Law Commission
Reforming the law

ETDs in private international law: FAQs

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This publication is available at https://lawcom.gov.uk/project/digital-assets-and-etds-in-private-international-law-which-court-which-law/.

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BACKGROUND TO THIS PAPER

The Electronic Trade Documents Act 2023

1.1 The Law Commission's work on electronic trade documents[1] led to the passing of the Electronic Trade Documents Act 2023 ("ETDA 2023"). The ETDA 2023 facilitates the use of certain types of documents used in international trade in electronic form by emphasising equivalence between electronic and paper forms.

1.2 During the course of our project on electronic trade documents, consultees raised issues relating to private international law, and we recognised that the conventional private international law rules for paper trade documents might not work well in the digital context. However, we said that the question of what rules would be better could not be answered satisfactorily in the context of that project, as these were identified as complex issues requiring dedicated consideration in their own right.

1.3 We said that, in the meantime, the courts would be able to deal with issues of private international law and electronic trade documents on a case-by-case basis, applying the existing rules.[2] We suggested that, for the time being, electronic trade documents would be governed by the rules that govern paper trade documents.[3]

1.4 Our approach to electronic trade documents, both in substantive law and private international law, broadly reflects that taken by the UN Commission on International Trade Law ("UNCITRAL") in relation to electronic transferrable records. The 2017 UN Model Law on Electronic Transferrable Records ("MLETR") is an international model law that "aims to enable the legal use of electronic transferable records both domestically and across borders". Such "electronic transferable records" would typically include bills of lading, bills of exchange, promissory notes and warehouse receipts.[4] The MLETR expressly preserves the existing rules of private international law applicable to transferable documents or instruments.[5]

Our work on private international law and ETDs

1.5 We began our work on electronic trade documents and other digital assets in private international law in 2023. We published a Call for Evidence in February 2024, which provided an introduction to the principles of private international law and the nature of the challenges that digitisation and decentralisation pose for this area of law. We are grateful to all those who submitted a response. The next formal stage of our project will be to publish a Consultation Paper with proposals for law reform.

1.6 Following the publication of our Call for Evidence, we became aware that there are significant concerns amongst stakeholders on how the ETDA 2023 operates in the

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1 Electronic Trade Documents: Report and Bill (2022) Law Com No 405.

2 Electronic Trade Documents: Report and Bill (2022) Law Com No 405, para 8.109.

3 Above paras 8.97 and 8.109.

4 UN MLETR website: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records

5 The core provision is Article 19(2). See further the Explanatory Text UNCITRAL Model Law on Electronic Transferable Records (2017) para 180.

cross-border legal context. We have therefore produced this document to explain in a little more detail how the ETDA 2023 and other MLETR-inspired legislation interact with private international law.

1.7 Although this document is structured as a FAQ ("frequently asked questions") to respond directly to some of the most common concerns raised with us so far, the concerns raised by stakeholders engage three different areas of law: private international law, the law of negotiable instruments, and the law on digitisation. All of these are in themselves highly complex and technical. Whilst we have endeavoured to address stakeholder concerns as succinctly as possible, many of these questions do not admit of a simple answer.

1.8 We therefore invite stakeholders to submit any follow up questions or concerns to us at conflictoflaws@lawcommission.gov.uk with the subject "ETDs in PIL: FAQs". Depending on the nature or number of questions, we may hold a subsequent live Q&A event.

1.9 The following members of the Commercial and Common Law team have worked on this document: David Hertzell (senior counsel), Laura Burgoyne (team manager), Amy Held (lawyer). The document has not been peer reviewed by Commissioners and is not a formal publication of the Commission.

Q.1. WHEN WILL ETDS ENGAGE PRIVATE INTERNATIONAL LAW?

Q.1(a) What is private international law?

1.10 Private international law is a body of domestic law that is engaged where the parties to a civil or private law dispute are based in different countries, or where events giving rise to the claim cross national borders.[6] In the law of England and Wales, it is traditionally said that questions of private international law arise where there is a "foreign element" to a private law issue before the courts.

1.11 For the purposes of our project, there are three main issues that must usually be resolved when questions of private international law arise.

(1) In which country's court can the parties litigate their dispute? This is the "jurisdiction" or "forum" question.

(2) Which law or combination of laws should be applied to resolve their dispute? This is the "applicable law" question, or the "conflict of laws" or "choice of law" question.

(3) How can a judgment be recognised and enforced in another country? This third question is premised on the first two questions being answered and arises only if the litigation actually proceeds to judgment. This is the "recognition and enforcement" question.

[6] Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 2.2.

1.12 In our project we are concerned in particular with the first two questions: jurisdiction and applicable law.

Q.1(b) How do private international law and trade documents interact in the cross-border context?

1.13 International trade is, by its very nature, a context with considerable potential for questions of private international law to arise.

1.14 Trade documents, notably bills of lading and bills of exchange, have their origin in the law merchant, an international body of customary practices developed by the medieval merchants in the chief trading and port towns of Europe. Historically, conflicts between private law systems arising from use of these documents were relatively rare because the law merchant was a uniform standard recognised in all countries as to the rights and obligations of the parties to certain recognised types of commercial transactions.

1.15 As we explain in more detail in Question 6, the uniform approach of the old law merchant is more challenging to secure in today's legal environment. Since the 19th century, there has been a significant drive towards national codifications of the law merchant.[7] Differences in national approaches therefore began to creep into what was once a uniform body of customary practices. As a result, the use of these instruments in the global context in which they had been developed has, for over a century, unavoidably carried some degree of the cross-border legal risks that arise in any international commercial transaction.

1.16 The fragmented approach in the modern private law is reflected in the rules of private international law that apply in the context of modern trade documents. These reflect a variety of approaches and sources, as follows.

