HOUSE OF LORDS

Electronic Trade Documents Bill [HL] Special Public Bill Committee

Oral evidence: Electronic Trade Documents Bill [HL]

Thursday 26 January 2023

10.25 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. 5 Heard in Public Questions 1 – 11

Witnesses

I: Professor Miriam Goldby, Professor of Shipping, Insurance and Commercial Law, Queen Mary University of London; Richard Hay, Counsel and UK Head of Fintech, Linklaters; Professor Andrew Steven, Chair of Property Law, University of Edinburgh; Dorothy Livingston, Consultant Herbert Smith Freehills LLP and Chair Financial Law Committee at the City of London Law Society; Mr Justice Foxton, Judge in Charge of the Commercial Court.

Examination of witnesses

Professor Miriam Goldby, Richard Hay, Professor Andrew Steven, Witness TBC and Mr Justice Foxton.

Q1 **The Chair:** I welcome you to the second session this morning of the Special Public Bill Committee on electronic trade documents. We are very grateful to the witnesses who have come today. We are a little behind in our schedule, so I will proceed to ask each, in turn, to say a little about themselves and their general experience.

Professor Miriam Goldby: I am a professor of shipping, insurance and commercial law at the Centre for Commercial Law Studies at Queen Mary University of London. I have been working on this subject pretty much since 2003; I wrote my PhD thesis on electronic bills of lading. Since then, I have also been looking at other documents that are commonly used in trade in a way that requires their possession. I wrote a book on the subject, which was published by OUP in 2013 and went to its second edition in 2019, and I remain quite active in this field.

Professor Andrew Steven: I am Professor of Property Law at the University of Edinburgh. I am an expert on property law more generally, rather than on the law of trade documents. I served as a Scottish Law Commissioner until 2019. In 2017, I was responsible for a report on moveable transactions law. This resulted in a Bill currently before the Scottish Parliament, which, as the committee knows, links to the Bill that you are considering this morning.

Dorothy Livingston: I am the chairman of the City of London Law Society Financial Law Committee. Our submission was referred to in the last session by Professor Mills. I have held this post for over 20 years, and my committee and I comment frequently on legislation. Our practice involves looking at a lot of incorporeal assets of one sort or another—shares, bonds and other assets. Some of our members, who were part of the working party, worked on the dematerialisation of financial instruments, which includes bills of exchange in some contexts.

Richard Hay: I am a finance lawyer with Linklaters. My practice is predominantly focused on financial market infrastructures, but I have been heavily involved in various initiatives relating to the dematerialisation of trade documents and, more broadly, to the financial services sector. I sit on the UK Jurisdiction Taskforce, which is in the process of preparing a legal statement on the dematerialisation and digitisation of securities in the context of novel technologies. In particular, I have been heavily involved in dematerialisation initiatives in the metals markets.

Q2 **The Chair:** Mr Justice Foxton, can you say who are and answer the first question we want to ask you? So far, we have received a lot of evidence about the UNCITRAL model law on electronic transferable records, and we have been told that it marks a turning point in the move towards the use of electronic trading documents in shipping and finance by establishing a common legal regime. Do you agree?

Mr Justice Foxton: I practised in commercial law at the Bar for 30 years before becoming a judge of the High Court in January 2020. I sit in the Commercial Court, which deals with all aspects of commerce, including shipping, international trade and associated instruments. From 1 August last year, I became the judge in charge of the Commercial Court. I am also the general editor of *Scrutton on Charterparties and Bills of Lading*.

In relation to the first question, I agree that the model law is a turning point. One needs only to read the preliminaries to realise that quite a lot had happened before. In terms of what is to happen afterwards, a number of countries have implemented it, but we are in the early stages of its implementation. I accept that it is a turning point, but I am not certain that it is the last turning point.

Professor Miriam Goldby: I completely agree that it was a turning point. It focused attention on what needed to be done, in particular solving the possession problem, which I understand is common across jurisdictions -whether common or civil law. It is the common problem with using these trade documents in electronic form. For this reason, it was definitely a turning point.

The Chair: If everyone agrees with that, you can just say, “I agree”.

Professor Andrew Steven: I agree.

Dorothy Livingston: I also agree.

Richard Hay: I also agree. I would also like to point out that, as the question is the extent to which it also establishes a common legal regime, as has been pointed out in prior sessions it is a model law and there are limitations to that.

