

# ICC Uniform Rules for Digital Trade Transactions (URDTT) and the UK Law Commission Report and Bill on Electronic Trade Documents



# Introduction

**The intent of this paper is to explain how the ICC Uniform Rules for Digital Trade Transactions (URDTT) are compatible with the proposed legislative changes in England and Wales with regard to the use of possessable electronic trade documents as set in the Law Commission’s recommendations.<sup>1</sup>**

As highlighted in these recommendations, the current law in England and Wales does not recognise the possibility of possessing electronic documents.<sup>2</sup>

Much of world trade is underpinned by English law — a legacy of the UK’s historic role in trade. Not just across The Commonwealth, but for every buyer, seller, insurer, financier and intermediary using English law as a basis for contract law or handling trade documents. The Bill will have a disproportionately large and positive impact on global trade at a time when companies all over the world are facing unsustainably high trade costs and suffocating under a sea of unnecessary paper documents.<sup>3</sup>

**URDTT:** In 2019, the ICC Banking Commission Executive Committee provided the ICC Working Group on Digitalisation in Trade Finance with a mandate to proceed with the drafting of a new set of rules that would essentially be agnostic in nature with regard to underlying technology and would effectively address the gaps in digital

trade, focusing on the use of data in digital trade transactions. The rules, Version 1.0, came into effect from 1 October 2021.<sup>4</sup>

**Law Commission:** In September 2020, the Department for Digital, Culture, Media and Sport (DCMS) asked the Law Commission to make recommendations to solve the problems caused by the law’s approach to the “possession” and transfer of electronic documents. DCMS also asked the Law Commission to prepare draft legislation to implement those recommendations.<sup>5</sup>

For reference purposes, the URDTT describe a digital trade transaction as a representation of the underlying transaction and is the process by which the terms of the commercial contract between the seller and the buyer are recorded and progressed.<sup>6</sup>

The proposed legal reform will also benefit other ICC rules such as eUCP Version 2.0<sup>7</sup> and eURC Version 1.0<sup>8</sup>, whilst providing support to the trade industry to make the necessary strides forward, in terms of digitisation.

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

2 <https://www.lawcom.gov.uk/recommendations-to-allow-electronic-documents-would-revolutionise-trade/>

3 Chris Southworth, Secretary General ICC United Kingdom, 9 May 2022

4 <https://2go.iccwbo.org/implementing-urdtt-uniform-rules-for-digital-trade-transactions-version-1-0.html>

5 <https://consult.justice.gov.uk/law-commission/electronic-trade-documents/>

6 <https://www.tradefinance.training/news/news-categories/icc-release-new-rules-uniform-rules-for-digital-trade-transactions-urdtt/>

7 <https://iccwbo.org/publication/eucp-version-2-0-icc-uniform-customs-and-practice-for-documentary-credits/>

8 <https://iccwbo.org/publication/urc-522-icc-uniform-rules-for-collections-supplement-for-electronic-presentation-eurc-version-1-0/>

# Law Commission recommendations — Electronic Trade Documents Act

## ● Recommendation 1

Trade documents in electronic form should be capable of being possessed as a matter of law, provided that they meet certain criteria which ensures that they can replicate the salient features of paper trade documents.

- The URDTT position is stated in article 7, Electronic Records, and article 12, Payment Obligation.
- Sub-article 7 (f) provides that where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee. “Exclusive control” of an electronic record is functionally equivalent to “possession” of a paper document and therefore meets the criteria for ‘possession’ as defined in the Law Commission’s recommendations.

## ● Recommendation 2

There should be legislative reform to allow for trade documents in electronic form that satisfy certain criteria to be possessed and therefore to have the same legal effects as their paper equivalents.

- As stated in the Law Commission Summary on Electronic Trade Documents<sup>9</sup>, possession has a core role in the current functionality of paper trade documents, both at common law and in domestic statutes, in terms of establishing who may have certain rights and entitlements.
- The URDTT provide for submission of electronic records rather than presentation of paper documents. As stated in URDTT sub-article 7 (f), Electronic Records, the rules contemplate exclusive control of an electronic record as meeting a legal requirement for possession of a document.

## ● Recommendation 3

Subject to certain explicit exclusions, legislation should make provision to allow for electronic forms of trade documents, possession of which is required as a matter of law or commercial practice for a person to claim performance of the relevant obligation, to be treated in law as equivalent to their paper counterparts.

