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DIGITAL ASSETS: Evidence to the House of Lords Special Public Bill Committee on the Electronic Trade Documents Bill (the ETD Bill)

Introduction

1. The City of London Law Society ("CLLS") represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. Its specialist Committees comprise leading solicitors in their respective fields. These solicitors and their law firms operating in the City of London act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to major transactions and disputes, both domestic and international.

2. The Financial Law Committee of the CLLS (with members also drawn from the Regulatory Law Committee) formed a working group (the ***Working Group***) to consider and respond to the Law Commission's *"Digital assets: Call for Evidence"*, its Consultation Paper on *"Digital assets: electronic trade documents"* and its subsequent Consultation Paper on Digital Assets. These documents, together with the ETD Bill, collectively form the output of the Law Commission's current project on digital assets, including cryptoassets. Our responses to these papers are all available on the Financial Law Committee Page of the CLLS website [link]

3. We are pleased to have the opportunity to provide observations to the Special Public Bill Committee regarding the ETD Bill and will address the questions on which the Committee is seeking views. The Chair of the Financial Law Committee of the CLLS, Dorothy Livingston, has been asked by the CLLS to be available also to give oral evidence to the Committee. In the interests of speed, this paper has been prepared by a sub-set of the original Working Group and the authors are named at the end of this paper.

Executive Summary

A. We agree that the proposed reforms are desirable, but with regard to the conflict of laws we consider they have defects which could prevent them achieving the desired takeup.

B. We believe it is right that the Bill should extend to the whole of the UK.

C. We can see that the Bill addresses some specifically Scottish issues, but we are not qualified in Scots law. Advice on this should be taken from Scots lawyers.

D. The Bill does not follow the Model Law on Electronic Transferable Records from the United Nations Commission on International Trade Law (MLETR). The Law Commission are best placed to explain the advantages they see from taking a different approach.

E. Broadly we believe the Bill addresses prudential concerns to the extent it needs to. General laws, such as those relating to money-laundering and fraud, and, as time goes by, there may also be regulatory measures which may apply to relevant systems. There are separate laws dealing with electronic signatures generally and we do not believe any special provisions are needed in relation to electronic trade documents.

F. We believe Clause 2(2) of the Bill sets out a sensible framework for the properties which will enable a document to be recognised as an electronic trade document. We would have expected the list at Clause 1(2) to include sea waybills.

G. While nearly all of us believe the use of possessory concepts is sub-optimal, changing to concepts of control would clearly involve a major re-draft and delay. We have proceeded on the basis that the Bill will retain its current form.

H. While the structure of the Bill should accommodate developments in the type of technology that may be used for systems holding electronic trade documents, we consider there is a serious defect to uptake of electronic systems in that the Bill in its present form creates legal uncertainty as to how certain requirements of conflict of laws rules which relate to the location of possessory items will be dealt with. We propose that at very least there would need to be provision for subsidiary legislation to address this, but also suggest some possible solutions which could be added to the Bill, including a solution which accords with latest UNIDROIT thinking on this issue.

A. whether you agree with the proposed reforms and whether the reforms achieve what they are intended to

We agree that it would be helpful to have a regime for the management of trade documents in electronic form which would be robust and effective for traders in and transporters of goods, as well as the financiers of the trade in and transport of goods. To achieve this goal the courts of the United Kingdom need to be able to apply the law in a manner that would provide legal certainty to users of systems for the management of trade documents in electronic form without excessive litigation to resolve points in dispute. Users (including financial counterparties) need confidence that the UK's legal systems provide a well-founded, clear and enforceable legal basis for the issue, holding and transfer of trade

documents in electronic form that achieves the same outcome as the use of paper documents, including the ability of holders of electronic trade documents to raise finance in lending markets in relation to those documents. This would be consistent with modern practice and would also encourage use of any legal system that provided confidence in the use of an electronic system for issuing, holding and transferring trade documents. The UK is well placed to provide a suitable legislative framework to provide this confidence: its legislators led the codification of the law on bills of exchange in the nineteenth century (widely copied internationally) and has already developed one legislative framework for dematerialisation covering, inter alia, bills of exchange, promissory notes and similar instruments as used in the financial markets (the Uncertificated Securities Regulations 2001 (S.I. 2001/3755), as amended by the Uncertificated Securities (Amendment) (Eligible Debt Securities) Regulations 2003 (S.I. 2003/1633), under which the CREST relevant system operates), while there is wide use of English law in international trade and financial markets.

