Canadian Perspectives on the Impact of the CMI Rules for Electronic Bills of Lading on the Liability of the Carrier Towards the Endorsee

Jocelyn Dube*

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* The author has an LL.B from the Universite du Quebec a Montreal.

I. INTRODUCTION

In June of 1990, the International Maritime Committee[1] adopted rules governing electronic bills of lading.[2] These rules, which parties adopt on a voluntary basis, are intended to supplement national legislation, which is still too strict with respect to evidence,[3] and allow for negotiation of a bill of lading in an electronic environment.[4] The use of electronic bills of lading is justified by the costs and risk of error associated with the use of paper as well as the more rapid communication of information such a vehicle allows. The idea of the electronic bill of lading was contemplated during the 1980's. SeaDocs Registry Limited, a company formed by Chase Manhattan and Intertanko, an association of oil tanker operators, launched a system similar to that of the CMI, known as the "SeaDocs Experiment."[5] The *Bolero Project*,[6] a consortium made up of carriers, shippers, banks, insurers, and telecommunication companies is even more recent than the CMI Rules.

1. The international Maritime Committee office is in Belgium. It is made up of national associations of maritime law from more than fifty countries.

2. *Reprinted in* Hugh M. Kindred, *Trading Internationally by Electronic Bills of Lading,* 7 BANKING & FINANCE L. REV. 265, 283 (1992); Documents, *CMI Rules for Elecronic Bills of Lading,* 22 J. M. L. & COM., [Hereinafter Rules].

3. *See generally* Kevin J. Kotch, *Addressing the Legal Problems of International Electronic Data Interchange: The Use of Computer Records as Evidence in Different Legal Systems,*6 TEMP. INT'L & COMP. L.J. 451 (1992); Christopher Nicoll, *E.D.I. Evidence and the Vienna Convention*, 35 J. BUS. L. 21 (1995).

4. *See* John Livermore & Krailerk Euarjai, *Electronic Bills of Lading: a Progress Report,* 28 J. MAR. L. & COM. 55 (1997); Richard Brett Kelly, Comment, *The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading*, 16 TUL. MAR. L.J. 349 (1992).

5. For an interesting overview of the attempts prior to the SeaDocs Experiment, see Boris Kozolchyk, *Evolution and Present State of the Ocean Bill of Lading from a Banking Perspective*, 23 J. MAR. L. & COM. 161 (1992).

6. *See generally* Diana Faber, *Electronic Bills of Lading,* LMCLQ 232, 242 (1996); Sharona Tamor, *Bolero Trade Steps,* BANKER, Feb. 1995, at 72; Ken Cottrill, *Banking on Electronic Shipping*, DISTRIBUTION, May, 1996, at 22.

CMI Rules are distinguished from the projects mentioned above as follows. Projects such as SeaDocs or Bolero are relatively closed. They are like a private club which pre-approves new members. In contrast, to join the CMI Rules, parties need only send in a contract. Second, in the other systems, all operations relating to the negotiation of goods in transit are contained in one central registry operated by an independent third party. Under the CMI Rules, each carrier has its own registry, which means that it is not forced to use technology or software compatible with a central registry or other "members." The CMI Rules appear to offer more flexibility.

The bill of lading constitutes a central aspect of an international sale. It is a document that the carrier remits to the shipper at the carrier's request.[7] Although few laws in common law jurisdictions define "bill of lading,"[8] it serves three essential functions: (i) a receipt for goods loaded onto a ship, (ii) a statement or evidence of a contract and, (iii) a title to the goods.[9] Function three makes the bill of lading especially important in international maritime trade. Under the international system, possession of a bill of lading is equivalent to possession of the goods,[10] giving title to the goods.[11] For its holder, it constitutes title to the goods and may be negotiated, by endorsement and delivery,[12] while the goods are in transit, thus operating as a symbolical delivery of cargo.[13] A bank may use it as guarantee for the issuance of credit which is often necessary to finance a sale. Therefore, the same document is always negotiated by endorsement and delivery, which increases confidence in commercial trade.

The carrier normally remits goods to the person who has possession of the bill of lading and who presents him with the document at the destination port. The carrier initially remits documentation to the shipper, and the shipper then sends them the consignee of the goods - this is usually done by air. The consignee may then take possession of the goods only upon presentation of the bill of lading to the carrier. Although this is one of the simplest scenarios taking place, one can imagine problems

7. Carriage of Goods by Water Act, R.S.C. ch. C-15, annexe, article III, § 3 (1985); Harter Act, 46 U.S.C. §§ 190-194 (1893); Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1936).

8. Section 1-201(6) of the Uniform Commercial Code defines "bill of lading" as "a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods. . . ."; Section 2041 of the Quebec Civil Code (L.Q. ch. 64 (1991)) defines it as "a writing, which evidences a contract for the carriage of property."; *See also* Banks Act, S.C. ch. 46 § 425 (1991).

9. C.G.E. v. Les Armateurs du St-Laurent Inc., [1977] 1 F.C. 215.

10. Cole v. North Western Bank, 10 L.R. 354, 362 (C.P.D. 1875).

11. Barber v. Meyerstein, 4 L.R. 317 (H.L. 1870).

12. Lickbarrow v. Masson, 5 Term. Rep. 683 (1794).

13. Sanders v. Maclean 11 L.R. 327, 341 (Q.B.D. 1883).

that would arise if goods arrived at the destination port before the documents – a purchaser could not claim goods intended for him. This major inconvenience slows down the speed of commercial trade and reduces the profitability of businesses involved either directly, or indirectly, in the transaction. It also causes storage costs to be incurred as well as port tie-ups. The situation becomes even more complex if paperwork were to go through several intermediaries, such as buyers and resellers of goods in transit, as is frequently the case in the petroleum industry.

International maritime business law can be viewed as a "law of document." The transition from paper documents to electronic or computerized data (EDI) is, therefore, no simple task.[14] In an electronic environment, the challenge is to make computerized data negotiable,[15] in particular, securing its authentic and confidential nature so as not to diminish confidence in the international system. The CMI accomplished this task by instituting a system based on possession and issuance of a "Private Key," which is a kind of personal identification number. Under this method, it is no longer possible for the seller of goods in transit to negotiate directly with the purchase without the knowledge of the carrier, as is currently the case. Instead of a paper document delivered by the carrier, the seller has a Private Key. However, breaking with tradition, the Rules prohibit the seller from negotiating the Private Key. The seller remits the key to the carrier, who delivers a new key to the person wishing to hold the right of control and transfer of goods. There is, therefore, one key in circulation and its holder is the only person that can claim goods from the carrier.

