

## CMI RULES FOR ELECTRONIC BILLS OF LADING

By Alan MacKenzie

One of the four topics before CMI in Paris was the consideration and adoption of a set of rules to facilitate paperless contracts for carriage of goods by sea, and transfers in respect of those contracts.

The committee sessions on the topic in Paris spread over 3 days, Monday, Tuesday and Thursday 25, 26 and 28 June. We started out considering the draft entitled *CMI Rules for the Electronic Transfer of Rights to Goods in Transit*. The committee amended draft, by then entitled *CMI Rules for Electronic Bills of Lading* which was adopted by the plenary session. A copy of that draft is attached.

The objective of the Rules is to provide, for parties who wish to use EDI a voluntary set of arrangements which will permit paperless transactions in both the making of the contract of carriage, and the transfer of rights under it. The Rules are essentially procedural, and are intended not to alter the contractual position which would apply if a paper Bill of Lading were issued.

The parties to an EDI contract will agree the terms of the contract, including the standard terms which would apply if a Bill of Lading were issued, and this is embodied in a receipt message. The receipt message contains the terms of the Contract of Carriage, and replaces the paper Bill of Lading in this respect. Like a paper Bill of Lading, the receipt message is not, strictly speaking, the contract, but rather evidence of it. The contract may have been concluded by earlier communication, also electronic, between the parties. The inclusion of the place and date of receipt of the goods effectively renders the receipt message equivalent to a "received for shipment" Bill of Lading. To provide for the situation where an "on board" Bill of Lading is required, the holder may demand that the receipt message be updated with date and place of shipment as soon as the goods have been loaded on board.

The carrier issues to the shipper, as part of the receipt message, a private key. This is a computer code used to identify the person who is entitled, as against the carrier, to issue instructions and to deal with the goods. The person who from time to time holds the private key is the only party with whom the carrier deals. Once in possession of the private key, the shipper is able to deal with the goods in much the same way as he would use a paper Bill of Lading. If the goods are sold then, instead of transferring the negotiable paper Bill of Lading, the shipper will notify the carrier of the transfer of

the right of control. The procedure is that the current holder notifies the carrier of the transfer, identifying himself by the private key. The carrier then advises the intended transferee of the terms of the receipt message. The proposed new holder advises the carrier of its acceptance of the right of control and transfer, upon which the carrier cancels the previous private key and issues a new private key to the new holder. Subsequent transactions are carried out in a similar manner.

The right of control and transfer is intended to confer on the holder of the private key the same rights as the holder of a paper Bill of Lading. As originally drafted, it would have conferred additional rights - for example, to split consignments, and to request delivery of the goods before arrival at the destination. The draft was amended to delete these rights, which go beyond those attaching to a paper Bill of Lading.

Upon the arrival of the goods at the destination, the carrier is to notify the holder of the private key of the place and date of intended delivery of the goods. The holder must nominate a consignee and give adequate delivery instructions, verified by the private key. The carrier is then to deliver the goods to the nominated consignee upon production of proper identification. A secure means of identification will be needed, as the carrier is under no liability for misdelivery if it can prove that it exercised reasonable care to ascertain that the party who claimed to be the consignee was in fact that party.

Either party can opt out of the Rules by requiring a paper Bill of Lading to be issued. If that happens, the Bill is to be issued as a "bearer" Bill (to avoid the need to record EDI transfers which have taken place), and is to be exactly in the form which would have been issued at the outset. That is, even if the goods have been lost or damaged in the meantime, the original description must be inserted unchanged. To avoid any suggestion that the Bill of Lading is being backdated, or issued in a way which does not reflect the position at the time of issue, it is to contain a statement that it has been issued upon termination of the EDI procedures. Issue of a paper Bill of Lading terminates the EDI procedures.

Additionally, a holder may request a copy of the receipt message marked as a "non-negotiable copy". He may for example, wish to have a document for customs or other purposes. The issue of a copy will not terminate EDI procedures.

The parties to EDI agree that EDI is equivalent to writing, and that they will not raise any defence about lack of writing. It is recognized that this may not in all cases be effective under national law, but the Rules address the issue as far as the parties are able.

