



Law Society
of Scotland

Consultation response

Electronic Trade Documents

July 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company and Insolvency Law Sub-committee welcomes the opportunity to respond to the Law Commission's consultation *on Electronic Trade Documents*.¹ The response to this consultation has been undertaken by those with finance backgrounds rather than those active in international trade, and our comments should be considered accordingly. We have the following comments to put forward for consideration.

General remarks

We note that the consultation addresses potential changes to the law of England and Wales. However, many international contracts are written, and therefore many international transactions take place, under English law and Scottish solicitors may undertake work on behalf of clients in this area. In addition, for the purposes of public international law, including trade law, it is the UK as a whole which is party to the relevant agreements. It is important that international commerce functions smoothly across all parts of the UK and that any areas where private law instruments may cross over with public legal or regulatory frameworks, do not cause confusion for both domestic and overseas stakeholders.

The laws of possession between England and Scotland are not identical. However, substantial amounts of the law of possession of corporeal moveables (the Scots law equivalent of tangible property) are the same as under English law. Care should be taken to ensure that electronic trade documents do not become deemed to be incorporeal moveables (the Scots law equivalent of intangible property), as Scots law dramatically diverges from English law on this topic – in particular, transfer of an incorporeal moveable does not occur until and unless the underlying debtor is notified of the transfer (the assignation is intimated to them). It should be noted, though, that Scots courts have held that Bills of Lading and negotiable instruments (such as Bills of Exchange) can be pledged as well under Scots law.

¹ <https://www.lawcom.gov.uk/project/electronic-trade-documents/#electronic-trade-documents-consultation-paper>

Response to questions

Question 1. We invite consultees' views on the advantages and disadvantages associated with using private contractual frameworks to facilitate the use of electronic trade documents, compared with using electronic documents recognised in law as being equivalent to paper documents. Paragraph 2.44

Broadly we welcome the introduction of a specific framework to facilitate electronic trade documents and address operational issues specific to those documents being constituted electronically. We note that the place of electronic signatures within this framework may need to be examined and will depend on which contractual framework is being applied. We note that this issue does not arise in a Scots law context as the instruments listed do not need to be formal writings in the same sense.

Question 2. We provisionally propose that our reforms cover only the following categories of document:

- (1) bills of exchange;**
- (2) promissory notes;**
- (3) bills of lading;**
- (4) ship's delivery orders;**
- (5) warehouse receipts;**
- (6) marine insurance policies; and**
- (7) cargo insurance certificates.**

Do consultees agree? If not, we invite consultees to suggest categories of document that should be added to or removed from this list, and to explain why. Paragraph 3.85

Broadly speaking, we agree with the proposed list of documents.

Question 3. We provisionally propose that sea waybills and air waybills need not and should not be included. Do consultees agree? Paragraph 3.86

We are content with the proposal to exclude sea and air waybills.

Question 4. We provisionally propose that bearer bonds and other documents of title including banker's drafts, certificates of deposit payable to bearer, bearer scrip certificates exchangeable for shares, mate's receipts, traveller's cheques, and dividend warrants need not and should not be included. Do consultees agree? Paragraph 3.87

We agree as long as the intention is confined to facilitating international trade of goods. However, if the intention is to address transferability of debt and negotiable instruments more broadly, then it is not clear why they would be excluded. Given that the focus of the consultation is international trade rather than financial instruments, we consider that the proposed approach probably makes sense.

Question 5. We provisionally propose that the Secretary of State should have the power to add, remove, or amend an entry in the list of documents described in Consultation Question 1 by regulations made by statutory instrument. Do consultees agree? Paragraph 3.88

We agree that it would be helpful for the Secretary of State to have the power but, as the intention is for the list of documents to be quite narrow, any additions should be limited to ensure that it can only be exercised in order to align with market practice for the purposes of trade. In addition, the Secretary of State should be required to consult on proposed changes under these regulations.

Question 6. We provisionally propose that the group of documents covered by our proposed reforms should be referred to as “trade documents” in the draft Bill. Do consultees agree?

Given the scope of the Bill, we think that this is appropriate so long as it is clear that this definition is specific to the Bill. For example, we would want to avoid a situation whereby an international trade bill used such terminology accidentally. If the intention is for the definition to be used more widely, then a narrower definition may be helpful.

