

mentally systems of incorporation by reference. As a practical matter, EDI messages are potentially less legally certain, without the rigorous incorporation by reference of the relevant legal, technical, and administrative terms, conditions, clauses, agreements, standards, rules, or guidelines. Consequently, an explicit rule is indispensable to assure that such incorporation by reference provides electronic commerce legal certainty and the facilitation of computer-based trade. A common example is the growing use of standardized message sets, which are intelligible, and derive legal import in some cases only by reference to the UN/EDIFACT standards.

3. *Traditional trade usage and legal tests inadequate*

The traditional use of incorporation by reference for diverse trade terms, such as the ICC's INCOTERMS, UCP 500 and similar terms which are recognized to reflect trade usage, is sometimes considered to enjoy greater legal certainty (when incorporated by reference) than are certain electronic commerce terms (including model EDI/interchange agreements, guidelines and security policies) when such terms are incorporated by reference. Because of the more recent origin of EDI, judicial or other treatment of incorporation by reference may fall to ensure a comparable level of legal certainty.

There is a significant threat that the application of traditional legal tests for determining the enforceability of terms that seek to be incorporated by reference are less effective when applied to corresponding electronic commerce terms because of the inherent differences between traditional and electronic commerce mechanisms. For example, certain traditional legal tests of incorporation by reference include whether the incorporated terms are "clear and conspicuous", whether they contain "suitable words of reference evidencing explicit intention to incorporate", or whether the intended incorporation is "clear and convincing". Such tests may create unintended barriers to the facilitation of electronic trade. Indeed, the proposed new article is consistent with, and imple-

ments the UNCITRAL EDI Rules' recognition of party autonomy. The problem is that methods of notice and access are different in a computer medium, and therefore could in some tribunals be rejected in the absence of supportive language of the type here proposed for UNCITRAL.

C. *Relevant UNCITRAL Texts*

While it could be argued that some Terms could be covered by the following UNCITRAL texts, it would not be sufficient to cover incorporation by reference in an electronic commerce context.

Article 9(2) of the Vienna Sales Convention

The parties are considered, unless otherwise agreed, to have impliedly made application to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[*Editorial note:* This provision was intended to accommodate the incorporation by reference of INCOTERMS and UCP. This particular wording, however, is not entirely appropriate for EDI electronic commerce purpose.]

Article 7 of the Model Law on International Commercial Arbitration

(1) ... An Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) ... The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

3. *Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat (A/CN.9/WG.IV/WP.66) [Original: English]*

1. At the twenty-eighth session of the Working Group, a proposal was made to include in the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was decided that the Working Group would address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (A/CN.9/406, paras. 90 and 178).

2. The Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158), had found general support in the Commission.¹ It was stated that related legal issues involving electronic registries were a necessary part of such a project (A/CN.9/406, para. 178).

3. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/406, para. 179).

4. Following the twenty-eighth session of the Working Group, the Secretariat received from the delegation of the United Kingdom of Great Britain and Northern Ireland the text of a proposed article on the issue of incorporation by reference, with explanatory comments and the text of a note discussing legal issues of negotiable bills of lading in an EDI context. The draft article proposed by the United Kingdom together with the explanatory comments, and the text of the note are reproduced as annexes I and II to the present note as they were received by the Secretariat.