(1) Some issues of private international law continue to reflect the old uniform law approach and pre-empt conflicts with uniform standards. These are usually set out in instruments of public international law, such as the Convention for the Unification of Certain Rules of Law relating to Bills of Lading and its Protocols (usually known as the "Hague-Visby Rules") which have been implemented in the UK via the Carriage of Goods by Sea Act 1971; and the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes 1930 ("Geneva Uniform Law Convention 1930"), to which the UK is not a party.

(2) Some issues of private international law are resolved using applicable law rules. These include the rules set out in section 72 of the Bills of Exchange Act 1882 and in the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes 1930 ("Geneva Conflicts Convention 1930"). Section 72 of the Bills of Exchange Act 1882 is a domestic body of private international law that applies in the UK. The Geneva Conflicts Convention 1930 is an international body of private international law that unifies the private international laws of various states.

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7 In the UK, such codifications include the Bills of Lading Act 1855 and the Bills of Exchange Act 1882.

1.17 While this legal framework has since the late 19th century given rise to some cross-border legal risks, these have largely not materialised in the time since. We have been told by stakeholders that well-established commercial customs and trust amongst market participants, as well as reputational risk, continue to exert a strong influence in this area of international trade. Any cross-border legal risk arising from potential conflicts between different systems of private law have, therefore, rarely crystallised following disputes before the courts; with market participants even averting identified legal risks by contractual agreements not to litigate.[8] Only in rare cases of fraud or insolvency are market participants likely to take their disputes to court.

1.18 Furthermore, in English and Welsh legal practice, even if potential conflicts between legal systems arising from use of these instruments did indeed come before the courts, they might not necessarily require resolution under the rules of private international law. As we explain below, in England and Wales, much depends on the positions taken by the parties to litigation.

Q.1(c) How do the courts of England and Wales approach private international law?

1.19 Private international law, and applicable law in particular, is one of the few areas of law in common law jurisdictions that largely borrows from Continental legal traditions. Although private international law is a discipline that is most effective when there is a coordinated approach between legal systems, differences in legal method as between Continental and common law legal systems exert a noticeable influence over national systems of private international law and their application in practice.

1.20 From this, it is important to recognise that although there is often an emphasis on applicable law in Continental legal systems and in the academic literature, issues of applicable law tend to come before the courts less frequently than questions of jurisdiction in English and Welsh legal practice. The editors of *Dicey* have said that:

> in the English conflict of laws, questions of jurisdiction frequently tend to overshadow questions of choice of law. Or, to put it differently, it frequently happens that if the question of jurisdiction (whether of the English or the foreign court) is answered satisfactorily, the question of choice of law does not arise.[9]

1.21 For example, for international jurisdiction over cases with a "foreign element", permission to serve out of the jurisdiction must be sought from the courts, except in very limited cases.[10] Issues of private international law will therefore generally be raised for resolution in the application for permission to serve proceedings out of the jurisdiction.

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8 We understand that such agreements underpin many contractual frameworks that had facilitated the use of electronic documents in the shipping sector long before the passage of the ETDA 2023.

9 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws (*16th ed 2022) para 1-005.

10 A claimant may serve a claim form on a defendant out of the United Kingdom without permission of the court if the claim form relates to proceedings under a consumer contract (s 15B Civil Jurisdiction and Judgments Act 1982) or an individual contract of employment (s 15C Civil Jurisdiction and Judgments Act 1982) if the relevant statutory requirements are met. See CPR, r 6.33(2).

1.22 The position is different for the law applicable to a case with a "foreign element". In the civil procedure of England and Wales, the application of a foreign law must be specifically pleaded and proved as a matter of evidence on the part of the party contesting the application of the substantive law of England and Wales.[11] Thus, in the Supreme Court decision in *FS Cairo (Nile Plaza) v Lady Brownlie*, Lord Leggatt said "it is for each party to choose whether to plead a case that a foreign system of law is applicable to the claim; but neither party is obliged to do so and, if neither party does, the court will apply its own law to the issues in dispute".[12] Accordingly, where there is no issue between the parties as to the applicable law, the law of England and Wales will apply "in its own right" as a "default rule".[13]

1.23 In the commercial context, parties do not necessarily make this argument. Generally, parties will only go to the expense and difficulty of arguing for a different system of law if they consider that one legal system gives them a clear or significant advantage over another.

1.24 In practice, issues of applicable law are usually canvassed at the pre-trial stage of litigation. This is particularly so in the Commercial Court where a significant proportion of cases contain a "foreign element". As stakeholders have pointed out to us, judges and legal practitioners in the Commercial Court are well used to considering whether the law applicable to the issues in dispute is indeed in issue between the parties.

1.25 This approach to foreign law as the applicable law is a distinctive aspect of the private international law of England and Wales. In many Continental systems of civil procedure, judges are often under a duty to consider on their own initiative whether the case before them might be governed by a foreign law; and a failure to do so will often be an error of law justifying an appeal.[14] The rules of civil procedure are also often drafted on the basis that the judge will know the content of foreign law and will apply it *ex officio*.[15] Specialist advice from foreign legal professionals would be required for more information on the approach taken by foreign courts.

1.26 In sum, although applicable law is often a question of prime importance in Continental systems of private international law, in England and Wales, the emphasis on jurisdiction and the adversarial mode of procedure has a significant effect on how questions of applicable law are treated in practice. As with any other issue in the civil procedure of England and Wales, the question of applicable law in live litigation is an issue that is largely the hands of the parties.

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11 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 6.11.

12 *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, [2022] AC 995 at [113].

13 *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, [2022] AC 995, at [112].

14 See the example of French civil procedure in Digital assets and ETDs in private international law: which court, which law? (2024) Call for Evidence, para 6.13 and nn 310, 311, 312.

15 A good example is Article 293 of the German Code of Civil Procedure which applies only insofar as the judge is not aware of the content of foreign law.

Q.1(d) If an applicable law rule points to the law of England and Wales, does this include the private international law rules of England and Wales?