The legal structures of global trade and trade finance developed over many centuries, and are broadly established in most legal jurisdictions. They are, so far as bills of lading and similar trade documents generally based on the idea that ownership of a trade document confers a right to possession of goods. This is a very different legal architecture from that which has grown up in the financial markets, in which ownership of a negotiable instrument generally confers an ownership ("title") right to a legal claim for a debt. In the financial markets, the transfer of rights by transfer of physical possession of documents is generally regarded as an anomaly, and in that area legal progress is being made to replace the remaining possessory concepts with title claims. This is the approach which we, along with many others, have advocated to the Law Commission in respect of their consultation on digital assets in general. However, as regards trade documents, it may well be necessary for the time being to work with the grain of the current market structure, which is based on possession or adopt some similar concept in relation to electronic trade documents (such as, "exclusive control", as a functional equivalent to possession). The Bill works on a possession concept.

We would emphasise that the approach taken in this Bill does not and should not be read through into the wider issue of dematerialised financial instruments generally. We also note in this regard that there are ongoing global initiatives in this area which may in time have the effect of bringing trade finance practice closer to mainstream financial market practice, and it may therefore be that this Bill provides a temporary bridge to a future state of the world in which trade finance document management can be incorporated within the broader title-based regime used in financial markets. However, we do not believe that this development is likely in the short or medium term, and the passage of this Bill, whether based on possessory or (potentially, for the reasons we explore in G below) "exclusive control", is therefore both important and necessary.

Paper Trade Documents

Trade documents in paper form are documents capable of possession and, as physical objects, subject to the law on physical goods, save in so far as there may be special rules for certain types of paper trade document, notably bills of exchange (the Bills of Exchange Act

1882) and bills of lading (the Bills of Lading Act 1855, replaced by the Carriage of Goods by Sea Act 1992 with the law on the application of the Hague-Visby rules on the Carriage of Goods by Sea Act 1971).[1] We note that such paper trade documents are typically negotiable and negotiation may be effected and/or evidenced by signed endorsement on the document itself. Similarly, negotiation or other transfer may be effected and/or evidenced by certain other acts (e.g. the receipt of cargo by the master of the vessel carrying the goods). We also note that because of long-standing commercial custom, usage or practice, these documents may frequently be used in international trade without inclusion of an express choice of law or jurisdiction provision. However, the law in most jurisdictions, both common law and civil law, has arrived at a high level of rule-based consensus as to how disputes relating to each type of trade document may be dealt with, the law that will apply to determine relevant issues affecting the document (in the absence of an express contractual choice of law) or title to the document and the court[s] likely to have jurisdiction, so providing a great deal of legal certainty for the parties to paper trade documents and their financiers.

As indicated above there are distinct differences between the effect of different types of trade document. For example, a bill of exchange is in effect a document of title to the financial obligations specified in it, while a bill of lading confers constructive possession of the underlying cargo through the process of attornment. We do not believe that the proposals in the Bill in any way affect these differences in the legal effect of different types of document: our concerns are related to the effect on legal certainly as to the applicable law, as explained in detail at H below and summarised in the immediately following section.