There are existing systems, and evidence has been submitted to this effect. Using a combination of the law of agency, bailment and attornment, they deal with the possession problem that has been referred to. It is a turning point. In particular, the breadth that it brings to international harmonisation is to be welcomed, but it is also important to bear in mind, particularly when it comes to questions in the Bill relating to reliability, that there are systems that have already solved these problems.

Q3 **The Chair:** We will come to that in due course. To come to a more detailed question, Singapore, which is another important common law jurisdiction, has implemented MLETR using the concept of exclusive control rather than possession. Can you help us with the distinction between these approaches, as you see them, and the benefits of using possession? As a sub-question to that, is the requirement of the intention to possess—animus possidendi—likely to cause any difficulty in practice? Will the determination of exclusive control resolve any of the issues that are likely to arise in practice?

Mr Justice Foxton: Singapore has implemented MLETR in terms, Article 11 of which, in its functional effect, is very close, if not extremely close, to the solution that the Law Commission is proposing in its Bill. The great benefit of the concept of possession, at least in the paper world, is that it is known and understood, and it works. I think, for a significant period, paper trade documents will exist not only alongside electronic ones but within the life of a single transaction. An electronic document may occupy only a small part of that life, as the form of the document changes.

The benefit of the Law Commission approach is in ensuring that there will be not a slip of paper, real or virtual, between the legal regimes that apply to those documents, whether in paper form or electronic form. In the vast majority of cases, the outcome under the Singapore approach or the proposed approach here will be the same.

Professor Miriam Goldby: I do not think it is correct to say that the MLETR approach uses exclusive control rather than possession. I think it uses exclusive control in order to plug into possession, in the sense that it uses the language of functional equivalence, but the idea is to make laws that are applicable to paper documents also applicable to their electronic counterparts. The way I understand it is that the English approach, the UK Bill, achieves exactly the same objective but uses different words and expresses the concept differently, without using the language of functional equivalence.

Dorothy Livingston: I am the outlier here. I would not have started from here; I would have started with functional equivalence. With a background in dealing with incorporeal assets, I find myself slightly offended with the concept of possession, which is for physical goods, being used for a dematerialised object, something which only exists in the ether. But I do believe that this can be made to work. It has a vast amount of support and I think it is probably more important to get on with it. Having said that, I will answer my questions on the basis that possession works and can work in this concept, although I think there is a major lacuna relating to the issue of location, which I will come back to later.

The Chair: If you have any suggestions about making it work, we have some questions that have come up from the discussion earlier this morning that we will want to ask you, but please help us on that. Mr Hay?

Richard Hay: I fully agree with the earlier comments that the MLETR approach almost embeds a certain intentional ambiguity. It is very clear that the MLETR reference to exclusive control and control more generally is to be given an autonomous meaning. I do not think it is a foregone conclusion that intention, for example, is not part of that concept, particularly because of the functional equivalence that has been referred to and the fact that it expressly refers back to possessory concepts that include an intentional element. So I fully agree. I am not sure that there is that opposition between exclusive control and possession; rather, it is exclusive control as an implementation of a possessory concept.

In really practical terms, the market is very familiar with possession in its broadest sense, and there are existing market structures that are structured around the broader concept of possession, including constructive possession. If we were to move away from that, it would likely require the market to move to other models to ensure, for example, insolvency remoteness when clients are facing intermediaries. There are structures in the market whereby end clients face an intermediary that in turn either holds a document itself or has a possessory entitlement held by somebody else.

To move away from possession would require a repapering of those arrangements—it would require the industry to move away from bailments, attornment, concepts that it is very familiar with, and towards other structures in order to ensure that end clients did not face insolvency risks with regard to their intermediaries. From an interpretative perspective, it is not clear that MLETR does not coincide with possession. More importantly, from a practical perspective and a market perspective, it is a really important thing to have in the Bill.

The last thing is just to touch on the intention question, the final limb of the question. There is certainly force to the question whether, given the way exclusive control is defined in the Bill, it will always effectively be the case that somebody can only obtain exclusive control if they indeed intend to possess the electronic trade document.

Where that makes me a little nervous is that the role of intention in relation to possession really only comes into play in two circumstances. One is that something has been found—on land, for example, which is controlled by somebody else—and a third party has come along and found something on that land, although that type of circumstance seems very unlikely to arise in the context of electronic trade documents.

The second scenario, which is more likely, or possible at least in an edge case, is one in which some burden attaches to possession of the document—for example, a cost, a fee, some form of sanction. It is conceivable that systems will emerge in which an electronic trade document could be sent to somebody in a manner that is equivalent to somebody posting a trade document through a letterbox. We would be ruling out the evolution of those types of systems and the flexibility that could be afforded to judges to achieve an equitable outcome if we were to include a presumption of intention.