1.27 Private international law is part of a country's domestic law. It is, however, a special body of domestic law insofar as it is only ever engaged when there is a foreign element to a case. This gives rise to some issues as to what is meant when a conflict of laws rule, including a valid choice of law, points to "the law of" a legal system. We understand there are some concerns amongst stakeholders as to how these issues might affect their commercial arrangements.

1.28 Suppose a judge applies a conflict of laws rule for the law governing contractual obligations, which points to the law of England and Wales. This could be interpreted by the judge in two ways:

(1) The wide interpretation is that this reference to "the law of England and Wales" *includes* the conflict of laws rules of England and Wales.[16] The judge would therefore apply the conflict of laws rules of England and Wales to identify the law applicable to the contractual issue before them.[17]

(2) The narrow interpretation is that this reference to "the law of England and Wales" *excludes* the conflict of laws rules of England and Wales. The judge would therefore apply the substantive contract law of England and Wales to the contractual issue before them.

1.29 In the commercial context, it is well established that the narrow interpretation applies. Any reference to "the law of" a legal system as the applicable law will be taken to mean the *substantive* law of that legal system, *excluding* its conflict of laws rules.[18] A valid choice of the law of England and Wales as the law governing the contractual obligations of the parties will, in most legal systems, be interpreted as a choice of the substantive contract law of England and Wales and not a choice of the conflict of law rules of England and Wales for contractual issues.

1.30 In the context of disputes arising out of trade documents, it is important to note that the rules with which our project is concerned are rules of private international law. For example, section 72 of the Bills of Exchange Act 1882 contains conflict of laws rules for certain contractual issues arising from bills of exchange and other negotiable instruments. Where a conflict of laws rule for an issue arising from a bill of exchange points to the law of England and Wales, courts around the world will generally apply

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16 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022), para 2-096.

17 This may give rise to issues of what is called *renvoi* (the French word for 'referral' or 'send back'). The term is used to capture the fact that the judge will find that, after having applied the conflict of laws rule, the law to which that conflict of laws rule points "refers" or "sends back" the issue to the law of another country by applying its own conflict of laws rules. Problems arising from renvoi are generally recognised in private international law as being more on the theoretical or academic side of the discipline, and are excluded from our Terms of Reference. The doctrine of *renvoi* has been applied in England and Wales in a few cases concerning family and succession matters but is expressly excluded from commercial and the general civil contexts.

18 For the position in England and Wales, see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022), para 2-116. For the Rome I Regulation, see the Giuliano-Lagarde Report [1980] Official Journal C 282/1 of 31.10.1980, p 37.

the relevant substantive provisions of the Bills of Exchange Act 1882, and not the provisions of section 72.

Q.2. WHAT LAW APPLIES TO/GOVERNS AN ELECTRONIC TRADE DOCUMENT AND ELECTRONIC VALIDITY?

1.31 Following consultation with stakeholders, we understand the primary concern surrounding the "law applicable to an electronic trade document" or the "governing law of an electronic trade document" relate to what some stakeholders have referred to as "electronic validity". By this, we understand the question to relate to whether a trade document in electronic form will be upheld as valid in a dispute that might involve foreign parties and/or courts and laws. Or, to put it another way, in what circumstances will a particular trade document in electronic form be able to benefit from the ETDA 2023 or a MLETR-based equivalent?

1.32 In particular, we think the concern that arises is as follows:

(1) Parties intend that their trade document has the benefit of the ETDA 2023, such that they may use a trade document in electronic form.

(2) A dispute arises from dealings in the document which the parties cannot resolve using the sector's customary methods. A case is therefore brought in the courts of England and Wales.

(3) One party pleads that a foreign law should apply. The law found to be applicable to the dispute is one that does not recognise or allow for such documents in electronic form.

(4) The document is then not recognised as a valid trade document for the purposes of the case, with all the implications that come of that.

1.33 For the purposes of a private international law analysis, the question of "what law applies to/governs an electronic trade document" requires separate consideration of two sub-questions:

(1) What law "applies to" or "governs a trade document"?

(2) What law "applies to" or "governs an electronic trade document" or issues related to "electronic validity"?

Q.2(a) What law "governs" or "applies to" a trade document"?

1.34 It is conventional in market practice to refer to certain trade documents as being governed by a particular law. We understand that it is common in the shipping sector to speak of "English-governed bills of lading" or "English bills".

1.35 Comparable expressions are also often used in the academic discourse. It is, for example, sometimes said that section 72 of the Bills of Exchange Act 1882 is a conflict of laws rule for "the law applicable to bills of exchange".

1.36 For the purposes of the conflict of laws, it is important to clarify what is meant by these expressions. Taken at face value, both are misleading because they tend to suggest

that the conflict of laws rules apply to specific types of *objects*, such as a trade document, a painting, or a car. This is not entirely accurate. Rather, the conflict of laws rules apply to the various rights, obligations, and relationships that arise from dealings in an object.

1.37 This is an important distinction to make in the present context, because the dealings in trade documents will, by virtue of their particular commercial characteristics, give rise to a wide range of legal rights, obligations, and relationships involving multiple parties.

1.38 In a conflict of laws analysis, each legal issue arising from these rights, obligations, and relationships will be taken on its own terms. It is critical to emphasise that each legal issue arising from a dealing in a trade document will be referred to a distinct conflict of laws rule, depending on the nature of the legal issue in question.

1.39 It can, therefore, be unhelpful to speak in terms of a, in the sense of *one*, particular conflict of laws rule specifically for "trade documents". In a live conflict of laws analysis, it will always be necessary to go further and identify the nature of the particular legal issue that arises from a particular dealing in a particular type of trade document. This process is known in the conflict of laws as "characterisation" and we discuss characterisation further below.

1.40 Although the network of different rights, obligations and relationships is particularly complex in the context of trade documents, the need to consider the nature of the dispute and characterise the particular legal issue applies generally. For example, there is no single conflict of laws rule for "the law applicable to a painting". Rather, a painting may be the subject of a contract of sale, or a security arrangement, or it may have been damaged or stolen. These factors, and the subsequent characterisation of the legal issue to be analysed by the court, will determine which conflict of laws rule will be applied.

