, because the Bill defines electronic trade documents in a way that ring-fences the area in which electronic records can be possessed, and there will be no danger of that applying in any other context. At the moment, our law says that you cannot possess intangible things, whatever we call them—either intangibles in terms of choses in action or intangibles that are not choses in action. The Bill is very good in that respect.

Other jurisdictions obviously have their own ways of doing things. This may come up later, but I will say it now because I may have to go. I looked at the US position. The US has been using the concept of control for electronic records for some time in the context of documents of title. In 2003, that was introduced into Article 7 of the UCC. When it made its recent revisions to the UCC—they have just been adopted and are now being implemented by states; that was done at the end of last year—all it did was adopt the concept of control that it already had into electronic controllable records, as it calls them.

The experience of the US, which after all had a codified system for commercial law, was that when it introduced control in Article 7 it had to make a number of amendments and think hard about how control could be the equivalent of possession. There were a lot of amendments to Article 7, and, I am sure, although I have not looked at it, to the rest of the UCC as a result. We, by this Bill, are able to plug into the whole of the law merely by saying that these trade documents can be possessed and so all the consequences of possession apply.

In terms of intention, the Law Commission argues—obviously, it is right—that for possession you need exclusive control and intention to possess. That is a general law, but it also applies to trade documents. There are not many cases with examples of this—at least, not as far as I know. There are a couple in relation to bills of lading: one is a case called *Aegean Sea* and the other is a case called *Erin Schulte*. In both those cases, it seems to have been assumed that not only would you need intention to accept delivery in order to trigger the effect of the Carriage of Goods by Sea Act but that, at a more basic level, in order to have just possession you need knowledge of the thing that you are possessing and intention to possess it. That is conceded in *Erin Schulte*.

This has been the law in relation to trade documents in paper form, and it would be very unfortunate, in my view, if it was changed in relation to electronic trade documents.

Q3 The Chair: Thank you. Could we turn to you next, Professor Fox? We will come to Scots law later, but at this stage could you answer primarily by reference to the law of the other parts of the United Kingdom?

Professor David Fox: Yes, and I might just build on what the others have already said about the distinction between control and possession. If we were starting with a completely blank slate, as we are with digital assets more generally outside electronic trade documents, then for the reasons that Professor Gullifer has given, control of those assets would be the appropriate test to use. The difference here, of course, is that we have an existing regime of paper trade documents, in which possession of the tangible object is the determining fact that governs where rights are transferred in relation to those documents. So we do not have a blank slate in relation to paper trade documents, which is the compelling reason why going for a possession-based criterion is justifiable in a way that it might not be for digital assets more generally.

On that leakage or bleeding point that Professor Gullifer mentioned, would there be some way in which tests of possession in relation to electronic trade documents might somehow affect or contaminate our approach more generally to digital assets? I do not think that is a risk. The Bill has been drafted very carefully so as to define paper trade documents, and to define electronic trade documents by analogy. It leaves quite untouched the entire range of other digital assets that exist for many different commercial purposes and to which an entirely different control-based regime might apply.

I can briefly say a little about Scotland here, or maybe come back to that later, depending on how you would like to take it.

The Chair: If it is in relation to Scots law, it is probably easiest if we come to it later.

Professor David Fox: I will defer it until later and close there.

Professor Alex Mills: I can be very brief indeed on this. My colleagues have explained the issues very well and I agree with their analysis. I also support the approach of the Bill.

The Chair: Thank you very much. Where people are able to do that, it is immensely beneficial.

Q4 **Lord Lansley:** I will raise a point particularly in respect of the helpful explanations that Professor Gullifer gave us a moment ago. In other evidence to the committee, which we will go on to talk about, we heard some views that it might have been better to focus on exclusive control as distinct from possession, but some witnesses have told us that this is a distinction without a difference.

