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Revised Discussion Paper:

Proposals for Reform of Australian Bills of Lading Legislation

Prepared by the International Trade Law Section of the Attorney-General's Department of Australia in conjunction with the Department of Transport.

June 1994

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INTRODUCTION AND SUMMARY

INTRODUCTION

In 1992 the Commonwealth Attorney-General and the Minister for Transport and Communications were approached by the Maritime Law Association of Australia and New Zealand (MLAANZ) who expressed concern about some perceived anomalies regarding limitations to title to sue in the Australian bills of lading legislation. The Commonwealth Attorney-General's Department felt that it and the Department of Transport and Communications (DOTAC) were well placed to facilitate consideration by the States and Territories of MLAANZ's concerns and associated issues worthy of discussion.

After discussions with DOTAC, the Commonwealth Attorney-General's Department agreed to proceed with the preparation, in conjunction with DOTAC, of a short Discussion Paper on the title to sue question and connected matters. The question of possible reforms would then be referred to the appropriate forum, perhaps the Standing Committee of Attorneys-General (SCAG). The States and Territories were invited to convey any concerns that they might have about the suggested course of action. No concerns were expressed.

The Attorney-General's Department wrote to interested industry and professional organisations with its proposal and to ask for the views of those groups. All views conveyed to the Department have been considered for incorporation into the paper.

A draft of the Discussion Paper was forwarded to all relevant State and Territory Ministers, the above industry and professional groups, and DOTAC (now the Department of Transport). All comments received in response to the draft Discussion Paper have been considered in the process of preparing this revised version of the Discussion Paper. Where appropriate, the final version has been altered to include or respond to comments received.

The objectives of the Discussion Paper

The purpose of the Discussion Paper is primarily to identify some relevant legal problems in the area of maritime legal documentation and present some proposals for appropriate reform in the areas where the law may be out of step with current or developing commercial practice. There is a focus on some perceived difficulties with bills of lading and related questions.

The paper seeks to analyse the legal issues in light of developing commercial practices. In circumstances where the law might be out of step with commercial practice or the development of more efficient commercial practice, an aim of the paper is to facilitate a legal response which accommodates such commercial practice, because the law should not unreasonably or unnecessarily constrain the operation of market forces with its attendant efficiency gains. Modernising the law to accommodate the development of commercial practice will assist Australian trading operators specifically, and the characterisation of Australia generally as an efficient and innovative trading nation.

The format of the paper

The paper examines four broad questions:

- difficulties regarding title to sue in contract in certain circumstances under the current law concerning bills of lading (PART I)
- sea waybills and other non-negotiable instruments (PART II)
- electronic bills of lading (PART III)
- the desirability or otherwise of Australia following the approach of the United Kingdom in modernising bills of lading legislation and the identification of any specific means by which that approach could be improved upon (PART IV).

These four issues are in turn divided into "summary", "discussion" and "recommendations" sections in respect of each Part. The recommendations are intended to advance further discussion.

The final part, Part V, discusses areas where future legislative reform may be required.

SUMMARY OF RECOMMENDATIONS

It is envisaged that the recommendations in Parts I – IV should be implemented as a total package. The recommendations from each Part are not so interdependent, however, that the set of recommendations from any Part or Parts are not capable of standing alone. For example, the amendments suggested in Part I could be made without the recommendations from the other Parts being followed.

The recommendations, as extracted from each Part, are as follows.

Title to Sue [from Part I]

- States and Territories should consider amending their bills of lading legislation with a uniform approach.
- The Australian bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the lawful holder of a bill of lading but for such transfer to occur irrespective of whether property in the goods passes upon or by reason of the consignment or indorsement.

Sea waybills and other non-negotiable instruments [from Part II]

- States and Territories should consider reform of the law pertaining to sea waybills and ship's delivery orders.
- Relevant bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the consignee named in a sea waybill or

such person to whom the carrier is duly instructed to deliver under the terms of the sea waybill.

- Amendments should allow the person entitled to delivery in accordance with an undertaking contained in a ship's delivery order such contractual rights against the carrier as are contained in the terms of the undertaking.

- The legislation should not at this stage be amended to extend to non-negotiable instruments other than sea waybills and ship's delivery orders.

Electronic bills of lading [from Part III]

- Legal policy areas should be vigilant and take a cooperative approach, in identifying legal constraints that unnecessarily inhibit the operation of market forces towards the more efficient use of EDI technology in the area of shipping trade documentation.

- Any reform of bills of lading legislation should include a provision similar to the Carriage of Goods by Sea Act 1992 (UK) allowing for the making of regulations to make provision for the application of the legislation to cases where EDI systems are used.

- The functional equivalence approach as advanced by the EDI Working Group of UNCITRAL should be further examined with a view to its applicability to electronic shipping documents.

The UK approach [from Part IV]

- Australia should consider following the UK approach of building on the current legal system rather than attempting to introduce any untried and uncertain legal regimes in the area of bills of lading legislation and associated legal issues.