The carrier plays a major role in the transfer of the right to goods. As he is the only person issuing the Private Key, he necessarily acts as registrar for the transactions. Contrary to the Bolero project, which has one central registry operated by a third party, the CMI system has one register per ship. One wonders what obligations result for the carrier. These technical aspects are intimately linked to the security and reliability of the computerized systems. This essay does not address those points.

Rather, this essay addresses the relationships which, because of the role of intermediary taken on by the carrier, are created between the carrier and the new holder of the Right of Control and Transfer of the goods in transit. Will the new role of the carrier in the "negotiation" process of

14. *See generally* R. David Whitaker, *Letters of Credit and Electronic Commerce*, 31 IDAHO L. REV. 699 (1995); Amelia H. Boss, *The Emerging Law of International Electronic Commerce*, 6 TEMP. INT'L & COMP. L.J. 293 (1992); Amelia H. Boss, *The International Use of Electronic Data Interchange and Electronic Communications Technologies*, 46 BUS. LAW. 1785 (1991).

15. *See generally* David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747 (1995).

the bill of lading create a new legal relationship between the carrier and the endorsee? Would this legal relationship be of a contractual nature? What would be the terms of contract? This last question is important because section 2 of the Bills of Lading Act,[16] does not allow the endorsee (the new holder of the Private Key) in an action against the carrier, to invoke the contract of carriage between the carrier and shipper. These are the types of questions with which this essay deals. The purpose of this essay is to determine whether the CMI Rules could have an impact on the current legal framework governing the relationship between carrier and endorsee. It emphasizes the responsibility of the carrier because his traditional role is the one that dramatically changes.

II. The Non-Creation of a Right for the Endorsee to Sue the Carrier Based on the Transportation Contract

A. The Exceptional Character of the Endorsee's Right to Sue on the Basis of the Transportation Contract Under the Current Bills of Lading Act

1. A Literal or Restrictive Interpretation of Section 2 of the Bills of Lading Act

Generally speaking, the endorsee is not a party to the contract of carriage entered into by the seller and carrier. Section 2 of the Bills of Lading Act[17] stipulates that the endorsee cannot institute an action against the carrier based on the contract of carriage. This provision is based on the doctrine of "privity of contract," which describes the relationship existing between two contracting parties and provides that only parties to the contract can invoke it.[18] Generally, the endorsee is not a party to the contract, which arises between shipper and carrier.[19] Section 2 of the Act provides an exception. It allows the endorsee to sue the carrier based on the contract of carriage if he proves that he acquired title on or by reason of endorsement. In other words, the endorsement must cause the transfer of property.[20] The provision reads as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with

16. Bills of Lading Act, R.S.C., ch. B-6 § 2 (1985) [hereinafter Act].

17. *Id.*

18. Black's Law Dictionary *1199 (6th ed. 1990).*

19. *See* G.H. Treitel, *Bills of Lading and Third Parties*, Lloyd's Mar. & Com. L. Q. 294 (1986).

20. *See* J. Beatson & J.J. Cooper, *Rights of Suit in Respect of Carriage of Goods by Sea,* Lloyd's Mar. & Com. L. Q. 196, 198 (1991); D.G. Powles, *Transport*, J. Bus. L. 157, 159 (1987).

> all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

It is important to note the exceptional character of the endorsee's right of action against the carrier. The expression "to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement" must be examined. What happens if the property passes before or after endorsement? A literal interpretation of the article leads to the conclusion that the right to sue between the endorsee and the carrier is only possible if the property passes at the time of the endorsement.

Canadian jurisprudence does not seem to have difficulty confirming a restrictive or literal interpretation of section 2 as British courts have done on occasion.[21] The words of Honorable Judge Kerwin, speaking for the majority in *The Ins. Co. of North America v. Colonial Steamships Ltd.*,[22] are very clear in this respect:

> It is not every endorsee who by reason of this section is vested with the rights of action in respect of the goods mentioned as if the contract contained in the bill of lading had been made with himself. It is only an endorsee to whom the property in the goods passed *upon or by reason of the endorsement.* Sewell v. Burdick.[23]

If, as proposed by the CMI, a literal interpretation prevails in the electronic environment, the stakes for the carrier are high. The purchaser cannot take advantage of the contract of carriage in an action against the carrier where the purchaser in his capacity as endorsee or holder of the new Private Key, is not given property "on or by reason of the endorsement." The only recourse left to the purchaser in such a situation is to argue that the transfer rights process provided by the CMI is, on one hand, the equivalent of a traditional endorsement, but on the other hand,

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21. Section 2 of the Act restates section 1 of England's Bills of Lading Act of 1855. The literal interpretation, although controversial, was the law in England until the Bills of Lading Act of 1855 was replaced by the Carriage of Goods by Sea Act, 1992. The British legislature went against the position established in the jurisprudence and opted for that advocated by the doctrine. *See* F.M.B. Reynolds, *The Carriage of Goods by Sea Act 1992*, LLOYD'S MAR. & COM. L. Q. 436 (1993); Tim Howard, *The Carriage of Goods by Sea Act 1992*, 24 J. MAR. L. & COM. 181 (1993); INDIRA CARR, INTERNATIONAL TRADE LAW, (1996). For a recent analysis of section 1 of the Bills of Lading Act of 1855, see Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. The Aliakmon, 2 All E.R. 145 (Eng. C.A. 1986); The Aramis, 1 Lloyd's Rep. 213 (Eng. C.A. 1989); Enichem Anic SpA and Others v. Ampelos Shipping Co. Ltd. (the "Delfini"), 1 Lloyd's Rep. 252 (Eng. C.A. 1990); Mitsui & Co. Ltd. v. Novorossiysk Shipping Co. (The "Gudermes"), 1 Lloyd's Rep. 311 (Eng. C.A. 1993); *see also* P. N. Todd, *Contracts with Consignees and Endorsees*, LLOYD'S MAR. & COM. L. Q. 162 (1984); Treitel, *supra* note 19; G. H. Treitel, *Bills of Lading and Implied Contracts,* LLOYD'S MAR. & COM. L. Q. 162 (1989).

22. [1942] S.C.R. 357.

23. *Id.* at 364.

causes title to pass simultaneously. In other words, could the process of transferring rights affect the exceptional character of the right to sue provided for in section 2 of the Act, such that the new purchaser of the goods and holder of the Private Key could invoke the contract of carriage against the carrier each time? As shown in the next section, this question is answered in the negative.