If not, what alternative label would consultees propose, and why? Paragraph 3.94

If the intention is for this definition to have wider use, then something along the lines of “private trade documents” should suffice to differentiate from any international/public law references.

Question 7. We provisionally propose that each individual trade document in the draft Bill need not and should not be defined. Do consultees agree? If not, please give reasons. Paragraph 3.96

We consider that individual documents are sufficiently defined elsewhere.

Question 8. We provisionally propose to include ship’s delivery orders and warehouse receipts in our list of trade documents, without an express restriction to those that have been made out to order. Do consultees consider that this will cause problems? Please explain why. Paragraph 3.99

We agree with this approach, but it will be necessary to ensure that staying silent does not accidentally change the law on this issue.

Question 9. We provisionally propose that bare legal rights should be excluded from the scope of our proposals for the possession of electronic trade documents. Do consultees agree? Paragraph 5.58

Excluding bare legal rights seems sensible.

Question 10. We provisionally propose that, in order for an electronic trade document to be capable of possession, the nature of the document must not support concurrent control by multiple parties at one time. Do consultees agree? Paragraph 5.72

We consider that there are opportunities for narrow forms of law reform (i.e. to enable current trade practice to be effected using novel technology) and wide forms (i.e. to improve the legal framework applicable to both

traditional “paper” and new “electronic” trade documents). We note that the Commission proposes a narrow reform. However, if the Commission were considering a more fundamental, wide reform then we consider there would be a benefit in having the ability to note real rights in security in addition to ownership.

Question 11. We provisionally propose that “control” should be defined as the ability (as a matter of fact) to:

(1) use; and

(2) transfer or otherwise dispose of an electronic trade document.

Do consultees agree? Paragraph 5.90

Control is used in a number of different legal tests (such as to ascertain whether a charge is a fixed charge or a floating charge). We consider that it may be worthwhile delineating the use of the “control” in this sense and “control” as it applies elsewhere.

Question 12. We provisionally propose that, in order for an electronic trade document to be capable of possession, “the system” on which the document is held must ensure that no more than one person can control the document at any one time. Do consultees agree? Paragraph 5.95

See comments above regarding the importance of a mechanism for noting real rights in security.

Question 13. We invite consultees’ views on whether there could be a situation in which multiple parties could have equal claim to “possession” of an electronic trade document in such a way that they would not be “one person” for the purposes of the law. Paragraph 5.96

Subject to comments above, we agree.

Question 14. We provisionally propose that, in order for an electronic document to be capable of possession, transfer of the document must transfer control of the document to the transferee, and the transferor must lose control of it as a consequence. Do consultees agree? Paragraph 5.103

Subject to comments above, we agree.

Question 15. We invite consultees’ views on how existing systems, or those in development, ensure that the transferor of an electronic document can no longer control the document after it is transferred. Paragraph 5.104

As legal experts, we leave it to more direct active market participants to comment on existing systems.

Question 16. We invite consultees’ views on whether the ability to retain a copy of an electronic trade document after transfer or other disposal of the electronic trade document could lead to problems in practice. Paragraph 5.109

There are practical questions in terms of how the document is to be constituted (see comments on defining “electronic documents above”). Consideration is also needed as to how a document would be dematerialised.

Question 17. We invite consultees' views on whether the possessibility of electronic trade documents should depend on any other factors or criteria. If so, please explain the reasons for your additional criteria. Paragraph 5.111

We have no suggested additions.

Question 18. We provisionally propose that:

- (1) the person who is able to control an electronic trade document is the person in possession of it; and**
- (2) possession of an electronic trade document is transferred from one person to another when the transferee gains control of that electronic trade document.**

Do consultees agree? If not, please explain why not. Paragraph 5.115

The proposed definition appears to be circular.

Question 19. We provisionally propose that there is no need to make explicit in legislation that the requirement of intention to possess applies to electronic trade documents. Do consultees agree? Paragraph 5.129

We consider that in the context of a centralised dematerialised programme intention is not necessary.

Question 20. We invite consultees' views on what circumstances there could be a debate about which of one or more parties is in possession of an electronic trade document held on a system of the type envisaged by our proposals. Paragraph 5.130

We consider that a real right in security or real mortgage under English law could potentially theoretically create such a risk (subject to delineation between definitions of control as noted above).

