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# The role of English public policy in promoting the circulation of electronic trade documents

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## Abstract

The Model Law on Electronic Transferable Records (2017) enabled the use and transfer of electronic and digital trade documents across borders. This Model Law influenced the enactment of the 2023 Electronic Trade Documents Act (ETDA) in the United Kingdom, which is a pioneer in this regard. In implementing the Model Law, however, the UK Parliament used permissive wording and allowed significant discretion regarding the assessment of the reliability, integrity, and recognition of electronic trade documents. This has caused significant legal uncertainty that parties can deploy when they try to avoid foreign obligations. The defence of public policy is one way by which parties can try to frustrate the efficient circulation of electronic trade documents. Although English courts apply public policy within a narrow scope, they usually need to hear such applications and determine them, which can be burdensome. This article critically examines relevant provisions of the ETDA *vis-à-vis* the evolving technology and the lack of guidance apart from factors that the courts may consider. Detailed analysis is then provided to show how courts can circumvent or mitigate the legal uncertainty by using public policy in a positive manner. This involves a consideration of relevant policies underpinning electronic trade documents. A major argument is that there is ample scope to apply English public policy in a way that promotes the circulation of ETDs. This argument is then complemented by an examination of how mandatory rules can serve as a basis to further determine what could be saved from the foreign law, considering the vague criteria in section 2(5) of the ETDA.

## I. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Transferable Records (MLETR) in 2017. The MLETR enabled the legal use

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and transfer of electronic and digital trade documents ‘domestically and across borders’,<sup>1</sup> a significant milestone in the international shipping and trade industry. Before 2017, certain trade documents, such as bills of lading and bills of exchange, could only function electronically through contract-based platforms on the basis of mutual agreements by platform members,<sup>2</sup> or some other general commercial law enactments, which paid little or no attention to the cross-border use of electronic versions of transferable documents.<sup>3</sup> This changed with the MLETR, which captures the cross-border use of the electronic transferable records (ETRs) used in trade.<sup>4</sup> Since its adoption, different jurisdictions across the globe have started to implement the Model Law by adapting their legal systems and rules to enable the use of digital trade documents in place of paper.<sup>5</sup> In the United Kingdom, this has led to the enactment of the Electronic Trade Documents Act (ETDA) in 2023.<sup>6</sup>

However, both the MLETR and the ETDA do not comprehensively address the complex private international law implications of the use and circulation of electronic trade documents (ETDs) in the cross-border context.<sup>7</sup> While the Law Commission of England and Wales (LCEW) recognized that ‘the conventional private international law rules for paper trade documents might not work well in the digital context’,<sup>8</sup> it decided to consider such private international law (PIL) issues ‘in a more general project on private international law and emerging technology’.<sup>9</sup> In the meantime, both the MLETR<sup>10</sup> and the ETDA<sup>11</sup> expect the courts to be able to

<sup>1</sup> See the ‘purpose’ of the MLETR adopted on 13 July 2017 <[https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records)> accessed 20 November 2025.

<sup>2</sup> Currently, some of the contract-based platforms whose management systems have been approved by the International Group of Protection and Indemnity Clubs (an insurance group which underwrites risks in the industry) include Bolero, essDOCs (now ICE Digital Trade), edoxOnline, WaveBL, CargoX, TradeGo, IQAX, Secro, Britic Etrade Solution Co Ltd, Covantis and others. See ‘IG Approved Electronic Bill of Lading Systems’ (*IGP&I*, 4 February 2025) at <<https://www.igpandi.org/article/ig-approved-electronic-bill-of-lading-systems/>> accessed 18 November 2025.

<sup>3</sup> In the US, the revised Article 7 of the Uniform Commercial Code ensured the legal recognition of electronic documents of title. Other major states like Germany (German Commercial Code, art 516), Australia (New South Wales Sea-Carriage Documents Act 1997, s 6), South Korea (Commercial Act 2001, art 862) and Japan (Electronically Recorded Monetary Claims Act, art 2(1)) have attempted to accommodate the operation of ETDs in their laws either by means of delegated legislation or by setting out the circumstances under which a person is deemed to hold and transfer specific rights or entitlements which are recorded electronically.

<sup>4</sup> See UNCITRAL, ‘Explanatory Note to the Model Law on Electronic Transferable Records’ (7 December 2017) UN Doc A/RES/72/114 (MLETR Explanatory Note) para 8.

<sup>5</sup> These jurisdictions include Bahrain, Singapore, Abu Dhabi Global Market, Belize, United Arab Emirates (UAE), Kiribati, Paraguay, Timor Leste, Papua New Guinea, the United Kingdom, Marshall Islands, Mauritius, and France. See UNCITRAL, ‘Status: UNCITRAL Model Law on Electronic Transferable Records (2017)’ <[https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records/status](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status)> accessed 18 November 2025.

<sup>6</sup> For coherence, this article adopts the general term ‘electronic trade documents’ (ETDs) for its comprehensive coverage of all the documents used in trade which depend on possession for their functionality. See the UK Electronic Trade Documents Act 2023 (ETDA), s 1 (1)(2).

<sup>7</sup> The attitude of the MLETR in this regard is captured in Article 19(2) of the MLETR, as follows: ‘Nothing in this law affects the application to electronic transferable records of the private international law governing a transferable document or instrument’. This approach is also adopted by the LCEW. See LCEW, ‘ETDs in Private International Law: FAQs’ (October 2024) para 1.4.

<sup>8</sup> LCEW, ‘ETDs in Private International Law: FAQs’ *ibid* para 1.2.

<sup>9</sup> The consultation paper on the PIL aspects of the use of ETDs was scheduled to be published in 2025. LCEW, ‘Digital Assets and ETDs in Private International Law: Which Court, Which Law? Call for Evidence’ (February 2024) <<https://lawcom.gov.uk/project/digital-assets-and-etds-in-private-international-law-which-court-which-law/#related>> accessed 18 February 2025. This was published in June 2025, with the consultation period closing in September 2025. See LCEW, ‘Digital Assets and (Electronic) Trade Documents in Private International Law: Consultation Paper’ Consultation Paper No 273 <<https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/54/2025/06/Digital-assets-conflicts-CP-2025.pdf.pdf>> accessed 26 November 2025.

<sup>10</sup> See the MLETR, art 19(2). See further the MLETR Explanatory Note (n 4) para 180.

<sup>11</sup> See LCEW, *Electronic Trade Documents: Report and Bill* (Law Com No 405, 15 March 2022) (ETD Bill & Report) para 8.109.

deal with PIL issues in the context of ETDs on a case-by case basis by applying existing PIL rules applicable to paper trade documents.

One area that throws up significant PIL concern is the assessment of the reliability and integrity of ETDs and the recognition of ETDs so assessed under foreign law by UK courts (and in jurisdictions inspired by the ETDA). The relevant laws and literature on ETDs are consistent in that fulfilment of the ‘reliability requirement’ (among other requirements) is necessary for ETDs to function in law as documents of title and operate as functional equivalents to transferable papers.<sup>12</sup> As a result, both the MLETR and the ETDA made detailed provisions for certain objective criteria to be met for assessing the reliability of ETDs.<sup>13</sup> These reliability provisions were intended to help in fostering the commercial utility of digital trade documents and checking fraud and cybercrime in ETD usage. By ‘reliable’, the LCEW meant that electronic systems must meet certain standards in the way that they operate.<sup>14</sup>

In implementing Article 12 of the MLETR on the requirement of ‘a reliable method’ for the use and integrity of ETDs, section 2(5) of the ETDA outlines certain matters that ‘may be taken into account’ by the courts in assessing the reliability of an ETD system. Apart from the fact that the wording of section 2(5) is anchored on permissive foundations, the section causes significant uncertainty as it provides no floor or ceiling regarding how to determine a reliable system for the purposes of section 2(2) of the ETDA. While a flexible approach was intentionally adopted in the ETDA for fear that endorsing any particular technology for the assessment of the reliability of an ETD system will potentially frustrate innovation,<sup>15</sup> the courts are left with the significant burden of assessing and determining reliability based on a potentially endless list of objective factors to ‘have regard to’ while doing so, without further guidelines. The legislator missed an opportunity to adapt the MLETR in a way that would have offered more predictability to courts and potential litigants regarding the reliability of ETD systems.<sup>16</sup>

It is contended in this article that this uncertainty regarding the reliability of ETDs in the relevant laws creates scope for parties to frustrate the cross-border ETD circulation on public policy grounds, which is a strategic defence that parties can use when they try to avoid any foreign obligations.<sup>17</sup> Exploiting the flexibility of section 2(5) and the fluid nature of public

<sup>12</sup> M Goldby & W Yang, ‘Solving the Possession Problem: An Examination of the Law Commission’s Proposal on Electronic Trade Documents’ (2022) LMCLQ 612.

<sup>13</sup> See the MLETR, art 12; ETDA, s 2(5).

<sup>14</sup> ETD Bill & Report (n 11) para 6.32. For further literature on the reliability requirement for ETDs, see *Explanatory Notes: Electronic Trade Documents Act 2023* (Explanatory Notes to the ETDA) Chapter 38, para 33 <[https://www.legislation.gov.uk/ukpga/2023/38/pdfs/ukpgaen\\_20230038\\_en.pdf](https://www.legislation.gov.uk/ukpga/2023/38/pdfs/ukpgaen_20230038_en.pdf)> (accessed 26 November 2025); LCEW, *Electronic Trade Documents: Report and Bill* (15 March 2022) (ETD Report & Bill) para 6.43–6.46; D Webb, ‘Research Briefing on Electronic Trade Documents Bill [HL] 2022–23’, Number 9641, 21–2; M Goldby, ‘The Electronic Trade Documents Act 2023 and the 2003 Amendments to Article 7 of the Uniform Commercial Code: Do They Do the Same Thing?’ (2023) 10 at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4517265](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517265)> accessed 26 November 2025; T Jiang, ‘Regulating Electronic Bills of Lading on a National Level’ (2023) 7 JBL 620–1; TY Yap, ‘What Makes a System “Reliable” and Is There Strength in Numbers?’ (2024) 28(2) DCW 37; Lord Parkinson of Whitley Bay, ‘Letter to Special Public Bill Committee on Electronic Trade Documents Bill’ (Department for Culture, Media & Sport, 17 February 2023) 5.

<sup>15</sup> ETD Bill & Report (n 11) para 6.46. see Explanatory Notes to the ETDA (n 14) para 32.

<sup>16</sup> The case would have been different had the ETDA, for example, contained an exceptional provision presuming the reliability of ETDs where the source ETD system is verified to meet relevant accepted industry standards. This approach would have retained the desired flexibility that is anchored on the industry’s incremental technical expertise, while providing a more certain threshold for the courts.

<sup>17</sup> See for example, the Court of Appeal case of *Spain v London Steam-Ship Owners’ Mutual Limited Insurance Association Ltd* [2024] EWCA Civ 1536 para 232 decided: ‘It would be manifestly in breach of the public policy applicable in England & Wales under article 34(1) [of the Brussels I Regulation] for the Spanish judgment to be recognised, when it conflicts with Mr Schaff’s awards that are binding and enforceable against Spain and France’.

policy itself,<sup>18</sup> parties may try to employ public policy as a defence to avoid recognition of ETDs from abroad, and other consequential obligations emanating therefrom, thereby further exposing recognition processes to uncertainty. While English public policy is usually employed in a narrow way that should promote foreign obligations, the variable features of evolving technology regarding ETDs and the unclarity in section 2(5) render public policy liable to complicating legal certainty and generating inefficiency through case-by-case analysis until, perhaps, a significant body of case law or guidance is developed.

Therefore, this article makes the case that there is need to examine: (i) the role that English public policy can play in relation to the circulation of ETDs and (ii) the policy that should influence the reasoning of the UK courts when public policy is raised as a defence to the enforcement of foreign obligations involving ETDs. The article contributes to the existing literature by querying the clarity and certainty of the reliability provisions of the MLETR and MLETR-inspired laws, like the ETDA. It contends that, although the ETDA's permissiveness could be exploited by UK commercial litigants to defeat the recognition of ETDs issued abroad on the ground of public policy,<sup>19</sup> the policy behind ETD laws should influence the reasoning of the UK courts when public policy is raised as a defence to the enforcement of foreign obligations involving ETDs. The article articulates a clear basis that will enable the courts to mitigate the legal uncertainty surrounding relevant ETDA provisions considering public policy. A major argument is that there is ample scope to apply English public policy in a way that promotes the circulation of ETDs. This argument is then complemented by an examination of how mandatory rules can serve as a basis to further determine what could be saved from the foreign law considering the vague criteria in section 2(5) of the ETDA.

The article will adopt the doctrinal methodology in analysing relevant ETD laws and interrogating English public policy and the relationship between policy and public policy. However, a comparative analysis of the reliability provisions in the ETDA, the MLETR, and other MLETR-inspired laws will be pursued as these domestic laws and international instrument present comparable thresholds for objective analysis. The article is divided into five parts. After the introduction, the second part unravels the uncertainty inherent in the reliability provisions of the MLETR and the ETDA, explaining how this flexibility gives scope for the negative use of public policy as a defence to ETD recognition or enforcement. The tone for the following discussion on policy and public policy is set in the third part, which examines the relevant policy pillars within which framework the article's core arguments are situated. After that, a distinction is made between the positive and negative iterations of public policy in the conflict of laws. In this context, the article will argue that when public policy is allowed to apply in a positive sense (rather than in a negative sense) through the consideration of the policies underpinning ETD laws, it can promote the circulation of ETDs and mitigate the problems caused by commercial litigants who seek to escape obligations incurred abroad. Considering the relationship between public policy and mandatory rules, the last substantive part of this article examines minimum thresholds that can guide courts and how foreign mandatory rules concerning ETDs may be allowed to have effect.

