



## **ELECTRONIC BILLS OF LADING IS THIS TIME DIFFERENT?**

Digitisation is the buzzword of the year for those in the trade industry. Following several large-scale frauds in the trade finance space, there is growing concern over the authenticity (and therefore, the value) of traditional paper bills of lading as a form of security. Further, in light of ongoing disruption to the trade cycle and the movement of documents due to the impact of Covid-19 restrictions across different jurisdictions, the digitisation of physical shipping documents is becoming much more significant.

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There is also a greater imperative for companies to reduce their impact on the environment. It was noted at the G7 Digital and Technology Ministers' meeting on 28 April 2021 that paper-based transactions are “*a source of cost, delay, inefficiency, fraud, error and environmental impact*”. There have been numerous attempts over the years to move towards widespread adoption of electronic bills of lading (**e-Bills**), but could now be the time?

### **Functional Equivalence**

Bills of lading serve three key functions:

1. As a receipt, confirming that the goods have been loaded on board the vessel
2. As evidence of the contract of carriage, between the shipowner and the shipper and/or the lawful holder of the bills
3. As a document of title to the goods.

E-Bills must replicate these functions in order to be viable for use in the shipping and trade industry.

It is relatively straightforward to fulfil the functions of a receipt and evidence of a contract of carriage. The challenge has always been in relation to fulfilling the function of a document of title. At the date of writing, few legal systems recognise

e-Bills as documents of title such that the possession of an e-Bill would make the holder entitled to the rights and potentially subject to the obligations that would typically follow.

This has been addressed in two principal ways:

1. By creating a contractual framework which effectively replicates how paper bills of lading operate as between the various interested parties. and
2. By moving towards recognising e-Bills as being equivalent to paper bills of lading. In 2017, the UN Commission adopted the UNCITRAL Model Law on Electronic Transferable Records (the **MLETR**), enabling the legal use of electronic transferable records (**ETRs**) both domestically and internationally. However, at the date of writing, only the Abu Dhabi Global Market, Bahrain and (recently) Singapore have adopted the MLETR.

### **The English position – potential developments in the air?**

Under the English Carriage of Goods by Sea Act 1992 (**COGSA**), the lawful holder of a bill of lading has rights of suit under the contract of carriage as if they had been a party to that contract from the outset. For example, the lawful holder of a paper

bill would generally be entitled to delivery of the relevant cargo, to sue the carrier if goods were damaged and/or to sue the carrier if goods were discharged without presentation of the original bill. However, COGSA does not apply to e-Bills because at present, English law does not recognise the concept of “possession” of an electronic record. That may now be changing. On 30 April 2021, the England and Wales Law Commission published a consultation paper, addressing the issue of whether electronic trade documents should have the same effect in law as their paper equivalents. The consultation will be open until 30 July 2021. This is a significant step forward.

### **Developments under Singapore law**

As one of the countries at the forefront of the push towards digitisation, it is unsurprising that the Electronic Transactions (Amendment) Act (the **Act**) recently became law in Singapore. The Act adopts the MLETR with slight modifications and amends several pieces of existing Singapore legislation. It gives recognition to electronic equivalents of transferable documents including bills of lading, promissory notes and bills of exchange (ETRs) such that these documents will not be denied legal effect, validity or enforceability solely because they are in electronic form. As with the MLETR, the Act

gives effect to ETRs where a “reliable method” has been used to:

- Identify the ETR
- Render that ETR subject to control for the duration of its validity
- Retain the integrity of the ETR.

Further, insofar as a “reliable method” has been used to establish exclusive control of the ETR and identify the person in control, that ETR now has the functional equivalence of a document or instrument conferring possessory rights on the person in control. This is important in the context of e-Bills as it enables possessory rights to the cargo to be transferred to the person in control of an e-Bill insofar as these requirements are met. The Act also covers situations where paper bills of lading are required to be converted into electronic form and vice versa.

### Operability of E-Bills

Whilst it is encouraging that e-Bills are finally being given recognition in Singapore, given the cross-border nature of international trade, it is not clear whether legislative change in a few jurisdictions will be sufficient to ignite an increase in their use. They can only be used effectively if they are recognised as transferable documents across all the jurisdictions through which they pass during their lifecycle, i.e. from issuance (or the point at which a paper bill of lading is converted into an e-Bill) to the point at which it becomes “spent” (or the point at which an e-Bill is converted into paper form).

As a result, e-Bills are currently used only in closed systems through platforms such as Bolero, E-Title and essDOCs. Each of these platforms offers unique capabilities, but all

generally operate by requiring all users to sign up to a multiparty contract, creating a legal ecosystem in which all parties contractually agree to treat the e-Bills as documents replicating the functional equivalence of paper bills. The idea is that through this framework, the holder of an e-Bill would effectively be subject to the same rights and obligations conferred upon the lawful holder of a paper bill, including but not limited to the entitlement to delivery of the goods.

Widespread adoption of legislation recognising equivalence between e-Bills and paper bills of lading will by no means make these systems redundant. For example, the requirement under Singapore law that a “reliable method” be used, amongst other things, to identify the ETR and the party controlling it, means that some sort of secure platform will likely still be required.

### Conclusion

Although e-Bills have yet to be recognised in many jurisdictions, their use in closed systems has been welcomed by a number of traders and banks. Following a new commitment from the G7 to pave the way in trade digitisation through the adoption of ETRs, the secretary general of the ICC’s UK chapter has urged players in the industry to be prepared for the widespread adoption of e-Bills within the next 12 to 18 months. In addition, BIMCO is presently working with the ICC to establish a global standard for e-Bills in the dry and liquid bulk sectors. In light of these developments, one can only be optimistic about positive legislative changes on the recognition of ETRs in the near future. Maybe this time it really is different.

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Americas | Europe | Middle East | Asia Pacific

For more information, please contact:



#### ADAM RICHARDSON

Partner, Singapore

**D** +65 6411 5327

**M** +65 9686 0528

**E** [adam.richardson@hfw.com](mailto:adam.richardson@hfw.com)



#### CHRIS METCALF

Partner, Singapore

**D** +65 6411 5343

**M** +65 9788 9858

**E** [chris.metcalf@hfw.com](mailto:chris.metcalf@hfw.com)



#### JOANNE WATERS

Senior Associate, Singapore

**T** +65 6411 5352

**M** +65 8890 6562

**E** [joanne.waters@hfw.com](mailto:joanne.waters@hfw.com)



#### LOUISE TAN

Associate, Singapore

**D** +65 6411 5359

**M** +65 9190 8615

**E** [louise.tan@hfw.com](mailto:louise.tan@hfw.com)



#### AMANDA RATHBONE

Professional Support Lawyer  
(Commodities), London

**D** +44 (0)20 7264 8397

**M** +44 (0)7900 167256

**E** [amanda.rathbone@hfw.com](mailto:amanda.rathbone@hfw.com)