Question 21. We provisionally propose that electronic trade documents should not be subject to an explicit statutory requirement for integrity. Do consultees agree? Paragraph 6.13

As a matter of the domestic law of Scotland, we would agree. Whether the absence of that requirement makes international acceptance more difficult may be another matter.

Question 22. We provisionally propose not to impose an express statutory reliability requirement. Do consultees agree? Please give reasons.

Agreed. The domestic law should be capable of addressing issues of "reliability".

If consultees disagree:

- (1) When should a party be required to prove that their electronic document is reliable?**
- (2) Do consultees think our proposals should include an accreditation process? If so, in what form? Paragraph 6.28**

Not applicable.

Question 23. We provisionally propose that there should be a statutory requirement that electronic trade documents must contain the same information as would be required to be contained in a paper equivalent. Do consultees agree? Paragraph 6.33

Yes.

Question 24. We do not consider there to be a need to introduce an express statutory provision on writing in electronic trade documents, because the law already considers electronic displays to be capable of constituting “writing”. Do consultees agree? Please give reasons. Paragraph 6.43

Yes.

Question 25. We do not consider there to be a need to introduce an express statutory provision on signing electronic trade documents. Do consultees agree? Please give reasons. Paragraph 6.49

Yes.

Question 26. We do not consider there to be a need to introduce an express statutory provision on the accessibility of information contained in electronic documents. Do consultees agree? Please give reasons. Paragraph 6.53

The person purporting to control a document should be able to access it. It may be that some parts of a document should be public so that they can function as evidence, whereas others might remain confidential.

Question 27. We provisionally propose that legislation should explicitly allow for indorsement of electronic documents. Do consultees agree? Please give reasons. Paragraph 6.60

We query whether this is necessary in a system that allows for free transfer, especially if the effect of indorsement can be achieved by a less circuitous route through new technology.

Question 28. We seek consultees’ views on whether there is any need for electronic trade documents to be capable of being issued in sets. Paragraph 6.62

As stated in the consultation, so long as changes in the law permit the issue in sets (or do not prohibit it), then this should be fine.

Question 29. We provisionally propose that no further provision is required in legislation to address the following in respect of electronic trade documents:

- (1) timing of delivery;**
- (2) timing of transfer;**
- (3) rejection; and**
- (4) amendment.**

Do consultees agree? Paragraph 6.75

We think that there may be some areas that need to be clarified – for example, the timing of delivery and transfer will be dependent on the platform used, and it would be best to expressly state when both occur (i.e. when processed in the relevant platform).

Question 30. We seek consultees' views on how amendment or rectification of an electronic trade document is achieved under existing systems and those in development. Paragraph 6.76

We have no view on this issue.

Question 31. We seek consultees' views on whether the phrase "so far as practicable" should be included in clause 2(2)(c). If yes, please give examples where such a qualification would be required. Paragraph 6.80

We agree with its deletion – it would cause uncertainty as to which elements were applicable at which times. Deleting the phrase resolves this issue.

Question 32. We seek consultees' views on what security interests are typically taken over trade documents at the moment. Paragraph 6.102

Under Scots law, when they embody a physical asset they are typically pledged (and there is controversy about whether such a pledge is a true pledge or an outright transfer), a negotiable instrument and certain warrants may be endorsed and certain other rights may be assigned and all (and any assets they represent) may be subject to floating charges.

Question 33. We provisionally propose that an electronic trade document should be capable of being the subject of possessory concepts including bailment, conversion, pledges, and liens, and that this should be provided for in legislation. Do consultees agree? Paragraph 6.110

Yes, although the differences in Scottish concepts should be borne in mind.

Question 34. We provisionally propose that existing rules and practices can accommodate the discharge, surrender or accomplishment of electronic trade documents, and that no specific legislative provision is needed. Do consultees agree? Paragraph 6.114

Their electronic nature is likely to require clarification in the application to electronic processes of current physical processes.

Question 35. We provisionally propose that provision should be made to allow for a change of medium for trade documents from electronic to paper, or from paper to electronic. Do consultees agree? Paragraph 6.125

Yes, although the complexity of rules required to preserve the integrity and consistency of electronic and paper systems will require significant attention by platforms.