- The UK approach as used in the Carriage of Goods by Sea Act 1992 (UK) should generally be followed in Australia and improved upon with an additional provision providing that where a carrier issues a document, being a bill of lading, to evidence the receipt of goods carried, that document is prima facie evidence of the taking over, by the carrier, of the goods as therein described.

PART III - ELECTRONIC BILLS OF LADING

SUMMARY

Exciting prospects exist for efficiency gains through the increasing use of new technology in international trade, especially in the area of electronic data interchange (EDI) of which electronic bills of lading (EBLs) are one form.

These efficiency gains should not be unnecessarily constrained by legal requirements and, in particular, EDI transactions should not be disadvantaged legally vis-a-vis otherwise identical "paper" transactions.

At the general level, law and policy makers should continue their involvement with international developments towards accommodating the greater use of EDI in general and EBLs in particular. An example of these developments is the work of a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) which, in seeking to deal with legal impediments to EDI, has adopted the "functional equivalence" approach to EDI in commercial transactions generally. This looks to the function of particular legal requirements as they apply to paper-based transactions and regards them as satisfied by an EDI transaction when the functions of those requirements are met to an equivalent extent, even though the form in which that occurs is different to that for paper-based transactions.

The likely emergence of the use of EBLs in commercial practices raises the sort of legal issues facing EDI developments more generally. Because it is difficult to predict the exact form of EBL developments, it would be undesirable that the law be changed in a manner that prevents flexibility in respect of new developments, but to do nothing would be an obstacle to their emergence as a better way of doing business. In light of this and in the interests of developing Australia's characterisation as an innovative and flexible trading nation, the approach taken in the Carriage of Goods by Sea Act 1992 (UK), of allowing regulations to be made whereby information given by means other than in writing is given equivalent force and effect to information in a paper document, should be adopted as one element of the Australian response. If, however, the Working Group of UNCITRAL finalises its proposed Model Statutory Provisions on EDI prior to the adoption of the recommendations in this Discussion Paper, it may be appropriate for all or some of the Model Statutory Provisions to be given legislative form. This would be an alternative to including a regulation-making power in the reforms.

DISCUSSION

Commercial efficiencies

Before dealing with electronic bills of lading (EBLs), it is worthwhile to outline some of the general characteristics of electronic data interchange (EDI). For the purposes of this Discussion Paper, the term "EDI" is used broadly to mean computer to computer communications in a structured format whereby trade "documents" may be transmitted in their informationally equivalent data flows.[61]

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61 P K Sokol, in *EDI: The Competitive Edge*, (1989) at p. 12 described EDI as "the inter company computer to computer communication of standard business transactions in a standard format that permits the receiver to perform the intended transaction".

Much of the value of EDI technology lies in its speed. It has often been said that international trade moves as much on information as it does on wheels, wings or water; and the speed with which data can be transmitted by EDI systems allows commercial parties to more quickly adjust to changing circumstances. In short, it allows for quicker dissemination of information, saves administrative costs (especially by making re-keying unnecessary), facilitates tracking of deliveries and receipts, and allows production schedules to be more easily modified. The ability to send data to relevant third parties such as insurers, carriers and customs and other authorities speeds up both delivery and payment.[62]

EDI simplifies "just in time" inventory management, reduces costs of information storage,[63] and gives more options for dealing with difficulties (including economic downturns) as they arise. It facilitates linkages with systems for making electronic payments, and there is a body of thought that because of its speed and direct links between parties, EDI helps to reduce the types of risks that generate disputes. The

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62 The *Australian Financial Review* on 2 April 1993 reported on the first ship in Australia to be cleared by customs and quarantine. "Paperless trading systems - or electronic data interchange - have been championed as the tools needed to make trade more efficient." The *Australian Endurance* which docked in Brisbane would normally be required to submit separate paper manifests to customs, quarantine and port authorities 48 hours before docking. It would then have received paper clearance certificates. While under the EDI arrangements the information still needs to be lodged 48 hours ahead, it can be done remotely from a computer terminal and only needs to be sent to customs.

63 A H Boss, in "The Legal Status of Electronic Data Interchange in the United States", prepared as part of the Electronic Trade Document Project [ELTRADO] funded by the Volkswagen Foundation, July 1992, at p. 2 said:

> Benefits of EDI are as varied as the companies which employ its technology. For example, EDI used in conjunction with bar coding has increased inventory efficiency saving retail grocery businesses a reported $500 million per year. Automotive firms rely on EDI to track auto parts in transit to determine when needed parts will arrive. The auto industry estimates the use of EDI cuts $200 from the cost of each car. A locomotive manufacturer was able to quadruple the number of parts ordered while reducing its warehouse space by a full acre. One user estimates an average cost of $2.75 to process a paper invoice versus 26 cents to process an EDI invoice. Another user cut its inventory from a 33 to a 6 day supply of parts and goods reducing its inventory value to $167 million. In shipping, EDI reduces the cost of processing claims from $20 to $1 each. And one major electronics firm which has used EDI to re-engineer its entire purchasing process has reported a $30 million savings, due directly to its implementation of an EDI system." (See footnotes 4 to 11 in Boss' paper for sources.)