1.41 Each particular type of trade document will have associated with it a vast range of different conflict of laws rules for each of the various legal issues that might arise from dealings in that trade document. Contractual issues will have their own distinct conflict of laws rules, as will property issues and tort issues. These rules for the various different types of legal issues will remain distinct; even if the majority of those rules are often grouped together and set out in a particular statute or chapter in *Dicey* as the rules for a particular type of trade document. Section 72 of the Bills of Exchange Act 1882 is the prime example.

1.42 From this, although it is often intuitive or convenient to think of trade documents, or particular trade documents, as an object or "thing" for which there is a particular conflict of laws rule, the question "what law applies to/governs a trade document" is unhelpful in a conflict of laws analysis.[19] At most, this can be taken as shorthand for

[19] It is worth noting that in some jurisdictions, particularly those based in Germanic legal traditions, this terminology is somewhat more prevalent. It is, however, important to understand that such terminology reflects significant differences in how negotiable instruments law is conceptualised at a deeper theoretical level in these systems of private law. Under Germanic legal systems, contractual issues arising from negotiable instruments tend to be conceptualised using property paradigms. This is controversial in Germanic legal systems, but in any event, has no application in the private international law of England and Wales.

"what various different laws are applicable to the various different legal issues arising from dealings in various different types of trade documents".

1.43 Following consultation with stakeholders in the shipping sector, we understand we should take references to "the law governing a bill of lading" to mean, for the purposes of the conflict of laws, "the law governing the contractual obligations as between shipper and carrier". These may arise directly under the contract of carriage between them, or under a closely related contract, such as a charterparty, that has been incorporated by reference in the bill of lading.

1.44 We therefore understand, for our purposes, the expressions "English bill of lading", "English-governed bills", and the like, as used in the shipping sector, to mean "contractual rights and obligations governed by English law that are contained in, evidenced by, or incorporated by reference in a bill of lading".

1.45 Any issue as to the parties' contractual rights and obligations under a contract of carriage or related contract will be characterised for the purposes of the conflict of laws as a contractual issue. A court will then look to the conflict of laws rules for contractual issues to identify the applicable law. These rules are contained in assimilated Rome I Regulation or, where they are excluded, the common law.

1.46 It is important for us to reformulate the expressions conventionally used in practice into terms more amenable to a conflict of laws analysis. Even if contractual issues might be the most prevalent for day-to-day market practice in "business as usual" circumstances, private international law is concerned with a wider range of legal issues. Not all legal issues arising from dealings in a bill of lading will concern "contractual rights and obligations arising from the contract of carriage or closely related contract that is evidenced by, contained in, or incorporated by reference in the bill of lading".

1.47 Legal issues arising from, say, fraud, fall to be characterised differently to those arising from the contract of carriage or related contract. The core example is the case brought against the present holder of a negotiable or "to order" bill by a previous holder. Although litigation is rare, the assertions in the decided cases are usually as follows: (i) the negotiation made in the name of the previous holder is invalid because the previous holder's signature was forged; and, as a result, (ii) the present holder did not acquire any rights under the instrument.[20]

1.48 In these circumstances, the legal issue is one of competing priority as between two indorsees at different stages in the chain of indorsements. The basic question is which of them is entitled to be the lawful holder. For the purposes of the conflict of laws of England and Wales, such issues of priority are characterised as property issues.

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[20] This is a core point of difference between the Bills of Exchange Act 1882 and the Geneva Uniform Law Convention 1930. Under Article 7 of the Geneva Uniform Law Convention, the chain of indorsements is unbroken by an invalid indorsement. By contrast, under section 24 of the Bills of Exchange Act 1882, a forged signature is wholly inoperative and no rights can be acquired through or under that signature. See also W G Crauford, "Differences Between the English and the German Law Relating to Negotiable Instruments" (1957) Vol 6 Issue 3 *International & Comparative Law Quarterly* 418-441, at 428.

These are referred generally to the *lex situs* rule, the prevailing rule for property issues.

1.49 Characterisation is of utmost importance in the conflict of laws because characterisation exerts considerable influence over the outcomes of the conflict of laws process. Characterisation is of even more importance in the law of negotiable instruments, where there is an especially close relationship between contract and property.

1.50 It is, therefore, important in a conflict of laws analysis to look beyond the negotiable instrument or trade document as an object in itself and to identify the particular issue that arises from dealings in the trade document and which falls to be analysed in the conflict of laws.

Q.2(b) What law "governs an electronic trade document" or "electronic validity"?

1.51 As with the first sub-question, it is necessary for us to reformulate this question in terms more amenable to a conflict of laws analysis. It builds upon the re-formulation of the first sub-question in relation to trade documents more generally.

1.52 We understand the questions of what often seems to be referred to as "electronic validity" or "the law governing an electronic trade document" or "the law governing the link between the electronic trade document and the right it represents" to be asking: "what law determines whether a particular dealing in an electronic trade document will be recognised as having the same legal effects as an equivalent dealing in a paper trade document?".

1.53 This is not an issue to which we gave independent consideration in our Call for Evidence. We have, however, since come to understand that the issue is of significant concern for stakeholders, who are anxious to ensure that their dealings in a trade document will benefit from the ETDA 2023 or other MLETR-inspired legislation. We also understand that some stakeholders are concerned that section 72 of the Bills of Exchange Act 1882 could cause a problem in this regard. We therefore give an overview of how the ETDA 2023 interacts with both substantive law and the conflict of laws below.

Q.3. WHEN DOES THE ELECTRONIC TRADE DOCUMENTS ACT 2023 APPLY?

