



International Trade
and Forfeiting Association

2023 Addendum to the

ITFA DIGITAL NEGOTIABLE INSTRUMENTS INITIATIVE HANDBOOK

In the second edition of our Guide to Digital Negotiable Instruments published as part of our DNI Initiative in 2021, we drew attention to the drop in global GDP, as recorded by the United Nations, following the Covid-19 Pandemic and the role that the digitalisation of trade documentation had to play in the recovery.

In 2023, similar problems persist. The Asian Development Bank has, just before this addendum was published, reported an increase in the global trade finance gap from \$1.7 trillion in 2020 to \$2.5 trillion in 2022ⁱ. It also highlights, as we have done, the role that the digitalisation of trade has to play in the reduction of this gap.

A major factor in enabling this change is legal reform. And major advances have occurred.

We foreshadowed one critical piece of legislation that was needed to promote legal certainty in the digitalisation of global trade. English law, because of its prevalence as the governing law of choice for the majority of global trade documentation, needed to be amended to allow documents such as bills of lading, bills of exchange and promissory notes to be created in digital form.

On 20th July 2023, the UK Parliament passed the Electronic Trade Documents Actⁱⁱ (ETDA) which became effective on 20th September 2023.

The passage of the ETDA followed lobbying by the trade associations, including ITFA, and the trade finance industry to government, and discussions with the UK Law Commission. It follows the enactment in a number of countries of what could be termed the ETDA's international counterpart, UNCITRAL's Model Law on Electronic Transferable Records (MLETR)ⁱⁱⁱ which it resembles, at least in its effect, in a number of key areas.

The combined effect of ETDA and MLETR marks a major turning-point in trade digitalisation and has the ability to revolutionise trade and trade finance and logistics.

It is important to note that ETDA simply allows qualifying paper trade documents to be created in digital form; all other applicable laws and rules are unchanged.

The industry is therefore able to follow conventional forms and templates with some adjustments to accommodate certain features and consequences of the ETDA

Delivery channels for digital trade assets will necessarily be different from paper and some implications are noted in this paper.

In particular the need for a “reliable system”^{iv} to ensure that digital trade assets in the form of electronic records qualify under the ETDA (a pre-condition to eligibility as an electronic trade document) is currently causing some concerns.

ITFA is working with ICC UK and the Centre for Digital Trade Innovation in the UK to produce a certification or approval system, but this will take some time before it is established in satisfactory form.

The Law Commission report, which led to the ETDA, argues that the need for a reliable system is to promote certainty. It draws attention to various private and associational initiatives, which would include this handbook and the standards and

i 2023 Trade Finance Gaps, Growth, and Jobs Survey (ADB Brief 256)

ii Electronic Trade Documents Act 2023 (legislation.gov.uk)

iii UNCITRAL Model Law on Electronic Transferable Records (2017) | United Nations Commission On International Trade Law

iv Section 2 of ETDA and Articles 10-12 inclusive of MLETR.

templates it contains, as exemplars of reliable systems or components of it.

Existing and future service providers are held to extremely high standards when onboarded by financial institutions and others and, as the Law Commission recognises, commercial expectations mean that the best solutions will always be sought.

It is ITFA's view that the ETDA has not created a new or higher set of reliability standards than respectable systems providers have been observing to date. The factors set out in Section 2(5) ETDA are well known and reflect long-standing good practice. Many standards, such as the ones set out in this document and previous editions of the Handbook in relation to financial negotiable instruments, have been followed by providers and users. It should be noted that, although reliability is ultimately a legal matter under the ETDA, the routes to proving reliability draw very much on technical and industry standards.

Nevertheless, in this transitional period some interim strategies are set out in this addendum to ease the change.

In Part 1, we set out some suggested additions to digital negotiable instruments. By this, we mean legally valid, digitally created negotiable instruments as now permitted by ETDA and not the ePU set out in previous edition of this handbook. See, however, the note concerning the continuing use of ePUs in Part 1.

These additions are:

- A governing law and jurisdiction clause to ensure the document falls within the scope of the ETDA and the coverage of the English courts
- A conversion from paper clause where this is needed^v
- Agreement between the parties that the system used to create/register the digital asset is a reliable system for the purposes of ETDA. As explained further in Section 1, this operates as a private agreement which is designed to prevent the obligor under the instrument from denying to the holder recognised by the system used that the system is a reliable system under ETDA
- An undertaking by the issuer/drawee to make payment to the then holder of the instrument
- A provision allowing new holders to have rights under the instrument.

All the footnotes should be carefully read as these contain important information, including discussion of some of the factors which may induce market participants to use a particular option.

In Part 2, we set out some new dDOC standards principally centred on reliability. The new standards are shown in red against the original standards for ease of reading.

These are:

- Ability to prove reliability of the relevant system in a legally satisfactory manner
- Ability to present digital instruments for payment under, or through, the system
- Need to evidence instructions given by holders so as to transfer or cause a transfer of the digital instrument, and to act as an auditable record of transfer

The benefits of digitising trade documents are widely recognised. This addendum is ITFA's contribution to achieving that goal and help overcome some short-term problems.

^v As required by Section 4 ETDA. Note that it is the new document which must contain this wording so a paper document converted from a digital document would need this wording.

Market participants who wish to trade in digital financial instruments should note the existence of ITFA's Uniform Rule for Transferable Electronic Payment Obligations.

ITFA is again grateful to Geoffrey Wynne of Sullivan & Worcester for drafting the additions to Part 1 and to André Casterman of Casterman Advisory for the additional dDOC standards.



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Nothing in this Addendum constitutes legal or commercial advice and none of ITFA, Sullivan & Worcester and Casterman Advisory assume any responsibility for doing so.