2. *The CMI Rules*

One purpose of the CMI Rules is to preserve the function of title to goods attributed to the bill of lading which, as a result, allows the document to be negotiated. To do this, the system is based on the use of a Private Key, a sort of personal identification number that allows each transmission to be authenticated.[24] Instead of the traditional paper bill of lading, the carrier issues the Private Key to the shipper of goods.[25] As with the holder of a paper bill of lading, only the holder of the Private Key can claim delivery or give instructions to the carrier.[26]

This method of negotiation breaks with tradition in that it requires participation of the carrier. Traditionally, a bill of lading is negotiated by endorsing and delivering the document.[27] This operation gives the endorsee the right to claim the goods from the carrier, the bill of lading constituting title to goods. Under the CMI, the Private Key, contrary to the paper bill of lading, is unique to each successive holder and is not transferable,[28] as only the carrier is authorized to issue it. The carrier therefore is involved in the negotiation process every time a bill is negotiated. This process is described in article 7b of the Rules:

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

This method is substituted for the traditional method of endorse-

24. Article 2f of the Rules defines "authenticated" as "any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a transmission." Kindred, *supra* note 2.

25. *Id.*

26. *Id.*

27. Lickbarrow v. Masson, 5 Term. Rep. 683 (1794).

28. Kindred, *supra* note 2.

ment.[29] Operations relating to the transfer right of goods hinge on the carrier. In addition to acting as registrar, there is a new relationship with the endorsee, the legal nature of which merits study. The question arises whether the new relationship between the carrier and endorsee gives the carrier a right of action based on the contract of carriage. The following discussion suggests, however, that the new holder of the Private Key, in capacity of purchaser and "endorsee," cannot take advantage of the contract of carriage and therefore cannot invoke it in an action against the carrier.

B. The Lack of Impact of the Rules on the Exceptional Character of the Right of Action Under the Contract of Carriage

1. The Absence of a Causal Link Between the Transfer of Property and the Transfer of the Right of Control and Transfer

The preceding analysis demonstrated that section 2 of the Act refers implicitly and indirectly to the rules on the transfer of property applicable to individual cases. To measure the impact of the CMI Rules on the situation just described, one must ask the following question: if section 2 of the act is interpreted literally, does the system introduced by the CMI create a causal link between the process of transferring rights and the transfer of property? If so, the new holder has a right of action against the carrier. If not, the parties simply refer to the jurisdiction they decided on or which otherwise applies to the transfer of property. An examination of the CMI Rules concludes that reference must be made to the jurisdiction determined by the seller and purchaser in the contract of sale underlying the contract of carriage. The CMI Rules are examined first because they were expressly chosen by the parties and therefore constitute the first source of law.

The relevant provisions are found in article 7:

7. Right of Control and Transfer
a. The Holder is the only party who may, as against the carrier:
(i) claim delivery of the goods;

29. Kindred, *supra* note 2, at 275-76. *But cf.* Boris Kozolchyk, *The Paperless Letter of Credit*, 55 Law & Contemp. Probs. 84, 91 (1992). Reflecting on the reason such a system exists, it is easy to understand that the carrier is less reticent to deliver goods to the holder of a code he issued and where he is the only one able to do so (analogous to the paper bill of lading that comes from a single source), rather than to someone who presents him with a simple print-out of a transaction carried out electronically between seller and purchaser. Even if such a print-out were admissible as evidence under a general treaty on EDI's, the number of possible sources of this print-out decreases confidence in the use of an electronic bill of lading. In short, everyone wants assurance that they are carrying out unique and concrete transactions.

(ii) nominate the consignee or substitute a nominated consignee for any other party, including itself;
(iii) transfer the Right of Control and Transfer to another party;
(iv) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill or lading.

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

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

d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effects as the transfer of such rights under a paper bill of lading.

As the section heading suggests, the holder only has a right of "control and transfer." Reference is made neither to the right to property nor to the right of action against the carrier, except for the right to claim goods. At first glance, it seems that the CMI left it to the parties to settle questions as to transfer of the right of property. Note that paragraph 7d states that the effects shall be the same as under a paper bill of lading. It was mentioned in the previous section[30] that due to the wording of section 2 of the Act, the negotiation of a bill of lading does not always result in the simultaneous transfer of property. In this respect, the remarks of Professor William Tetley are relevant when he confirms that: "[b]ills of lading acts were adopted not to decide when risk or title passed but to transfer the shipper's contractual rights against the carrier to the consignee and also to third parties."[31] Paragraph 7d, giving full effect to section 2 of the Act, suggests a referral to external rules relating to property.

Such an interpretation is confirmed by article 6 of the CMI Rules, stating that "[t]he Contract of Carriage shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued." This provision brings out the essence/goals of the CMI Rules, saving the three essential functions of the bill of lading and, as a whole, providing for its negotiability in an

30. *See supra* p. 5.
31. WILLIAM TETLEY, MARINE CARGO CLAIMS 185 (1988).

electronic environment. This is in response to problems arising from the use of EDI's in international trade; these problems have repercussions on maritime transport. This goals can be attained without upsetting rules relating to property which are not national nor international problems. The next section is therefore devoted to the examination of these rules as they are ordinarily applied. The general rules provide that property is transferred according to the wishes of the parties, and endorsement cannot be assimilated to the transfer of property.

2. *Maintaining the Rule of Free-Will in Determining When Property Passes When Endorsement Occurs in Transit*

In international sales, the parties choose which law governs conflict, except where an international convention must be followed. On the specific question of transfer of property, the Vienna Convention[32] does not offer guidelines. Therefore, recourse is made to the rules of the jurisdiction agreed on by the parties. In common law and civil law countries, the parties determine when property passes unless determination is against public order or legislative provision. The transfer of property between seller-endorser and purchaser-endorsee of goods sold in transit is subject to the contract of sale, not the time of endorsement, even if the transfer of risk occurs instantaneously.[33] Section 2 of the Act, as applied by the courts, implies that transfer of property can take place either before or after endorsement.

Cases may arise where parties have not clearly stipulated the time of transfer; for example, where a clause stipulates "f.o.b. Vancouver" without any express referral to the time property is transferred. One cannot rely on the *Incoterms*[34] as defined by the International Chamber of Commerce because they deal mostly with transfer of risk, not transfer of property. A few times, Canadian courts were asked to determine the time when property was transferred when the contract only stated "f.o.b." a destination port. Consignment generally resulted in the transfer of property, giving rise to the consignee's recourse under section 2 of the Act. Can the same be said for endorsement?

