

The Electronic Trade Documents Bill – a major breakthrough in digitising trade finance?

July 2023

At the time of writing, it is very likely the Electronic Trade Documents Bill (the **Bill**) will become law at some point in 2023¹. The Bill seeks to support the digitisation of international trade and trade finance by giving English law recognition to “electronic trade documents” (**ETDs**). The idea is that, if ETDs can be created, enforced and transferred in a digitally equivalent way to that in which original paper trade documents can – with the same or equivalent legal effects – the resulting vast efficiencies and time, money and resource savings should significantly:

- reduce negative environmental impacts;
- increase supply chain robustness; and
- tend to increase profitability,

in international trade and associated industries.

Trade finance

If the Bill does become law, the impact on trade finance digitisation could be very significant indeed. This is partly because English law is very widely used in international trade, insurance, international carriage of goods and international finance transactions. This said, the Bill intentionally does not cover governing law or jurisdiction issues, which may be addressed in later legislation.

Trade documents

Trade documents are certain documents (such as bills of exchange, promissory notes or bills of lading) which (among other things):

- are commonly used in at least one part of the UK in connection with international trade in or transport of goods or related trade or transport finance; and
- broadly, confer rights (such as title to goods in transit, or a claim for payment) on the entity possessing them, partly by virtue of that possession.

¹ This article is based on the text of the Bill which was publicly available on 28 June 2023.

Possessing an ETD

The Bill does not define digital possession of an ETD, but does:

- provide that an ETD can be possessed (which is not possible at common law for intangible assets) and indorsed; and
- address a major component of digital possession – an ETD’s holder controlling the ETD when they use, transfer or otherwise dispose of it – with this control being a feature of a “reliable system” which must be used for certain operations and purposes relating to the ETD.

The reliable system

Among other things, this system must be used to:

- identify the ETD as distinguishable from any copies and to protect it from unauthorised alteration;
- make it impossible for more than one person (or one group of persons acting jointly) to control the ETD at any time;
- allow anyone with control of the ETD to demonstrate their ability to exercise that control; and
- ensure a transfer of the ETD deprives anyone able to control the ETD immediately before transfer of their ability to do so (unless they are a transferee).

Reliability

Whether a system is sufficiently reliable will partly be judged by reference to these (and certain other) criteria:

- any rules regarding system operations;
- how the integrity of information held on the system is secured and unauthorised access or system use prevented;
- the regularity of and extent of any independent audits of the system;
- any assessment of the reliability of the system made by a supervisory or regulatory body; and
- any voluntary schemes or industry standards that apply to the system.

Part of the thinking behind these criteria is not to tie the use or validity of ETDs to any given platform or technology. For example, it may or may not be the case that all reliable systems will always need to use distributed ledger technology.

Residual issues

If the Bill becomes law, parties considering using ETDs may wish to consider these issues:

- While the Bill introduces the idea of electronic possession of an ETD, and the related idea of exclusive control of an ETD, it does not define electronic possession, leaving the courts to work out this concept;
- Similarly, it will be for the courts to decide whether the requirement for a “reliable system” has been met for any given digital platform; and
- The English conflict of laws rules on the governing law of a bill of exchange or promissory note (including when in ETD form) could be clearer – as could the equivalent conflict of laws rules in many other states.