<sup>18</sup> The application of public policy itself is fraught with some challenges, which include, for example, the problem of fluidity. See *Kuwait Airways Corp v Iraqi Airways (No 6) (Kuwait Airways)* [2002] 2 A.C. 883.

<sup>19</sup> Public policy is a strategic defence that parties can use when they try to avoid any foreign obligations, even in arbitration. See *Payward Inc v Chechetkin* [2023] EWHC 1780 (Comm) 1536 para 232.

## II. The reliability provisions of the MLETR and the ETDA

The drafters of the MLETR and the ETDA intended to provide functionally equivalent conditions or requirements that must be met for ETDs to legally perform equivalent functions as transferable papers.<sup>20</sup> Traditionally, transferable papers rely on the legal fiction of incorporation.<sup>21</sup> By this fiction, the right to delivery of or payment for goods is incorporated into the transferable paper in such a manner that this right cannot originate or be transferred or claimed without the paper document or instrument.<sup>22</sup> Consequently, transferable papers possess unique features that make it possible for certain rights to be ‘locked’ in them and transferred or traded as a token representing specific commercial value.<sup>23</sup> These features include: ability to preserve original information (integrity), uniqueness, ability to maintain independent existence and identity, exclusive possess-ability by a holder who can be identified, and transferability.<sup>24</sup> Since these features are not necessarily inherent in information in electronic form, the basic idea underpinning both the MLETR and the ETDA is to structure the requirements for ETDs so as to replicate the above features of transferable papers.<sup>25</sup>

These requirements are contained in Articles 10–12 of the MLETR. A cumulative reading of the relevant articles of the MLETR reveals the following five requirements that ETDs must meet to legally function as functional alternatives to paper-based trade documents: (i) Same Information Requirement: ensures that the ETD contains the required information found in paper trade documents once allowance is made for the difference in form; (ii) Singularity Requirement: ensures that only one ETD is identifiable at each point in time; (iii) Exclusive Control Requirement: ensures that the ETD is subject to the exclusive control of the person in control and that such person is identifiable; (iv) Integrity Requirement: ensures that the ETD remains complete and unaltered, including any authorized changes; and (v) Reliable Method: ensures that singularity, control, integrity, and other functions are achieved through a reliable method.<sup>26</sup>

The above conditions are also substantively maintained in section 2(2) of the ETDA (the gateway criteria). The said section provides that:

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

<sup>20</sup> See the MLETR Explanatory Note (n 4) paras 7–8 and the Explanatory Notes to the ETDA (n 14) para 2. The term ‘transferable papers’ is used as a general term for paper-based transferable instruments and documents of title. See UNGA, ‘Legal Issues Relating to the Use of Electronic Transferable Records – Note by the Secretariat’ (8 September 2011) UN Doc A/CN.9/WG.IV/WP.115 (UN Doc 115) paras 5–6.

<sup>21</sup> G Finocchiaro & L Castellani, ‘The UNCITRAL Model Law on Electronic Transferable Records: Introduction and Overview’ (2023) No 5 ERPL 2. UN Doc 115 para 6.

<sup>22</sup> Z Safranko, ‘The Notion of Electronic Transferable Records’ (2016) 3 InterEULawEast: J Int’l, Econ & Market Integrations 3.

<sup>23</sup> Guo Yu, ‘Functional Equivalence to A Piece of Paper: A Comment on the UNCITRAL Model Law on Electronic Transferable Records’ (2019) International Commercial Law Issues 24.

<sup>24</sup> Safranko (n 22) 10; See also Goldby, ‘The Electronic Trade Documents Act 2023’ (n 14) 2.

<sup>25</sup> Safranko (n 22) 7; ETD Bill & Report (n 11) 1.3–1.4.

<sup>26</sup> See the MLETR, arts 10–12.

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).

From the provisions cited above, both the MLETR and the ETDA require, as part of the functional equivalence rules, that ‘a reliable method’ (in the case of the MLETR)<sup>27</sup> or ‘a reliable system’ (in the case of the ETDA)<sup>28</sup> be employed for ensuring the singularity, exclusive control, identification, integrity, and transfer of ETDS. Such *reliable method or system* is needed, especially to ensure the integrity of ETDS.<sup>29</sup> The reliability and integrity of ETDS are, therefore, valuable requirements for ensuring trust in the widespread use of ETDS and combatting the risk of cybercrime and related scams in its use.<sup>30</sup> This is especially so, as there is credible evidence through case law that even in the paper-based world, transactions with transferable papers are often fraught with fraud.<sup>31</sup>

As the potential for fraud increases in the electronic environment,<sup>32</sup> it is reasonable to expect that, in determining the reliable method or system required for ETD use, more attention should be paid to clarity and certainty. However, this is not the case in the MLETR (although there is a suggested pattern that can be adapted) and the ETDA. Article 12 of the MLETR provides for two general standards for determining or assessing the reliability of ETD systems.<sup>33</sup> First, it provides that whichever method used to establish the exclusive control, integrity, singularity, or identify an electronic transferable record shall be ‘as reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances’.<sup>34</sup> To determine whether a particular method is ‘as reliable as appropriate’, the MLETR lists certain objective factors that a court may have regard to. These factors include: (i) any operational rules relevant to the assessment of reliability; (ii) the assurance of data integrity; (iii) the ability to prevent unauthorized access to and use of the system; (iv) the security of hardware and software; (v) the regularity and extent of audit by an independent body; (vi) the existence of a declaration by a supervisory body, an accreditation body, or a voluntary scheme regarding the reliability of the method; and (vii) any applicable industry standard.<sup>35</sup>

Additionally, the MLETR provides that, where a particular method is ‘proven in fact to have fulfilled the function by itself or together with further evidence’, the obligation to assess whether or not such method is ‘as reliable as appropriate’ according to the listed factors above will be dispensed with.<sup>36</sup> Supposedly, this is to prevent parties from being dragged

<sup>27</sup> *ibid.*

<sup>28</sup> See the ETDA, s 2(2)(5).

<sup>29</sup> See the MLETR, art 10(b)(iii) and the ETDA, s 2(2)(b).

<sup>30</sup> See ETD Bill & Report (n 11) para 6.60. Explanatory Notes to the ETDA (n 14) para 36.

<sup>31</sup> See for example *Transpacific Eternity SA v Kanematsu Corporation and Another* [2002]1 Lloyd’s Rep 233. In *Glyn Mills v East and West India Dock Co.*, [1882] 7 App Cas 591 at 604–5, Lord Blackburn held that practice of issuing paper bills of lading in triplicate originals is perplexing since such practice facilitates fraud. See also P Ellinger & D Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 253–4.

<sup>32</sup> See B Yüksel Ripley & A MacPherson, ‘Response to the Law Commission of England and Wales Consultation on Digital Assets: Electronic Trade Documents, (July 2021) 12 <[https://www.abdn.ac.uk/law/documents/CCL%20Response%20to%20Call%20for%20Evidence%20on%20Digital%20Assets\\_24.7.21.pdf](https://www.abdn.ac.uk/law/documents/CCL%20Response%20to%20Call%20for%20Evidence%20on%20Digital%20Assets_24.7.21.pdf)> accessed 18 November 2025.

<sup>33</sup> See the MLETR, art 12(a)(b).

<sup>34</sup> MLETR, art 12(a).

<sup>35</sup> MLETR, art 12(a)(i–vii).

<sup>36</sup> MLETR, art 12(b).

into lengthy litigation on technical grounds when the method used in relation to an ETD is proven to have performed its function.<sup>37</sup>

The above reliability provision of the MLETR is undermined by uncertainty and, without appropriate adaptation, the provision burdens the courts of MLETR-implementing jurisdictions. This is because there are no clear guidelines within the MLETR on how to determine, with certainty, whether a particular ETD system is 'as reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances'. In the first place, the term 'reliable method' is too general and has been held to be 'nebulous and flexible'.<sup>38</sup> Without any further guidance, it remains unclear and difficult to apply and could lead to unintended results.<sup>39</sup> Second, the test of 'as reliable as appropriate' above is relative and subjective. In interpreting the 'as reliable as appropriate' test in the context of the electronic signatures used in electronic communications under the 2005 Convention on the Use of Electronic Communications in International Contracts (CUECIC), it was stated that legal, technical, and commercial factors may be taken into consideration in determining whether a method is 'as reliable as appropriate'.<sup>40</sup>

Within this context, such factors that may be considered include: (i) the sophistication of the equipment used by each of the parties; (ii) the nature of their trade activity; (iii) the frequency at which commercial transactions take place between the parties; (iv) the kind and size of the transactions; (v) the function of signature requirements; (vi) the capability of communication systems; (vii) compliance with authentication procedures set forth by intermediaries; (viii) the range of authentication procedures made available by the intermediary; (ix) compliance with trade customs and practice; (x) the existence of insurance coverage mechanisms against unauthorized communications; (xi) the importance and value of the information contained in the electronic communication; (xii) the availability of alternative methods of identification and the cost of implementation; (xiii) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field, both at the time the method was agreed upon and the time when the electronic communication was communicated; and (xiv) any other relevant factor.<sup>41</sup>

The above interpretation of the Explanatory Note to the CUECIC extends to the MLETR test of 'as reliable as appropriate for the fulfilment of the function for which the method is being used'. Since the conditions for determining whether an ETD system is 'as reliable as appropriate' and what 'function' such systems are meant to perform may involve factors with unclear weights (as shown under the CUECIC), subjective judgement is required.<sup>42</sup> For example, the emerging framework for the verification or assessment of the reliability of ETD systems or platform under the MLETR is the Reliability Assessment Framework provided by the

<sup>37</sup> Hence, the Explanatory Note to the MLETR states that paragraph 12(b) of the MLETR 'provides a 'safety clause' with the purpose of preventing frivolous litigation by validating methods that have in fact achieved their function regardless of any assessment of their reliability. It refers to the fulfilment of the function in the specific case under dispute and does not aim at predicting future reliability based on past performance of the method'. See MLETR Explanatory Note (n 4) para 136. See also A Davidson, 'Electronic Records in Letters of Credit' (2011) IV UNCITRAL Working Group Colloquium on Electronic Commerce 9.

<sup>38</sup> A Davidson, 'Implementation and Implications of the UNCITRAL Model law on Electronic Transferable Records in Trade Finance in Australia' in C Hare & D Neo (eds) *Trade Finance* (Oxford 2021) para 11.21.

<sup>39</sup> *ibid.* See the difficulty expressed by Perram J in applying the reliability test in a context where reliability is pitched at a very high level of generality. *Getup Ltd v Electoral Commissioner* [2010] FCA 869 [14]–[17].

<sup>40</sup> UNCITRAL, 'Explanatory Note to the United Nations Convention on the Use of Electronic Communications in International Contracts' (January 2007) para 162.

<sup>41</sup> *ibid.*

<sup>42</sup> Yu (n 23) 21.

Digital Governance Council (DGC) on behalf of the International Chamber of Commerce Digital Standards Initiative.<sup>43</sup> Under this framework, the DGC:

evaluates a platform's technical and operational features, such as data security, system integrity, user authentication, and the ability to maintain control over ETRs. It also checks for conformity with industry standards and operational rules to ensure alignment with MLETR's reliability criteria.<sup>44</sup>

While the above framework may be able to assess whether a particular ETD system is 'reliable', there is no standard which assesses whether, having regard to the MLETR objective factors, an ETD system is 'as reliable as appropriate'. This latter determination as to appropriacy is a subjective judgment call left to the court by the MLETR. Such determination may depend on other factors, including (but not limited to) the security appetite and infrastructure and the development level of individual national jurisdictions, as well as the terms under which the MLETR is adapted by individual jurisdictions. As noted in the Explanatory Note to the CUECIC above, it may also depend on the type of ETD system employed by the platform. Since some ETD systems use a centralized database to record possession and title, and others use distributed ledgers, the evaluation of reliability factors will need to consider the distinct technology and methodology employed by each system.<sup>45</sup>

Consequently, assessment of the reliability of the different methods employed by different platforms or systems may not follow a uniform 'one size fits all' approach or a pass/fail criterion.<sup>46</sup> According to TY Yap, 'it is likely to be a nuanced process, carried out on a case-by case basis, incorporating qualitative assessments relevant to the unique characteristics of each system'.<sup>47</sup> As a result, the 'as reliable as appropriate' test alone leaves the court with a complicated responsibility without any clear, certain, and objective guidance. Even if regard is to be had to the more objective factors listed in Article 12(a), the said Article does not provide the 'degree' to which the listed objective factors will be considered sufficiently *reliable* when applied by the courts in each case.

In 2023, section 2(5) of the ETDA implemented Article 12 of the MLETR. Among other things, the section made some significant improvements to the text of the MLETR. The said section provides that:

When determining whether a system is reliable for the purposes of subsection (2), the matters that may be taken into account include, (a) any rules of the system that apply to its operation; (b) any measures taken to secure the integrity of information held on the system; (c) any measures taken to prevent unauthorised access to and use of the system; (d) the security of the hardware and software used by the system; (e) the regularity of and extent of any audit of the system by an independent body; (f) any assessment of the reliability of the system made by a body with supervisory or regulatory functions; (g) the provisions of any voluntary scheme or industry standard that apply in relation to the system.