The Chair: Thank you. We might come back to that point later. Professor Steven, do you want to add anything at this stage, or leave it till we get to the questions of Scots law?

Professor Andrew Steven: I can perhaps speak briefly and say that I found the Law Commission's approach on this persuasive. I read it in some detail. Scottish law in relation to possession is, in many ways, similar to English law. We have the two arms of it, if you like: the physical aspect—the holding—and the intention aspect. To possess, you have to have both aspects. Now, exclusive control is more the physical aspect than the intention aspect, but I found the comments of Professor Gullifer, in the earlier session this morning, very persuasive. I agree with her that current legislation, which typically applies on a UK-wide basis such as in the Factors Act and the Sale of Goods Act, has 'possession' but does not explicitly refer to intention. In practice, the fact that intention is not specifically mentioned in the Bill is fine.

Q4 **Lord Bassam of Brighton:** So far, we have heard that the Bill essentially implements MLETR with minor adjustments for the laws in the UK. We have also heard that the Bill sets up a system that is interoperable with laws of other states. First, do you agree with that? Is there any cause for concern about interoperability with other international jurisdictions and regimes, particularly MLETR and the future regimes in legal systems in Europe, the US and elsewhere, perhaps China?

Mr Justice Foxton: In relation to interoperability, the basic concepts that underpin English law in this area have a universal quality, I think. If one were to trace them back to their historical origins, they are probably transnational, many of them originating in a law merchant that did not recognise national boundaries. You will get differences in style as what is, after all, a model law is implemented in different jurisdictions, but the core concepts will be sufficiently common across all the countries of implementation, and they are sufficiently common between the Law Commission's Bill and MLETR, that interoperability should not present any problem.

Professor Miriam Goldby: I agree with what has just been said. Certainly, in jurisdictions that base their legislation on MLETR, I do not think there will be any significant or material inconsistencies with UK law, which means that, yes, the systems should be able to operate across the two jurisdictions.

Dorothy Livingston: In concept, it will work interoperably. There is obviously a big gap in interoperability in our own law in that it does not deal with conflict of law issues, which is exacerbated by the fact that it does not deal with the factual question of how you decide where an electronic bill of exchange is.

However, because we are adopting the law of possession, in order to create a valid security over, for example, a bill of exchange, a bill of lading or anything else physical, such as an aircraft, you need to comply with the relevant formalities—whatever they might be—or absence of formalities not only under the governing law of the contract you are dealing with but in the law of the place where the thing is. Relatively recent law from 2010 reinforces that. When you create a charge over an aircraft, for example, if it happens to be flying over the Netherlands and you fail to register the charge in, for example, the district registry of Maastricht, you will not have a valid English charge, even if it is all English law, the chargor is an English company and it is all duly registered at Companies House.

That sort of problem is lessened if you have created an effective pledge. However, to do that, you also need to know that you have created it in the place where the pledge is created—where the thing is. The electronic pledge will be created in a system. If the system is a DLT system, it could technically operate in 30 different countries and could be run by somebody with a place of business somewhere or other, who might or might not have real control over it, and interacted with by people in lots of different countries. There could be real doubt about where this is.

If I were advising somebody who is lending money on the security of an electronic trade document, that would be a concern. Until we get this fixed, I would have to advise that there is uncertainty on whether we have complied with all the necessary formalities, depending on where the English court ultimately decides that the electronic document is located. I cannot decide that myself, and there is no hint in the law.

The Singapore law has provided at Section 16J that, where a rule of law requires you to know time or place, you can use any reliable method to identify where or when that is. Something of that sort would be very useful in this Bill. It would be a practical halfway house. It is not the full solution to the conflict of laws issues that will be considered by the Law Commission and which other bodies, such as UNIDROIT, are currently consulting on as a form of private international law, which would answer the question on conflict. However, as a step forward, it would make it much easier to determine where electronic trade documetns are.

It would be very helpful, in an English context, if a clause was added that referred to any reliable method of identifying time and place but also included the choice of parties as to where the asset should be deemed to be. That would be enormously helpful in being able to start to use this legislation as soon as there is a suitable system, for users to be able to raise finance and financiers to have confidence.

Lord Bassam of Brighton: Thank you for your very full answer.

Richard Hay: I do not see any material concerns from an interoperability perspective. I have only one point to add to Dorothy's points on conflict of law. This is obviously important, as has been acknowledged, and steps have been taken internationally and in the UK to cater for it. It is appropriate that this is done consistently across the digital assets initiatives and this initiative.