¹Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

ANNEX I

INCORPORATION BY REFERENCE

Note by the United Kingdom

1. In the UK, it is generally possible to incorporate terms in a contract by reference to other documents where the terms are set out. In this way, terms may be made to apply as between the parties to a contract even if they are not set out in the contractual documentation, provided that the contract clearly refers to another document where the full terms may be seen, or it is otherwise clear that the parties intended the terms to be incorporated in the contract.¹
2. In some countries, the law, at least in some cases, requires actual approval of the terms by the party who is intended to be bound. Some countries, too, may require some terms to be in writing and approved by signature; for example clauses about limiting liability, cancelling or suspending a contract, restricting the ability to object to exceptions, restricting the freedom to contract with third parties etc.
3. The use of EDI does not give rise to any new problems in this context, but it often increases the number of communications from which the terms of the contract as a whole are to be derived. Even where a contract is formed by means of written communication, its terms may have to be pieced together from a number of different documents. With EDI, however, the number of brevity of messages in the course of concluding a transaction mean that the risk of fragmentation is exacerbated. For reasons of clarity and certainty, it is often desirable if the agreed terms can be collected up in a single body of text to which reference can be made. In closed user groups, accustomed to dealing with each other, this pre-arrangement is relatively easy. If open trading is desired, it is more important that clear identification is made, at the commencement of a fresh interchange, about which terms are to be applied and where the full statement of them can be found.
4. There are two principal ways in which the terms can be transmitted electronically. If they are set out in full and sent in a "free text" segment of a message, the sender can be confident that they will arrive at the party's computer; but to the recipient they are useless unless they are converted to human readable form. This interruption ruins the automated processing of data which is the main characteristic and purpose of EDI. Moreover, setting them out in this way is both cumbersome and expensive.
5. Alternatively, the terms can be transmitted in standardised format by using codes, so as to enable uninterrupted processing of the data. This will, however, require the prior agreement of the two parties that the coded abbreviations represent the full terms exactly and unambiguously; and further, that their reception by the receiving party's computer system constitutes a proper notification of the terms to him.
6. Where express acceptance of the terms is required, this requirement would also need to be covered in the prior agreement, and most probably the acceptance would be communicated in one or more of the messages exchanged at the time that the contract is formed.
7. Where standard terms are used, these will often be subject to exceptions or variations in individual cases. Some of these will be dealt with specifically in the relevant message segments, but any text relating to them will have to be treated in a similar way to the text of the general terms, and be governed by the same prior agreements.
8. If there are several different versions or variants of the so-called standard terms, any one of which could be assumed to be appropriate in the absence of a clear stipulation, the party specifying the terms should identify which set is applicable, possibly using EDI codes, before the contract is concluded. Mere silence could be dangerous, because the terms which might be implied from custom of the trade or previous dealings might not be what is wanted.
9. Generally there should be no difficulty in incorporating terms by referring to external sources, provided that these have been identified by the parties concerned and accepted by them as applicable; and that the national courts, if necessary, will be convinced that this identification and acceptance has taken place.

Third parties

10. There appear to be few real problems in English law as regards third parties. As a general rule, the doctrine of privity of contract applies, and only the original parties to a contract are concerned with its terms. Nevertheless, a third party who acquires the benefit of a contract, or undertakes the burden of it, will wish to know its terms. In the case of maritime transport contracts, the consignees or indorsee or holders of bills of lading, or those to whom delivery is to be made under sea waybills or ship's delivery orders, will have transferred to them all rights of suit under the contract of carriage (Carriage of Goods by Sea Act 1924). They are therefore closely affected by the terms and will need them to be accessible.

11. If EDI is being used and the third party is in the same "EDI club" as the original parties (i.e. party to the underlying agreement to use EDI), and is using the same EDI communication techniques, standards and common rules, the terms can be made available to the third party by the same means as to one of the original parties. If the third party is not in the same "EDI club", however, it will be necessary for the EDI users always to make sure that other means are used to provide such third parties with the information which they require, or at least to indicate to them where it is available. In some countries, the courts can take a very stringent view about whether knowledge of the terms has been adequately given or made available to the third party.

12. EDI systems will need to take account of this. Where a contract is concluded pursuant to an earlier master agreement, it may be unwise to rely on the fact that the applicable standard terms were originally identified in the master agreement, without further reference to them. It is desirable to refer to them in the course of communications between the parties concluding the contract in question. In EDI systems, therefore, there should be an adequate "master" reference made, albeit by means of pre-arranged codes if possible, at the commencement of each series of messages which lead up to a contract or a group of related contracts. This reference could be made by means of a separate message. To make doubly sure that the references are adequate in those jurisdictions where courts will be looking for a very close connection, it may be

¹Even where terms are not incorporated *by reference*, terms may be incorporated in a contract where the terms themselves, and one party's intention to incorporate them, have been sufficiently brought to the notice of the party to be bound, before or at the time that the contract is made, by a document which a reasonable man would expect to contain contractual conditions, such as a railway or airline ticket. Terms may also be implied from an established custom of the trade or from the previous course of dealing between the parties, or by statute.

advisable for other messages in a series to contain references to the "master" reference itself.

13. Where the contract is not made pursuant to an earlier master agreement, the incorporation of terms which are ascertainable elsewhere will certainly require reference to them when the contract is made. This could be achieved by using the same sort of "master" reference as is mentioned in paragraph 12 above. This would identify what the terms are, and where they can be found. Additional references could also be used in individual subsequent messages.

14. In conclusion, there seem to be a number of respects in which there is a role for good practice to be applied when incorporating terms by reference in a contract formed by means of EDI. In some countries, there may be a need to encourage courts, within their existing discretion, to accept such good practice as being a sufficient means of notifying and agreeing contract terms. It is not clear, however, that there is a need for legal provision to require these good practices. On the other hand, if some countries have laws which restrict parties' ability to incorporate terms by reference in a contract formed by means of EDI, they may wish to consider whether any such restrictions could be modified with advantage, so as to accommodate the use of EDI, provided that certain conditions are met. If provision in the Model Law was thought desirable to encourage the modification of national law, the following might be considered:

"(1) Where a contract is formed by using a data message, or any of its terms are contained in a data message, any terms which are not set out in that data message, but to which reference is made therein, shall be taken to form part of the contract if the data message expressly indicates.