Dematerialised trade documents

[1] Confusingly, particularly bills of exchange/promissory notes may be referred to as documentary intangibles in that the right to call for performance travels with the document: see the discussion in the Judicial Taskforces paper on Cryptoassets at para 113: "They have three fundamental characteristics. First, they must be identified with an underlying right to something. Second, there must be a tangible document which can be physically possessed. Third, the tangible document must be treated in mercantile usage as representing the underlying right itself, with the result that the right can be transferred by transferring the document". https://lawtechuk.io/explore/cryptoasset-and-smart-contract-statement

When, trade documents are "dematerialised" and recorded in an electronic system, then those rules, designed and given practical content by reference to assumptions based on the physical manifestation of the relevant paper trade document and its location, will lose their legal certainty. Such rules, founded on the location (situs) of a document or of acts in relation to the document (e.g. the place of issue or of presentment for payment), will cease to have a clear answer when applied to an electronic document without any physical manifestation to enable or facilitate the obvious identification of its "location": for example, will the electronic trade document be located by reference to characteristics of the system in which it is recorded or according to where it would have been if it were an equivalent paper trade document, if that is ascertainable. For permissioned, centralised systems, it may be possible to mitigate any potential legal uncertainty through appropriate provisions in the rulebook for the system (although such rules will be contractual and consideration would need to be given as to how they will bind third parties who are not system participants.

Unless there is clarification in the jurisdiction whose law is applicable to the documents in electronic form, as to what rules are to be used, there is room for legal uncertainty in a number of areas. This may, inter alia, create uncertainty in relation to the validity and perfection of security taken over electronic trade documents and is, therefore, of considerable significance for effective and practical market reliance on the new legislation. There is not a question which specifically addresses our concern on this issue, so we will discuss it further at H below immediately after our response to the question on the use of possessory concepts, so that our main substantive concerns in relation to the draft ETD Bill are explained in proximity to each other.

It is for these conflict of laws and related reasons arising out of the absence of an evident or apparent "location" for an electronic trade document (or acts in relation to such a document) that we consider, in its present form, the draft legislation does not fully achieve its intended purpose i.e. to provide a clear, enforceable and well-founded legal basis for the issue, holding and transfer of electronic trade documents. In addition, many of us have considerable doubts about the use of possessory concepts in relation to electronic trade documents and will discuss this further at G below.

We note that the Law Commission has now commenced a project in relation to conflict of laws and digital assets which will probably report in early 2024. This could provide a forum for the resolution of these issues, and, provided there is provision for suitable subsidiary legislation included in the ETD Bill, this might enable this legislation to be supplemented in a way that would cure the deficit.

B. **whether the Government was right to extend the Bill to the whole of the UK**

We believe that the Government is right to do this. We note that the Bills of Exchange Act 1882 and the Carriage of Goods legislation that applies to bills of lading, sea waybills and ship's delivery orders, apply to the whole United Kingdom, including both Scotland and Northern Ireland, as well as England and Wales. There is good reason to provide equally for the use of electronic trade documents in all of the UK's jurisdictions.

C. **whether the application of the Bill to the whole of the UK sufficiently takes account of any differences there may be with the law of Scotland**

We are English lawyers and the Bill was prepared by the Law Commission for England and Wales. We see nothing in the main underlying Acts that would suggest a difficulty in applying this law in Scotland and we note provisions (e.g. Clause 3(4)) which address aspects of Scots law. We believe evidence from Scottish lawyers would be helpful to the Committee, as to those provisions, in particular as the Scots law on moveable property is different from that in England and Wales.

We also believe provision may need to be made for future adjustment as there are proposals for new Scots laws on taking security over moveable property. It will be important, if electronic trade documents maintain their possessory characteristics, to provide for how this new regime will be applied, in particular whether it applies only to electronic trade documents held by Scottish registered companies or by reference to a deemed (Scottish) location of the electronic trade document.

D. the interoperability of the Bill with national and international regimes, in particular the Model Law on Electronic Transferable Records from the United Nations Commission on International Trade Law (MLETR);

The UK has the option to adopt legislation which more precisely mirrors the MLETR. We would have thought that this would have been helpful to recognition of the legislation in other jurisdictions. We believe that the Law Commission are best placed to advise on the benefits they see flowing from their decision to adopt a different approach. We express our concerns in answer to G below.