"When the U.S. Department of Defense (DOD) converted to EDI bills of lading and freight bills the taxpayers were saved seventeen million dollars a year. Before this conversion the DOD generated an annual stack of bills of lading which reached four times higher than the Empire State Building". S M Williams, "Something Old, Something New: The Bill of Lading in the Days of EDI", *Transnational Law and Contemporary Problems*, Fall 1991, 555, at p. 556, fn. 3.

reduction of transcription errors is particularly likely to reduce the potential grounds for legal dispute.[64]

These benefits all add up to commercial benefits through reduced costs and provide a competitive advantage to the EDI user.[65]

While it is necessary to speak of the commercial advantages of EDI, brief mention should be made of a factor which inhibits the advantages of EDI being fully explored. This is what many commentators refer to as the "inertia of tradition" - a frequent reluctance among traders to alter a system that has "worked" to date. Moreover, an attachment to traditional ways of doing business can lead us to expect a standard of certainty and comfort from new methods which was previously never fulfilled by the old ways, and perhaps never sought. The assumption is made for the purposes of this Discussion Paper that market forces will alter commercial practice towards greater efficiency and in the context of this Part, greater use of EDI methods. This appears to be already happening in the maritime area,[66] but what has to be ensured is that a similar inertia among law makers does not prevent development of the law to accommodate improved ways of doing business. Failure to develop the law in these areas could unintentionally force a similar lack of commercial development and competitiveness upon our traders.

Thus the objective of this Part must be to analyse if and where the law is unnecessarily inhibiting the development and use of EDI, in the form of EBLs, in the market.[67]

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64 I Walden, *EDI and the Law*, 1989, p. 3.

65 See Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, *Efficiency of the Interface between Seaports and Land Transport "Warehouse to Wharf"*, April 1992, p. 64 and ff. and p. 88 and ff.

66 Ibid.

67 This Discussion Paper assumes that market forces determine commercial practice. But brief mention should be made of the two instances where the law has set the pace in the use of EDI. The Australian Customs Service (ACS) now provide the facility for the lodgement of customs export details through by electronic means. (See J M Drury, "Customs Prepares for the 21st Century", Seventeenth International Trade Law Conference papers, Canberra, September 1990, p. 165). ACS advise that 97% of Australian export clearances (by number of applications) are now by EDI.

See also on the approach of the Korean government in seeking to actively promote the use of EDI and a commentary on the Korean Act on Promotion of Trade Business Automation, Korea Edifact Center, Secretariat of the Korea Edifact Committee, "Progress Report about the Act on Promotion of Trade and Business Automation", 1992.

Electronic bills of lading and the legal problems

A set of rules for EBLs has been adopted by the Comite Maritime International (CMI).[68] Essentially the CMI rules are an advancement of the central registry concept which was the pivotal feature of SeaDocs Registry Limited (SeaDocs), a corporation formed by Chase Manhattan bank and INTERTANKO, an association of independent oil tanker operators.[69] The CMI rules do away with the concept of the central registry and replace it with a private key which is changed each time that the information is exchanged.[70] Each carrier in effect acts as its own registry. The CMI Rules operate by the carrier issuing to the shipper an EBL using electronic messages together with a private code or "key", possession of which entitles the holder to control the goods. This right of control is passed to other interests after notification by the shipper to the carrier who cancels the original key and gives a new key to the new person entitled to control of the goods. In this way the key holder should have the same rights as the bill of lading holder.

The CMI Rules provide that the carrier, shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring writing and signature is satisfied by the procedures, and that the defence that the contract is not in writing will not be raised.[71] As one commentator has noted, it remains to be seen how effective the rule will be in a particular jurisdiction.[72] One might, for example, question the effectiveness of this rule where legislation does not use the specific term "writing" or "signature", where the local law implements the terms of an international convention, where writing is considered a mandatory

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68 The CMI is composed of more than 50 national maritime law associations. G F Chandler III, "The Electronic Transmission of Bills of Lading", *Journal of Maritime Law and Commerce*, Vol. 20, No.4, October 1989, fn. 3.

69 While SeaDocs was intended to bring about the telecommunications negotiation of bills of lading issued in connection with oil shipments, by the end of 1986 SeaDocs had closed its doors. B Kozolchyk, "Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective", *Journal of Maritime Law and Commerce*, Vol. 23, No. 2, April 1992, 161 at p. 227.

Kozolchyk explains the reasons for SeaDocs failure as follows:

> Many reasons have been given for its demise: the potential high cost of registry operations' insurance, especially since the participants' liability had not been established; the unwillingness of commodity traders to record their transactions in a central registry subject to inspection by competitors and tax authorities; the reticence by the ultimate buyers of spot crude oil to acquire bills of lading from an entity designed to service intermediaries and speculators; and the banks' discomfort with the exclusive control of the registry business by one of their competitors. (Ibid. at p. 228.)

70 For a fuller treatment of the CMI Rules see: the Honourable Mr Justice K J Carruthers, "An Overview of the CMI Rules for Electronic Bills of Lading", *Seventeenth International Trade Law Conference - Papers*, Canberra 1 - 2 September 1990, 131.