In the case of *Paterson Steamships Ltd. V. Aluminum Co. of Canada Ltd.*,[35] the appellant claimed that the respondent did not acquire title to goods as a result of consignment and, therefore, had no right to sue. The

32. *Final Act of the United Nations Conference on Contracts of International Sale of Goods*, U.N. Doc. A/Conf./97/18 (1980).

33. Article 68 of the Vienna Convention decrees that when goods are sold in transit, the risk passes to the purchaser upon formation of the contract. This convention does not deal with the transfer of property.

34. ICC Pub. No. 460 - Incoterms (1990).

35. [1951] S.C.R. 852.

words of Honorable Judge Rand, while suggestion application of a literal interpretation, give a satisfactory reply to the question of when the transfer of property takes place in a f.o.b. contract:

> The respondent is therefore the named consignee; *and that title to the bauxite passed to it on the consignment* is equally clear. It is mere trifling with the facts to suggest anything else. "Consigning" goods is delivering them to a carrier who accepts them as initiating his obligation to carry and deliver. The bill of lading is to evidence the terms of the undertaking and operate as a document of title. Whether it is issued five seconds or five hours after the last pound has been stowed is immaterial; in either case it takes effect as from the moment of the commencement of the duty of the carrier as such. *The title passes to the purchaser when the goods have been committed to the vessel for the journey; that is, it has passed on the "consignment"* and the requirement of the Bills of Lading Act has been satisfied.[36] [Emphasis added.]

The Court's reasoning is based on two premises. First, the transfer of property takes place when goods are loaded. Second, the loading of goods constitutes "consignment." As a result, unless indicated otherwise,[37] almost all f.o.b. contracts give the consignee recourse under section 2 of the Act.[38] In Canadian law, the consignment and transfer of property are simultaneous in a f.o.b. contract.

This situation does not, however, apply to endorsement. There is no implied simultaneous endorsement and transfer of property. When dealing with consignment, courts have inferred the will of the parties to pass title to respective interest as soon as goods cross the rail of the ship. This position might be based on two facts. First, risk is transferred as soon as goods cross the rail. Second, the seller, who is beneficiary of an irrevocable credit, claims payment immediately after loading, when the carrier gives him the bill of lading stipulated in the credit conditions; knowing he will be paid, the seller no longer has an interest in retaining property to

36. *Id.* at 856 (recently applied in Norfolk W. Ry. Co. v. Great Lakes Brick & Stones Ltd., [1955] Ont. C.J. General Division No. 40265/89 LEXIS 1813).

37. Loading goods onto a ship does not always transfer title, even though the risk may be transferred. For example, when a *chose du genre* is sold, property is only acquired at the time the thing is individualized, which only happens once the goods arrive at their destination. This is also the case of the contract containing a clause whereby the seller retains title. Thus, even if the purchaser assumes the risk from the time the goods are loaded, should the goods arrive damaged, based on section 2 of the Act, he would have no recourse against the carrier, even in his capacity as consignee or endorsee. *See e.g.*, Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. The Aliakmon, 2 All E.R. 145 (Eng. C.A. 1986); *see also,* The Aramis, 1 Lloyd's Rep. 213 (Eng. C.A. 1989). This situation benefits the carrier in two ways. First, the carrier does not have to worry about which party might sue him, and second, the purchaser assumes any loss or damage.

38. *See e.g.*, Prairie City Oil Co. v. Munn, [1916] Que. S.C. 322, 32 D.L.R. 141; Atlantic Fruit Co. v. Oke, [1919] 16 O.W.N. 121; Brace, McKay & Co. v. Schmidt, [1920] 31 Que. K.B. 1; Nfld & Labrador Hydro v. Day & Ross Ltd., [1981] 31 Nfld. & P.E.I.R. 23.

the goods.[39]

According to the Supreme Court, if loading goods is the equivalent of consignment, it cannot be the equivalent of endorsement because when endorsement occurs, the goods have been loaded for some time. The *Incoterms* are especially aimed at determining the sharing of risk before and after intervention of the carrier; it is an important moment in an international transaction culminating when the goods cross the ship's rails. As a result, the *Incoterms* are less useful in determining when title to goods in transit passed. As for the CMI, this system adds nothing new to applicable rules. The main novelty is that the carrier knows the identity of each endorsee. This does not prevent the terms of a contract of sale of goods in transit, including the transfer of property, from continued governance by rules that previously applied. Unless there is a rule of law that endorsement transfers title, the will of the parties apply. In common law, endorsement alone is not enough to transfer title. The dichotomy of the transfer of property and endorsement is clearly stated in the well-known case of *Lickbarrow v. Masson*,[40] rendered over two centuries ago:

> A bill of lading is the written evidence of a *contract for the carriage and delivery* of goods sent by sea for a certain freight. . . . The general property remains with the shipper of the goods, until he has disposed of it by some act *sufficient in law to transfer property*. The endorsement of the bill of lading is simply a direction of the delivery of the goods. When this endorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods.[41] [Emphasis added.]

British jurisprudence changed despite the adoption in 1855 of section 1 of the Bills of Lading Act 1855.[42] *Sewell v. Burdick*[43] rendered at the end of the nineteenth century, became the main authority for the literal interpretation of section 1 of the Bills of Lading Act. The court expressed itself as follows: "[n]ow the truth is that the property does not

39. The following words of Professor Treitel should be noted,

> [p]assing of property under c.i.f. contracts commonly occurs on transfer of shipping documents, including a bill of lading, against payment of price. Property passes at this point, not because there is any rule of law to this effect, but because of an inference as to the intention of the parties, and in particular as to the intention of the seller: it is assumed that he would intend to retain the property, until payment, by way of security for that payment.

G.H. Treitel *Passing Property Under C.I.F. Contracts and the Bills of Lading Act 1855*, LLOYD'S MAR. & COM. L. Q. 1, 2 (1990) (referring to BENJAMIN'S SALE OF GOODS ¶ 1690 (3rd Ed. 1987).

40. Lickbarrow v. Masson, 5 Term. Rep. 683 (1794).

41. *Id.* at 359-60, *cited in* Hickman Grain Co. v. Canadian Pac. Ry., [1927] 36 Man. R. 322, 337, 340, 344; *see also* Smurthwaite v. Wilkins, [1862] 11 CBNS 842.

42. *See supra* note 21.

43. [1884] 10 App. Cas. 74.

pass by the endorsement, but by the contract in pursuance of which the endorsement is made."[44] The position adopted by the Court was not set aside until the British Parliament replaced it in 1992.

