

# The Legal Status of Electronic Bills of Lading

A report for the ICC Banking Commission

CLYDE & CO



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## Acknowledgement

The survey has been coordinated by Stephen Tricks and Robert Parson of Clyde & Co LLP in London. We are grateful to the members of the ICC Banking Commission Legal Committee who helped drive this project forward. We would also like to thank all those colleagues in Clyde & Co's offices and associated offices who have contributed to the survey.

Particular thanks are due to the other lawyers and law firms who have contributed to the survey. They are:

- Dr Tim Schommer LLM, Germany
- Van Traa Advocaten NV, Netherlands
- Clasis Law, India
- Sokolov, Maslov & Partners, Russia

The responses from each of the ten jurisdictions are set out in the appendices to this report. Contact details for the contributors are at the end of each respective appendix.

## Introduction

Each week the international financial press publishes articles on how developments in information technology will change the face of international trade. Banks, traders and shipping companies announce new blockchain projects. Fintech companies launch new platforms for trade finance. Established providers of electronic trading systems sign up more members. In all this publicity for new projects one question is rarely addressed. Can the law keep pace with developments?

For centuries the principal document in international trade has been the bill of lading (B/L). It is issued by the carrier and can be transferred from seller to buyer, often via their respective banks. The B/L is a "document of title" in that the holder of the original B/L has specific legal rights, plus some potential liabilities, in relation to the goods. Are those rights and liabilities replicated if the original paper B/L is replaced by an electronic bill of Lading (eB/L)? What is the legal consequence if the eB/L is subsequently printed in paper format?

The International Chamber of Commerce Banking Commission, on the recommendation of the Legal Committee, appointed Clyde & Co LLP to conduct a survey on the legal status of eB/Ls, whether in the form of an electronic record or in paper format when converted from an electronic record. The survey covers the following ten jurisdictions: UK (English law), USA (NY law), Germany, Netherlands, UAE, China, Singapore, Brazil, India and Russia. This report sets out the relevant issues and the results of the survey.

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## Part 1 – Summary of Issues and Conclusions

International trade has traditionally been based on documents. For a typical shipment of goods by sea the documentation may include:

- An invoice and packing list issued by the seller;
- A bill of lading or other transport document issued by the carrier;
- Certificates of quantity and quality issued by surveyors;
- An insurance certificate issued by cargo insurers
- A certificate of origin issued by a local chamber of commerce.

These shipping documents are required in order to demonstrate that the goods have been shipped to the agreed destination within the designated shipping period. The tender of the correct shipping documents is essential to the fulfilment of several forms of international sale contract, notably CIF contracts. It is also fundamental to the operation of documentary letters of credit issued as a payment mechanism for the purchase of the goods. Indeed, UCP600 Article 5 provides that banks deal in documents, not in the goods or services to which those documents relate.

This reliance on documents, however, has drawbacks. The preparation, transmission and checking of documents take time and cost. It is also open to error and even forgery. Further, as discussed in more detail in Part 2, problems can arise if the vessel reaches the discharge port before the documents have made their way through the chain of sellers, buyers and their respective banks.

With the advance in information technology and electronic data interchange (EDI), the concept of replacing paper shipping documents with electronic documents has been debated for several decades<sup>1</sup>. In theory the use of electronic shipping documents should save both time and cost, as well as reducing the incidence of documentary errors. However, progress has been slow. There have been three principal difficulties to be overcome:

- The development of technology to enable electronic records to be transferred safely and securely;
- The adoption of such technology in many different countries by a wide variety of participants, such as producers, traders, buyers, carriers, insurers, surveyors and banks;
- Uncertainty over the legal status of the electronic transferable records. This problem is particularly acute in relation to eB/Ls, given the important legal characteristics of an original paper B/L.

Several technological solutions now appear to be in place, but widespread adoption has been slow. In part this may be due to conservative attitudes among long-established participants and/or a desire to wait and see which systems will gain the most support, but legal uncertainty is a significant factor. The laws of most countries recognise the status of paper shipping documents in international trade, but it is not clear if the same legal status applies to the transmission of the data in electronic form.

For many international transactions, such as the sale and purchase of manufactured goods shipped in containers by sea, air, rail or road, the legal uncertainty is less acute. There will normally be a single seller and a single buyer, who may have been doing business with each other on a regular basis. The carrier knows from the start of the journey to whom it has to deliver the cargo. The risk of default, delays or legal disputes is therefore relatively low. These transactions are often covered by multimodal transport documents or waybills.

Several solutions now appear to be in place but legal uncertainty is a significant factor.

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<sup>1</sup> As far back as 1990 the Comité Maritime international (CMI) published Rules on Electronic Bills of Lading. In 2008 the United Nations adopted a new convention on carriage of goods by sea (the Rotterdam Rules), which allows for the use of eB/Ls.

The data in those transport documents can easily be replicated in electronic form and transmitted between carrier, seller and buyer with relative ease. Some major shipping lines are already promoting electronic solutions which can handle that transmission of data.

There remains, however, a significant problem in handling transactions for the shipment of commodities and other goods which may be financed by banks. Such shipments are usually covered by a negotiable bill of lading. Most legal systems recognise that the original bill of lading is a transferable document of title. It may be passed along a chain of sellers, buyers and their respective banks by endorsement. The holder of the original bill of lading will have the right to demand delivery of the goods from the carrier at the discharge port. Replicating in electronic form the transferable nature of an original bill of lading is both technically and legally more complex than replicating the function of, for example, a non-negotiable sea waybill.

There is no single definition of an eB/L, but in broad terms an eB/L is an electronic record which aims to have the functional equivalence of an original paper B/L<sup>2</sup>. It should be possible to transfer the eB/L from one holder to another in a manner which ensures that there is only one holder at any one moment and that multiple copies cannot be put into circulation. It is not, for instance, sufficient to take a paper bill of lading, make a PDF image of it and then transmit it down the chain. Although the transmission of a PDF copy of the document by email is both quick and cheap, it is not secure and, more importantly, does not guarantee that there is only a single holder of the document at any one time. The same PDF image could be sent to multiple parties, all of whom might then claim to have rights to the goods.

Any eB/L solution must also be compatible with the various separate contracts which arise in a single international trade transaction. These may include the sale and purchase contract, the contract of carriage, the insurance contract and letters of credit.

The extensive use of SWIFT for international banking transactions is a good example of the potential expansion of electronic commerce. SWIFT is based on a rulebook, to which registered users must adhere, rather than on national legislation. SWIFT has also developed its own digital trade finance instrument, the Bank Payment Obligation (BPO), but neither the SWIFT messaging system nor the BPO is designed to handle the transfer of an eB/L.

As discussed in more detail in Section 2, a few proprietary systems seek to provide registered users ("members") with the ability to create, transfer and receive an eB/L and other shipping documents in a manner which is both secure and has a unique holder at any one time. These systems are often referred to as "Club" systems because one has to be a member in order to have access to the system and to benefit from the services it offers. The transmission of rights and liabilities simultaneously with the transmission of electronic documents is governed by contractual arrangements between members and the proprietary system.

With the development of distributed ledger technology (such as blockchain), there is much talk of trade and trade finance moving into the digital age. Again this is discussed in more detail in Section 2, but there remains a significant outstanding question of how legal rights and liabilities will be passed between the parties to the transaction.

In order to address some of these issues, the United Nations Commission on International Trade Law (UNCITRAL) has published a model law to govern the use of electronic transferable records, such as bills of lading and bills of exchange. This is a positive step forward, but it does require governments to adopt the model law into national legislation. Unless organisations such as the ICC are prepared to encourage national governments to adopt the model law, it is unlikely that one will see any significant movement on this front for several years.

Replicating in electronic form the transferable nature of an original bill of lading is both technically and legally more complex than replicating the function of, for example, a non-negotiable sea waybill.

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<sup>2</sup> Functional equivalence is discussed in Part 2.

Given the uncertain legal status of eB/Ls, banks generally do not treat security over eB/Ls as legally equivalent to security over original paper B/Ls. Valid security over an eB/L may allow a bank to obtain regulatory capital relief in respect of its trade finance exposure. In turn, the capital relief may enable the bank to pass on some of that benefit to its clients in the form of lower margin or fees.

Further, a bank acting as an issuing or nominated bank under a documentary credit may be reluctant to accept the presentation of an eB/L, either in electronic form or when converted to paper because that may jeopardise the bank's right to reimbursement.

This survey therefore aims to assess the legal status of eB/Ls under the national laws of ten countries. The idea is to see what developments have already taken place and what more can be done. The ten countries were chosen as a representative sample of major trading states with different legal systems. Lawyers in each of the ten countries were asked to complete a questionnaire, which can be found in Part 3 of this report. The responses from each country are set out at appendices 1-10.

## Conclusions

The responses show that the legal rights associated with traditional paper B/Ls are well established. However, not surprisingly, the legal status of eB/Ls is still very unclear. Most of the ten countries have some form of legislation allowing contracts to be created and signed electronically but only the USA has any specific law currently supporting the use of eB/Ls. In some circumstances it may be possible to establish rights based on an electronic acknowledgement given by the carrier to the holder of the eB/L, but there is no clear pattern on how far a holder could rely on such an acknowledgement in the absence of a contractual relationship between the holder and the carrier.

Likewise, the legal status of a paper B/L that has been converted from an eB/L is uncertain. In many of the ten countries there was support for recognising such a document as equivalent to a traditional paper B/L, but the question of whether the effective date of the document is the date the eB/L was originally issued or the date of the conversion remains in doubt.

The systems which are currently best able to operate with eB/Ls are the "Club" systems which are based on contractual arrangement agreed in advance between the parties.

Will the law catch up with the technology so that rights and liabilities under an eB/L can be transferred without specific contractual agreement? At present, that remains uncertain, but the adoption of the UNCITRAL model law by major trading countries would be a significant step forward.



## Part 2 – Detailed Discussion of Specific Issues

### Bills of lading and trade finance

Bills of lading (B/Ls) in paper format have for several centuries been the principal transport document covering the carriage of goods by sea<sup>3</sup>. One or more original B/Ls will be issued by the carrier (or his agent) upon shipment of the goods. The B/L will identify the shipper, who is often the seller of the goods, and it may also identify the consignee and a notify party. Traditionally the B/L has three functions:

- It operates as a receipt in that it confirms that the goods have been shipped on board the vessel at a named port for delivery to a named destination;
- It is evidence of the contract of carriage in that it either sets out the terms on which those goods are carried or incorporates terms from another document, such as a charterparty;
- It is a "negotiable document of title" to the goods in that constructive possession of the goods may be transferred by consignment or endorsement of the original B/L to a buyer or a bank. This constructive possession gives the new lawful holder the right to demand delivery of the goods from the carrier<sup>4</sup>.

Banks which finance international trade (through letters of credit or otherwise) may obtain security over the goods by taking a pledge of the original B/L and thus use this concept of constructive possession to provide security for that finance. However, for the pledge to be effective, the bank must have physical possession of the original B/L.

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<sup>3</sup> Other shipping documents in current use include multi-modal bills of lading and sea waybills. These documents are not "negotiable" (in the sense that an original B/L is "negotiable") and therefore fall outside the scope of the current survey.

<sup>4</sup> Although an original B/L is often described as a "negotiable document of title", it is not a negotiable instrument in the strict sense that transfer by consignment or endorsement gives the transferee better rights than the transferor. The transferee will normally acquire the same rights and obligations as the transferor in relation to the carrier. In some cases transfer of the original bill of lading may also have the effect of transferring ownership of the goods to the transferee. This will depend upon the nature and terms of the underlying transaction and the law applicable to that transaction.

If taking valid security over an eB/L would allow a bank to obtain regulatory capital relief in respect of its trade finance exposure, the bank could then pass on some of that benefit to its clients in the form of lower margin or fees.

With the increase in pace and complexity of international trade the physical movement of the original B/L from trader to trader and/or bank to bank lags behind the movement of the goods. Consequently, the original B/L is rarely in the location where a financing bank needs it to be in order to obtain security over the goods. As a result, it has become very difficult for banks to obtain security over goods in transit through possession of the original B/L. The wider use of eB/Ls would help to solve that problem, provided that the eB/L has a similar legal status to that of an original paper B/L.

Another factor for banks in providing trade finance is the impact of capital adequacy regulations. If a bank can show that it has security in the form of a paper B/L, the cost of doing business may be reduced. Again the question is whether that security can be replicated through the use of an eB/L. If taking valid security over an eB/L would allow a bank to obtain regulatory capital relief in respect of its trade finance exposure, the bank could then pass on some of that benefit to its clients in the form of lower margin or fees.

## Letters of Indemnity

One other problem caused by the delay in transmission of paper documents is that the original paper B/L will often not be available for presentation to the carrier by the time the vessel reaches the discharge port. Strictly speaking, the carrier cannot release the goods without presentation of the original B/L. However if the discharge is delayed pending the arrival of the B/L, demurrage may be incurred and the receiver will not have access to the goods. This problem may be overcome by the use of letters of Indemnity (LOIs) given to the carrier. In a chain of sales additional LOIs may also have to be given by each successive seller to its respective buyers. LOIs create rather than resolve uncertainty in that they leave open the possibility that claims may arise months, or possibly years, after they have been issued. If an LOI has to be countersigned by a bank, fees will be increased and credit lines will be tied up. The use of digital shipping documents can resolve these problems at a stroke, if all parties accept them.

### The Form and Transmission of the eB/L.

The eB/L is an electronic record. It does not start life as a paper document, but is created and transmitted electronically. For the eB/L to be legally and commercially effective, it must be unique and secure. There must be only one holder at any one moment and that holder must be able to transmit the record to the next holder in a manner which can be independently verified, if required. At the instant of transmission, the transferring party relinquishes its status as holder and the receiving party gains that status. It must not be possible to put into circulation multiple electronic records for the same consignment, such as a copy in pdf format, otherwise the system would quickly collapse. Is there a risk of hacking by fraudsters? The integrity of IT systems is outside the scope of this report, but it is worth remembering that paper B/L can be forged relatively easily. The move to digital will not necessarily increase the risk. The high usage of SWIFT suggests that banks are willing to trust electronic systems to handle everyday business.

For the eB/L to be legally and commercially effective, it must be unique and secure.

## Functional Equivalence

As stated in Part 1, an eB/L is an electronic record which aims to replicate the three traditional functions of an original paper B/L listed above, i.e. it is a receipt for the goods; it is evidence of the contract of carriage and it is a negotiable document of title. This replication is usually referred to as "functional equivalence". In order to achieve functional equivalence, the eB/L does not have to mirror precisely the operation of an original paper B/L, but the holder of an eB/L must be in much the same position as the holder of the original paper B/L. In the absence of any substantive law on eB/Ls in most jurisdictions, functional equivalence has to be achieved through contractual arrangements between the parties to the transaction. That concept works as between those contracting parties, but it may run into difficulties when third parties claim rights over the goods.

### The legal status eB/Ls under the "Club" systems

Some organisations, such as essDOCS and Bolero, are already promoting the transfer of eB/Ls and other electronic shipping documents through a central electronic platform with the aim of achieving the functional equivalence of an original paper B/L. These organisations require all members (whether sellers, buyers, carriers or banks) to sign up to a single contract, which is itself subject to an established legal system, such as English law. All members have access to software for processing and transferring the electronic documents and all members agree to recognise each other member's rights as those rights are transferred from member to member. These systems are sometimes referred to as "Club" systems because all parties involved in a specific transaction have to be members of the group if the process is to work efficiently<sup>5</sup>.

One mechanism for transferring rights under the eB/L in these Club systems is a two-step process<sup>6</sup>. Upon the transfer of the eB/L the contract of carriage between the carrier and the former holder is automatically replaced by a new contract as between the carrier and the new holder of the eB/L. Further, the Club operator, acting as agent for the carrier, acknowledges to each successive holder of the eB/L that the carrier holds the goods to the order of that

<sup>5</sup> For essDOCS see <https://www.essdocs.com/capabilities/users-agreement-dsua> (accessed 31.08.2018); For Bolero see <http://www.bolero.net/home/electronic-bills-lading/> (accessed 31.08.2018). E-Title Authority Pte Ltd also provides a commercial eB/L service. See <http://www.e-title.net/> (accessed 31.08.2018).

<sup>6</sup> This example is based on the essDOCS system, for which the central contract signed by all members is subject to English law. The contract therefore uses the English law concepts of novation and attornment to describe respectively the new contract of carriage and the acknowledgement in favour of the new holder.

holder. The new holder thereupon acquires constructive possession of the goods and may demand delivery.