1.54 The ETDA 2023 extends to the whole of the UK.[21] Its central provision is section 3(2), which states that "an electronic trade document has the same effect as an equivalent paper trade document". An "electronic trade document" for the purposes of the Act is a document in electronic form that meets certain criteria. Where these criteria are met, "a person may possess, indorse and part with possession of an electronic trade document"[22] and "anything done in relation to an electronic trade document has the same effect (if any) in relation to the document as it would have in relation to an equivalent paper trade document".[23]

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21 One provision, (s 3(4)), applies only in Scotland.

22 Electronic Trade Documents Act 2023, s 3(1).

23 Electronic Trade Documents Act 2023, s 3(3).

1.55 The ETDA 2023 is a part of what might for present purposes be conveniently called the "trade documents law" of the UK. This is not a term of legal art but is used here to refer conveniently to the cumulative body of law that applies to paper trade documents, as defined in section 1 of the ETDA 2023. We are particularly focused on the "trade documents law" of England and Wales.

1.56 Such "trade documents law" is not a uniform body of law. Given the breadth of even the indicative and non-exhaustive list of documents in section 1(2) of the ETDA 2023,[24] the sources that comprise "trade documents law" are wide and diverse. It would, for example, include the Bills of Exchange Act 1882 and the Carriage of Goods by Sea Acts 1971 and 1992.

1.57 As a starting point, it is unhelpful to consider the ETDA 2023 as a standalone statute that has the effect of conferring "electronic validity" on trade documents within its scope or creating a "link" between the electronic trade document and the right it represents. It does not create a new type of private law object called an "electronic trade document" that is subject to its own unique legal principles and authorities.[25]

1.58 We think it is far more helpful to think of the ETDA 2023 as a supplementary aspect of the "trade documents law" of England and Wales. Its supplementary function is to fill in any gaps that may arise between the paper-based context in which the existing "trade documents law" was drafted and the electronic realities of modern trade.

1.59 The ETDA 2023 Act could be thought of as parasitic insofar as it latches upon existing "trade documents law". Wherever there is some paper-based requirement or assumption in the existing "trade documents law", the ETDA 2023 provides that a dealing in or act done in relation to an electronic trade document has the same legal effect as an equivalent dealing in or act done in relation to a paper trade document.

1.60 For example, section 5(2) of the Carriage of Goods by Sea Act 1992 defines a "holder of a bill of lading" by reference to "possession of the bill". The broad effect of the ETDA 2023 is that "possession of the bill" in section 5(2) of the Carriage of Goods by Sea Act 1992 also now includes "possession of an electronic bill". It follows that any rights of suit vesting in the holder of a paper bill of lading (by virtue of their becoming the holder of the bill) under section 2(1) of the Carriage of Goods by Sea Act 1992 Act will also vest in the lawful holder of an equivalent electronic bill of lading.

1.61 It is critical to note that the different bodies of law that comprise the "trade documents law" of England and Wales each impose different paper-based requirements and/or make different assumptions as to the nature of the acts done in relation to a trade

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24 The Act concerns documents commonly used in connection with trade in or transport of goods, or the financing of such trade or transport, and which rely on possession for their operation. The Act then includes the following examples: bills of exchange, promissory notes, bills of lading, ship's delivery orders, warehouse receipts, mate's receipts, marine insurance policies and cargo insurance certificates.

25 It is worth contrasting the ETDA 2023 and MLETR-inspired legislation with other legislative acts that do indeed create new institutions of private law in response to the same trends in digitisation and decentralisation. For example, the 2021 amendments to the Swiss Code of Obligations provides from Article 973d onwards a new private law regime for tokens registered on a blockchain, which become private law instruments comparable to securities, but which have their own legal effects. These are often called (in translation) "ledger-based securities" and may be used for a wide range of rights traditionally embodied in paper instruments, such as bills of exchange, cheques, and promissory notes.

document. Each particular body of "trade documents law" will, therefore, rely on the ETDA 2023 in different ways. In the same vein, different jurisdictions impose different requirements and/or make different assumptions as to the nature of the acts done in relation to a trade document.[26] Different systems of law therefore will rely on MLETR-style legislation in different ways.

1.62 For present purposes, the key point to note is that the conflict of laws analysis mirrors the parasitic relationship between existing "trade documents law" and the ETDA 2023. Whenever an applicable law rule points to the existing "trade documents law" of England and Wales as applicable to the legal issue in question, the ETDA 2023 will attach to the relevant body of "trade documents law" and apply as part of the law applicable to that issue.

Q.4. CAN I CHOOSE THE ELECTRONIC TRADE DOCUMENTS ACT 2023 AS THE LAW APPLICABLE TO MY TRADE DOCUMENT?

1.63 For the reasons we set out above, it is unhelpful to consider the ETDA 2023 as standalone statute that creates a new area of private law. Rather, it is a part of the "trade documents law" of England and Wales and latches onto any provisions in the existing "trade documents law" that impose paper-based requirements and/or make paper-based assumptions regarding dealings in or any act done in relation to a trade document.

1.64 We also said above that the ETDA 2023 will apply in a supplementary manner when an applicable law rule points to the "trade documents law" of England and Wales (or the law of another part of the UK) as the law applicable to the issue in dispute.

1.65 From this, the extent to which any applicable law rule for a "trade documents" issue permits an express choice of the law of England and Wales depends on specific principles of "trade documents law" in question. For this reason, the extent to which parties can choose the "trade documents law" of England and Wales (and with it, the ETDA 2023) will differ as between different types of trade document and the particular legal issue that falls to be analysed under the conflict of laws.

1.66 For example, the law governing the contractual rights and obligations of the parties to a contract of carriage between themselves is commonly referred to the law chosen by the parties. A governing law clause in a contract of carriage contained in or evidenced by a bill of lading in favour of the law of England and Wales will be upheld by the conflict of laws rules used in most legal systems. When, therefore, adjudicating the issue in dispute, courts will apply, for example:

(1) The common law principles applicable to contracts of carriage.