Canadian jurisprudence is to the same effect. As an illustration, note the following words of the Manitoba Court of King's Bench in *Bedard v. Spencer Grain Co.*:[45]

> The authorites I have cited seem to me quite clear that as between the shipper and the endorseee of a bill of lading, *the intention of the parties must govern the rights conferred by an endorsement, and that unless the shipper by his agreement with the endorsee intended, when he endorsed the bill of lading, that the property in the goods should pass absolutely out of him to the endorsee, such a property did not pass merely by the manual act of endorsing and delivering the bill of lading.*[46] [Emphasis added.]

The moment property passes is determined by either the intention of the parties expressed in the contract of sale, or by legislation; endorsement alone does not transfer property. In addition, the terms of section 2 of the Act imply that the question of the transfer of property is completely separate from that of endorsement, as they anticipate the possibility of endorsement without transfer of property, the Act not dealing with the rules on the transfer of property.[47]

This analysis demonstrated that endorsement must be separated from the question of transfer of property, the latter being up to either the parties contracting, or the legislator. The CMI Rules do not alter this situation; at the time of transfer-endorsement, the question of transfer of property is already settled by the principal contract according to the intention of the parties - independently of carrier intervention in the process. Therefore, in response to the initial question, the CMI Rules do not result in the creation of a causal link between the transfer of rights and the transfer of property so that the exceptional character of the recourse provided for in section 2 of the act is preserved. However, there is nothing to stop the new purchaser in his capacity as endorsee from giving himself the opportunity to eventually sue the carrier under section 2 of the Act; the purchaser-endorsee can stipulate in the contract of sale that transfer of property took place at the time the carrier issued the purchaser the Private Key under article 7b of the Rules. Property is therefore passed "on or by reason of the endorsement."[48]

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44. *Id.* at 105.

45. [1919] 2 W.W.R. 723.

46. *Id.* at 730.

47. TETLEY, *supra* note 31, at 185.

48. These arrangements are impossible where the legislator does not give the parties the right to determine when property is transferred, as is the case when the goods must be individualized before there can be a transfer of property.

III. Towards a Redefinition of the Liability of the Carrier Towards The Endorsee Under the CMI Rules

A. Possible Formation of a *Brandt v. Liverpool*[49] Contract

As discussed earlier, section 2 of the Bills of Lading Act provides that the carrier and new holder cannot invoke the contract of carriage against each other unless property in the goods passed on or by reason of the transfer of the right of control and transfer. However, the courts already allowed a right of action despite the absence of the condition relating to the transfer of property under the terms of the contract of carriage pursuant to the theory of an implied contract, commonly called the "*Brandt v. Liverpool*[50] contract." The implied contract appeared in England as a desirable solution in maritime law. It allowed parties to circumvent the literal interpretation of the first section of the Bills of Lading Act of 1855 which reflected a strict adherence by the courts to the privity of contract doctrine.[51] The formation of such a contract depends on particular facts that arise at some point between the carrier and the endorsee. One may ask whether the CMI Rules, which imply a direct relationship between the carrier and endorsee, can give rise to the application of the theory of implied contract.

The *Brandt v. Liverpool*[52] decision is the modern authority for this theory. In this case, the carrier delivered to the shipper a bill of lading which read "Apparent good order and condition." The goods, bags of zinc ashes, arrived at the destination port both late and in less quantity than indicated in the bill of lading. Meanwhile, its market price decreased causing damage to the plaintiff and endorsee that held the bill of lading in warranty against the purchaser of funds used to finance the purchase. The goods were delivered and accepted by the plaintiff in consideration for which the bill of lading and freight were delivered and paid to the carrier. The plaintiff could not validly base his recourse on section 1 of the Bills of Lading Act of 1855 since, even though he was endorsee, he did not have title to the goods on or by reason of the endorsement. In fact, he never acquired title to the goods. The action was nevertheless granted on the basis of an implied contract between the plaintiff and the carrier. The following words of Lord Judge Bankers indicate the position taken by the Court of Appeal:

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49. Brandt & Co. v. Liverpool Brazil & River Plate Steam Navigation Co. Ltd., [1924] 1 K.B. 575.

50. *Id.*

51. F.M.B.R., *Proper Law of a Brandt v. Liverpool Contract*, Lloyd's Mar. & Com. L.Q. 188 (1985); Malcom A. Clarke, *The Consignee's Right of Action Against the Carriers of Goods by Sea: the Captain Gregos*, 2 Lloyd's Mar. & Com. L.Q. 5 (1990).

52. *Supra* note 49.

> By those authorities it has been clearly established that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the shipowner, the holder of the bill of lading comes under an obligation to pay the freight and to pay the demurrage, if any, and there are general expressions in all those three cases, I think, in which the learned judges have said that the contract so made by that offer and acceptance covers, so as to include, the terms of the bill of lading. In my opinion in this particular case the contract must include the terms and conditions of the bills of lading and for this reason. In this case the bill of lading holder offered the freight before the goods were delivered; and in fact paid it, and under those circumstances it seems to me that by acceptance of the freight and the subsequent delivery the shipowners undertook an obligation to deliver the goods as described in the bill of lading. I think from the shipowner's point of view it must necessarily include the whole of the terms of the bill of lading, because he must desire that he should be covered by the exception in the bill of lading. I think, therefore, that the learned judge is right when he states his conclusion that on the facts in this case it is sufficient to say there was a promise by the shipowners to deliver the goods to Brandt & Co. in the condition in which they ought to be delivered under the bill of lading.[53]

A contract, the terms of which appear on the bill of lading, can therefore be inferred when the carrier delivers the goods in exchange for the document.

In *The Aramis*[54], the Court of Appeal of England had another chance to look into the theory of implicit contract. Judge Lord Bingham suggested the following questions.

The questions to be answered are, I think, twofold:

> (1) Whether the conduct of the bill of lading holder in presenting the bill of lading to the ship's agent would be reasonably understood by the agents (or the shipowner) as an offer to enter into a contract on the bill of lading terms.
> (2) Whether the conduct of the ship's agent in accepting the bill or the conduct of the master in agreeing to give delivery or in giving delivery would be reasonably understood by the bill of lading holder as an acceptance of his offer.[55]

Thus, according to the jurisprudence, the circumstances surrounding the formation of such a contract are a *de facto* relationship between the carrier and the endorsee arising at the destination port as the only place where delivery may take place. In an environment proposed by the CMI, such a *de facto* relationship arises not only at the destination port, but also, at sea while the goods are in transit. In the latter case, the goods cannot be delivered and the bill of lading cannot be presented. Thus, judging only by this distinction, one must conclude that the *Brandt v. Liv-*

53. *Id.* at 589-90.
54. The Aramis, 1 Lloyd's Rep. 213 (Eng. C.A. 1989).
55. *Id.* at 224.

erpool[56] contract theory does not apply due to the participation of the carrier in the transfer of the Right of Control and Transfer under the CMI.

