



## SHIPPING | JULY 2023

# KEY FEATURES OF THE UK'S ELECTRONIC TRADE DOCUMENTS ACT

**In a year when the world's largest container lines have committed, through the Digital Container Shipper Association, to 100% adoption of electronic bills of lading by 2030, a short but significant piece of legislation has just received Royal Assent.**

The Electronic Trade Documents Act ("the Act") reforms English and Welsh law by enabling electronic trade documents to operate in the same way as their physical counterparts, e.g. bills of exchange, bills of lading, warehouse receipts and promissory notes. The Act brings the UK into line with other jurisdictions including Singapore, the USA and Germany, which already have legislation in force giving legal status to electronic trade documents.

While there are signs that the rate of development is increasing, electronic trade documents have had a lengthy genesis. Over thirty years ago, the Carriage of Goods by Sea Act 1992 made provision for the relevant Secretary of State to enable electronic bills of lading by statutory instrument. The technology itself has been in use for many years through International Group approved systems, such as essDOCS and Bolero.

Prior to the Act, English law did not recognise electronic documents of title as being legally valid instruments. That is because the law relating to documents of title has development on the basis that there is a single holder who is in physical possession of the document. With that physical possession comes the legal rights of the holder which are valid against the world. Prior to the Act, the law did not recognise the concept of exclusive physical possession of a digital asset. Without exclusive physical possession, there was no unique holder and no single individual or entity which could exercise legal rights against the world.

Until now, these problems have been overcome by technical solutions which have relied on contractual frameworks. More specifically, they use multiparty rulebooks, which require each party to a transaction to sign up to the rulebook and agree to the legal validity and enforceability of electronic trade documents. Participants must agree to follow a set mechanism for transfer of the document (with either a centralised or de-centralised ledger recording the identity of the holder) and they agree not to challenge the validity of the document, or its transfer. The Act removes the need for bespoke multiparty rulebooks for electronic trade documents are governed by English law.

The Act extends the legal concept of physical possession of a paper trade document to encompass electronic trade documents, by introducing the concept of "control". A person with control of an electronic trade document is the person who has the traditional rights that would be associated with physical possession of that document.

Although to date the technology and the contractual legal solutions have functioned adequately, the reforms are significant. They ensure that the rights of the holder of an electronic trade document are rights against the world, i.e. they are not just contractual rights against a counterparty. That should improve the position of the holder of the electronic document: they will no longer be seeking to enforce a "mere" contractual claim for damages: instead they will be enforcing actual property rights, namely the right to possession of goods.

The core function of the Act is to ensure this equivalence between electronic and paper form. It does this by scoping the paper trade documents in question, identifying them as documents, which as a matter of law or custom enables the holder to claim performance of an obligation, i.e. a document of title.

Electronic trade documents are information in electronic form which is equivalent to information contained in a paper document and which is held on a reliable software system.

That system must perform the following functions:

- identify the document from any copies,
- protect the integrity of the document from alteration,
- ensure the document is controlled by just one person,

- ensure the system can identify that person and
- require transfer of the document to be accompanied by full divestment of any control.

Provided that electronic trade documents satisfy these various requirements, they will have the same legal effect as a paper equivalent and may be possessed, endorsed and transferred to a third party.

The Act includes a set of legal criteria for a reliable system. This provides guidance to the Court as to the kinds of factors they should consider when assessing suitability of software and point towards a more formalised legal framework in future with assessments by "*a body with supervisory or regulatory functions*".

In addition, the Act provides clarification of certain issues. Change of form from paper to electronic, and vice-versa, is permitted subject to certain requirements.

Finally, parties are free to disapply certain parts of the Act. This exception applies where the electronic document itself, or some underlying rulebook, suggest an intention for the aspects of the Act dealing with possession, endorsement, and the effect of the electronic document are not to apply. This acknowledges that some existing contractual solutions for electronic trade documents are highly successful and provide market confidence and certainty, which legislators wish to remain settled.

While electronic trade documents are already used commercially, the Act has the potential, when it comes into effect in September this year, to dramatically affect commercial practice and encourage more widespread adoption.

**Please join our upcoming webinar on this ground-breaking change**, on 13 September 09:30am UK time. Our panel of experts will be discussing the opportunities and challenges for e-bills of lading, e-warehouse receipts, and other e-trade documents.

Professor Sarah Green of the Law Commission of England and Wales and Marina Comninos, Co-Head at ICE Digital Trade will join HFW partners Matthew Cox and Matthew Wilmschurst for a discussion on the implications of English law recognition of e-trade documents as digital negotiable instruments, and what this means for commodity and trade finance, shipping, and logistics. [Click here to register.](#)

For more information, please contact the author(s) of this alert.



**DANIEL MARTIN**  
Partner, London  
T +44 (0)20 7264 8189  
E [daniel.martin@hfw.com](mailto:daniel.martin@hfw.com)



**CATHERINE EMSELLEM-ROPE**  
Legal Director, London  
T +44 (0)20 7264 8279  
E [Catherine.emsellem-rope@hfw.com](mailto:Catherine.emsellem-rope@hfw.com)



**ALEX ANDREOU**  
Associate, London  
T +44 (0)20 7264 8067  
E [alex.andreou@hfw.com](mailto:alex.andreou@hfw.com)

**hfw.com**

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