The practical question is whether the Bill is dead in the water until that happens. It is really important not to hold the application of technology to these systems to a higher standard than is applicable to paper-based systems. It is very common to encounter complex conflict of laws questions in a financing context, including in relation to security arrangements, and there are very practical solutions: you essentially identify possible touch points, take security and obey the formalities in each of those jurisdictions. Without adding a great deal of complexity, that can be done very easily. In a practical sense, you can mitigate 99% of the uncertainty relating to that. Is the Bill dead in the water until we solve conflict of laws problems? I do not think so, although there may be divergent views on that. The benefits of having a harmonised approach from a conflict of laws perspective outweigh the potential downsides.

Lord Bassam of Brighton: Are you saying that we can put to one side the conflict of laws issues while we consider this and put the Bill in place?

Richard Hay: In my view, yes.

Dorothy Livingston: Can I come back on that, as we do not always agree on these things? You could say that some people have a greater risk appetite than others. That may not matter, but if this Bill indicated that the courts did not have to follow a rule which meant that they had to spend a lot of time laboriously determining where the place is whenever there is a dispute about security, that would be enormously helpful for uptake.

In this context, we might have a lot of relatively small transactions that do not justify taking security in three or four different jurisdictions. You will certainly not go for all 30 countries—in fact, you might not be able to know what countries the computers are in—but even if you just go for where the system appears to be established and you know the nationality of the person who appears to run the system, plus the system of the governing law, you will not do that for relatively quick, small transactions. You will do that only for the mega-deals. We should do something to make things a bit easier for the quicker, smaller transactions as well.

The Chair: That neatly leads to the next question on the ability of the judiciary to deal with such problems.

Q5 **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 and should this be covered in the Bill itself? I think our last panel said that, so far, the judiciary had been able to cope with understanding evolving technology.

Mr Justice Foxton: I am conscious that I have an interest in answering that question favourably, but that is my view none the less. Part of the genius of the common law is its ability to adapt to changing circumstances of commerce or technology. Judges do that with the benefit of enormous assistance in London, throughout England and Wales—and in Scotland, I am sure—from extremely qualified lawyers or experts who will assist them. Leaving possible points of dispute to be the subject of judicial decision if necessary is an element in the future-proofing process that the Bill, as I understand it, is aiming to achieve.

Once a decision has reached a certain level, the Court of Appeal, you will have a principle of great authority. Even then, if circumstances prove that not to be the ideal answer, there is an ability to revisit the question, and to do so, I suspect, with rather greater ease and flexibility than by amending legislation.

Professor Miriam Goldby: I agree and think this is the right approach, for two reasons. If the Bill were too prescriptive, it might affect innovation and future developments. It is also an exercise in futility trying to anticipate all the issues that might arise and to provide for them in advance. I also agree with what was just said regarding the approach of addressing issues when they arise in disputes. There are a lot of advantages to that approach.

Professor Andrew Steven: I also agree that the Bill should not be too prescriptive. The judiciary is more than capable of developing the law here. The background in Scotland is the same as in England: possession is a common-law term, in the sense that it is a non-statute law concept, so it can be moulded by the courts because it is not set down in legislation. Legislation refers to it, as I mentioned earlier, such as the Sale of Goods Act, which applies throughout the UK, so I think this is the right approach.

In Scotland, we recently had a leases case where the judge accepted that the tenant had accepted the landlord's terms on the basis of an emoji, so I think that the judiciary is more than capable of developing the law here as technology expands.

Lord Harlech: That is a brilliant example. Thank you.

Dorothy Livingston: I think the judges are very capable of making law. It is only that this question of location is novel; I am not aware of any other incorporeal asset that sits in a system that depends on physical location. Giving judges some broad guidance that they could accept any reliable solution that parties had arrived at would help them to develop the law without in any way restricting them from taking sensible decisions.

Richard Hay: I have nothing to add to the comments made. I think it is appropriate. The judiciary is fully capable of taking this forward.

Q6 **Lord Clement-Jones:** You have all been broadly reassuring about the shape of the Bill, the use of the concept of possession and so forth. This is almost a hypothetical question: would you consider it an issue if the UK were perceived to be diverging from MLETR? Of course, we know that that is not the Government's intention, despite the use of the possession concept. Could it be made clearer in the Bill that it is not the Government's intention, rather along the lines of Section 2 of the equivalent Singaporean Act?