It should be noted that the Court of Appeal refers to general principles of the formation of contracts. Thus, if the offer, acceptance, intention to contract, and any other consideration exist while the goods are in transit, one may ask whether a *Brandt v. Liverpool*[57] contract is formed when the rights are transferred under the CMI, the time at which the carrier and endorsee first communicate with each other. On this point, reference may be made to the terms of article 7b of the Rules:

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

The transmission by the carrier (iii) is similar to an offer and may be considered as such. Note that "acceptance" is required from the proposed holder (iv) or, if one prefers, from the endorsee. By analogy with the questions asked by Judge Lord Bingham in *The Aramis*[58], one may first ask whether the conduct of the carrier, when he transmits information to the proposed holder, may reasonably be seen as an offer to enter a contract based on the information transmitted. One must then ask if the conduct of the proposed holder, in accepting the transfer of rights, may reasonably be seen to be an acceptance of an offer to enter a contract by the carrier. In this respect, the following comments of author Diana Faber[59] on the Bolero project[60] are relevant:

> Such a solution may be found as a consequence of the communication between the parties which is involved in an electronic bill of lading system and which is not found when paper bills are being used. The participants in the Bolero project do not claim to be involved in business process re-engineering and state that they are trying to establish the exact electronic equivalent of a paper bill. They have, however, introduced a system under which the carrier is involved in the "endorsement" of the electronic bill to subsequent holders. The registry which receives and passes on the messages which effect the transfer of the right of control is the agent of the carrier. It may be that

56. *Supra* note 49.
57. *Supra* note 49.
58. *Supra* note 54.
59. Faber, *supra* note 6.
60. Tamor, *supra* note 6.

> as a result a new legal relationship is created between the carrier and the new holder. The effect of the messages may be said to be an attornment or promise to deliver he goods to the new holder or in accordance to his new instructions. Since the carrier also transmits the full bill of lading message which contains, or contains reference to, his terms and condition, it could be said that there is an attornment on the terms and conditions of the contract of carriage. The effectiveness of the holder's right of action would depend on the court finding contractual intent and consideration.[61]

The presence of an intention to enter a contract and give consideration is more obvious in a situation where, in an electronic environment, the business relations between the carrier and the "proposed holder" occur when the goods are in transit as opposed to cases such as those in *Brandt v. Liverpool*[62] and *The Aramis*[63], where these same relations only occur at the destination port. In the latter case, the respective obligations of the parties are practically fulfilled. This is different from the first case, where the parties continue to worry whether the obligations will be completely and properly fulfilled. As an aside, the respective advantages gained from a sale in transit are greater.

The possibility of a *Brandt v. Liverpool*[64] contract being formed is, however, lessened by the following words of Judge Lord Bingham in *The Aramis*[65], on the question of behavior of parties and the intention to enter a contract. These words are further to his test or reasoning in the two questions studied above:[66]

> I do not think it is enough for the party seeking the implication of a contract to obtain "it might" as an answer to these questions, for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an *intention to contract* than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. *Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.*[67] [Emphasis added.]

Applied to paragraph 7b, the above reasoning allows the argument that one cannot infer the formation of a contract because the parties' conduct is, in effect, imposed on by the terms of this paragraph. Despite

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61. Faber, *supra* note 6, at 243.
62. *Supra* note 49.
63. *Supra* note 54.
64. *Supra* note 49.
65. *Supra* note 54.
66. *See supra* text p. 18.
67. *Supra* note 54, at 224. *Accord* Mitsui & Co. Ltd. V. Novorossiysk Shipping Co. (The "Gudermes"), 1 Lloyd's Rep. 311 (Eng. C.A. 1993).

the existence of an offer and acceptance, the parties behave exactly the same way as they do in the absence of a contract.[68]

However, in applying paragraph 7b, the above reasoning of Judge Lord Bingham lets us see the situation in a different light. According to the Court of Appeal, the intention to enter a contract is at the heart of implied contract theory. CMI Rules are not legally binding; parties must agree to them. Moreover, for paragraph 7b to apply, the carrier and proposed holder must agree at some point to be governed by this provision. When they express desire to abide by the Rules, they are therefore fully aware of the offer and acceptance provisions contained therein.

The question arises whether by expressing desire, the carrier and proposed holder indicate their intention to be bound contractually every time rights are transferred. It is conceivable that the reason the carrier agreed to be bound by the CMI Rules and invest in the purchase of necessary equipment for the transmission, management, and confidentiality of the terms of the bill of lading, was to keep an eye on any new purchaser and holder of the Private Key and, should he be sued by the latter, invoke the exceptions contained in the bill of lading. Similarly, the proposed holder may wish to create a contractual relationship with the carrier, allowing him to avoid section 2 of the Bills of Lading Act should the goods arrive damaged or late.

The above remarks are along the same lines as the following words of Professor George F. Chandler III:[69]

> Such a system would make the carrier privy to each transfer, unlike the existing system in which the carrier usually does not learn of the identity of the last holder of the bill of lading until that holder presents it. It was felt that some companies could have concerns about the privacy of some trades, but not so many as to overcome the net benefit of such a system, which would put the carrier in privity of contract with each holder.[70]

Such an application of the Rules allows financial institutions to sue the carrier irrespective of the question of the passing of property, *sine qua non* condition imposed by section 2 of the Act. To this effect, reference may be made to the famous case *Sewell v. Burdick*,[71] where the terms of section 1 of the Bills of Lading Act 1855 prevented the carrier from suing the bank because the latter only became holder of the bill of lading in order to give himself a guarantee and not to become holder of the goods.[72] The financial institution only has to become holder of the Pri-

68. Faber, *supra* note 6, at 243.

69. George F. Chandler III, *The Electronic Transmission of Bills of Lading*, 20 J. MAR. L. & COM. 571 (1989).

70. *Id.* at 574.

71. [1884] 10 App. Cas. 74.