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[26] One core difference between the Bills of Exchange Act 1882 and both Geneva Conventions 1930 lies in the formal requisites for concluding contracts on a bill of exchange: the Bills of Exchange Act 1882 has a heavy emphasis on delivering possession of the instrument whereas the Geneva Conventions 1930 rather emphasise signature. As such, the Bills of Exchange Act 1882 will rely much more heavily on the ETDA 2023 than Geneva Conventions countries might rely on the MLETR to ensure that the formal requisites for concluding contracts on a bill of exchange can be met in the electronic context.

(2) Various statutes that apply specifically to bills of lading, such as the Carriage of Goods by Sea Acts 1971 and 1992.

(3) Assuming the bill of lading is in electronic form, the ETDA 2023 for any contractual questions relating to possession under sections 5(2) and 2(1) of the Carriage of Goods by Sea Act 1992.

1.67 From this, to say that the parties have "chosen" the ETDA 2023 does not accurately reflect the legal position. The parties have chosen the contract law of England and Wales as it applies to contracts of carriage of goods by sea. This brings with it the ETDA 2023, which latches onto the law relating to the carriage of goods by sea as one part of the "trade documents law" of England and Wales.

1.68 Not all conflict of laws rules express or permit the principle of party autonomy. Property issues and the formal requisites for legal acts (such as concluding a contract or executing a will) are both areas in the conflict of laws where party autonomy is not generally recognised. Where party autonomy is not recognised by the relevant conflict of laws rule, there is less scope for parties to make an "indirect" choice of the ETDA 2023 as a supplementary aspect of the "trade documents law" of England and Wales.

Q.5. IS SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882 PROBLEMATIC IN THE ELECTRONIC CONTEXT?

1.69 Section 72 raises some issues in the electronic environment, including in relation to certain electronic trade documents, but is not inherently problematic for the conflict of laws.

1.70 Section 72 is a conflict of laws provision that sets out four conflict of laws rules for certain contractual issues that may arise under the various contracts embodied in a (paper) bill of exchange:[27] formal validity;[28] interpretation;[29] the duties of a holder in relation to presentment for acceptance or payment;[30] and the due date for payment.[31] Section 72 applies where "a bill drawn in one country is negotiated, accepted, or payable in another" and may apply to both inland and foreign bills, as defined in section 4.

1.71 The primary difficulty of section 72 in the electronic environment arises from the fact that the connecting factors it employs are expressed in terms of the physical location of the bill at the time of a particular dealing or act done. These are difficult to reconcile with the electronic environment in which electronic bills of exchange might be used.

1.72 In the case of subsections 72(1) and (2), the relevant provisions on interpretation contained in section 2 both ultimately refer to a delivery, which means "a transfer of

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27 It also applies to cheques and promissory notes: Bills of Exchange Act 1882, s 73 on cheques, and s 89(1) on promissory notes.

28 Bills of Exchange Act 1882, s 72(1).

29 Above s 72(2).

30 Above s 72(3).

31 Above s 72(5).

possession, actual or constructive, from one person to another".[32] In the electronic environment, it is difficult to say "where" such "possession" is transferred from one party to another. We have also been told by stakeholders that presentment is generally understood as involving the physical delivery of the bill, which causes similar difficulties of localisation for the purposes of subsection 72(3).

1.73 Localising delivery for the purpose of section 72 is the core question with which we are tasked to consider in this project. In our Call for Evidence, we identified three potential ways to identify where it could be said that an electronic trade document is "delivered" for the purposes of section 72: by reference to the reliable system; by reference to the transferor/indorser; by reference to the transferee/indorsee. We expect to make proposals for law reform on this matter in our consultation paper, due next year.

Q.6. CAN SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882 "INVALIDATE" AN ELECTRONIC TRADE DOCUMENT?

1.74 During our stakeholder engagement period, we become aware that there are many concerns that section 72 may "invalidate" an electronic trade document by referring to a law of a place other than the UK (where the ETDA 2023 applies) or a jurisdiction that has not yet enacted legislation consistent with MLETR's aims.

1.75 We understand the concern to be that:

(1) Parties may make an express choice of the ETDA 2023 or otherwise choose the law of England and Wales as "governing" their trade document to ensure it has the benefit of ETDA 2023; but

(2) Such choice of the ETDA 2023 or of the law of England and Wales will not be upheld, because section 72 points to another law; and

(3) The law to which section 72 points might not recognise the "electronic validity of the instrument"; therefore

(4) Under the law of England and Wales, interpreted broadly to include its conflict of laws rules, the trade document will not be recognised as "electronically valid" notwithstanding the ETDA 2023.

1.76 We consider these concerns below, relying on and expanding upon the answers to the questions given above. However, it is important first to emphasise that these concerns ultimately relate to the implications or outcomes of applying a particular national law that does not provide for equivalence between paper and electronic trade documents. The conflict of laws has traditionally been said to be "blind" to such consequences that might flow from identifying the applicable law.

1.77 As we said in our Call for Evidence,[33] the conflict of laws is traditionally concerned only to identify *which* particular state's private law will apply in a given set of

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[32] Bills of Exchange Act 1882, s 2.

[33] "Digital assets and ETDs in private international law: which court, which law?" Law Commission Call for Evidence (2024) para 11.22.

circumstances. In doing so, it traditionally begins from the starting point that all systems of private law are as equally just and valid as all others. As such, private international law takes no position on whether the private law of a state that has implemented the MLETR should be preferred to the private law of a state that has not. Certainly, it does not take such considerations into account when identifying the applicable law.

1.78 We said that there are some rare cases in which the court will not apply the foreign law to which their conflict of laws rule points.[34] There are two main circumstances in which this may occur.