Mr Justice Foxton: To some extent, this debate has echoes of the debate on whether the UNCITRAL model law on arbitration should be adopted in England and Wales. The Singapore International Arbitration Act indeed has a statement in it that it is in implementation of the model law. We departed from the model law in certain respects, but in the vast majority of instances the law of arbitration in Singapore and in this jurisdiction is the same.

Not only will it be clear from the Law Commission's report that the Bill is intended to give effect in an English context to MLETR, which will be admissible when questions of interpretation arise, but it could also be made clear in Explanatory Notes. I am not aware that it is a legislative drafting tradition here to include language of that kind when one is not simply replicating the text of the implemented convention verbatim, but I may be wrong.

Lord Clement-Jones: Thank you very much. That is very clear.

Professor Miriam Goldby: I entirely agree with what Mr Justice Foxton just said and do not have anything to add.

Professor Andrew Steven: I also agree entirely with Mr Justice Foxton.

Lord Clement-Jones: We have consensus, do we?

Dorothy Livingston: Yes, I broadly agree. The only reason to put any reference in is possibly to reassure people in other jurisdictions who are thinking of using or copying this law.

Lord Clement-Jones: Yes, I think it was Professor Mills in the previous session who was a bit of an outlier.

Richard Hay: Yes, I agree. The Bill is not unique in this respect.

The one point that perhaps could be made is that it is a question of emphasis and the weight given to potentially different interpretations. It is probably the case anyway that regard would be had to MLETR. Including a provision in the Bill from a structuralist perspective and a practitioner's perspective may run the risk of introducing greater uncertainty by referring to an autonomous set of meanings. For example, in relation to the concept of control, MLETR is express that that is different to the concept of control under English law. When we are advising clients in approaching these structures, we want to avoid circumstances in which we are left guessing what the content of those considerations may be. It is far safer for the starting point very clearly to be English law, albeit with regard to be had in a broader context to MLETR and other jurisdictions. That is the only gloss I would add that probably weighs in favour of a slightly less direct reference to MLETR than inclusion in interpretive provisions in the Bill.

Q7 **Lord Davies of Brixton:** The Bill introduces electronic trade documents, and inherent to that concept is a reliable system. Perhaps we can start with the two practitioners, as it were. Are you confident that there is a reliable system as of now? More generally, how do we know what constitutes a reliable system? Is it something that is found out only after the event if it is challenged, or will there be some understanding of what constitutes a reliable system for the person undertaking the transfer?

Richard Hay: To tackle the first question about whether there are reliable systems, although the concepts in the Bill are specific to ETDs, the concept of reliability in the context of financial market infrastructures and other existing structures is well understood. One can draw analogy with existing systems that have extensive business continuity practices. They are not necessarily regulated systems. The reliability of certain settlement systems, for example, that operate in the unregulated space derives from market participants' expectations of what systems that deal with very valuable entitlements will cater for.

Do reliable systems exist already? Yes, although they have not been designed specifically with the requirements of the Bill in mind. Do I think that the same means to address reliability that commonly exist in the financial market infrastructures of today could be applied in this context? Absolutely.

The question of when you test that is interesting, although I query whether that is more of a theoretical than a practical concern. These systems tend to be very stable and, when they are changed, the operators of the systems go through a large consultation process with participants, and any amendments to the systems are well publicised.

There is a question of whether this market will evolve to follow those types of processes or whether systems will emerge that are more susceptible to change. The answer is probably that, if we are looking at systems that are dealing with high-value documents, the people using them will, from the outset, require the governance of those systems to be very clear on any change. They will first become comfortable with the system as it stands, but will require the operator of the system to undertake that any change is highly publicised and very clearly agreed to by the parties. The parties will have the ability to withdraw from the system if there is any issue.

The prospect of having a system that starts life as reliable, becomes unreliable and then, all of a sudden, you lose your rights is very interesting. In the context of the way in which these systems are deployed in markets, there is essentially a market solution, because people will simply not use a system that does not have robust governance around it.

Dorothy Livingston: That the system self-evidently meets the requirements of the Bill is essentially a matter for the market. I think parties are careful about the systems they interoperate with and, in this context, will be looking for something very reliable. If there are serious issues, it would be a regulatory matter but not a matter for this Bill, in any event. That is a different set of rules: does the operator of something like this need to be regulated? That is not a question for now, because I do not think it is essential, although it might be deemed as such in the future. As things stand, it is perfectly possible for reliable systems to be established. I have every belief that the relevant technology exists and would be deployed to satisfy market demand.