71 Rule 11 of the CMI Rules.

72 Carruthers, op. cit., at p. 152.

requirement that public policy dictates parties should not be able to contract out of, and where third parties are involved.

One disadvantage of the CMI Rules, which was pointed out in a submission made in response to the draft Discussion Paper, is that it is the actions of the carrier that determine when the right to control the goods is effectively transferred. The submission stated that "[m]any independent shipowners do not have the electronic sophistication to do this and many trading houses will not trust the shipowners to do so in any event. Major charterers and trading houses of bulk cargoes do have the electronic sophistication but never put themselves in the position of carrier of the goods. Such trading houses and charterers might make ideal custodians of the Register but are unable to do so under the CMI protocol."[73]

While there may be technical obstacles to widespread use of EBLs, notably difficulties in ensuring uniqueness and electronic negotiability, along with possible issues of authenticity (although electronic forms of authentication seem to provide potentially greater assurance than paper forms)[74] we may be seeking a technical perfection in EBLs which we do not have in paper bills. In any case, these issues are likely to be solved before too long. Now is therefore the time to address legal obstacles, and seek to remove those which may prevent EBLs being used in a commercial context. One commentator has made this very point:

> The electronic transmission of shipping documents will take place ... Just as we see the proliferation of wonderfully convenient automated tellers from local to regional and now international networks, the advantages of EDI will spread throughout the shipping industry. By developing rules before the commercial use of EDI has become widespread, most problems will be avoided and EDI will be facilitated. This also provides a unique opportunity for the legal community to find legal solutions before commercial custom and practice have become entrenched, and bad habits have become established.[75]

The relevant question then becomes: will the law treat an EBL in the same manner as a paper bill of lading and, if not, how can it be made to do so?

We now examine some of the legal obstacles to the greater use of EBLs. In doing so we consider areas of the law that might unnecessarily constrain (or might be perceived as unnecessarily constraining) the development of greater efficiencies through the use of EBLs.

A summary of the legal obstacles to the greater use of EBLs is given under the following headings:

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73 Comments made on behalf of the West Australian branch of the Maritime Law Association of Australia and New Zealand in a letter dated 10 January 1994, pp. 4-5.

74 UNCITRAL Preliminary study of legal issues relevant to the formation of contracts. A/CN. 9/333 18 May 1990 para. 53 ff.

75 G F Chandler III, "The Electronic Transmission of Bills of Lading", *Journal of Maritime Law and Commerce*, Vol. 20, No.4, October 1989, 571, at p. 579.

- The requirement of a "writing" or a "document"
- Documents of title and negotiability
- Signature and other authentication
- Evidential value of EDI messages
- Formation of contracts
- Communication.

Each is discussed below.

1. The requirement of a "writing" or a "document"

There are at least two examples in Australian maritime law where the requirement of writing is imposed either explicitly or implicitly.

Firstly, article 1 of the amended Hague Rules, which are incorporated in the *Carriage of Goods by Sea Act 1991* (Cwlth), define the term "contract of carriage" as "a contract of carriage covered by a bill of lading or any similar document of title ..." (emphasis added). If an electronic message is outside this definition then the rules governing the rights and liabilities of the parties will be different.

There are some statutory definitions of, and judicial statements on the meaning of, "document", although, as we are dealing with the interpretation of an international convention, we must approach them as merely illustrative.

Section 25 of the *Acts Interpretation Act 1901* (Cwlth) provides:

> In any Act unless the contrary intention appears:
> "document" includes:
> (a) any paper or other material on which there is writing;[76]

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76 The term "writing" itself seems to have a wide meaning. In NM Superannuation Pty Ltd v Baker and Others [1992] 7 ACSR 105 the articles of association of the company administering the superannuation fund provided that all documents had to be served "in writing". Cohen J held, in accordance with section 21 of the *Interpretation Act 1987* (NSW), that writing includes "any form of printing or other means of reproducing words in a visible form". Thus, he could see no reason to find that a notice "sent and received by facsimile transmission is any less a notice in writing than one which is sent and received in any other fashion".

The UNCITRAL Working Group on EDI agreed that writing served the following functions: (1) to provide that a document would be legible by all; (2) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (3) to allow for the reproduction of a document so that each party would hold a copy of the same data; (4) to allow for the authentication of data by means of a signature; and (5) to provide that a document would be in a form acceptable to public authorities and courts; (6) to finalise the intent of the author of the writing and provide a record of that intent; (7) to allow for the easy storage of data in a tangible form; (8) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (9) to help the parties be aware of the consequences of their entering into a contract; (10) to facilitate control and subsequent audit for accounting, tax or regulatory purposes; and (11) to bring rights and obligations into existence in those cases where a writing was required for validity purposes. United Nations Commission on International Trade Law, Report of the Working Group on Electronic Data Interchange (EDI) of the Work of its Twenty-fifth Session (New York, 4 - 15 January 1993), A/CN.9/373, p. 12.