One significant feature of the Club systems is that if one of the parties involved in a transaction is not a member of the Club, that party will not be able to receive or transfer the electronic documents because it will not have access to the software. Further it may not be able to rely on the contractual rights and obligations agreed between members of the group to establish any rights over the goods.

The Club systems address this issue by allowing members to call for the conversion of the eB/L into a paper B/L issued by the carrier. This conversion option enables a member to present a bill of lading to a non-member, whether a buyer, a bank or any other party with an interest in the transaction.

In order to facilitate the use of a documentary letter of credit as a payment mechanism for the underlying sale contract, the Club systems may allow for the documentary credit to be issued incorporating e-UCP<sup>7</sup>.

### **Distributed Ledger Technology / Blockchain**

In recent years Distributed Ledger Technology (DLT), often referred to as "Blockchain", has been promoted as the way forward in the digitisation of international trade and trade finance. It is, however, not clear whether DLT will overcome some of the limitations of the current systems using closed central platforms, particularly in relation to the use of eB/Ls. Several bank and groups of banks have announced pilot projects on the use of DLT in trade finance, but none of these appear to cover multi-party transactions where control of an eB/L may need to pass through successive holders. Even with the rapid development of the required technology, DLT still faces various hurdles, such as

- The widespread adoption of common standards;
- The use of an open or closed group of databases;
- The management of regulatory issues, including KYC, AML and sanctions compliance;
- The legal status of the electronic documents and in particular whether an eB/L in a DLT-based transaction will have the equivalent characteristics of an original B/L in traditional paper form.

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<sup>7</sup> eUCP is the supplement to UCP600 which allows for presentation of electronic records under a letter of credit. In fact eUCP is not widely used. One potential problem with eUCP in handling eB/Ls is that it does not require that the any electronic record should be unique.

Several bank and groups of banks have announced pilot projects on the use of DLT in trade finance, but none of these appear to cover multi-party transactions where control of an eB/L may need to pass through successive holders.

### **UNCITRAL – MLETR**

In July 2017 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Transferable Records (MLETR). The concept of a "model law" is that it is a specimen text which can be used by national legislatures when preparing a new statute on the topic in question. This aids the development and harmonisation of international trade law.

UNCITRAL's website carries the following summary of the model law<sup>8</sup>:

#### **Purpose**

*The Model Law on Electronic Transferable Records (MLETR) aims to enable the legal use of electronic transferable records both domestically and across borders. The MLETR applies to electronic transferable records that are functionally equivalent to transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument. Transferable documents or instruments typically include bills of lading, bills of exchange, promissory notes and warehouse receipts.*

#### **Why is it relevant?**

*Transferable documents and instruments are essential commercial tools. Their availability in electronic form may be greatly beneficial for facilitating electronic commerce by, for example, improving speed and security of transmission,*

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<sup>8</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2017model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2017model.html) (accessed 03.09.2018)

permitting the reuse of data and automating certain transactions through "smart contracts".

Electronic transferable records may be particularly relevant for certain business areas such as transport and logistics, and finance ("fintech") and for developing countries interested in establishing a market for electronic warehouse receipts to facilitate farmers' access to credit.

Moreover, electronic transferable records are a fundamental component of a paperless trade environment, which may make an important contribution to trade facilitation.

### Key provisions

The MLETR builds on the principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality underpinning all UNCITRAL texts on electronic commerce. It may therefore accommodate the use of all technologies and of all models, such as registries, tokens and distributed ledgers.

According to the MLETR, an electronic transferable record is functionally equivalent to a transferable document or instrument if that record contains the information required to be contained in a transferable document or instrument, and a reliable method is used to: (a) identify that electronic record as the electronic transferable record; (b) render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and (c) retain the integrity of that electronic record.

Control is a fundamental notion of the Model Law since it represents the functional equivalent of possession of a transferable document or instrument. In particular, the possession requirement is met with respect to an electronic transferable record if a reliable method is used to: (a) establish exclusive control of that electronic transferable record by a person; and (b) identify that person as the person in control.

Moreover, the MLETR enables information that may not be included in a paper-based transferable document or instrument because of its nature to be included in an electronic transferable record. The MLETR also provides guidance on assessing the reliability of the method used to manage an electronic transferable record and on change of medium (electronic to paper and the reverse), among other things. Finally, the MLETR aims to facilitate the cross-border use of electronic transferable records by supporting the principle of non-discrimination against the foreign origin or use abroad of an electronic transferable record.

The MLETR does not affect in any manner the law applicable to transferable documents or instruments, which is referred to as "substantive law" and includes rules on private international law.

Although the MLETR is a positive step forward, it is not law. Individual states will have to decide whether to adopt it into their own law. It may be several years before one sees any widespread adoption of the MLETR.

### Principal Issues for Banks

Given the uncertain legal status of eB/Ls, banks generally do not treat security over eB/Ls as legally equivalent to security over original paper B/Ls. Further, a bank acting as an issuing or nominated bank under a documentary credit may be reluctant to accept the presentation of an eB/L, either in electronic form or when converted to paper.

In summary, banks face two principal issues:

- A. If a bank wishes to take security over the goods, what rights (or obligations) does the bank have as holder of the eB/L when the carrier has acknowledged electronically that it holds the goods to the order of the bank? In particular does that acknowledgment give the bank sufficient rights against third parties, such as the owner of the goods or a liquidator? If not, is the position of the bank materially different if it holds a paper B/L?
- B. Does an eB/L when converted to paper and bearing either an original manual signature or an electronic signature (which includes a scanned signature) give the holder equivalent rights as if it was the holder of an original B/L issued in the traditional paper format? Is the effective date of the document the date on which the electronic record was created (usually the date of shipment) or the date on which it was converted to paper?

The survey has attempted to answer those questions.

Counsel in each of the ten chosen jurisdictions were asked to comment on generic issues in relation to

- i. the legal status of electronic documents;
- ii. the application of foreign law.

Counsel were then asked to answer a series of specific questions in relation to the legal status of original paper bills of lading and eB/Ls.

These generic issues and specific questions are set out in Part 3. The respective answers for each jurisdiction are set out in Appendices 1-10.

**Please note that this survey and the responses set out in it do not constitute legal advice. Specific advice should be obtained, whenever appropriate, on any transaction or dispute.**

## PART 3: Generic Issues and Specific Questions Presented to Counsel in Ten Countries

### Generic Issues;

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)
- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.
- vii. Any dispute relating to the bank's security will be brought before the courts of the local jurisdiction. The application of the law of the local jurisdiction may arise because, for example, the contract of carriage is subject to the law of the local jurisdiction or because the relevant goods will be discharged at a port in the local jurisdiction.

### Specific Questions;

Please answer the following specific questions as far as you are able in respect of your local jurisdiction. Questions 1 and 2 address the law relating to original bills of lading issued in the traditional paper format. Questions 3 – 7 address the legal status of eB/Ls in the relevant local jurisdiction. Question 8 relates the legal status of other negotiable instruments.

In responding to questions 3, 4 and 5 Counsel is asked to have regard to Principal Issue A, as set out in Part 2 above, and to assume in their response that:

- i. The carrier has issued an eB/L in respect of the relevant goods;
  - ii. The bank's customer is the holder or prospective holder of the eB/L, whether as shipper, consignee or endorsee.
  - iii. The bank's customer has granted the bank security over the goods and the eB/L by way of a pledge or other form of security generally recognised by the law of the local jurisdiction.
  - iv. In the event that the bank's customer is not incorporated in the local jurisdiction, such security is valid and binding in the jurisdiction of the customer's incorporation.
  - v. Pursuant to the grant of such security, the bank becomes the holder of the eB/L in accordance with the relevant operating system for that eB/L.
  - vi. The process under which the bank becomes holder of the eB/L includes an acknowledgement by the carrier (whether by way of written contract or specific electronic message) that it holds the goods to the order of the bank.
1. Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?
  2. Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?
  3. Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?
  4. Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?

For question 6, Counsel is asked to have regard to Principal Issue B, as set out in Part 2 above, and to assume the same facts as for questions 3, 4 and 5 except that, in place of points (v) and (vi), the bank becomes holder of a paper B/L (converted from the eB/L which then ceases to exist as an eB/L) bearing either an original manual signature or an electronic signature (which includes a scanned signature).

5. Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?
6. Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?
7. If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.
8. Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.



# Appendices

# APPENDIX 1: England

## Generic Issues

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)
- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.

## Response:

This response covers the law of England and Wales, generally referred to as English law. Although most statutes enacted by the UK legislature cover the whole of the United Kingdom, there are some differences between English law, Scottish law and Northern Irish law both in legislation and case law. These differences need to be taken into account if dealing with any matters under Scottish law or Northern Irish law.

- i. Legal status of electronic documents.
  - a. Contracts. Most contracts do not need to be in any particular form under English law and do not even need to be in writing. There is therefore no intrinsic problem with contracts based on electronic document interchange (EDI). A 'document' means "anything in which information of any description is recorded". The term extends to electronic documents, whose legal status is recognised in the English Civil Procedure Rules.
  - b. Electronic signatures. The Electronic Communications Act 2000 (the "ECA 2000") provides a statutory framework for the admissibility of electronic signatures in England and Wales as evidence in any legal proceedings. More recently, the validity of electronic signatures has been formally recognised in the EU by The Electronic Identification and Trust Services Regulation (910/2014/EC) ("eIDAS"). Consequential provisions supporting this regulation were implemented into English law by the Electronic Identification and Trust Services for Electronic Transactions Regulation 2016 (No. 696).

The eIDAS took effect on 1 July 2016, establishing a new legal structure for electronic identification, signatures, seals and documents throughout the EU. For the first time, there is a consistent legal framework and a single market for the recognition of electronic signatures and identities across the entirety of the EU. This provides companies with a predictable legal environment in which to develop and expand the use of electronic signatures in the EU.

The eIDAS classifies electronic signatures according to varying degrees of identification and authentication:

- a) Basic electronic signatures: The law holds that an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely based on the fact that it is in electronic form.
- b) Advanced electronic signatures: Advanced electronic signatures allow unique identification and authentication of the signer of a document to enable the verification of the integrity of the signed agreement, typically through the issuance of a digital certificate by a certificate authority to that signer.
- c) Qualified electronic signatures: While both advanced and qualified electronic signatures are uniquely linked to the signer, qualified electronic signatures are based on qualified certificates. Qualified certificates can be issued only by a certificate authority that has been accredited and supervised by authorities designated by the EU member states and must meet the requirements of eIDAS. Qualified certificates must also be stored on a qualified signature creation device such as a smart card, a USB token or a cloud-based hardware security module (HSM).
- d) Electronic seals: The eIDAS Regulation also introduces the recognition of electronic seals. These are similar to electronic signatures but only available to legal persons, such as corporate entities.

Although both basic electronic signatures and advanced electronic signatures are legal, admissible and enforceable under eIDAS, only qualified electronic signatures are deemed to be legally identical to handwritten signatures. Importantly, they are also the only type of electronic signature that is mutually recognised by all of the EU member states. Thus, while it is not necessary to use a qualified electronic signature in every instance, it is a useful tool when executing some types of agreements.



- c. Bills of lading. The Carriage of Goods by Sea Act 1924 (COGSA 1924) contains provisions to overcome the problems of privity of contract in contracts of carriage so that a consignee or endorsee, as lawful holder of the original paper bill of lading can sue the carrier directly under the contract of carriage for any loss or damage to the goods. Section 1(5) COGSA 1924 authorises the Secretary of State to extend the Act, by regulations, to paperless transactions. For the time being, however, no such regulations are in force.

In the absence of express contractual provisions, used in systems such as essDOCS and Bolero (the "Club" systems), English law at present does not recognise an eB/L as a negotiable document of title. Holders of eB/Ls cannot rely on COGSA 1924 to give them rights to pursue claims against the carrier unless they have entered into express contractual arrangements on this point.

An example of the attitude of the English courts to these problems can be seen in *Glencore International v MSC Mediterranean Shipping Company* [2017] EWCA Civ 365. Glencore, as holder of original paper bills of lading, which were subject to English law and jurisdiction, sued MSC for the loss of two containers of cobalt briquettes carried from Australia to Belgium. MSC operated an electronic release system [ERS] at Antwerp. Under the ERS, Glencore (or its agent) would present original the bills of lading upon the vessel's arrival at Antwerp. MSC would then issue a unique PIN for each container. The haulier engaged by Glencore's agent could collect the containers from the port by entering the correct PIN. This worked well for 69 shipments, but on the 70th shipment two containers went missing from the port. It appeared that they had been stolen by thieves who had gained access to the PINs, possibly by hacking computers of MSC or Glencore's agent. MSC argued that the ERS was the functional equivalent of delivery and that its liability ended upon issue of the PIN for each container. The contract of carriage made no reference to ERS. The English Court of Appeal rejected MSC's defence. Lord Justice Clarke said,

*"It may be that a system whereby delivery against a PIN code is valid, even if presented by a thief, is sensible because of the benefits of using modern technology in place of paper. But, if that is to be done, it requires, in my view, either appropriate contractual provision or statutory imposition. "*

- d. Bills of Exchange and Promissory Notes. The use of electronic bills of exchange and promissory notes faces similar problems. What amounts to 'signing' is not defined in the Bills of Exchange Act 1882. The consensus is that an electronic signature is insufficient for promissory notes and bills of exchange in the absence of express contractual or statutory provision. Even if the Secretary of State were to exercise his power under section 8 of the ECA 2000 to amend the Bills of Exchange Act 1882 in order to facilitate the use of electronic communication, this may not in itself be sufficient to permit bills of exchange and promissory notes, which are a physical embodiment of a payment obligation, to be transferred electronically.
- e. UNCITRAL MLETR. The UK has not yet made any move to adopt the UNCITRAL Model Law on Electronic Transferable Records, which would cover documents such as bills of lading, bills of exchange, promissory notes, cheques and certificates of deposit.

- ii. Application of foreign law.

If the English court has jurisdiction, it will consider the application of foreign law to all or some of the issues in the case when asked to do so by one of the parties. If the relevant contract contains an express choice of law clause, that will normally be recognised and applied. If there is no express choice of law, the starting point for deciding the applicable law is The Contracts (Applicable Law Act 1990, which implemented the 1980 Rome Convention on the Law Applicable to Contractual Obligations ("Rome 1"). In some complex disputes there may be two or more systems of law to be applied to different issues.

The court will give the parties permission to adduce expert evidence on the relevant foreign law, usually in the form of reports from lawyers qualified in the foreign country. The court will then decide the point on the basis of those expert reports and, if necessary, cross-examination of the experts.

## Specific Questions

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes, English law has recognised the status of the original paper B/L as a document of title since the case of *Lickbarrow v Mason* in 1794. The concept of transfer of rights to allow the consignee or endorsee to sue the carrier for loss of or damage to the goods was first given statutory recognition in the Bills of Lading Act 1855. This act was itself replaced by the Carriage of Goods by Sea Act 1924.

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

English law treats a bank holding an original paper bill of lading pursuant to a pledge as having a "special property" in the goods, rather than full title. See the decision of the House of Lords in *Sewell v Burdick* [1884]. The bank has the right to demand delivery from the carrier, but if it does so, it will become potentially liable under the terms of COGSA 1924 for any outstanding obligations owed to the carrier under the contract of carriage.

In the event of default by the borrower, the bank will normally have the right to sell the goods in order to recover the outstanding loan.

In the event of the insolvency of a party who sold the goods to the borrower, the bank's rights as against that party's liquidator may depend upon whether property in the goods had already passed from the seller to the borrower prior to the insolvency.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

English law does not recognise eB/Ls as having the same legal status as paper B/Ls either under case law or statute. The transfer of eB/Ls may, however, be effective in transferring rights within a bilateral or multilateral contractual arrangement such as operated by the Club systems.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

No, unless either a) both the holder of the eB/L and the carrier have entered into a contractual arrangement to that effect or b) the carrier has issued an attornment in favour of the holder as described in the answer to question 5 below.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

In English law such an acknowledgement is known as an "attornment". The carrier, as bailee of the goods, owes a duty to deliver the goods to the order of the bank. Accordingly the bank will be able to enforce that obligation against the carrier, subject to a) the terms of the attornment, b) the contractual provisions pursuant to which the carrier holds the goods and c) whether the property in the goods had already passed from the previous holder to the borrower at the time of the insolvency.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

In principle, the holder of the converted paper B/L should have the same rights as if it were issued in paper form on the date stated in the signature box, but to the best of our knowledge, this has not yet been tested in the English courts.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

English law would not currently recognise an eB/L issued under an open system as a transferable document of title. There would have to be some contractual arrangements governing the rights and obligation of the parties either in the form of a multilateral central contract or a bilateral contract between the relevant parties.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

See the answers to the generic issues.