Mr Justice Foxton: I defer to the views of the practitioners on this. Their perspective is much more enlightened than mine.

Professor Andrew Steven: I have nothing to add.

Professor Miriam Goldby: Neither do I.

Q8 **Lord Holmes of Richmond:** Are you confident that current technology can safeguard the integrity and security of electronic trade documents?

Professor Miriam Goldby: I am aware of a number of systems that are currently in operation and have been operating for a while. Their use is not high-volume, but I am not aware of any issues that have been experienced, in the sense of them not being able to perform the functions that would be required under this Bill. I am also not aware of any indications from system providers that they are not able to fulfil the requirements, in particular the integrity requirement, in the Bill. Even beyond this field, as has already been said, electronic records and communications have been used to support very high-value transactions for many years. We have evidence that it can be done. I hope that answers the question.

Professor Andrew Steven: I am not sufficiently qualified to comment on this.

Dorothy Livingston: I agree with what has just been said and do not have much to add to my last answer. It seems to be the same sort of question.

Richard Hay: I agree; it is really a question about the technology. Just to re-emphasise, there are systems that deal with high-value entitlements very reliably. There does not seem to be anything specific to this context that would lead me to assume that that would not be the case here.

Mr Justice Foxton: I do not have anything I could usefully add.

Q9 **Lord Holmes of Richmond:** Has the risk of cybersecurity attacks on systems that deliver electronic trade documents been sufficiently considered? How highly do you rank that risk?

Professor Miriam Goldby: There have been a number of high-profile cyberattacks in the news, but I am not sufficiently knowledgeable about the risks as such. Risks can also be mitigated and managed by using insurance or a number of existing risk-mitigation measures but, as I said, I am not sufficiently knowledgeable about how best to address cyber risk to give you a fuller answer.

Professor Andrew Steven: Neither am I.

Dorothy Livingston: I think I can safely say that I am not an expert on cybersecurity.

Richard Hay: I am certainly no expert on cybersecurity. The only point I would add is that, when we advise on any type of system of this nature, there is a high focus from all participants on cyberattacks and the system’s overall resilience policies. It is an area on which market participants are very focused. No system is infallible, and that is understood, but there are ways of dealing with that.

Mr Justice Foxton: My only observation is that we have functioned for centuries with bills of lading issued in triplicate. One would have thought that that would have offered opportunities for fraud on a significant scale, but it has not been a major problem. Although I accept that the risk of cyberattack poses its own challenges, my instinct is that electronic documents of this kind would be more secure, as far is fraud is concerned, than their paper equivalents are at the moment.

Q10 **Lord Parkinson of Whitley Bay:** I will direct my question initially to Professor Steven, but if others wish to come in, please do. Do you think that any differences between English and Scots law have been properly considered and reflected in this Bill?

Professor Andrew Steven: In general terms, yes, I do. I begin by saying that I support the extension of the Bill to Scotland 100%. I cannot speak for Northern Ireland, but I am absolutely of the view that the Bill should extend to Scotland. I am a member of the expert group that Lord Hodge is chairing, which was referred to in the earlier session this morning, and I agree with Professor Fox in relation to that.

I regret that the Law Commission was not able to work with the Scottish Law Commission and do a joint project on this, but I accept the reasons that Professor Green gave you in an earlier session. To me, this Bill should have applied to Scotland from the Law Commission stage.

I agree with evidence given by Professor Fox earlier today. I think the Bill is well done, particularly Clause 1, which allows legroom in theory for the Scottish courts to take a different approach to what would qualify as a trade document; I think the drafting of Clause 1 allows for that. I would be surprised if a Scottish court would want to do that. The history—this being a commercial law area—is that Scottish courts have generally followed the approach south of the border, but the property law is, in fundamental terms, different. There is Scottish property law and there is English property law. If a Scottish court wanted to take a slightly different approach, it could, under the Bill as drafted. I commend the drafting of the Bill.

I have particular thoughts—indeed, questions of clarification—on Clause 3(4), but you may want to ask me about that separately.

Lord Parkinson of Whitley Bay: I was going to come on to that and ask whether you think that covers, obviously, the Moveable Transactions (Scotland) Bill, which is before the Scottish Parliament. Please make any points that you would like to about Clause 3(4) now.