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and

(c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device.

In the case of Beneficial Finance Co Ltd v Conway,[77] McInerney J held that tape-recordings were not documents. However in the UK it was held in the case of Huddleston v Control Risks Information Services Ltd [78] that a computer disk could be a "document" for the purposes of the Supreme Court Act 1981 (UK).

Secondly, the Australian bills of lading legislation probably only covers bills of lading in paper form in the sense of requiring them to be signed (see 3 below - signature and other authentication) and in referring to indorsement. It seems questionable that either requirement would be regarded as being met by electronic methods without legislative changes.

If an EBL is not recognised as a bill of lading the consequences can be severe. The New South Wales Court of Appeal's decision in Carrington Slipways[79] and the Federal Court's decision in Comalco v Mogal,[80] (both involving paper documents), demonstrate strict judicial approaches to defining "bill of lading" and exemplify the significant commercial consequences that might occur where a document is judicially held to be other than what it appears or purports to be.[81]

2. Documents of title and negotiability

A general question concerning documents of title in an EDI environment is whether negotiability and other characteristics of documents of title can be accommodated in an electronic context. The formulation of the CMI Rules, referred to above, required the resolution of a relevant and fundamental question. That was whether the CMI Rules should be structured to perform all the functions of a traditional bill of lading, including its asserted role as a document of title. The CMI International Sub-Committee resolved that the CMI Rules should not seek to interfere in any way with property rights. The view was taken that the CMI Rules should be confined to the contract of carriage. Specifically, they should be confined to the right to claim goods upon arrival at their destination and related rights.[82]

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77 [1970] VR 321 at p. 322.

78 [1987] 2 All ER 1035.

79 (1991) 24 NSWLR 745. In that case the consignee was unable to rely on the bills of lading provision, section 50A of the *Sale of Goods Act 1923*, and was unable to recover damages for loss of goods.

80 Per Sheppard J in the Federal Court, March 1993, unreported to date.

81 See fn. 1.

82 Carruthers, op. cit., p. 145.

The basic concepts underlying the system were encapsulated in the Report of the Chairman of the CMI International Sub-Committee in the following terms:

> When the parties have agreed on rules for electronic transfer of rights to goods in transit it would be possible to refrain altogether from issuing bills of lading. Needless to say the shipper would always have the right to demand a bill of lading but such document, if issued, would perform only two of the traditional functions of the bill of lading, namely, it would act as a receipt and as a record of the contract of carriage. So far as concerned the third function, namely the transfer or the right of control through the endorsement of a document of title, the carrier would register the person who at any time would be considered "holder of the contract" i.e. the person who otherwise would have been in possession of the original of the bill of lading ...[83]

This would accord with the view of one commentator who advocates that it is neither the paper itself nor the mere printing and embellishments on that paper that are the key to negotiability. Rather it is the agreed process that the medium (which currently is paper) is put through that achieves negotiability. If we wish to update the medium to EDI, then we need only have a process that will instil confidence.[84] This is largely a technical question - a question, for example of whether the uniqueness of an EBL can be guaranteed, not to a level of absolute certainty, but to the same extent as a paper bill of lading. In the legal area, probably the best approach is a broadly expressed one which will accommodate a process satisfying the technical criteria, and will not disadvantage the results of that process vis-a-vis a "paper-based" process.

3. Signature and other authentication

Authentication of a transmission, by signature or otherwise (in the EDI context this might be done by the parties using secret digital codes, as in the PIN numbers used for access to automatic tellers, or a more sophisticated combination of public and private codes (or "keys")) serves to indicate to the recipient and to third parties the source of the document and the intention of the authenticating party to issue it in its authenticated form. In the case of a dispute, authentication provides evidence of those matters. The most common form of authentication required by statutes and international conventions is a manual signature.

Some international transport conventions requiring a signature on the transport document permit that signature to be made in some way other than a manual signature. For instance, article 14 rule 3 of the United Nations Convention on the Carriage of Goods, being Annex 1 of the Final Act of the United Nations Conference on the Carriage of Goods by Sea done at Hamburg on 31 March 1978[85] provides:

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83 Ibid., p. 146.

84 G F Chandler III, "Negotiable EDI Messages? the Electronic Bill of Lading and CMI", unpublished paper, p. 3.

85 The Rules contained in Articles 1 to 26 of this Convention and in Annex II of the Final Act are referred to in the remainder of this Discussion Paper as the "Hamburg Rules".

> The signature on the bill of lading may be in writing, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.[86]

A signature is required in most of the provisions of the Australian bills of lading legislation. For example subsection 50C (1) of the *Sale of Goods Act 1923* (NSW) provides:

> Bills of lading conclusive evidence of shipment
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> 50C. (1) Every bill of lading held by a consignee or indorsee for valuable consideration which represents that goods have been shipped on board a vessel is conclusive evidence of the shipment of the goods as against the master or other person signing the bill of lading even if the goods or some part of the goods have not been so shipped. (Emphasis added)[87]

In this regard the word "signing" must be read in light of the judicial definitions. In R v Moore, ex p Myers[88] Higginbotham J said:

> A "signature" is only a mark, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory.

