



UNCITRAL Webinar  
Dematerialized Negotiable Transport Documents:  
Industry & Regulatory Responses

# 1. Introduction

## Digital Trade

- The world is digitizing at an unprecedented rate – and even shipping & trade are now catching up ...
- Pandemic has triggered a massive acceleration of digital trade, estimated at speeding it up by 5-10 years (source: ICC)
- Electronic Bill of Lading penetration rates vary depending on mode:
  - <0.1% for liner (source: DCSA)
  - Up to 60% in some key metals and minerals markets (source: essDOCS)
- Legal uncertainty still cited as a blocker to broader adoption
  - Contractual legal frameworks are still key enablers of digital trade
  - Enaction of UNCITRAL Model Law by States critical to overcoming legal uncertainty

## 2. Contractual Frameworks & Enabling Legislation

### Overview

- Multipartite contracts which replicate the rights and obligations which apply (by law) to paper bills of lading
  - These contracts only regulate functional equivalence by providing the legal mechanism through which an eB/L gives the carrier/holder/end receiver the same rights (and obligations) as they would have at law under a paper bill
  - They do so by creating a club of users who all contractually agree with each other that they will treat the eB/L as the equivalent to paper: making it critical that each participant in the 'club' has validly signed the legal framework.
- National legislation such as the Singapore Electronic Transactions (Amendment) Act and the US Uniform Commercial Code ensure functional equivalence by legislative fiat
- So how can the contractual frameworks and national enabling legislation work together in the field of international trade?

## 2. Contractual Frameworks & Enabling Legislation Challenges

- By definition, international trade is cross-border
  - So, enabling legislation in one jurisdiction (US or Singapore) does not mean that an English law governed eB/L used in a trade from the UK to Spain financed by a Swiss bank and issued by a Greek ship operator will be enforceable
  - Disputes involving the bill can arise in a number of different ways (at discharge, under financing arrangements, etc.) in different jurisdictions and under different contractual relationships
  - There remains a need for contractual frameworks to support eB/Ls until [enough/the majority/certain key\*] trading nations have adopted the equivalent of the Model Law on Electronic Transferable Records or eB/Ls are sufficiently broadly adopted that they become custom of the trade...
    - \* Delete as appropriate, there will be many views on which of these is correct
  - How long could that take...?

## 2. Contractual Frameworks & Enabling Legislation

### Challenges (cont.)

- Can eB/L providers rely on national legislation such as the Singapore Electronic Transactions (Amendment) Act 2021 under their contractual frameworks?
  - Novation and Attornment is the legal mechanism used by the majority of eB/L providers to create functional equivalence
  - Rationale is that we do not want to rely on one nation's laws to create functional equivalence, i.e. by saying our eB/Ls are valid because US law says they are, as it is considered that this approach is more likely to be rejected by a foreign court
  - Instead, we use legal tools (novation and attornment) to contractually recreate rights and obligations, as these tools are broadly recognised in a large number of jurisdictions, and therefore they are less likely to be rejected by local laws
  
- However, there is a way that national enabling legislation and contractual frameworks can work together to provide greater certainty and therefore promote broader adoption

### 3. Legislation & Contractual Frameworks Working Together

## Interplay between Legislation & Contract

- The essDOCS legal framework, the DSUA, has always had a dual mechanism:
  - The Uniform Commercial Code in the US has recognised eB/Ls since 2003
  - Our 2009 IG-approved DSUA provided that, if an eB/L is governed by US law, transfer of title shall pass in accordance with US law, not novation & attornment
  - In all other cases (i.e. eB/Ls governed by any law other than US law) novation and attornment is used to pass rights and obligations through the trade chain
  
- This has now been extended to cover Singapore:
  - On 12 April 2021, the IG approved an updated version of the DSUA, which provides that if an essDOCS eB/L is governed by Singapore law, the Electronic Transactions (Amendment) Act will apply to the transfer of rights and obligations under the eB/L (not novation and attornment)
  - In addition, Singapore was added as a possible jurisdiction in which claims can be brought under the DSUA (in addition to the courts of England and New York)
  - The updated DSUA (2021.1) is now going through a User review process before becoming the effective version in the coming weeks

## 4. Conclusion

# Conclusions



- The UNCITRAL Model Law is the key to overcoming legal uncertainty and enabling legal interoperability of Electronic Transferable Records solutions
- The pandemic means that governments are looking at implementing legislation as a priority
- Contractual frameworks can and should work together implementing legislation, until such time as they are no longer required because eB/L are broadly recognised at law

essDOCS  
Propelling Paperless Trade

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