Stephen Tricks  
[stephen.tricks@clydeco.com](mailto:stephen.tricks@clydeco.com)  
Robert Parson  
[robert.parson@clydeco.com](mailto:robert.parson@clydeco.com)

Clyde & Co LLP  
The St Botolph Building  
138 Houndsditch  
London EC3A 7AR UK

[www.clydeco.com](http://www.clydeco.com)

## Appendix 2: United States Federal Law and New York Law

### Generic Issues:

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)
- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.

### Response

- i. Legal Status of Electronic Documents

Under the law of the State of New York, electronic documents of commercial agreements and transactions are legally effective, valid and enforceable, including electronic bills of lading and other electronic documents of title as defined by the Uniform Commercial Code ("UCC") as adopted in New York.

It should be noted that all references to the UCC (including its Article 9) are to the UCC as enacted in New York, including substantial revisions made as of December 17, 2014. Accordingly, the UCC as enacted in other states may be substantially different.

A federal statute, the Electronic Signatures in Global and National Commerce Act ("ESIGN Commerce Act"), 15 U.S.C. §7001 et seq. (2009)(effective October 1, 2000), provides a "general rule of validity," effectiveness and enforceability for electronic contracts and other records:

"Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –

- 1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- 2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

15 U.S.C. §7001(a). This provision also explains how a record may be effectively "notarized, acknowledged, verified, or made under oath" by electronic means. 15 U.S.C. §7001(g).

The ESIGN Commerce Act preempts state law, unless the state law is the Uniform Electronic Transactions Act ("UETA"), or other state law establishing "alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records" that are consistent with the provisions of the ESIGN Commerce Act. 15 U.S.C. §7002(a). Only three states (New York, Illinois and Washington) have not enacted the UETA. (New York has enacted an "Electronic Signatures and Records Act" which gives an electronic record "the same force and effect as those records not produced by electronic means." State Tech. Law §305(3).) The other 47 states have all adopted the UETA, which contains provisions substantially similar to the federal ESIGN Commerce Act's provisions concerning the effect, validity and enforceability of electronic signatures. Under the UETA, "[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form." UETA §7(a). "A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." UETA §7(b). "If a law requires a record to be in writing, an electronic record satisfies the law." UETA §7(c). "If a law requires a signature, an electronic signature satisfies the law." UETA §7(d). As with the ESIGN Commerce Act, the UETA contains a provision for electronic signatures to be effectively "notarized, acknowledged, verified, or made under oath." UETA §11.

Although the ESIGN Commerce Act makes an electronic signature as valid, effective and enforceable as any other signature, it does not require any non-governmental party to any transaction "to agree to use or accept electronic records or electronic signatures." 15 U.S.C. §7001(b)(2). Whether a party to such a transaction agrees to use or accept electronic signatures for that transaction must be determined by reference to other laws concerning contract formation and the validity and effect of signatures generally, as applied to the particular circumstances. Similarly, the UETA "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." UETA §5(b).

Moreover, one of the few specific exceptions to the application of both the ESIGN Commerce Act (specifically, 15 U.S.C. §7001) and the UETA is "a contract or other record to the extent it is governed by – (3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A." 15 U.S.C. §7003(a)(3); *see also* UETA §3(b)(describing exception in nearly identical terms). Consistent with this exception, Article 1 of the UCC expressly "modifies, limits, and supersedes" the ESIGN Commerce Act. UCC §§1-108, 7-103(c). As enacted in New York, Article 7 of the UCC (which specifically governs documents of title) controls over the New York Electronic Signatures and Records Act, to the extent there is a conflict between the two. *See* UCC §7-103(d); State Tech. Law §307(2).

Accordingly, the relevant UCC definitions and related provisions (which are discussed in response to the specific questions below) provide the primary, statutory basis for the legal effectiveness, validity and enforceability of an electronic document of title such as a bill of lading. In particular:

**"Document of title"** means a record (A) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (B) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. **The term includes a bill of lading**, transport, document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. **An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. . . ."**

UCC §1-201(b)(16)(emphasis added). Similarly, a "record" is defined by the UCC to be "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." UCC §1-201(b)(31).

As well, Article 7 of the UCC, which specifically governs documents of title, includes the following definition: "'Sign' means, with present intent to authenticate or adopt a record: . . . (B) to attach to or logically associate with the record an electronic sound, symbol or process." UCC §7-102(a)(11)(B).

## ii. Application of Foreign Law by New York Courts

New York law recognizes that "[p]arties are 'generally free to reach agreements on whatever terms they prefer,' including choice of law provisions." *Van Wie Chevrolet, Inc. v. General Motors, LLC*, 145 A.D.3d 1, 38 N.Y.S.3d 662, 668-69 (4<sup>th</sup> Dep't 2016) (further citations omitted). "Such provisions will be upheld unless 'the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal.'" *Id.*, 38 N.Y.S.3d at 669 (quoting *Brown v. Brown, Inc.*, 25 N.Y.3d 364, 368, 12 N.Y.S.3d 606 (2015) (internal quotation marks omitted)). "This public policy exception is reserved for those foreign laws that are truly obnoxious [, and] [t]he party seeking to invoke the exception bears a heavy burden of proving that application of [the chosen] law would be offensive to a fundamental public policy of this State." *Id.* (quoting *Brown*, 25 N.Y.3d at 368-69 (internal quotation marks omitted)).

In the absence of contractual parties' written agreement as to the law to govern their contract (*see Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977)(refusing to enforce alleged oral agreement under Saudi Arabian law, on the basis that such an agreement would run afoul of New York's Statute of Frauds)), New York courts have well-established rules for determining the law applicable to various types of contract disputes. "Under New York's choice-of-law rules, 'the interpretation and the validity of contracts are determined by the law of the place where the contract is made, while all matters connected with its performance are regulated by the law of the place where the contract, by its terms, is to be performed.'" *Prince of Peace Enterprises, Inc. v. Top Quality Food Market, LLC*, 760 F.Supp.2d 384, 396 (S.D.N.Y. 2011)(quoting *Auten v. Auten*, 308 N.Y. 155, 160 (1954))(internal citation omitted).

A federal court with diversity jurisdiction sitting in New York will apply New York's conflict of laws rules when the law applicable to a dispute pending before it is in doubt. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Those conflict of laws rules state that where the parties to a contract do not agree what law should govern the contract, and the laws of at least two possibly applicable jurisdictions actually conflict, a court must engage in what is described as a "center of gravity" or "grouping of contacts" analysis. That analysis is meant to evaluate a "spectrum of significant contacts – rather than a single possibly fortuitous event." *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 151 (2d Cir. 2008) (quoting *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 597 N.Y.S.2d 904 (1993)). Factors such as the places of contracting, negotiation and performance; the location of the subject matter of the contract; and the domiciles and places of business of the contracting parties are to be considered and weighed against one another to find the "center of gravity" identifying what single jurisdiction is "the place having the most interest in the problem . . . thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation." *Liberty Mut. Fire Ins. Co. v. The Burlington Ins. Co.*,

15 Civ. 3438, NYLJ 1202763984791, at \*9 (S.D.N.Y. 2016) (quoting *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 822 F.3d 620, 641 (2d Cir. 2016))(further citation omitted). The center of gravity/grouping of contacts analysis also requires consideration of "the policies underlying conflicting laws in a contract dispute [where they] are readily identifiable and reflect strong governmental interests." *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 152 (2d Cir. 2008)(quoting *Stolarz*, 81 N.Y.2d at 226, 597 N.Y.S.2d 904).

## Specific Questions

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes, as discussed above, a bill of lading is generally a document of title. See UCC §1-201(b)(16).

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

Under the UCC, a "holder" can mean "(B) the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession." UCC §1-201(b)(21)(B). A holder of a tangible, original paper bill of lading under this definition is entitled to delivery of the goods from the carrier/bailee, subject to certain lawful excuses for non-delivery. See UCC §7-403. Subject only to limited exceptions (i.e., as against certain persons whose legal interest or perfected security interest in the goods preceded issuance of the bill of lading, and who are described in UCC §7-503), a holder to which a bill of lading has been duly negotiated (as described in UCC §7-501(a)) "acquires thereby: (1) title to the document; (2) title to the goods; [and] (3) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued." UCC §7-502(a).

If, "[w]hile goods are in the possession of a bailee that has issued a negotiable document covering the goods" the bank perfects a security interest in the document, the bank thereby perfects a security interest in the goods that "has priority over any security interest that becomes perfected in the goods by another method during that time." UCC §9-312(c). Perfection of a security interest in a tangible negotiable bill of lading can take place by (and from the time of) possession of the bill of lading. See UCC §9-313(a), (d). Such "a security interest is enforceable against the debtor and third parties with respect to the collateral" (subject to certain exceptions not applicable here) "if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3). . . (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement." UCC §9-203(b).

3. *Is law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

As discussed above, the UCC definitions of "document of title," "record" and "sign" are evidence of statutory intent to recognize electronic bills of lading as having the same legal status and enforceability as tangible bills of lading and other documents of title. Further, the UCC definition of "holder" expressly provides for the recognition of electronic bills of lading. A "holder" can be "the person in control of a negotiable electronic document of title." UCC §1-201(b)(21)(C); see also UCC §1-201(b)(5)(similar definition of "bearer").

Whether a person is in control of an electronic bill of lading, in turn, is governed by UCC §7-106 ("Control of Electronic Document of Title"), which provides:

- a. A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.
- b. A system satisfies subsection (a), and a person is deemed to have control of an electronic document of title, if the document is created, stored and assigned in such a manner that:
  - i. a single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
  - ii. the authoritative copy identifies the person asserting control as:
  - iii. the person to which the document was issued; or
  - iv. if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;
  - v. the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

- vi. copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- vii. each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- viii. any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

The specific rules describing how an electronic document of title such as an electronic bill of lading may be negotiated are set forth in UCC §7-501(b):

1. If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.
2. If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.
3. A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

Perfection and enforceability of the bank's security interest in an electronic bill of lading is governed by UCC Article 9 (governing secured transactions). "A security interest in . . . electronic documents may be perfected by control of the collateral under Section 7-106 . . . when the secured party obtains control and remains perfected by control only while the secured party retains control." UCC §9-314(a), (b). Subject to certain exceptions not applicable here, "a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met: . . . (D) the collateral is . . . electronic documents, and the secured party has control under Section 7-106 . . ." UCC §9-203(b).

4. *Under law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

Neither UCC Section 7-403, setting forth the obligation of a bailee/carrier to "deliver the goods to a person entitled under a document of title," nor UCC Section 7-502(a), setting forth that the holder of a duly negotiated document of title acquires title to both the document and the goods, as well as "all rights . . . to goods delivered to the bailee after the document was issued" distinguishes between tangible and electronic documents of title. Nothing in either of those statutes suggests an application limited only to tangible documents of title. The same is true for Article 9, Part 6 of the UCC, which addresses the enforcement of security interests. Taken together with the other UCC provisions that provide for the recognition of electronic documents of title (and which are discussed above), these UCC provisions suggest that – all other factors being equal (e.g., validity of and defenses to the bill of lading) – the holder of an electronic bill of lading is no worse off in enforcing a right to demand delivery of the goods described in the electronic bill of lading than an identically situated holder of a tangible, paper bill of lading would be.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

Under the UCC, no such acknowledgement by the carrier that it holds goods described in a bill of lading for the bank is required in order for the bank that is the holder of the duly negotiated bill of lading to be able to enforce the bill of lading against the carrier, even if a competing claim is made by a previous holder or previous holder's administrator, liquidator, or other successor in interest. See UCC §9-313(f) ("A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit."); see also UCC §7-502(a) (holder of a duly negotiated document of title acquires title to both the document and the goods). In the event such an acknowledgment is given, it "is effective . . . even if the acknowledgment violates the rights of a debtor" to allow the bank as secured party to take "possession of collateral." UCC §9-313(g)(1); UCC §9-313(c). However, such an acknowledgment by itself triggers no duty running from the carrier to the bank as secured party, and the carrier "is not required to confirm the acknowledgment to another person." UCC §9-313(g)(2).

Nothing about the subsections of UCC Section 9-313 concerning acknowledgment by a carrier (or other person in possession of goods) that it holds the goods as collateral for the benefit of a secured party

suggests that the acknowledgement need be in any particular form, whether tangible or electronic. Rather, the UCC definition of "record" would appear to apply to any such acknowledgment, and permit it to be "stored in an electronic or other medium [that] is retrievable in perceivable form." UCC §1-201(b)(31). Similarly, the UCC definition of "sign" would appear to encompass electronic authentication of the acknowledgment. See UCC §7-102(a)(11)(B).

6. *Under law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

The UCC expressly provides a mechanism for the reissuance of an electronic bill of lading as a paper, tangible bill of lading, and "as a substitute for the electronic document" if the bank as the holder of the electronic bill of lading directs a request to its issuer for such reissuance. See UCC §7-105(a). The bank would need to surrender control of the electronic bill of lading to the issuer. See UCC §7-105(a)(1). In order to be valid and effective, the paper bill of lading must include "a statement that it is issued in substitution for the electronic document." UCC §7-105(a)(2). If these requirements are met, the paper bill of lading effectively replaces the electronic bill of lading, which "ceases to have any effect or validity." UCC §7-105(b)(1). The process can also be reversed, with a paper bill of lading substituted with an electronic bill of lading. See UCC §7-105(c), (d). There is apparently no limit on the number of times a bill of lading may be converted from electronic to paper form and back again if the minimum requirements for effectiveness and validity set forth in UCC Section 7-105 are met.

The bank or other holder of a bill of lading (or other document of title) does not have the right to require the issuer to reissue the bill of lading (or other document of title) in a different form pursuant to this section. See UCC §7-105(a), (c) ("the issuer . . . **may** issue . . ." (emphasis added)). "The issuer is not required to issue a document in an alternative medium and if the issuer chooses to do so, it may impose additional requirements." Official Comment No. 1 to UCC §7-105.

UCC Section 7-105 and its Official Comment are less than explicit as to whether a converted paper bill of lading (or converted electronic bill of lading) remains effective and valid from the original date of issuance, as opposed to the moment of conversion. However, no other construction of the statute, in view of its apparent central purpose, would appear to be reasonable. That seems particularly true in view of the statute's references to "substitution" and of the need for surrender of the original/current bill of lading in order for the converted bill of lading to become effective and valid.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

None of the above answers would necessarily be limited in their applicability "only to a closed system where all parties have signed a central contract." The "control" that a holder of an electronic bill of lading or other electronic document of title must have requires only "a system employed for evidencing the transfer of interests in the electronic document [that] reliably establishes that person as the person to which the electronic document was issued or transferred." UCC §7-106(a). A "closed" system is not an explicit requirement.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

As noted in the above answers, the analysis generally applies to all electronic documents of title under the UCC.

John R Keough  
[John.Keough@clydeco.us](mailto:John.Keough@clydeco.us)  
William M Cooney  
[William.Cooney@clydeco.us](mailto:William.Cooney@clydeco.us)

Clyde & Co US LLP  
The Chrysler Building, 405 Lexington Avenue, 16th Floor  
New York NY 10174 USA

[www.clydeco.us](http://www.clydeco.us)



## Appendix 3: Brazil

### Generic Issues:

- i. *Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)*

In 2007, the Federal Revenue Service and all Brazilian states launched a project to progressively substitute the paper Bill of Lading for an electronic version.

Since the issuance of the regulation called "Ajuste SINIEF no. 09 in October 2007" (hereinafter referred to as "The Brazilian eB/L Regulation") by the Brazilian National Council of Finance Policy ("CONFAZ") and the Brazilian Federal Revenue Service, the Electronic Bill of Lading ("eB/L") was duly regulated and, in theory, gained the same legal status and validity as the original paper bill of lading in Brazil.

The eB/L is a paperless tax document created to replace the need for issuance of multiple documents to cover domestic cargo transported within Brazil.

The provider of services or goods and the consignee are linked to the system which is accessible by way of digital certification and permission issued by the state tax authority.

