NUS Centre for Maritime Law Working Paper 23/07

NUS Law Working Paper 2023/020

THE USE OF INSURANCE DOCUMENTS IN INTERNATIONAL TRADE – ENABLING DIGITALISATION

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[Uploaded August 2023]

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ABSTRACT

For the past few years, work has been underway to harness emerging technologies such as blockchain, smart contracts, the Internet of Things (IoT) and Artificial Intelligence (AI) within the insurance industry. The technologies can be harnessed to digitalise cargo insurance documentation. However, one of the barriers to adopting and using digital alternatives is the legal framework governing this documentation and its use in transactions. Focusing on the UK jurisdiction and the marine insurance market in London, this paper argues that legal reform may be required to enable effective technological innovation when digitalising transactions in the cargo insurance space. The paper also discusses a recent law reform initiative, namely the Electronic Trade Documents Act 2023, commenting on how it may achieve the necessary enabling effects.

Keywords: Cargo insurance, marine policy, insurance certificate, blockchain, digitalisation, Electronic Trade Documents Act, automation, assignment, insurable interest, insurance claims processes

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1 Introduction

Trading in goods across borders is a high-risk activity that would be significantly impeded if not for insurance products, whereby these risks (or a portion of them) are transferred to a third-party insurer. While in recent years, there has been a drive to harness technologies promoting innovation within the insurance industry and across other sectors supporting international trade (including transport and finance), international trade activities continue to rely heavily on paper documents for the information required to support transacting.

Relying on paper documents is inefficient and not without its risks, as has been demonstrated by disputes that have played out in the courts in recent years,[1] and there has been a drive to harness emerging technologies to digitalise the information supply chain underpinning international trade in goods.[2] It has been proposed that certain of these technologies, including distributed ledger technology (DLT) or blockchain, the Internet of Things (IoT), smart contracts technology and machine learning and Artificial Intelligence (AI) can also be helpful in the cargo insurance context, in particular when it comes to claims notification, handling and settlement.[3]

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1 See, eg, *ABN Amro Bank NV v Royal and Sun Alliance Insurance plc* [2021] EWCA Civ 1789, [2022] 1 WLR 1773; *Quadra Commodities SA v XL InsuranceCo SE* [2022] EWHC 431 (Comm), [2022] 2 Lloyd's Rep 541.

2 For a good general overview see Ziyang Fan et al, *The Promise of TradeTech: Policy Approaches to Harness Trade Digitalization* (World Economic Forum and World Trade Organization 2022) <https://www.wto.org/english/res_e/publications_e/tradtechpolicyharddigit0422_e.htm> accessed 30 June 2023.

3 See, for example, N Mavrias and M Lin, 'Blockchain: Some Potential Implications for Marine Insurance' *Standard Bulletin* (March 2018) 6-7, <https://www.standard-club.com/fileadmin/uploads/standardclub/Documents/Import/publications/bulletins/split-articles/2018/2678970-blockchain-some-potential-implications-for-marine-insurance.pdf> accessed 28 June 2023; M Goldby et al, 'Triggering Innovation: How Smart Contracts Bring Policies to Life', Lloyd's Emerging Risk Report 2019: Understanding Risk (Lloyd's of London 2019) <https://www.lloyds.com/news-and-risk-insight/risk-reports/library/technology/triggering-innovation> accessed 28 June 2023, esp. 24-25; W Yong, 'Is Artificial Intelligence Relevant to Insurance', IBM Blog, 1 May 2023, <https://www.ibm.com/blog/is-artificial-intelligence-relevant-to-insurance/> accessed 28 June 2023; A Clere, 'Using AI to Improve the Insurance Experience for Good', InsurTech, 11 May 2023, <https://insurtechdigital.com/articles/using-ai-to-improve-the-insurance-experience-for-good> accessed 28 June 23; Insurance Europe, 'AI in the Insurance Sector' (November 2021), <https://www.insuranceeurope.eu/publications/2608/artificial-intelligence-ai-in-the-insurance-sector/> accessed 28 June 2023, esp 4; R Maull et al, 'Taking Control: Artificial Intelligence and Insurance' Lloyd's Emerging Risk Report 2019: Technology, (Lloyd's of London 2019) <https://assets.lloyds.com/assets/pdf-taking-control-aireport-2019-final/1/pdf-taking-control-aireport-2019-final.PDF> accessed 28 June 2023, 42.

One of the barriers to adopting and using digital alternatives is often the legal framework governing this documentation and its use in transactions. With a focus on the UK jurisdiction and the marine insurance market in London, this paper discusses to what extent legal reform may be required to enable effective technological innovation when digitalising transactions in the cargo insurance space. The paper analyses the UK Electronic Trade Documents Act 2023, commenting on how it may achieve the necessary enabling effects.

2 Marine insurance documents

Marine insurance documents come in two primary forms: policies and certificates. Marine policies are not explicitly defined in the Marine Insurance Act 1906. However, reference is made in the Act to the form of policy found in the Schedule to the Act, namely the SG form, which after centuries of use, became defunct in the 1990s, making this part of the Schedule something of an anachronism.[4] Other provisions of the Act provide that a policy must fulfil the following formal requirements: it must identify the assured, or 'some person who effects the insurance on his behalf'[5] and be signed by the insurer.[6]

Present-day marine policies in the London Market are issued mainly in the MAR 91 form (formally issued policies)[7] or simply using the Market Reform Contract (MRC) form, which legally may be able to function as both a slip and a policy under the Act.[8] Both formal policy documents and MRCs are often in electronic form.[9] Centralised facilities for electronic issue are available in the London Insurance Market, a subscription market.[10]

MIA 1906, s 22, a leftover from now-defunct stamp duty legislation, provides that the policy is the only admissible evidence of the existence of an insurance contract. This is another

4 Law Commission of England and Wales and Scottish Law Commission (hereinafter, 'Law Commissions'), *The Requirement for a Formal Marine Policy: Should Section 22 be Repealed?* Reforming Insurance Contract Law Issues Paper 9 (October 2010) <https://www.lawcom.gov.uk/project/insurance-contract-law/> accessed 30 June 2023, para 5.33.

