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**UK ELECTRONIC TRADE DOCUMENTS ACT 2023:  
A FURTHER STEP TOWARDS PAPERLESS TRADE**

## UK ELECTRONIC TRADE DOCUMENTS ACT 2023: A FURTHER STEP TOWARDS PAPERLESS TRADE

In July 2023, the UK Electronic Trade Documents Act 2023 (ETDA) became law. From 20 September 2023, the ETDA will allow for the legal recognition of trade documents such as bills of lading and bills of exchange in electronic form. We consider some of the ETDA's key provisions and its likely impact on global trade.

On 20 July 2023, the ETDA received Royal Assent. The ETDA was largely based on the draft bill published by the UK Law Commission in March 2022. The aim of the ETDA is to help to rectify deficiencies in the treatment of electronic trade documents under English law. This will allow businesses to take advantage of reduced costs and accelerated transaction timelines, increasing trade and access to trade finance. Previously under English law, electronic documents did not have the same legal recognition as their paper counterparts. The ETDA will give electronic equivalents of paper trade documents the "same legal treatment, effects and functionality" as their paper equivalent. It will take effect after two months, from 20 September 2023.

### What documents are covered by the ETDA?

The ETDA does not contain an exclusive list of all documents intended to fall under its remit. Instead, it covers trade documents where possession is required "as a matter of law or commercial custom, usage or practice for a person to claim performance of an obligation". This is deliberate and seeks to avoid restrictive issues.

However, the ETDA does list out the following instruments as examples of electronic trade documents: bills of lading, promissory notes, bills of exchange, marine insurance policies, warehouse receipts, mates' receipts, cargo insurance certificates and ship's delivery orders. These are all examples of documents that entitle the bearer to claim delivery of goods or payment of a sum of money when they are in *possession* of the instrument. Similarly, the transfer of the (physical) possession of a document can also transfer the right or obligation on its face. Therefore, being the "holder of" or having "possession of" a trade document has special significance. As English law only recognises tangible assets as possessable, an important area of focus for the ETDA has consequently been how to transform an intangible trade document in electronic form into an asset which can be possessed.

### A new definition of document

The ETDA introduces a new definition for "electronic trade documents" which is based on the requirement that these documents exist within a system to process them that conforms to particular minimum standards. This new category of electronic trade document is granted the same legal standing as its paper equivalent, and lawful holders are enabled by the ETDA to take constructive possession of the goods to which the trade document refers (or to claim performance of the relevant obligations).

### Minimum system standards

For electronic documents to be considered electronic trade documents and fall within the scope of the ETDA, the system on which they run must be sufficiently reliable. The ETDA defines the principal operative features for a system to qualify as "reliable" for the recording of electronic trade documents but does not prescribe a particular system.

## A reliable system

To constitute an “electronic trade document” under the ETDA, a reliable system must ensure that an electronic trade document:

1. contains the same information as its paper equivalent;
2. is distinguishable from any copies;
3. is protected against unauthorised alteration;
4. is access-restricted in a way that ensures only one person can exercise control over it at any one time;
5. is sufficiently accessible that a person who can exercise control over it can demonstrate this; and
6. is fully divested on transfer – i.e., is only transferable in a way that grants the transferee exclusive control which cannot be shared with the transferor.

The decision to avoid prescriptive specification of systems or technologies is a deliberate feature to ensure that the ETDA can continue to be applied as digital technology develops. However, it is likely that industry-agreed standards will be required to support adoption and create market certainty for platform providers and participants. Trade industry associations will also have a role to play in coordinating and maintaining modern and ‘best in class’ standards.

## Impact on security

A key feature of the ETDA is that it enables electronic trade documents to be possessed and for possession to be transferred electronically (on a “reliable” system), and therefore eligible for possessory security arrangements (such as pledges and liens). The ability for an electronic trade document to be used as effective security opens up opportunities for businesses to have greater access to trade financing structures. As the practice for possessory security arrangements commonly used in trade and commodity finance becomes dependent on system rules and operating procedures for the relevant ‘reliable’ system, market practice will need to adapt. For example, due diligence will need to be expanded to cover the system rules and operating procedures (including what happens in the case of any technical errors), insolvency risk of the provider and to discern any existing security interests. These factors will also need to be integrated into financing processes and perfection steps.

## Containers on the blockchain?

The ETDA’s legal anchoring of existing platforms is likely to be of greater impact than its implications for new technologies. The fact that distributed ledger technology (DLT) or blockchain-based systems can qualify as “reliable” under the ETDA has been greeted with some enthusiasm and there are a growing number of trade finance platforms offering products using DLT which purport to be faster and more secure than some traditional alternatives. However, for any new system to succeed, a critical mass of support is crucial. For example, last year Maersk and IBM announced the discontinuation of their blockchain-based TradeLens platform that sought to achieve global supply chain digitisation, referencing insufficient “full global industry collaboration”. It remains to be seen whether the ETDA will help to bolster support for other nascent DLT-based trade finance products and initiatives.

## **Preserving existing systems (legal and digital)**

### **Possession**

*Possession* of an electronic document is not defined under the ETDA; it remains a matter of common law and is therefore a question of (i) factual control and (ii) intention. This is intended to maintain the validity of existing case law, and to allow the courts to remain flexible and fact specific.

### **Opting out**

The ETDA does not invalidate existing ways of using documents in electronic form to facilitate the types of trade with which it is concerned, provided this is the specified or inferable intention of the parties. Existing solutions to use electronic documents that do not meet the “electronic trade document” criteria are not immediately at risk.