The Brazilian eB/L Regulation sets out how the issuance and signature of the eB/L needs to be operated, amongst other provisions such as how the carriers issuing eB/Ls may register at the Federal Revenue's system.

Even though the above mentioned regulation has been implemented in Brazil, the use of the eB/L in replacement of the paper Bill of Lading is a very recent practice. Also, it is intended to be used in the carriage of goods by sea within Brazilian ports.

Thus, even though the Brazilian legislation recognises the validity of the eB/L as having the same status of the paper Bill of lading, by virtue of the aforesaid eB/L Regulation, this recognition will apply to eB/Ls issued and registered in the Brazilian Federal Revenue system.

Thus, it is yet to be established whether the Brazilian courts would also recognise electronic Bills of Lading issued abroad and outside the Brazilian e-BL system.

It is worth mentioning that it is not clear on the legislation whether the Brazilian eB/L have the status of a document of title, as it has been implemented as a means to control the circulation and taxation of goods amongst the Brazilian ports.

Insofar as the validity of electronic contracts and signature in general, these are normally recognised and enforceable in Brazil, as there is no express legislation preventing legal instruments to be executed electronic.

Thus, under Brazilian law, contracts are generally valid if the requirements of validity are in place such as legal capacity, valid object and intention, whether the contract is agreed verbally, electronically or in a physical paper document.

The only limitation in relation to the use of electronic documents is where Brazilian law requires specific formal procedures for the issuance of certain contracts (such as Deeds).

Insofar as the validity of digital signatures in Brazil, this has been expressly recognised through the Provisional Measure n°. 2.200-2/ 2001.

Also, pursuant to Article 889, paragraph 3, of the Brazilian Civil Code, documents of title may be issued electronically, as long as it includes date of issuance, precise indication of the rights it confers, and a valid signature.

Considering that Bills of Lading are regarded as documents of title in Brazil, it should be possible that the Brazilian Courts would recognise the validity of electronic Bills of Ladings under the general approach to the enforceability of electronic contracts mentioned above.

- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.

Pursuant to Brazilian law, the parties have autonomy to choose whatever governing law they wish to apply to their contract, provided that this does not violate Brazilian national sovereignty and public policy rules (Article 17, Law of Introduction to the Brazilian Civil Code).

However, in practice, the Brazilian courts are generally reluctant to apply foreign legislation to Brazilian proceedings and normally apply Brazilian law to commercial disputes, notwithstanding the governing law chosen by the parties.

### Specific Questions

1. Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?

Yes. Pursuant to Brazilian law, the original paper Bill of Lading is regarded as a document of title (*título de crédito*), giving the holder the right to demand delivery of the goods and to endorse the Bill of lading, amongst others.

2. Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?

In the event the bank becomes the holder of the original paper B/L, either with full title or as a secured party, the Brazilian laws would recognise the rights of the bank under the Bill of Lading, and the bank would be entitled to enforce such rights against the carrier in relation to goods located in the Brazilian jurisdiction.

With regards to the situation where the bank is the holder of the original paper B/L as a secured party, but title remains with the previous holder who is under administration/insolvency/liquidation, it should normally be possible for the bank to enforce the security on the B/L against an administrator or liquidator of the previous holder.

In the event the bank becomes the holder of the original paper B/L with full title (rather than as a secured party), there is no settled jurisprudence in Brazil on the rights of the bank under the Bill of Lading in relation to an administrator or liquidator of the previous holder. This situation is unlikely to arise as title to the goods would already have passed from the previous holder to the bank.

3. Is law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?

As mentioned above, the Brazilian eB/L Regulation has implemented the electronic Bill of Lading in the country and has granted this the same status of the paper Bill of Lading. Thus, in theory, the eB/L which is issued in accordance with the proceedings set out under the eB/L Regulation and registered in the Federal Revenue system, enjoys the same status as the paper Bill of lading.

However, in practice, as this is a very recent practice in Brazil (i.e., the operation of carriage of goods by the sea with eB/Ls), we do not have any case law on the point recognising the status of the eB/L as an original paper B/L (even though the regulation on the matter states that it is).

In addition to this, please note that the Brazilian eB/L was created more as a document to support the tax system than as a document of title. Also, as advised above, it is intended for the transportation within the Brazilian ports.

4. Under law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?

On the condition that the eB/L in question is issued in Brazil in accordance with the Brazilian eB/L Regulation and is registered with the Federal Revenue system, the answer is yes.

However, the position is not the same in relation to eB/Ls issued abroad and outside the Brazilian eB/L Regulation and system.

In this case, it is uncertain whether a holder of an eB/L issued abroad would be able to demand delivery of the goods in the same way as a holder of a paper B/L would be.

We have researched and could not find any case law on this point.

In the absence of legislation expressly allowing and/or case law on this point, our views are that the holder of an eB/L issued abroad and outside the Brazilian eB/L system would not in principle be able to automatically enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be.

However, should a dispute on the enforceability of the eB/L issued abroad arise, as mentioned above, our view is that it should be possible that the Brazilian Courts would recognise the validity of electronic Bills of Ladings under the general approach to the enforceability of electronic contracts.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

As mentioned above, it is uncertain whether a holder of an eB/L issued abroad and outside the rules governing the Brazilian eB/L would be enforceable against the carrier.

In the circumstances described, assuming that the Brazilian Courts would recognise the validity of the eB/L as enforceable against the carrier, the competing claim for release of the goods made by a holder of the eB/L would most likely prevail over a claim based on the carrier's acknowledgement (through an electronic message) that it holds the goods described in the eB/L for the bank, as a contract would have more weight than an electronic message from the carrier. However, this is yet to be tested in the Brazilian Courts and, again, it would depend on the Judge of the case.

6. *Under law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

The Brazilian eB/L Regulation does not deal with the possibility and effects of the conversion of the B/L into a paper B/L.

There is a paper document which is ancillary to the Brazilian eB/L called DACTE, which is a simplified version of an eB/L, in paper format, and it is intended to be a supporting document, not a replacement to the eB/L.

However, in the event of a foreign eB/L (outside the above Brazilian eB/L regulation), in which the carrier subsequently issues and signs a paper original B/L at the request of one of the parties, this would normally grants the holder of the new paper B/L the same rights as under the eB/L, as from the moment of conversion. In other words, the conversion will operate at the moment of its inception as to grant to the holder of the converted paper B/L the same rights as before.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

The Brazilian eB/L is issued under the Federal Revenue system, which is a centralised operation by the parties, who signed the eB/L through a digital certification. If the eB/L was issued outside this system, under a different and open system, it is unclear whether this would be valid and enforceable in Brazil as a paper B/L. Likewise, it is uncertain whether the Brazilian Courts would enforce an eB/L issued within a similar centralized system abroad, subject to a foreign law, and outside the Brazilian Federal Revenue system. This is yet to be tested in the Brazilian Courts.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

Even though there is no direct legislation on this possibility, we consider that the general provision of the Civil Code on documents of title would apply here to recognise the validity of electronic bills of exchange, i.e, it should in principle be enforceable.

Stirling Leech  
[Stirling.Leech@clydeco.com](mailto:Stirling.Leech@clydeco.com)  
Denise Medeiros  
[Denise.Medeiros@clydeco.com](mailto:Denise.Medeiros@clydeco.com)

Clyde & Co  
Rua Padre João Manuel  
199, 2º andar, cj 24, CEP 01411-001  
Sao Paulo-SP, Brazil

[www.clydeco.com](http://www.clydeco.com)

## Appendix 4: United Arab Emirates

### Generic Issues:

- i. *Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)*

The UAE does recognise electronic records and documents in Federal Law 1 of 2006 concerning E-transactions and e-commerce (the E-Commerce Law). 'Electronic Record or Document' is defined as "a record or document that is created, stored, generated, copied, sent, communicated or received by electronic means, on a tangible medium or any other Electronic medium and is retrievable in perceivable form".

The objective of the law is to facilitate commerce and transactions conducted electronically. Article 4(1) recognises that an electronic message will have legal effect and enforceability and will not be denied such legal effect solely on the basis that it is electronic. Dubai Court Cassation 241/2007 judgment provides commentary that affirms this and further confirms that, pursuant to Article 4(2) of Federal Law No.1 of 2006, information referred to in an electronic message will not be denied legal effect if the details of the information can be found in the electronic system of the originator.

Article 7 provides that where there is a requirement for a document, record or transaction to be in writing, any Electronic Document which satisfies the conditions outlined in Article 5(1) will fulfil this requirement. Article 10 recognises that electronic messages and signatures are admissible as evidence in UAE Court proceedings and are not deemed inadmissible merely on the basis of their electronic form.

However, the E-Commerce Law does not refer expressly to eB/Ls or other documents used in international trade. Further, it expressly excludes from its application certain documents and transactions - including negotiable instruments. Thus, any negotiable document, such as an "order" B/L, cannot benefit from the protection and recognition given to other electronic documents under the E-Commerce Law.

In practice we are not aware of any form of eB/L (negotiable or "straight") having come before the Courts of the UAE and there must be some doubt that a UAE court would uphold the alleged rights of the holder of even a straight eB/L.

- ii. *Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.*

The UAE Courts will respect arbitration clauses (including arbitrations seated overseas) and decline jurisdiction or, where appropriate (such as where local precautionary attachment proceedings have been commenced in the UAE) stay substantive proceedings in favour of foreign arbitration.

However, the UAE Courts will not typically apply a foreign law to disputes over which they retain jurisdiction - even where a contract specifies that a foreign system of law governs the relationship between the parties concerned. The Courts will typically apply UAE law to the dispute in question.

### Specific Questions

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes. Article 267 of Federal Law 26 of 1981 on Maritime Commercial Law (the **Maritime Code**) provides that "The Master must deliver the goods to the consignee or his representative, and the consignee is the person whose name is mentioned on a named bill of lading, the last endorsee of a bill of lading to order, or the person presenting the bill on arrival if the bill is in favour of the bearer".

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

Yes. A holder of a B/L can enforce its rights under article 267 against a carrier in the UAE courts, although the UAE Courts would recognise and uphold any foreign arbitration clause in the B/L and stay proceedings in favour of foreign arbitration if the Defendant carrier raised such a defence at the first court hearing. The

UAE Courts also have the power to arrest a vessel as security for any claims under a B/L, including where substantive proceedings would be pursued overseas.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

No. The only effective way for a financial institution to obtain security over goods in the UAE without being in physical possession of those goods is to obtain rights to those goods by the endorsement to it of a negotiable instrument representing those goods, such as a B/L. As set out above in the answers to the generic issues, there is no recognition of negotiable eB/Ls under UAE law.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

No. See 3 above.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

Assuming,

- a. The carrier is effectively the bailee of the goods;
- b. The bank can show an express acknowledgement given by the carrier to the bank (possibly by electronic message – see below) stating that the carrier holds the goods to the order of the bank;
- c. There are no competing claims from any other party claiming to be holder of the original bill(s) of lading, and
- d. The bank can show pledge documentation signed by all relevant parties,

In such a case, the bank can argue before the courts/against other creditors that it has the right to take delivery of the goods.

There is a concept of bailment under UAE law but the enforcement of rights by the bank in such circumstances is an untested concept. The bank would have to rely on its rights as pledgee with control over the goods rather than on its rights as holder of the eB/L. If the bank's rights are challenged, the result would be largely dependent on the documentary evidence. Ordinarily the pledge documents should be notarised, so that the question of authorisation/capacity is addressed directly, and the pledge must be perfected. In order for a pledge to be created and perfected, there are a number of other legal requirements that need to be satisfied. For example, the pledgee must have full control over the goods so that the pledgor has very limited/no discretion in terms of dealing with the goods.

One would ordinarily also expect to see some form of contractual relationship that governs the obligations of the bailee in relation to the goods it is holding. This may present a problem if those contractual rights are embodied in the eB/L issued under a closed "Club" system with a central multi-party contract.

Potentially, an unequivocal email from a bailee to the bank would be evidence that the bank has the right to the goods. However, the status of other forms of electronic message, such as might be used in a closed "Club" system is untested under Article 10 of the e-Commerce Law.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

Article 257 (2) (f) of the Maritime Code provides that a B/L must state, amongst the other usual information that one would expect to see in a B/L, the place and date of issue of the B/L. It says nothing, however, about whether the conversion of an eB/L into a paper B/L constitutes the issuing of the B/L. If a document is issued which satisfies the requirements for it to be recognised as a B/L, then it should be treated by the court as a B/L. Further, the court ought also to recognise a B/L which contains an electronic signature pursuant to Article 7 of the e-Commerce Law. However, in practice it is difficult to predict how a UAE court would treat such a document.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

Not applicable, given the lack of recognition of an eB/L.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

As stated above, the e-Commerce Law expressly excludes negotiable instruments from its application.

Patrick Murphy  
[patrick.murphy@clydeco.com](mailto:patrick.murphy@clydeco.com)

Clyde & Co  
PO Box 7001 | Rolex Tower  
Sheikh Zayed Road  
Dubai, UAE

[www.clydeco.ae](http://www.clydeco.ae)

## Appendix 5: Singapore

### Generic Issues;

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)

#### Electronic documents generally

Singapore contract law is based on English common law. Accordingly, the creation of a contract is founded on basic common law principles such as intention to create legal relations, offer and acceptance, capacity to contract and consideration.

These basic principles apply whether the contract is made orally or in writing. The Electronic Transactions Act (Cap. 88) ("**ETA**") clarifies that those basic principles can be fulfilled in electronic form and provides legal recognition of electronic records.

The ETA was first enacted in July 1998 and provides a legal framework for electronic signatures and contracts formed electronically. Under the ETA, information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. It is also stipulated that an electronic record satisfies any rule of law that requires information to be writing if the information contained therein is accessible so as to be unusable for subsequent reference.

At that time, with the enactment of the ETA, Singapore was the first country in the world to implement the UNCITRAL Model Law on Electronic Commerce (the "**UNCITRAL Law**")<sup>9</sup>. In July 2010, the ETA was repealed and re-enacted for alignment with the law on electronic transactions with the United Nations Convention on the Use of Electronic Communications in International Contracts (the "**UN Convention**") which was an update to the UNCITRAL Law.

The Evidence Act (Cap. 97) was also amended in 1997 to allow the use of electronic records as evidence in the courts.

#### Electronic Documents used in international trade

With reference to documents used in international trade, we have assumed that these are transferable paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument, such as bills of lading, bills of exchange, promissory notes, cheques and certificates of deposit ("**Transferable Records**").

It has been specifically provided under the ETA that the provisions conferring legal recognition of electronic records do not apply to documents that are Transferable Records.

With respect to bills of lading in particular, the operation of bills of lading in Singapore is governed under the Bills of Lading Act (Cap. 384) ("**BLA**"). As presently enacted, the BLA only contemplates and addresses the usage of physical bills of lading in international trade. Although the BLA does contain provisions which will allow the Minister to introduce regulations to extend the applicability of the BLA to paperless or electronic transactions, no such regulations have been introduced to date. Hence, Singapore law is silent on the use of electronic equivalents of bills of lading.

It is worthwhile to note however that it is presently anticipated that the ETA may be amended for alignment with international standards in the future, in particular, the UNCITRAL Model Law on Electronic Transferable Records which was adopted by UNCITRAL on 13 July 2017 ("**Model Law**"). If enacted by Singapore, the Model Law provisions will enable an electronic Transferable Record (including bills of lading) to enjoy the full legal recognition of the substantive law governing the paper-based equivalent.

In view of the above, the Info-communications Media Development Authority ("**IMDA**") and the Attorney-General's Chambers ("**AGC**") are presently conducting a review of the ETA. As part of this review, there will be a two-phase public consultation to seek public feedback on the scope and proposed list of amendments to the ETA to ensure that "*the ETA remains relevant in providing a supportive legal framework that promotes a*

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<sup>9</sup> <https://www.imda.gov.sg/regulations-licensing-and-consultations/acts-and-regulations/electronic-transactions-act-and-regulations>



vibrant, trusted electronic transactions landscape in Singapore and strengthens Singapore's role as a secure international hub in support of the digital economy."

Under the first phase of the public consultation, a consultation paper was published that reproduced the text of the Model Law, provided a commentary on selected issues and posed questions for which views were sought.<sup>10</sup> The first question posed in the consultation paper is whether Singapore should adopt the provisions of the Model Law, and if so, whether Singapore should be an early adopter. The consultation paper then sought comments on 3 specific questions relating to specific draft articles of the Model Law. The public consultation closed on 24 April 2017 but IMDA and AGC have yet to publish any response or decision following this first phase of the public consultation.