5 MIA 1906, s 23(1).

6 Ibid, s 24(1).

7 See discussion in M Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (2nd edn, OUP 2019) para 7.12.

8 Ibid, paras 7.17-7.18.

9 Ibid, paras 12.09 and 12.18.

10 Ibid, para 8.29.

anachronistic provision in the Act which had the purpose of disincentivising tax evasion.[11] While it remains on the statute book, it is essential that documentation issued by the industry be recognised as constitutive of a policy by the courts.[12]

The documentation used for Hull and Machinery (H&M) policies differs from that used in cargo cover. Most cargo cover is placed on an open cover basis, whereby the contract establishes uniform terms that will cover declared shipments over an agreed period (usually one year). Assureds that require cover of individual shipments to be documented to be able to tender an insurance document to their buyer or present it to a bank[13] are issued a cargo insurance certificate covering the specific shipment.[14]

Insurance certificates can be of two distinct types. They can either be documents issued by an insurance broker, certifying that the broker had taken out insurance on behalf of the insured,[15] or they can be issued directly by the insurer (sometimes referred to as 'American certificates').[16] Cargo insurance certificates tend to be of the latter type and to be issued by a declaration under (often facultative-obligatory)[17] open cover agreements. As such, they import a direct contractual nexus between the assured and the insurer and document the latter's rights against the former.

Electronic cargo insurance certificates are widely used in international trade transactions, typically administered over insurers' portals or using platforms such as QuickAssure,[18] which is ubiquitous in the London market. In the London Market, Lloyd's Agency[19] used to administer the issuance of cargo insurance certificates under the Insurance Certificate

[11] Law Commissions (n 4), paras 2.1-2.20.
[12] Ibid, paras 2.21-2.22.
[13] As discussed below, section 5.
[14] Goldby (n 7), paras 7.13-7.14.
[15] Ibid, para 7.20.
[16] Ibid, para 7.21.
[17] Ibid, para 7.14.
[18] World Assurance, *QuickAssure*, <http://www.worldassurance.com/quickassure/> accessed 28 June 2023.
[19] Lloyd's Agency Network <https://www.lloyds.com/resources-and-services/lloyds-agency-network> accessed 28 June 2023.

Byelaw.[20] However, this service has been discontinued, and the Lloyd's Certificate Office closed. Guidelines[21] are available for issuing Lloyd's branded certificates.

The byelaw itself has not yet been repealed at the time of writing. While there is no longer any need for much of its content, which pertains to the role of the Society and Lloyd's Agency, there are still certain provisions which may remain relevant to the issue and use of Lloyd's branded cargo insurance certificates. These are Rule 4, which provides safeguards against unauthorised alterations of issued certificates; Rule 5, which confers on the certificate holder a right to have the certificate replaced by a formal policy document and Rule 6, on brokers' obligations towards underwriters. The power to make regulations and rules conferred on Lloyd's Council under Rule 8 might also need to be partially preserved to maintain control over branding.

To be clear, there are no instances of which the author is aware where resort to these rules was had or needed, so these issues may not be ones which, in practice, require to be formally provided for in a byelaw. However, the Rules provide a framework to resolve such issues should they arise. Preserving the right in Rule 5 might be particularly important because, as indicated above, under MIA 1906, s 22, the certificate holder might require a policy.[22]

3 The notion of the assignable document: assignment by transfer of the document itself

3.1 Assignment of policy

A feature of marine policies is that the document itself (as distinct from the rights under the marine insurance contract it evidences) is assignable. Assignment of the policy document itself is provided for by MIA 1906, s 50.[23] A marine policy is assignable unless its terms

[20] Insurance Certificates Byelaw No 1 of 2006 (15 February 2006) <https://assets.lloyds.com/assets/pdf-insurance-certificates-byelaw/1/pdf-insurance-certificates-byelaw.pdf> accessed 28 June 2023.

[21] Lloyd's Marine insurance certificates – guidelines for use of the Lloyd's brand, v3, September 2021, <https://assets.lloyds.com/media/3752e11e-bbb9-4f05-9f6a-d67311ea786b/Lloyd's-Marine-Insurance-Certificates_guidelines.pdf> accessed 28 June 2023.

[22] See text to n 11 and n 12.

