

ปัญหาเกี่ยวกับสถานะทางกฎหมายของใบตราส่งต่อเนื่องในฐานะเอกสารสิทธิภายใต้
ระบบกฎหมายอังกฤษ

**Problems Relating to Legal Status of Multimodal Transport Documents as
Documents of Title under English Common Law**

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บทคัดย่อ

ในปัจจุบันรูปแบบการขนส่งระหว่างประเทศเปลี่ยนแปลงไปจากในอดีต กล่าวคือ การขนส่งรูปแบบเฉพาะอย่างใดอย่างหนึ่งมีบทบาทน้อยลง แต่ในทางกลับกันการขนส่งต่อเนื่องหลายรูปแบบซึ่งบูรณาการรูปแบบการขนส่งที่หลากหลายมารวมเข้าด้วยกันเป็นระบบปฏิบัติการการขนส่งเดียวกลับมีบทบาทมากขึ้นตามลำดับ อันเป็นผลสืบมาเนื่องจากการพัฒนาการขนส่งด้วยผู้คอนเทนเนอร์และเทคโนโลยีที่เกี่ยวข้องกับระบบ ปฏิบัติการขนส่งและระบบโครงสร้างพื้นฐาน ถึงแม้ว่าการเติบโตของการขนส่งด้วยผู้คอนเทนเนอร์และการขนส่งต่อเนื่องหลายรูปแบบจะเป็นไปอย่างต่อเนื่อง บทบาทที่เพิ่มมากขึ้นดังกล่าวกลับไม่ถูกสะท้อนให้เห็นในบริบทของกฎหมายระหว่างประเทศ กล่าวคือ ยังไม่มีสนธิสัญญาระหว่างประเทศเกี่ยวกับการขนส่งต่อเนื่องหลายรูปแบบ ฉบับใดที่มีจำนวนประเทศสมาชิกรับรองถึงเกณฑ์ที่จะมีผลบังคับใช้ ส่งผลให้ไม่มีกฎหมายระหว่างประเทศซึ่งสร้างความสอดคล้อง กลมกลืน และบรรทัดฐานในระดับนานาชาติ ผลที่ตามมาอย่างหลีกเลี่ยงไม่ได้คือ ปัญหาความไม่เป็นแบบแผนอันหนึ่งอันเดียวกันของกฎหมายที่ใช้บังคับกับการขนส่งต่อเนื่องหลายรูปแบบ

ในบริบทของใบตราส่งต่อเนื่อง ในบางประเทศไม่มีกฎหมายเฉพาะใช้บังคับกับการขนส่งต่อเนื่องหลายรูปแบบอยู่เลยและหนึ่งในนั้นคือ ประเทศอังกฤษ การไม่มีกฎหมายที่ใช้บังคับกับการขนส่งต่อเนื่องหลายรูปแบบส่งผลให้เกิดปัญหาความไม่แน่นอนทางกฎหมายเกี่ยวกับสถานะของเอกสารดังกล่าว

ซึ่งอาจส่งผลเสียในหลากหลายมิติรวมถึงในประเด็นของสถานะเอกสารสิทธิซึ่งมีบทบาทสำคัญในการรับรองสิทธิของผู้รับตราส่งและผู้รับโอนในฐานะผู้ทรงสิทธิที่จะรับมอบสินค้าจากผู้ขนส่ง ณ จุดหมายปลายทางและสิทธิที่จะจำหน่ายโอนสินค้าในระหว่างระยะเวลาขนส่ง หากประเด็นปัญหาความไม่แน่นอนดังกล่าวยังคงอยู่ ย่อมส่งผลเสียแก่ผู้รับตราส่งและลดคุณค่าใบตราส่งต่อเนื่องลง อีกทั้งในระดับมหภาคย่อมส่งผลกระทบต่อระบบการค้าระหว่างประเทศที่มีการขนส่งต่อเนื่องหลายรูปแบบเข้ามาเกี่ยวข้อง บทความนี้มีจุดมุ่งหมายเพื่อวิเคราะห์ความเป็นไปได้ที่ใบตราส่งต่อเนื่องจะได้รับการยืนยันสถานะในระดับเดียวกับใบตราส่งทางทะเลในประเด็นการเป็นเอกสารสิทธิซึ่งให้สิทธิผู้รับตราส่งและผู้รับโอนใบตราส่งภายใต้ระบบกฎหมายอังกฤษ และจากผลการวิเคราะห์ ผู้เขียนมีความเห็นว่าเพื่อรับรองและปกป้องสิทธิของผู้รับตราส่งและผู้รับโอนใบตราส่ง อีกทั้งเมื่อคำนึงถึงวิวัฒนาการของรูปแบบการขนส่งและบทบาทของการใช้การขนส่งต่อเนื่องหลายรูปแบบในปัจจุบัน สถานะในแง่ของการเป็นเอกสารสิทธิมีแนวโน้มที่จะได้รับการยอมรับจากศาลอังกฤษในอนาคตอันใกล้ ซึ่งจะเป็นทางออกของปัญหาความไม่แน่นอนของสถานะของใบตราส่งต่อเนื่องซึ่งเป็นอยู่ในปัจจุบัน