E. the reliability and security implications of moving to an electronic system, including:

- **the immutability of electronic documents;**
- **the potential risks from the ability to create multiple copies of a document;**
- **the reliability of electronic signatures; and**
- **the benefits and risks of a list of trusted signatures and reliable systems.**

We think that these issues should for the most part be dealt with by the rules and other contractual provisions governing the relevant system in which the electronic trade documents are recorded, party autonomy in choosing whether or not to participate in the relevant system on such terms and (to the extent wider public policy concerns may be in issue) in other legislation or regulatory systems in so far as they need to be addressed:

- We note that the Bill sets out some basic requirements in Clause 2. Within that framework, issues of system and document security and integrity are for the system provider and for any relevant regulatory body. The existence of numerous dematerialised systems of record in the field of financial services tells us that they can be managed responsibly and provide adequate security and integrity: e.g. CREST,

Euroclear Bank, Clearstream, the electronic records of corporate registrars and of financial intermediaries holding interests in or in relation to securities for the benefit of their clients. Many investors also have confidence in some of the unregulated systems that currently exist using blockchain or distributed ledger technology, although the risks associated with them are clearly greater.

- We would expect the records of the system, rather than a physical document, to be determinative of the person able to deal with and exercise control over an electronic trade document. Only if a document were taken out of the system and issued in paper form again, would we expect a physical document to be a document of record. In that event the system would no longer hold the document of record as an electronic document. We anticipate that systems would allow counterparties becoming holders of an electronic trade document to be able to interrogate the system, as well as convert an electronic document back to a paper one or require removal of the document to another system (if there are rival systems). Indeed, such changes in form are contemplated by Clause 4 of the ETD Bill. We would expect there to be security measures to prevent the creation of more than one document of record. The system's record would be conclusive for the document held in electronic form, not a simple printout of an electronic document, but the scheme of the Bill leaves how that it achieved to the rules and architecture of the system being used and its contractual arrangements with its users, so long as they meet the standards set out in Clause 2.

- Dealing with the last two bullet points, we would refer the Committee to the Law Commission Report on Electronic Execution of Documents[2] and the paper issued by the CLLS and the Law Society on this subject.[3] We believe English law in this area to be robust. If the law of other UK jurisdictions is lacking at all it is better dealt with in legislation related to electronic signatures, rather than in specific legislation for electronic trade documents: reference in registered land legislation (s 91 of the Land Registration Act 2002) to a particular type of electronic signature, resulted in unfortunate pronouncements which were damaging to the use of other forms of electronic signature in other contexts: a combination of this and technical difficulties in implementing an electronic system using the mandated form of signature resulted in the acceptance of electronic signatures by the Land Registry being delayed until 2020. This exemplifies the dangers of specific legislation on electronic signatures for particular applications.

  We believe that the main risk to certainty relating to electronic signatures is the inclusion of relevant retained EU law (the EIDAS Regulation) in the planned "sunset clause" pursuant to the Retained EU Law (Revocation and Reform) Bill, which could see this law disappear without replacement at the end of 2023.

F whether the list in Clause 2(2) [4] of what constitutes an "electronic trade document" is right

[2] https://www.lawcom.gov.uk/project/electronic-execution-of-documents/

[3] https://www.citysolicitors.org.uk/clls/committees/financial-law/ CLLS and Law Society E-Signatures Paper October 2022.

[4] We wonder whether the reference here should be to, or include a reference to, Clause 1(2)?

If or to the extent that the Committee is intending to refer to Clause 1(2) here, we note that the Carriage of Goods by Sea Act 1992 treats sea waybills as having similar characteristics to bills of lading and ship's delivery receipts, and that the definitions are interlinked. We would expect sea waybills to be included in the list.