- URDTT sub-article 1 (b), Scope of the URDTT, provides that a digital trade transaction is a process, as agreed between the principal parties, whereby electronic records are used to evidence the underlying sale and purchase of goods or services, and the incurring of a payment obligation.
- As such, a digital trade transaction is a representation of the underlying transaction and is the process by which the terms of the commercial contract between the seller and the buyer are recorded and progressed. Intrinsicly, a digital trade transaction is distinct from the commercial contract.
- As stated in URDTT sub-article 12 (a), a payment obligation is incurred by the buyer upon compliance with the terms and conditions of the digital trade transaction by the seller. An unconditional payment obligation, evidenced by electronic record, is distinct from the digital trade transaction, replicating the autonomy of a bill of exchange.
- As previously mentioned, URDTT sub-article 7 (f) provides that where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.

## ● Recommendation 4

Legislation should specifically allow for the following documents to be used in electronic form, provided that possession is required as a matter of law or commercial practice for a person to claim performance of an obligation:

1. Bills of exchange;
2. Promissory notes;
3. Bills of lading;
4. Ship's delivery orders;
5. Warehouse receipts;
6. Mate's receipts;
7. Marine insurance policies; and
8. Cargo insurance certificates.

- The URDTT provide for the information traditionally contained in a paper document being replaced by data in an electronic record.
- In electronic commerce, data is grouped together into a unit. Although these units are often provided with designations such as “messages”, “files” and “documents”, the term “electronic record” has emerged as a common label to identify a grouping of data in one message, file, or document and to distinguish it from a paper document. A digital original record is one that exists in digitised form only, whereas an electronic record may also encompass a copy of an original document that is stored in electronic form, e.g. a scanned copy.
- The URDTT definition of “electronic record” would include a digitised record (“data created...by electronic means”) but is broader than that.
- Although there is no definition of “electronic” in the URDTT, such term would, by its nature, exclude paper documents.

## ● Recommendation 5

Instruments entered in a “relevant system” under the Uncertificated Securities Regulations 2001<sup>10</sup> should be excluded from the scope of legislation allowing for trade documents in electronic form.

- This recommendation is not an issue because the URDTT, as stated in sub-article 1 (b), Scope of the URDTT, relate to the underlying sale and purchase of goods or services, and the incurring of a payment obligation.
- The Uncertificated Securities Regulations 2001 relates to eligible debt securities and not to trade in goods or services.

## ● Recommendation 6

Bearer bonds should be excluded from the scope of legislation allowing for trade documents in electronic form.

- As stated in the Law Commission Summary on Electronic Trade Documents, a bearer bond is a negotiable instrument and a document of title to a debt, according legal title to the person in possession.<sup>11</sup>
- The reason for excluding this document type is that it is used in the financial markets and not in trade.
- This recommendation is not an issue because the URDTT, as stated in sub-article 1 (b), Scope of the URDTT, relate to the underlying sale and purchase of goods or services, and the incurring of a payment obligation.

## ● Recommendation 7

Legislation should contain a power to make secondary legislation, subject to the affirmative procedure, to add to, remove from, or otherwise amend the list of documents which are excluded from the scope of the Bill.

- The URDTT, as with all ICC rules, always default to law.
- As stated in sub-article 17 (b), Applicable Law, the URDTT supplement the choice of the applicable law agreed between the principal parties to the extent not prohibited by, and not in conflict with, that applicable law or any applicable regulation.
- Accordingly, this recommendation does not impact upon the content of the URDTT.

<sup>10</sup> <https://www.legislation.gov.uk/uksi/2001/3755/contents/made>

<sup>11</sup> <https://www.lawcom.gov.uk/document/electronic-trade-documents-report/>

## ● Recommendation 8

In order to qualify as an electronic trade document, a document in electronic form must contain the same information as would be required to be contained in the paper equivalent.