The word seems to be restricted by the courts to manual signatures.[89] In those circumstances where it is not certain whether the courts will include an electronic

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86 Under the *Carriage of Goods by Sea Act 1991* (Cwlth), if the Hamburg Rules have not been proclaimed by 30 October 1994, they will commence automatically at the end of the three years unless, before that time each House of Parliament has passed a resolution that they should be repealed or that the question of the repeal of the provisions should be reconsidered after a further three year period.

87 The assumption of a paper bill of lading is even more pronounced in section 74 of the Victorian *Goods Act 1958*:

> Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped shall be in all civil proceedings conclusive evidence of such shipment against the master or other person signing the same notwithstanding that such goods or some part thereof were not so shipped unless such holder had actual notice at the time of receiving the same that the goods had not been in fact loaded on board. (Emphasis added)

88 (1984) 10 VLR 322, at 324.

89 Even in the area of facsimiles there is some uncertainty. The requirement of signature requires simply that the name be intended as a signature: Leeman v Stocks [1951] 1 Ch 941. This can be achieved by either manually writing one's signature on the document or by using a stamp to affix a facsimile representation of one's signature: Electronic Rentals Pty Ltd v Anderson (1971) 124 CLR 27 per Windeyer J at 42-42.

form of authentication as a "signature", it is likely that such uncertainty will be overcome only by legislation.

In the absence of a statutory or judicial definition which expressly provides that electronic messages can be bills of lading or documents of title there is, at least, a risk that they would not be recognised as such. This seems unsatisfactory now that technical developments allow sophisticated electronic means of authentication which are more secure than manual signatures[90] and since paper bills of lading, especially when issued in sets, are by no means secure from fraud.[91]

4. Evidential value of EDI messages

In some common law jurisdictions all computer generated information has been classified as hearsay evidence. The essence of this is that assertions which are not made at the trial by the witness who is testifying are inadmissible as evidence of the truth of that which they assert. There is some question about whether computer evidence is inherently hearsay.[92] But even if all computer-generated information is classified as hearsay evidence, it can be admitted as evidence if it is a business record

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In the British Columbian case of Beatty v First Exploration Fund 25 BCLR (2d) 377 (1988) the court held that a voting proxy was "signed" even though the proxy was faxed to a meeting and bore only the signature as recorded on the fax.

In Australia there are some dicta on this issue.

In Molodyski v Vema Australia Pty Ltd (1989) NSW Conv R 55-446 the issue was whether a fax of a signed document constituted a document signed by the sender (the offeror) which when signed by the recipient (offeree) amounted to a binding signed agreement.

In obiter Cohen J stated that whether delivery of a fax of a signed document is as effective as delivery of the original signed agreement turns on the intention of the signatory. If the intention of the signatory is that their facsimile signature on the copy of the agreement is to be used for the purpose of authenticating the document and regarded as one's signature, then the document will be treated as a copy duly signed.

In Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd, unreported, Supreme Court of New South Wales, 15 August 1989. Young J assumed, but did not expressly decide, that a fax could meet both the writing and the signature requirements.

However, in contrast to these two Australian decisions, Cohen J in NM Superannuation Pty Ltd v Baker and Others [1992] 7 ACSR 105, the latest case on the issue, appeared to take a different view. He suggested that a faxed signature was not the original signature and therefore may not be adequate in cases where a signature is required, although he did not need to decide this question, since there was no signature requirement in the particular case.

90 UNCITRAL Preliminary study of legal issues relevant to the formation of contracts. A/CN. 9/333 18 May 1990 para. 53 ff.

91 R Colinvaux, *Carver's Carriage of Goods by Sea*, 13th edition, para. 54, p. 54.

92 R Bradgate, "The Computer, the Court and the Curate's Egg: is it hearsay or not?", *Computer Law and Practice*, March/April 1991, p. 174.

created in the ordinary course of commercial activity.[93] In addition most Australian jurisdictions have enacted specific provisions facilitating the use of computerised information as evidence.[94]

An important rule in evidence law is the "best evidence rule" which requires production of the best available evidence.[95] Under this rule a record of an electronic transaction could be inadmissible where the best evidence available is an original document. Presumably, if there is no "original" of such a transaction, an original could not be required, and the best other evidence would be called for. While it is questionable whether a computer print-out or a display on a VDU be considered an "original",[96] it would often be the best available evidence, and therefore should satisfy that rule. At common law there have been cases where the courts will allow secondary evidence of a "document's" contents where the mode of recording is not in written form.[97]

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93 It is difficult to expound this body of law on a general basis and for a description of the law in each jurisdiction, refer to D M Byrne and J D Heydon, *Cross on Evidence*, 3rd ed., 1986, at pp. 934 - 965.

94 See section 95 of the *Evidence Act 1971* (Qld), section 55B of the *Evidence Act 1958* (Vic), part VII of the *Evidence Act 1971* (ACT), part IVA of the *Evidence Act 1929* (SA).