There are two general issues upon which brief comment is desirable. The first is whether the Rules can be adopted voluntarily, or whether legislation is necessary to achieve the result. Here, the British MLA had originally expressed doubts as to whether the Rules would be effective, in common law jurisdictions where the doctrine of privity of contract applies, unless the Bills of Lading Act 1855 were amended. That objection was not pursued at Paris, apparently in the light of possible amendments to the Bills of Lading Act, which could meet the difficulty. In any event, the Rules contemplates direct contact between all 3 parties involved in a transfer, namely the current holder, the carrier, and the proposed new holder. This would appear to enable the question of privity of contract to be dealt with by the doctrines of novation or assignment where necessary.

Another basis issue was whether UDI should proceed on the basis of there being a third party depository for electronic Bills of Lading, or whether a carrier based system should be used. A third party registration system has been attempted, for tankers, but has not proved successful. The CMI international sub-committee felt that the difficulties in the way of a third party registration system were such that it was preferable for the Rules to provide for a carrier based system. However, the ability of a carrier to act through agents should not preclude the development of a third party registration system if that seems commercially viable.



CMI RULES FOR ELECTRONIC BILLS OF LADING1. SCOPE OF APPLICATION

These rules shall apply whenever the parties so agree.

2. DEFINITIONS

- a. "Contract of Carriage" means any agreement to carry goods wholly or partly by sea.
- b. "EDI" means Electronic Data Interchange, i.e. the interchange of trade data effected by teletransmission.
- c. "UN/EDIFACT" means the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport.
- d. "Transmission" means one or more messages electronically sent together as one unit of dispatch which includes heading and terminating date.
- e. "Confirmation" means a Transmission which advises that the content of a Transmission appears to be complete and correct, without prejudice to any subsequent consideration or action that the content may warrant.
- f. "Private Key" means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission.
- g. "Holder" means the party who is entitled to the rights described in Article 7(a) by virtue of its possession of a valid Private Key.
- h. "Electronic Monitoring System" means the device by which a computer system can be examined for the transactions that it recorded, such as a Trade Data Log or an Audit Trail.
- i. "Electronic Storage" means any temporary, intermediate or permanent storage of electronic data including the primary and the back-up storage of such data.

3. RULES OF PROCEDURE

- a. When not in conflict with these Rules, the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, 1987 (UNCID) shall govern the conduct between the parties.
- b. The EDI under these Rules should conform with the relevant UN/EDIFACT standards. However, the parties may use any other method of trade data interchange acceptable to all of the users.
- c. Unless otherwise agreed, the document format for the Contract of Carriage shall conform to the UN Layout Key or compatible national standard for Bills of Lading.
- d. Unless otherwise agreed, a recipient of a Transmission is not authorized to act on a Transmission unless he has sent a Confirmation.
- e. In the event of a dispute arising between the parties as to the data actually transmitted, an Electronic Monitoring System may be used to verify the data received. Data concerning other transactions not related to the data in dispute are to be considered as trade secrets and thus not available for examination. If such data are unavoidably revealed as part of the examination of the Electronic Monitoring System, they must be treated as confidential and not released to any outside party or used for any other purpose.
- f. Any transfer of rights to the goods shall be considered to be private information, and shall not be released to any outside party not connected to the transport or clearance of the goods.

4. FORM AND CONTENT OF THE RECEIPT MESSAGE

- a. The carrier, upon receiving the goods from the shipper, shall give notice of the receipt of the goods to the shipper by a message at the electronic address specified by the shipper.
- b. This receipt message shall include:

- i. the name of the shipper;
- ii. the description of the goods, with any representations and reservations, in the same tenor as would be required if a paper Bill of Lading were issued;
- iii. the date and place of the receipt of the goods;
- iv. a reference to the carrier's terms and conditions of carriage; and
- v. the Private Key to be used in subsequent Transmissions.

The shipper must confirm this receipt message to the carrier, upon which Confirmation the shipper shall be the Holder.

- c. Upon demand of the Holder, the receipt message shall be updated with the date and place of shipment as soon as the goods have been loaded on board.
- d. The information contained in (ii), (iii) and (iv) of paragraph (b) above, including the date and place of shipment if updated in accordance with paragraph (c) of this Rule, shall have the same force and effect as if the receipt message were contained in a paper Bill of Lading.