<sup>43</sup> See a sample of the draft verification statement issued by the DGC to platform service providers

<sup>44</sup> Digital Governance Council, 'Reliability Assessment Framework' <<https://github.com/dgc-cgn/CAS-Digital-Trade-Documentation/blob/main/docs/finalized/Q-A.md>> accessed 24 November 2025.

<sup>45</sup> TY Yap, 'What Makes a System "Reliable" and Is There Strength in Numbers?' (2024) 28 DCW No 2 27.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

This ETDA reliability provision omits the ‘as reliable as appropriate’ test in the MLETR, probably because of its unclear latitude. Nevertheless, the final decision as to whether having regard to the above-cited, non-exhaustive, objective factors of section 2(5)(a–g), an ETD system is reliable, remains subject to courts’ judgment, following an assessment of the system’s features against the reliability indicators and/or other relevant evidence.<sup>48</sup> Also, the ETDA omits the MLETR provision that presumes reliability once a system has performed the function for which it is used. As the LCEW explained, including such a provision could produce unintended results.<sup>49</sup> Given that a system is required to be reliable in order for the document in electronic form to qualify as an ETD, an assessment of the system’s reliability should not be excluded, even in cases where a particular system is proven to have performed its function.<sup>50</sup>

Nonetheless, section 2(5) of the ETDA failed to cure the uncertainty inherent in Article 12 of the MLETR. Like the MLETR, the wording of section 2(5) is permissive as it provides that ‘when determining whether a system is reliable for the purposes of subsection (2), the matters that may be taken into account include’. One major problem with this provision is that it offers no *floor or ceiling* regarding how to determine a reliable system for the purpose of section 2(2). Most of the guidance and literature on this subject have only stated that ‘the matters’ referred to above are non-exhaustive.<sup>51</sup> While this statement is true, it erroneously suggests that there is a clear baseline, albeit that there is no upper limit. This would be, arguably, a rather strained or ambitious reading of the provision.

A literal interpretation of the text of section 2(5) suggests otherwise. The text provides no *floor or ceiling* regarding the matters that the courts may consider in determining or assessing the reliability of the system in question. In fact, the section may be interpreted to mean that those matters listed in section 2(5) do not even need to be considered, depending on how the court deals with the issues that need to be determined. This leaves significant uncertainty as to what matters the courts may consider in arriving at the reliability of ETD systems.

For example, Article 12(a)(i) of the MLETR provides that one of the objective factors to which the courts are expected to have regard in assessing the reliability of ETD systems is ‘the existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method’. Relying on this, some jurisdictions opted to designate relevant national accreditation bodies to determine what level of reliability is acceptable in the interest of objectivity and predictability.<sup>52</sup> Hence, in Singapore, section 160(2) of the Electronic Transactions (Amendment) Act 2021 creates a rebuttable presumption of reliability where an ETD management system is registered, licensed, accredited, or recognized by an accreditation body in accordance with the regulation to be made under

<sup>48</sup> See Explanatory Notes to the ETDA (n 14) para 32. The objective factors of section 2(2)–(5) only serve as a guideline to courts.

<sup>49</sup> ETD Report & Bill (n 11) para 6.53.

<sup>50</sup> *ibid.*

<sup>51</sup> See ETD Report & Bill (n 11) para 6.46 and Explanatory Notes to the ETDA (n 14) para 22. See also Finocchiaro & Castellani (n 21) para 41. For a legal practitioner/industry view, see further Clifford Chance, ‘Paperless International Trade: Achieving Harmony Between the Law and Technological Potential’ (December 2021) 4.

<sup>52</sup> In Singapore, a Public Consultation Paper published in preparation for the revision of the Electronic Transactions Act 2021 noted that this approach ‘may help to ensure a certain level of objectivity in the assessment of the reliability’. See the Joint IMDA–AGC Review of the Electronic Transactions Act (Cap. 88), ‘Review of Draft UNCITRAL Model Law on Electronic Transferable Records (Public Consultation Paper)’ (10 March 2017) (Singaporean Review) para 5.2.4.

section 16Q of the Act. Both France<sup>53</sup> and Thailand<sup>54</sup> have also adopted this prescriptive approach.

Such prescriptive approach to reliability was not adopted in the ETDA as the drafters of section 2(5), in implementing Article 12 of the MLETR, excluded the clause on accreditation or registration by a national body. The LCEW explained that requiring that specific systems be accredited by a national or State-appointed regulators could create some problems. For example, State-based accreditations or prescriptive systems could be burdensome (especially for small businesses), and might frustrate innovation, increase transaction costs, and lead to delays in the transition to ETDs.<sup>55</sup> According to the Commission, it might also lead to a situation where operators could face having to become accredited in multiple jurisdictions.<sup>56</sup> In addition, if there is a burgeoning of such State-based accreditation without mutual recognition, the market may become closed off to new entrants until they are able to obtain all the different accreditations and operate globally. Moreover, since State-based accreditations only create a rebuttable presumption of reliability, it could be argued that they are not increasing certainty by much.

The above problems with the prescriptive approach to reliability notwithstanding, the fact remains that, in so far as the matters listed in section 2(5) of the ETDA are only matters that ‘may’ be taken into account in determining reliability, this section does not absolutely preclude the UK courts from considering or recognizing national accreditation as a reliability-conferring device—or indeed, any other extraneous factor. Therefore, where an ETD was created abroad, whose reliability is not in doubt under foreign law merely as a result of the decision of a manifestly corrupt national agency, it is not clear whether a UK court should recognize the validity of such ETDs and the consequent obligations they give rise to among international commercial parties. Could a party raise the defence of public policy against the recognition of such ETDs, citing the threat of insecurity and cybercrime? This question is not sufficiently answered by section 2(5) for its lack of certainty.

This unanswered question remains a key aspect of legal certainty because different jurisdictions have different ways of doing things. Developing countries substantially face different challenges compared to developed countries. This is especially so in emergent legal areas (such as ETDs) that are underpinned by technology. As a result, issues of security, transparency, technology, corruption and independence of regulatory bodies, digital connectivity, and effective regulatory and enforcement frameworks are handled differently in different countries.<sup>57</sup> In such a context, providing a number of non-objective factors for assessing reliability without a clear marker as to what degree of reliability is acceptable or unacceptable is unhelpful to both the courts and potential litigants. It has been suggested that, as more

<sup>53</sup> Article 3 of the French Decree No 2025-811 of 12 August 2025, in clarifying what constitutes ‘reliable method’ under Article 16 of Law No 2024-537 in relation to electronic transferable documents, stated that ‘in order to constitute a reliable method within the meaning of Article 16 of the above-mentioned Law No. 2024-537 of 13 June 2024, the process implemented must have been the subject, by an independent evaluation and control body, of an evaluation and certification issued less than five years ago and without significant reservation by reference to the criteria set out in Article 1’.

<sup>54</sup> The recent draft of the Thailand’s amended Electronic Transactions Act includes a provision to the effect that electronic transactions executed using a method or an electronic method stipulated by the Thailand Electronic Transactions Development Agency (ETDA) is presumed to be reliable. See ‘Thailand Releases Draft of Amended Electronic Transactions Act’ (Tilleke&Gibbins, 11 December 2024) <<https://www.tilleke.com/insights/thailand-releases-draft-of-amended-electronic-transactions-act/31/>> accessed 18 November 2025.

<sup>55</sup> ETD Report & Bill (no 11) para 6.47; T Jiang, ‘Regulating Electronic Bills of Lading on a National Level’ (2023) 7 JBL 616.

<sup>56</sup> *ibid.*

<sup>57</sup> See generally, A Parry et al, ‘Are Digital Advances and Inclusive Growth Compatible Goals? Implications for Trade Policy in Developing Countries’ in M Smeets, *Adapting to the Digital Trade Era: Challenges and Opportunities* (World Trade Organization, 2021) 280–99.

universally applicable ETD reliability standards are developed, the issues of uncertainty and lack of objectivity relating to the determination and assessment of the reliability of ETDs will be resolved.<sup>58</sup> In effect, the hope is that international accreditation bodies<sup>59</sup> accepted by relevant industry stakeholders will substitute national accreditation bodies<sup>60</sup> in verifying the conformity of ETD system providers with relevant industry standards.<sup>61</sup>

However, even if clear industry standards are laid down, the present formulation of the reliability section of the ETDA does not constrain a UK court to accept the report of an international verification body when presented by potential litigants to support the reliability of their systems. Industry standards are only one of the many factors that the courts are expected to have regard to in determining the reliability of ETD systems. It has been stated that when the DGC Digital Trust Conformity Program<sup>62</sup> receives official accreditation as an international verification body, a statement of verification of a system provider's compliance with industry standards issued by the DGC shall constitute a 'formal recognition' of the reliability of the verified platform.<sup>63</sup> This statement does not sit well with section 2(5) of the ETDA, which leaves it to the UK courts to judge the reliability of ETD systems in the light of

<sup>58</sup> ETD Report & Bill (n 11) para 6.47. Already, the Digital Container Shipping Association (DSCA) has produced standards for electronic bills of lading to achieve harmonised frameworks amongst stakeholders in the industry, including carriers, cargo owners, banks, and insurers. See DSCA, 'Streamlining International Trade by Digitalising End-to-end Documentation' (February 2022) 7–9 available at <<https://dcsa.org/newsroom/streamlining-international-trade>> accessed 23 November 2024. Standards are also being developed by international organisation in the area of DLTs. See International Organisation for Standardisation ("ISO"), 'Technical Committee ISO/TC 307, Blockchain and Distributed Ledger Technologies' available at <<https://www.iso.org/committee/6266604.html>> accessed 23 November 2024. Also, the International Chamber of Commerce (ICC), The Society for Worldwide Interbank Financial Telecommunication (SWIFT), The Baltic and International Maritime Council (BIMCO) and the International Federation of Freight Forwarders Associations have recently formed the Future International Trade (FIT) Alliance to bring together their various sets of standards and create one universal set of rules for the digitalisation of international trade. See ICC, 'Future International Trade Alliance Launched' (15 February 2022) available at <<https://iccwbo.org/news-publications/news/future-international-trade-alliance-launched/>> accessed 23 November 2024.

<sup>59</sup> One of such international verification bodies is the Digital Governance Council (DGC) which can now review the reliability self-assessment reports of system providers on behalf of the International Chamber of Commerce Digital Standards Initiative. Based on the self-assessment and the outcome of the review, the DGC can verify that an entity has provided sufficient evidence regarding, for example, the reliability of the system provider in line with Article 12 of the MLETR. However, the statement of verification should not be interpreted as an endorsement of the platform or its services. See K Jansa & P Mar, 'Draft Verification Statement' (*ICC Digital Standards Initiative*) <<https://github.com/dgc-cgn/CAS-Digital-Trade-Documentation/blob/main/docs/finalized/example-verification-statement.pdf>> accessed 18 February 2025. The International Chamber of Commerce (ICC)'s Digital Standards Initiative (DSI) partnered with the Digital Governance Council Canada to launch a technical tool to assess the reliability of digital services or networks globally. See Digital Governance Council, 'DGC Canada and ICC DSI Unveil Digital Trade Reliability Assessment Tool' (18 October 2024) <<https://dgc-cgn.org/dgc-canada-and-icc-dsi-unveil-digital-trade-reliability-assessment-tool/>> accessed 21 November 2025. There is yet no such international verification body in the UK.

<sup>60</sup> See, for example, the Infocomm Media Development Authority (IMDA) in Singapore. See P Prowse *et al*, 'TradeTrust-enabled Electronic Bills of Lading: A Legal and Practical Analysis of Their Use in Global Trade' (*Stephenson Harwood LLP*, 2023).

<sup>61</sup> In 2024, trace:original, a MLETR-compliant digital document solution (developed by a Swedish document technology company (Enigio AB)) became the first verified solution under the ICC DSI digital trade reliability assessment. See 'Enigio's trace:original Becomes First Verified Solution under ICC DSI Digital Trade Reliability Assessment' (*Enigio*, 18 November 2025) <<https://enigio.com/post/enigos-traceoriginal-becomes-first-verified-solution-under-icc-dsi-digital-trade-reliability-assessment/>> accessed 21 November 2025.

<sup>62</sup> The DGC Digital Trust Conformity Assessment Program has been created to provide organizations that meet recognized standards around digital technologies a way to set themselves apart. It brings together standards, assessment methodologies, accreditation programs and communities to engender digital trust that is principles-driven, evidence-based and open-source by design. See DGC, 'Digital Trust Conformity Program' <<https://github.com/dgc-cgn/CAS-Digital-Trust/tree/main>> accessed 24 November 2025.

<sup>63</sup> See a sample of the draft verification statement issued by the DGC to system providers at <<https://github.com/dgc-cgn/CAS-Digital-Trade-Documentation/blob/main/docs/finalized/example-verification-statement.doc>> accessed 24 November 2025.

the listed non-exhaustive objective factors.<sup>64</sup> The case would have been different had the ETDA contained an exceptional provision presuming the reliability of ETDs where the source ETD system is verified to meet relevant industry standards.

There are at least three risks that can emerge from the flexibility and uncertainty of section 2(5). The first risk is the possibility that the courts may refuse recognition of ETDs in situations where the courts cannot resolve the issue in favour of parties from other countries, regardless of whether the standards are what may be reasonably expected within such countries or regions. The second risk is that parties are not sure exactly what will happen when they seek the recognition of obligations arising under section 2(5) of the ETDA. This second point is probably more challenging than the first point on outright refusal. Business people are often pragmatic<sup>65</sup> and if they knew a refusal of recognition were likely, they would structure their businesses accordingly. The third risk concerns efficiency—the courts do not have one standard regarding what particular cases would attract refusal of recognition. The ETDA complicates this by the absence of a floor or ceiling regarding the list of matters that may be considered.