Question 36. We seek consultees' views on whether the draft Bill should contain a requirement that the issuer of a trade document must allow the person in possession to change the document's medium. Paragraph 6.128

See response to Question 35, in addition to which the issuer will have interests to protect in relation to systems used.

Question 37. We seek consultees' views on whether the electronic trade documents that satisfy the requirements of our draft Bill will also satisfy the requirements of the MLETR. To the extent that consultees consider our provisional proposals to be incompatible with the MLETR or other international approaches, please explain this and the consequences to which it could give rise. Paragraph 6.136

We do not believe there to be any incompatibility.

Question 38. We provisionally propose that the Law Commission should consider the private international law aspects of digital assets, including electronic trade documents, as part of a separate project. Do consultees agree? Paragraph 6.148

We recognise the practical issues in trying to address these issues now but uncertainties on the issues especially those identify in paragraph 6.143 may undo some of the certainties which the Law Commission seeks to achieve.

Question 39. We provisionally propose that the word "issue" describes the process by which a trade document (where relevant) becomes a document of title. Do consultees agree?

Agreed.

Question 40. We provisionally propose that the change of medium of a trade document issued before the Act comes into force should not be permitted. Do consultees agree? Paragraph 6.165

Agreed.

Question 41. We provisionally propose that our proposals do not create any additional risk that documents which are not intended to be documentary intangibles will become so by virtue of the draft Bill. Do consultees agree? Paragraph 6.175

Is it possible to put the matter further beyond doubt by an amendment to the Bill?

Question 42. We seek consultees' views on what, in their experience, is the average number of paper documents required in a single trade transaction, compared to our current assumption of 40. Paragraph 7.19

No comment.

Question 43. We seek consultees' views on whether our estimate of the global total number of paper trade documents used in container shipping is accurate. Paragraph 7.20

No comment.

Question 44. We seek consultees' views on whether the average number of documents required in a trade transaction varies between sectors. If so, please give details. Paragraph 7.21

No comment.

Question 45. We seek consultees' views, if they are able to give an estimate, on the percentage of trade and shipping documentation which is under the law of England and Wales. Paragraph 7.23

No comment.

Question 46. We seek consultees' views on how quickly the industry would move to electronic trade documents if these provisional proposals came into force in 2022. If possible, we request that consultees say what percentage of documentation might be issued and used in electronic form: (1) by 2030; and (2) by 2050. Paragraph 7.28

No comment.

Question 47. We seek consultees' views on how much money, or what percentage of the cost of a transaction, do consultees estimate could be saved per transaction by transitioning to electronic documents. Paragraph 7.37

No comment.

Question 48. We seek consultees' views on the efficiency gains of a transition to electronic trade documents. Please provide evidence or data if possible. Paragraph 7.48

No comment.

Question 49. We provisionally propose that electronic trade documents will reduce the risk of fraud compared to paper trade documents. Do consultees agree? Paragraph 7.53

No comment.

Question 50. We provisionally propose that electronic trade documents will enhance the transparency of supply chains. Do consultees agree? Please provide examples or evidence if possible. Paragraph 7.57

No comment.

Question 51. We provisionally propose that there will be environmental benefits from a transition to electronic trade documents. Do consultees agree? Please provide examples or data if possible.

Paragraph 7.61

No comment.

Question 52. We seek consultees' views on what impact is foreseen for ultimate end-users of goods. Please provide quantitative evidence if possible. Paragraph 7.65

No comment.

Question 53. We seek consultees' views on if there are any potential positive impacts of our proposals that have not been identified above. Paragraph 7.66

No comment.

Question 54. We seek consultees' views on whether it is anticipated that transition costs will be a brake on the uptake of electronic trade documents. Paragraph 7.72

No comment.

Question 55. We seek consultees' views on factors that may affect the willingness of financiers of trade transactions to adopt electronic trade documents. Paragraph 7.78

No comment.

Question 56. We seek consultees' views on the average energy consumption per transaction for proposed electronic trade document platforms. Paragraph 7.84

No comment.

Question 57. We seek consultees' views on how the energy consumption of DLT can be minimised. Paragraph 7.85

No comment.

Question 58. We seek consultees' views on whether there are any other potential negative impacts of our proposals that have not been identified above. Paragraph 7.86

No comment.



For further information, please contact:

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