THE LAW COMMISSION: CONSULTATION PAPER ON DIGITAL ASSETS AND (ELECTRONIC) TRADE DOCUMENTS IN PRIVATE INTERNATIONAL LAW

CLLS FINANCIAL LAW COMMITTEE RESPONSE: ELECTRONIC TRADE DOCUMENTS AND SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882

INTRODUCTION

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The members of the Financial Law Committee ("**FLC**") of the CLLS are drawn from law firms based in the City of London which specialise in major financings involving obligors incorporated in multiple jurisdictions, creditors incorporated or doing business in multiple jurisdictions, and assets located, or deemed by principles of private international law to be located, in multiple jurisdictions. Concepts of English law and other laws relating to digital assets and electronic trade documents and the development of these concepts are increasingly critical to the transactions and advisory matters on which members of the FLC advise. Full details of the members of the FLC appear on the CLLS website.

In June 2025, the Law Commission released its Consultation Paper 273 entitled, "Digital assets and (electronic) trade documents in private international law" (the "**Consultation Paper**"). The FLC is submitting two responses to the Consultation Paper: (a) a response to various proposals made with respect to digital assets generally in the Consultation Paper, and in particular, to matters discussed in Chapter 5 and Chapter 6 of the Consultation Paper (the "**Principal Response**"), and (b) this response (the "**ETD Response**"), which focuses on Chapter 7 of the Consultation Paper –"Electronic Trade Documents (ETDs) and section 72 of the Bills of Exchange Act 1882" – and also takes into account the document entitled, "ETDs in Private International Law: FAQs", prepared by members of the Commercial and Common Law team at the Law Commission and published in October 2024[1] (the "**ETD FAQs**"). References in this ETD Response to the "**1882 Act**" are to the Bills of Exchange Act 1882, and references to "Section 72" are to section 72 of the 1882 Act.

The Principal Response has been prepared by a Working Group (the "**WG**") of subject specialists drawn from members of the Committee and more widely; this ETD Response has been prepared by a smaller sub-group of the Working Group, again drawn from subject specialists. The names of the members of the WG, and their law firms, are set out at the end of the Principal Response. The names

[1] https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/54/2025/01/FAQs-ETDs-in-PIL.pdf

of the members of the sub-group of the WG who have prepared this ETD Response, and their law firms, are set out at the end of this ETD Response.

As we have noted in our Principal Response and in earlier responses to the Law Commission in the context of the Law Commission's projects on electronic trade documents (and digital assets more generally), the FLC appreciates greatly the thorough work and detailed analysis undertaken by the Law Commission in the course of these projects. In the context of electronic trade documents ("**ETDs**"), the FLC is keen to support and encourage the continuing development and use of ETDs, and bills of exchange and promissory notes (collectively referred to in this ETD Response as "**Payment Instruments**") in particular, in international trade and related financing transactions and to that end, to facilitate the ability of the various parties to a Payment Instrument to choose English law as the law to govern their respective obligations on or with respect to that Payment Instrument. In our experience, parties to international commercial dealings (including financings of cross-border trade transactions) which have no obvious or apparent connection with England nonetheless prefer to choose English law – a neutral, robust, efficient legal system with centuries of valuable precedents and expert judiciary – as the law governing their financial obligations relating to those commercial dealings.

The FLC noted in its submission to the Special Public Bills Committee of the House of Lords convened to consider the Electronic Trade Documents Bill that concepts of private international law presented a number of challenges to the development of electronic trade bills, and that certain provisions of the 1882 Act – including but not limited to Section 72 – would create areas of uncertainty if the Bill was passed without amendment. We are, therefore, very supportive of the Law Commission's additional work in the context of Section 72 and the 1882 Act.

1. GENERAL OBSERVATIONS AND PROPOSALS

Reflecting the focus in Chapter 7 of the Consultation Paper on ETDs, and the 1882 Act in particular, this Response focuses on consideration of the appropriate private international law rule(s) to determine certain legal principles applicable to Payment Instruments, notably the rules relating to formal validity, and the law or laws applicable to the contractual obligations of parties to a Payment Instrument. As a general observation, we welcome the Law Commission's proposals that party autonomy should be permitted and respected sofar as possible.