Another issue with section 2(5) of the ETDA relates to subsection 2(5)(a), which provides that the matters that may be considered in assessing reliability include ‘any rules of the system that apply to its operation’. In enacting the Act and adopting a list of non-exhaustive factors ‘based loosely on article 12 of the UNCITRAL Model Law on Electronic Transferable Records’,<sup>66</sup> the ETDA modified the wording of sub-Article 12(a)(i) of the MLETR, which provides for ‘any operational rules relevant to the assessment of reliability’. No clarification was offered in the Explanatory Notes to the ETDA explaining the reasons for the modification. The relevant ETDA wording may have been adapted for linguistic reasons. It may also be argued that a more holistic or purposive reading of the ETDA text points to the fact that the ‘system’ in question refers to the ETD system.<sup>67</sup> Yet, the adaptation in the ETDA creates some scope for the interpretation that the ‘rules’ in question in subsection 2(5)(a) may be referring to the legal rules of a foreign legal system as distinguishable from soft laws such as industry standards.

Regardless of whether a legal system was intended or may be inferred from section 2(5), relevant foreign legal provisions may come up for consideration before UK courts to the extent that they are the bases on which obligations have emerged regarding the validity of ETDs in cross-border transactions. An ETD system is likely to have its foundations in laws or regulations enabled by law. In considering such foreign laws that form the basis for obligations seeking recognition, what should be the role of public policy when English courts deal with situations where litigants try to frustrate the circulation of ETDs? Litigants may try to

<sup>64</sup> See Explanatory Notes to the ETDA (n 14) para 32. After implementing the MLETR in 2024, the French government intends to promulgate a decree which will lay down the criteria that any technological solution should comply with in order to be deemed ‘reliable’. Unlike in the UK, the decree will specify how platforms can ‘reliably’ identify holders of electronic transferable records, as well as establish and preserve exclusive control over them. The French approach differs from that of the UK’s ETDA, which did not include standards on what constitutes a reliable system, theoretically leaving the criteria for reliability up to a court to decide and triggering industry efforts to develop standards for digital trade platforms, which are being led by the International Chamber of Commerce. See J Atkins, ‘What is a Reliable System? France’s Digital Trade Law may Provide an Answer’ (*Global Trade Review*, 17 April 2024) <<https://www.gtreview.com/news/fintech/what-is-a-reliable-system-frances-digital-trade-law-may-provide-an-answer/>> accessed 21 November 2025.

<sup>65</sup> On how and why ‘it is plausible to think businesspeople [would act] reasonably’ and make practical legal or business choices, see the dissenting opinion of Lord Sales in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574 para 281.

<sup>66</sup> See Explanatory Notes to the ETDA (n 14) para 33.

<sup>67</sup> This is especially so as ‘the Act does not prescribe or endorse any particular system of technology’. Explanatory Notes to the ETDA (n 14) para 32.

impede the recognition of foreign obligations based on public policy because section 2(5) raises issues concerning documentary integrity and fraud.

### III. Policy pillars

This part of the article focuses on public policy and its relationship with policy, especially the policies underlying ETD laws. This section outlines the spectrum from which policy is viewed in this article and explains how this understanding of policy relates to the operation of public policy in the conflict of laws. The first task is to situate the context within which policy and public policy are used in this article. Policy is used here within the context of commercial law generally, focusing on the need to promote integrity and transparency. In seeking legal certainty and predictability, the policies underpinning the ETDA and MLETR are examined below with a view to promoting the enforcement of obligations across borders. The relationship between policy and public policy is also scrutinized, with an explanation of how the public policy exception operates in the conflict of laws.

#### 1. Policy in commercial law

In discussing the reliability provisions of the ETDA and MLETR, Part II of this article (above) highlighted how section 2(5) of the ETDA raised issues concerning documentary integrity and fraud. Preventing or discouraging fraud, by way of illustration, is a policy pillar that supports commercial law generally. There is ‘an old legal rule that fraud unravels all: *fraus omnia corrumpit*. It also reflects the practical basis of commercial intercourse’.<sup>68</sup> Successfully proving fraud ‘vitiates judgments, contracts and all transactions whatsoever’.<sup>69</sup> Such a policy goal regarding fraud is so fundamental that it would be relevant in international commercial legal transactions regardless of any specific mention in statute.<sup>70</sup> In this context, determining the extent to which policy drives or underpins law can be challenging. The overlaps between law and policy, in some cases, means that a deliberate and systematic approach is needed to ascertain relevant policies that underpin the ETDA and MLETR.

#### 2. Policies underpinning the ETDA and the MLETR

What policies underpin the MLETR and the ETDA? The Explanatory Notes to the ETDA state that ‘the policy objective of the Act’ is ‘to allow for certain trade documents in electronic form that satisfy specific criteria to be recognised in law as capable of possession, so that they can have the same legal treatment, effects and functionality as their paper counterparts’.<sup>71</sup> However, it seems more practical to understand these elements as constituting ‘overarching policy intentions’.<sup>72</sup> This is because ‘significant cost savings and efficiencies, increased transparency, increased security, reduced errors, and greater resilience to the impact of sudden shocks such as COVID-19’<sup>73</sup> are clearly important features of the underpinning policy matrix with respect to the ETDA.<sup>74</sup>

<sup>68</sup> *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, 15 [Lord Bingham].

<sup>69</sup> *Ibid.*

<sup>70</sup> *Candy Ventures Sarl v Aaqua Bv* [2025] EWHC 2877 (Comm) para 153.

<sup>71</sup> Explanatory Notes to the ETDA (n 14) para 9.

<sup>72</sup> Liang Zhao, ‘UK Electronic Trade Documents Act: problems of reliable system and exclusive control’ (2025) 31(3) *International Trade Law & Regulation* 159, 163.

<sup>73</sup> Explanatory Notes to the ETDA (n 14) para 9.

<sup>74</sup> Baroness Blake of Leeds, considering the impact assessment attached to the ETDA, observed how the Act ‘could save businesses approximately 50% in costs by moving to forms of electronic trade’. <<https://hansard.parliament.uk/lords/2023-09-14/debates/4DCA2CEB-617E-413C-A774-0B83291461A5/ElectronicTradeDocumentsAct2023>> accessed 26 November 2025.

ETDs having the same ‘legal treatment, effects and functionality’ as transferable papers should be seen from the perspective of how these policy features can reach the furthest extent possible regarding ETD circulation. As the Impact Assessment of the ETD Bill noted: ‘the objective of the legislation is to put electronic trade documents on the same legal footing as paper trade documents. This will support the development of a global ecosystem for electronic trade documents, which are cheaper, simpler, faster, and more secure than their paper equivalents’.<sup>75</sup> Indeed, there is no doubt that the electronic layer introduced into such trade documents means greater implications for cross-border obligations. The need for increased transparency and increased security is accentuated when cross border elements are involved in electronic trade documentary transactions.<sup>76</sup> In other words, the risks regarding documentary integrity and fraud need to be addressed, especially in cross-border contexts.

Like the ETDA, the MLETR also ‘aims to enable the legal use of electronic transferable records both domestically and across borders’.<sup>77</sup> There is an expectation that various jurisdictions, in enacting MLETR-influenced statutes, may be guided by national policy goals, as suggested in the Explanatory Notes to the MLETR.<sup>78</sup> So, the ETDA broadly reflects the MLETR’s objectives of promoting ‘efficiency of commercial activities’, ‘promoting trade and economic development both domestically and internationally’, and providing legal certainty.<sup>79</sup> But the ETDA seems to go even further in terms of details (for example, on the nature and quantum of cost savings) and even scope (for example, by making express reference to ‘environmental benefits due to a reduction in paper documents’).<sup>80</sup> Reducing transaction costs, increasing efficiency, and transparency also go hand in hand.<sup>81</sup> Consequently, it was stated that ‘the legislation is expected to reduce trade costs, accelerate trade transaction times, increase administrative efficiency, reduce documentation errors and increase access to trade finance’.<sup>82</sup>

Such policies, as stated above, will be frustrated if obligations are not performed by parties transacting with ETDs. After all, transferable documents embody relevant obligations (for example, to deliver goods or pay money), which are supposed to be recognized everywhere.<sup>83</sup> It is at the level of enforcing obligations that the connections between policy and public policy are functionally clear. Where obligations in transferable records are not allowed to be ordinarily enforced in cross-border contexts through the exclusionary operation of public policy, this vitiates the underlying policy underpinning ETD laws (that of promoting the circulation of ETDs). It also creates problems for the international trade industry and invalidates the overall claim to functional equivalence between transferable papers and ETDs.

<sup>75</sup> Department for Science, Innovation & Technology, *Impact Assessment of the Electronic Trade Documents Bill* (8 December 2022) para 10 <<https://www.gov.uk/government/publications/electronic-trade-documents-bill-impact-assessment/impact-assessment-of-the-electronic-trade-documents-bill>> accessed 27 November 2025.

<sup>76</sup> Risks that concern obligations, certainty and efficiency were highlighted in Part II of this article.

<sup>77</sup> See the ‘Purpose’ as set out in the home page of the ‘UNCITRAL Model Law on Electronic Transferable Records (2017)’ <[https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records)> accessed 25 November 2025.

<sup>78</sup> Explanatory Note to the MLETR (n 4) para 62.

<sup>79</sup> See Explanatory Note to the MLETR (n 4) para 3.

<sup>80</sup> See Explanatory Notes to the ETDA (n 14) para 12(c).

<sup>81</sup> It is possible to extrapolate more policies especially since ‘further policy and background to the Law Commission’s recommendations is provided in its final report and the consultation paper which preceded it’. Explanatory Notes to the ETDA (n 14) para 13.

<sup>82</sup> Department for Science, Innovation & Technology (n 75) para 11.

<sup>83</sup> See Explanatory Notes to the ETDA (n 14) para 4–5.

Therefore, where enforcement of transactions relating to ETDs does not constitute a significant breach of foreign law (even if the principle of comity is considered)<sup>84</sup> or involve fraud or an application of a morally repugnant foreign law<sup>85</sup> (which is offensive to the conscience of the English court),<sup>86</sup> the public policy defence should not override the relevant policies underpinning ETD circulation. There should be a ‘calibrated balancing exercise’ between (i) the policy that favours upholding contracts and (ii) respect for other countries, with the likelihood that the policy should be accorded priority.<sup>87</sup> This is why England is such a dependable dispute resolution hub.<sup>88</sup> Foreign acts/rights should be recognizable if legal and enforceable abroad and not illegal, fundamentally offensive, or expressly prohibited in England.

### 3. Policy and public policy

Undoubtedly, English courts are bound by law rather than policy.<sup>89</sup> This point is relevant not only in the context of the argument made above on the role that policy can play in enforcement of transactions relating to ETDs but also because confusion may arise for litigants and businesspeople with respect to this issue. The fact that governments issue policies may potentially give room for these policies to be confused with law, but the fact remains that these policies are not law. However, it is also true that legislative provisions may not properly capture all policies that influenced debates regarding relevant subjects.<sup>90</sup> As a result, the courts do take policy considerations into account, sometimes overtly, more usually in addressing the purpose or effect a statutory provision.<sup>91</sup> However, such government policy is not public policy in a conflicts sense.

Defining public policy, within the context of conflict of laws, has always been a challenging task,<sup>92</sup> and most scholars or even courts do not try to do so.<sup>93</sup> One is more likely to find the application of public policy than its definition. In a leading conflict of laws case, Lord Nicholls reiterated that public policy lacks a precise definition.<sup>94</sup> However, he observed that

<sup>84</sup> In a Hong Kong case, Lord Collins, while not accepting that a contract might be automatically refused enforcement if performed in a way that involves commission of a legal wrong under foreign law, noted that ‘a sufficiently serious breach of foreign law which reflects important policies of state’ may contravene public policy to enforce a contract. See *Ryder Industries Ltd. v Woo* [2015] HKCFCA 56–7.

<sup>85</sup> See *Glencore International v Metro Trading International* [2001] 1 Lloyd’s Rep 284 para 33 (on ‘the right of the English court to refuse to recognise the transfer [of property] on well-established public policy grounds if it regarded its effect as morally repugnant’. The court refused to invalidate the transfer).

<sup>86</sup> *Cheni v Cheni* [1965] P 85 at 98 (on ‘the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law’. The Probate, Divorce & Admiralty Division refused to invalidate a marriage lawful in Egypt but not in England; and refusing to apply public policy) see similarly *Armitage v Nanchen* (1983) 4 FLR 293.

<sup>87</sup> Adam Johnson, ‘Foreign law illegality: where are we now?’ (2018) 77(3) Cambridge Law Journal 475, 478.

<sup>88</sup> Also, English courts promote the ‘pro-enforcement policy of the Convention and its equivalent provisions in the 1996 Act’. See *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 para 80.

<sup>89</sup> *R v Heathrow Airport Ltd* [2020] UKSC 52.

<sup>90</sup> Catherine Needham and Emily Burn, ‘“Law but not law”: explaining unenacted policy as a type of policy failure’ (2025) 53(2) Policy & Politics 273.

<sup>91</sup> Relatedly, ‘differences of policy and approach’ between friendly governments preferably may be resolved through ‘bilateral contacts and negotiations between Governments’ before resorting to jurisdictional principles under international law. See Protection of Trading Interests Bill HL Deb 24 January 1980 Vol 404 Column 555.

