The Electronic Trade Documents Act and digitalising trade

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September 2023 sees the coming into effect of the Electronic Trade Documents Act (ETDA), the UK's response to the Model Law on Electronic Transferable Records (MLETR).

This has rightly been described as a 'game changer'. Its quick passage through the UK Parliamentary procedures was due to a combination of the efforts of the Law Commission, which chose a straightforward approach to the issue of digital documents in trade, certain key members of the House of Lords and organisations including the ICC and ITFA (International Trade and Forfaiting Association). There was much industry support, including from lawyers involved in trade and trade finance.

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In reality, English law has recognised digital documents and digital signatures for a number of years, and these have been used to evidence certain key aspects of trade finance transactions including receivables being bought and sold. ITFA has led the way in digitalising certain payment instruments, called ePUs (electronic payment undertakings).

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However, the development of this was held back in two key areas: the first was payment obligations evidenced by promissory notes and bills of exchange which could not exist in digital form under the Bills of Exchange Act 1882 as it was not possible to 'possess' an intangible, like a promise in digital form. The second was title to goods on board ship using bills of lading and in warehouses using warehouse receipts, which also could not legally exist in digital form.

ETDA is designed to solve these issues in particular. The purpose behind ETDA is relatively simple: it gives legal recognition to the digital form of a specific list of documents used in trade which meet key criteria, giving them the same legal effect as if they were in paper form. It is meeting the criteria that will be challenging.

What criteria?

The digital document — essentially an electronic record — must be in the exclusive control of the holder in a 'reliable system' that recognises this and enables its transfer. ETDA is agnostic of the medium for the electronic record and of what constitutes a reliable system, although in the latter case it sets out factors to be considered. In its simplest form the electronic record could be a PDF in respect of which the holder has the (only) private key. All of this must be generated by a system which satisfies the requirement of being a reliable system.

As and when the criteria are satisfied then trade transactions can move forward quickly without the need for paper or delays of transmission. Parties can evidence the payment obligation for a trade transaction using a digital payment obligation which can be transferred easily and quickly. These are the revolutionary aspects of ETDA!

Where next?

ETDA puts the law ahead of the technology and more importantly, in some cases, suppliers and buyers in trade and other service providers including shippers and customs authorities. This means a process of education for all involved is needed to accept moving to a digitalised trade transaction. But what goes with this is a warning that there must remain a place for human intervention to check what is happening at all stages of the trade transaction and the financing for it.

ETDA was, rightly, not designed to prevent fraud but to facilitate the move to digitalisation. There are a number of key steps that need to be taken to achieve a flow of transactions that are more than just proofs of concept:

- It must be agreed between parties so that digital trade can be open to all.
- What the electronic record looks like and contains will be important and specifying its form for a transaction will be needed.
- Achieving exclusive control of the electronic record will need to be demonstrated, as well as how to transfer the rights to it.
- Finally, what constitutes a reliable system will need to be determined. This will need to be without the intervention of a court judgment but to recognise that the ultimate arbiter of this would be a court. Moves are afoot to achieve standards, but arguably this will take time and there is a need to move more quickly.

Proceeding more quickly

All parties to trade and trade finance transactions should be encouraged to embrace the solutions offered by ETDA. That means contractual solutions will continue to play a key part in any trade or trade finance transaction.

Parties can agree in their contracts for the sale and purchase of goods and the payment for them, how electronic records are to be produced, how to give exclusive control of the relevant electronic record, how a transfer can take place and what the reliable system is that will recognise all this. The chosen system must itself be capable of satisfying the relevant elements of ETDA to evidence exclusive control and the transfer of rights. Any transfer must be achievable by and recognisable to another system, itself a reliable system, to demonstrate interoperability, another factor of a reliable system.

Even if contracts exist to achieve all this, ultimately the resulting contractual obligations would have to satisfy a court that there was an enforceable obligation. English law is flexible and well able to meet these challenges. Documenting the various contracts will need careful thought. Avoiding complicated terms of use for a reliable system will be another challenge for all involved.

Conclusion

ETDA has concentrated the minds of those involved in trade and trade finance of the potential to achieve the desires of speedy solutions and the avoidance of so much paper. The ICC has moved forward in other areas such as the modification of eUCP (Uniform Customs and Practice for Documentary Credits for electronic presentation) and URDTT (Uniform Rules for Digital Trade Transactions). ITFA has played its part in producing URTEPO (Uniform Rules for Transferable Electronic Payment Obligations) to facilitate the selling of electronic payment obligations such as those under the Bills of Exchange Act1882 (as amended).

This means that legal and contractual solutions await commercial parties applying these to trade and trade finance. Time will tell the speed at which all this happens.

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