In the context of the Bill before us, we need to establish that the electronic trade document established under Clause 2 is capable of possession under Clause 3. There is this idea hanging around that the intention to possess might mean that an electronic trade document exists but is not necessarily, in all circumstances, possessed by the person who has exclusive control. This seems to my mind—I am speaking only for myself as a layman—to be undesirable.

I can see entirely what Professor Gullifer explained about the benefits of accessing the statutory and common-law provisions relating to possession but, for the avoidance of doubt, can we say in the Bill that, if an electronic trade document satisfies the requirements under Clause 2 and is in the exclusive control of a person or persons acting jointly, as defined, it is to be regarded as in that person's possession? We might think it is implied, but that is not how statute works. If you want to avoid any doubt, the best thing to do is put in something that says, "for the avoidance of doubt". Would that be helpful or would it complicate the issue in relation to digital assets? It is new territory for us to be thinking about future legal issues beyond the Bill, as ideally we want to focus on this Bill.

Professor Louise Gullifer: To be honest, it crossed my mind as well: should the Bill say that "exclusive control equals possession"? There are two reasons for using the term "possession". One is just a linguistic one—we have the word "possession" in all the cases and statutes, so we should be using the same word and concept here. That is what they have done in Article 7 of the UCC, to some extent. It talks about possession of tangible records—there is a term for that which I cannot remember, I am afraid—and control of electronic records, which are equivalent to the tangible records. It possibly uses the term "documents of title", but I am sorry; I do not have it at my fingertips. So it says that control equals possession.

The problem for us is that possession is a long-standing concept in English law. There is a lot of case law about possession, but it has never been statutorily defined. The relevant statutes are the Carriage of Goods by Sea Act, the Sale of Goods Act, the Factors Act and the Bills of Exchange Act. There is a lot of talk about delivery and possession, but possession itself is not defined. The only definition, if we could call it that,

is in the Factors Act, where it is made clear that possession includes what is called in case law constructive possession, as well as actual possession.

One point that may cause problems if we use exclusive control is the concept of constructive possession, where one person is in possession of a tangible—usually, for the moment—for another person. For example, a warehouseman is in actual possession, but the owner of the goods has constructive possession of those goods. If you put your goods in a warehouse, you will still have constructive possession, even though they are held for you by a warehouseman or whoever is looking after them for you.

This is particularly important in the context of tangible goods and pledges. A person taking a pledge will not necessarily take possession of the goods themselves—they will be in a warehouse—but will have constructive possession, because they are held in the warehouse for them. Constructive possession also occurs in the context of documents, particularly trust receipts. Someone buying goods has pledged those goods to a bank. In order to raise the money to pay the bank, they want to sell the goods but, in order to sell them, they have to be able to get hold of them. The bank will have possession of the document of title—paper document, as things are—and will be able to release that to the buyer under what is called a trust receipt. The buyer will hold it for the bank, so the bank still has a pledge because it has constructive possession, even though the actual document is in the actual possession of the buyer.

Those types of rather complicated concepts immediately apply to electronic trade documents under the Bill, to the extent that trust receipts and other devices will still be used, as I am sure they will. But they apply by virtue of saying that an electronic trade document can be possessed. If we used exclusive control, we would have to be very careful and basically provide for exclusive control to have those types of concepts.

If you just said that exclusive control equals possession, then exclusive control, certainly in the way it is defined in Clause 2(2), is basically actual exclusive control; I am the person who actually controls it. We can talk about persons acting jointly being treated as one person, but there is no real concept of constructive exclusive control there. We have been talking about this in relation to digital assets more broadly, and we still think that the concept of control should be a factual concept in relation to digital assets. In electronic trade documents, the wider concept of possession is quite important. There are other types that I will not go into, but they are also detailed in the Law Commission document.

The basic message is that possession is a wider legal concept than exclusive control, even though exclusive control is a very important component of actual possession. I agree that the intention point is very unlikely to arise in most situations. Somehow transferring an electronic trade document to someone without their having any intention of having

it or controlling is not quite the same as sending a paper document to someone in the post, or whatever.