There will be a second phase of this public consultation which we understand will focus on general issues pertaining to the ETA, the scope of the ETA and the certification authorities framework. It has not commenced yet.

#### Electronic Trading Systems in Singapore

Notwithstanding the above, parties may elect to utilise electronic equivalents of bills of lading where there has been express contractual agreement between parties.

In particular, we note that online platforms or electronic trading systems ("ETS") which replicates the contractual matrix as between the parties to a trade are utilised by Singapore traders to create and trade electronic bills of lading, and there has been substantial growth reported in the use of such ETS platforms.

Under these ETS, parties to a trade sign up to the relevant ETS, which seeks to replicate the existing legal framework of paper bills by an express central contractual agreement between parties and implements as between them all the rights and obligations associated with paper bills of lading, such that the electronic bill of lading can be transferred and traded between them.

Although there are no laws which expressly govern the operation of electronic bills of lading traded through ETS, it is arguable that the utilisation of an electronic trading system such as those approved and covered by the International Group of P&I Clubs and which appear to have substantial growth in acceptance and uptake amongst users (e.g. Bolero and essDOCS), will likely give electronic bills of lading traded through ETS a considerable legitimacy and credence in the eyes of the Singapore courts.

We will wish to caveat however that the courts in Singapore have yet to been asked to consider the legitimacy of electronic bills of lading traded in an electronic trading system. It does not seem to have been tested in courts in other jurisdictions either.

- ii. *Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.*

We understand this to be a choice of law question. The Singapore courts follow the common law choice of law methodology (which is very similar to the Rome Convention on the Law Applicable to Contractual Obligations applicable in the European Union). The choice of law rules were considered by the Law Reform Committee of the Singapore Academy of Law (Reform of the Law Concerning Choice of Law in Contract) in 2003, which recommended the retention of the common law.

Generally, the court analyses the situation in these steps.

- 1) If the parties to the contract have expressly selected a law to govern the contract, that will be the proper law (the subjective proper law), unless the choice was not made in good faith (*Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491; *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842). The exception of good faith is narrowly construed and the choice of an unconnected law is not in itself objectionable.
- 2) If the parties have not made any express selection, the court may infer a choice from the contract and the surrounding circumstances at the time of the making of the contract.

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<sup>10</sup> The draft consultation paper together with responses from the industry were published on the IMDA's website (which may be found at this link: <https://www.imda.gov.sg/regulations-licensing-and-consultations/consultations/consultation%20papers/2017/public-consultation-on-the-draft-uncitral-model-law-on-electronic-transferable-records>).

- 3) If the court cannot find any choice by the parties, then the proper law is the law of the country or system of law with the closest and most real connection with the transaction and the parties (the objective proper law).

### Specific Questions

1. Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?

Yes, Singapore law is very similar to English law in this regard. The Bills of Lading Act (“**BLA**”) (which is *pari materia* with the UK Carriage of Goods by Sea Act 1992) removes the link between contractual rights and the passing of property and allows the assertions of rights of suit against the carrier irrespective of the passing of property in the goods shipped.

Accordingly, where a person becomes a lawful holder of the bill of lading in accordance with the statutory requirements under the BLA, he has, by virtue of becoming the holder of the bill, transferred to and vested in him all rights of suit as if he had been a party to the bill of lading (section 2(1) of the BLA) and will be entitled to demand release of the goods described in that bill of lading.

2. Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder’s administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?

#### Enforcement against Carrier

Where a bill of lading is indorsed to the intermediary bank or issuing bank prior to the previous holder’s administration, insolvency or liquidation, the bank becomes the lawful holder of the bill of lading by virtue of section 5(2)(b) of the BLA and is entitled, as lawful holder of the bill of lading, to delivery of the goods.

The bank will thus be able to enforce its rights under the bill of lading against the carrier, who will be under a duty to deliver the goods to the bank on presentation of the bills of lading. The bank will also gain the contractual rights of suit sufficient to enable him to maintain an action in conversion or detinue against the carrier in the event that the carrier refuses to release the goods to the bank or releases the goods to a third party without production of the original bill of lading.

#### Insolvency of Seller

The position under Singapore law is similar to that under English law.

In the event that the seller of goods to the buyer/borrower becomes insolvent whilst the goods are still in transit, the liquidator or administrator of the seller may make a competing claim for the release of the goods on the basis that the goods form part of the pool of distributable assets in insolvency, notwithstanding that the bill of lading is in the bank’s possession.

In this case, the issuing bank’s rights under the bill of lading as against the seller’s administrator’s or liquidator’s competing claim may depend upon whether legal title in the goods had already passed from the seller to the buyer/borrower prior to the insolvency.

Although a pledge of the goods has been intended to be created in favour of the issuing bank as security for the buyer’s obligations to it, conferring upon the bank “special property” in the goods, the effectiveness of such pledge is conditional upon the buyer/borrower having legal title to the goods.

Hence, in the event that legal title to the goods has not passed from the seller to the buyer/borrower under the underlying sales contract, it is possible that the competing claims for release by the seller’s administrator or liquidator will trump the issuing bank’s ownership claims over the goods.

#### Insolvency of Buyer

The position under Singapore law is similar to that under English law.

In the event that the buyer/borrower of goods become insolvent, the liquidator or administrator of the buyer/borrower may make a competing claim for the release of the goods on the basis that the goods form

part of the pool of distributable assets in insolvency, notwithstanding that the bill of lading is in the bank's possession.

Where the buyer/borrower of goods becomes insolvent before the bank has been paid and before the buyer/borrower has onsold the goods, the bank's claims will likely take precedence over the liquidator's or administrator's competing claims for release and the bank will be entitled as pledgee to demand delivery from the carrier and to sell the goods to recover its monies paid.

Even where the buyer/borrower becomes insolvent after the sale of the goods to a third party, the bank is likely to be able to claim priority over the proceeds as it has an equitable proprietary interest in them.

Of course, the above assumes that legal title to the goods has already passed from the seller to the buyer/borrower under the sales contract. Should this not be the case, the seller may make a competing claim for the release of the goods, in which case, the legal title of the seller is likely to prevail.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

The position in Singapore with respect to this is similar to that under English law. Singapore law does not recognise electronic bills of lading as having the same legal status as paper bills of lading either under case law or statute. The transfer of electronic bills of lading may, however, be effective in transferring rights within a multi-party contractual arrangement replicating the contractual matrix as between the parties to a trade such as in an ETS as mentioned in our response to Generic Issue (i) above.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

The position in Singapore with respect to this is similar to that under English law. As the BLA does not purport to confer any rights on a holder of an electronic bill of lading of suit under the contract of carriage, there is no *prima facie* right by law for the holder of an electronic bill of lading to demand delivery of the goods from the carrier in the same way that a holder of a paper bill of lading may. This is of course unless the holder of the electronic bill of lading and the carrier have entered into a contractual arrangement to that effect, for example, through an express acknowledgement from the carrier or a contractual arrangement pursuant to an ETS as mentioned in our response to Generic Issue (i) above.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

As mentioned above, the ETA does not apply to electronic bills of lading. Hence, consistent with international trade practices, in the absence of an express agreement between the carrier and the bank, there is no *prima facie* obligation on the carrier to release the goods to the bank against the presentation of an electronic bill of lading.

However, where the carrier has provided a specific acknowledgement that it holds the goods described in the e Bill of Lading for the bank, such acknowledgement will likely be enforceable against the carrier to the extent that such acknowledgement constitutes a valid contract between the carrier and the bank under Singapore law.

Where there is a competing claim for release made by an administrator or liquidator of the previous holder, the carrier will nonetheless be obliged to adhere to its obligations to release the goods to the bank pursuant to the abovementioned contractual arrangements, save to the extent the administrator or liquidators obtain an order or injunction to prevent such release. Notwithstanding release of the goods to the bank, should the administrator or liquidator indeed have a valid claim to the legal title or ownership of the goods, they will be able to separately commence a claim against the bank for the return of the goods.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

The position in Singapore with respect to this is likely to be similar to that under English law. In principle, the holder of the converted paper bill of lading should have the same rights as if it was issued in paper form on the original date, but to the best of our knowledge, this has not yet been tested in the Singapore courts.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

The position in Singapore with respect to this is likely to be similar to that under English law. Singapore law does not accord the same rights and legitimacy to an electronic bill of lading issued under an open system as it does to a physical bill of lading. There would have to be some contractual arrangement governing the rights and obligations of the parties either in the form of a multilateral central contract or a bilateral contract between the relevant parties, such as in an ETS as mentioned in our response to Generic Issue (i) above.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

Sue Wei Tan  
[SueWei.Tan@clydeco.com](mailto:SueWei.Tan@clydeco.com)  
Justin Tan  
[Justin.Tan@clydeco.com](mailto:Justin.Tan@clydeco.com)

Clyde & Co Clasis Singapore Pte Ltd  
12 Marina Boulevard  
Marina Bay Financial Centre Tower 3 #30 - 03  
Singapore 018982

[www.clydeco.com](http://www.clydeco.com)

## Appendix 6: Germany

### Generic issues:

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade.

Quite a number of German laws deal with “electronic documents”. Still, it is difficult to comment on the legal status of electronic documents in general. The reason being is that, in the German jurisdiction, the legal position is not identical in the various areas of law. A certain type of electronic document might be acceptable in the area of administrative law, but not in civil or criminal law. Therefore, and with regard to the current topic, it does not seem to make sense to come up with a comprehensive summary of all German laws dealing with electronic documents. Rather, it seems useful to concentrate on those laws which are of relevance with respect to declarations of intent and contracts in civil law, and, in particular, transport law.

#### General position under German civil law

In August 2001, Germany implemented the European Directive 1999/93/EG by creating the Electronic Signature Act. Since then any document, in respect of which the law requires written form, can be set up by way of an electronic document. In essence, the handwritten signature is substituted by a digital signature. The relevant rule is section 126a German Civil Code. It reads:

- “(1) If electronic form is to replace the written form prescribed by statute, the issuer of the declaration must add his name to it and provide the electronic document with a qualified electronic signature.
- (2) In case of a contract, the parties must each provide a counterpart with an electronic signature as described in subsection 1 above.”

However, and this is important to note, a “qualified electronic signature” in the meaning of section 126a German Civil Code must fulfil the requirements set up by the “European Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market”. The Regulation (EU) 910/2014 sets up fairly detailed rules. With respect to electronic signatures, the relevant rule is Article 36 of the Regulation (EU) 910/2014. It reads:

#### “Requirements for advanced electronic signatures

*An advanced electronic signature shall meet the following requirements:*

*it is uniquely linked to the signatory;*  
*it is capable of identifying the signatory;*  
*it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and*  
*it is linked to the data signed therewith in such way that any subsequent change in the data is detectable.”*

The Regulation, in addition, sets up rules for qualified certificates for electronic signatures, their certification as well as the requirements for the validation of qualified electronic signatures. In practise, it is fair to say, that electronic signatures are not commonly used in the German jurisdiction (yet).

#### Legal position under German transport law

In Germany, the law of transport is governed by the German Commercial Code. The chapter regulating transport by sea (chapter 5 of the German Commercial Code) was amended by way of a law reform in the year 2013. This law reform introduced a clause which deals with electronic bills of lading. The relevant clause is section 516 of the German Commercial Code. It reads:

#### “Bill of lading format; authorisation to issue statutory instruments

- (1) The carrier must sign the bill of lading; reproductions of the personal signatures by means of printing or stamp shall be sufficient.
- (2) An electronic record having the same functions as a bill of lading shall be deemed equivalent to a bill of lading, provided that the authenticity and integrity of the record are assured (electronic bill of lading).

- (3) The Federal Ministry of Justice is hereby empowered to determine by regulation, issued in agreement with the Federal Ministry of the Interior and not requiring the consent of the Federal Council (*Bundesrat*), the details of issuing, presenting, returning and transmitting an electronic bill of lading, as well as the particulars of the process of posting retroactive entries to an electronic bill of lading.”

The current position is that the Federal Ministry of Justice has not yet issued - in fact, it has not even started drafting - a regulation in the meaning of section 516 paragraph 3 German Commercial Code. As a consequence, the use of electronic bills of lading subject to German law, at this point in time, is not possible.

The explanatory memorandum of the law reform which implemented the changes in chapter 5 of the German Commercial Code describes what requirements an electronic bill of lading subject to German law must be fulfilled. In that respect, it might seem interesting to note that the German legislator takes the view that an electronic bill of lading does not need to fulfil the requirements of section 126 a German Civil Code. Rather, only the requirements of section 516 paragraph 2 German Commercial Code must be fulfilled. There are two reasons for this. Firstly, the legislator took the view that electronic signatures in the meaning of section 126 a German Civil Code require compliance with a fairly complicated system. This, in the view of the legislator, might hinder the development of electronic bills of lading, which is not intended. Secondly, an original paper bill of lading, under German law, does not require a handwritten signature. This follows from section 516 paragraph 1 German Commercial Code which allows “reproductions of the personal signature by means of printing or stamp”. Hence, it seems logical not to require an electronic signature in the meaning of section 126 a German Civil Code which is “to replace the written form”.

However, what also follows from the explanatory memorandum of the law reform is that a regulation to be issued by the Federal Ministry of Justice will need to ensure that an electronic bill of lading fulfils the same criteria as a paper bill of lading. In this respect, the explanatory memorandum of the law reform mentions the following functions of a bill of lading: (1) the evidential function, (2) the receipt function, (3) legitimation, (4) the so-called lock function (giving the legitimate holder of the B/L the right to give orders to the carrier during transport), and (5) the function as a document of title of goods. In addition, section 516 paragraph 3 German Commercial Code mentions that the regulation to be issued by the Federal Ministry of Justice will need to deal with “the details of issuing, presenting, returning and transmitting an electronic bill of lading, as well as the particulars of the process of posting retroactive entries to an electronic bill of lading”.

Due to the fact that electronic bills of lading subject to German law do not (yet) exist, it is not surprising that there is hardly any literature with respect to electronic bills of lading under German law. The only literature which exists relates to section 516 German Commercial Code. It is short and not significant. Some commentators express their scepticism that it will be possible to transfer the functions of a paper bill of lading to an electronic bill of lading (*Rolf Herber*, *Seehandelsrecht*, 2. Auflage, 2015, p. 330). Others are less pessimistic (*Rabe/ Bahnsen*, *Seehandelsrecht*, 5. Auflage, 017, § 516, Rd. 5). They refer to the BOLERO system ([www.bolero.net](http://www.bolero.net)), the ESS System ([www.essdocs.com](http://www.essdocs.com)) as well as the *CMI Rules for Electronic Bills of Lading*. However, also those authors take the view that these systems, at this point in time, would not work under German law. The main reason mentioned is the *numerus clausus* of negotiable papers under German law.

- ii. *Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.*

German state courts need to comply with the procedural rules laid down in the German Civil Procedure Code. The relevant section is section 293 German Civil Procedure Code. It reads:

*“The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.”*

In cases in which a German court has jurisdiction, but in which the law of the contract in dispute is subject to a foreign law, the German court will need to examine what the position is under such foreign law. In practice, the German courts will ask the parties to file submissions explaining the foreign legal position. Normally, the party which is under the burden of proof is asked to submit a legal opinion of a lawyer qualified in that foreign jurisdiction. Assuming the parties’ submissions contradict each other, the German

court, in all likelihood, will appoint a neutral court expert to advise on the legal position in that foreign law. Normally, a German court will appoint a professor of law of that foreign law, who will then advise the court neutrally on the foreign legal position. The court will then base its judgement on the legal opinion provided by that professor of law.

### **Specific questions**

1. *Under the laws of Germany, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes, it is indeed. This follows expressly from section 521 paragraph 1 sentence 1 German Commercial Code which reads:

*“Upon the goods’ arrival at the discharging wharf, the rightful holder of the bill of lading shall be entitled to demand that the carrier make delivery of the goods.”*

2. *Assuming that a bank becomes the holder of an original B/L (with full legal title or as a secured party) prior to the previous holders administration, insolvency and liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

Not surprisingly, there is no straightforward answer to this question. What would need to be examined first of all is which law applies with respect to the insolvent estate. German law would not automatically apply simply because the bank, as legitimate holder of the B/L, claims delivery of the goods in a German harbour. Likewise, German law would not automatically apply, because the terms of the B/L are subject to German law (or referral is made in the B/L to terms of a charter party which is subject to German law).