<sup>92</sup> ‘Considerations of public policy can never be exhaustively defined’. See *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 Lloyd’s Rep 707.

<sup>93</sup> Although public policy can be ‘an unruly horse’ (see *Richardson v Mellish* (1824) 2 Bingham 229, 252), there has been a deliberate use of public policy in solving problems whether using that term or ‘concealed under some other designation, which, however, really expressed the same thing’. See Percy H Winfield, ‘Public Policy in the English Common Law’ (1928) 42 (1) Harvard Law Review 76, 77.

<sup>94</sup> *Kuwait Airways* (n 18) 883.

its flavour is captured by the much repeated words of Judge Cardozo<sup>95</sup> that the court will exclude the foreign decree only when it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal'.<sup>96</sup> Referring to the operation of public policy in English conflict of laws in *Loucks v Standard Oil Co of New York*, it was held that:

the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>97</sup>

This understanding of public policy has continued to illuminate relevant case law.<sup>98</sup>

## IV. Navigating between policy and public policy regarding ETDs

It can be challenging to draw any neat lines between public policy and policy, although this challenge arguably creates some scope to promote the circulation of ETDS. For example, the English High Court referred to 'the policy of the English law to prevent wrongdoers from benefitting from their own wrong' and 'the policy of English law to protect and enforce agreements' as 'public policies' in the context of enforcing obligations.<sup>99</sup> Such policies may be referred to as 'legal policy' to the extent that the latter 'consists of the collection of principles that the judges consider over time that the law has a general duty to uphold'.<sup>100</sup> One such principle is that the law should be certain and predictable.<sup>101</sup>

However, although legal policy is modifiable, the law may not be immediately responsive to legal needs and therefore policies may bridge the gap or be precursors to law.<sup>102</sup> This implies that legal policy may be inchoate because a pragmatic articulation of solutions to legal problems is sometimes necessary, although there is no formal law or legal certainty. The decision of the UK Parliament not to provide legal certainty (or, at least, a floor/base) regarding section 2(5) of the ETDA strengthens the argument to explore policy in filling such gaps. The policy objective that underpins the ETDA is not strictly legal policy that has formed over

<sup>95</sup> *ibid.*

<sup>96</sup> *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202.

<sup>97</sup> (1918) 224 NY 99 at 110.

<sup>98</sup> The Court of Appeal more recently relied heavily on, and followed, the House of Lords decision in *Kuwait Airways* (n 18). See *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886. It is unlikely that component parts of the UK will have different public policies, and even more unlikely that they will have conflicting approaches to public policy. For example, English courts will not refuse Scottish or Northern Irish judgments on grounds of public policy. See Pt II of the Civil Jurisdiction and Judgments Act 1982. See also Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (16th edn, Sweet & Maxwell 2022) para 14-154. But other courts could explore innovative ways that facilitate the enforcement of foreign obligations so far as possible. E.g., see Lord Hodge's observation, obiter, regarding the defence of public policy in the context of foreign judgments and the Protection of Trading Interests Act 1980. An award of multiple damages will not be recognised and enforced but he seemed to leave the door open for the award of compensatory damages in appropriate cases. See *Service Temps Inc v Macleod* 2014 SLT 375 at para 41. See also *SAS Institute Inc v World Programming Limited* [2020] EWCA Civ 599 para 43.

<sup>99</sup> *Deutsche Bank AG v Unitech Global Limited* [2013] EWHC 2793 (Comm) para 31.

<sup>100</sup> FAR Bennion, *Common Law Legislation* (Oxford University Press 2001) 90.

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid* 129, 142; Patrick Devlin, 'The Enforcement of Morals' (Maccabaeian Lecture in Jurisprudence, 1959): at <[https://psi329.cankaya.edu.tr/uploads/files/Devlin,%20The%20Enforcement%20of%20Morals%20\(1959\)\(1\).pdf](https://psi329.cankaya.edu.tr/uploads/files/Devlin,%20The%20Enforcement%20of%20Morals%20(1959)(1).pdf)> (last visited 27 May 2025).

many decades or centuries. After all, technological advancement is relatively recent, and ETDs are new or emergent. To illustrate this, the ‘policy objective’ to allow ETDs to be recognized in law is the product of practical and commercial needs.<sup>103</sup> It is not part of ‘the collection of principles that the judges consider over time that the law has a general duty to uphold’.<sup>104</sup> However, such inchoate policy objective, which may be found in documents such as reports and consultation papers,<sup>105</sup> clearly promotes and underpins the law.

Both policy (whether legal or inchoate) and public policy can be used positively or negatively. The commonly known use of public policy is in the negative sense (for example, ‘to avoid the application of foreign law’,<sup>106</sup> or not enforcing foreign obligations as this article posits). Unlike the usual approach to choice-of-law rules that factors in connections between the foreign system and facts of a case, public policy usually applies when the foreign rule cannot be accepted.<sup>107</sup> This may be on grounds of morality and justice ‘or when it would prejudice some important policy of the forum’.<sup>108</sup> To illustrate this, the English court will not enforce a foreign award regarding an underlying contract where there was a common intention to commit an illegal act.<sup>109</sup> In reaching this decision, the Court of Appeal overturned the High Court’s decision (which had enforced the award) and the Court of Appeal’s judgment has since found support.<sup>110</sup> The different decisions in the same case alone illustrate the importance of forum policy in the context of enforcing obligations.

Apart from the above, public policy can also be used in a positive sense to ‘insist on the application of forum law (or even foreign law)’.<sup>111</sup> A common thread between policy and public policy is the scope to use both in a positive (not just negative) sense. The MLETR, and statutes that have adapted or adopted the MLETR, are essential foundations in developing relevant frameworks and case law to promote the circulation of ETDs. However, the ETD sphere will remain policy-laden for the foreseeable future. This is because the very nature of the factors that the English court may consider in determining whether a system is reliable for the purpose of section 2(5) of the ETDA implies that policies will be relevant, and perhaps dominant, for the foreseeable future in many countries. For example, one of the factors that the courts may have regard to in determining the reliability of ETDs in the ETDA includes ‘any measures taken to prevent unauthorised access to and use of the system’.<sup>112</sup> This is not a category that may fit within strict confines of laws or regulations, especially in an emergent area underpinned by evolving technology.

Policy should be considered in the application of public policy, and this approach could provide more certainty to parties. However, resort to policy—for example, of promoting the circulation of ETDs—should only be made if it is clear what policy should be used and how

<sup>103</sup> Explanatory Notes to the ETDA (n 14) para 9.

<sup>104</sup> Bennion (n 100) 90.

<sup>105</sup> Explanatory Notes to the ETDA (n 14) para 12. ‘Inchoate policy’ is not a legal term but one that this article espouses. Hartley argued that the law also ‘pursues policy aims’ from political, economic, cultural and social perspectives. See Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (3rd edn, Cambridge University Press) 687.

<sup>106</sup> Hartley *ibid* 587.

<sup>107</sup> *ibid* 586.

<sup>108</sup> *ibid* 586.

<sup>109</sup> *Soleimany v Soleimany* [1999] QB 785, 797. See also *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 – the contract was not enforceable in England considering that it was the common intent of the parties to violate Indian law and it was contrary to public policy to enforce such an agreement.

<sup>110</sup> In *Betamax Ltd v State Trading Corporation (Mauritius)* [2021] UKPC 14 para 50: ‘In one (*Soleimany*), the illegality of the contract was made clear in the award; the court therefore was entitled to determine that enforcement should be refused on public policy grounds’. The Court subsequently provided some nuance regarding the finality of awards generally. See para 51.

<sup>111</sup> *ibid* 587.

<sup>112</sup> See ETDA s 2(5)(c).

that policy may be identified. In a typical conflict of laws situation, where an otherwise applicable foreign law is disapplied on the basis of the forum's public policy, a lacuna is often left regarding the appropriate applicable law.

When a rule of foreign law is excluded, 'it is unclear whether the lacuna should be filled with the residual applicable law or the law of the forum'.<sup>113</sup> Thus, the answer to this problem would be predicated on 'whether such a residual applicable law, compatible with local public policy, can be identified and applied to the dispute'.<sup>114</sup> Where this is the case, the remainder of the applicable law (after the offensive part has been rejected) ought to be applied to give effect to the policies underlying choice-of-law-rules. An apt illustration is witnessed in how the House of Lords, in *Kuwait Airways Corp v Iraqi Airways (Kuwait Airways)*, disregarded an aspect of the foreign law, but then applied residual provisions of the Iraqi Civil Code.<sup>115</sup> It is only when it is not possible to apply the remainder of the applicable (foreign) law that the law of the forum becomes the most appropriate alternative. In this context, it was concluded that 'the application of English public policy remains an application of local norms' regardless of whatever positive law (local or foreign) is applied instead of the objectionable foreign law.<sup>116</sup>

This approach is persuasive and based on sound reasoning. Indeed, there is scope to go further regarding ETDs. In considering the residual applicable foreign law, it is contended that courts can also consider policies that underpin foreign laws. Courts can factor in what the relevant foreign law sought to achieve regarding issues such as reliability and integrity where they struggle with the enforcement of foreign obligations. The same principle can apply where the court resorts to applying the forum's domestic law as an alternative. The consideration of relevant policies applies at three levels: the foreign law, local statute, and comparative legal support through instruments such as MLETR, considering any case law that the latter generates—all of which are subject to the application of English norms. Regarding the comparative aspect, English courts can find further support in English statutes that have implications for related aspects of integrity such as corruption.<sup>117</sup> In interpreting and calibrating public policy in a way that factors in relevant policies from outside the United Kingdom, the test should be relevance and compatibility, regardless of labels. This will also align with considering the purpose of (the remainder of) the applicable foreign law. Ordinarily, this should be easier in other MLETR countries and by undertaking comparative analysis based on MLETR guidelines and case law that may emanate from the application of such guidelines elsewhere.

<sup>113</sup> Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) *Journal of Private International Law* 208. See generally: William E Holder, 'Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law' (1968) 17 *International and Comparative Law Quarterly* 926, 950 (on when public policy plays 'a choice of law role'). See also Monrad G Paulsen and Michael I Sovern, "'Public Policy" in the Conflict of Laws' (1956) 56(7) *Columbia Law Review* 969, 981 (arguing that "the 'public policy' doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function". Cf. Adeline Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 *Law Quarterly Review* 88, 113 (on how 'transnational public policy may in certain cases apply in a positive manner as opposed to the traditional negative effect of public policy' and, in this context, providing an example of how 'transnational public policy may lead to the application of an otherwise inapplicable foreign public law').

<sup>114</sup> *ibid.*

<sup>115</sup> See Mills (n 113) 208 citing para 45–6 of *Kuwait Airways* (n 18).

<sup>116</sup> Mills (n 113) 208.

<sup>117</sup> In *Crane Bank Limited v DFCU* (n 97), the Court of Appeal noted that 'it is at least arguable, not least from the criminal law as framed in the Bribery Act 2010, that corruption of foreign public officials is contrary to English public policy is developing'.

There is fertile ground for the consideration of policy issues to thrive.<sup>118</sup> The approach of considering the policy that drives relevant foreign law (on which bases the obligations emanated) can also be supported by the English court's willingness to consider the intention behind the underlying contract that gave rise to any obligations. In *Dana Gas PJSC v Dana Gas Sukuk Limited*,<sup>119</sup> a case concerning a financial transaction governed partly by English law and partly by United Arab Emirates (UAE) law (including 'principles of Islamic Shari'a' and the prohibition of usury), the claimant alleged that the transaction was invalid and unenforceable under UAE law.<sup>120</sup> In rejecting the claimant's argument, the English High Court observed that 'it is only if a contract has as its object and intention the performance in a friendly foreign country of an act which is illegal under the law of that country that the contract will be considered contrary to English public policy'.<sup>121</sup> The court, therefore, decided that the purchase undertaking was lawful. There was no evidence that the purchase undertaking required that any sale agreement should be executed in the UAE. Even if this was the case, the Court could 'see no reason why it should be regarded as invalidating the entire contract'.<sup>122</sup>

It is especially necessary to consider relevant policies because the emergent nature of ETD regulatory frameworks means that there may be no clear or direct legal provisions concerning guidance on specific legal questions for the foreseeable future in many countries. However, it is relatively easy to determine the policies that underpin relevant or related laws generally and a positive application of public policy can be advanced on this basis. Specific legal provisions may not exist yet in some jurisdictions, but the overarching aims of such laws and related laws can be helpful in determining what foreign practices or conduct are compatible with English public policy. The policies of MLETR countries should be straightforward, but this can be rather challenging in non-MLETR countries that do not have specific legal provisions regarding the range of factors listed in section 2(5) of the ETDA.

## V. English public policy as an exceptional choice-of-law rule

As explained in section III, public policy is essentially about considering fundamental principles of justice, morality, or national interests in determining whether obligations emanating from foreign jurisdictions should be recognized or enforced. As an exceptional choice-of-law rule,<sup>123</sup> 'the threshold for invoking English public policy is in any event very high'.<sup>124</sup> The function of public policy as a choice-of-law rule is not widely used in literature but this

<sup>118</sup> Law Commission, 'Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets' paras 1.22–1.23, 1.35–1.36, 1.38–1.40, 1.47.1.53 at <<https://cloud-plat-form-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2025/01/Digital-assets-in-private-international-law-FAQs.pdf>> (last visited 27 May 2025).

<sup>119</sup> *Dana Gas PJSC v Dana Gas Sukuk Limited* [2017] EWHC 2928 (Comm).

<sup>120</sup> *ibid* para 1.