### **Conversion from / to paper**

A crucial feature of the ETDA is that it allows for a change of trade document medium at law: a paper document can be converted to electronic form and an electronic document to paper form provided that (i) the converted document clearly states the form which it has been converted from and (ii) contractual or other requirements governing conversion of the document are complied with. In addition to removing single points of supply or digital chain failure, the ability to move between hard copy and digital versions is also expected to improve international interoperability as a holder can transfer the document into a paper medium when, for example, seeking to exercise its rights in a jurisdiction that does not recognise the legal validity or admissibility in court of electronic trade documents.

## **Platforms and contractual frameworks**

Well before the ETDA's introduction, providers of electronic trade platforms such as Bolero and essDocs (now ICE Digital Trade) sought to address these issues by using platform-specific contractual frameworks to create rights between parties. In the absence of legislation giving electronic trade documents equivalence at law, such systems relied on individual participants agreeing with counterparties that possession and transfer of electronic trade documents would have the same legal consequences as if they were paper. It is likely that many platforms will adapt their terms and conditions to take account of new statutory frameworks like the ETDA and international equivalents as they gain traction; in many cases, platforms have advocated for such legal reform.

In the short term, existing contractual frameworks will need to run in parallel with statutory frameworks which may pose some initial challenges for legal and compliance teams particularly. However, as more countries adopt MLETR-like legislation (see below) and usage of, and trust in, electronic trade documents increases, it is likely that there will be a transition for platforms and their users towards the use of statutory frameworks like the ETDA. Such a move will necessitate changes in industry practice, including in relation to legal documentation. For example, electronic bills of lading would need to have their own governing law and jurisdiction clause separate to the charterparty agreement in order to take advantage of domestic frameworks such as the ETDA under English law.

## An electronic paper tiger? The international context

The ETDA is one step in a wider long-running international effort to harmonise and digitise global commerce and the legal frameworks which underpin this. The ETDA is designed to complement the 2017 UNCITRAL Model Law on Electronic Transferable Records (MLETR), which itself has roots in the 2008 Rotterdam Rules that sought to harmonise international standards of liability for loss or damage arising from carriage of goods by sea. The ETDA, whilst only applying to English law trade documents, should be viewed as a significant step in an ongoing process of gradual legal globalisation. The Law Commission points out that *“it sets an important precedent across all 54 Commonwealth countries and all contracts that use English law”*. A significant proportion of global trade is conducted using English law documents which means the change will already have impact internationally, but it is hoped that other jurisdictions will follow.

National approaches to electronic trade documents range from outright adoption of the MLETR to separate frameworks that do not consider the model law at all. In its Electronic Transactions (Amendment) Act 2021, Singapore opted for the former through the introduction of control as a functional equivalent to possession. In contrast, China, South Korea and Japan have not adopted the MLETR but instead have set out in law the circumstances in which a person is deemed to hold a document, and how that person can transfer specific rights or entitlements.

The ETDA was drafted to complement MLETR whilst taking into account specific features of English law. As additional countries opt to adopt all or parts of the MLETR, discrepancies between the model law and national implementations like that of ETDA may multiply. Further legislative coordination is needed and is being actively pursued through the introduction of electronic trade documents as component parts of Digital Economy Agreements (DEAs). There is the opportunity for individual jurisdictions such as the UK and Singapore to enter into bilateral and mutual recognition frameworks which will underpin a global digital trade ecosystem around which platforms, financiers, insurers, logistics players and other key participants can centre their activity. For more, see our coverage of earlier developments in this space in our December 2021 briefing [\*\*Paperless International Trade: Achieving Harmony Between the Law and Technological Potential.\*\*](#)

## An aircraft financing use case?

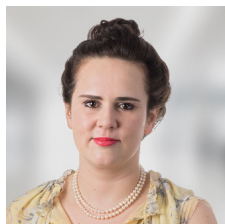
Alongside the maritime sector, aviation is a prime example of an industry where English law prevails as the chosen law to govern cross-border commercial dealings in movable goods. Aircraft, including engines and parts, are bought and sold (and financed) by international parties across multiple jurisdictions. In each case where the “metal” is traded and English law governs the sale arrangement, ownership is transferred either by way of delivery or by way of a bill of sale. The latter method is invariably preferred, in order to ensure a (paper) chain of title, ideally from manufacture, and to satisfy the requirements of national aviation registries and/or the property laws of the parties’ different jurisdictions. Typically, use and possession of the aircraft will be provided to the airline or other operator pursuant to a lease. When a leased aircraft is traded, the lease will be transferred by novation, together with related documents, including aviation insurance certificates and supporting collateral items.

The international aviation leasing and financing industry seems a perfect candidate for the policy objectives underlying the ETDA. However, the ETDA focuses on paper trade documents which require possession. Actual or constructive possession of the original bill of sale is not required at law (nor should it be) to effect the transfer of ownership in an aircraft or other goods. Similarly, English law does not (and should not) require the original aircraft lease to be held by the lessor in order to claim performance of the lessee's obligations.

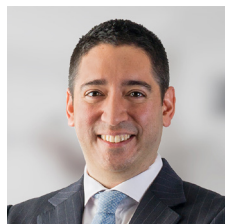
As the ETDA regime develops in practice, it remains to be seen whether if a buyer and seller expressly agree that possession of the English law (paper) aircraft or engine bill of sale is a requirement for the seller's contractual obligation to transfer ownership in the goods to be effective, this could bring their transaction within the scope of the ETDA and its benefits.

Any benefits under the ETDA would complement existing initiatives to increase efficiencies in aircraft lease trading. For example, the Aviation Working Group, a not-for-profit industry association, has recently established the **Global Aircraft Trading System (GATS) platform** which uses an electronic ledger to record ownership and security interests in aircraft equipment.

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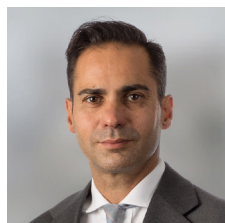
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