คำสำคัญ: การขนส่งต่อเนื่องหลายรูปแบบ, ใบตราส่งต่อเนื่อง, เอกสารสิทธิ

Abstract

The current cross-border transport of goods has been shifted from unimodal carriage of goods to an integrated multimodal transport where two or more modes of transport are involved in one journey under a single contract. This phenomenon is obviously a by-product of containerisation and technological developments in terms of transport operations and relevant infrastructure. Despite the constant growth of containerisation and multimodal transport operations, the peculiar but true fact is that, in terms of regulatory framework, there has been no successful attempt that could achieve global uniformity. Therefore, the fragmented and disharmonious legal framework on multimodal transport both at international level and national level is inevitable. Moreover, there is no specific law regulating multimodal transport in many countries including England. In terms of multimodal transport documents, a lack of international set of rules regulating multimodal transport leads to the situation where the legal status and functions of multimodal transport documents are ambiguous and it can possibly jeopardise the legal value of this type of transport documents in various dimensions including the legal status as document of title which entitles consignees and transferees the right to claim delivery at the destination as well as the right to trade goods in transit. Providing that this legal uncertainty still remains, not only the rights of consignees and transferee is put at

risk, at the larger scale, it can negatively affect international trade transaction as a whole. This article aims to analyse the appropriateness and possibility that multimodal transport documents could be considered as documents of title in the same level as maritime bills of lading under English common law. From the discussion in this article, it is found that, in order to provide proportionate protection to all stakeholders involving in multimodal transport contracts and according to the prevalence of multimodal transport, the status as document of title is likely to be granted by the English Court in the near future.

Keywords: Multimodal transport, Multimodal transport document, Document of title

Introduction

Transportation is commonly accepted as a key sector for trade transactions, not only at international but also at regional and national level (United Nations Conference on Trade and Development [UNCTAD], 2000, p. 7). Contemporarily, this is the age of multimodalism or door-to-door transport based on efficient use of all modes of transport, including sea, air, rail, road and inland waterway. Such transport combines various forms of transportation under one responsible transport operator and one contract known as the ‘multimodal transport contract’.* This phenomenon is obviously a by-product of containerisation and technological developments in terms of transport operations and relevant infrastructure.

In terms of multimodal transport documents, various types of such documents have been simultaneously used, namely COMBICONBILL (1995), MULTIDOC (1995), the FIATA Multimodal Transport Bill of Lading, COMBICONWAYBILL (1995), MULTIWAYBILL 95 and the FIATA Multimodal Transport Waybill. However, the legal status of these aforementioned documents is still uncertain and confusing since some of them adopt the term ‘bill of lading’ such as the FIATA Multimodal Transport Bill of Lading, and indeed, these documents also share some features of maritime bills of lading. For example, Article 3.4 of the FIATA Multimodal Transport Bill of Lading regarding evidentiary effect of the multimodal bills of lading. Despite some similarities, it is undoubtedly true that multimodal transport

* The definition of multimodal transport can be found in Article 1 of the 1980 United Nations Convention on International Multimodal transport: ‘International multimodal transport means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.’

documents and traditional ocean bills of lading are not the same things in terms of their legal status and functions.

Even though national laws used in some countries such as Germany, the Netherlands, South Korea, India and Thailand provide a clear status for multimodal transport documents, the issue of the legal status and functions of multimodal transport documents is still unsettled at international level and also in many jurisdictions including under English common law (Tettenborn, 2014, p. 127). This article aims to discuss a specific topic relating to the problems and uncertainties relating to legal status of multimodal transport documents as documents of title under English common law.

Significance of the legal status as a document of title

In case of negotiable maritime bills of lading, sea voyages normally take a long time from the port of loading to the port of discharge. These can therefore be used during the sea transport in order to provide the cargo interests with the opportunity to trade the goods in transit (Tettenborn, 2014, p. 132). A document of title enables the consignee or the endorsee to receive the goods at the port of discharge, entitles him to make legal claims against the carrier for shortage or damage to the goods as well as gives the consignee or the endorsee a right to transfer those two abovementioned rights to a transferee during transit (Lorenzon, 2012, para 5-047). In relation to the process to transfer such rights, there are two main methods:

- 1) To endorse and deliver the bill to the endorsee in cases of ‘order bill’; or,
- 2) To solely deliver the possession of the bill of lading to the transferee in cases of ‘bearer bill’. (Baughen, 2012, p. 6)

Since possession of a negotiable bill of lading is considered as possession of the goods covered by it, this leads to three major consequences:

1. The holder of the bill of lading has the right against the carrier to receive the goods at the port of discharge (Baughen, 2012, p. 327). That is to say, the carrier has a responsibility to deliver the goods only to the holder, not someone else. * Where the carrier delivered the cargo to the holder in good faith, he is protected from liability even if it was later revealed that the holder was not entitled to delivery of goods. *

* *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 [586].