Rather, in accordance with the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (or otherwise applicable German law with respect to the laws on conflict) the insolvency law would apply where insolvency proceedings have been commenced with respect to the insolvent estate.

Assuming German insolvency law applied, the bank would be able to enforce its rights in accordance with the applicable provisions of the German insolvency law. Without going into too much detail, the owner of the goods, under German insolvency law, would indeed have a right for separate / preferential satisfaction. However, some exceptions apply. For instance, in a scenario where a bank would have received title in the goods (by receiving the original B/L) only shortly before insolvency proceedings commenced, and the bank knew or should have known that insolvency proceedings were to commence, the insolvency administrator would have the right, under certain conditions, to challenge the bank’s right for separate / preferential satisfaction.

3. *Is the law of Germany familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

As mentioned above, electronic B/Ls do not (yet) exist under German law.

4. *Under the law of Germany, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would?*

As mentioned above, the German legislator has authorised the Ministry of Justice to issue a Regulation dealing with eB/Ls. Due to the fact that such Regulation does not yet exist, an original paper B/L is required to request delivery of the goods.

5. *Under the law of the local jurisdiction would the carrier’s acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank’s rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

Due to the fact that electronic B/Ls are not (yet) recognised under German law, the bank (as the holder of the eB/L) cannot enforce its right vis-à-vis the carrier that the goods are delivered to its order. An acknowledgement of the carrier that the goods are held by the order of the bank does not change the legal position. First of all, such an acknowledgment does not change the legal status of eB/Ls under German law.

Secondly, the English legal concept of "attornment" does not exist identically under German law. Therefore, the acknowledgement of the carrier as such has no influence on the right of the bank to require delivery. However, the bank will be able to request delivery of the goods if it can prove that it became the legitimate owner of the goods, either as the absolute owner or pursuant to a pledge. In the standard scenario, the bank can prove this quite easily. The bank must simply represent the original paper B/L (see the answer to question 1 above). Where no original B/L, but only an eB/L has been issued, it will be more difficult for the bank to provide evidence. However, it is not impossible. Quite to the contrary, the bank must only show that the former owner of the goods has validly transferred ownership in the goods to the bank. Such proof can be provided, for instance, by showing that the former owner has transferred the ownership and has assigned to the bank the right to claim for return of the goods (*actio in rem*) from the possessor of the goods.

In a scenario where the previous owner of the goods has filed for insolvency, the rights of the bank will need to be examined against the background of the applicable insolvency laws. Assuming, German insolvency law applied, the bank, first of all, will need to prove that ownership in the goods was transferred prior to the insolvency. In case such proof can be provided, the bank, as legitimate owner of the goods, will have a right of preferential satisfaction. Such right can only be defeated in case the administrator has a legal reason to rescind the transfer of title, for instance if he can show that the bank knew (or should have known) that the previous owner was about to file for insolvency.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

This, no doubt, is a very interesting question. However, first of all, it remains to be seen whether and when the German Ministry of Justice issues a regulation dealing with eB/Ls. Due to the fact that the intention of the German legislator is to give eB/Ls the same legal status as paper B/Ls, I tend to believe that a regulation to be issued by the Ministry of Justice should ensure an eB/L has exactly the same legal status and force and effect as if it were issued in paper form on the original date of issuance. Otherwise there would be the risk that, in an insolvency scenario, paper B/Ls were treated differently, i.e. with a higher ranking, than eB/L. This, as I understand, is not the aim of the German legislator.

7. *If any answers to questions 3 -6 above would be available only to a closed system where all parties have signed a central contract, please state to what extent your answers will be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

As mentioned above, eB/Ls do not yet exist under German law. Another question is whether a German entity, e.g. a German bank, could sign up to a central contract, subject to for instance English law, which allows for the processing and transferring of electronic documents between the relevant parties of that contract. The answer to this question is yes. There is no reason why this would not be possible.

Dr. Tim Schommer LL.M.,  
Reader, Bucerius Law School  
Eichenstrasse 46, 20255 Hamburg, Germany  
[timschommer@yahoo.de](mailto:timschommer@yahoo.de)



## Appendix 7: Netherlands

### Generic Issues:

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)
- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.

### Response

This response covers the law of the Kingdom of the Netherlands, generally referred to as Dutch law. The below relates to the law applicable in the European territory of the Netherlands. Although most statutes enacted by the Netherlands will also be given effect in the Dutch overseas territories in South America, differences may apply.

- i. Legal status of electronic documents

- a. Contracts

Most contracts do not have to be in a particular form under Dutch law or even have to be in writing. The obligations that the parties take upon them have to be identifiable.

Pursuant to s. 6:227a – 227c Dutch Civil Code, electronic signatures and electronic trade are allowed under some conditions.

In cases in which it is statutorily required that an agreement is only valid in writing, such agreement can also be concluded electronically, provided that (a) it can be consulted by the parties; (b) its authenticity has sufficiently been safeguarded; (c) the moment that the agreement was concluded can be established with sufficient certainty; (d) the parties' identities can be established with sufficient certainty [section 6:227a Dutch Civil Code).

- b. Electronic signatures

Since 1 July 2016, the electronic signature is regulated by the European Electronic Identification and Trust Services Regulation (910/2014/EC) ("eIDAS"). This Regulation is directly applicable. Its contents have been set out by Clyde & Co in respect of its replies for the UK.

In addition, the Dutch Civil Code expressly provides that the advanced electronic signature as well as the basic electronic signature as mentioned in art. 3 under 11 respectively 10 of the eIDAS, have the same legal effects as a handwritten signature, provided that the signing method was sufficiently reliable taking into account the purpose of the signature and all other circumstances of the specific case.

- c. Bills of Lading

The Dutch Civil Code does not contain any specific provisions for the e-Bill of Lading. It follows from the Dutch Civil Code's system that the rules that apply for general electronic contracts and B/Ls will also be applied to the eB/Ls.

The main challenge concerns the delivery requirement for order and bearer bills of lading. The code requires the granting of possession and transfer of *paper*, and for the order bills also endorsement. This is not possible when use is made of the systems of Bolero and essDOCS and as such delivery of rights to bearer and order cannot be arranged.

This seems to be different for straight B/Ls, which seems to be allowed as delivery of the paper B/L is not required.

The Dutch legislator was in the process of drafting legislation, but put the implementation on hold to await the developments, if any, with the Rotterdam Rules.

Similar issues apply in respect of bills of exchange/drafts.

d. UNCITRAL MLETR

The Netherlands have not yet taken action to implement the UNCITRAL Model Law on Electronic Transferable Records.

ii. Application of foreign law

If a Dutch court has jurisdiction, it will generally automatically determine the applicable law to all or some of the issues of the case. The starting point to determine the applicable law in civil and commercial matters are the European Rome Regulations [Regulation 593/2008/EC respectively 864/2007/EC] which give rules to determine the applicable law to contractual (Rome I) and non-contractual obligations (Rome II). The applicable law to subjects not covered by the Rome Regulations has to be determined by national conflict of law rules. In case the Rome Regulations do not apply because the subjects have been excluded from their scope, in the absence of another international regime, the national Dutch conflict of law rules will apply. However, when the Regulations do not apply because the subjects have been excluded, the Dutch Code provides that the rules of the Rome Regulation will apply to determine the applicable law to most of these obligations after all, although some specific rules have been provided.

Generally, if the relevant contract contains an express choice of law clause, that will normally be recognised and applied.

The court will usually ask the parties to provide expert evidence on the applicable foreign law. However, it can also make investigations itself.

**Specific Questions:**

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes, section 8:481 DCC provides that in order to receive the goods, the lawful holder of the B/L has to hand over the B/L to the carrier. Only the lawful holder of a B/L has title to sue and is entitled to claim damages, even if the B/L holder has not suffered any damage himself (section 8:441(1) Dutch Civil Code).

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

No, unless a right of pledge has been established on the B/L before the debtor's insolvency.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

Dutch law does not recognise eB/Ls as having the same legal status as paper B/Ls, neither statutorily nor in case law. This is fresh ground.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

From a legal point of view, the enforcement of the rights is not the same.

However, the eB/L is instrumental in order to exercise the rights to obtain delivery of the goods as it serves as a "key to the warehouse": the holder of an eB/L is the exclusive key holder and is as such legitimated to take delivery under the applicable contractual rules of the eB/L system.

In this case, security by way of a pledge is established directly on the goods without the use of the pledging of the eB/L. There is nothing under Dutch law that prohibits such direct pledge on the goods during transport.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

In the absence of competing claims, the bank as holder of the eB/L is entitled to delivery of the goods. The carrier has agreed to deliver to the bank and is bound to comply with its agreed undertaking.

In general: at the end of the day, the carrier (whether under B/L or eB/L) has to surrender the goods to the interested party with the best rights in rem (“goederenrechtelijke rechten”). The position of ‘previous holder of an eB/L’ does not have decisive meaning, if any. The test is which party has the best rights in rem. This means that the liquidator of the owner of the goods will in principle (and inter alia in the absence of conflicting security rights) have a stronger right. This also means that in case of a valid right of pledge on the goods in transit, the carrier has to surrender the goods to the pledgee.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

The converted paper B/L will in our opinion take effect and come into existence as a paper B/L from the moment of conversion. It does not have retroactive effect in respect of the document of title elements of the paper B/L. This has not yet been tested in the Dutch Courts.

The connected parties to the eB/L system can agree that a certain retroactive force is given to the conversion (and are bound to such agreement), but as a matter of Dutch law parties do not have the freedom to set aside the statutory laws on the in rem position of the goods.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

Dutch law would not currently recognise an eB/L issued under an open system as a transferable document of title. There would have to be some contractual arrangement which governs the rights and obligation of the parties to the (closed) system, either in the form of a multilateral, central contract or a bilateral contract or a chain of bilateral contracts between the relevant parties. The rights and obligations, if any, of the parties to the open system are unclear and wholly uncertain given the absence of applicable legislation (and case law) and adequate contractual arrangements.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

See the answers to the generic issues.

Marc van Maanen  
[Maanen@vantraa.nl](mailto:Maanen@vantraa.nl)  
Jolien Kruit  
[Kruit@vantraa.nl](mailto:Kruit@vantraa.nl)

VAN TRAA ADVOCATEN N.V.  
P.O. Box 21390, 3001 AJ Rotterdam  
Minervahuis II, Meent 94, 3011 JP Rotterdam

[www.vantraa.nl](http://www.vantraa.nl)

## Appendix 8: India

### Generic Issues:

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)
- ii. Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.

### Responses

- i. Legal status of electronic documents:

The General Clause Act, 1897 envisages that a document shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

#### Bills of Lading

Bill of lading occupies a unique position among the documents used in international commerce. It is at the same time a receipt issued by the carrier for the goods received for carriage by sea, an evidence of the contract of affreightment and more importantly from the commercial point of view, it is a document of title to the goods, the assignment of which would pass the title from one person to another. With the passage of the time, there was a rapid increase in trade and commerce and that had necessitated faster movement of goods across the globe.

The Indian courts continued to insist on the same evidentiary requirements as laid down in the Indian Evidence Act, 1872 ("**Evidence Act**") which is basically based upon paper records and oral evidence. The law of evidence in India is predominantly based on the existence of paper based records and documents bearing the signatures and authentication. Before the Indian courts, it was easier to substantiate a fact, if the same had been written down and authenticated, but to prove the existence or non-existence of a right or a duty which had not been clearly charted out in a paper document, remained an uphill task.

In 1990 the Comité Maritime International (CMI) published its 'Rules for Electronic Bills of Lading' which provided an elaborate complex system for overcoming the problem of proving title to goods by electronic means. The swiftness with which transactions could be completed through electronic medium led to its universal acceptance compelling the Indian Parliament to take note of the same and enact a law facilitating electronic commerce. Taking cue from the UNCITRAL adopted Model Law on Electronic Commerce, the Information Technology Act, 2000 (the "**IT Act**") was enacted in India with the said objective which brought into effect the amendments to certain legislations including the Indian Evidence Act. By virtue of the said statute, it can be said that legal recognition has been granted to electronic records and digital signatures.

The Parliament of India has passed its first cyber law, the IT Act, which provides the legal infrastructure for E-commerce in India.

The object of the IT Act as defined therein is as under: –

“to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Evidence Act, the Banker’s Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”

Towards that end, the said Act thereafter stipulates numerous provisions. The IT Act aims to provide for the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means. The IT Act further states that unless otherwise agreed, an acceptance of contract may be expressed by electronic means of communication and the same shall have legal validity and enforceability. The Act purports to facilitate electronic communication in trade and commerce, eliminate barriers and obstacles coming in the way of electronic commerce resulting from the glorious uncertainties

relating to writing and signature requirements over the Internet. The Act also aims to fulfil its objects of promoting and developing the legal and business infrastructure necessary to implement electronic commerce.

By virtue of the provisions of the IT Act, it can be said that an electronic Bill of lading will be admissible in any legal proceedings without further proof or production of an original in paper format, provided the requirements as laid down under Sec. 65 B of the Evidence Act are complied with. However, it may be clarified that we have not come across any precedent which has categorically clarified that the electronic Bill of lading and any other related document will be admissible in any legal proceedings.

a) Recognition of electronic records/contracts

An 'electronic', 'dematerialized' or 'system generated' bill of lading appears to fall within the definition of an electronic record as defined in Sec. 2 (t) of the IT Act. The said section defines an electronic record as data, record or data generated image or sound stored received or sent in an electronic form or micro film or computer generated micro fiche.

The IT Act also aims to provide the legal framework under which legal sanctity is accorded to all electronic records. Section 4 of the IT Act confers legal recognition to electronic records. Paper based documents are equated with electronic records so long as they are made available in electronic form and are accessible so as to be usable for a subsequent reference. Therefore, it means that unless otherwise agreed, an acceptance of contract may be expressed by electronic means of communication and the same shall have legal validity and enforceability.

The Hon'ble Supreme Court in the case titled **Trimex International FZE Limited, Dubai vs. Vedanta Aluminium Limited, India** reported in (2010) 3 SCC 1, has held that an arbitration clause contained in a contract exchanged by way of emails between parties would be considered to be valid and binding between the parties. It was further observed that the parties can be said to have entered into a legally enforceable contract through exchange of e-mails.

b) Electronic signature:

Electronic signature has also been dealt with under Section 3A of the IT Act as introduced by way of an amendment to the IT Act by Act 10 of 2009. A subscriber can authenticate any electronic record by such electronic signature or electronic authentication technique which is considered reliable and may be specified in the Second Schedule. The implication of this amendment is that it has helped to broaden the scope of the IT Act to include new techniques as and when technology becomes available for signing electronic records apart from digital signatures. Section 5 of the IT Act confers legal recognition to electronic signatures and equates it with handwritten signatures. The authentication of such electronic signature will be ensured by means of electronic signature affixed in such manner as the Central Government prescribes.

The aforementioned amendments indicate that the electronic bill of lading shall be acceptable as per Indian law. Further, since the admissibility of an electronic bill of lading before a Court of Law in India would depend on the due compliance of the norms laid down in Sec. 65 B of the Evidence Act as included therein vide the amendment in 2000, it would be worthwhile to deal with the relevant provisions herein below.

Indian Evidence Act, 1872:

As per the provisions of the Indian Evidence Act the contents of the electronic records are admissible as evidence subject to it being proved as per the provisions of the Evidence Act. In this regard, Section 65A and 65B of the Evidence Act are the relevant provisions which deal with the electronic records.

Section 65A (*Special provisions as to evidence relating to electronic record*) stipulates that the contents of electronic records may be proved in accordance with the provisions of Section 65 B.

