



5th BILETA Conference British and Irish Legal Technology Association

The Electronic Transmission Of Commercial Contracts

Samir Mankabady

Abstract: It is absurd to expect the existing legal rules to cope with the problems of the electronic transmission of commercial contracts. In a sense, the present weakness of the legal system is perhaps one of the reasons for the strength of the electronic and computing activities. They have developed freely without legal control. It is time to formulate new legal rules to take into account the recent trends in the electronic transmission of data.

1. Introduction

During the last thirty years, the electronic transmission of data of trade transactions has developed rapidly as a result of great technical changes. On the other hand, the legal rules remain the same in 1990 as before. This creates some doubts as to whether the existing law is suitable for the electronic revolution. At the present time, such doubts become a certainty.

2. Electronic Data Interchange (EDI) Expansion

The expansion in the use of EDI will continue, with the ultimate aim of eliminating the issue of documents and the use of paperwork. Many international and private bodies are currently working on one or more aspects of electronic transmission. This may be regarded as a very encouraging sign. However, the proliferation of data transmission projects is causing confusion and duplication of efforts.

3. Trade Electronic Data Interchange Systems (TEDIS)

On October 5, 1987, the EEC Council adopted an initial phase of a programme on Trade Electronic Data Interchange Systems (TEDIS) (871499, O.J. L.285, October 10, 1987). The objectives are:

- a) To avoid a proliferation of closed trade EDI systems and the widespread incompatibility which this would entail in the 1992 market;
- b) to promote the creation and establishment of trade EDI systems which meet the needs of the users, in particular small and medium sized enterprises;
- c) to increase the awareness of the European telematics equipment and services industry in order to meet users' requirements in this area;
- d) to support the common use of international and European standards, where these exist, and in particular the recommendations of the UN ECE (Economic Commission for Europe) with regard to international trade procedures.

The programme adopted horizontal and vertical actions. The former concerns common interests of all trading sectors such as standardization, tariffs, multilingualism, confidentiality, security, etc., while the latter relates to sectoral pilot projects.

Currently the EEC efforts are directed towards standardization and the creation of "electronic highways" of the 1992 market (see COM (88) 341, June 21, 1988).

4. The Electronic Contract - The Pre-contracting Stage

In the past, contract lawyers had to acquire certain skills in drafting the terms of the contract. They had to consider the words used, their reasonableness and impact upon the liability of the parties. The construction given to these terms was, and still is, based on the words used and the intention of the parties. However, with the wide use of printed standard forms of contracts, lawyers are not concerned any more with drafting. Of course, in many contracts, they may delete or add new terms. But that entails a modest effort as the rest of the standard terms of the contract will be used.

Nowadays, information may be vital for the contract and the skill of the lawyer will be demonstrated through the use of the information. For example, in off-shore operations, a distinction is drawn between a wet and a dry tow. In the latter, the rig or equipment is placed on a barge which is towed, pushed or pulled by a tug. Accidents frequently occur as a result of the parting of the tow-rope. If the tow-rope is long, the tow will be unmanageable and could be lost. If it is short, the tow could collide with the tug. Therefore, the length and thickness of the tow-rope is of vital importance for the safe towage operation (see the Author, the International Maritime Organisation, *Accidents at Sea*, Vol.2, p.263, published by Croom Helm). A computer program has been developed to show the exact length and thickness of the tow-rope.

Other examples could be cited, for instance the so-called permissible loss in the transport of oil. Some courts and arbitrators accepted the loss of a percentage of 0.5% relying on a custom of trade while others denied the existence of such custom. A computer program takes account of the age of the tanker, the duration of the voyage, the quantity of oil, the grade, etc., and determines the exact percentage of loss. Such a percentage will then be inserted in the charter-party as an express term.

5. The Electronic Contract - Elements

It has argued, (see Bernard Amory and Marc Schauss, *EDI as a way to conclude contracts* - a paper presented at the Rome Conference in May 1988) that the elements of an ordinary contract; offer, acceptance and consideration are the same for an electronic contract. Nothing is new and it is just another method of transferring data. All that is needed is the fitting of the new method into the established framework. The question usually raised is: What is the difference between two contracting parties in person and a contract entered by machines under the control of the contracting parties? The consent exists in both cases. Even where the offer is received at the terminal, its owner (or perhaps operator) is supposed to have given his acceptance.. A dispute between the parties on the absence of consent or a discrepancy between the offer and acceptance is a matter of evidence and is not related to the elements of the contract. Similarly, as a result of the speed in transmission of the consent, questions of errors have to be resolved in accordance with the rules of evidence.