We note that any amendments to the 1882 Act may affect Payment Instruments which exist in physical form as well as Payment Instruments which exist only in electronic form; we do not think it would be safe, sensible or desirable to develop different rules for Payment Instruments depending on the medium in which they exist. That said, and recognising the fact that many market participants have developed, and more are in the course of developing, platforms for the issuance of ETDs, including electronic Payment Instruments, we would strongly encourage any amendments to the 1882 Act to utilise the framework of a "reliable system", as referred to in the Electronic Trade Documents Act 2023. This approach depends on there being a high degree of certainty as to the integrity of the operation of the system for issuing, accepting and presenting Payment Instruments, and in our view, that degree of certainty can be achieved by applying the law chosen by the parties operating or participating in the applicable system.

We believe that further work and analysis is required in order to address concerns already raised by market participants around the interoperability of digital finance platforms and digital trade platforms

which seek to achieve the status of a reliable system, as well as on the formats of electronic trade documents which may be eligible for use on, or recorded in, these platforms. In our submission to the House of Lords Special Public Bill Committee convened in 2022/2023 to consider the Electronic Trade Documents Bill, we expressed our concern that the Bill did not include a power to make statutory instruments in order to address the resolution of uncertainties arising from Section 72 and other provisions of the 1882 Act. The Electronic Trade Documents Act was enacted without such a power. In our view, the development of English law in this area would benefit from an amendment to the 1882 Act to include the power to make statutory instruments for this purpose. A similar argument could be made with respect to the Electronic Trade Documents Act 2023, in order to facilitate the development, use and international recognition of electronic trade documents, including Payment Instruments, and continue to encourage English law as the predominant choice of law for the financing of international trade.

Consistent with the FLC's position set out in the Principal Response, that party autonomy should be permitted, the FLC proposes that any reform to Section 72 should:

1. recognise and uphold the choice of law made by the rules of a reliable system to govern the issues of formal validity and "interpretation" (widely applied, as suggested by para. 7.182 of the Consultation Paper, to include material validity) of the contracts on a Payment Instrument, under Sections 72(1) and (2) – so that this law should be added to the "menu of options" suggested in para. 7.234 of the Consultation Paper and be the law that can be indicated by the parties to the Payment Instrument, for this purpose, as contemplated by para. 7.185 of the Consultation Paper; and

2. (in connection with the duties of a holder in respect of presentment etc. under Section 72(3)) provide that:

    (a) as tentatively suggested by the Law Commission in para. 7.250 of the Consultation Paper, the holder's duties in relation to presentment for acceptance of a Payment Instrument and for presentment for payment by an acceptor can be governed by the law applicable to the acceptor's contract (and such law can be specified by the rules of the reliable system); and

    (b) where there is no acceptor (e.g. a drawee under a cheque or where the Payment Instrument is a promissory note), the "law of the place where the bill/note is payable" for the purposes of the Law Commission's proposals set out in para. 7.247(3) and (4) of the Consultation Paper can be conclusively specified (absent a choice of law clause) by the rules of the reliable system in which the relevant Payment Instrument (here, including a cheque) is recorded.

This "deemed place of performance" contemplated by 2(b) above will also assist the operator of the reliable system and the participants in the system to have high degree of confidence that, assuming due diligence has been carried out to negate the concerns, there is no mandatory law of the "place of performance" that might invalidate a relevant contract on a relevant Payment Instrument under the rule in *Ralli Brothers*[2] (noting that the corresponding rule in Article 9(3) of the Rome I Regulation will not

[2] *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287

apply because obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments, to the extent that the obligations under such other negotiable instruments arise out of their negotiable character, are excluded from the scope of the Rome I Regulation – see Article 1(2)(d) – as the Law Commission has noted in the Consultation Paper).