[23] MIA 1906, s 50(1).

expressly prohibit its assignment[24] and may be assigned before or after the loss occurs.[25] Where the policy is assigned, the assignee may sue on the policy in its own name and obtains better rights than it would have obtained from the legal or equitable assignment of contractual rights because when the policy itself is assigned, the insurer may raise only defences that it would have been entitled to raise if the action had been brought in the name of the person by, or on behalf of whom, the policy was effected if those defences arise out of the contract itself (including any defences relating to an alleged breach of the duty of fair presentation at the time of formation of the contract).[26] For the assignment to be effective under s 50, the entire interest must be assigned because the expression 'beneficial interest' in s 50(2) is taken to mean the *whole* beneficial interest.[27] Under s 51, assignment must take place before or concurrently with the transfer of the assignor's interest in the subject matter insured, otherwise, the assignment is not operative.[28]

MIA 1906, s50(3) provides that assignment may be by indorsement on the policy or other customary manner. Indorsement requires the transferee's signature or that of someone authorised to act on its behalf. The cases on the effectiveness of an assignment of the policy in the absence of such an indorsement are conflicting,[29] and the result is likely to depend on proving that the method used in the relevant case is a 'customary manner' of assignment (although if this is not proven, an assignment in equity may still be found to have occurred).

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[24] It is unclear whether this has effect only as between the assignee and the insurer, or also as between the assignee and assignor. See H Bennett, *The Law of Marine Insurance* (2nd edn, OUP 2006) paras 20.27 and 20.28.

[25] MIA 1906, s 50(1). The buyer must pay the seller against tender of compliant documents, even if the goods are lost or damaged prior to arrival at destination: see Goldby (n 7) para 3.05. For this reason, it is essential that the policy is capable of being assigned also after loss.

[26] MIA 1906, s 50(2). See also *Barker v Adam* (1910) 15 Com Cas 227. An example of a defence arising out of the contract is non-disclosure of material facts by the assured at the time the contract is entered into (*William Pickersgill & Sons Ltd v London & Provincial Marine & General Insurance Co Ltd* [1912] 3 KB 614) or any breach of the duty of utmost good faith, or fraud on the part of the original assured (*Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437, 519). See also *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (The Ioanna) (No 1)* [1924] AC 294 (HL), 297; cf *P Samuel & Co Ltd v Dumas* [1924] AC 431 (HL), in which the mortgagee was a party to the policy in his own right, rather than an assignee.

[27] *Williams v Atlantic Assurance Co* [1933] 1 KB 81 (CA), 100; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC (The Mount I)* [2001] QB 825, [72]. Note, however, that a partial interest may be assigned in equity. See *The Mount I*, ibid, [83].

[28] See *Powles v Innes* (1843) 11 M&W 10; *North of England Oil Cake Co v Archangel Maritime Ins Co* (1875) LR 10 QB 249 (Div Ct).

[29] See *Barker* (n 26); *Safadi v Western Assurance Co* (1933) 46 Ll L Rep 140, 144; *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The Angel Bell)* [1979] 2 Lloyd's Rep 491, 497.

The question here is whether, to prove this, the court must be satisfied that the relevant custom is 'reasonable, certain and notorious',[30] rather than simply that a prevailing trade practice be proved.[31] The British Insurance Law Association (BILA) has expressed an opinion that the latter should at least arguably be sufficient[32] and, given this, expressed concern at the Law Commissions' proposal to retain the word 'customary' within s 50(3) in the intended reforms to MIA 1906,[33] although these reforms have not to date taken place. The Association added that its concern was that the retention of the word would prevent the achievement of the intended result of the reform, which 'is to allow assignment in modes which the market practice now regards as acceptable'.[34]

The assignability of the policy itself was 'designed to respond to the demands of international sale of goods contracts, especially on CIF terms',[35] but in practice, it is the cargo insurance certificate that now performs this particular function.

3.2 Assignment of a certificate

Cargo insurance certificates have been used for over 100 years and were designed by the insurance industry specifically for use in international sales of goods.[36] As such, they were

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30 See *Devonald v Rosser & Sons* [1906] 2 KB 728 (CA), 743.

31 See *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856 (CA), 874 (Slade LJ): 'There is, however, the world of difference between a course of conduct that is frequently, or even habitually, followed in a particular commercial community as a matter of grace and a course which is habitually followed, because it is considered that the parties concerned have a legally binding right to demand it. As Ungoed-Thomas J pointed out in *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438: "What is necessary is that for a practice to be a recognised usage it should be established as a practice having binding effect."'

32 Law Commission of England and Wales and Scottish Law Commission, *Insurance Contract Law: Summary of Responses to Second Consultation Paper Post Contract Duties and Other Issues – Chapter 4: Policies and Premiums in Marine Insurance* (February 2013) <https://www.lawcom.gov.uk/document/insurance-contract-law-post-contract-duties-and-other-issues-consultation/> accessed 28 June 2023 (hereinafter Law Commissions, *Summary of Responses*), para 2.49.

33 Law Commission of England and Wales and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues: Consultation Paper* (CP No 201, 20 December 2011), <https://www.lawcom.gov.uk/document/insurance-contract-law-post-contract-duties-and-other-issues-consultation/> accessed 28 June 2023, para 17.38: 'We propose to amend section 50(3) to say, quite simply, that a marine insurance contract may be assigned in any customary manner or as agreed between the parties to the transfer.' This amendment is no longer required in light of the imminent coming into force of the Electronic Trade Documents Act, discussed below, text to n 74. The issue it purported to resolve has been addressed otherwise.