In brief, some jurists took the view that the main principles of the ordinary Law of Contract could be easily adapted to be applied to electronic contracts. Few concepts had to be accepted to deal with issues such as an open offer, conditional offer, the time of acceptance and the use of a computer or terminal owned by a telecommunication authority in transmitting the offer and acceptance. Examples of these concepts are: the theory of appearance (i.e. the terminal or the computer appears to give the consent) and the theory of an independent will.

As for the time of the conclusion of the contract, a number of views are expressed on the time when acceptance is given; the time when acceptance is sent; the time when the offeror takes notice of acceptance and the time when the offerees acceptance is received by the offerer. Similar controversial ideas are raised with regard to the issue of authentication.

It is quite clear that attempts to apply the existing rules, adapt them or create new documents are faced with complex problems. The solutions offered are artificial as it is very difficult to stretch the existing rules to transactions of different characteristics. It is submitted that new legal rules should be formulated on the electronic contract. This is a difficult task but it would not be beyond the ability of legal experts.

The following points may be given in support of this view.

- a) The elements of contracts in a common law system differ from a Civil or Germanic system.
- b) The adaptation of the existing rules or the introduction of new documents (such as the use of the deferred electronic funds transfer instead of a bill of exchange) will bring with them new problems.
- c) Banking, trading and transport practices under the new technology are hardly established to give the courts any guidance.
- d) The American experience in passing the US Electronic Funds Transfer Act. of 1978, and the preparation of a draft Convention on the Electronic Bill of Lading, show that issue in question requires new rules.
- e) It is difficult to predict the state of technology in five or ten years time. For instance, one is tempted, in order to avoid disputes, to say that a message should be irrevocable on receipt. This may be a suitable rule for the present stage of technology but could prove to be short of taking advantage of developments in this field.

Two observations must be borne in mind. Firstly, contracts which require formality could not be transmitted electronically. Secondly, the contracting parties will always have the choice either to use the traditional or the electronic contract.

6. Transport Transactions

With modern electronic communication techniques, ships are extensions of headoffice computer networks. A typical message received at the office from a cargo-broker says that a consignment of 30,000 tons of clean oil is to be loaded in Northern Spain between 5 and 8 May bound for Boston, USA: Have you a suitable tonnage? This message will mark the start of a number of calculations on the computer and information transferred between various databases on matters relating to the voyage, speed, bunker, port dues, weather conditions, etc. In the light of the information, the shipowner will decide whether to enter into a charter-party.

As for the operations on board the ship, the Petroluk Mars is the first ship to be certified for single-man bridge operation. On her bridge, electronic and automation has replaced the usual team of skilled watch keepers, helmsman and navigating officers, leaving room only for a single officer charged with sole responsibility for navigation, steering, and reacting properly to changes in the ship and her surroundings.

In October 1985, a group of major British companies set up a research programme entitled "Data Interchange for Shipping" (DISH). Its objective was to develop ".. a data interchange system that would allow exporters/importers to exchange data with shipping lines, trailer and ro-ro operators, air lines and freight forwarders dealing with European trade and trade between Europe and the rest of the world." The effort in this programme led to the establishment of a DISH pilot scheme. In this private initiative, the field of shipping was divided into the following areas: booking (including

schedule change); shipping instructions; maritime transport contract information (waybill or bill of lading); and freight accounts. The various aspects of the Project are considered by five task groups on: message design; communications and software security; legal; pilot trials; and future planning.

In September 1987, the EDI Association (EDIA) was set up to promote its use in international trade and related services. Following the experience of the DISH project, the Association has six subgroups: deep sea, short sea and surface; air; banking and financial services; governmental issues; insurance.

Recently the Container EDI Council (CEDIC) has been formed, with a view to promoting the use of EDI. CEDIC sees its role as building consensus between EDI users on matters such as message design and data coding, and also to assess what new messages ought to be developed. The basis of the electronic communication between container owners, carriers and depots is intended to be the ISO Data Exchange Code (ISO 9897) known as Cedex. This ISO Cedex is a code which is to be used for inspection, repair, etc., and has been developed by ISO, with input from the shipping industry, for incorporation into the printed Nations Edifact system.

The draft Convention on the Electronic Bill of Lading: Under the chairman-ship of Lord Justice Lloyd, the Comité Maritime International prepared the Uniform Rules for an Electronic Bill of Lading, Waybill or other Transport Document. The Rules took as a basis a trustworthy party who could be a bank or a telecommunication authority and it is called Databank. The Rules provided for solutions to the negotiability of the bill of lading; the applicable law and the duties of the carrier, the shipper and the Databank.