We note that certain usages of bills of exchange, promissory notes and other similar instruments are not suitable for treatment under the ETD Bill as they are financial instruments falling within the ambit of the Uncertificated Securities Regulations 2001 (i.e. as "eligible debt securities") or the terms of issue of such instruments are inconsistent with their being treated as "electronic trade documents" for the purposes of the Bill. We believe, however, that this is adequately dealt with under Clauses 1(1)(b), 5(1) and 5(2).

If or to the extent that the Committee is intending to refer to Clause 2(2), we consider that a "reliable system" used to record an electronic trade document should properly exhibit the criteria specified by that sub-clause in order to support the safe, secure and efficient issue, holding and transfer of trade documents when held in electronic form and so as to replicate (as far as is practicable) the corresponding rights and obligations that arise in relation to equivalent paper trade documents. We, therefore, believe the sub-clause to be appropriate in defining the principal operative features for a system to qualify as a "reliable system" for the recording of electronic trade documents.

G. whether the emphasis on "possession" and its development by the courts in the UK rather than "exclusive control" is the best approach (as compared to Article 11 of MLETR and section 16 I of the Singapore Electronic Transactions (Amendment) Act 2021)

Most of us would have preferred it had the Bill not adopted possessory concepts, which we consider are sub-optimal for a digital system that hold records in dematerialised form. The reasons for this preference do vary between the authors of this paper. The CLLS Working Group made submissions to this effect to the Law Commission at the time of their consultation on Electronic Trade Documents.[5]

Possessory concepts are legal concepts appropriate for physical assets and we are not aware of their use as such in relation to incorporeal property in other contexts under the laws of any part of the United Kingdom, including dematerialised securities and, indeed, registered securities, though some civil law systems make no clear distinction between materialised and dematerialised securities. While possessory concepts do apply to bearer securities, we note that UK companies are now no longer permitted to issue bearer shares and that practice has moved away from small denomination bearer debt securities to "global bonds" (e.g. one bearer instrument for an issue of £100m). Global bonds are held by a common depository with all settlement activity in relation to the bonds being effected by way of book-entries across the records of the International Central Securities Depositories (**ICSDs**) - being, Euroclear Bank (based in Belgium) and Clearstream (based in Luxembourg) – or the records of custodians, brokers or other intermediaries operating at levels below the ICSDs. In such cases, the asset that is in fact transferred by way of settlement (e.g. in performance of a trade in the underlying global bond) is a separately constituted statutory, trust or

5 https://www.citysolicitors.org.uk/clls/committees/financial-law/ Digital Assets – the Limits to the Concept of Possession 13/08/2021 and Response to the Law Commission Consultation Paper – Digital assets electronic trade documents

contractual (and, therefore, intangible) interest or entitlement in or in relation to the underlying bond.[6] These market changes have been brought about for prudential, cost and regulatory reasons, but demonstrate the increasing redundancy of possessory concepts in dealing with incorporeal assets. Although the physical nature of paper trade documents, and the ability to present e.g. a bill of lading at the arrival port for the cargo concerned, has loomed large historically, we anticipate that the use of electronic documents accessible to the relevant party through a computer terminal, will remove the value attached to the physical existence of the document and the need for possessory concepts.

We note that in its later work on digital assets the Law Commission has moved away from possessory concepts to the concept of control.[7] This would make this Bill something of an experiment. The Bill would, however, require recasting to revert to concepts of control and/or more closely to follow the MLETR. It must be a matter of judgement whether, in an area where reform is a high priority, the time taken to do this would be justified and the benefits outweigh any disadvantages of a somewhat anomalous approach. We have approached this response on the basis that the Bill will be passed in its current form adopting possessory concepts.