The Chair: Thank you. We may come back at the end with one or two questions for you and the others to think about.

Q5 **Lord Bassam of Brighton:** So far, we have heard that the Bill essentially implements MLETR with minor adjustments for laws in the UK. We have also heard that the Bill sets up a system that is interoperable with laws of other states. My question is in two parts. First, do you agree with that? Secondly, is there cause for concern about interoperability with other international regimes, in particular MLETR, the future regimes in the legal systems of Europe, the US through changes to the Uniform Commercial Code, and elsewhere—perhaps China?

Professor Sir Roy Goode: I do not think so. Of course, the model law is what it says, a model law. Therefore, states do not have to adopt it. If they do adopt it, they can change it; they can adopt it in a totally different form. So a model law is not necessarily consistently adopted around the world. As to interoperability, it is hard to say in the abstract, because it might take slightly different forms in different countries. I do not think there is likely to be a problem over that.

Going back to the previous question, exclusive possession will normally give exclusive control. The point, though, is this. With electronic stuff, a number of people may have the capacity at any one time to deal with an asset. At one stage, the Law Commission's report seemed to suggest that it was looking at the capacity to exercise powers. Actually, the answer to that is that it does not matter how many people have the capacity. What matters is when a person has exercised it. Once one person has exercised it by disposing of it, by making a transfer, the others cease to have any power to do so.

I think it is a very good Bill. It is well drafted. I am not sure whether it is the right time to mention this, or whether it is completely connected, but I have a couple of concerns. One relates to the list. The other relates to the requirement of system reliability.

The Chair: Could we come back to that, because it will arise in other questions?

Professor Sir Roy Goode: Yes.

Lord Bassam of Brighton: Perhaps Professor Gullifer would like to comment next.

Professor Louise Gullifer: I do think there will be interoperability with MLETR. MLETR says, "Where the law requires or permits the possession of a transferable document or instrument, that requirement is met ... if a reliable method is used ... To establish exclusive control", and so on. So even MLETR itself is basically saying that the whole idea is that you plug into the concept of possession. Therefore, it will be as interoperable as it is possible to be, given that we also want to include the whole of English

law on possession. So I echo what Professor Goode said about the adoption of a model law. This often happens.

I have already said a bit about the US. The other thing I would say is that the US made its change in relation to electronic records in 2003; it changed to the concept of control for that. We have been operating quite happily with that since 2003. We operate different concepts of control and possession in different countries. That is already well baked into the system, so I do not think this will change it any further. What is still very important is that electronic documents and paper documents are treated the same under English law.

Lord Bassam of Brighton: I think that is understood.

Professor David Fox: I do not have anything to add to what has already been said on this question.

Professor Alex Mills: I also do not have any particular concerns about the interoperability question. There is another aspect of interoperability, which is related. I would like to say a bit about that, and this is probably a good time to do so. It was raised in a written submission to the committee from the City of London Law Society, so it requires a very small bit of background, which I hope members of the committee with legal expertise will forgive.

For trade documents generally to work, they have to have basically the same legal effect in different legal systems, but that does not mean that all the legal issues that arise will be treated in the same way. For example, if a trade document is transferred to a third party as a security, the effects of that transfer are a question of property law, and property law is quite different in different states.

So in addition to common rules on trade documents, to make them work well we also need what are called conflict of laws rules. In cross-border cases, we need those rules to tell us which laws apply to which issues. That is equally true in relation to electronic trade documents, because precisely the same kinds of issues will continue to arise.

In the case of electronic trade documents, however, there are special difficulties, because the conflict of laws rules that we use often rely on the location of a document. For example, the law governing the effects of an assignment of property is normally the law of the place of the property. The challenge, of course, is that it can sometimes be difficult to locate electronic documents depending on nature of the system on which they are held. This is often difficult for blockchain, for example, or distributed ledger technology. So the adoption of electronic trade documents will raise some consequential questions for the conflict of laws, which will also need to be addressed.