Professor Andrew Steven: I fundamentally agree with the policy that the Electronic Trade Documents Bill should fit with the Moveable Transactions (Scotland) Bill. The two should absolutely be made to work together. I do not entirely understand what Clause 3(4) is doing, so it is not opposition to it but a request for clarification from the Government about exactly what they are trying to do. You have had written evidence from me where I have set this out in a bit more detail. I have a colleague in Edinburgh, Dr Simone Lamont-Black; she is an expert on trade documents law, which I am not. We have had long discussions about Clause 3(4), and we are not sure that we have quite got there yet. Is it possibly trying to create security over the bill of lading itself, to take the classic example of a trade document, rather than the goods that the bill of lading represents? That is our theory, but it is not entirely clear to us what it is trying to do.

In broad terms, hooking into or plugging into the concept of possession works well with the Moveable Transactions Bill. At a certain level, I wonder whether Clause 3(4) is actually needed, but there could be greater clarification from the Government about exactly what they seek to do. We know in broad terms that they are making sure that the Electronic Trade Documents Bill fits with the Moveable Transactions Bill. That is absolutely fine, but the devil is in the detail and, as it currently stands, I do not entirely follow it. Maybe Simone Lamont-Black and I are missing something. I think you have evidence from the University of Aberdeen's Commercial Law Centre along similar lines.

Lord Parkinson of Whitley Bay: I am conscious that there will be an opportunity for me to set out the Government's response a bit more in later stages of the Bill's hearings, but we are looking at the possessory pledges aspect of the Bill that is before the Scottish Parliament.

Professor Andrew Steven: I think the Electronic Trade Documents Bill would actually work without Clause 3(4) in relation to possessory pledges in Scotland. I have no policy disagreement with you; it is just on the detail of what Clause 3(4) is doing and whether it is definitely needed. In policy terms, the desire that the two pieces of legislation fit together is entirely the right one.

Dorothy Livingston: The underlying laws, such as the Bills of Exchange Act and the Carriage of Goods by Sea Acts, are national laws that cover the whole of the UK. Therefore, I would support Scots and Northern Irish law also being affected by the Bill, and I am very pleased to see the support in Scotland for that approach.

Mr Justice Foxton: I have nothing to add.

Professor Miriam Goldby: I have nothing to add either.

Q11 **The Chair:** Maybe we can find a mechanism to resolve Professor Steven's issue before we get to the next stage of the Bill. It would obviously be sensible. Really, his point is, "Is the subsection needed, and can we do without it?" The shorter the Bill, the better the Bill—possibly. I was going to sweep up by asking you about future-proofing the Bill, but I think we have covered it: it is up to the judges.

Is there anything not in the Bill that you would like to see in it, or anything in the Bill that you think should be amended? I want to touch on the two points that Professor Sir Roy Goode raised. The first was about the list of documents in Clause 1(2), particularly the inclusion of the words "mate's receipt"; he was concerned that that might have an effect. The second point that he wanted to make was: what would happen if the system was no good and was deemed unreliable, but a particular transaction had taken place? Surely that transaction should be saved.

Those were the first two points that I would like to take up. I think we have dealt sufficiently with conflicts of law and the views on whether an interpretation or reference to MLETR is needed. There is one other question, but I will ask you first that general question and then deal with Professor Sir Roy Goode's two points.

Professor Miriam Goldby: If I understand correctly, your question is whether there is anything I would like to see added to the Bill or anything I think should go. I cannot express a view on the provision that Professor Steven talked about earlier. However, with respect to everything else, I think the Bill is exactly right as it is. I would not change a thing.

The Chair: And do you have any comments on the two points raised by Professor Sir Roy Goode, or would you prefer to think about those and let us have something in writing?

Professor Miriam Goldby: I can do both. I can give you a very quick preliminary impression and send you something in writing. Would you be happy with that?

The Chair: Very.

Professor Miriam Goldby: It is really important to understand Clause 1(2) as simply giving a descriptive list of documents that are commonly used in the way described in Clause 1(1). If it is understood in that way, I do not think it can in effect create a document of title where there is not one, in the sense that it is only saying, in so far as these types of document function on the basis of possession, that we want them also to be able to function in the same way if they are in electronic form, provided that they meet the criteria in the subsequent provisions. That is my initial reaction to that concern, but I will come back to you in writing at a later date.

The Chair: —on that and the other point. Thank you very much indeed.

Professor Andrew Steven: As I said at the beginning, my core expertise is not in trade document law. However, I am content with the Bill. Its brevity is a good thing, and the fact that it will allow judges to develop the law is a good thing.

On Sir Roy's two points, what Professor Goldby has just said is also my view. First, I am unaware of any Scottish authority at all on mates' receipts. That has simply not been considered in Scotland in the courts, to the best of my knowledge. I will need to think about Sir Roy's second point.