- A digital trade transaction is a representation of the underlying transaction and is the process by which the terms of the commercial contract between the seller and the buyer are recorded and progressed.
- In view of the neutrality of the URDTT, the rules can be easily assimilated into the underlying commercial contract between the buyer and the seller, thereby avoiding the requirement for “paper” processing, with both parties agreeing to use a digital trade transaction subject to URDTT whereby electronic records are used to evidence the underlying sale and purchase of the goods, and the incurring of a payment obligation.
- Electronic records (documents) will be submitted that either evidence the underlying sale and purchase of the goods or services, or evidence the actual delivery/receipt of those goods or services.
- In respect of the URDTT, the underlying contract between the buyer and the seller requires agreement by both parties on the actual electronic records to be submitted, by whom they are to be issued, their data content, and the time frame in which they are to be submitted.
- URDTT sub-article 12 (c), Payment Obligation, lists the information that is required in the form of data elements.
- Bills of Lading fall under the definition of an electronic record as stated in URDTT article 2, Definitions.

## ● Recommendation 9

Where a trade document in electronic form comprises separate, but linked elements — a data structure consisting of functional code, and a human readable part which contains or specifies certain rights — these elements together should comprise “the document”.

- URDTT article 2, Definitions, highlights that an electronic record means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
  - *capable of being authenticated as to the apparent identity of a submitter and the apparent source of the data contained in it and as to whether it has remained complete and unaltered; and*
  - *capable of being examined for compliance with the terms and conditions of a digital trade transaction.*
- As highlighted in the above paragraph, the key point is that the data must be capable of being examined for compliance. This applies whether readable by human or by machine.
- URDTT sub-article 7 (a), Electronic Records, states that a digital trade transaction must specify the terms and conditions by which compliance of an electronic record will be determined.
- Furthermore, sub-article 7 (b), mentions that all data relating to a digital trade transaction must be associated with, and be submitted by, a submitter to an addressee, in the form of an electronic record.

## ● Recommendation 10

In order to qualify as an electronic trade document, a reliable system must be used to ensure that the document contains certain functionality designed to replicate the salient features of a paper trade document.

Legislation should include a non-exhaustive list of factors which may be taken into account when considering whether a system is reliable, being:

1. Any rules of the system that apply to its operation;
2. Any measures taken to secure the integrity of information held on the system;
3. Any measures taken to prevent unauthorised access to and use of the system;
4. The security of the hardware and software used by the system;
5. The regularity of and extent of any audit of the system by an independent body;
6. Any assessment of the reliability of the system made by a body with supervisory or regulatory functions;
7. The provisions of any voluntary scheme or industry standard that apply in relation to the system.

- URDTT article 2, Definitions, defines a data processing system as a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages in whole or in part.
- As highlighted in the ICC publication, *Implementing URDTT*<sup>12</sup>, it is essential that internal data processing systems can handle the relevant formats for electronic records, authenticate messages, and execute electronic signatures. In view of the fact that the rules are technology neutral, it is up to the parties concerned to decide the most appropriate method of processing.
- The above publication also outlines the minimum standards for data processing systems.

## ● Recommendation 11

In order to qualify as an electronic trade document, a document in electronic form must be protected against unauthorised interference or alteration.

- URDTT article 2, Definitions, states that an electronic record must remain complete and unaltered.

## ● Recommendation 12

For the purposes of the gateway criteria, a person should be taken to exercise control of a trade document in electronic form when the person uses, transfers or otherwise disposes of the document (regardless of whether they have the legal right to do so).

- URDTT article 2, Definitions, states that transfer means the transferring of the rights and benefits of a payment obligation (in whole or in part) and, where added, a financial services provider payment undertaking (in whole or in part), by the beneficiary to one or more transferees.
- URDTT sub-article 7 (f), Electronic Records, highlights that where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.
- URDTT article 15, Transfer, covers transfer in more detail, and it is also mentioned in sub-articles 7 (f), 12 (d), and 13 (f).

## ● Recommendation 13

“Use” of a trade document in electronic form should comprise utilising or retaining the document to achieve a particular purpose. It should include causing something to happen (or preventing something from happening) to the document, but exclude merely reading or viewing the document.

- As stated in URDTT sub-article 1 (b), Scope of the URDTT, a digital trade transaction is a process, as agreed between the principal parties, whereby electronic records are used to evidence the underlying sale and purchase of goods or services, and the incurring of a payment obligation.
- URDTT sub-article 7 (a), Electronic Records, emphasises that a digital trade transaction must specify the terms and conditions by which compliance of an electronic record will be determined.

- Reference should also be made to article 12, Payment Obligation, as a document that achieves a particular purpose, i.e., in this case, gives the holder the right to get paid.