(a) an intention to incorporate in the contract the terms to which it refers; and

(b) the place where those terms can be found.

"(2) Where, by virtue of paragraph (1) above, any terms are incorporated in a contract by a data message, the terms so incorporated shall also be taken to form part of any other contract, which is formed by using a data message which expressly indicates that the incorporating data message shall apply for the purposes of that other contract."

15. In some cases, national law provides that terms incorporated by reference shall be ineffective insofar as they conflict with the other terms of the contract. For example, charter party terms incorporated into a bill of lading will not be effective insofar as they conflict with the terms of the bill of lading. Any such rule should not be affected merely because the contract is formed by using a data message. To meet this point, the following provision should be added:

"(3) Paragraphs (1) and (2) above are subject to any rule of law by virtue of which any terms so incorporated take effect subject to any other terms of the contract, to the extent of any inconsistency therewith."

16. It may be that certain countries have rules requiring notice of the terms to be given to any other party, or requiring the place where the terms can be found to be sufficiently accessible to the other party. If so, and if it is wished to preserve such rules, an additional provision might be considered as follows:

"(4) Paragraphs (1) and (2) above are subject to any rule of law which requires adequate notice of the terms to be given, or which requires the place where the terms may be found to be accessible to the other party."

ANNEX II

BILLS OF LADING

Note by the United Kingdom

1. This note concentrates on those aspects of the functions and use of a bill of lading which might be affected by the use of EDI communications instead of paper.

2. A bill of lading is:

(1) a receipt for the cargo by the carrier;

(2) good evidence of the contract of carriage:

(a) as to the general terms—some on the face but mostly on the back of the paper;¹

(b) as to the particular details of vessel, loading and destination ports and nature, quantity and condition of the cargo - on the face of the paper; and

(3) a document giving the holder of it the right to be given delivery of the cargo at its destination. The named consignee, endorsee or holder of it is entitled to possession of the goods upon discharge, and can control to whom this entitlement is passed. It is therefore a document of title. As such, it may, for example, be deposited with a creditor as security for a loan.

Receipt for the cargo

3. The first function is easily performed by EDI. It is simply a transmission of information from carrier to shipper. Currently the UN/EDIFACT Message IFTMCS ("contract status") is used for this. (Note that the shipper will have previously used the IFTMIN ("shipping instruction") message in which he declares the details of the cargo he intends to ship, its destination and the consignee.)

Evidence of the contract of carriage

4. The second function can also be performed by EDI. It too is simply a transmission of information from carrier to shipper, and the same IFTMCS Message is used. The transmission of information (rights and terms etc.) can be managed quite satisfactorily by using EDI messages, provided there are proper security and authentication methods in place. Even the process of passing a piece of information down a chain of parties can be achieved with complete confidence that it can retain, and be shown to have retained, its integrity throughout and that the originating and successive parties in the chain are authentic.

5. Function (2)(b) above is easily performed because the standard IFTMCS message is structured to contain all these variable pieces of information (quantified and, where necessary, codified) in its standard segments. Function (2)(a) is not directly performed

¹In addition, certain terms may be incorporated by treaty (e.g. the Hague or Hague/Visby Rules, and in the case of multimodal bills, the CMR, CIM and Warsaw Convention), or by a statute which gives effect to a treaty, or by reference (e.g. charter party terms).

by the IFTMCS message, nor by any other standard message. The general terms are not transmitted in full by EDI in the IFTMCS message. They are incorporated by reference to an extrinsic source, which will or should have been notified by the carrier to the shipper; and the evidence of them is to be found there.² By this incorporation the IFTMCS messages are in this respect, therefore, like a number of waybills, and they are also like the "short form" or "blank-back" bills of lading, which do not carry the full "small-print" terms on them either. In many trades such bills of lading are entirely effective — and so is the IFTMCS message.

Document of title

6. The third function is the one which presents most difficulty. A negotiable bill of lading is transferable by delivery, with any necessary indorsement, and its possession gives the holder of the bill control of the goods with the right to delivery of them and to deal with them before delivery. An EDI message can have no physical "holder" as such. Who has the entitlement to take delivery of the cargo at destination must be established by other means.

