

UK Parliament Call for Evidence on the Electronic Trade Documents Bill
(January 2023)

1. This response is provided by Dr Burcu Yüksel Ripley and Dr Alisdair MacPherson on behalf of the Centre for Commercial Law (CCL) at the University of Aberdeen. The CCL brings together researchers across the broad groups of corporate and commercial law, international trade law, intellectual property and technology law, and dispute resolution. The law relating to electronic trade documents is one of the research areas of the CCL. Working groups and members of the CCL have responded to various calls for evidence and consultations in relation to electronic trade documents (see <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php#panel1114>) and published in the area to help raise awareness of the issues and contribute to the development of solutions. This includes:
 - B. Yüksel Ripley and A. MacPherson, ‘Digital Assets Law Reform in England and Wales and Prospects for Scotland’, *Aberdeen Law School Blog*, 2022, <https://www.abdn.ac.uk/law/blog/digital-assets-law-reform-in-england-and-wales-and-prospects-for-scotland/>.
 - A. MacPherson and B. Yüksel Ripley, ‘Scottish Government Consultation on Digital Assets in Scots Private Law’, on behalf of the Centre for Commercial Law at the University of Aberdeen (June 2022), <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php>.
 - B. Yüksel Ripley and A. MacPherson, ‘Law Commission of England and Wales Consultation on Digital Assets: Electronic Trade Documents’, on behalf of the Centre for Commercial Law at the University of Aberdeen (July 2021), <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php>.
 - B. Yüksel Ripley, ‘Transition to Paperless Trade to Mitigate COVID-19 Impact on International Trade’, *Aberdeen Law School Blog*, 2020, <https://www.abdn.ac.uk/law/blog/transition-to-paperless-trade-to-mitigate-covid19-impact-on-international-trade/>.

Questions:

whether you agree with the proposed reforms and whether the reforms achieve what they are intended to

2. Yes, we agree with the proposed reforms and think that they achieve what they are intended to. As we identified in the consultation responses and publications cited in paragraph 1 above, the current law, which is heavily based on paper-based trade practices and does not adequately accommodate the use of electronic trade documents, is far from suitable to address the needs of today’s international trade landscape. The reforms intend to remove legal barriers for certain electronic trade documents by giving them the same legal effects as their paper counterparts. This will unlock significant potential for international trade by increasing efficiency, building resilience to shocks such as COVID-19, and will bring financial and environmental benefits. All of these are of value to the UK and its economy and justify reform in this area.

whether the Government was right to extend the Bill to the whole of the UK;

3. Yes, we think that there is a pressing need for law reform in the UK as a whole in this area and it was the right decision to extend the Bill to other jurisdictions of the UK. As we considered in the consultation responses and publications cited in paragraph 1 above, the laws across the UK in this area are largely aligned and legislation such as the Bills of Exchange Act 1882 and the Carriage of Goods by Sea Act 1924, which will be affected by proposed reforms, are also applicable in the jurisdictions of the UK beyond England and Wales. Given this UK-wide impact, it is important that the proposed reforms are applicable across the three jurisdictions of the UK and that a level of uniformity is to be achieved among them. Otherwise, there would be a divergence of the application of provisions within the same legislation across the jurisdictions of the UK, which would potentially cause confusion and complications, divergence in trade practices in the UK, and, depending on the circumstances, intra-UK conflict of laws issues.

whether the application of the Bill to the whole of the UK sufficiently takes account of any differences there may be with the law of Scotland;

4. Regarding Scotland, we considered, in the consultation responses and publications cited in paragraph 1 above, that there are no significant obstacles to applying the proposed Electronic Trade Documents Bill in Scotland and we argued that there is a compelling case for Scotland to participate in the electronic trade documents reform based on the reasons we gave therein. The provisions of the Bill take account of certain differences between Scots law and the law elsewhere in the UK.
5. Clause 1(1)(c) would seem to allow a court to decide that certain types of documents are not paper trade documents under Scots law for the purposes of the Act, on the basis that the possession of the document is not required as a matter of Scots law or commercial custom, usage or practice in Scotland for a person to claim performance of an obligation, despite the existence of clause 1(1)(b) and 1(2) and the fact that such documents are commonly used in another part of the UK. By virtue of the rest of the Bill, the same would be true for equivalent electronic trade documents. While a contrary approach could be justified for reasons of consistency and commerce, this would appear to require amended wording. In any event, it is likely that a Scottish court would be heavily influenced by the position in England when deciding a relevant case under Scots law, particularly with respect to whether or not a particular document is a paper trade document or electronic trade document.
6. In the latest version of the Bill, the only substantive provision applicable to Scotland alone is clause 3(4). While electronic trade documents are ordinarily incorporeal moveable property, the provision states that they are to be treated as corporeal moveable property “for the purposes of any Act of the Scottish Parliament relating to the creation of a security in the form of a pledge over moveable property”. As detailed in the explanatory notes (paras 69-73), this is directed towards the Moveable Transactions (Scotland) Bill, which is currently before the Scottish Parliament, and will, *inter alia*, reform the law of possessory pledges and introduce statutory pledges. Clause 3(4) will enable electronic trade documents to be the subject of possessory pledges and statutory pledges. Possessory pledges are limited to corporeal moveable

property while statutory pledges will also extend to certain incorporeal moveable property (such as intellectual property). In the absence of clause 3(4), it would not be possible to pledge electronic trade documents. Section 40(5) of the Moveable Transactions (Scotland) Bill provides that the provisions on pledge do not affect any rules of law regarding pledges of negotiable instruments. As such, electronic versions of such documents should also be unaffected by the Moveable Transactions (Scotland) Bill. The possibility of pledging an electronic trade document should depend on whether the paper equivalent can be pledged. The provisions in clause 3(1)-(3), in combination with clause 3(4), appear to achieve this but the position is not entirely free from doubt.