We would add that references to the Uncertificated Securities Regulations in this submission, and the papers attached to it, are not intended to suggest that that particular statutory scheme would be suitable for the issue, holding and transfer of electronic trade documents. It would not. The references are intended merely to illustrate how, in certain financial markets, participants and policy-makers have determined that negotiable, paper instruments should be dematerialised under a legislative scheme that allows for their issue, holding and transfer as registered instruments and not so as to make them amenable to possession. As we have pointed out in our introductory remarks to this submission, similar title-based solutions may in the longer term come to be developed for trade documents. However, in the short to medium-term, we think it likely that possessory or, in the alternative, "exclusive control"-based statutory models are likely to offer the best, practical solution to the legal and other issues created by the use of electronic trade documents.

H. whether the Bill is future proofed

We believe that the design of the Bill is intended to enable it to apply to a wide range of future systems without need for changes to the legislation itself.

There is one aspect, however, where the Bill raises legal uncertainties which are not resolved, and the Bill contains no provision which would enable this issue to be addressed by secondary legislation. That is the issue that arises in any case where the physical location of a trade document, and of actions taken in relation to the document, might be relevant. A quick glance at the Bills of Exchange Act 1882 illustrates the issue:

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6 There is also an active and growing market in the private placement of notes issued by corporates. Each subscriber receives its own note certificate; the notes are invariably registered instruments, not bearer instruments, so the use of a global note is not needed. Some of these private placements raise hundreds of millions of the relevant currency, so are at least comparable to most bond issues.

7 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf at paras 1.14 and 1.19 with more detailed discussion at Chapters 4 and 11.

- Bills of exchange are divided between inland bills and foreign bills according to the place where they are drawn and payable (s 4). In the case of a physical document, evidence will be available. It is not clear whether a bill issued in electronic form is to be viewed as drawn where the party drawing the bill is (or is domiciled or resident) at the time of issue or where the system in which it is issued is located, managed or administered. Nor whether that should be judged according to the relevant place of business of the system operator (if any) or where the physical assets constituting the system are to be found. In modern systems the physical assets are likely to be in several different jurisdictions and for unregulated systems there may be a consensual, decentralised system which does not have a responsible centralised operator.

- Section 45 requires that, in order for a bill of exchange to be "duly presented" for payment (which is a condition to the accrual of a cause of action for non-payment under section 47), it must be presented by the holder or some person authorised to receive payment on his behalf "at the proper place" (as that term is defined in sub-section (4)). Where a bill of exchange is held as an electronic trade document and is to be presented for payment by means of and through a "reliable system", is there a "place" of payment at all that can satisfy the requirement of s. 45(4)? If so, how is to be determined by reference to the "physical" location requirements set out in sub-section (4)? If an electronic system is considered incapable of providing a "proper place" for electronic presentment or if electronic presentment is not in fact effected at the "proper place" (as a court may interpret sub-section (4) as applicable to an electronic bill of exchange held in the relevant system), then there will be no effective act of "due presentment" of the electronic bill of exchange for the purposes of Clause 3(3) of the ETD Bill and, as such, no statutory basis to bring an action on the bill of exchange (in the event of its non-payment by the person designated as payer or his agent) under s. 47 of the 1882 Act.

- Section 72 contains detailed conflict of laws rules for determining the law that should govern the formal validity of a bill of exchange, its interpretation and duties with respect to presentment and other acts in relation to the bill. Several of these depend on where an event happens or is to happen (e.g. protest, payment) or where the contract is made. Where these events take place within an electronic system, it will be unclear which law is to be applied in accordance with these rules.

Yet there is no provision in the Bill which either addresses the resolution of these uncertainties or provides for secondary legislation which could do so. As bills of exchange (and most other trade documents) do not often have an express choice of law, the absence of any clear rules is particularly troublesome.

While the legislation on bills of lading etc. does not address conflict issues, it is evident that questions of applicable law will arise as a bill of lading moves around the world together with the cargo to which it relates and that the applicable law could be affected by moving to an electronic system (particularly if there is no choice of law to govern the bill). The Bill, however, proposes in Clause 6(2) to completely repeal ss 1(5) and (6) of the Carriage of

Goods by Sea Act 1992, which could have allowed for the making of supplementary rules to address any conflict issues that arise, and not to add any replacement to the Bill.