### ● Recommendation 14

In order to qualify as an electronic trade document, a trade document in electronic form must be susceptible to exclusive control; that is, only one person (or persons acting jointly) must be able to exercise control of a document in electronic form at any one time.

- URDTT sub-article 7 (f), Electronic Records, states that where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.

### ● Recommendation 15

In order to qualify as an electronic trade document, a trade document in electronic form must be divestible; that is, after the document is transferred, any person who before the transfer was able to exercise control of the document is no longer able to do so (except to the extent that a person is able to exercise control by virtue of being a transferee).

- URDTT sub-article 15 (a), Transfer, denotes that once transfer has been realised, each transferee automatically becomes a beneficiary under the appropriate instrument (i.e. payment obligation or financial services provider payment undertaking).
- As a result of this, unless otherwise waived at the time of transfer, each transferee retains rights of recourse against the transferor. The actual terms of recourse against the transferor cannot be mandated by the URDTT and are a matter of practice. Accordingly, they should be dealt with in the underlying digital trade transaction, and remedies available under applicable law.
- Under sub-article 15 (c), unless precluded by the financial services provider, any transfer shall include the transfer of the rights and benefits of any financial services provider payment undertaking that has been added in respect of that payment obligation.

- In any event, this is a matter for the technology service provider and is not specified in URDTT. It should be noted that the technology already exists to achieve this.

### ● Recommendation 16

In order to qualify as an electronic trade document, a document in electronic form must be identifiable as “the document” so that it can be distinguished from any copies.

- As highlighted in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Transferable Records (MLETR)<sup>13</sup>, providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge.
- An electronic record that incorporates technology that allows a party to distinguish between an original and a copy and provides a means to prove possession of an “original” can be used in a digital trade transaction.

### ● Recommendation 17

In order to qualify as an electronic trade document, the trade document in electronic form must be capable of being uniquely associated with the person or persons able to exercise control of it.

- URDTT article 2, Definitions, states that an electronic record must be capable of being authenticated as to the apparent identity of a submitter and the apparent source of the data contained in it and as to whether it has remained complete and unaltered.
- As stated in URDTT sub-article 7 (f), Electronic Records, where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.



### ● Recommendation 18

Intention should be an element of possession in the context of electronic trade documents in the same way that it is for paper trade documents, but it need not be referenced expressly in legislation.

- As stated in URDTT sub-article 7 (f), Electronic Records, where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.

### ● Recommendation 19

Once electronic trade documents are regarded by the law as possessable as a matter of fact, all other possessory interests, such as constructive possession, should also apply to them.

- As stated in URDTT sub-article 7 (f), Electronic Records, where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.

### ● Recommendation 20

Legislation should provide expressly that an electronic document is capable of being possessed.

- As stated in URDTT sub-article 7 (f), Electronic Records, where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.

### ● Recommendation 21

An electronic trade document should be treated in law as equivalent to a paper trade document, and anything that can be done to a paper trade document should have the same effect if done to an electronic trade document.

- In view of the neutrality of the URDTT, the rules can be easily assimilated into the underlying commercial contract between the buyer and the seller, thereby avoiding the requirement for “paper” processing, with both parties agreeing to use a digital trade transaction subject to URDTT whereby electronic records are used to evidence the underlying sale and purchase of the goods, and the incurring of a payment obligation.

- Authentication in the paper world is the process by which the validity of the representations and the paper documents containing them are ascertained. There are, necessarily, various levels of authentication.

- In the digital world, there is a greater deal of focus on the authentication of data. Although referenced in URDTT article 2, Definitions, and article 6, Submitter and Addressee, it is deliberate that “authentication” is not defined. It does, however, link the term to, and embody its meaning for purposes of, the URDTT in its definition of “electronic record”.

### ● Recommendation 22

Legislation should provide that an electronic trade document is capable of being indorsed.

- This is a matter of practice and not to be mandated by ICC rules.
- Ultimately, it is a matter for the technology service provider to address. In essence, from a technology perspective, an indorsement is simply additional data added to a digital original record, effectively creating a new iteration of the record which renders previous iterations invalid. It should be noted that the technology already exists to achieve this.

### ● Recommendation 23

Legislation should provide expressly that:

1. A trade document may be converted from electronic to paper form and from paper to electronic form, provided that a statement is included in the document in its new form to the effect that it has been converted, and any contractual or other requirements relating to conversion of the document are complied with.
2. Where a document is converted, the document in its old form should cease to have effect, and all rights and liabilities relating to the document should continue to have effect in relation to the document in its new form.