* *Glyn Mills Currie & Co v East & West India Dock Co* (1881-82) 7 App Cas 591 (different copies of same bill in hands of A and B: defendants surrendered goods to B: the defendants were protected despite the fact that A had better right to goods as against B).

2. The holder of the bill of lading is entitled to transfer the right over the goods to third parties by means of endorsement (Wilson, 2010, p. 133).

3. The bill of lading can be used as security for a debt. In other words, the bill can commonly increase the financial credit when presented to the bank (Wilson, 2010, p. 133).

Multimodal transport documents as documents of title

1. Historical background of the concept ‘document of title’ at common law

Historically, one of the major issues that hindered the facilitation of overseas trade was the lack of the buyer’s right to claim the goods from the carrier in the event that the carriage of goods contract was concluded between the seller and the carrier according to the doctrine of privity, which does not allow third parties to claim delivery from the carrier. In order to deal with this unfavourable situation, the solution by the English courts was provided in the case of *Lickbarrow v Mason*.^{**} According to this judgment, the court acknowledged the customary use of transferable shipped bills of lading and identified this type of document as ‘document of title’ at common law.^{***} The court also explained that the transfer of shipped bill of lading to third parties, namely the buyer or the bank, was equivalent to the transfer of the right to receive the actual possession of the goods identified in such document (Debattista, 2009, para 2.3; Treitel, 2014, para 18-007).^{****} That is to say, firstly, the holder of a transferable shipped bill of lading has

the right to claim actual possession of goods upon tendering the document to the carrier^{*} and, secondly, the holder is able to re-sell the goods and transfer the rights over such goods by means of endorsement and/or

^{**} *Lickbarrow v Mason* (1794) 5 Term Rep 683.

^{***} *ibid*; see also *Hindley & Co Ltd v East Indian Produce Ltd* [1973] 2 Lloyd’s Rep 515.

^{****} *Lickbarrow v Mason* (1794), 685-686; *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd’s Rep 81.

^{*} Nevertheless, it should be borne in mind that, although the legal function is called ‘document of title’, there is no direct relationship with title in the contractual goods as the transfer of title is governed by the parties’ intentions according to Section 16-19 and 20A of the Sale of Goods Act 1979. However, the parties are free to agree amongst themselves that the title is to pass at the same time the transport document is tendered, see *Sewell v Burdick* (1884) 10 App Cas [105] (Lord Bramwell).

passing the bill to third parties without the need of assignment. ** After legally transferring the ‘document of title’, the constructive possession over goods covered by the document is shifted to the transferee (Debattista, 2009, para 2.3).*** However, it should be noted that this special characteristic of transferability is not, *per se*, the evidence that entitles the shipped bill of lading as the ‘document of title’ at common law (Treitel, 2014, paras 18-008 and 18-010).

2. An overview of the definition and qualifications of ‘document of title’ at common law

The next issue to be scrutinised is whether a multimodal transport document qualifies as a ‘document of title’ at common law since, up until now, there has been no court judgment that expressly clarifies the specific legal status of multimodal transport documents (Thomas, 2014, p. 149). In the common law context, the main criteria to determine this can be taken from *Lickbarrow v Mason*. This case provided the general criteria that a transport document can be judicially considered as a document of title under the condition that mercantile custom of the use of such a document can be proved. Commonly, in order to meet the basis of mercantile custom, widespread and consistent acceptance of the practical use of such documents is required. It can be seen that the concept of document of title at common lacks straightforward clarification and depends on case-by-case basis consideration. Hence, it is unsurprising that the debate on whether multimodal transport documents can be recognised as such at common is still ongoing.

In terms of the national statutes, the definitions of ‘document of title’ under the English legislations, namely Section 1(4) of the Factors Act 1889, which is incorporated into the Sale of Goods Act by virtue of Section 61 of the Sale of Goods Act 1979, and COGSA 1971 vary from one to another. According to the Factors Act 1889, the definition of document of title is relatively extensive since ‘any bill of lading’ is regarded as a document of title (Bridge, 2014, paras. 7-055, 7-069; Bugden and Lamont-Black, 2009, para 17-61). On the other hand, COGSA 1971 does not expressly provide a definition for it. Nevertheless, this Act does mention ‘bills of lading or similar document of title’ in Section 1(4) for the purpose of considering whether the Hague/Visby Rules is applicable to the carriage of goods contract between the cargo interest and the carrier.*

** *Lickbarrow v Mason* (1794); *Official Assignee of Madras v Mercantile Bank of India Ltd* (1935) AC 53 [60].

*** See also *Barber v Meyerstein* (1869-70) LR 4 [330]; *Ross T Smyth & Co Ltd v TD Bailey & Son Co* [1940] 3 All ER 60 HL [69] (Lord Wright).