34 Law Commissions, *Summary of Responses* (n 32), para 2.49.

35 Bennett (n 24), para 20.15.

36 PW Thayer, 'Marine Insurance Certificates' (1935) 49 Harvard LR 239, 239-244.

conceived as documents granting rights to the holder (i.e. the person in possession of them to whom they had been validly transferred).[37] In *Diamond Alkali*, McCardie J held that MIA 1906, s 50, does not apply to certificates, and he raised doubts as to their assignability;[38] nonetheless, they continued to be used widely in CIF transactions, and their assignability appears to have been accepted in several subsequent cases. For example, in *Koskas*,[39] it was held that:

> The next point taken was that the certificate required that a person to sue on it should have it indorsed and that though the plaintiff was the holder of and in possession of the certificate, and though he appeared to have bought the goods which have been lost from the person who was the original assured, he could not recover because the original assured had not indorsed on the back of the certificate his name so as to amount to an indorsement. Now the language of the certificate is extremely puzzling. It conveys all the rights of the original policy holder as if the property were covered by a special policy direct to the holder of this certificate. The loss is payable to the order of assured or order. It looks rather tautological in itself; and in my view the English underwriters have very properly decided not to press that point. They have issued a very ambiguous document.

This suggests that documentary assignment of certificates occurred as a matter of course and that, unless clearly required, indorsement was not necessary to effect an assignment.

An essential feature of the certificate is that it is viewed as a contract between the insurer and the certificate holder separate from the underlying open cover under which it was issued.[40] In *De Monchy v Phoenix Insurance Co of Hartford*,[41] it was held that:

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37 See Goldby (n 7), para 7.21.

38 *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 KB 443, 457: '[Section 50(3)] only applies, so far as I can see, to that which is an actual marine policy. . . . If, as is admitted, this document be a certificate only and not a policy, it therefore seems not even to be admissible in evidence before me. If the certificate does not fall within the Marine Insurance Act it appears to be only assignable if at all by writing in accordance with the provisions of the Judicature Act, 1873, s 25, sub-s. 6.' The latter provision has since been re-enacted as s 136(1) of the Law of Property Act 1925.

39 *Koskas v Standard Marine Insurance Co Ltd* (1927) 27 Ll L Rep 59 (CA), 61.

40 See Goldby (n 7), para 7.23.

41 (1929) 34 Ll L Rep 201 (HL), 205 and 209. Regarding the application of open cover terms to the certificate contract see *MacLeod Ross & Co Ltd v Cie d'Assurances Generales l'Helvetia* [1952] 1 Lloyd's Rep 12 (CA). On the treatment of discrepancies, see *Evialis SA v SIAT* [2003] EWHC 863 (Comm), [2003] 2 Lloyd's Rep 377, esp

> [A]ll clauses of the [underlying] policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question[42] is a collateral stipulation imposing a condition precedent. It has nothing particular to do with insurance, but might be applied to any contract. Common sense and fairness revolts against the idea of this being enforced against the holder or indorsee of the certificate. Neither the holder as here nor a possible indorsee could ever have seen the policy. There is not even expressed in the certificate a right to ask for exhibition of the policy. Against them it may be fair to assume ordinary insurance clauses, but not to assume a collateral agreement of this sort. … I think that the contract of insurance to which the assignee becomes a party is expressed in the certificate of insurance which becomes in his hands a policy.

A consequence of this separateness is that assignment of the certificate will not allow the insurer to raise against the certificate holder defences available to the former against the policy assured, even if they arise out of the underlying contract.[43] Thus, the certificate holder should receive cover free from any liabilities – an important advantage in the case of CIF contracts, under which the cost of insurance is included in the price of the goods. Indeed, it would appear that certificates were developed specially to address the particular feature of policy assignment that allowed the insurer to raise against the assignee defences arising out of the contract that he would have been able to raise against the assured under the underlying policy or open cover.[44]

4 Transfer of title to goods, insurable interest and indemnity: the law in brief

Following a valid assignment, the assignee becomes an assured under the insurance contract. Having been established as an assured, and therefore a person with standing to make a claim, it is incumbent upon the claimant to show several things: not only that it has suffered a financial loss caused by a peril insured against, but also that the subject matter of the loss was

[17] and [26]-[42]; *Craft Enterprises (International) Ltd v AXA Insurance Co* [2004] EWCA Civ 171, [2005] Lloyd's Rep IR 14.

[42] This refers to a one-year limitation clause contained in the underlying open cover policy.

[43] See *De Monchy* (n 39) and *Glocom Ltd v Eagle Star Insurance Co Ltd* (CA, 4th October 1996).

[44] Thayer (n 36), 241. It must be noted, however, that, under an open cover that is facultative for the underwriters, precontractual duties of utmost good faith attach to each declaration (*Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442), and any breach would therefore relate to the contract in the certificate rather than the underlying contract.

covered and that the assured had an insurable interest in it at the time of loss,[45] as required by MIA 1906, s 6. 'Insurable interest' is defined by MIA 1906, s 5(1), as an interest in a marine adventure. By way of illustration, s 5(2) provides:

> In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

The courts have elaborated upon the concept of insurable interest by establishing that only a person with a direct concern in the subject matter insured has an insurable interest.[46] The definition of the subject matter insured is essential to determining whether or not the claimant had an insurable interest, and, in the case of cargo insurance, may require reference to the marine adventure – that is, the safe arrival of the goods – rather than (just) the goods themselves.[47]

Being able to show insurable interest is particularly relevant in cargo insurance, especially where the goods in question are sold in transit and are subject to possible rejection by the buyer. This is covered by MIA 1906, s 7, which provides expressly that even a defeasible interest (such as that of the buyer who might reject the goods or treat them as at the seller's risk by reason of delay in delivery or otherwise) is insurable. Further, in an international sale of cargo, others besides the seller and buyer may be interested in the safe arrival of the goods, such as a financing bank. Provision for these cases is made under MIA 1906, s 8, which

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[45] Regarding the importance of the assignee's insurable interest in the subject matter of the insurance see *Comlex Ltd v Allianz Insurance plc* [2016] CSOH 87, [2016] Lloyd's Rep IR 631.