- As stated in the Preliminary Considerations, the URDTT apply solely to a fully digital environment.
- It is feasible that one aspect of a digital transaction may inadvertently be documented on paper rather than digitally. However, this is a “practice” issue which cannot be mandated by rules that solely cater for a fully digital environment.



- It is expected that, in the event part of a transaction “converts” to paper, then the involved parties (or persons) would reach a separate agreement on how to proceed, particularly if such action were inadvertent. However, it should be noted that such a process would be outside the scope of the URDTT.

### ● Recommendation 24

Documents issued before the day on which the Electronic Trade Documents Act comes into force should not be capable of being electronic trade documents within the meaning of that legislation.

- This is not an issue that impacts upon the URDTT.
- The rules provide a framework that applies to each party or person that participates in a digital trade transaction.
- As such, the timing of the Electronic Trade Documents Act only applies to matters stated within the Act itself.

### ● Recommendation 25

We recommend that the change of medium provisions in the Bill should not apply to a paper trade document issued before the Act comes into force.

- This is not an issue that impacts upon the URDTT.
- The rules provide a framework that applies to each party or person that participates in a digital trade transaction.
- As such, the timing of the Electronic Trade Documents Act only applies to matters stated within the Act itself.
- In any event, as stated in the Preliminary Considerations, the URDTT apply solely to a fully digital environment, and not to paper trade documents.

### ● Recommendation 26

The existing provisions on electronic presentment of instruments in the Bills of Exchange Act 1882<sup>14</sup> should not apply to electronic trade documents within the meaning of the Bill.

- In respect of Bills of Exchange as part of a digital trade transaction, although not currently covered by the URDTT, this will be decided by market practice.
- A payment obligation under the URDTT that meets the provisions of the Bills of Exchange Act (notwithstanding its electronic nature) can be treated as a bill of exchange.

### ● Recommendation 27

Sections 1(5) and 1(6) of the Carriage of Goods by Sea Act 1992<sup>15</sup> should be repealed.

- This is not an issue that directly impacts upon the URDTT.

<sup>14</sup> <https://www.legislation.gov.uk/ukpga/Vict/45-46/61>

<sup>15</sup> <https://www.legislation.gov.uk/ukpga/1992/50/contents>

# Other issues raised by the Law Commission

## ● Technological neutrality

The recommendations of the Law Commission and the Bill are not predicated on the functionality of a particular technology. Instead, they ask: as a matter of law, what features must trade documents in electronic form have in order to be equivalent to paper documents, and therefore amenable to being possessed? They do not suggest that any requirements of the Bill can only be met with one particular type of technology. They aim for recommended reforms to be able to accommodate future technologies. They consider that their approach will foster innovation and allow more flexible commercial arrangements to be reached. It will also circumvent the risks of referring to particular technologies which may quickly become outdated or obsolete, and of excluding other potential existing or future solutions.

- The mandate for the URDTT clearly stated that the rules would essentially be agnostic in nature with regard to underlying technology and would effectively address the gaps in digital trade, focusing on the use of data in digital trade transactions.
- It is essential that internal data processing systems can handle the relevant formats for electronic records, authenticate messages, and execute electronic signatures. In view of the fact that the rules are technology neutral, it is up to the parties concerned to decide the most appropriate method of processing.
- Although at this stage, there are no recommended minimum standards surrounding data processing systems, the ICC publication, *Implementing URDTT*<sup>16</sup>, provides a guide.
- It is worth noting that ITFA's d-doc specification, under their DNI initiative, provides a detailed

definition of what any chosen technology solution should deliver. This is consistent with MLETR<sup>17</sup> and also, therefore, with the Law Commission recommendations.<sup>18</sup>

- The choice of technology platform and messaging standards is to be agreed separately by the buyer and seller. It is recommended that both these parties transact on the same platform. However, if not, it should be agreed by both the buyer and the seller, and will depend on the terms and conditions of the digital trade transaction. Practical issues such as interoperability would require attention.
- The ICC publication, *Implementing URDTT*<sup>19</sup>, provides a guide to the recommended content for the commercial contract between the buyer and the seller, as well as the recommended terms and conditions to be included in a digital trade transaction.
- The buyer and seller must agree on the actual electronic records to be submitted, by whom they are to be issued, their data content, and the time frame in which they are to be submitted.

