Following a review of the Bill by the Electronic Bills of Lading Working Group (the "WG") of the **British Maritime Law Association (the "BMLA")**, and subsequently the **Call for Evidence issued by the House of Lords**, the WG has the following comments.

The purpose of the BMLA is to promote the study and the advancement of British maritime and mercantile law: to promote and consider with foreign and other maritime law associations proposals for the unification of maritime and mercantile law in the practice of different nations: to afford opportunities for members to discuss matters of national and international maritime law.

Membership principally consists of representatives from the following groups: shipowners, shippers, P&I clubs and other insurers, insurance brokers, maritime law firms. The Association also has a number of individual members including barristers or academics interested in maritime law.

The Association seeks to perform two principal functions: to advise U.K. Government bodies responsible for maritime legislation or regulation and secondly, to co-operate with its international parent body, the CMI, in research and drafting of international instruments for the harmonisation of maritime and mercantile law.

The proposed reforms and whether the reforms achieve what they are intended to:

The Explanatory Notes that accompany the Bill note that "*in providing for the possessability of electronic trade documents that fall within its scope, the Bill enables such documents to have the same legal recognition and functionality as their paper counterparts."*

As is also noted within the Explanatory Notes, "*the intended effects of the Bill are to:*

a. *reduce transaction costs associated with paper trade documents by reducing resourcing and operational costs, and increasing productivity;*
b. *increase efficiency and encourage business growth by facilitating the development of digital products and services;*
c. *deliver environmental benefits due to a reduction in paper documents; and*
d. *increase security and transparency in documentation."*

It is difficult effectively to provide a response as to whether the Bill will meet the intended effects as much will depend on the take up of electronic trade documents following the Bill's passage into primary legislation. The Bill will not reach its intended effects by virtue of it becoming primary legislation, rather it will enable the possibility of reaching its intended effects. However, in order to attempt to provide a reasonable response, each intended effect shall be taken in turn, as below:

- It is difficult to quantify transaction costs in their entirety without the appropriate data, and we will therefore defer to the impact assessment conducted by the Department for Digital, Culture, Media and Sport (DCMS), and presume that the figures that have been provided are correct.

- It would be reasonable to expect that the Bill would encourage the development of digital platforms, products and services in response. However, it would be remiss not to recognise that there have already been attempts within the maritime industry to utilise blockchain technology as the backbone of a supply chain platform in order effectively to enable sharing of data and information without a physical paper trail. Even as recently as 2018, a joint A.P. Moller-Maersk/IBM/GTD Solution venture known as TradeLens was launched on that basis. Unfortunately, the platform is to be discontinued by the end of Q1 2023 because "*the need for full global industry collaboration has not been achieved"* which indicates what we believe to be the main crux of why there is so little take up: it is difficult to build the level of trust required from all stakeholders in order to benefit from an end-to-end platform. Even in Singapore, where the use of electronic bills of lading governed by Singaporean law has been enabled since

February 2021, anecdotal evidence suggests that there has been very little take up. We support the least interventionist approach taken in the drafting of the Bill in order not to be overly prescriptive. However, it will be the encouragement to utilise the opportunity brought about by the Bill following its passage into primary legislation which will be key to reaching this goal.

- There is little to add on the environmental benefits of using electronic trade documents compared to their paper counterparts.

- With regards to "security", it would be prudent to make reference to the system of reliability required under the Bill. Unlike the UNCITRAL Model Law on Electronic Transferable Records, the Bill does not include a "safe harbour" provision such that, where the method has in fact achieved the function for which it was adopted, the enquiry as to the method's reliability need not be undertaken. Our understanding is that the reason for this is that the original drafters of the Bill believed that including such a provision could produce an unintended result in that, where the system could be shown to have done what is required in a particular case, the system's reliability would not need to be assessed. Given that the Bill requires a system to be reliable in order for the document in electronic form to qualify as an electronic trade document, it was suggested that an assessment of the system's reliability should not be excluded in such cases.

  We would suggest that this evidences the delicate balance the Bill is attempting to strike in enforceability versus commercial benefits. As already noted there is an element of lack of trust throughout the maritime industry of the use of electronic trade documents and to incorporate an automatic "safe harbour" could discourage business engagement. The manner in which the Bill is currently drafted indicates that there is a conscious effort to assess and anticipate risks, as well as clearly recognising the need for resilient trade. However, we would be wary of saying that utilising electronic trade documents would de facto "*increase security and transparency";* the use of electronic blockchain or other such technology is accompanied by its own dangers of fraudulent and other cyber security concerns which must be considered.

Having stated the above, we would support the reforms that have been proposed and consider them to be well drafted to enable electronic trade documents the same legal recognition and functionality as their paper counterparts. As has been noted, however, to realise the full effect of the Bill will require increased trust and similarly increased take up on the part of the industry.

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

The WG has not identified any issues in the context of the interoperability of the Bill with national and international regimes. Where the Bill does not follow the MLETR, the reasoning provided by the Law Commission report for not following the MLETR appears sound.

Whether the list in Clause 2(2) of what constitutes an "electronic trade document" is right

Yes: proceeding from the starting point that the Bill should seek to encapsulate the electronic equivalent of the legally significant attributes of *possession* of an *original* paper trade document.

Proceeding on that basis, the attributes listed in 2(2)(a) and (b) in our view deal with the concept of an *original*, namely its identification and integrity.

Those attributes set out in 2(2)(c) and (d) deal with the concept of *possession* by reference to the exercise of control and with 2(2)(e) its divestment.

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

Section 2 (2) (a) provides that *"a person exercises control of a document when the person uses, transfers or otherwise disposes of the document (whether or not the person has a legal right to do so)"* and 2 (1) (c) – (e) that a qualifying system must inter alia *"secure that it is not possible for more than one person to exercise control of the document at any one time",* and *"allow any person who is able to exercise control of the document to demonstrate that the person is able to do so".*

Reading these clauses together with section 3, there already appears to be a close textual link in the Bill between (i) the concept of "control" (which the Bill makes clear is a factual question) and (ii) the juridical concept of "possession".

It is thought that the locus of control will therefore answer any question as to the party in possession in almost all cases, where both control and the intention to posses, the animus possidendi are present.

10 January 2023