[46] See *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL), 630. The direct concern must be in the form of a legal or equitable interest.

[47] See *Wilson v Jones* (1867) LR 2 Ex 139 and its treatment in *Macaura*, ibid, 627–8. See also *Quadra Commodities* (n 1), [65]: '… when read with the other terms of the Policy, I consider that what the clause provides is that the insurance is on all types of property ('goods and/or merchandise and/or cargo and/or interest of every description'), whether it is being used incidentally to the business of the Assured, or otherwise, in which the Assured has a relevant insurable interest.'

provides that a partial interest of any nature is insurable. Similar rules to these apply in jurisdictions that have modelled their laws on MIA 1906,[48] as well as in the US.[49]

These provisions must be read in conjunction with MIA 1906 s 15, which provides that where the assured transfers his interest in the subject matter insured, he does not thereby transfer to the transferee his rights under the contract of insurance unless there is an express or implied agreement with the transferee to that effect. The timing of the assignment is thus crucial. Accordingly, the insurance document is normally delivered and (where necessary) indorsed to the transferee alongside other documents, including a bill of lading, which is a document of title to the goods covered by the insurance.[50]

5 The use of insurance documents in international trade

The performance of international trade and trade finance transactions often involves the transfer of documents. In Cost, Insurance, and Freight (CIF) transactions, typically, these documents include an invoice which sets out a description and the cost of the goods, an insurance document which evidences that cargo insurance has been arranged to cover the goods while in transit,[51] and a transport document that evidences that a contract of carriage whereby the goods will be delivered at the agreed destination has been entered into, and relevant freight paid.[52] Under the ICC INCOTERMS 2020,[53] insurance documents are a required part of performance by the seller not only in the performance of contracts on CIF terms but also in transactions on the basis of Carriage and Insurance Paid To (CIP) terms. Trade finance provided by a documentary credit is almost invariably provided subject to the Uniform Customs and Practices on Documentary Credits (UCP) version 600 (2007). These

[48] See, eg, Federal Marine Insurance Act SC 1993, c 22 (Canada), s 10, and Marine Insurance Act 1909, No 11 of 1909 (Australia), s 11.

[49] For an overview of US law in this regard, see DT Rave and S Tranchina, 'Marine Cargo Insurance: An Overview' (1991–92) 66 Tulane LR 371, 382–4.

[50] See below, text to n 51.

[51] For example, under art 28(f)(iii) of the UCP 600 the insurance document must evidence that risks are covered during transport of the goods between the places specified in the credit.

[52] *Ireland v Livingston* (1872) LR 5 HL 395, 406–7.

[53] International Chamber of Commerce (ICC) Incoterms 2020: ICC Rules for the Use of Domestic and International Trade Terms (2019).

contain rules specific to insurance documents presented in fulfilment of the documentary credit conditions.

One important feature that the insurance document has to comply with, under INCOTERMS, is that it must give the buyer the right to claim directly against the insurer.[54] The insurance document presented under a documentary credit arrangement must comply with the requirements found in art 28 of the UCP 600. Article 28(a) provides that the parties who can sign the insurance document include a proxy, and the signature of an agent or proxy must indicate whether it is for or on behalf of the insurance company or underwriter. Article 28(c) disqualifies cover notes which are not issued by or on behalf of the insurer from constituting a compliant presentation. Article 28(d) provides '[a]n insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover.' Taken together, these provisions indicate that the document presented should be one issued by the insurer and capable legally of forming the basis of a claim against the insurer. Article 28(b) also requires that the full set of originals be presented to the banks, where the insurance document is issued in a set of more than one original. This requirement is in line with the bank's need to receive the document not only for the purpose of checking it for compliance but also, where needed, to facilitate the transfer to it of rights pertinent to its position as a secured creditor. The transfer of such rights occurs by operation of laws determining the legal effects of being the 'holder' of the insurance document in question.[55]

Electronic presentation of documents in fulfilment of documentary credit requirements is provided for in the electronic supplement to the UCP600, the eUCP v 2.1 (2023).[56] While the

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[54] CIF INCOTERMS 2020, para A5. See commentary on this provision in Trade Finance Global, *Cost, Insurance & Freight (CIF) Incoterms® 2020 Rules – A 2023 TFG Walkthrough*. <https://www.tradefinanceglobal.com/freight-forwarding/incoterms/cif-price-cost-insurance-and-freight/> accessed 30 June 2023: 'The seller must provide the buyer a separate contract or a certificate under an existing policy giving the details of the shipment to enable the buyer, or anyone else having an insurable interest in the goods, to claim from the insurer. This document usually shows the seller as the insured and is then endorsed by the seller on the back of the original/s in blank or with a specific endorsement.' Under paras A1 and B1 of the INCOTERMS 2020 CIF rule, 'an electronic form' will satisfy the requirement to provide a policy or other evidence, 'as agreed, or where there is no agreement, as is customary'.

[55] As discussed above, text to n 23.