## ● The role of the courts

Where the Bill is silent on how certain concepts apply to electronic trade documents (for example, timing of transfer of possession, delivery, rejection, and acceptance), the role of the courts will be to apply the existing principles of those concepts to electronic trade documents, subject to any necessary adaptations of the common law to cater for their digital nature.

- Under URDTT sub-article 17 (a), Applicable Law, the terms and conditions of the digital trade transaction should state the applicable law.

<sup>16</sup> <https://2go.iccwbo.org/implementing-urdt-t-uniform-rules-for-digital-trade-transactions-version-1-0.html>

<sup>17</sup> [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records)

<sup>18</sup> <https://itfa.org/itfa-digital-negotiable-instruments-dni-initiative/>

<sup>19</sup> <https://2go.iccwbo.org/implementing-urdt-t-uniform-rules-for-digital-trade-transactions-version-1-0.html>

- The rules state that they supplement the choice of the applicable law agreed between the buyer and the seller to the extent not prohibited by, and not in conflict with, that applicable law or any applicable regulation.
- In the event that any party or person would be prohibited by applicable law in complying with its obligations under a digital trade transaction, a payment obligation, or a financial services provider payment undertaking, then they are not obligated to do so, and assume no liability of responsibility for the result of such non-action.
- If no applicable law is stated, then it is a matter for the buyer and the seller to decide, not the URDTT. However, good practice is that the applicable law should be specified in the terms and conditions of the digital trade transaction.
- Should the parties require a differing law to that stated in the digital trade transaction, then this must be agreed separately.
- In the event of a blocking statute in one jurisdiction which conflicts with applicable law in another jurisdiction, the circumstances will be resolved by practice and not by the rules.
- Law will always prevail over rules and ICC rules cannot mandate which particular jurisdiction takes precedence.

### ● International compatibility

The Law Commission note that possession is central to the use of trade documents across various jurisdictions. Efforts to address the possession problem and digitalise trade documents are reflected in various initiatives in both international frameworks and individual jurisdictions that aim to legally recognise the use of electronic documents. The principal initiatives include the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea 2008<sup>20</sup>, the Model Law on Electronic Transferable Records (MLETR)<sup>21</sup> produced by the United Nations Commission on International Trade Law, developments in Singapore, and the US Uniform Commercial Code<sup>22</sup>.

They are conscious of the importance of international compatibility insofar as this is possible. It is vital that electronic trade documents can move between different jurisdictions and be recognised worldwide as legally equivalent to paper versions.

In developing their recommended reforms, they have been mindful in particular of the MLETR, given its international significance. The MLETR provides a prototype for law reform initiatives at a national level. It aims to enable the use of electronic transferable records by establishing legal equivalence between control of an electronic transferable record (such as a bill of exchange) and possession of a transferable paper document or instrument. Their recommendations align with the aims and policy of the MLETR, but are tailored specifically to the law of England and Wales.

- The URDTT definitions, article 2, are modelled on the MLETR.
- The only area identified to date as one for possible misperception regarding divergence between the URDTT and local electronic commerce law relates to the degree of authenticity required for electronic records and the meaning to be attached to a requirement for an electronic signature.
- Where there is a mandatory requirement under local electronic commerce law for a higher degree of authenticity than would be required under the URDTT, local electronic commerce law may impose additional requirements on an electronic presentation.
- Of significant importance is that the rules align with the “Framework for G7 collaboration on Electronic Transferable Records”<sup>23</sup> to promote the adoption of legal frameworks compatible with the MLETR.

### “In writing”

Documents that fall within the scope of their proposals for reform may have a requirement that they must be “in writing”. Unlike the MLETR, they do not include an explicit provision in the Bill allowing for electronic documents to satisfy “in writing” requirements. This is because the law of England

<sup>20</sup> [https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam\\_rules/status](https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status)

<sup>21</sup> [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records)

<sup>22</sup> <https://www.uniformlaws.org/acts/ucc>

<sup>23</sup> [http://www.g8.utoronto.ca/ict/2021-annex\\_4-framework-records.html](http://www.g8.utoronto.ca/ict/2021-annex_4-framework-records.html)

and Wales defines “writing” in broad terms. For example, schedule 1 to the Interpretation Act 1978<sup>24</sup> defines writing as “typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form”. In addition, statutes are generally, unless otherwise indicated, construed by the courts so as to respond to societal developments, including changes in technology. Their further research suggests that electronic displays are likely to be considered to satisfy an “in writing” requirement. As such, they think that the position in domestic law is already clear: a trade document in electronic form can satisfy a requirement to be in writing.