72. *See* P. N. Todd, *Actions by Banks Against Carriers*, 1 JIBL 11 (1986); *see also* P. N.

vate Key under paragraph 7b of the Rules in order to have a right to sue under section 2 of the Act. Note that paragraph 7b of the Rules does not allow the carrier to oppose transfer of rights nor does it give him any discretion in the choice of proposed holder.

Liability of the carrier is similar to that of a "mandatory"; liability is limited to acting as intermediary between the purchaser and seller. Thus, as long as acting within limits of his mandate, the carrier is not contractually liable because he is not acting in his own name. The question arises: in whose name does the carrier act; the seller's or both? A review of article 7b concludes that the carrier acts as mandatory for both purchaser and seller, in which case the fault of the carrier when rights are transferred is a breach of contract either towards the purchaser or seller, depending at which state of the transfer process fault occurs.

The purchaser, a speculator in a hurry, accepts the offer of another person at a higher price. In this case, the only person whom the carrier is liable to is the purchaser. In fact, damage incurred by the seller is not linked to fault of the carrier but instead to that of the purchaser; the purchaser who acquired title to the goods by virtue of the contract of sale that is independent of the endorsement or transfer. The purchaser fulfills his corresponding obligation, which is to pay the price. The seller's recourse should be against the purchaser and not against the carrier. As for the purchaser, he can sue the carrier for damages suffered, amounting to the difference between amount paid for the goods and that which should appear in the electronic transmission representing the terms of the contract with the initial seller.

One may conclude from this subsection that the nature of the new relationship between carrier and endorsee, the proposed holder of the Private Key, may be attacked by contractual liability. Creation of such a relationship is problematic. Although some authors want to see the existence of privity between the carrier and new holder of the Private Key, the principles developed in *Brandt v. Liverpool*[73] and subsequent jurisprudence, mitigate such a possibility to a certain extent. The formation of a contract is nevertheless possible provided that certain elements are present: offer, acceptance, intention, and consideration. The circumstances of each particular case are important. Finally, one may consider the exist-

Todd, *Actions by Banks Against Carriers – an Update of the Tort Position*, 2 JIBL 127 (1986). Section 435 of the Banks Act, *supra* note 8, provides that property transfers automatically in favor of a bank if the latter holds the bill of lading as surety for a debt of which it is the creditor: "(2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of acquisition thereof, (a) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof . . . ." *See also* IAN G. BAXTER, LAW OF BANKING 151-52 (1992).

73. *Supra* note 49.

ence of a contractual relationship according to the rules applying to mandates. The actual functioning of the system established by the CMI appears to make the carrier the mandatory of the seller and purchaser. In any event, it would certainly represent an increase in the obligations of the carrier compared to his traditional situation.

B. Increase in the Obligations of the Carrier under Section 4 of the Bills of Lading Act

1. The Private Key as Conclusive Evidence of Shipment

When delivering the bill of lading, the carrier risks liability as to both the presence of goods on board ship and the state of goods indicated in the bill of lading. Section 4 of the Act provides that the bill of lading constitutes "conclusive evidence" that the goods mentioned therein are shipped. This provision reads as follows:

> 4. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of the shipment as against the master or other signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped, unless the holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or the holder, or some person under whom the holder claims.

Paragraph 7b of the CMI Rules forces the carrier to retransmit information contained in the register to the proposed holder of the Private Key. If, by error, any such transmission does not correspond to the actual state of goods on board the ship, and the proposed holder accepts the right of control and transfer based on such information, the latter will, according to section 4 of the Act, constitute conclusive evidence against the carrier. Thus, the new purchaser could claim the amount of goods described in the electronic transmission even if a lesser quantity was loaded on board ship. Here, the impact under the CMI Rules is an increase in the carrier's obligations because of potential liability every time rights are transferred.

2. Increase in the Burden of Proof Relating to the Means of Exoneration

In case of a transmission error by the carrier, one could ask whether the carrier's more active role has an impact on the means of exoneration available under section 4 of the Act. The carrier may exonerate himself

in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or the holder. Section 4 of the Act does not distinguish between a voluntary or involuntary misrepresentation.[74] An involuntary misrepresentation is, for example, a misrepresentation resulting from fraud on the part of the loader of which the carrier is unaware.

Suppose an electronic bill of lading indicates that 189 containers of coffee were loaded but in actuality only 168 were loaded. Suppose further that this situation results from fraud on the part of the seller. The transfer of rights to a subsequent purchaser takes place according to two hypotheses depending on whether or not the carrier's misrepresentation is voluntary. In the first hypothesis, the carrier becomes aware of the situation and, when transferring the information to the subsequent purchaser, he indicates that 189 boxes will be delivered. Here, the misrepresentation is voluntary or, at least, known to the carrier. The purchaser accepts and the transfer of rights takes place. At the port, the purchaser, as endorsee or holder of the Private Key, demands the 189 boxes and the carrier tells him that he can only deliver 168. In court, the endorsee claims that the bill of lading, the electronic transmission in this case, constitutes conclusive evidence within the meaning of section 4 of the Act. Under the same section, the carrier claims that he only retransmitted the information that the shipper gave him, therefore the misrepresentation is that of the shipper. The carrier thereby alleges that the misrepresentation was caused *wholly by the fault of the shipper.*

The second hypothesis arises when a carrier in good faith transmits information fraudulently transmitted by the loader. This is the case where the misrepresentation is involuntary. The purchaser accepts and the transfer takes place. The court investigation demonstrates that the carrier was a victim of fraud and that it was realized at the destination port when the purchaser claimed the goods. As in the previous hypothesis, the purchaser argues that of conclusive evidence, and the carrier argues that the misrepresentation was caused by the shipper's fault.

In these hypotheses, the carrier pleads that his obligation is limited to re-transmitting the information contained in the computer file. If this initial information turns out not to correspond with the actual state of goods on board ship due to the shipper's false declaration, he should not suffer consequences.[75] This raises the question as to whether, in the strict

74. Such a distinction exists in insurance law as well as banking. It appears in section 565(1) of the Banks Act above, which reads as follows: "Every person who wilfully makes any false statement (a) in any warehouse receipt or bill of lading given to a bank under the authority of this Act . . . ." Note that both French versions of the Banks Act and of section 4 of the Bills of Lading Act use the terms fausse declaration.

75. *Cf.* Kozolchyk, *supra* note 29, at 91-92.

framework of the means of exoneration provided for in section 4 of the Act, the CMI Rules create a new obligation for the carrier and, if so, the extent of the obligation. This question is new because under the traditional method of endorsement, the carrier is not involved at all. The carrier, therefore, has no control over the information transmitted each time the bill of lading is negotiated. However, under the CMI Rules, the carrier is the issuer of each new Private Key. He is, therefore, able to see if the goods on board ship correspond to the terms of the electronic bill of lading.