5. TERMS AND CONDITIONS OF THE CONTRACT OF CARRIAGE

- a. It is agreed and understood that whenever the carrier makes a reference to its terms and conditions of carriage, these terms and conditions shall form part of the Contract of Carriage.
- b. Such terms and conditions must be readily available to the parties to the Contract of Carriage.
- c. In the event of any conflict or inconsistency between such terms and conditions and these Rules, these Rules shall prevail.

6. APPLICABLE LAW

The Contract of Carriage shall be subject to any international convention or national law which would have been compulsorily applicable if a paper Bill of Lading had been issued.

7. RIGHT OF CONTROL AND TRANSFER

a. The Holder is the only party who may, as against the carrier:

- (1) claim delivery of the goods;
- (2) nominate the consignee or substitute a nominated consignee for any other party, including itself;
- (3) transfer the Right of Control and Transfer to another party;
- (4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper Bill of Lading.

b. A transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and (ii) Confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in Article 4 (except for the Private Key) to the proposed new Holder, whereafter (iv) the proposed new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer, whereupon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.

c. If the proposed new Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

- d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effect as the transfer of such rights under a paper Bill of Lading.

8. THE PRIVATE KEY

- a. The Private Key is unique to each successive Holder. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key.
- b. The carrier shall only be obliged to send a Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when such Holder secures the Transmission containing such electronic message by the use of the Private Key.
- c. The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security password or identification used to access the computer network.

9. DELIVERY

- a. The carrier shall notify the Holder of the place and date of intended delivery of the goods. Upon such notification the Holder has a duty to nominate a consignee and to give adequate delivery instructions to the carrier with verification by the Private Key. In the absence of such nomination, the Holder will be deemed to be the consignee.
- b. The carrier shall deliver the goods to the consignee upon production of proper identification in accordance with the delivery instructions specified in paragraph (a) above; such delivery shall automatically cancel the Private Key.
- c. The carrier shall be under no liability for misdelivery if it can prove that it exercised reasonable care to ascertain that the party who claimed to be the consignee was in fact that party.

10. OPTION TO RECEIVE A PAPER DOCUMENT

- a. The Holder has the option at any time prior to delivery of the goods to demand from the carrier a paper Bill of Lading. Such

document shall be made available at a location to be determined by the Holder, provided that no carrier shall be obliged to make such document available at a place where it has not facilities and in such instance the carrier shall only be obliged to make the document available at the facility nearest to the location determined by the Holder. The carrier shall not be responsible for delays in delivering the goods resulting from the Holder exercising the above option.

- b. The carrier has the option at any time prior to delivery of the goods to issue to the Holder a paper Bill of Lading unless the exercise of such option could result in undue delay or disrupts the delivery of the goods.
- c. A Bill of Lading issued under Rules 10(a) or (b) shall include:
  - (i) the information set out in the receipt message referred to in Rule 4 (except for the Private Key); and
  - (ii) a statement to the effect that the bill of Lading has been issued upon termination of the procedures for EDI under the CMI Rules for Electronic Bills of Lading. The aforementioned Bill of Lading shall be issued at the option of the Holder either to the order of the Holder whose name for this purpose shall then be inserted in the Bill of Lading or "to bearer".
- d. The issuance of a paper Bill of Lading under Rules 10(a) or (b) shall cancel the Private Key and terminate the procedures for EDI under these Rules. Termination of these procedures by the Holder or the carrier will not relieve any of the parties to the Contract of Carriage of their rights, obligations or liabilities while performing under the present Rules nor of their rights, obligations or liabilities under the Contract of Carriage.
- e. The Holder may demand at any time the issuance of a print-out of the receipt message referred to in Rule 4 (except for the Private Key) marked "non-negotiable copy". The issuance of such a print-out shall not cancel the Private Key nor terminate the procedures for EDI.

11. ELECTRONIC DATA IS EQUIVALENT TO WRITING

The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the Contract of Carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language on a video screen or as printed out by a computer. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.