(1) First, cases where the application of the foreign law would be against the public policy of the forum. If the courts in England and Wales have accepted jurisdiction over a case but the application of the foreign law indicated by the applicable law rule would offend the public policy of England and Wales, the courts will decline to apply that law. This will be a rare occurrence: the result has to be "wholly alien to fundamental requirements of justice as administered by an English court".[35] Public policy has been invoked where a contract was entered into through coercion[36] and it has been said that serious international law or human rights violations may also be a reason to disapply foreign law.[37]

(2) Second, cases where the application of foreign law is inconsistent with an overriding mandatory law of the forum. Article 9(1) of the Rome I Regulation explains that "[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests […] to such an extent that they are applicable to any situation falling within their scope". The editors of *Dicey* suggest that the Hague-Visby Rules, an international uniform law convention implemented in the UK by the Carriage of Goods by Sea Act 1971 Act, should be viewed as being overriding mandatory provisions of the law of England and Wales.

1.79 Exceptions for the public policy[38] and mandatory law[39] of the forum feature in most systems of private international law.

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34 *Vervaeke v Smith* [1983] 1 AC 145, 164, by Lord Simon of Glaisdale; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 5R-001 (Rule 5). Public policy in this sense refers to the fundamental values of English law, which change over time: A Briggs, *The Conflict of Laws* (4th ed 2019) p 192.

35 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [16] by Lord Nicholls of Birkenhead.

36 *Kaufman v Gerson* [1904] 1 KB 591 (CA), 600, by Lord Justice Mathew.

37 See generally, A Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4(2) *Journal of Private International Law* 201-236.

38 Eg, Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation provide in materially similar terms that "the application of a provision of the law in any country specified the Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum".

39 Eg, Article 9 of the Rome I Convention and Article 16 of the Rome II Regulation provide in materially similar terms that "nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable".

1.80 Notwithstanding the traditional position that the conflict of laws is "outcome blind", we also said that the idea that a court might apply the law that would provide for a fairer substantive outcome runs throughout the history of the conflict of laws. The arguments for and against such an approach must, however, be contextualised as part of a far broader debate surrounding the overriding objective of the modern conflict of laws.[40] It would, for example, be difficult to provide legal certainty with an approach that directed courts to apply the law with the fairer outcome.

1.81 These issues are evidently complex, and we said in our Call for Evidence that balancing these various policy considerations would form a part of our analysis and proposals for law reform.

Q.6(a) When do issues of "electronic validity" arise under section 72?

1.82 We said above that it is more helpful to reformulate the question of "electronic validity" as the question of whether a particular dealing in or act done in relation to an electronic trade document will be recognised as having the same legal effects as an equivalent dealing in or act done in relation to a paper trade document.

1.83 We also said that the ETDA 2023 is parasitic on the existing "trade documents law" of England and Wales. In essence, the ETDA 2023 provides for functional equivalence between dealings in and acts done in relation to a paper trade document and equivalent dealings in and acts done in relation to an electronic trade document.

1.84 This is also the approach of the MLETR, which is primarily concerned with functional equivalence between paper records and electronic records. Both the ETDA 2023 and MLETR work on the basis that there is some existing legal provision with a paper-based requirement or assumption, which is then the reference point for "functional equivalence".

1.85 The question of "electronic validity" when section 72 is engaged is therefore complex. We think it is helpful to think of the question as requiring a three-step analysis:

(1) What law has been identified by applying the relevant rule under section 72?

(2) Does the identified applicable law impose, either expressly or impliedly, some paper-based requirement for this particular dealing?

  (a) If no, then the question of "electronic validity" does not arise.

  (b) If yes, then it becomes necessary to ask the third question:

(3) Does the identified applicable law recognise the particular dealing in the particular electronic instrument in issue as having the same legal effects as an equivalent dealing in or act done in relation to a paper trade document?

  (a) If yes, then the particular dealing in the electronic instrument in issue will be, at least on the face of it, "electronically valid".

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[40] "Digital assets and ETDs in private international law: which court, which law?" Law Commission Call for Evidence (2024) Chapter 6.

(b) If no, then the particular dealing in the electronic instrument in issue will not be "electronically valid".

1.86 We recognise the commercial significance of any legal finding that a particular dealing in an electronic instrument is not electronically valid and are sympathetic with our stakeholders who are concerned to avoid such an outcome.

1.87 However, there is only one real way to eliminate wholly this kind of cross-border legal risk that arises from the potential conflicts between different private law systems: states must all adopt the same substantive laws. Where laws are uniform across legal systems, conflicts of law are eliminated at their source, and it will not matter in which courts parties litigate their dispute because every court will resolve the dispute by applying the same substantive principles. Evidently, for this approach to work in the present context of electronic trade documents, all states would need to be committed to the recognition of functional equivalence between paper and electronic instruments. Without such commitment, there remains possibility for conflicts of laws between those states that recognise such functional equivalence and those states that do not. We recognise this may seem contrary to the original spirit of the law merchant and cross-border realities of international trade.

1.88 At the same time, we recognise that the decision to implement such legislation remains within the prerogative of sovereign states. While governments might be lobbied to pass such legislation, these remain questions of domestic politics outside the remit of our project. Nevertheless, we are aware of significant initiatives at the intergovernmental level and by international standard setters, like the International Chamber of Commerce, to encourage states to implement legislation consistent with the MLETR. We welcome these initiatives and recognise their importance for bringing trade documents into the digital age, even if they may take some time to come to fruition.

1.89 For our present purposes of private international law, however, the fact that the benefits of recognising functional equivalence between electronic and paper instruments have been secured in England and Wales through the ETDA 2023 does not necessarily mean that all other states will or must make a similar choice. Where states decline to pass MLETR-inspired legislation, or simply need more time to enact such legislation, this does not necessarily create an injustice that the law of England and Wales can seek to remedy through its rules of private international law. After all, private international law is premised on there being differences in national laws.