- URDTT sub-article 7 (e), Electronic Records, highlights that, unless applicable law requires otherwise, a requirement that information should be in writing is satisfied when an electronic record containing such information is accessible to an addressee and is not affected by any data corruption.
- This reflects one of the objectives of the MLETR, which is to enable or facilitate the use of electronic commerce and provide equal treatment to users of paper-based documentation and to users of computer-based information.

### “Signed”

Trade documents may be required to be signed in order to be validly issued. The MLETR makes specific provision to allow for the signing of electronic documents. However, as the Law Commission discuss in detail in their Electronic Execution Report<sup>25</sup>, the law of England and Wales is already sufficiently flexible to accommodate electronic signatures. What is important is not the form of signature (unless this is prescribed by law), but whether it was applied in a manner which indicates the parties’ intention to authenticate the document. They think that electronic signatures can be used to sign electronic trade documents without the need for an express statutory provision.

- Although at this stage, there are no recommended minimum standards surrounding electronic signatures, the ICC publication, *Implementing URDTT*<sup>26</sup>, provides a guide.

- The URDTT defines “electronic signature” as data attached to an electronic record with the intent of identifying the signer and authenticating the record.
- As provided in the rules, signatures on required documents perform two separate functions in a digital trade transaction; indicating the identity of the person signing and authenticating the electronic record itself and the information contained in it.
- The URDTT does not contain any substantive requirement that an electronic record contain an electronic signature.
- The only reference to “electronic signature” is contained in article 10, Electronic Signature, wherein it states that if an electronic signature is used, it must be in compliance with any conditions specific to that electronic signature in the digital trade transaction.
- The usage of any electronic signature must comply with the conditions for such electronic signature contained in the digital trade transaction.
- Each relevant party or person must be in a position to fulfil such requirements.

### Accessibility of information

The Law Commission think there is no need for a provision in the Bill requiring that information contained in an electronic trade document be accessible. As a matter of practicality, unless parties are able to access and show that their document satisfies the other requirements of the Bill, they cannot prove that the document in question qualifies as an electronic trade document. They think other recommended criteria given in the Bill (such as those relating to “use”, “transfer” or “otherwise dispose of”) which require a person in factual control to interact with an electronic document in some way, ensure that a person would have access to the information in the document.

24 <https://www.legislation.gov.uk/ukpga/1978/30/contents>

25 <https://www.lawcom.gov.uk/project/electronic-execution-of-documents/>

26 <https://2go.iccwbo.org/implementing-urdt-uniform-rules-for-digital-trade-transactions-version-1-0.html>

The URDTT position is stated in article 7, Electronic Records.

- Sub-article 7 (f) provides that where the applicable law requires or permits delivery, transfer or possession of an electronic record, that requirement or permission is met by the transfer of that electronic record to the exclusive control of the addressee.
- URDTT article 2, Definitions, defines an addressee as the party or person that receives or is granted access to an electronic record by the submitter.

### Sets of documents

It remains common practice for some trade documents, such as bills of lading and bills of exchange, to be drawn in sets of three. However, there is no requirement for these documents to be drawn in sets, and we therefore do not consider it necessary to include a requirement that the system on which an electronic trade document exists must make this possible. If this practice continues in the context of electronic trade documents, we think technology providers are likely to develop their platforms to enable electronic trade documents to be issued in sets, and neither the law nor our recommendations prohibit this.

- While originals and copies have less relevance in a digital world, URDTT sub-article 7 (c), Electronic Records, clarifies that any requirement for submission of one or more originals or copies of an electronic record is satisfied by the submission of one electronic record.
- In essence, this is a technology issue and such technology already exists to achieve this. In practice, the need for sets of originals is probably negated with digital original records anyway.

### Law Commission approach to the MLETR

In developing their provisional proposals for reform, they have been mindful of international initiatives and similar reforms in other countries, particularly the MLETR. They consider the overall approach of MLETR to be sound in principle, and they have sought alignment with it insofar as possible.

- The URDTT definitions, article 2, are modelled on the MLETR.

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