7. Trade Transactions

In September 1987, the International Chamber of Commerce (ICC) adopted a text of the Uniform Rules of Conduct for Interchange of Trade Data by Tele-transmission (UNCID). It would be pointless to analyse these rules as the ICC is about to publish a new comprehensive version on this subject.

More recently, the EDI Association prepared the Electronic Data Interchange Agreement which is intended "to govern the rules of conduct and methods of operation between the parties in relation to the interchange of data trans-mission for the purposes of or associated with the supply of goods and/or services (referred to as Trade) and take account of the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission as adopted by the ICC."

EDI will play a significant role in the fliture of factoring. By using an electronic system such as FacFlow, details of invoices and credit notes can be transmitted electronically to the Factoring company giving quicker access to cash and an automatic checking of the accuracy of invoices and credit notes.

8. Banking Transactions

In view of the enormous impact of the EDI on banking, flinds are transferred electronically. This opened unlimited possibilities and opportunities for banking and trade operations. Yet, many legal problems remain unsolved. For instance, the bill of exchange is a negotiable instrument and to reproduce electronically the characteristics of transferability could be difficult. Again existing systems allow the storage of payment instructions at least for some days. This could create difficulties in the legal position during this period.

From the point of view of the bank, where funds are transferred to another bank, it is not always easy

to determine at what point the recipient bank ceases to be the agent of the transferor bank and becomes the agent of the creditor. Where the transferee bank is instructed by its client to hold the funds for a certain period, can the transferor bank cancel the payment message during that period?

From the point of view of the client, the following questions are still not free of controversy:

- When is the transfer of funds to be considered completed?
- When does a payment become irrevocable?
- Does the instruction to the bank constitute an assignment of funds?

Different solutions to these problems and others are provided in the various legal systems.

9. Financial Transactions

By 1992, a European Community liberal market will be established in the field of financial services. This market will cover banking, insurance and transactions in securities. Capital will move freely, banks will be able to set up branches throughout the Community and investors will have a strong market for capital borrowings. By creating a European security market and removing national barriers, stock exchanges would be linked electronically. This would offer the investor the best conditions and increase the liquidity of the stock exchange market. However, investors will not have a legal document making their shareholding. They may have a share account through a broker or bank. See Directive 80/39 on listing on a stock exchange; Directive 89/298 on coordinating the requirements for the drawing up, scrutiny and distribution of prospectuses published when transferable securities are offered to the public. The Second Banking Directive adopted on December 15, 1989, relates to the taking-up and pursuit of the business of credit institutions.

The Community has made considerable progress in co-ordinating the conditions of securities to official stock exchange listing, the contents, scrutiny and method of publication of the listing particulars and the publication of information by quoted companies. See Directive 87/345; Directive 85/611 and] Directive 89/592 on insider dealing (O.J.. L.334, November 18, 1989).

10. Integration

The electronic transmission of commercial documents and data offers the users efficiency and reduction of costs. In fact, the revolution in electronics is shaping the future of many commercial transactions and services. The bill of lading, the letter of credit and the invoice are transmitted electronically by some companies and banks.

The clear practical legal problems arising from electronic transmission makes the case of new legislation imperative to cope with new technology. Efforts are currently made to formulate new rules. However, these efforts are directed to one document or a transaction. Yet, the trend in electronic technology is towards integration. For instance, the navigational paper chart is disappearing in favour of the electronic chart. This, in turn, is integrated into the radar. Integration is taking place in many other areas to achieve more efficiency.

Shortly, the contract of sale, the letter of credit, the bill of lading and the insurance policy will be integrated and transmitted electronically together. Any proposed new legal rules should deal with commercial transactions as a package. Such rules should be accepted internationally. UNIDROIT or the EEC Commission are suitable forums and are well placed to take the challenge of the new technology.

Books

Goode R.M. *Electronic Banking, The Legal Implications*, edited, published by the Centre for Commercial Law Studies, Queen Mary College, London.

Reed C. *Computer law*; edited, published by Blackstone Press Ltd.H.

Thomsen and Wheble B. *Trading with EDI; The Legal Issues*, published by IBC Financial Books.

Articles

Amory B. and Schauss Marc *EDI as a way to conclude contracts*, a paper presented to the Rome Congress in 1988.

Dale R. Background to a speech to the SD SCICON Seminar, on February 28, 1989, on file with the Author.

Schwank F.- *International Bank Guarantees and Letters of Credit* published by Electronic Means, a paper presented to the Rome Congress in 1988.