The Bill does not address these conflict of laws questions. Instead, they will be looked at separately by the Law Commission as part of its inquiry into digital assets: *Digital Assets: Which Law, Which Court?* This is the

preferred approach: separating out those questions into a separate inquiry. I can say more about why I think that is the preferred approach, if that would be helpful.

The Chair: Can we come back to the further detail if we need to? I am just concerned about time, particularly Professor Gullifer's time.

Lord Bassam of Brighton: It is picked up in the City of London Law Society's evidence, and it is quite an important issue, because it poses quite a big question.

The Chair: Could we hear Professor Gullifer on the other points, and then come back to this as a separate issue?

Q6 **Lord Harlech:** Is leaving to the judiciaries of the UK any necessary development or clarification in the law made by the Bill the right way forward, or could this be covered in the Bill itself? Professor Mills, would you like to go first on this?

Professor Alex Mills: Others may have more to say on this issue. My only comment is that, in this very fast-moving field, it is very important for the law to be able to adapt to particular technological developments, and, at least generally, leaving clarification of how the law works to the judiciaries is likely to best support that objective. But I would be interested to hear what my colleagues have to say.

Professor David Fox: The approach taken by the Bill is the right one: that it is better to leave the judiciary to develop fine points of application. I say that partly for the reason given by Professor Mills: that the more prescriptive we are in the Bill at this stage, the more time-limited it may become in its operation and the more we close off the application of this regime to any future technological developments.

That leaves a degree of openness, which is also good because it allows for a sensitive approach across different constituent systems in the UK—Scots law may be different from English law on certain points. It enables the leeway of slightly different application of this Act to make it fit with the existing private law principles already in those different systems.

I do not have any doubt about the ability of the judiciary to cope with this legislation. There has been a swathe of recent litigation involving digital assets over the past two or three years. What has been obvious is that the courts have had no great difficulty in understanding the technology involved and working out the salient legal points that emerge from such technology.

So I think this is the right approach, and I will be confident of the judiciary's ability to make the best of it.

Professor Louise Gullifer: I agree with both points made by Professor Mills and Professor Fox—on being technologically neutral and future developments, and on the ability of the judiciary to develop the law. The law of possession has been developed by the judiciary over many

centuries. It has never really been the subject of legislation, and I think it would be quite dangerous in a way to start developing the law of possession in legislation now.

Could I say one thing about what Professor Mills said about conflict of laws? It is a piece of information that the committee might be interested in. Not only is the Law Commission going to do a project on conflict of laws in relation to digital assets, but there is a proposal—it has not yet been adopted by the governing councils of the various bodies—made jointly by the Hague conference, which is the international body that looks at conflict of laws, and UNIDROIT, which is the body producing the private law of digital assets principles, to look in great detail at the conflict of laws in relation to digital assets. That is now public. If it is adopted, work will also be done at an international level as well as that being done by the Law Commission.

Professor Sir Roy Goode: I agree entirely with my colleagues. The judiciary is very adept at making things work and responding to changes. A statute that was perhaps focused on one thing can be interpreted by the courts as being intended also to cover later developments. You get a lot of flexibility, which is very important.

Another point is that the Secretary of State has the power to make certain amendments to certain provisions of this Bill, so there is a fall-back position. But I agree with my colleagues that one can safely leave those things to the judiciary.

Q7 Lord Clement-Jones: You have all given considerable reassurance on the Bill sticking to the concept of possession, as opposed to going fully towards exclusive control. You have also talked about the fact that MLETR is a model law and is to be used as such, but I want to ask each of you about perceptions. Would you consider it an issue if the UK were perceived to be diverging from MLETR? We know that that is not the Government's intention, but could it be made clearer in the Bill—as was the case in Section 2 of the equivalent Act in Singapore—that it is not the intention?