[56] Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (Version 2.0) (2019) with additional text inserted on 30 June 2023 intended to align it with the UNCITRAL Model Law on Electronic Transferable Records (MLETR) in respect of issues pertaining to electronic transferable records (version 2.1) (2023) <https://iccwbo.org/news-publications/policies-reports/eucp-

eUCP covers presentation rules, and includes a definition of 'Electronic Transferable Record' (Article e3(b)(5)), it does not specify how the transfer of rights will be effected where electronic data are being presented in place of paper documents. Article e9, on 'Originals and Copies' simply provides 'Any requirement for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.' It is true that there is likewise no provision in the UCP600 regarding the transfer of rights through (indorsement and) delivery of paper documents. However, such a provision is not needed in the paper context as these methods of transferring rights are recognised as effective by the laws of most jurisdictions, deriving as they do from the *lex mercatoria*.[57] This is not the case when it comes to the transfer of rights using documents in electronic form. Thus, the question of how important rights, normally received by the bank pursuant to the assignment of a cargo insurance certificate, are to be acquired when data rather than documents are being presented is not addressed either in legislation or in standard terms that govern banks' standard practices for documentary credits. Therefore, the method for transferring those rights needs to be carefully considered and built in when entering into the letter of credit arrangement.

A more recent set of standard rules prepared by the International Chamber of Commerce, the Uniform Rules on Digital Trade Transactions v 1.0 (2021) (URDTT)[58] do on the other hand, contain provisions envisaging a transfer of electronic records having the same effects as a transfer of paper documents when it comes to the transfer of rights. Article 7(f) provides, 'Where the applicable law requires or permits delivery, transfer or possession of an Electronic Record, that requirement or permission is met by the transfer of that Electronic Record to the exclusive control of the Addressee.' It, therefore, adopts a similar approach to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic

version-2-1-icc-uniform-customs-and-practice-for-documentary-credits/#single-hero-document> accessed 1 July 2023. It was emphasised on the publication of v 2.1 that: 'It is very important to note that this was not a revision nor an update of the eUCP. It was solely an alignment with MLETR with respect to electronic transferable records.' See ibid, 1.

[57] Law Commission of England and Wales, *Digital assets: electronic trade documents*, Consultation Paper 254, 30th April 2021 <https://www.lawcom.gov.uk/project/electronic-trade-documents/> accessed 28 June 2023 (hereinafter LCCP254), para 3.6.

[58] International Chamber of Commerce, Uniform Rules on Digital Trade Transactions, Version 1.0, 2021, <https://2go.iccwbo.org/uniform-rules-for-digital-trade-transactions-urdtt-version-1.html> accessed 28 June 2023.

Transferable Records 2017. Article 11 of this Model Law provides that legal requirements for documentary possession are met by a system which enables an electronic record to be exclusively controlled.[59] The URDTT are a very recent addition to the landscape regarding trade and trade financing transactions, and it is not clear how widespread their use is at the time of writing. This author has not found any evidence indicating where and how they are being used.

Pending the wider adoption of URDTT by the trade and trade financing communities, the assignment of rights under the insurance contract may be, and is in fact, often achieved by naming additional assureds when declaring the shipment[60] or by identifying the assured in general terms so that all relevant parties can claim under the insurance provided they satisfy the insurable interest requirement. Assignment of the certificate becomes unnecessary, as a sufficiently equivalent effect may be achieved otherwise from the perspective of transferees of the goods in an international trade chain.

A consequence of this approach, however, is that a person's right to claim has to be ascertained when the claim is made by reference to supporting documentation that demonstrates that the claimant is indeed the person with insurable interest to claim.[61] This hampers the industry's ability to increase the automation of claims processes, increasing the speed and efficiency and reducing the cost of claims settlement.[62] As is discussed below,[63] enabling electronic assignment of the document alongside the transfer of the bill of lading as a document of title to the cargo would generate real-time information as to who has an interest in the goods at the time they are lost or damaged, and who therefore has the standing to claim under the insurance.

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59 See in particular, art 11(1)(a).

60 As was done, for example, in *Craft Enterprises* (above, n 41).

61 See the discussion above, text to n 45.

62 As noted in Goldby (n 3), 25, 'In order to assist in enhancing the efficiency of the cargo claims process, and ensure that the payout is made to the correct person, it might be worthwhile for the market to consider building electronic assignment into the functionality of electronic cargo insurance certificates platforms.'

63 See above, section 6.

6 New technologies and cargo insurance

Blockchain and other new technologies, such as smart contracts technology, have been viewed as having great potential in the insurance space to improve record keeping, to process the data necessary for placing the risk, to settle claims more efficiently and in an environment of increased trust and auditability, and to increase automation.[64] For the past few years, work has been underway to harness these technologies within the insurance industry by establishing collaboratives,[65] an insurance-specific blockchain architecture called Canopy in partnership with Corda[66] and the launch of pilot schemes. In 2019 Lloyd's of London published a report exploring potential applications for smart contracts technology in insurance, with one of the case studies being cargo insurance.[67] They also launched Parsyl, a cargo insurance application focusing on perishable cargoes.[68] In 2021 the Law Commission of England and Wales published a Consultation Paper on Electronic Trade Documents, which was followed by a Report in 2022. These publications explained how the (indorsement and) physical transfer of a paper document could be replicated in the electronic space, for example, using blockchain technology.[69]

New technologies that have emerged in the past decade and are becoming established can be particularly useful in the cargo insurance space. Blockchain can be used to provide proof of insurance and to effect assignment by transfer of the document, simultaneously with the transfer of an insurable interest in the cargo from seller to buyer. As a source of verifiable data, blockchain can also be used to trigger smart contracts, facilitating crucial steps in the

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64 See above, n 3.