Section 65B (*Admissibility of electronic records*) stipulates that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if it satisfies certain conditions envisaged in the said Section, and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Another important provision from the procedural point of view is Section 65 (4), which mandates that in any proceedings where an electronic document is proposed to be produced as an evidence by invoking Section 65B a certificate purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), identifying the electronic record containing the statement and describing the manner in which it was produced or giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or dealing with any of the matters to which the conditions mentioned in sub-section(2) relate shall be produced. Such a certificate shall be evidence of any matter stated therein.

c) Bills of Lading:

Bill of Lading has been defined under Section 2 (4) of the Indian Stamps Act, 1899 as "Bill of lading" includes a "through bill lading", but does not include a mate's receipt. The mechanism of a Bill of Lading in India is found under the Indian Bills of Lading Act, 1856 (the "Bill of Lading Act") and the Indian Carriage of Goods by Sea Act, 1925 (the "Indian Carriage of Good by Sea Act"). Bill of lading is a document of title signed by the ship owner or by the master or other agent of the ship owner which states that certain specified goods have been shipped on a particular ship, which purports to set out the terms on which such goods have been delivered to and received by the ship. The 'bill of lading' is well-known mercantile document of title, which is transferred in the business world by endorsement, passing to the consignee, good title to the goods covered by such 'bill of lading'. The High Court of Gujarat in the case of **State of Gujarat and 2 Ors. vs. Reliance Industries Ltd. and 5 Ors., decided on September 8, 2011** has held that a bill of lading is a document of title enabling the holder or transferee/endorsee thereof to take delivery of the goods. Therefore, a 'bill of lading' entitles the person named therein or his assign/endorsee to the delivery of the goods as mentioned therein. Such person or his assign/endorsee does not require any separate order to claim delivery of goods. As regards the term 'bill of lading', the Hon'ble Supreme Court of India, in the case of *J.V.Gokal & Company (Private) Ltd. v. Asst. Collector of Sales Tax*, reported in AIR 1960 SC 595, held as under:

*"A bill of lading is "a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage subject to such conditions as may be mentioned in the bill of lading". It is well-settled in commercial world that a bill of lading represents the goods and the transfer of it operates as a transfer of the goods."*

These characteristics of the bill of lading may complicate the task of digitalizing the same so as to meet the requirements of international shipping and at the same time accommodating it within the legal regime. The enactment of the IT Act grants legal recognition to electronic documents and lays down broad contours for ensuring the genuineness and legal acceptability of electronic documents. The presence and content of an electronic document thus stands legally recognized and a bill of lading in electronic form which satisfactorily meets the stipulations in the statute regarding digital signatures, provisions for admissibility of electronic records under Section 65B of the Indian Evidence Act etc. would be a valid piece of evidence before a court of law in India. However, it will only mean regarding its existence and content. There still exists an uncertainty in law as to whether certain peculiar facets of the bill of lading like its negotiability and capacity to pass on title to the holder is due course, would receive the same legal recognition in the courts of law as it presently commands, when it is digitalized. As such, in order to confer legal recognition upon electronic bill of lading, there is a need to clear out the said uncertainties by incorporating specific provisions regarding electronic bills of lading in the legislations affecting carriage of goods by sea in India.

d) Bills of Exchange and Promissory Notes:

Under Section 5 of the Negotiable Instruments Act, 1881 (the "Negotiable Instruments Act"), a "bill of exchange" is defined as an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. Further, Section 4 of the Negotiable Instruments Act defines "promissory note" as an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. Under Section 6 of the Negotiable Instruments Act, a "cheque" is defined as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form. According to Explanation I to the said section, "a cheque in the electronic form" means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case

may be. In view of the aforesaid, the India Law recognizes only an electronic form of cheque amongst other bills of exchange and promissory notes. Therefore, electronic bills of exchange and promissory notes are not legally recognized under the India law yet.

#### Summary (IT Act)

In view of the above, it can be said that the enactment of the IT Act grants legal recognition to electronic documents and lays down broad contours for ensuring the genuineness and legal acceptability of electronic documents. The presence and content of an electronic document thus stands legally recognized and a bill of lading in electronic form which satisfactorily meets the stipulations in the statute regarding digital signatures, provisions for admissibility of electronic records etc. would be a valid piece of evidence before a court of law in India. But that will only mean regarding its existence and content.

#### ii. Application of foreign law:

If the parties have chosen foreign law as the governing law of the contract, the Indian Courts would apply the said foreign law. The Indian Courts have held that the application of what the relevant foreign law might be is a peculiar question of fact and therefore, will need to be proved by the experts. Further, under Section 45 ("opinions of experts") of the Evidence Act, where the Indian Courts have to form an opinion upon a point of foreign law, the Court may take the opinions of persons especially skilled in a particular foreign law.

The Indian Courts have also held that to disregard a foreign law only because it is contrary to an Indian statute/Indian would defeat the basis of private international law to which India undisputedly subscribes.

### **Specific Questions**

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

Yes, the Indian law recognises the status of an original paper B/L. The Delhi High Court in the case of *Manibhardra Electromech Engineers Pvt. Ltd. vs. Fluxtile Company Limited and Ors.*, decided on December 9, 2009, has held that a bill of lading is a document of title, issued by the carrier, evidencing the handing-over of goods in a delivered state and also indicating precisely the quality and quantity of the goods so consigned. It was further held that the plaintiff having paid for the goods, which were known to the parties, they were *prima facie* appropriated to the contract passed. Title, therefore, passed to the plaintiff when the bill of lading was issued, in which the plaintiff was shown as the consignee.

Under Section 1 of the Bills of Lading Act, every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Further, Section 3 of the Bills of Lading Act provides for a bill of lading in the hands of a consignee/endorsee being a conclusive proof of evidence as against the master of the ship. Subsequently, Indian Carriage of Goods by Sea Act provides for rules applicable to bills of lading. Amongst other Articles, Article I (b) defines "contract of carriage" as contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

Indian law recognizes the entitlement of a bank in whose favour a pledge on original bill of lading has been created. The High Court of Bombay in *Official Assignee of Madras vs. Mercantile Bank of India, Limited* reported in AIR 1934 PC 246 as held that the bank has the right to demand delivery from the carrier, but if it does so, it will become potentially liable under the terms of Indian Carriage of Goods by Sea Act for any outstanding obligations owed to the carrier under the contract of carriage. In the event of default by the borrower, the bank will normally have the right to sell the goods in order to recover the outstanding loan.

In the event of the insolvency of a party who sold the goods to the borrower, the bank's rights as against that party's liquidator may depend upon whether property in the goods had already passed from the seller to the borrower prior to the insolvency.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

We have not come across any provisions or precedent which suggest that the Indian Courts are familiar with the electronic B/L and whether the eB/L enjoy the same legal status as a paper B/L.

However, as stated in the above responses and considering the amendments in the IT Act, it could be said that the eB/L may be considered by the Indian Courts and is legally recognised. While considering it, the Courts may also take into consideration the fact that there are evidences to show that the parties had acted upon the eB/L. Further, as stated above, such eB/L may also be admitted as evidence under Section 65 B of the Evidence Act and therefore, can be proved in the Court.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

It could be possible if the parties have categorically agreed to the same in their contractual arrangement and on the assumption that the electronic Bill of lading has been given the legal sanctity. However, it is difficult to say with certainty considering that we have not come across any Indian precedent which specifically clarifies the above point.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

Under the Indian law, such an acknowledgement is known as an "attornment". The carrier, as bailee of the goods, owes a duty to deliver the goods to the order of the bank. Accordingly the bank will be able to enforce that obligation against the carrier, subject to a) the terms of the attornment, b) the contractual provisions pursuant to which the carrier holds the goods and c) whether the property in the goods had already passed from the previous holder to the borrower at the time of the insolvency. Further, we may reiterate that this will be subject to the fact whether the electronic Bills of lading are considered to have a legal sanctity.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

In principle, the converted paper Bill of lading would have the same legal status and force and effect as it were issued in paper form on the original date of issuance. However, this will have to be seen and considered from case to case basis. We may clarify that we did not come across any precedent which clarifies the above aspect.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

Under the Indian law, an electronic Bill of lading may not be recognised under an open system as a transferrable document of title. It is relevant to have some contractual arrangements governing the rights and liabilities of the parties.



8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

See the answers to the generic issues.

Mustafa Motiwala  
[mustafa.motiwala@clasislaw.com](mailto:mustafa.motiwala@clasislaw.com)  
Clasis Law  
Mumbai, India

## Appendix 9: Russia

### Generic Issues;

- i. *Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)*

Russian law does not directly regulate issues related to electronic bills of lading (the “eB/L”).

Both bills of lading and bills of exchange, are items of securities as a matter of Russian law. In order that electronic (paperless) bills of lading and bills of exchange be acknowledged as securities, the following requirements shall be met:

- rights thereunder are fixed in a decision on issuance or other act of the issuer, and
- enforcement and transfer of rights are made in accordance with rules of registration of rights (Art. 142, 143, 149-149.5 of the Civil Code of the Russian Federation (the “CC”).

Art. 149 of the CC envisages that registration of rights under paperless items of security (the “PS”) shall be made by a person acting upon instruction of the issuer, or by a person acting on the basis of a contract with the right-holder or other person exercising rights over the security item in accordance with the law. Registration of rights over the PS is a licensed activity; therefore the list of potential registrars shall consist of professional participants of the securities market.

Registration of the bank's rights as provided by the law is obligatory. Therefore a simple electronic acknowledgement from the carrier's side shall not create the bank's rights over the goods.

Non-compliance with registration requirements (unless it is caused by the force-majeure) shall be ground for the right-holder to claim losses. The issuer of the PS and the person instructed by the issuer to register rights over respective PS shall be jointly and severally liable for losses caused by improper registration (except for cases when registration of rights is made by parties acting on the basis of contract with the right-holder or other person exercising rights over the security item).

If the bank is the holder of a paper bill of lading (the “B/L”) the position materially differs. Registration of rights under the B/L by a specifically appointed / engaged third party is not required. Existence of rights shall be evidenced by presentation of the original B/L where the holder is either referred to as the consignee (or endorsee), or is the B/L bearer (for “to bearer” B/L).

- ii. *Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.*

Disputes arising from carriage of goods under the B/L can be considered either by arbitrazh courts (federal courts for commercial disputes), or by arbitrations. Both are entitled to apply foreign law (whether when agreed by the parties, or when applied pursuant to the choice of law / conflict rules). Art. 1191 of the CC provides that when applying foreign law the court shall ascertain the content of its norms in accordance with their official interpretation, practical application and doctrine (scholarship application) in the relevant foreign state. By “the court” the CC understands the “arbitral tribunals” also. For the purposes of ascertaining the content of foreign law, the court shall be entitled to request the Ministry of Justice of the RF, or other competent bodies in the RF and abroad, or shall have the right to appoint experts to give evidence on substantive foreign law. Alternatively, the court can place the burden of proof of the content of foreign law upon the parties. Even if the burden of proof is not placed upon them by a specific court act, participants to the case are entitled to assist the court in ascertainment of the content of the law, *inter alia*, by presenting documents evidencing the content of the substantive foreign law on which the parties rely for justification of their claims and / or defences.

If, despite the above measures, the content of the foreign law is not ascertained within reasonable period, Russian law shall be applied. The decision on whether evidence of content, official application and practical application of foreign law are sufficient or not shall be made at the judge's / arbitral tribunal's discretion.

The above rules do not affect operation of those imperative Russian law provisions that apply due to an indication directly therein, or due to their special significance (including for ensuring rights and interests of participants of the civil comments protected by a statute). If consequences of application of foreign law

may be manifestly in contradiction with public policy of the RF (with due consideration of nature of relationships with foreign element), the respective Russian law provisions shall be applied if necessary.

Refusal to apply foreign law cannot be argued merely by difference in the legal, political or economic system of the respective foreign state and that of the RF (Art. 1193 of the CC).

## Specific Questions

1. Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?

Yes. This is provided by Art. 158(1) of the Merchant Shipping Code of the Russian Federation ("MSC"):

- "Cargo which is carried on the basis of the B/L shall be released by the carrier at the port of delivery upon provision of the original B/L;
- "Named" B/L – to the consignee named in the B/L or to the person to whom the B/L is endorsed upon full endorsement or in other form in accordance with rules provided for assignment;
- "Order" B/L – to the person to whose order the B/L is issued, subject to endorsements to the person referred to in the latest endorsement of the continuous series of endorsements, or to the bearer of the B/L with the last blank endorsement;
- "To bearer" B/L – to the presenter".

2. Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?

The holder of the original B/L shall be entitled to enforce its rights in relation to goods referred to in the B/L either against the carrier or the cargo (if it is placed to a warehouse / for custody).

Therefore assuming that the bank is a holder of a properly endorsed original B/L, the rights of the bank over the cargo and /or against the carrier shall be recognized.

The fact of the previous holder's administration and / or insolvency and / or liquidation as such shall neither be relevant to, nor be the obstacle for enforcement of rights under the B/L against the carrier. The previous holder may be liable before the bank for invalidity of the endorsement, but not for delivery (non-delivery) of cargo to the bank. Administrator and / or liquidator shall be deemed as the previous holder's (as insolvent party's) representatives, and so shall not be personally liable for debts / upon claims of whatever nature against their principal.

3. Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?

Russian law does not directly regulate issues related to the eB/L. In order that the eB/L be an enforceable instrument it shall comply with requirements for paperless securities. One of the main requirements (see comments in Generic issues above) is an obligatory registration of issuance of the eB/L, transfer (-s) of rights thereunder, etc. Registration shall be made by a third party, non-participant to carriage relationships.

For the moment eB/Ls have not become a common practice for Russian shipping market. Certain carriers (shipping lines) use so said electronic telex-releases (express-releases), which although having elements being analogous to B/L (specifically – order to release the cargo to a concrete person), cannot be however deemed as B/L (and eB/L particularly).

Considering that Russian shipping market gives preference to paper B/Ls, use of eB/L has not been tested by the court practice either.

4. Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?

Pursuant to Art. 158(1) of the Merchant Shipping Code (the "MSC") the carrier upon receipt of the original B/L shall release the cargo to:

- the consignee (under named B/L), or to a person to whom the B/L is endorsed under a named (full) endorsement or endorsed otherwise in accordance with assignment rules;
- the person to whose order the B/L or the person referred to in the latest endorsement of the continuous series of endorsements (under order B/L);
- to the presenter of the B/L (under the bearer B/L).

Although the MSC does not directly limit application of Art. 158 to paper B/L, it may be concluded that “*provision / acceptance of an original*” shall be possible only when the B/L is executed in hard copy.

It is to be noted that the MSC does not refer to eB/L at all. No provision excludes the use of eB/L (in the order established by the CC for paperless securities), but poses questions how the holder of an eB/L shall act to demand delivery of the goods.

Art. 143(6) of the CC envisages as follows: “*Unless otherwise is provided by this Code and the law, or arises from particularities of fixation of rights over paperless securities, such securities shall be regulated by the rules on named securities, and the holder of rights shall be defined in accordance with registered records*”.

It may be therefore concluded that eB/L shall be a named B/L, and the cargo can be released to the consignee only.

Having in mind that the only evidence of existing right of the eB/L holder shall be registration in respective records by an authorized and licensed third person, enforcement of the eB/L (enforcement of rights over the goods by the eB/L holder) does assume participation of the registrar in eB/L relationships – i.e. of an additional element in comparison with paper B/L. The order of dealing of the rights-holder, the carrier and the registrar, the form of confirmation of rights, the form of redemption of the eB/L are neither regulated by the law, nor clarified by court practice. In any case it is evident that the ways of enforcement of rights under paper and electronic bills of lading shall be different.

5. *Under the law of the local jurisdiction would the carrier’s acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank’s rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

In the sense of Art. 142 of the CC the eB/L shall be a paperless item of security provided that:

- rights under the eB/L are fixed in a decision on issuance or other act of the issuer of the eB/L and
- exercising and transfer of these rights shall be possible only in accordance with rules of registration of rights in accordance with Art. 149 of the CC (see comments in Generic issues above).

Registration of rights under paperless items of security shall be made by a person acting upon instruction of the issuer, or by a person acting on the basis of a contract with the right-holder or other person exercising rights over the security item in accordance with the law (Art. 149 of the CC). Registration of rights over the PS is a licensed activity, therefore the list of potential registrar shall constitute of professional participants of the securities market.

Therefore an acknowledgement of the carrier (in whatever form: by a contract or a message) shall not create the bank’s rights over the goods if the registration of rights is not properly made.

Another important issue (see also comments to Question 4 above) is that in the light of Art. 143(6) of the CC the eB/L shall be subject to rules on named (and not “to order”) securities papers. So, if the bank is not a consignee under the eB/L, transfer of rights over the goods to the bank may be made only under a named endorsement or otherwise in accordance with assignment rules (Art. 158(1) of the MSC).

If transfer of rights over the goods to the bank is properly made and registered, the previous holder of the eB/L shall not be entitled to claim release of goods in its favour. If it acts so, the records on registration and transfer of rights shall be the prima facie evidence of the bank’s rights over the goods.