For the same public policy reason set out above, i.e. the integrity of the operation of relevant reliable systems, corresponding rules should be developed and enacted for ETDs which are negotiable instruments but are not Payment Instruments within the scope of Section 72.

2. RESPONSES TO CONSULTATION QUESTIONS

Consultation Question 13

"*We provisionally propose that Section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what Section 72(2) currently encompasses. This would mean that the amended Section 72(2) would apply to the law governing contractual obligations (understood in the ordinary modern sense of the substantive rights and obligations of the parties) arising from a bill of exchange and is not limited to "interpretation" in a narrow sense.*

Do consultees agree?"

Response

We strongly agree.

Consultation Question 14

"*We provisionally propose that the default law applicable to contractual obligations arising from a bill of exchange should be the law chosen by the party incurring the obligation, as indicated on the bill alongside their signature.*

Do consultees agree?"

Response

We agree, but do not think this proposal should apply where a Payment Instrument contains a master choice of law clause along the lines we suggest below, or (subject to addressing concerns relating to the interoperability of different reliable systems) is recorded in a "reliable system", where the participants in the system have (through the rules of the system) chosen a specific governing law to govern all contractual obligations applicable to a Payment Instrument recorded in the system.

We suggest that Section 72 should allow a Payment Instrument to be drawn or made (as applicable) with a master choice of law clause on its "face" (by which we mean any page of the Payment Instrument). Where this is done, that choice would bind all original parties to the Payment Instrument and any entity which later became a party to the Payment Instrument by signing it, or by receiving (and not rejecting) the Payment Instrument as its initial payee or as a later indorsee. Signing the Payment Instrument could be achieved through electronic signature in a form recognised as legally valid either by the master choice of law or, if the Payment Instrument is recorded in a reliable system, by the rules of that system (which would likely reflect, in any event, the chosen law of the system).

Becoming a party to the Payment Instrument in these ways would be taken to demonstrate each party's consent to the master choice of law clause and there should be no requirement for any party explicitly to agree to the master choice of law clause .

If our proposal for a master choice of law clause were accepted, and a Payment Instrument contained such a clause or was recorded in a reliable system the rules of which provide for an express choice of law, we would oppose parties being able to choose a governing law for their liability which differed from that selected in the master choice of law clause. To permit a different choice of law would invite confusion and disputes regarding the governing law of their liability or of the efficacy of the master choice of law clause. That said, if a choice of law were made by parties to a Payment Instrument which was recorded and existing on a reliable system, or determined in accordance with the rules of that system, that choice or determination should only be effective if unconditionally recorded on the "face" of the Payment Instrument[3].

Consultation Question 15

"*We provisionally propose that, where no choice of law is made on the face of the bill, the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:*

(1) the law of the place where the instrument is payable, as indicated on the face of the bill;

(2) where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address;

(3) where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

Do consultees agree?"

Response

We agree, subject to the point we make above, and (subject to addressing concerns relating to the interoperability of different reliable systems) that if the Payment Instrument is recorded in a reliable system, the choice of law may be determined by the rules of the reliable system. We also suggest clarifying that "face" in this context means any page of a Payment Instrument.

[3] We note that there is a strong (though not absolute) principle of English law that Payment Instruments within the 1882 Act should be complete on their face, allowing an initial payee or potential indorsee to know what it has been given or offered. This is why, for instance, the order or promise to pay (as applicable) on a Payment Instrument cannot be conditional, and why it is not possible validly to refer to external floating interest rates in a Payment Instrument, or include margin protection indemnities in them.

Consultation Question 16

"*We provisionally propose that, in the absence of a valid choice by a person incurring secondary liability on the bill, the law applicable to that person's liability on the bill should be the law of the place where that person has their habitual residence.*

Do consultees agree?"

Response

For certainty, efficiency and to reduce the need for legal advice from multiple jurisdictions (which is particularly burdensome on SME businesses, but on other market participants as well), we would suggest the default fallback in the absence of a valid choice by such a party should be the law which governs the liabilities of the party with primary liability on the Payment Instrument or, in the context of a Payment Instrument recorded in a reliable system, and subject to addressing concerns relating to the interoperability of different reliable systems, the law determined in accordance with the rules of that system.