Electronic note diagram

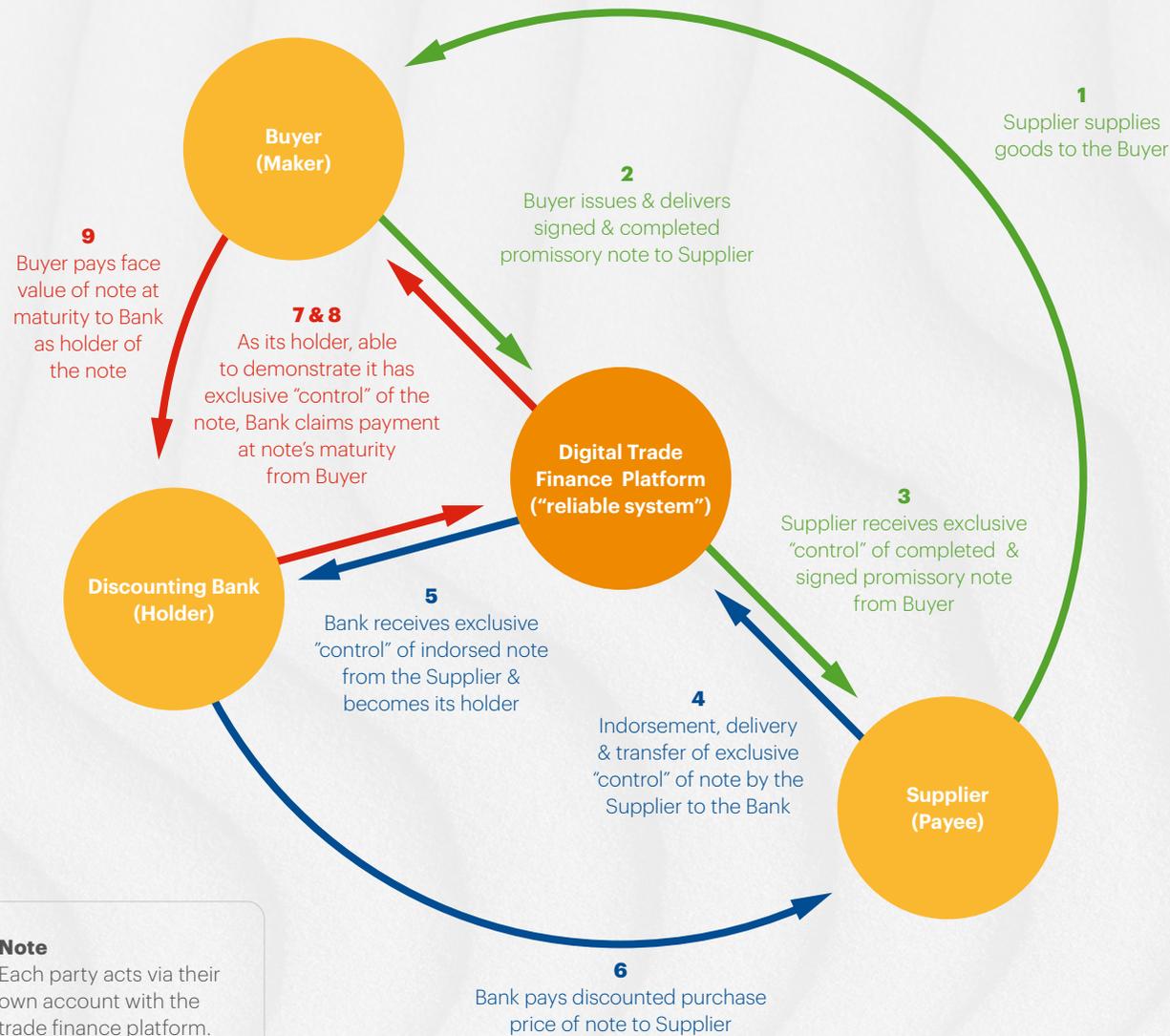


Diagram illustrates how traders & financiers might use a digital trade finance platform (that was a "reliable system" under the Bill) to issue, indorse, discount & claim payment under an electronic promissory note with a 90-day tenor given to pay for goods. Arrows going into, or emerging from, the platform refer to operations that would need to be done via a reliable system under the Bill. Instead of physically passing around possession of an original paper note, the parties pass around exclusive "control" of an original electronic note on & via the platform – with control including the ability to demonstrate that control via the platform. Among other things, the platform (as a "reliable system") must make it possible to identify the original electronic note & distinguish it from any copies.

Key

Green arrows represent transaction between Buyer and Supplier

Blue arrows represent transaction between Bank and Supplier

Red arrows represent transaction between Bank and Buyer

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