Professor Sir Roy Goode: I understand the point of the question, but I do not think it is really necessary. It is clear that this Bill is influenced by MLETR. I do not think it necessary to put a provision in the Bill. It would do no harm, perhaps, but on the whole, as a simple-minded commercial law mongrel, I am all in favour of keeping things short and simple.

Professor Louise Gullifer: I agree with Professor Goode. It is very clear that there is no intention to deviate from the principles of MLETR, so I am not sure that it would be necessary or even desirable to put a particular clause in the Bill. It is the sort of thing that might go in a preamble if we had legislation that had preambles, but I am not sure that it needs to be in the Bill itself.

Lord Clement-Jones: In a sense, it sounds as though you do not think that there will be much of a perception in that case in any event, even if

you felt there was anything to be cured.

Professor David Fox: On preambles, I checked the Singapore legislation and, yes, there is a reference in the Long Title to the Act to MLETR. In some respects, it may just be a token addition, and I really do not think it would do much to change the general perception of contract users outside the UK as to which system of law it adopted. I would not be concerned on this point.

Professor Alex Mills: I have a slightly different view. There could be some benefit to the Act stating more clearly that its purpose is to align UK law with the MLETR approach. The benefit would be that it could have an impact on the way courts interpret the Bill when it becomes an Act; they might be more open to drawing on case law from other states that have adopted MLETR—not as binding authority, of course, but as guidance on how best to interpret the Bill consistent with its purpose, that being to align UK law with broader international developments based on the model law. That is something that Singapore has done in its legislation. It has adopted an interpretive principle expressly to guide the courts in interpreting that legislation in line with broader international developments. I could see the benefit for that reason.

Lord Clement-Jones: So you think there might be a case for including something along the lines of Section 2 of the Singapore Act.

Professor Alex Mills: It may not strictly be necessary, because the courts may already take into account the work of the Law Commission as background in developing this legislation and the underlying purpose of that work, but given the importance of the point, it might be worth confirming expressly, as Singapore has done.

The Chair: I will just ask you one question, Professor Gullifer, because you must be about to leave. Do you want to add before you depart?

Professor Louise Gullifer: I do not think so. We have covered many of the points on which I felt I could make a contribution—I certainly cannot make a contribution on Scots law or about reliable systems, which are the other things that you will talk about. The Bill is well drafted and suitable for its purpose. If there is anything in detail that I would like to put forward, no doubt there will be a way of doing that before the Bill becomes law.

The Chair: Thank you very much indeed, Professor Gullifer. We will now leave you to your students.

Professor Louise Gullifer: Thank you very much indeed.

Q8

Lord Davies of Brixton: Professor Goode, you have raised the issue of reliability inherent in the Bill, but that pushes the issue one step further down. How do we know what a reliable system is, and when do we need to know? The Bill is technologically neutral, but that issue still needs to be resolved.

Professor Sir Roy Goode: That is a very good question, if I may say so. There is no absolute reliability. No system is not prone to errors; you cannot guarantee 100% reliability. What I would say about the reliability provision is that MLETR has a sensible position that says that, if a function works for a particular transaction, the system for that purpose can be deemed to be reliable, even if it does not work for other things.

That is not in the Bill and, in my view, it should be. Imagine this: someone discounts a bill of exchange and they pay a large amount of money for a bill. That is fine and the transfers are effected electronically. Then it is discovered that the system is not reliable for some other type of function, the effect of which is to disapply the entire Act. This means that the person who thought he was in a nice position as a holder in due course, and pays a lot of money, finds that he has no rights on the bill at all.

On that, the second of my two points, I urge that we ought to include the same provision that is in MLETR to avoid that situation. In other words, if something is carried out that fulfils the function properly, the fact that the system might otherwise be unreliable should not matter. Otherwise, we are in danger of depriving innocent people engaging in a perfectly proper transaction of a total right to enforce the bill.

Lord Davies of Brixton: Was there any indication from the Law Commission about why it did not adopt this approach?