65 Most notably, the Institutes Risk Stream Collaborative, see 'The Institutes Risk Stream Collaborative', <https://www.riskstream.org/> accessed 28 June 2023.

66 N Morris, RiskBlock launches Canopy 2 blockchain insurance platform, Ledger Insights, 17 September 2018 <https://www.ledgerinsights.com/riskblock-launches-canopy-2-blockchain-insurance/> accessed 28 June 2023. See also Risk Stream Collaborative (n 65): 'RiskStream leverages a world-class, SOC2 and ISO certified (security) blockchain infrastructure with off-chain data sharing capabilities which ensure personally identifiable information data is exchanged in compliance with rules/regulations.'

67 Goldby (n 3).

68 Lloyd's, 'Parsyl', <https://www.lloyds.com/news-and-insights/futureset/join-the-community/product-simplification/parsyl> accessed 28 June 2023. See also 'Parsyl' <https://www.parsyl.com/> accessed 28 June 2023.

69 LCCP254 (n 57), paras 2.48-2.53.

process such as First Notice of Loss.[70] The Internet of Things (IoT), when applied, for example, to sensors fitted in containers, can be used to generate and record real-time data about the goods, for example, the temperatures, humidity and vibrations to which they were exposed in the course of the voyage. Importantly for our purposes, smart contracts technology, in combination with IoT data, can be used to streamline the claims process in case of loss or damage. For example, Lloyd's cargo insurance application Parsyl, applies IoT together with smart contracts technology: '[w]e recently demonstrated this with an air cargo client – our smart sensors identified a temperature issue and we paid a claim in a record-breaking eight-hours.'[71]

All these technologies, taken together, can enable the development of innovative cargo insurance products, for example, parametric products that reduce or eliminate the pain points for the insurer in settling claims and for the assured in obtaining a payout. However, crucially, in order to harness these technologies in a 'joined up' way, the insurer must have easy visibility into where the insurable interest lies as soon as a loss is notified, without having to rely on time- and resource-intensive manual document verification processes. This would be facilitated by electronic documentary assignment. The next and final section of this paper is therefore devoted to discussing the extent to which this can be done under current and forthcoming laws.

7 Can assignment of documents be done electronically? Current law and recent legal reforms

Under English law, the understanding of the concept of document is broad. Section 13 of the Civil Evidence Act 1995 and Rule 31.4 of the Civil Procedure Rules 1998 both provide that '"document" means anything in which information of any description is recorded'. Section 7C

[70] P Schmid on behalf of The Institutes Risk Block Alliance, 'Blockchain Technology and Insurance', Presentation given at the American Institute of Marine Insurers (AIMU) Marine Insurance Day Seminar, 5 October 2018, <https://aimuedu.org/aimupapers/3_Blockchain_and_Insurance_Patrick_Schmid.pdf> accessed 28 June 2023, slide 23. The Institutes Risk Block Alliance is the former name of the Risk Stream Collaborative. See 'The Institutes Changes Name of its Global Blockchain Consortium to The Institutes RiskStream Collaborative', 6 May 2019 <https://web.theinstitutes.org/institutes-changes-name-its-global-blockchain-consortium-institutes-riskstream-collaborative> accessed 28 June 2023.

[71] Lloyd's (n 68): 'Parsyl uses a trusted risk trigger via a smart sensor, leading to faster and simplified claims process.'

of the Electronic Communications Act 2000 defines a document as 'anything stored in electronic form, including text or sound, and visual or audiovisual recording'. At first sight, therefore, it would appear that marine insurance documents would equally be considered documents if issued electronically. However, under UK law as it stands at the time of writing, assignment by indorsement and delivery of a document can only occur if the document is in tangible form because 'delivery' [72] requires a transfer of possession. The law considers only tangible things possessable so that if property is not tangible, it is automatically disqualified from being a thing in possession.[73]

The Law Commission of England and Wales's Electronic Trade Documents project precisely addressed this 'possession problem', a major obstacle to paper trade documents that function on the basis of possession being used in electronic form.[74] The project resulted in the Electronic Trade Documents Act 2023 (ETDA), which received Royal Assent on 20 July 2023 and is due to come into force in September 2023.[75]

Certain basic notions underpinning the ETDA capture features inherent to paper that are not equally inherent to information in electronic form, and that therefore need to be built in to enable an electronic document to do the same things as a paper one that functions based on possession. A paper trade document generally retains its integrity because it is composed of permanent marks on a physical medium. The paper document also has its own identity: it exists as a thing, distinct from all other things. Therefore, a person who has the document can easily show that they have the document, exclude others from it, and transfer it to another person (after which they will no longer have it). Because these features are not necessarily

[72] Delivery is defined in the Sale of Goods Act 1979, s 61(1), as the 'voluntary transfer of possession from one person or another' while under the Factors Act 1889, s 1(2) states, 'A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.' In *Forsythe International (UK) Ltd v Silver Shipping Ltd (The Saetta)* [1993] 2 Lloyd's Rep 268, it was held that this definition applies for the purposes of the Sale of Goods Act 1979. See, however, *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514 (CA), [34]–[35] and LCCP 254 (n 57), para 5.82 and fn 71.

[73] See in particular, *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1; *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41. See also fuller discussion in Miriam Goldby and Weishi Yang 'Solving the Possession Problem: An Examination of the Law Commission's Proposal on Electronic Trade Documents' [2021] LMCLQ 605, 607-610.

