

"PAPER BUT BETTER" – WILL DIGITAL REALLY BE MORE RELIABLE UNDER THE ELECTRONIC TRADE DOCUMENTS ACT 2023?

The UK Electronic Trade Documents Act comes into force next week. Section 2 of the Act requires that in order for a document to achieve the "electronic trade document" (ETD) status which will allow it to be possessed, indorsed and transferred under English law, a reliable system must be used. The market will have to get to grips with this concept. In the meantime, convincing users of reliability will be key to a platform's success. It is likely to be easier for the well-established platforms which have been operating for years to do this than it is for smaller or newer players in the market.

At today's HFW webinar featuring Law Commissioner Professor Sarah Green, Co-Head of ICE Digital Trade Marina Comminos and HFW Partners Matthew Cox and Matthew Wilmshurst, a main point of focus was how to establish that a system is "reliable". Here are 8 things we learnt from the panel:

1. Ultimately, a body like the ICC could provide certification to platforms but the Act does not mandate this as a requirement and it will not be an available option when the Act comes into force next week. The main options currently available are:
 - Self-certification
 - Obtaining a legal opinion from a law firm
2. Market participants should not get carried away: the requirements for reliability set down in the Act are quite limited and should be relatively easy to establish.
3. The aim of Section 2 of the Act was to replicate the important characteristics of paper documents. It was intended to demonstrably avoid the risk of "double spend" and thus to reassure users.
4. It was intended to provide a minimum threshold of reliability, not to make access to the market difficult for smaller start-ups and fintechs.
5. The Act is intentionally technology agnostic in relation to reliability. It was a deliberate choice to take this approach, so that the legislation would not become obsolete as technology develops.
6. All these intentions matter because they are reflected in the Law Commission report which accompanied the draft legislation. This report would be a primary reference point for the English Courts if they were asked to interpret the Act.
7. For those still anxious that leaving paper and going digital might be beyond their appetite for risk, the panel pointed out that there is no requirement for a reliable system to be used in paper trade.
8. Encouragingly, a poll conducted during the webinar showed that only 9% of the audience of around 250 market participants thought reliability was the biggest challenge to widespread adoption of electronic trade documents.

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