<sup>121</sup> *ibid* para 82. The principle derives from *Foster v Driscoll* [1929] 1KB 470. The House of Lords applied it in *Regazzoni* (n 109) 301.

<sup>122</sup> *Dana Gas PJSC* (n 119) para 83.

<sup>123</sup> Public policy is exceptional because it chooses local law as 'an exception to the usual choice-of-law process' due to incongruence with English public policy. See Mills (n 113) 201, 207 and 209.

<sup>124</sup> Writing in the context of the Convention of 30 June 2005 on Choice of Court Agreements 2005, leading scholars thus wondered if there was any value in emphasising that recognition and enforcement may be refused where it would be 'manifestly incompatible with public policy' see Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (n 98) para 14-208.

function has been recognized for many decades.<sup>125</sup> In common law countries, typically, ‘public policy has been applied positively to require the application of a rule of law that would not otherwise be applicable. Most often, this would be a rule of forum law, but it can also be a rule of foreign law’.<sup>126</sup> As one of the functions of public policy, ‘the usual effect of the choice of law function is to reject foreign law and assert “the forum’s right to have its law applied to the transaction because of the forum’s relationship to it.”’<sup>127</sup> The assertion of English law when public policy is upheld effectively amounts to choosing English law regardless of what parties may prefer.<sup>128</sup> A similar purpose was achieved by the UK Bribery Act. Some UK investors sometimes prefer foreign jurisdictions because they find more flexibility than may exist in the United Kingdom.<sup>129</sup> In response, the UK legislator enacted the Bribery Act, which has extraterritorial application with respect to the conduct of UK nationals in other parts of the world.<sup>130</sup>

This assertion of English law by means of public policy is traditionally used as a shield.<sup>131</sup> A party who seeks to avoid any foreign obligations can invoke public policy as a defence or the court itself may make the invocation. An egregious violation of public policy should not be left to parties to decide on whether they would like to proceed with the breach. The court steps in to block the application of an otherwise applicable foreign law, thereby freeing parties from obligations. Indeed, public policy has been aptly described as ‘the escape device *par excellence*’.<sup>132</sup> Where it works to disavow acts or laws that are ‘morally repugnant’<sup>133</sup> or ‘offensive to the conscience of the English court’,<sup>134</sup> or that ‘violates some moral principle, which, if it is not, ought to be universally recognised’,<sup>135</sup> its application enjoys merit. For example, a clear case of fraud should not be allowed by an English court to prevail merely because conflict of law rules require the application of a particular foreign law or the recognition of a foreign act.

However, parties could raise the defence of public policy before the court despite the fact that a foreign law or act is not morally repugnant or offensive to the conscience of the English court. An example that may give rise to such a situation is in relation to the reliability of ETDs. Given the judicial flexibility regarding section 2(5) and its permissive provisions with respect to determining or assessing reliability, litigants may ask the courts to deny

<sup>125</sup> Murphy contextualised choice of law as a ‘function of public policy’ as long ago as 1981. Kent Murphy, ‘The Traditional View of Public Policy and Ordre Public in Private International Law’ (1981) 11(3) *Georgia Journal of International & Comparative Law* 591, 609.

<sup>126</sup> Trevor Hartley, ‘Public Policy and Mandatory Provisions’ in Paul Beaumont and Jayne Holliday (eds), *A Guide to Global Private International Law* (Bloomsbury Publishing 2022) 75–87, 76.

<sup>127</sup> Murphy (n 125). The forum’s law used here refers to the forum’s public policy regardless of whether it leads to the application of the remainder of a foreign law or a domestic law.

<sup>128</sup> Parties’ preference of law may be due to exercising party autonomy (i.e. choosing specific law) or just a pragmatic inclination towards any law.

<sup>129</sup> Simon Jack, ‘Action urged to halt exodus of firms leaving UK’ BBC News (9 July 2025) <<https://www.bbc.co.uk/news/articles/cz6g85qp0p6o.amp>> accessed 30 November 2025. See also, Ellie Hannagan, ‘42% of investors are moving assets out of the UK, report finds’ Smart Currency Exchange – Property News (21 January 2025) <<https://www.smartcurrencyexchange.com/news/property-news/42-of-investors-are-moving-assets-out-of-the-uk-report-finds/>> accessed 30 November 2025. Andrew Morris and Charlotte Ku, ‘English Company Law: The Caribbean Advantage’ (*IFC Review*, 10 October 2023) <<https://www.ifcreview.com/articles/2023/october/english-company-law-the-caribbean-advantage/>> accessed 30 November 2023.

<sup>130</sup> The UK Bribery Act 2010 s 12(5).

<sup>131</sup> Briggs used the language of the common law of contract. See Adrian Briggs, ‘Public Policy in the Conflict of Laws: a Sword and a Shield?’ A Note on *Kuwait Airways Corp. v. Iraq Airways Co.* (Nos. 4 and 5) (2002) 6 *Singapore Journal of International & Comparative Law* 953, 974.

<sup>132</sup> Hartley, *International Commercial Litigation* (n 105) 586.

<sup>133</sup> *Glencore International v Metro Trading International* (n 85).

<sup>134</sup> *Cheni* (n 86).

<sup>135</sup> *Kaufman v Gerson* [1904] 1 K.B. 591, 599.

recognition or enforcement of obligations involving ETDs created abroad on the grounds of public policy. Parties could seek to exploit mere differences between domestic and foreign laws to escape obligations incurred abroad. For example, while reliability assessment by a national supervisory or regulatory body is only one of the non-exhaustive factors to which the courts could have regard while assessing reliability under section 2(5)(f) of the ETDA, it could be the sole factor upon which reliability is presumed under section 160(2) of the Singaporean Electronic Transactions (Amendment) Act 2021. This difference is material as parties may apply to UK courts to refuse recognition of such ETDs created in Singapore whose reliability is premised solely on national accreditation, citing non-compliance with more technical objective factors relevant for determining reliability under section 2(5) of the ETDA, and by extension, public policy.

The point needs to be made that even a foreign legal impediment may not necessarily lead to an inevitable disregard for foreign obligations. It may be possible to ‘overcome the foreign legal impediment’.<sup>136</sup> Otherwise, a limited application of public policy will only appreciate the role of public policy through a prism.<sup>137</sup> Indeed, public policy can operate in various ways.<sup>138</sup> While the application of public policy is usually identified in a negative sense (that is, the context of avoiding obligations), it is important to realize that public policy could also be used positively in a way that could promote the enforcement of obligations in deserving cases. In its positive application, public policy should be directed to the policies underpinning ETD laws and usages either in foreign or domestic law.

To be clear, this article does not predicate a positive use of public policy on the creation of a right where none exists in the foreign jurisdiction.<sup>139</sup> The analytical focus is on the enforcement of rights already created in an ETD context. The issue is not whether public policy is narrowly applied in English law, as scholars and courts have highlighted,<sup>140</sup> but the uncertainty that underpins the doctrine and how parties can exploit this particularly in the context of the factors listed in section 2(5) of the ETDA. A narrow application of public policy may dissuade, but will not prevent, parties who are keen to avoid the enforcement of foreign obligations or impede the circulation of ETDs. Public policy concerns regarding related areas (notably digital assets) are practical issues with which judges sometimes struggle as complexities evolve with technology.

It is difficult to contest the English courts’ internationalist approach to commercial transactions, which invariably requires a narrow application of public policy. This is especially so considering the role of England as an international business hub for international commercial litigants.<sup>141</sup> But there is also a view that this narrow application of English public policy is (at least in part) a result of the reality that some functions of public policy in some other countries are ‘discharged in England by means of other doctrines’.<sup>142</sup> One example is comity,

<sup>136</sup> *ibid* 974. As earlier noted, even when a part of foreign law is disapplied on the ground of public policy, the remainder of that foreign law, where possible, could still be applied as a law of choice.

<sup>137</sup> Briggs argued that ‘public policy can operate in various ways’. See Briggs (n 131) 973.

<sup>138</sup> *ibid*.

<sup>139</sup> Briggs noted the possibility, in principle, although it would require ‘some formidable work’. See Briggs (n 131) 977.

<sup>140</sup> Richard Fentiman, *International Commercial Litigation* (2<sup>nd</sup> edn, Oxford University Press 2015) paras 4.34–4.37; Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (n 98) para 14-208; *Kuwait Airways* (n 18) para 114 [Lord Steyn concurring with the majority opinion]; *Ertel Bieber v Rio Tinto Company* [1918] A.C. 260, 273.

<sup>141</sup> Between April 2023 and March 2024, 68% of litigants before the commercial courts in London were not from the UK: at <<https://portland-communications.com/publications/commercial-courts-report-2024/>> (last visited 27 May 2025).

<sup>142</sup> Enonchong also cited natural justice in his comparison with French law. See Nelson Enonchong, ‘Public Policy in the Conflict of Laws: A Chinese Wall Around Little England’ (1996) 45 *International & Comparative Law Quarterly* 633, 639.

on which this article does not focus<sup>143</sup> because comity itself is inherently vague as ‘a term of very elastic content’.<sup>144</sup> At least two challenges arise: first, the fact that public policy manages to push any issues outside its remit by a narrow approach does not necessarily mean a resolution of problems; and second, the need to resolve such issues will remain a burden on the justice system. This is especially so where parties are convinced that they need to test the system regarding emergent issues in areas underpinned by relatively fluid or rapidly developing technology *vis-à-vis* the inadequacy or absence of specific ETD law in the foreign jurisdiction.

The next section examines why public policy should be used more positively in addition to any necessary negative or restrictive application. Despite the narrow application of public policy, there are some risks inherent in having to resolve disputes that need to be determined in courts. These practical risks are intertwined with certain features that are analysed below from the perspectives of fluidity, competition of public policies, and statutory delimitation. Such risks reinforce the need to adopt a deliberate approach to ETD policies with a view to ensuring that public policy is used to promote the circulation of ETDs.

## VI. Challenges associated with the application of public policy

From the foregoing, the case has been made that section 2(5) of the ETDA does not clarify or mitigate the uncertainty in Article 12 of the MLETR with respect to matters that may be considered to determine whether a system is reliable. As earlier noted, parties who want to avoid foreign obligations could exploit such uncertainty (as there is no floor or ceiling in section 2(5)) and public policy is one way by which parties could attempt avoidance. This section argues that, apart from the flexibility inherent in the reliability provision of the ETDA, public policy itself (especially when applied in a negative sense) is a vague and elastic concept that can further complicate the challenges faced in the recognition and cross-border circulation of ETDs. It may be true that English courts usually approach public policy questions with great caution and maintain a narrow scope. However, this does not necessarily prevent parties from trying to exploit the legal uncertainty in section 2(5) and burden the courts, especially when public policy is fraught with problems of fluidity and competing public policies.

### 1. Fluidity

Earlier, this article highlighted the fluid nature of public policy. The fluidity of public policy is illustrated in *Kuwait Airways*,<sup>145</sup> where the House of Lords observed that the Court of Appeal ‘broke new ground’ as it attained the status of ‘the first decision to hold that the acts of a foreign state within its territory may be refused recognition because they are contrary to public international law’.<sup>146</sup> The House of Lords confirmed the Court of Appeal’s decision and observed that it was right to ‘extend the public policy exception beyond human rights violations to flagrant breaches of public international law’.<sup>147</sup> The need to extend the application

<sup>143</sup> Although ‘when the illegality arises under the foreign law, the principal concern is comity’. See Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (n 98) para 32-255.

<sup>144</sup> *ibid* para 7-002.

<sup>145</sup> *Kuwait Airways* (n 18).

<sup>146</sup> *ibid* para 114.

<sup>147</sup> *ibid* para 114.

of public policy beyond a subsisting scope is anchored on the fluidity of public policy.<sup>148</sup> This fluidity is potentially complicated by the fast-paced evolution of technology, which may reasonably accommodate such extension. The Explanatory Notes to the ETDA reflect the wisdom of the legislator by not prescribing or endorsing any type of technology in assessing the reliability of a system.<sup>149</sup> However, this also potentially exposes recognition processes to uncertainty because different jurisdictional approaches may be compounded by a challenging search for functional equivalence.

The very nature of public policy (from the perspective of fluidity and vagueness) has led to a scholarly argument for a calibrated approach regarding the scope or application of public policy.<sup>150</sup> The application of public policy should be narrower and more limited in private international law than in domestic or internal law.<sup>151</sup> For example, the House of Lords had noted that non-compensatory and confiscatory legislation based on racial discrimination grounds must be rejected completely, regardless of whether there was any uncertainty outside the United Kingdom.<sup>152</sup> In cases concerning ETDs from other jurisdictions, the courts should be able to explore how policies underpinning domestic enactments can be compared with policies that underpin the MLETR to promote a positive approach to public policy. This will facilitate the circulation of ETDs. Despite subject categorizations, conflict and non-conflict cases share the desire for a principled approach to public policy in a way that discourages arbitrariness.<sup>153</sup> Domestic and international public policies may overlap: for example, the internal public policy (for domestic cases), international public policy (for private international law cases), and ‘truly international’ public policy derived from international law do not ‘indicate clearly different types of norms, but merely positions on a continuum’.<sup>154</sup> The potential for overlap is there, but public policies may also compete.

## 2. Competing public policies and statutory delimitation

Public policies may compete. This is because public policies may be better linked to either domestic issues (which have international implications such as manipulating the London Interbank Offered Rate) or cross-border issues (such as the sanctity of agreements). The potential for such competition is significant regarding ETDs because, as this article has argued, some of the policies that underpin ETDs are emergent (including the overarching use of technology and implications for reliability and integrity).