[74] LCCP254 (n 57) and Law Commission of England and Wales, *Electronic Trade Documents: Report and Bill*, Law Com No 405, 15 March 2022 <https://www.lawcom.gov.uk/project/electronic-trade-documents/> accessed 28 June 2023 (hereinafter LCR405).

[75] The final version is available at <https://bills.parliament.uk/bills/3344> accessed 21 July 2023. See s 8(2).

inherent to information in electronic form, the information has to be stored and structured to give it these features if it is to perform the same functions and achieve the same effects as its paper counterpart.

In order to be used in the same way as a paper document, therefore technology must be used to ensure that an electronic document that contains information that makes it a document of a certain type (i.e. a cargo insurance certificate or a marine policy) meets the following requirements: (i) the document is identified (i.e. given its own identity); (ii) the document's integrity is ensured; (iii) the document is capable of being controlled exclusively by one person; (iv) the person who has the document is divested of it upon transferring it to another. These requirements appear in the gateway criteria for a document to be an electronic trade document under s 2(2) of the ETDA:

> **2 Definition of 'electronic trade document'**
>
> (1) This section applies where information in electronic form is information that, if contained in a document in paper form, would lead to the document being a paper trade document.
>
> (2) The information, together with any other information with which it is logically associated that is also in electronic form, constitutes an 'electronic trade document' for the purposes of this Act if a reliable system is used to—
>
> (a) identify the document so that it can be distinguished from any copies,
>
> (b) protect the document against unauthorised alteration,
>
> (c) secure that it is not possible for more than one person to exercise control of the document at any one time,
>
> (d) allow any person who is able to exercise control of the document to demonstrate that the person is able to do so, and
>
> (e) secure that a transfer of the document has effect to deprive any person who was able to exercise control of the document immediately before the transfer of the

ability to do so (unless the person is able to exercise control by virtue of being a transferee).

In defining an electronic trade document, s 2(2) of the ETDA adds to the definition of 'document' for the purposes of English law, set out above, 'any other information with which it is logically associated' to capture the composite nature of an electronic trade document (including a human-readable component and a data structure). This is an acknowledgement that a method must be found of giving a structure of some permanence to information in electronic form, as paper does, giving it a specific identity, to fulfil the requirement in s 2(2)(a), namely 'identify[ing] the document so that it can be distinguished from any copies'. The Bill does not prescribe using any particular technology and merely specifies the outcomes to be achieved. However, based on currently available techniques, cryptographic hashing techniques used in blockchain technology provide one way of achieving these outcomes. Cryptographic hashing forms a 'data structure' consisting of functional code, which is logically associated with (and specifically identifies) human-readable information.[76]

As seen from s 2(2) above, a crucial element in the gateway criteria is the notion of exclusive control. The combined effect of s 2(2)(c) and s 2(2)(e) is to establish that the document must be capable of exclusive control, as would be the case with a paper document. Thus, the notion of control is used to require that, for an electronic document to be considered an ETD at law, it be given features that echo features inherent in a paper document that make it possessable. Technologically, the criteria amounting to exclusive controllability of the document can also be fulfilled in practice using blockchain technology.

In order to address the possession problem mentioned above, s 3 of the Act provides that if the gateway criteria in s 2(2) are met, making the document an electronic trade document, the document is deemed to be possessable at law:

3 Possession, indorsement and effect of electronic trade documents

(1) A person may possess, indorse and part with possession of an electronic trade document.

[76] LCR405 (n 74), paras 6.17-6.22.

(2) An electronic trade document has the same effect as an equivalent paper trade document.

(3) Anything done in relation to an electronic trade document has the same effect (if any) in relation to the document as it would have in relation to an equivalent paper trade document.

….

It should be noted that s 3 does not refer to control. Indeed the Act does not seek to answer the question 'who is in possession of an ETD?' Instead, it answers the question, 'what is required to make an electronic document possessable?' It answers this question by setting out, in s 2, the gateway criteria that must be fulfilled for a document to fall within the definition of an ETD. The former question, i.e. 'who is in possession?', a question of fact, is left to be answered according to the circumstances of the case.

8 Conclusion

This paper sought to demonstrate, first, the potential benefits of digitalising marine cargo documentation and, second, the extant legal obstacles to using these electronic documents in the same way and to achieve the same effects as their paper counterparts. While these legal obstacles may be overcome with appropriate contractual drafting, these contractual solutions are not such as to facilitate the harnessing of all the benefits that digitalisation may achieve.

In particular, the achievement of fuller automation of the claims process based on emerging digital technologies such as DLT, IoT, smart contracts technology and AI is hindered if the insurer does not have a means of ascertaining who the assured is and whether that person has an insurable interest without a resource-intensive process of manual submission and checking of documentation. Establishing who the assured with insurable interest is can be challenging in an international trade scenario where the cargo can change hands several times before the completion of its transit (and therefore within the duration of cover). In the paper environment, the person with the right to claim is identified by submitting paper documentation in its possession by the assured, including the (indorsed) insurance certificate

and the bill of lading (proof of title to the covered goods). In the digital environment, where the electronic system over which the certificate is issued does not provide for electronic assignment, reliance will need to continue to be placed on the claimant to submit the required evidence, stalling further automation of the claims process.

The enactment and imminent coming into force of the ETDA in the UK will provide a legal framework for electronic assignment which may enable the building of necessary functionality into electronic cargo insurance certificate systems. However, whether these developments take place will ultimately depend on commercial considerations, including perceived demand, and will need to occur alongside the digitalisation of other trade documents, particularly the bill of lading.