7. Of course, if the shipper's instruction and the carrier's receipt (in EDI, the "IFTMIN" and "IFTMCS" messages respectively) identify that the latter is to be treated like a waybill (for which purpose of identification there is an allocated code), then delivery may correctly be given to the named consignee if he identifies himself. (A sea waybill does not need to be presented at the port of discharge as evidence of entitlement to possession.) If the IFTMCS is to be treated like a consigned bill of lading, the named consignee will again be the person to whom delivery should be made. He will need to demonstrate by other means that he has been authorised by the shipper to apply for delivery. Paper documents may be used for this, but so may EDI messages, provided they are used with adequate authentication and security methods

²One way of making the reference to the extrinsic source can be as follows. In the UK EDI Association's "MIG" (message implementation guideline, sometimes known as a user manual) there are quite comprehensive texts in each message's section which set out the commercial and the legal significance of the message as a whole and its individual segments where applicable. The users of this MIG are bound to acceptance of these meanings and this is reinforced, for those who have signed the Association's standard interchange agreement, by one of the clauses in it.

One of the texts which applies to the IFTMCS message is:

"The parties accept that the goods referred to in a transport Contract Status message are to be subject, in respect of their receipt and of their carriage, to the terms, conditions and exceptions which the Carrier applies in the particular trade route being used.

"These terms, conditions and exceptions are those which

(a) are set out in the Carrier's own Waybill, or on a Waybill previously authorised by the Carrier as acceptable to him

AND (b) are set out on the Carrier's current Bill of Lading and which are, by incorporation through (a) above, applicable to the carriage of the goods as if the Waybill in (a) above were such a Bill of Lading.

AND, if applicable

(c) are, by way of additional qualification or exception, stated by the Carrier, in writing or by electronic transmission, to apply to the carriage of the goods.

"A copy of the terms, conditions and exceptions applied by the Waybill, (a) above, and set out in the Bill of Lading, (b) above, may be obtained from the office of the Carrier or from any of his authorised agents."

so as to preclude fraudulent or premature application for delivery. This process will enable the right to delivery (constructive possession; possessory title) to be withheld until, for example, the shipper or the banks³ are satisfied as to payment.

8. The particular problem presented by EDI is how to provide a guarantee of uniqueness (or singularity)⁴ equivalent to possession of a negotiable paper bill of lading. Reference has been made above to the possibility of transmitting information satisfactorily by EDI down a chain of parties. The same process can be used by any of the parties to transmit the information that he renounces his title in favour of another person. It can therefore be used to effect endorsements. However, if a person is to receive an exclusive benefit, such as possessory title, by receiving a particular EDI message, he will need to be satisfied that no identical message(s) could have been sent to any other person(s) by any preceding party in the chain, creating the possibility of other claimants to the title. Of course, in EDI no message can be actually the very same message as another; but so long as it is technically possible for a message, with no possibility of detection, to be replicated exactly and sent to someone else, there can be no guarantee of singularity.

9. Without this guarantee, negotiability for bills of lading cannot be provided by EDI. Passing the information, both about the cargo and about who is to receive title, from party to party may in fact be safe using EDI in particular cases, but at the moment there is no guarantee.

10. Until a technical solution is found — and some, based on combining time-stamping and other security techniques, have come close — the problem needs to be looked at from a different point of view. Methods of circumventing it have been, and are being, researched by various organisations. These depend on a "central registry" system, in which a central entity manages the transfer of title from one party to the next, cancelling the first party's rights and creating fresh rights for the second party and so on. This can be done using EDI communications. The basic principle of these systems is that all who would use them will share a universal confidence that the central registry can be trusted not to duplicate a message.

11. No doubt some of these schemes might provide elegant solutions to the problem, assuming that the commercial companies were prepared to take them up. Many companies have not yet appreciated that simple sea waybills (and their electronic equivalent) could be used anyway instead of bills of lading in many international transactions. It remains to be seen which of the current "central registry" schemes for emulating negotiability will prove popular.

12. There are, therefore, two approaches to the final problem of the "guarantee of singularity": the technical one and the central registry one. Commercial demand will show in due time which, if either, approach is sufficiently attractive to produce enough supporters to sustain development and implementation.

³UCP500, which sets out the requirements of banks in relation to documentary credit transactions, may, however, need amendment.

⁴In fact, two or three original bills of lading are frequently issued, stating on their face the number. Carriers are protected because delivery of the goods against production of one bill will render the others void.

4. Proposal by the United States of America: note by the Secretariat (A/CN.9/WG.IV/WP.67) [Original: English]

1. At its twenty-eighth session, the Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and

transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158) had found general support in the