1.90 Certainly, it would be a significant political decision at the international level for one state to adopt rules of private international law that ultimately seek to cut across or undermine the sovereign prerogatives of other states to determine the content of their domestic laws. As we said above in paragraph 1.78, the threshold for declining to apply a foreign law identified by a conflict of laws rule is extremely high. It would be only in very rare cases concerning the "fundamental requirements of justice", such as coercion or violations of international law and/or human rights obligations, that a court might be justified in declining to apply a foreign law to which an applicable law points.

1.91 Moreover, it cannot be guaranteed that any technique of private international law that sought to circumvent the effect of applying foreign laws would, in practice, have the intended effect. Given that the ETDA 2023 is parasitic legislation that attaches to the

existing "trade documents law" of England and Wales, there are significant technical and theoretical difficulties with attempting to treat it as overriding mandatory law. Even if, however, as a matter of the law of England and Wales, the application of the ETDA 2023 could somehow be made expressly mandatory, it would still be possible in many cases for disputes to arise in foreign courts. Those courts would not be required to recognise or apply the mandatory application of the ETDA 2023.

1.92 Similarly, it cannot be guaranteed that an express choice of jurisdiction and choice of law clause in favour of England and Wales will be upheld in foreign courts. The law of negotiable instruments is an area in which there are significant differences between jurisdictions on more fundamental theoretical principles surrounding the nature and basis of liability. Given that such liability emerged from mercantile practice and customs rather than the "usual" principles of private law, liability on a negotiable instrument is recognised in many jurisdictions as "exceptional".[41]

1.93 As a result, in most jurisdictions, many aspects of domestic negotiable instruments law are mandatory private law, in the sense that parties cannot contract out of them and impose their own contractually agreed standards.[42] The implications in private international law will be that, for the law applicable to these specific issues, domestic courts will be unlikely to uphold a choice of foreign law and/or jurisdiction.

1.94 While this may seem like a harsh legal environment unfavourable to the international realities of trade, it is worth remembering that the strength of commercial custom and trust among market participants has long been such that recourse to litigation has been rare in this area of international trade. Potential conflicts between different systems of private law have remained, therefore, potential rather than actual; and cross-border legal risk has only very rarely materialised. This continues to underscore that the spirit of the old law merchant as customary practices outside of the "ordinary" domestic law and courts of nation states continues to be relevant even in the digital age.

Q.7. IS SECTION 72 OUT OF DATE?

1.95 Quite separately to the ETDA 2023, we are aware of arguments in the academic literature that section 72 is ripe for reform. The main concern is that section 72(2) in its use of the place where the contract was made has failed to keep up to date with developments in the conflict of laws.

1.96 Subsection 72(2), on the face of it, concerns the "interpretation" of each of the contracts on a bill of exchange. Whilst there is some debate as to what "interpretation" covers, the prevailing view, supported by the authorities, is that "interpretation" should be read broadly to mean that subsection 72(2) covers, not only the construction and interpretation of the words used in the contract, but also substantive matters or "legal effects" of the words. Under this view, subsection 72(2) also identifies the law

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41 See generally A Grisoli, "Uniform Law of Bills of Exchange from the Standpoint of Anglo-American Law" (1958-1959) 33 *Tulane Law Review* 289 and W G Crauford, "Differences Between the English and the German Law Relating to Negotiable Instruments" (1957) Vol 6 Issue 3 *International & Comparative Law Quarterly* 418-441.

42 These include the threshold test for negotiable status, the formal requisites of a bill of exchange and subsequent contracts on a bill of exchange, and the procedures upon dishonour of a bill of exchange.

applicable to the "obligations of the parties as deduced from such interpretation"[43] or, put differently, "the rights and liabilities of the parties *inter se*".[44] It would also include matters of material validity, such as whether a contractual obligation is void for substantive reasons, such as illegality.

1.97 This stands in contrast to the general contract law context, where there is a general consensus across different systems of private international law that the contracting parties are free to choose the law that governs their mutual contractual rights and obligations. As we said in Chapter 7 of our Call for Evidence, the default rule in Article 3(1) of the Rome I Regulation on the law applicable to contractual obligations is the law chosen by the parties. Thus, it has been argued that subsection 72(2) is out of date.

1.98 Subsection 72(2) is, however, by no means an outlier. Few, if any, systems of the conflict of laws for negotiable instruments provide for the autonomy of the parties to a contract on a bill to choose the law to govern their mutual obligations and rights.[45] Furthermore, obligations arising under negotiable instruments have always been treated as distinct from ordinary contractual obligations, given their exceptional nature and origins in mercantile practice.[46] It is for this reason they are excluded from the Rome I Regulation. The extent to which the policy underpinning Article 3(1) can be applied to contracts on a bill of exchange is therefore a highly complex question.

1.99 It should be noted that subsection 72(2) has little bearing on the issue of "electronic validity". Whilst there is some debate as to the precise scope of subsection 72(2), this does not have any bearing on the question of whether a particular act done in relation to an electronic instrument is functionally equivalent to an act done to a paper trade document. The matters covered by section 72(2), discussed above, engage very different private international law principles and considerations to those that arise under the ETDA 2023.

FOLLOW UP QUESTIONS

1.100 As mentioned at the outset of this paper, we recognise that these issues are complex. We therefore welcome follow up questions arising from this document, which can be sent to conflictoflaws@lawcommission.gov.uk.

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43 Sir M D Chalmers, *A Digest of the Law of Bills of Exchange* (9th ed 1927) p 282. See now also S J Gleeson, *Chalmers and Guest on Bills of Exchange and Cheques* (18th ed 2016) para 12.015.

44 J M Phillips, I Higgins, R Hanke, *Byles on Bills of Exchange and Cheques* (30th Ed 2019) para 25.015.

45 See, for example, Article 4 of the Geneva Conflicts Convention 1930.

46 See P S Atiyah, *The Rise and Fall of the Freedom of Contract* (1979) p 135 onwards. The reception of the law merchant into the common law was furthermore a long and gradual process, see for example *Clerke v Martin* (1702) 2 Ld Raym 757, 1 Salk. 129.