There appears little legislation specifically referring to place in respect of the remaining forms of trade document referred to, but similar issues may arise and we would recommend that there is a comprehensive power to make secondary legislation to address the application of rules on the conflict of laws and other "locational" matters applicable in the United Kingdom or any of its jurisdictions to electronic trade documents.

Additionally, there is an issue specifically arising from the use of possessory concepts, related to taking a charge over electronic trade documents. English law has a rule that an English law charge or other proprietary security over physical items will not be valid and effective against third parties unless relevant formalities have been complied with in the place where the item is located at the time that the charge or security is created: applied, for example, in *Blue Sky One Limited & O'rs v. Mahan Air & Ano'r* [2010] EWHC 631 (Comm). In addition, if a non-possessory charge is created by a UK company under English or Northern Irish law, it will (subject to some limited exceptions for financial collateral arrangements[8] and charges in favour of the Bank of England and other central banks[9]) require registration in the relevant companies' registry (but Scots law does not currently allow for a specific charge over movables, only a pledge which involves physical delivery – see reference in Clause 3(4).) Again, there is nothing in the ETD Bill that would enable uncertainties relating to the location of an electronic document to be addressed with any certainty and this is a considerable practical barrier to using electronic trade documents as security.

A quick (limited) fix of general application would be to disapply to electronic trade documents - other than bills of exchange - any rules in the laws of any jurisdiction of the United Kingdom which require compliance with the law of a place where a trade document is or which makes the law of the place where something happens or is to happen in relation to a trade document applicable. For bills of exchange, it could be provided that all bills held in a system whose rules are governed by the law of a UK jurisdiction shall be treated (for the purposes of determining perfection and other proprietary issues affecting the bills) as inland bills and are to be treated as being located in that UK jurisdiction, with a power to make further provision in relation to foreign bills. These measures could be effective so far as matters are resolved according to English, Scots or Northern Irish law.

It would be possible to legislate more generally that the location of an electronic document should be deemed to be in the jurisdiction of the law applicable to the system in which the electronic trade document is held from time to time, making it clear that any law chosen to govern the rules of the system will be recognised as the applicable law This would have a similar effect to the suggestion above where a law of the United Kingdom is the applicable law, but would also provide a basis for courts in the UK to deal with disputes involving electronic trade documents held in systems governed by other laws. It is noteworthy that this solution is both consistent with the general rules on choice of law applicable in the UK

[8] See the Financial Collateral Arrangements (No. 2) Regulations 2003.

[9] See section 252 of the Banking Act 2009.

and many other countries (including those of the EU) and is the approach adopted in the current draft of the UNIDROIT Digital Asset and Private Law Working Group's Draft Principles (Principle 5- conflict of laws).

However, these steps would not necessarily assist if a relevant issue in relation to an electronic trade document were to come before an overseas court applying a conflict of laws rule that locates the relevant electronic trade document at the relevant time (or relevant act in relation to the document as occurring) outside of the UK and requires perfection or other proprietary issues affecting the charge or other security interest over the document to be determined in accordance with the registration, perfection or other formality requirements of that other non-UK country or territory.

We should be happy to discuss this further with the Committee if this would be helpful.

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Richard has asked us to note that, whereas most members of the working group consider references to "possession" to be inappropriate in relation to dematerialised assets, his firm considers that concepts substantively equivalent to possession can and should apply in the context of electronic documents that are themselves capable of attracting property rights (albeit that the concept of possession as it applies to tangible things may not strictly apply in an intangible context). Linklaters consider that relative legal interests (falling short of outright title) are capable of arising in relation to certain digital assets (including electronic trade documents) – just as possession is a form of relative legal title to tangibles. However, this issue is not dealt with in this paper, as it proceeds on the basis that the Bill will proceed in its current form.

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