A careful reading of the following part of section 4 of the Act should clarify this point: "by showing that it was caused without any *default* on his part, and *wholly* by the *fault* of the shipper or the holder . . . ."[76] This section deals with the notion of fault. For the purpose of this analysis, without going into the questions of legislative jurisdiction and civil or common law concepts, one may think of how a reasonable and diligent person would act in similar circumstances. It is not necessary to examine this aspect further; one can agree that the shipper's initial fraud constitutes a fault under the law. Rather, the words "wholly" and "default" are the ones at which one should look. The first imposes a relatively heavy burden of proof and does not allow for shared liability. The second suggests a lesser standard than the word "fault' used in the same paragraph.

At this point, it would be useful to examine the distinction between a voluntary and involuntary misrepresentation. Where the carrier becomes aware of the shipper's fraud but does not tell the new holder, it would be difficult to say that the false declaration contained in the electronic transmission is the whole result of the loader's fault. Where the misrepresentation is involuntary, i.e. the carrier only becomes aware of the fraud after the transfer rights, it is difficult to see how fault can be attributed to the carrier.

Even if the misrepresentation is involuntary, it must be recognized that it is always possible for the carrier, before transmitting the information to the proposed holder, to verify goods contained in his ship. Is that enough to crate an obligation to verify goods? Such an obligation, if it exists, emanates from the word "default" found in section 4 of the Act. According to this interpretation, it seems that the carrier, because he acts as registrar, finds it difficult to exonerate himself under the traditional system where the loader commits fraud.

It is unreasonable to check whether goods, every time they are loaded aboard a carrier's ship, correspond to the information required by the CMI. This indirectly makes the carrier responsible for the shipper's

76. Article III(4) of the Hague Rules states that "[s]uch a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods therein described . . . ."

fraud. The inaccessibility of certain goods, once loaded, would make such verification impossible. In addition, the simultaneous sale of goods belonging to different owners slows the speed of commercial trades unless additional personnel is hired for this sole purpose. If any obligation on the part of the carrier exists, the particular circumstances of each case should be taken into consideration; one should ask whether the carrier had the reasonable chance to examine goods.

Even if the carrier is asked to issue several Private Keys, the register always contains the same information originally provided by the shipper. Without a confidential and secure system, doubts may arise as to the integrity of the information transmitted by the carrier. The carrier may claim that the false declaration results from shipper's fraud, where in reality, it results from a computer system error. This is a question of proof requiring examination of the carrier's register to ensure that the declaration of the shipper was not altered between the time of initial and final transmission of the holder suffering damages. A systematic check of the goods each time a Private Key is issued is prudent and allows the time of fraud or deficiency to be defined.

IV. Conclusion

The process for transfer of right of control and transfer established by the CMI directly involves the carrier. In contrast to the way the system operates traditionally, the carrier deals directly with the endorsee at the time of transfer of rights to the goods sold in transit. However, these new relationships do not allow the new purchaser of goods and holder of the unique Private Key to take advantage of the contract of carriage in an action taken against the carrier. The transfer of the right of control and transfer does not pass property, and section 2 of the Act makes the passing of property a *sine qua non* condition of the right of action under the contract of carriage. Moreover, the endorsement alone does not transfer property unless there is a clear intention to do so. Thus, to be successful in an action against the carrier, the new holder of the Private Key must ensure that he obtains property to the goods on or by reason of the transfer of the right of control and transfer.

As for formation of a *Brandt v. Liverpool*[77] contract, one should expect that the courts are reluctant to apply this theory. Contracts between carrier and proposed holder occur when the goods are at sea, whereas the theory of implicit contract is only applied in circumstances where relationships are physical and arrive at the destination port. Even if one finds an offer by the carrier, and acceptance by the proposed holder, during the transfer of the right of control and transfer the intention to enter a con-

77. *Supra* note 49.

tract remains a problem. The British Court of Appeal is clear in this respect when it requires that parties behave in a manner incompatible with respective obligations. Thus, to the extent that the offer and acceptance process is imposed by the Rules, we admit that parties behave in a manner that is compatible with respective obligations. The parties, however, abide by the CMI Rules on a voluntary basis and, in some cases indicate their intention to be bound contractually. To conclude that a *Brandt v. Liverpool*[78] contract exists, courts must use imagination because, until now, jurisprudential rules governing the formation of such a contract have not applied to a virtual situation.

It is easier to view the new liability of the carrier as that of a mandatory who is both the current and proposed holder of the Private Key. The participation of the carrier may be viewed as limited to the role of intermediary where the main purpose remains to negotiate electronic bills of lading and not to revolutionize maritime trade. New obligations for the carrier result; he is both operator of the register of information, and mandatory of the contracting parties.

The carrier must be careful when transmitting information to the proposed holder. Section 4 of the Act states that the bill of lading is conclusive evidence of the shipment of goods. Although this provision is drafted with the intent that only one bill of lading is delivered, and those goods are only shipped once, we expect the courts to easily make the necessary adaptation for the electronic bill of lading. Thus, each Private Key issued is equivalent to a bill of lading within the meaning of section 4 of the Act, and the information transmitted electronically is conclusive evidence against the carrier that it corresponds, in quality and amount, to the goods on board ship. The carrier risks incurring liability as often as the right of control and transfer is passed. Moreover, the carrier cannot automatically exonerate himself from the misrepresentation even if the shipper committed fraud. The courts decide whether the carrier has an obligation to systematically verify the goods each time a Private Key is issued.

The CMI Rules are better adapted to commercial reality than national or international laws. However, the integrity and confidentiality of the information contained in the carrier's register and electronic transmissions are the cornerstone of the future success of the system established by CMI, especially since the international system is based on confidence. The last real obstacle is the uniformity of technology. Although the CMI Rules are for everyone, not everyone can afford to submit to technology which is often imposed by the stronger or more financially influential party. Moreover, the current tendency varies be-

78. *Id.*

tween two types of electronic environments. Aside from the system proposed by the CMI, a private system exists. It is based on a central registry operated by a third party instead of the carrier. This is the case of the *Bolero* project, which brings together strong and influential economic partners internationally. This kind of system may ultimately lead to the establishment of economic partnership "blocks" - an interesting option for the carrier because he would not act as registrar, thus submitting himself to the resulting obligations.