<sup>148</sup> To illustrate, the English High Court decided that English courts should not enforce an English law contract required to be performed abroad where it concerns an activity ‘contrary to the head of English public policy which is founded on general principles of morality’ and, where that public policy applies to the country of performance [Qatar] and has the effect of the agreement not being enforceable under the law of that country. See *Lemenda Trading Co Ltd. v African Middle East Petroleum Co. Ltd.* 448, 461.

<sup>149</sup> Explanatory Notes to the ETDA (n 14) paras 35 and 27.

<sup>150</sup> In other words, how ‘the private international law function of public policy differs from the ordinary function of public policy in English domestic law’. See Stavros Brekoulakis, ‘Public policy rules in English and international arbitration law’ (2018) 84(3) *Arbitration* 205, 211.

<sup>151</sup> *Kuwait Airways* (n 18) para 114.

<sup>152</sup> *Oppenheimer v Cattermole* [1976] AC 249. See also *Kuwait Airways* (n 18) para 114.

<sup>153</sup> Non-conflict cases also demonstrate that the search for systematic and progressive approach to public policy. See *Hewison v Meridian Shipping Pte Ltd* [2002] EWCA Civ 1821 paras 26 and 46 (a domestic tort case concerning negligence and fraudulent misrepresentation). For a disapproval of the public conscience test, see *Tinsley v Milligan* [1994] 1 AC 340; *Stone & Rolls Ltd v Moore Stephens* [2009] 1 A.C. 1391 para 107; *Patel v Mirza* [2016] UKSC 42 – Lord Clarke para 219; *Blakewell Management Ltd v Brandwood* [2004] UKHL 14 para 60. In *Patel v Mirza* *ibid* para 113, the Supreme Court adopted ‘a range of factors approach’ (having contended with its criticisms, notably, uncertainty. But even in that case, Lord Mance (at para 192) cautioned that the approach did not call for ‘an open and unsettled range of factors’.

<sup>154</sup> See *Mills* (n 113) 213.

English case law shows how public policies may compete. In *Deutsche Bank AG v Unitech Global Limited*,<sup>155</sup> one of the issues that was considered was whether certain interest was irrecoverable on grounds of public policy and whether the defendants were entitled to payment of certain interest that had already been paid to Deutsche Bank (DB).<sup>156</sup> If the London Interbank Offered Rate (LIBOR) rate was manipulated, it would be contrary to public policy to allow DB to benefit from its own wrong, which would happen if it recovered interest based upon the LIBOR rate. The other side was what the High Court termed ‘a countervailing public policy’ that parties should be held to their bargain, which was to pay interest according to the screen rate of the British Bankers Association.<sup>157</sup> The position of the court was that there was ‘a strong argument for saying that effect can be given to both public policies by enforcing the obligation to pay interest at the screen rate whilst allowing the Defendants a counterclaim for the damage, if any, caused by the alleged manipulation of LIBOR’.<sup>158</sup> Therefore, the court concluded that there was no real prospect that the public policy defence would succeed at trial.<sup>159</sup>

The potential for public policy competition may be complicated by statutory scope. Public policy may be delimited by different UK statutes. This may be illustrated through the Administration of Justice Act 1920 (to facilitate reciprocal enforcement of judgments and awards in the United Kingdom and other parts of His Majesty’s Dominions or Territories under His Majesty’s protection) and the 1933 Foreign Judgments (Reciprocal Enforcement) Act 1933 (concerning the enforcement of foreign judgments which accord reciprocal treatment to UK judgments). Under the 1920 Act, foreign judgments will not be registered if they concern ‘a cause of action which for reasons of public policy or for some other reason could not have been entertained by the registering court’.<sup>160</sup> Under the 1933 Act, however, registration of foreign judgments may be set aside if enforcing such judgments ‘would be contrary to public policy in the country of the registering court’.<sup>161</sup>

The distinction is significant because, whereas the 1933 Act stipulates ‘a more limited principle’, the 1920 Act prohibits registration of foreign judgments even ‘for some other reason’ or for reasons that are not stipulated in the Act.<sup>162</sup> Hence, any capacity to recognize and enforce a foreign judgment ‘even if the cause of action is unknown to English law’<sup>163</sup> needs to be considered in appropriate contexts of applicable regimes on foreign judgments. However, the discrepancy within these competing statutes further illustrates the potential that statutes with wider delimitation in relation to public policy or related concepts, like the 1920 Act, can have in emboldening litigants in seeking to defeat the recognition or circulation of ETDs in obligations undertaken abroad. Parties who seek to enforce judgments relating to

<sup>155</sup> *Deutsche Bank AG v Unitech Global Limited* [2013] EWHC 2793 (Comm).

<sup>156</sup> *ibid* para 60.

<sup>157</sup> *ibid* para 62.

<sup>158</sup> *ibid* para 62.

<sup>159</sup> *ibid* para 63. See also *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119 affirming the High Court’s judgment.

<sup>160</sup> See s 9(2)(f) of the 1920 Act.

<sup>161</sup> See ss 4(1)(a)(v), 8(1)(2) of the 1933 Act. The 1920 and 1933 statutes remain valid although the UK ratified the 2019 Hague Judgments Convention on 27 June 2024. The Convention has been in force in the UK since 1 July 2025. See the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>> accessed 12 April 2026.

<sup>162</sup> For the argument that this is ‘an important difference’, see Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (n 98) para 14-154.

<sup>163</sup> Mills highlighted the probability of enforcing such judgments considering *Cablevision Systems Development Co v Shoupe* (1986) 39 *WIR* 1. See Mills (n 113) 212. For a commentary on this judgment and support for ‘sensible guidelines’, see Winston Anderson, *Enforcement of foreign judgments founded upon a cause of action unknown in the forum* (1993) 42(3) *International & Comparative Law Quarterly* 697, 701.

ETDs must carefully navigate relevant foreign judgment regimes. This is especially so considering the potential for varying approaches to public policy. Statutory regimes are also not co-extensive with the common law. Therefore, the ‘genius of the common law ... to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems’<sup>164</sup> may not guarantee solutions to specific statutory requirements.<sup>165</sup> As such, the courts may also consider what could be saved from the foreign law, since there are some rather vague criteria relating to reliability and section 2(5) of the ETDA. In this way, mandatory rules will contribute to exploring practical solutions to issues concerning the enforcement of obligations across borders. They can also significantly reduce any legal uncertainty and promote predictability.

## VII. Mandatory rules

Mandatory rules are:

substantive legal rules that embody important state interests and that, for this reason, are intended to necessarily, mandatorily, and *directly* apply to multistate situations—that is, regardless of whether a choice-of-law rule authorizes their application, and even if a choice-of-law rule calls for the application of another law.<sup>166</sup>

They are regarded as ‘crucial for safeguarding [a country’s] public interests, such as its political, social or economic organisation’.<sup>167</sup> English statutory law with international overriding effect will prevail over foreign contractual law so that English law will govern.<sup>168</sup> This article concerns cross-border issues, and therefore, is not focused on mandatory rules with a purely domestic context.

As noted earlier, the reliability criteria set out in section 2(5) of the ETDA do not provide a *floor* or a *ceiling* regarding the matters that the courts may consider in determining or assessing the reliability of the system in question. This challenge, for the arguments already canvassed, is complicated by the relative latitude also inherent in public policy, although this article argues that public policy can be used in a way that promotes the enforcement of obligations from abroad in the context of ETDs. There is a question as to whether mandatory rules have the potential to mitigate any legal uncertainty that concerns public policy, which this part of the article examines.

The enquiry is important partly because of the relationship between public policy and mandatory rules. First, there are overlaps in terms of policy content. Policies underpin relevant parties’ interests as well as the application of legal rules including applicable law.<sup>169</sup> Earlier discussions identified the policies that underpin ETDs,<sup>170</sup> and such policies (for

<sup>164</sup> *Dow Jones & Co. Inc v. Gutnick* [2002] 210 CLR 575 para 92 (Kirby, J) (Austl.). For the view that ‘analogical reasoning is the cornerstone of the common law’, see Michael Gvozdenovic, ‘Statute, Common Law, and Analogical Reasoning: Pouring Oil on Troubled Waters (2022) *Statute Law Review* 41(3) 315, 317.

<sup>165</sup> In *Koza Ltd v Koza Altin Isletmeleri AS* [2023] EWCA Civ 1284. The English Court of Appeal observed that the application of principles by analogy was done erroneously as *Williams and Humbert Ltd v W. & H. Trade Marks (Jersey) Ltd* [1986] A.C. 386 did not concern the recognition of foreign judgments.

<sup>166</sup> Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014) 299.

<sup>167</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’) art 9(1).

<sup>168</sup> Fentiman (n 140) para 4.11

<sup>169</sup> Hartley, ‘Public Policy and Mandatory Provisions’ (n 126) 75

<sup>170</sup> Part III(B) of this article on policies underpinning the ETDA and MLETR.

example, promoting ‘efficiency of commercial activities’, ‘promoting trade and economic development both domestically and internationally’, providing legal certainty,<sup>171</sup> and transparency)<sup>172</sup> are relevant to mandatory laws. Second, both public policy and mandatory rules can essentially have an overriding effect—in the case of the latter, where a statute states so expressly or impliedly.<sup>173</sup> Third, and perhaps strategically, both public policy (indirectly, as this article has argued, subject to English public policy) and the courts’ application of mandatory rules can allow foreign law to have effect, although there is no requirement to do so.<sup>174</sup> Regarding third countries (in the context of the Rome 1 Regulation as retained EU law),<sup>175</sup> the overriding mandatory rules of such countries may be given effect with respect to obligations emanating from the contract if the country is the place of performance and the relevant obligation is unlawful under that third country’s law.<sup>176</sup> From a related standpoint, this approach is essentially consistent with the English common law to the extent that a contract will not be enforced under English law if it requires a party to demonstrate conduct that would be illegal under the law of the foreign country. To this extent, the English court may (but it is not required to) allow the application of foreign law. There are several sound reasons for this policy approach. One is the respect for sovereignty in the context of international comity,<sup>177</sup> which essentially connotes courtesy or friendliness.<sup>178</sup> Determining what countries are friendly can be challenging. But this should be less so in an MLETR-based regime where countries have committed to facilitating the circulation of ETDs. The Model Law regime ‘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’.<sup>179</sup> In considering both parties’ and State interests, therefore, it is necessary to predicate the balance of such interests on according priority to private obligations across borders. Limitations that mandatory rules impose need to be carefully considered in the light of third parties’ rights and obligations.<sup>180</sup>

Other reasons for not allowing a party to perform a conduct that would be illegal under the law of the foreign country include fostering international cooperation, reducing (undue) forum shopping, and possibly encouraging a reciprocal treatment by countries, since there is no requirement to give effect to foreign mandatory laws.<sup>181</sup> This rationale is relevant in determining minimum thresholds that may guide the courts and the extent to which foreign mandatory rules may apply.

<sup>171</sup> See Explanatory Note to the MLETR (n 4) para 3.

<sup>172</sup> It is possible to extrapolate more policies especially since ‘further policy and background to the Law Commission’s recommendations is provided in its final report and the consultation paper which preceded it’. Explanatory Notes to the ETDA (n 14) para 13.

<sup>173</sup> Hartley, ‘Public Policy and Mandatory Provisions’ (n 126) 80.

<sup>174</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) art 9(3). See also Hague Principles on Choice of Law in International Commercial Contracts 2015, art 11(2).

<sup>175</sup> Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019/834. See Richard Alexander, ‘“Completing Brexit” could in fact mean greater uncertainty for businesses’ (2023) 44(7) *Company Lawyer* 213, 214 (arguing that the incorporation of the Rome 1 Regulation into UK domestic law ‘provides a clear benefit to business’).

<sup>176</sup> The Rome 1 Regulation art 9(3).

<sup>177</sup> *Foster* (n 121) 470.

<sup>178</sup> Its etymology can be traced to *comitas*, its Latin roots. Thomas Schultz and Niccolò Ridi, ‘Comity and International Courts and Tribunals’ (2017) 50(3) *Cornell International Law Journal* 577, 581.

<sup>179</sup> UNCITRAL, ‘key provisions’ [of the MLETR] <[https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records)> accessed 25 January 2026.

<sup>180</sup> Explanatory Note to the MLETR para 50.

<sup>181</sup> Adeline Chong, ‘The Public Policy and Mandatory Rules of Third Countries in International Contracts’ (2006) 2(1) *Journal of Private International Law* 27, 38.

## 1. Fundamentals of minimum thresholds

Like public policy, mandatory rules may also constitute an escape mechanism.<sup>182</sup> Therefore, it is necessary for courts to engage with relevant issues rather than avoid genuine engagement with conflict of laws questions when issues concerning mandatory rules arise.<sup>183</sup> Regarding ETDs, such engagement should be with a view to determining two main questions: first, whether English law should override, and, second, whether (and, if so, to what extent) foreign law may be allowed to have effect. Neither of these two questions is necessarily easy to answer, but the first question arguably poses less contentious issues. A chosen law may be displaced by a law chosen by the forum's mandatory rule, and in such a case, 'overriding rules of policy of the forum' take effect.<sup>184</sup> However, the ETDA 'was not intended to operate as a set of mandatory provisions that apply regardless of the parties' choice of law'.<sup>185</sup> This may, therefore, be taken as the first minimum threshold—the ETDA should be interpreted in a way that promotes party autonomy, including the laws that parties choose. While this minimum threshold is helpful, courts may not be restricted to the ETDA in assessing the potential application of any mandatory rules, since mandatory rules may not be in one place or statute. However, promoting party autonomy and essentially discounting the ETDA for the purposes of determining mandatory rules reduce the scope for legal uncertainty.