An important reservation shall be made with regard to the above: these comments are based on comprehensive interpretation of the CC and the MSC general rules on securities and bills of lading; this has not been tested by the court practice.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion?*

Since direct regulation for eB/L does not exist in Russia, any comments with regard to converting of the eB/L to paper are no more than practical interpretation of general rules for the PS and the B/L.

The very first question shall be whether the “conversion” is allowed per se. The law provides no comments in this respect; therefore it may be assumed that this is allowed in so far as is not explicitly forbidden.

Further question which arises is whether the conversion means cancellation of the eB/L in the relevant registry. If yes, it is clear neither by which document the registrar’s functions shall be terminated; nor by which documents the carrier’s obligations to issue a “replacing” paper B/L shall be “resumed”. As regards the date issue, it would be logical that the effective date should be the date when the electronic record was created (the date of shipment / acceptance of cargo for carriage). However the law gives no answer in this respect.

Another set of questions appears if the eB/L record is not deleted / cancelled at the conversion. Whether such a “new” (“printed”) B/L can be deemed as original while the electronic record is saved? If yes – how the number of original B/L shall be defined? Pursuant to Art. 144(1(10)) of the MSC the B/L must contain a reference to the number of original bills of lading. If several original copies are issued by the carrier, each original copy shall clearly refer to the number of issued original copies (Art. 147 of the MSC). This is connected, inter alia, with the holder’s right to endorse the B/L. Parallel existence of electronic record and paper copy makes unclear the order of transfer of rights: while it requires registration by a specifically appointed third party as regards the eB/L, endorsements under paper B/L shall be made in writing by the B/L holder.

Lack of regulation and court practice makes provision of clear and definite comments on this question objectively impossible.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*
8. The above comments shall be applicable to both closed and open systems.

Russian procedural law and rules of main arbitration institutions do not limit the list of evidence. The evidence may be any paper, electronic documents, things, explanations of parties, expert opinions, witness statements, audio- and video-records, other documents and materials – all obtained legally.

With this in mind we see no obstacle to recognize the use of an eB/L in the Club system – provided that the court has paper evidence of such use (extracts from the closed system, witness statements, opinions, etc.).

9. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

The above comments are based on general provisions of the Civil Code of the RF on securities and on general rules of the Merchant Shipping Code of the RF on bills of lading, and shall be applicable also to the creation, validity and transfer of other negotiable instruments in electronic form.

Elena Popova  
[Elena.popova@smplawyers.ru](mailto:Elena.popova@smplawyers.ru)

"Sokolov, Maslov & Partners"  
17, Ulitsa Barklaya,  
121309, Moscow, Russian Federation

[www.smplawyers.ru](http://www.smplawyers.ru)

## Appendix 10: China

### Generic Issues:

- i. Please describe the legal status of electronic documents in your local jurisdiction with particular reference to documents used in international trade. (This will include bills of lading and may also include bills of exchange.)

#### Electronic documents generally

According to the PRC Contract law, the establishment of legal relations depends on the intention of the parties, which may be express or implied. In China, the effect and legal force of electronic contracts has been regulated in the PRC Electronic Signature Law.

Article 14 of the PRC Electronic Signature Law provides that:

*"A reliable electronic signature shall have equal legal force with handwritten signature or the seal."*

Article 16 the PRC Contract Law in effect confirms that an electronic contract is a valid form of the contract. Article 16 states (emphasis added):

*"An offer shall take effect when it reaches the offeree."*

*Where a contract is concluded through the use of **electronic documents**, and the recipient of the offer specifies the use of a particular system for the receipt of electronic documents, the time at which the relevant electronic document enters the said system shall be deemed to be the time at which the offer reaches the offeree; where the recipient has not specified the use of a particular system, then the first time at which the electronic document enters any of the recipient's systems shall be deemed to be the time at which the offer reaches the offeree."*

Alternatively, a contract may be concluded prior to transmission of electronic documents. Article 33 of the PRC Contract law reads (emphasis added):

*"Where a contract is concluded by correspondence or electronic documents, either party may, prior to the contract being concluded, request the signing of a letter of confirmation. Where this is the case, the contract shall be concluded upon the signing of the letter of confirmation."*

In summary, the PRC Electronic Signature Law confirms the legal validity of data and electronic documents, but the above legal provisions are based solely on paper documents that can be converted into electronic versions by electronic technologies. For example, if the parties agree that the bill of lading used for the carriage of goods may be transmitted in electronic format (such as pdf) the transmission of the B/L shall take effect on the date it is transmitted via the offeree's system.

However, Chinese legislation currently does not expressly recognise the legal concept of the eB/L as an electronic transferable record which has not been converted from a paper document. It is not certain whether both the original paper B/L and eB/L can equally give the holder equivalent rights.

#### Electronic Trading Systems in China

Chinese eB/L and/or electronic trading systems are based on the framework of eUCP. By cooperating with some reliable eB/L system suppliers such as Bolero and essDocs, Chinese banks are able to operate and accept eB/L in practice. According to the record of banks, the first attempt at operating an eB/L in China happened in 2013, when CITIC Bank cooperated with Bolero to deal with an international transportation business as an experiment. After that, some Chinese banks similarly tried to deal with business in eB/L by cooperating with eB/L system suppliers. However, most of these transactions were merely treated as an experiment because of the lack of legal protection in China. There is no exact definition of eB/L in Chinese legal system and Chinese government is not the member of any international conventions with rules recognising the eB/L. Therefore, the lack of Chinese legal protection of eB/L makes banks have to consider potential risks when accepting it as a document of title. Any party intending to operate with eB/L should

firstly negotiate with Chinese banks to ensure they are willing and able to provide the platform which is legally safe and reliable.

Moreover, the core question for eB/L is to prove that it can operate as a document of title and can be transferred so that the banks can hold it as security for finance to sellers or buyers. From the perspective of Chinese law, Chinese banks' concern of whether accepting eB/L depends on the following:

1. At present, Chinese-related laws do not have exact definition of "eB/L". The absence of legislation makes banks have to consider potential risks of whether hold eB/L as a security for trade finance. For example, Article 79 of the PRC Maritime Law states (emphasis added):

*"The negotiability of a bill of lading shall be governed by the following provisions:*

- a. A straight bill of lading is not negotiable;*
- b. An order bill of lading may be negotiated with endorsement to order or endorsement in blank;*
- c. A bearer bill of lading is negotiable without endorsement;"*

The above definitions of bill of lading are believed to refer to paper bills of lading and do not include eB/L under Chinese international transportation practice. This understanding can be inferred from the year of enactment of the PRC Maritime Law, which is 1993 when there was no established use of eB/Ls in international trade. Therefore, for the consideration of potential legal risks, the banks are unlikely to accept eB/L as a document of title and security.

2. To realise the potential benefits of eB/L, the exchange process selected by sellers, buyers, banks and carriers becomes crucial. In practice, the decision whether to use paper or electronic transmission of documents depends on the contract signed by parties. However, sometimes it is hard for those parties to understand which eB/L rules they should choose especially in China, which has no clear and exact regulations of eB/L to protect the interests of each party. On the other hand, the parties who want to choose eB/L for the transaction face a difficulty because they are relatively weak in negotiating with banks. The decision to use eB/L for a transaction in China is in effect made by banks. For contractual parties, to some extent, it would be more convenient to uniformly choose the traditional way - paper bills of lading – in order to obtain finance from Chinese banks.

- ii. *Please describe briefly the circumstances in which the courts of your local jurisdiction will apply the law of a foreign jurisdiction, for example if a relevant contract of carriage or a relevant financing agreement is subject to a foreign law.*

In China, regardless of whether it is a domestic contract or a foreign-related contract, party autonomy is generally regarded as a fundamental principle of contract and it is in the vast majority of cases duly respected by courts. As long as it does not violate the mandatory legal provisions, both parties to the contract can freely agree on the terms of the contract.

The PRC Law on the Application of Laws Concerning Foreign-related Civil Relations stipulates that the parties are free to agree to choose the law applicable (proper law) in the contract. Provided that there is no violation of the public interests of the Chinese society, the agreement on the application of the foreign-related contract law can be freely agreed by both parties according to the principle of autonomy of will.

The PRC Supreme People's Court's Interpretation on Certain Issues Concerning the Application of the Law Concerning Civil Relations Concerning Foreign Affairs further stipulates that

- if a party wishes to challenge the application of the law previously chosen by the parties, on the ground that there is no actual contact with the foreign civil relations, the Court shall reject the challenge;
- the People's Court shall permit the parties to agree to or change the choice of applicable laws before the end of the first instance court hearing.

It can be concluded that:

- 1) Mandatory provisions of Chinese law apply directly where there is a legally enforceable requirement;
- 2) The parties are free to stipulate proper law by themselves if there is no legally enforceable requirement ("Principle of autonomy of will");
- 3) Where the parties do not agree to apply the proper law, the court is free to apply according to the "principle of most significant connection".
- 4) If the parties have not made any express selection, the court may infer a choice from the contract and the surrounding circumstances at the time of the making of the contract.

Lastly, there are certain areas wherein the application of Chinese law is mandatory, for example the exploitation of natural resources within the territory of China, but such mandatory law will rarely be relevant to international trade transactions.

## Specific Questions

1. *Under the law of the local jurisdiction, is an original paper B/L a title document giving the holder the right to demand delivery of the goods described in that B/L?*

The status of a paper B/L as a document of title has been confirmed by the PRC Maritime Law, Article 71 of which provides that:

*"A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking."*

And Article 78 states:

*"The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading."*

Theoretically speaking, it could be said that in China, both the B/L and eB/L could be legally treated as a form of contract and document of title. Where a person becomes a lawful holder of the B/L, he has, by virtue of becoming the holder of the bill, transferred to and vested in him all rights of suit as if he had been a party to the bill of lading and will be entitled to demand release of the goods described in that bill of lading.

However, as mentioned above, there is no concept of eB/L in Chinese legal system. Even though there have been some experiments in the use of eB/L operated by Chinese banks, the initiative came from the banks in most circumstances. Any party considering using eB/L should negotiate with banks to confirm if the banks are able to provide eB/L service.

2. *Assuming that a bank becomes the holder of an original paper B/L (with full legal title or as a secured party) prior to the previous holder's administration, insolvency or liquidation, would the law of the local jurisdiction recognise the rights of the bank so that the bank can enforce its rights under that B/L either against the carrier in relation to goods located in the local jurisdiction or against an administrator or liquidator of the previous holder?*

According to the Article 71 of the PRC Maritime Law, the B/L is a document of title. That is to say, the rightful holder of the B/L can require the carrier to deliver the goods to them. When a B/L is held by a bank, that bank will then have a proprietary right over the goods. Whilst the precise nature of the bank's right – whether it is absolute ownership or only a form of security – is a debatable issue in China, the banks are able to require carriers to deliver the goods to them as a matter of law and practice.

If a seller goes insolvent after the goods are shipped and a bank receives the B/L, as a matter of Chinese law, the bank will have no claim against the liquidator or administrator. This is because under Chinese law, a seller's principal obligation under a contract of sales of goods – to deliver the goods – is deemed properly discharged once the goods are shipped. The title to the goods passes to the buyer when the goods are delivered to the first carrier; in case of sales by way of a B/L, the seller is deemed parted with ownership when the B/L is negotiated in exchange for the cargo price. It follows that, when the B/L is in the hands of



the bank, the seller no longer has title to the goods and the liquidator / administrator will have no right to demand the return of the goods or the B/L.

3. *Is the law of the local jurisdiction familiar with electronic B/Ls such that these eB/Ls enjoy the same legal status and are as capable of being enforced as paper B/Ls, whether by statute, binding case law or otherwise?*

As mentioned in item (i) of the Generic Issues, Article 14 of the PRC Electronic Signature Law and Article 16 of the PRC Contract Law have in principle confirmed the same effects of paper B/L and eB/L and they enjoy the same legal status, in theory. However, it is not clear whether Article 79 of the PRC Maritime Law governs an eB/L.

4. *Under the law of the local jurisdiction, would the holder of an eB/L be able to enforce a right to demand delivery of the goods described in that eB/L from the carrier in the same way that a holder of a paper B/L would be?*

If the eB/L is issued by the carrier, there is no barrier under Chinese law for the holder of such an eB/L to enforce a right to demand delivery of the goods described therein against the carrier. But such practice, if any, is rarely heard of. As stated above, it is not clear whether Article 79 governs an eB/L.

5. *Under the law of the local jurisdiction would the carrier's acknowledgement (by contract or specific electronic message) that the goods are held to the order of the bank, be sufficient for the bank (as holder of the eB/L) to require the carrier to deliver the goods to its order? Would the bank's rights against the carrier be defeated by a competing claim for the release of the goods from an administrator or liquidator of a previous holder of the eB/L?*

This is a very complicated issue and much litigated because there are different understandings of a paper B/L's function when it is in the hands of a bank. It is therefore not possible to give a short answer in relation to an eB/L.

6. *Under the law of the local jurisdiction, would the conversion of an eB/L into a paper B/L result in a paper B/L that has the same legal status and force and effect as if it were issued in paper form on the original date of issuance or would the converted paper B/L take effect and come into existence as a paper B/L from the moment of conversion.*

In accordance with the Electronic Signature Law of the People's Republic of China, the holder of the converted paper bill of lading should have the same rights as if it was issued in paper form on the original date.

7. *If any answers to questions 3-6 above would be applicable only to a closed system where all parties have signed a central contract, please state to what extent your answers would be different if the eB/L was in use under an open system with no central contract between the relevant parties.*

As far as we know, no Bolero contract (or similar arrangement) has been litigated in China. However, Chinese judiciary has recently been quite innovative and willing to embrace new technologies. For example, an internet court, said to be the world's first, was set up in 2017 which is dedicated to entertain disputes arising from internet, cf: [http://www.chinadaily.com.cn/china/2017-08/18/content\\_30770108.htm](http://www.chinadaily.com.cn/china/2017-08/18/content_30770108.htm). As such, we believe that, if the modus operandi of Bolero or its like is well explained to the court and understood by the judges, there is a real prospect that the court will recognise its contractual force, provided that the essential requirement of the formation of contract under Chinese law, i.e. an agreement of the parties' true intention, is met.

It is not possible to be certain how the Chinese court would view the position if the parties had not signed a central contract.

8. *Where any of your analysis also applies more broadly to the creation, validity and transfer of negotiable instruments in electronic form please note this in your reply.*

The above analysis should be applicable to other negotiable instruments in electronic form (save as to those provisions which are specific to Bills of Lading, such as delivery of cargo, etc).

Ik Wei Chong

[ikwei.chong@clydeco.com](mailto:ikwei.chong@clydeco.com)

Samuel Yang

[samuel.yang@clydeco.com](mailto:samuel.yang@clydeco.com)

Clyde & Co

Level 23 - Shanghai Two IFC, 8 Century Avenue,  
Shanghai, 200120, China

[www.clydeco.com](http://www.clydeco.com)

## About the Authors

### **Stephen Tricks** **Consultant, London** **Clyde & Co**

Stephen Tricks is an English lawyer. He was a partner at Clyde & Co LLP for over 25 years and is now a consultant with the firm. His practice is focused on international trade and commodities, and in particular on trade finance. Stephen advises companies and banks on letters of credit, standbys, demand guarantees, letters of indemnity, sale contracts, carriage contracts and insurance.

Stephen lectures regularly on trade finance issues at conferences for the International Chamber of Commerce and other organisations. He is a member of both the Legal Committee and the Guarantees Task Force of the ICC Banking Commission. He is also a member of the ICC UK Committee on Banking Technique and Practice.

Stephen is author of A Practitioner's Guide to Demand Guarantees published by the London Institute of Banking & Finance (2017).

### **Robert Parson** **Partner, London** **Clyde & Co**

Robert is a Partner at Clyde & Co with a strong reputation as a trade finance specialist.

Robert focuses on commodity and trade finance law, structuring deals and complex cross-border financing arrangements for many of the world's major banks, traders, exporters and other participants in the global trade market. He is frequently called upon to advise in the default and restructuring of complex, cross-border trade financings and payment instruments.

Robert has also acted in some of the most significant and innovative trade and commodity finance transactions in recent years and advises on a number of projects in the digital trade and trade finance space.

Robert is editor of Finance & Credit Law, is a member of the editorial board of Global Trade Review and is named in the Hall of Fame in the current edition of Legal 500 and in Chambers Directory as a leading individual in Trade Finance.

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