Professor Sir Roy Goode: There may have been. I think all it said was that reliability is a condition of the application of the Act, which is true but does not really answer the point.

Professor David Fox: I defer to Professor Goode on this discussion of reliability. On the general approach taken, which we find in Clause 2(5), it is right that we have a rather open list of generally worded criteria to determine the reliability of the system. Again, reliability is a question of fact in a matter of evaluation. It is not something that can be prescribed in detail in the legislation itself; it is about a judgment to be made, possibly after the event. Again, there are reasons for having a relatively open set of criteria for reliability—critically, not to close down the application of this Act to any particular system that may be in force now but may not be in the future. So a general criteria-based approach seems to be the right one to take. That is all I would say on that point.

Lord Davies of Brixton: Professor Mills, are you able to say something about aspects after the event in deciding whether a system is reliable?

Professor Alex Mills: I do not have much to add to my colleagues on this point, except to say that the general approach of the Bill is facilitative rather than prescriptive. The solutions and the standards are likely to come from industry rather than from the law, which is probably the best approach.

Q9 **Lord Holmes of Richmond:** I declare an interest as an adviser to

Circulator, which is involved in supply chain traceability. Are you confident that current technologies can safeguard the integrity and security of electronic trade documents?

Professor Sir Roy Goode: I do not think I am the right person to answer that. I am not technologically minded—I have great difficulty with technology, actually. All one can do is to look to the specialists in this to do the best they can. You can get a very high degree of reliability, but I do not believe that you can get 100%. I do not think that is possible, but other people are better placed to answer your question than I am.

Professor Alex Mills: This may not be a question for lawyers; it may be for technical experts. But I have no reason to lack confidence that the current technology could provide this.

Professor David Fox: I will take the same line, but add that, when we consider the reliability of this electronic system, it has to be compared against the reliability of the existing paper-based system, which has its own vulnerabilities to attack and fraudulent use. As industry tries to define the appropriate standard of reliability, we should not be too tough on it to the point of overlooking the vulnerabilities that already exist in paper-based trade documents.

Q10 **Lord Holmes of Richmond:** That was very well put. Thank you for that. On the next question, I fear I may get similar levels from you. Do you think the risk of cyberattacks on these systems has been sufficiently considered? How highly do you rate that risk?

Professor Alex Mills: I am afraid it is a similar response from me. Again, leaving those questions to industry rather than being too prescriptive in the Bill is the right approach.

Professor David Fox: I agree with that.

Lord Holmes of Richmond: Professor Goode, would you make it a trio?

Professor Sir Roy Goode: Yes.

The Chair: We now turn to the question of Scots law, which the Minister, Lord Parkinson, will ask.

Q11 **Lord Parkinson of Whitley Bay:** We started to stray into this earlier. One of the early changes between the draft Law Commission Bill and the Bill before the committee is in widening the extent to Northern Ireland and Scotland, as well as England and Wales. Do you support that change of extent, so that we are looking at a UK Bill?

Professor Sir Roy Goode: Yes, indeed. I am a great admirer of the Scots legal system, but I think this should apply to the whole UK.

Professor Alex Mills: I do not claim any knowledge of Scots law but, as a matter of principle, it is obviously highly desirable that the Bill extends to the whole United Kingdom for its practical effect.

Lord Parkinson of Whitley Bay: Thank you. And probably more pertinently, Professor Fox, what is your view?

Professor David Fox: I might say a little more about this than my colleagues. Yes, we support the extension to Scotland. Many of the statutes that are, in effect, amended by the operation of the Electronic Trade Documents Bill are UK-wide and, if the Bill applied only in England and Wales and not in Scotland, it would create a glaring anomaly in the application of those statutes across the different constituent jurisdictions of the UK. That would be disadvantageous to commercial and legal activity in Scotland. It might well lead to the choice of English law over Scots law as the relevant governing system that applies to these various contracts.