7. There is also a need to distinguish between the pledging of the documents themselves and the pledging of the items that the documents may represent. As regards the latter, there is a special provision regarding the delivery of a bill of lading representing property in the Moveable Transactions (Scotland) Bill at section 42(1)(d). In the absence of clause 3(4), the provision regarding bills of lading would still apply and would also probably do so to electronic bills of lading representing property (due to clause 3(1)-(3)); however, the possibility of pledging electronic trade documents themselves (including electronic bills of lading) would seem to be precluded without 3(4) and some such documents may not be able to be pledged even with clause 3(4). If this is not intended, or to clarify the position and remove any ambiguity, it may be worthwhile to consider the position further and assess whether the current wording and interrelationship with the Moveable Transactions (Scotland) Bill achieve what is sought.
8. In order to avoid some of the difficulties arising from clause 3(4), perhaps amended wording along the following lines or similar could be considered: “An electronic trade document is capable of being encumbered by a possessory pledge or statutory pledge under the law of Scotland provided that an equivalent paper trade document can be encumbered by such a pledge.”

the interoperability of the Bill with national and international regimes, in particular the Model Law on Electronic Transferable Records from the United Nations Commission on International Trade Law (MLETR);

9. We considered, in the consultation responses and publications cited in paragraph 1 above, that broadly speaking, the proposal and the MLETR seem to be compatible to a considerable extent. We don't think that differences between the two instruments would cause any great difficulty as the MLETR, as a model law (not convention), serves mainly as guidance for national legislators.

the reliability and security implications of moving to an electronic system, including

- **the immutability of electronic documents;**
- **the potential risks from the ability to create multiple copies of a document;**
- **the reliability of electronic signatures; and**
- **the benefits and risks of a list of trusted signatures and reliable systems;**

10. One of the key concerns in this regard is fraud. We considered, in the consultation responses and publications cited in paragraph 1 above, based on an example of a bill of lading, that paper documents are very vulnerable to fraud (eg they can be forged by adjusting details, or by switching). This is less of an issue with electronic documents, because they are not in a physical form and therefore not being transferred from hand to hand. They can remain securely in electronic/digital systems due to strong security and encryption mechanisms in place in these systems. From this perspective, electronic trade documents will reduce the risk of fraud compared to paper trade documents depending on the level of security and encryption mechanisms in place in a given electronic/digital system. Creating multiple copies of a document is also less of an issue in electronic/digital systems as the way these systems usually work is that one person has the document at a given time, rather than having multiple copies of the document.
11. On the other hand, electronic/digital systems inherit a risk of cybersecurity attacks or hacking which can be considered as a new form of fraud for electronic trade documents. Arguably, this fraud risk for electronic documents could be higher than the fraud risk for paper documents given the size and number of transactions that could be accessed in electronic/digital systems. For example, essDOCS provides insurance that covers all electronic bill of lading users against electronic risks up to US\$20 million per electronic bill of lading (see <https://www.essdocs.com/company/insurance>), which might give an indication about the potential risk and liability that one might be exposed to in electronic/digital systems.
12. Regarding immutability, it is generally considered as an advantage that distributed ledger technology (DLT) or blockchain (a type of DLT) based electronic/digital systems offer. However, this may not be always the case. For example, mistakes on electronic trade documents should be able to be corrected on the system. Otherwise, the system will be fed by incorrect data as DLT or blockchain will not preclude this due to immutability.
13. Regarding electronic signatures, the issues that would potentially arise in this area would not be significantly different in comparison to other areas where electronic signatures are in use.

whether the list in Clause 2(2) of what constitutes an “electronic trade document” is right;

14. We don't have any objection to the cumulative list in clause 2(2). As we understand it, that section is to be interpreted with clause 1(2) which provides a non-exhaustive list for documents that are commonly used as paper trade documents.

whether the emphasis on “possession” and its development by the courts in the UK rather than “exclusive control” is the best approach (as compared to Article 11 of MLETR and section 16 I of the Singapore Electronic Transactions (Amendment) Act 2021);

15. Our understanding is that the proposed reforms in the Bill have a very targeted purpose of enabling the legal recognition of certain trade documents in electronic form. The concept of possession seems to be fit for this targeted purpose. It is also to be noted that electronic/digital systems usually allow their users a default back to a paper document at any time in the process and therefore we see value in using the concept (ie possession) for both paper and electronic versions of a trade document. This is in comparison to the ongoing law reform work of the Law Commission of England and Wales of other digital assets (eg cryptoassets) which considers the broader question of how existing personal property law does/should apply to them and places more emphasis on the concept of (exclusive) control.

whether the Bill is future proofed.

16. Yes, we think that the Bill is future proofed given its generality and technological neutrality.