Part 1

The following are suggested additions to any bill of exchange or promissory note in digital form.

Whether or not an ePU, as explained in the ITFA DNI Handbook, would qualify as a trade instrument under the ETDA is not definite. It is the view of ITFA that it currently is not and therefore provides an alternative, where needed, to an ETDA-compliant digital negotiable instrument and therefore does not need to satisfy the requirements of the Act e.g. as to formal proof of reliability.

1. Governing law

The laws of England shall govern this [], its interpretation and any non-contractual obligations arising from or connected with it.

Note: Section 8(1) of the ETDA extends to England and Wales and Scotland and Northern Ireland (except that section 3(4) only extends to Scotland). On the basis of Section 8(1) in order for the relevant electronic trade document to benefit from the benefit of the ETDA, users should ensure that the instrument indicated the applicable law as English law.

2. Jurisdiction (if required)

The English courts shall have exclusive jurisdiction over any dispute or claim arising from or in connection with this [] or any non-contractual obligations arising from or connected with it.

Note: This language is only required when the parties would like the applicable jurisdiction to apply in case of a dispute to be the courts of England and Wales.

3. Reliable System

The [Issuer/Drawer/Obligor] and the [Holder] agree for the benefit of themselves and any subsequent [Holder] of this [] that the [relevant system] constitutes a “reliable system” for the purposes of the Electronic Trade Documents Act 2023 and they agree not to challenge it being a reliable system for the purposes of the Electronic Trade Documents Act 2023.

Note: This allows parties to the instrument, including transferees, to agree between themselves that a system is reliable for the purposes of the ETDA and hence avoids any legal argument over this issue. This should not encourage suppliers to adopt or sell systems that cannot be demonstrated to be reliable and this wording is not designed to avoid satisfying the technical and legal criteria set out for reliability in the ETDA.

4. Third Party Rights

A person who is not a party to this [] has no rights under the Contract (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this other than the [Holder] for the time being of this [] who shall be entitled to enforce and enjoy the benefit of this [].

5. Payments to Accounts

The [Issuer/Drawer/ Obligor] agrees for the benefit of the [Holder] and each subsequent holder of this [] that it, irrevocably and unconditionally agrees to pay the [Holder] to the following account (or to such other account as notified to the [Issuer/Drawer /Obligor] by the [Holder] or any subsequent holder for the time being for this purpose from time to time on [] Business Days' notice):

Account Bank: [***]
Account number: [***]
Sort Code: [***]
SWIFT/IBAN number: [***].

6. Conversion to Paper

This [] previously existed in [paper/ digital] form and has been converted into [digital/paper] form [on [description of system]], the previously existing form ceases to exist as of the date it was converted, this being [DATE].

Note: The reason for a change of medium to be permissible under ETDA is to ensure that in cross border transactions, the instrument is still valid and/or useable e.g. for presentation to port and tax authorities. This is particularly relevant in jurisdictions where electronic instruments are not recognised. In general, ITFA does not recommend that documents created in one form be converted to another as there is a risk of concurrent copies especially where it is difficult to completely extinguish or destroy the previous version. It can also be a logistically difficult process to manage.

Part 2

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2.4 Principles and requirements of dDOCs

2.4.1 Principles of the dDOC specifications

In order to achieve the benefits highlighted above, the dDOC specifications have been designed with interoperability and portability in mind. As such, dDOC-compliant document technology is able to demonstrate:

1. Openness to any document format
2. Openness to any financial institution and type of client (e.g., SMEs)
3. Openness to any third-party trade platform (e.g., bill of lading platform)
4. Compatibility with any communication channel (e.g., e-banking, SWIFT)
5. Support for structured data, free text, or binary image within the document
6. Ability to track the document lifecycle through a public register
7. A natively digital design (i.e., no use of paper)
8. Compliance with data privacy laws (e.g., full protection and control of client data).
9. Reliability by satisfying applicable legal criteria in a way suitable for the system in question and the types of instruments processed by it or to resolve this requirement in an alternative, legally robust manner
10. Existence of an effective means to present financial negotiable instruments for payment using the relevant technology
11. Existence of an effective means to transfer, or cause the transfer of the financial negotiable instruments from one holder to another

Requirement 3: Digital notary using DLT

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In addition to the digital original, the DL verifying the state and holder of the digital original must:

1. function as an incorruptible cryptographic assurance utility with central governance using a distributed block-chained ledger. This ledger must be continuously and independently validated and approved by its participants;
2. be publicly accessible to any holder of a digital original or anyone holding a copy of a digital original;
3. be associated with a uniform resource locator (URL) where any person or organization can manage and receive a digital original; and
4. be auditable via a detailed and complete audit trail of any change applied to the document.

Requirement 4: Technology integration and data storage/privacy

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The document technology solution should also:

1. be operationally and technically compatible with integrations for existing and future front-to-back office practices, processes, systems (e.g., digital document processors / booking systems/platforms) and channels (digital couriers e.g., file transfer protocol (FTP), electronic banking internet communication standard (EBICS), SWIFT, e-banking);
2. ensure that all business data stays in the digital container and no business data is, through the underlying technology, shared in any central register or in the associated DL;
3. be a utility where participants using negotiable instruments and documents of title can share a common trust in the truth of what an original document is, what the current version of an original document is, and who the current holder of an original document is;
4. enable the original document and its referred attachments and the secret private ownership key to be stored anywhere the holder sees fit, using a storage technology with security measures deemed appropriate by the holder; and
5. offer the ability for parties to confirm their agreement on the reliability of the technology being used to process dDOC documents.