More generally, the question of applying the Bill to Scotland has been considered by an expert reference group set up by the Scottish Ministers and chaired by Lord Hodge, the Deputy President of the Supreme Court. We considered this very question and came out in unanimous support of extending the Bill to Scotland. There was a consultation on that, earlier in the summer, to limited specialist stakeholders, which came back with the same support.

Q12 **Lord Parkinson of Whitley Bay:** That was very helpful. The Government have undertaken quite a lot of work to ensure that the Bill is consistent with Scots law as well as English and Welsh law. Have we done that sufficiently and is it reflected in the Bill, particularly in Clause 3(4)? The Moveable Transactions (Scotland) Bill is before the Scottish parliament as well. Does Clause 3(4) sufficiently cover changes that that Bill or similar future legislation might make in this area?

Professor David Fox: A few possible sticking points were identified during the consultation process. The first is the concern about the extension of the Bill to the moveable transactions regime, which is currently before the Scottish parliament.

Clause 3(4) is directed at that concern. It makes clear for the purposes of that legislation that the electronic trade document is to be regarded as moveable property. It may in fact be incorporeal rather than corporeal moveable property, for the purpose of general property categorisation, but in order to align with that regime it has been treated as corporeal moveable property. It therefore goes into the statutory pledge regime for creating securities, rather than the register of assignments regime for creating securities. That is an important point of alignment.

Other little things came up during the consultation. The list of paper trade documents in Clause 1(2) includes a warehouse receipt. In Scots private law, there is some thinking that it may not be a negotiable kind of document, even though it is in English private law, but we are not concerned about that, given the drafting of the Bill, because we read Clause 1(2) as giving only indicative examples of documents that might be regarded as paper trade documents, so the enactment of that provision would not make any substantive change to existing Scots

private law definitions of the kinds of documents that are paper trade documents.

More fundamentally, going back to the question of possession that we discussed earlier, in the debate over possession versus control as the appropriate criterion, Scots law has the same basic blockage as English law—that is, possession applies only to corporeal property, or tangible property in English law terminology. There may be some differences on the margins about the application of possession concepts in Scots law, but the Bill fundamentally removes the same blocker to the application of an electronic regime to a paper trade document that already exists in English law. There is the same difficulty in Scots law, which the Bill is trying to remove.

On the application of possession in Scots law in Clause 3(1), which we discussed earlier, we are reasonably confident—and my colleague Professor Andrew Steven, who has worked on the moveable transactions Bill, would agree—that the Scots judiciary, prompted by this Act, would handle and understand the notion of possession in relation to an electronic trade document in the same way as the English judiciary would. That is all I want to say on the application of Scots law at this stage.

Lord Parkinson of Whitley Bay: Thank you. That is very helpful.

Q13 **Lord Lansley:** I think we were going to come back to the point raised earlier on location. Do Professor Mills or Professor Fox want to say anything further about the difficulty of electronic trade documents not necessarily having a location ascribed to them in the way that paper trade documents physically exist in a place?

Professor David Fox: I think that would be one for Professor Mills.

Professor Alex Mills: I am happy to take that question. That poses a difficulty, although it is not necessarily unsolvable or unique to electronic trade documents; it arises across a whole range of digital assets. That is part of the reason why it is more appropriate to look at that question as part of the Law Commission's work into digital assets and the conflict of laws more broadly. It would be very desirable for the solutions across these questions to be consistent if possible and not to have a particular solution for trade documents.

One of the questions that the Law Commission needs to look at here is whether we need new rules or legislation to explain how the existing rules apply to new problems, or whether it is better to leave the existing rules to be adapted by the courts as they apply them to those problems as they arise. This is already taking place in practice. To go back to something Professor Fox mentioned earlier, in cases dealing with other digital assets such as cryptocurrencies, the courts have proved quite adept in adapting the existing legal rules to deal with those kinds of issues.

More work needs to be done on conflict of laws rules, but I do not think it would necessarily be appropriate or desirable to do that in this Bill. It would also be desirable, if international work is going to be done on these questions—Professor Gullifer mentioned the project involving the Hague conference and others—to align UK law on those questions with those international developments.