95 D M Byrne and J D Heydon, *Cross on Evidence*, 3rd ed., 1986, at p. 1008.

96 One view as to the relationship between the computer record and the print-out is as follows:

> There exists one document only in the strict sense of the word, namely the 'electronic document' stored into the record of the machine. All print-outs produced by the machine are copies of the one and only electronic document ... [L]awyers ... have been led astray by the idea that a print-out emerging from the machine is analogous to a traditional transport document and, in fact, functions as such. Clearly this is not so. (C M Schmitthoff and R M Goode, eds, *International carriage of goods: some legal problems and possible solutions*, 1988, p. xxxiii.)

A strong contrary view exists within the EDI Working Group of the United Commission on International Trade Law (UNCITRAL) where it was suggested that the concept of originality was a concept limited to traditional paper-based documents and that, in view of the manner in which computer records were created, maintained and communicated, it was impossible to speak of original computer records. (United Nations Commission on International Trade Law, Report of the Working Group on Electronic Data Interchange (EDI) of the Work of its Twenty-fifth Session (New York, 4 - 15 January 1993), A/CN.9/373, p. 21.)

97 R v Matthews and Ford [1972] VR 3, R v Gaudion [1979] VR 57; but cf Conwell v Tapfield [1981] 1 NSWLR 595, R v Migliorini (1982) 38 ALR 356.

Section 25A of the *Acts Interpretation Act 1901* (Cwlth) provides:

> Where a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under an Act to produce the information or document containing the information to, or make a document containing the information available for inspection by, a

5. Formation of contracts

The means used in formation of contracts are essentially a matter for commercial decision by the individual parties but the background of what is or is not legally certain or acceptable will, of course, influence those decisions.

From a practical point of view it may be that automation of contractual procedures increases the possibility of an EDI message being sent and a contract formed that does not reflect the actual intent of one or more parties at the time when the contract was formed. Automation may also increase the possibility that, where a message is generated that does not reflect the sender's intent, the error will remain unperceived both by the sender and the receiver until the mistaken "contract" has been acted upon. The consequences of such an error in the generation of a message might therefore be greater with EDI than with traditional means of communication.

As with offer and acceptance principles in common law governing contract formation, the time and place of formation of a contract presents some difficulties in the EDI context. The courts have developed rules governing time and place of formation of a contract through the post, telephone and telex. But few rules have been developed in relation to EDI. In those circumstances many parties have developed communications agreements before they try and set the parameters of their EDI relationship.

The use of interchange agreements[98] is an example of parties making their own arrangements. It may be that interchange agreements could include multi-party interchange agreements embracing carriers, banks and commercial parties and a similar agreement including the insurer. This would still not prevent the need for legislative changes, however, since just as contracts relating to paper transactions may rely on a scheme of law in relation to, e.g. signature, without specifically mentioning the problem of signature, and will not be invalid because of a failure to address the question, transactions relating to EDI should have a similar legal context, but one that

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court, tribunal or person, then, unless the court, tribunal or person otherwise directs, the requirement shall be deemed to oblige the person to produce or make available for inspection as the case may be, a writing that reproduces the information in a form capable or being understood by the court, tribunal or person constitutes compliance with the requirement.

98 "While we can analogise to rules governing other sports (in this case paper-based transactions), these rules (which have traditionally come from legislation, court decisions and regulation), may or may not work adequately. These pre-existing rules are not EDI specific, and applying the paper-based rules to electronic transactions may lead to inappropriate results. Moreover, the application of these rules is not certain. Lacking is a comprehensive, fair, even-handed set of standards to govern the play. To cease play because of the absence of needed standards or rules, however, would not be a practical or sound decision. The alternative? For the parties themselves to engage in the legislative or rule-making process and develop rules to govern the game as the game develops. Ultimately, the need to clarify the rules and standards applicable to such transactions has led some users of EDI to consider the use of model interchange or trading partner agreements as a means of private rule making." From A Boss, "the Proliferation of model interchange agreements", Temple University School of Law, USA, Quoted in B S Wheble, Economic Commission for Europe Trade Facilitation Working Party, unpublished paper presented at Pisa, 1991.

is not paper oriented. By putting EDI contracts in the same position as paper transactions, the question is also avoided of whether a contract can validly override EDI - unfriendly legislation or legislation expressed in terms that are simply alien to EDI.

6. Communication

A legal problem which needs to be addressed by EDI users is: who will bear the risk of a failure or error in communication? This can be allocated in a trading partner agreement,[99] but where third parties are involved, the issue becomes more complex. At this stage, special legislation dealing with allocation of risk in the multiplicity of EDI contracts would not appear appropriate.

Functional Equivalence

The UNCITRAL Working Group on EDI is attempting to develop uniform international rules that would validate and encourage the use of EDI. To demonstrate the Working Group's "functional equivalence" approach, it might be useful to analyse some examples.

The functional equivalence approach for determining how a "signature" requirement for paper documents could relate to an electronic environment is to look at what a written signature does. If the functions of a handwritten signature are (for example): to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of the document - then the next task is to devise, in an EDI context, requirements which meet each of those functions to the same degree.