The second question (the extent to which foreign law may be allowed to have effect) is significantly more contentious, and its discussion is relevant to obligations emanating from ETDs obtained in other jurisdictions. The Electronic Trade Documents Bill was intended 'to apply whenever the status or effect of electronic trade documents falls to be determined as a matter of English law'.<sup>186</sup> This intention is consistent with this article's argument that it is still English law that is applied when English public policy takes relevant policies that underpin the foreign law into account. This approach is essentially applicable where the dispute in question falls within the scope of a foreign governing law. The English court should not disregard that foreign governing law,<sup>187</sup> just as it should not ignore parties' choice of law.<sup>188</sup> This is the second minimum threshold, and the Explanatory Notes to the ETDA do not contradict these views. The Notes highlight how 'it is inevitable that different jurisdictions will recognize electronic trade documents to varying extents'.<sup>189</sup> This reinforces the need to assess the extent to which foreign law may be considered.

Under section 2(5) of the ETDA, the court may take a wide range of non-exhaustive matters into account in determining whether a system is reliable. In principle, this approach is compatible with the capacity of courts (as argued in the case of public policy) to consider relevant policies that underpin foreign law. Hence, the Court of Justice of the European Union (CJEU) observed (albeit within the EU context) as follows:

<sup>182</sup> Hartley, 'Public Policy and Mandatory Provisions' (n 126) 80.

<sup>183</sup> Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13(2) *Journal of Private International Law* 435, 461.

<sup>184</sup> *Cox v Ergo Versicherung AG* [2014] UKSC 22 para 28. This case was in a tort context, but it is instructive.

<sup>185</sup> Law Reform Commission, *Electronic trade documents: Report and Bill* (Law Com No 405, 2022) <[https://webarchive.nationalarchives.gov.uk/ukgwa/20250109113011mp\\_/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2022/03/Electronic-Trade-Documents-final-report-ACCESSIBLE-1.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20250109113011mp_/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2022/03/Electronic-Trade-Documents-final-report-ACCESSIBLE-1.pdf)> para 8.113

<sup>186</sup> *ibid* para 8.113.

<sup>187</sup> *ibid* para 8.113.

<sup>188</sup> *ibid* para 8.113.

<sup>189</sup> ETDA Explanatory Notes para 75.

The Rome I Regulation harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract. In so far as the latter provide that the court of the forum is to take into account, as a matter of fact, overriding mandatory provisions of the legal order of a State other than the State of the forum or the State of performance of the contractual obligations, Article 9 of the regulation cannot prevent the court seised from taking that matter of fact into account.<sup>190</sup>

Determining how, exactly, such foreign States' laws can be considered requires significant endeavour. However, such exercise may be considered if the focus is to promote the enforcement of obligations. Regarding the CJEU case above, the German courts did not take Greek law provisions into account—an approach that was described as 'unfortunate'.<sup>191</sup>

The third minimum threshold is about considering the policies that underpin foreign mandatory rules. This is especially so given the special nature of ETDs and the emergent technology that drives the subject. Stipulating minimal (or the minimum) standards in promoting foreign obligations is crucial to determining when and how foreign mandatory rules may be given effect in English courts.

## 2. Giving effect to foreign mandatory rules

Giving effect to constraints inherent in foreign mandatory rules can be challenging.<sup>192</sup> This is potentially complicated by the possibility of the foreign law having some degree of direct or indirect penal characterization. Several provisions in section 2(5) of the ETDA concern security. In relation to reliability of the system, these are measures taken to secure the integrity of information held,<sup>193</sup> prevent unauthorized access to and use of the system,<sup>194</sup> and secure relevant hardware and software.<sup>195</sup> These constitute the first set of provisions that this article categorizes under section 2(5) of the ETDA for the purpose of discussing mandatory rules.<sup>196</sup> The English courts can closely examine the facts of cases to strike an appropriate balance between competing interests. The mere consideration of foreign law that concerns some penal elements is not the same as enforcing penal laws or judgments.<sup>197</sup> Practical characterization is critical to enforcing foreign obligations,<sup>198</sup> and it is therefore 'impossible to state that certain foreign rules will at all times be refused recognition on the ground of their penal content'.<sup>199</sup> In showing respect to friendly countries, English courts can 'refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil'.<sup>200</sup> This case law perspective is important because the case fell within the scope of English public policy at the time.<sup>201</sup>

<sup>190</sup> *Republik Griechenland v Nikiforidis* Case C-135/15, EU:C:2016:774. This observation by the CJEU is relevant for the UK based on retained EU law.

<sup>191</sup> Hartley, 'Public Policy and Mandatory Provisions' (n 126) 80.

<sup>192</sup> Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) 373.

<sup>193</sup> ETDA s 2(5)(b).

<sup>194</sup> *ibid* s 2(5)(c).

<sup>195</sup> *ibid* s 2(5) (d).

<sup>196</sup> 'Any rules of the system that apply to its operation' under s 2(5)(a) can be subsumed under this first set.

<sup>197</sup> Since English courts generally lack jurisdiction to enforce such laws or judgments. See *Huntington v Attrill* [1893] A.C. 150.

<sup>198</sup> On navigating between civil debts and criminal sanctions, see *Official Receiver of Bangkok of Commerce Public Co Ltd v Saxena* [2023] EWHC 521 (Comm).

<sup>199</sup> Michael Mann, 'Foreign Penal Laws and the English Conflict of Laws' (1956) 42 *Transactions of the Grotius Society* 133, 146.

<sup>200</sup> *Regazzoni* (n 109) 318–19.

<sup>201</sup> However, there is a strong argument that Art 9(3) of the Rome I Regulation now provides ample scope to achieve the same result. See Hartley, *International Commercial Litigation* (n 105) 720.

There is another set of provisions in section 2(5) of the ETDA that may go beyond the purview of the courts. This second set is about an independent body auditing the system,<sup>202</sup> a supervisory or regulatory body assessing the reliability of the system,<sup>203</sup> and the application of any voluntary scheme provisions or industry standard regarding the system.<sup>204</sup> Regarding these sets of provisions, it is also necessary to factor in access to foreign law and its availability. Traditionally, the English common law has reflected the capacity and willingness to adopt an internationalist, dynamic, and progressive attitude to emergent technology.<sup>205</sup> This is particularly needed regarding ETDs. English courts can request relevant information, especially regarding the second set of provisions, and this complements the need for countries to make individual laws available. Such aims can be attained through administrative and judicial cooperation.<sup>206</sup> It would be ideal to promote such cooperation at the MLETR level or a platform with international focus to coordinate national standards or at least converge towards an international model that is predicated on similar policies as reflected in the MLETR. This requires a liberal interpretation of the ETDA as well. Such fundamentally liberal English approach seemed so important that there was no need to include any specific provision in the ETDA clarifying that ETDs should be denied effect merely because they were issued in a foreign jurisdiction.<sup>207</sup>

The foregoing discussions establish that the interests that should be balanced go beyond the parties. States' judicial machineries for the enforcement of obligations need to accommodate contractual obligations and be subordinated to rules that protect the integrity of the judicial system.<sup>208</sup> Thus, even 'the principle of party autonomy can be reconciled with the overriding effect of the public policy and mandatory rules of the forum State'.<sup>209</sup> The interests of States and parties should be balanced to properly determine what aspects of foreign law may be allowed to take effect. The application of public policy and mandatory rules is prone to considerable uncertainty. Leading English case law (notably *Regazzoni v KC Sethia*<sup>210</sup> and *Foster v Driscoll*),<sup>211</sup> although concerning contracts governed by English law, suggests that 'courts would have had no hesitation in striking them down even if they were governed by a foreign law'.<sup>212</sup> However, there is considerable scope to argue that a principled approach to mandatory rules could mitigate such uncertainty or unpredictability.

Respecting foreign rules in the public interest should, of course, not be to the detriment of private justice or even conflict of laws rules in general.<sup>213</sup> Therefore, the courts can focus on overriding mandatory provisions that render the performance of the contract unlawful.<sup>214</sup> A systematic approach to the non-exhaustive list of matters in section 2(5) of the ETDA demonstrates the potential for foreign law to be considered. Parties that infringe on foreign legal

<sup>202</sup> ETDA s 2(5)(e).

<sup>203</sup> *ibid* 2(5)(f).

<sup>204</sup> *ibid* 2(5)(g).

<sup>205</sup> *Dow Jones & Co Inc v Gutnick* [2002] 210 CLR 575.

<sup>206</sup> Marta Requejo Isidoro, 'Application of Foreign Law' in Paul Beaumont and Jayne Holliday (eds), *A Guide to Global Private International Law* 133, 137–43.

<sup>207</sup> This was unlike the MLETR and the Singapore Electronic Transactions Act 2010 (amended in 2021). See Law Reform Commission, *Electronic trade documents: Report and Bill* para 8.116.

<sup>208</sup> Andrew Dickinson, 'Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?' (2007) 3(1) *Journal of Private International Law* 53, 60.

<sup>209</sup> *ibid*

<sup>210</sup> (n 109).

<sup>211</sup> (n 121).

<sup>212</sup> Chong (n 181) 33

<sup>213</sup> Matthias Lehmann and Johannes Ungerer, *Applying or Taking Account of Foreign Overriding Mandatory Provisions—Sophism under Rome 1 Regulation* (2017/18) *Yearbook of Private International Law* 53, 61.

<sup>214</sup> *ibid* 62.

provisions concerning security, documentary integrity, or fraud with respect to ETDs may find that performing the contract would be illegal. The willingness of courts to give effect to foreign mandatory rules, although they are not required to do so, is itself a significant mitigation of legal uncertainty. However, clearly recognizing the policies that underpin such laws gives the approach some form. This operates on two levels. First, parties can also predict the approach of English courts by comparing policies that underpin relevant English rules and foreign mandatory rules. Second, the courts can have greater justification in considering foreign law by factoring in the need for cooperation, which plays a significant role in the MLETR and influenced the enactment of the ETDA.

## VIII. Conclusion

This article has made a bold and unprecedented engagement with the reliability provisions of the ETDA. It has been contended that the reliability provisions of the MLETR and the ETDA leave room for much flexibility and uncertainty, which could be exploited in the cross-border process of recognition and enforcement to defeat the circulation of ETDs when raised by commercial litigants seeking to escape international liabilities on grounds of public policy. When used in a negative sense, public policy has been shown to be an exceptional conflict of laws rule by which an otherwise applicable foreign law could be disapplied in favour of the forum's law. However, it was argued that, despite the many complexities that may trail the application of public policy itself, a positive use of public policy through a consideration of the policy or policies that underpin relevant ETD laws and relevant foreign mandatory rules, could favour the promotion and circulation of ETDs.

A positive use of public policy should involve a consideration of UK policies as well as policies that drive foreign laws directly concerning ETDs and related laws. Such policies are also relevant to mandatory rules considering the overlaps between such rules and public policy. Therefore, the need to chart a principled approach that promotes the circulation of ETDs extends to mandatory rules. The foundations for this approach should be found in policy. ETDs should also not be allowed to circulate or have effect if relevant acts are illegal under foreign law. This should be distinguished from a situation where there is no equivalent law in that country although the act itself is not illegal or expressly prohibited. Foreign acts/rights should be recognizable if they are legal and enforceable abroad and not illegal, fundamentally offensive, or expressly prohibited in England. There should be a 'calibrated balancing exercise' between (i) the policy that favours upholding contracts and (ii) respect for other States with the likelihood that the policy should be accorded priority.<sup>215</sup> Such policy issues constitute a minimum threshold for judicial consideration.

In the light of the above, this article has suggested some minimum thresholds for the recognition of foreign law relating to ETDs. Party autonomy should be accorded priority to the extent possible. Laws that parties choose should apply subject to narrow exceptions.<sup>216</sup> Also, the English courts should not ignore foreign governing laws (even when they contain penal elements) just as they would not discount the laws that parties choose, except if it is necessary to do so. The effect of these thresholds, as articulated in this article, is that English courts can adopt a practical characterization approach to foreign mandatory laws in such a way that focuses on promoting obligations although they are not required to do so. Such characterization is especially important regarding foreign rules that concern security, fraud,

<sup>215</sup> Adam Johnson, 'Foreign law illegality: where are we now?' (2018) 77(3) *Cambridge Law Journal* 475, 478.

<sup>216</sup> E.g., 'non-derogable provisions'. See Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (n 98) para 32R-222(a).

or penal effect of some sort. The courts can also benefit from international cooperation with respect to administrative issues and industry standards. As a leading jurisdiction and commercial hub, English authorities should be able to drive cooperation beyond the courts. Given the emergent nature of ETDs, such cooperation has the potential to set global industry precedents, and the UK could be a key player at forums for coordinating industry standards.

Based on this nuanced approach that this article sets out, the security related aspects need to be properly characterized in a way that prioritizes the enforcement of obligations. Foreign mandatory rules related to the ETD security provisions discussed under section 2(5) of the ETDA, especially when characterized as issues or concerns pertaining to fraud, can be allowed to have effect thereby promoting obligations. The second set of provisions in section 2(5) seems less likely to pose serious characterization issues. But where such need arises, a similar approach should be taken in favour of prioritizing obligations. The difference between both categories is that the enforcement of administrative and industry standards is ideally suited to a model of international cooperation. In both cases, an essential parameter for reducing any scope for legal uncertainty is a focus on the place of performance and how performing the contract would be unlawful under relevant foreign law.