Regarding the law of the habitual residence of the party with secondary liability as a connecting factor, the EU Commission appears recently to have withdrawn[4] its proposal for an EU Regulation on the Third Party Effects of Assignments (which heavily relied upon the law of an assignor's habitual residence) as it had proved impossible for EU Member States fully to agree on how that proposed connecting factor should or should not apply in practice. The Law Commission is no doubt also aware that, before Brexit, the U.K. Government indicated that it would exercise its right not to opt in to the proposed EU Regulation[5].

Consultation Question 17

"*We provisionally propose that no "escape clause" is necessary or desirable. The framework we have provisionally proposed gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties.*

Do consultees agree?"

Response

In our view, an escape clause would be neither necessary nor desirable if the Law Commission's proposals, or our suggested variations on those proposals, were adopted.

[4] 7617998c-86e6-4a74-b33c-249e8a7938cd_en. See page 26, item 31.

[5] https://webarchive.nationalarchives.gov.uk/ukgwa/20220322085221/https://europeanmemoranda.cabinetoffice.gov.uk//files/2018/07/Assignment_of_claims_-_HOC_letter_from_the_Economic_Secretary.pdf

Consultation Question 18

"*We provisionally propose that the formal validity of a contract on a bill of exchange should be upheld if it complies with one of:*

(1) the law governing the substance of the relevant contract;

(2) the law governing the substance of the drawer's contract;

(3) the law governing the substance of the acceptor's contract;

(4) the law of the place where the instrument is payable.

Do consultees agree?"

Response

We strongly agree with this validating menu approach, as supplemented by our proposal that where a Payment Instrument is recorded in a reliable system, the rules of that system should govern formal validity. In our view, the law "governing the substance of the [relevant drawer's/acceptor's] contract" includes the law chosen by the relevant parties or party under the Law Commission's proposals, or our suggested variations on those proposals, including the proposal for making master choice of law clauses effective or allowing the rules of an applicable reliable system to govern.

Consultation Question 19

"*We provisionally propose that section 72(3) should be reformed as follows:*

(1) the duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has its habitual residence.

(2) the necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has its habitual residence.

(3) the duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.

(4) The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

Do consultees agree?"

Response

We suggest the applicable law for these issues, where there is a choice of law on any page of the Payment Instrument (in a master choice of law clause or alongside a party's signature), or where a Payment Instrument has been recorded in a reliable system (and subject to addressing concerns relating to the interoperability of reliable systems), the rules of which provide for an express choice of law, should be that chosen law. If different parties are permitted to, and have, chosen different governing laws for their respective liabilities, the relevant law should be that chosen by the party subject to the relevant duty.

Where there is no relevant choice of law, we would suggest adopting a menu of potentially validating applicable laws in line with the approach the Law Commission has provisionally proposed for formal validity issues.

The Law Commission has placed some emphasis on "the publicity considerations underpinning notarial acts where an acceptor is liable to pay in a jurisdiction that requires notarial protest". In our view, this possible benefit of noting and protest can be overstated in an age where creditors can use ratings agencies or credit reference agencies, consult the global financial press, obtain copies of companies' audited accounts from national registries or their counterparties direct, or use digital information services (e.g. Dun & Bradstreet) to evaluate potential counterparties to Payment Instruments.

8 September 2025

Members of the CLLS Financial Law Committee Working Group: ETDs and Reform of Section 72 of the Bills of Exchange Act 1882

Rebecca Shepherd, Clifford Chance LLP

Alexander Hewitt, Dentons UK and Middle East LLP

Kate Cofman, Simmons & Simmons LLP

Jonathan Gilmour, Travers Smith LLP

Sarah Smith, Baker & McKenzie LLP

Natalie Lewis, Travers Smith LLP

Natalie Butchart, Slaughter and May