The functional equivalence approach to a legal requirement for an original document would probably not be to make deeming rules that, say, establish a legal fiction that a computer record is to be considered an original. Rather, the approach would be to formulate rules that provide that any legal requirement for a document to be presented in (for example) the original, is satisfied if certain conditions are met. Those conditions might be that: (a) there is a reliable identification of the originator of the message and (b) there exists reliable assurance as to the integrity of the content of the message as sent and received.

EBLs: Conclusions

Legal obstacles constrain the greater use of EBLs and illustrate the importance of the need for a statutory recognition of electronic methods of doing business in maritime and other areas. While such electronic methods provide opportunities for efficiency gains, it is less likely that those gains will be taken up if to do so would result in legal uncertainty. In those circumstances the approach in the Carriage of Goods by Sea Act 1992 (UK), where there is express provision for regulations[100] to be made to extend

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99 An example of such a contractual arrangement can be found in articles 5 and 8 of the UNCID.

100 Some Australian Parliaments view with disfavour those "Henry VIII" clauses which do not contain guidelines in the parent Act as to how the subordinate legislation is to be made. It could be argued however that guidelines similar to the terms of the regulation making power in the Carriage of Goods by Sea Act 1992 (UK) would be sufficient.

the application of its provisions to cases where telecommunications or other information technology is used, is a useful model for Australia to adopt. This would allow for a quick legislative response necessary to accommodate rapid EDI developments.[101] It would allow for the making of legislation to require, at least, the recognition in law of EBLs which perform a function which is equivalent to that of a paper bill of lading. In taking such an approach the regulations need, of course, to be uniform, just as any legislation would need to be. While there is some risk of an absence of uniformity in implementation, or divergence over time, a cooperative approach should limit this risk to the point where it is clearly outweighed by the benefits of a proactive course of legislative action which creates in Australia the best climate for developments of new and more efficient ways of doing business.

Responses to the recommendation in the draft Discussion Paper that reform of the bills of lading legislation should include a provision similar to that in the UK Act allowing for the making of regulations providing for the application of the legislation to cases where EDI systems are used were generally supportive. There was some support for UNCITRAL's work in this area and its emphasis on the "functional equivalence approach". The UNCITRAL Working Group will make its final report in the latter part of 1994. If the Working Group completes the Model Statutory Provisions on EDI prior to the adoption of the recommendations in this Discussion Paper on this issue, it may be appropriate for all or some of the Model Stautory Provisions to be given legislative form as an alternative to including a regulation-making power in any reforming legislation. Such legislation could be uniform state and territory legislation or Commonwealth legislation.

Adopting the approach suggested above will also allow time to assess the response of Australia's trading partners to the issues of EDI and EBLs. It would be in Australia's interests to adopt legislation on EDI and EBLs that is consistent with any legislation adopted by Australia's trading partners. In addition, when any such legislation is adopted, the evidentiary provisions of each jurisdiction will need to be examined to ensure that EBLs are recognised in legal proceedings.

Sea Waybills and EDI

The analysis in this Part (other than in respect of negotiability) applies equally to other shipping trade documentation (and in many respects to commercial documentation generally). We have focused on bills of lading because of the additional problems they present in possessing the characteristic of negotiability and therefore requiring some form of electronic negotiability. In particular, as was submitted in response to the draft Discussion Paper, sea waybills are much more adaptable to EDI systems than bills of lading because they are non-negotiable. The use of sea waybills is being increasingly recognised.[102] The use of sea waybills in

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Any regulations would, as disallowable instruments, be subject to parliamentary scrutiny and supervision.

101 Professor J E Byrne contends: "If a law revision merely articulates rules reflective of current practice - even if it is EDI practice ... its value will, at best, be short term." Professor J E Byrne, "Electronic Letters of Credit: Is there such a thing? - a Legal Perspective", *EDI and the Law*, 1991.

102 J Richardson, "Increased Use of Sea Waybills", a paper delivered at the Future of Bills of Lading Conference held in London on 14-15 October 1993, p. 5.

letter of credit transactions has been recognised by the International Chamber of Commerce in its latest edition of rules for documentary credit usage.[103] If the recommendation to include a regulation-making power in the reforming legislation is adopted, the regulations could be used initially to recognise the use of EDI in relation to sea waybills to encourage its use in Australian business.

RECOMMENDATIONS

- Legal policy areas should be vigilant and take a cooperative approach, in identifying legal constraints that unnecessarily inhibit the operation of market forces towards the more efficient use of EDI technology in the area of shipping trade documentation.

- Any reform of bills of lading legislation should include a provision similar to the Carriage of Goods by Sea Act 1992 (UK) allowing for the making of regulations to make provision for the application of the legislation to cases where EDI systems are used.

- The functional equivalence approach as advanced by the EDI Working Group of UNCITRAL should be further examined with a view to its applicability to electronic shipping documents.

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103 International Chamber of Commerce Uniform Customs and Practice for Documentary Credits (UCP500), 1993 - revision in force as of 1 January 1994, Article 24.