Dorothy Livingston: I am happy with the Bill, provided it gives some guidance on the location issue. I was not troubled by what Roy Goode said about different types of document, such as mate's receipts, being included in the list. First, the Law Commission did a thorough examination before selecting those documents and, secondly, I think Professor Goldby's explanation was on point.

On the second point, I am not sure that it is something for this Bill, because presumably if a system failed or became unreliable, it would be a legal entity of some sort and be wound up. There is law that deals with the rights of parties in that context. That these things are possessed and are in the name of sole person or group of people will make that very much easier.

Richard Hay: I fully agree with the comments that have been made. On the first question of whether I would change anything in the Bill, my answer is no. On Professor Sir Roy Goode's comment about the list of documents, it is important to highlight in that regard not just Clause 1(1) but what is said in subsection (2), which states that the documents listed are "examples of documents that are commonly used as mentioned in subsection (1)(b)". Subsection (1)(b) is simply a factual statement; it renders subsection (2), about the types of document that are commonly used in relation to trade. That is unobjectionable. It leaves completely open the question of Clause 1(1)(c) in relation to the question of possession. If you fail subsection (1)(c) but you are in the list, you fail the test. That is a satisfactory answer.

The Chair: Do you have anything on the second point, or do you want to think about it?

Richard Hay: It is key to answering the question about when we are testing reliability. If the system started life as reliable and then became unreliable, surely any transaction that went through at the time when the system was reliable is unchallengeable. The issue arises only if there is a transfer at the time when the system is unreliable. It seems very unlikely, for the reasons I mentioned earlier, that that will be a significant concern.

The Chair: Or we leave it to the judges to sort it out.

Mr Justice Foxton: In relation to Sir Roy's point, my understanding of the Bill is that it does not tell you when possession of a particular document will be legally significant; it just tells you that, if it is legally significant, this is what will constitute possession. The Law Commission makes the point at paragraph 3.44 of its report that there is Privy Council support for the view that there may be circumstances in which, by reason of a local custom, mates' receipts will operate as documents of title. There is no harm done by the Bill when they do not, but if there is a custom where they do, we need to be able to have possession of the electronic version or an equivalent as we do for the paper version.

In relation to system failure, if there is an unreliable system, that will have the effect that one cannot have an equivalent to possession with what follows from that, but it will not affect other legal doctrines, contract assignment and novation. It does not mean that a transaction ceases to exist for all purposes, just that one part of the law of trade—namely, that dependent on possession—will not apply.

The Chair: Some suggestion was made that, in practical effect—this is what most of our witnesses have told us—where there is exclusive control, possession will almost inevitably follow, and one should not worry about the intention to possess. Is that a point safely left to the judges, or do we need something in the Bill that makes it clear that, essentially, there is a presumption that if you have exclusive control, you have possession subject to proof to the contrary?

Mr Justice Foxton: I think the number of cases in which any issue of intention to possess will be live in this area will be vanishingly few, if any. Of course, there have been cases with paper documents where unwitting attempts to transfer to the wrong person have created potential problems. I seem to remember a decision of yours, Lord Thomas, in the Aegean Sea case, addressing something similar. I would not want to exclude the possibility of cases where the court will want to use the need for intention to possess to provide an answer to something that has gone wrong, but my expectation is that it will probably never happen.

The Chair: Yes, vanishingly small. Do Professor Goldby or the others have any comment on what, from me, is the final question?

Professor Miriam Goldby: It is important that the Bill does not exclude the necessity of animus possidendi. As Mr Justice Foxton has just said, the number of situations where it is likely to be significant will be very minor indeed. If the question arises, the Bill does not exclude the need for it, so that is reassuring.

Dorothy Livingston: I agree. I think it can be safely left to the judges.

Professor Andrew Steven: I commented on this earlier. That is my view too.

Richard Hay: It also depends on the design of the system. For a transfer to go through, many systems require the transferee to click on a button and consent to the transfer. Why preclude the possibility that somebody, someday, would want to design a system that does not require that? Then you have the question of the consequences of an unwitting transfer. It also goes to future-proofing not to override the question of intention and to leave flexibility to the judiciary.

The Chair: A sort of justice safety brake.

Richard Hay: Quite.

The Chair: I thank you all very much indeed on the committee's behalf for coming to give evidence to us today and for being very helpful. We have, I hope, been enabled to look at all the hares that have been set to run on this area with your great assistance.