Professor Sir Roy Goode: I am just a little concerned that we have not looked at the list in Clause 1(2), which I think is seriously defective. I can explain why, if I am allowed to do that. It says that “possession of the document is required as a matter of law or commercial custom, usage or practice”.

Looking at that, “a mate’s receipt” should not be there. The Law Commission says that it features in Section 1(4) of the Factors Act. That is a slip; it does not feature anywhere in the Factors Act. There is a very good reason; it is a temporary document. All it does is acknowledge receipt of goods on board, without guaranteeing carriage. Therefore, its only function is to enable it to be exchanged for a bill of lading. Mates’ receipts, certainly as a matter of law—I am focusing on law at the moment—should not be there. The same applies to warehouse receipts; well, sometimes they are and sometimes they are not, depending on whether they are expressed to be in favour just of the person who deposits, or in favour of whoever presents the warehouse receipts.

Bills of lading are rightly listed, but not all of them fulfil the conditions of Clause 1. A “received for shipment” bill of lading, for example, should not be included. It is common in container transport—that is where it is used—but it is not by itself transferable, so is not intended to deal with goods in transit. A “received for shipment” bill is not actually a document of title. A straight bill of lading also is not a document of title, except as it enables the consignor to transfer rights under the contract of carriage to the consignee—but one transfer only; no further transfers are covered, so it does not meet the requirements of the Bill. These things are serious matters to be looked at. If we are looking at the law, they do not fit.

The other question is: “custom, usage or practice”? My concern is that, if these things are listed here, as they are, is it to be assumed that there is a custom or practice that gives effect to things that would not otherwise be documents of title? What if custom or practice does not exist? Are we going to say that something is neither a document of title at law, nor actually a document of title in practice because there is no practice? These are quite serious matters that need to be very carefully considered.

The Chair: Presumably your suggestion is that, for example, “mate’s receipt” is deleted, because you do not want it to be suggested that this fulfils the condition of a paper trade document. Of course, that would always be open, as subsection (2) merely gives examples for someone to try and show the opposite. Have I understood you correctly?

Professor Sir Roy Goode: This is my problem. They are shown as examples. In other words, they are not intended to be exhaustive, but

they are nevertheless given as examples of things that satisfy Clause 1(1). My point is, "What if they don't?" At law, a number of them do not satisfy it. My view is that, if you are looking at the law, they should not be there; and if you are looking at custom or practice, the question is whether it is necessary to show whether custom or practice exists, or is it deemed to exist when it does not, simply because it is included in this list? I am very much in favour of this Bill—it is well done—but these, for me, are really serious things that need to be looked at carefully.

The Chair: Thank you. Lord Bassam, did you want to pursue the point on conflict?

Lord Bassam of Brighton: No, I think we have heard enough on that.

Q14 **The Chair:** I will therefore just ask a general sweep-up question. Do you think the Bill is sufficiently future-proof, and is there anything you would like to see in the Bill or anything in it that you think should be amended, apart from what you have already mentioned?

Professor Sir Roy Goode: No, you have heard enough already.

Professor Alex Mills: No. I would say just that the Bill does not solve the whole puzzle of electronic trading documents, but nor could it. It also depends on what other states do, on technological developments, and on some further work on the conflict of laws. What the Bill does do is put in place one absolutely essential element of the legal solution, so I would be very supportive of it on that basis.

Professor David Fox: Likewise, I think it is sufficiently future-proof. There may well be some areas of doubt about its application, some of which Professor Goode has just mentioned, but taking a non-prescriptive approach is by far the best way towards keeping the Bill adaptable for future practice. Critically, though, there must be the removal of the blocker that enables electronic versions of documents to be treated as possessable for the purpose of these transactions.

The Chair: Unless my colleagues have any further questions, I thank you all very much for coming and for the very helpful evidence that you have given us this morning.