* See also Article I(b) of the Hague/ Visby Rules.

However, there is another interesting issue regarding the interpretation and clarification of what kinds of transport documents qualify as documents of title. This can be found in the English case of *The Rafaela S.*^{**} It is stated in this judgment that, apart from the negotiable bills of lading, straight bills qualify as documents of title as well in a different context. As a result, the expansion of document of title to non-negotiable documents was established by this distinguished case. Nonetheless, it should be noted that this case is controversial and lacks sufficient reasonable grounds to support that it can be applied in practice without creating more gaps related to the legal status of straight bills of lading. From the vague criteria to qualify as a document of title at common law and various definitions of document of title provided in the aforementioned legislations, it can be seen that the issue of the specific legal status of multimodal transport documents regarding their qualification as document of title is still questionable.

3. Possibility of multimodal transport documents to qualify as document of title at common law

As previously mentioned, the legal status of document of title at common law can be acquired by judicial recognition based on mercantile custom or customary use. Since the emergence of multimodal transport documents in the late nineteenth century, there has not been any judicial confirmation from the courts regarding their legal status. Undoubtedly, it is still an ongoing issue that leads to legal uncertainty (Thomas, 2014, p. 149). Hence, the first issue to be considered at this stage is whether the use of multimodal transport documents is widely accepted as mercantile custom and, as a result, can be recognised as documents of title at common law.

Compared to traditional bills of lading which were accepted as document of title at common law a long time ago, multimodal transport documents lack some features of bills of lading (De Wit, 1955, para 6.34). These missing features include; 1) they are not commonly issued by the sea carrier and, 2) even though sea carriage is involved, the documents cover carriage of goods *partly*, not wholly, by sea (De Wit, 1955, para 6.34; Bridge, 2014, para 21-083). Based on these two grounds, there is a concern that if multimodal transport documents were accepted as documents of title, the circumstance might arise where there is more than one document of title covers the same goods in circulation (Bugden & Lamont-Black, 2009, para 6-04). However, this argument is weakened due to the fact that transport documents do not transfer better rights than those held by the transferor (Debattista, 2009, para 3.19).

^{**} The *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* [2005] 1 Lloyd's Rep 347

Apart from that, the prevalence of multimodal transport documents in international trade has been reflected in the INCOTERMS 2010 which recognises the issuance of multimodal transport documents in negotiable form (Ramberg, 2011) as well as the acceptance of negotiable multimodal transport documents in the same way as traditional ocean bills of lading under the international banking practice (Article 19 of UCP 600) also supports the recognition of multimodal transport documents as document of title (Bugden & Lamont-Black, 2009, para 6-04; Aikens, Lord & Bools, 2006, para 11.48). To be more specific, this type of transport document is widely used under international sale contracts as well as letters of credit (Lord & Bools, 2006, para 11.48). Furthermore, it can be seen in Article 6 and 7 of the MT Convention that the characteristics of multimodal transport documents with negotiable function are described in a parallel way as the traditional negotiable bills of lading which are unquestionably and indisputably documents of title at common law. In spite of the failure to gain the sufficient number of ratifications in order to enter into force, it can be noted that the drafters of the MT Convention were at least aware of the principal similarities regarding legal functions in the context of international trade practice between negotiable multimodal transport and negotiable port-to-port bills of lading (Thomas, 2014, p. 149). Another piece of supporting evidence is found in the joint Report of the English and Scottish Law Commissions titled 'Rights of Suit in Respect of Carriage of Goods by Sea' (Law Com No 196, Scot Law Com 130, 1991) which appears to consider negotiable multimodal bills of lading as documents of title. According to paragraph 2.46 – 2.49 of the aforementioned Report, it was accepted that this Report was one of the influential factors for the enactment of COGSA 1992 (Thomas, 2014, p. 150). From all of this evidence, it seems clear that multimodal transport documents play an important role in contemporary international trade practice and have gradually gained international acceptance as documents of title.

With regard to the practical aspect of international trade, multimodal transport documents including COMBICONBILL (1995) and MULTIDOC (1995) expressly state the word 'negotiable' on their face in order to emphasise the legal function of such documents. In addition, various bills of lading are printed in an adjustable format, that is to say, one document can be used for either port-to-port or place-to-place depending on the choice of the parties. The applicability clause stated in this bill specifying which function was chosen is often printed in small print so when it is used as port-to-port bill of lading there is no doubt that this document is the document of title at common law. Nonetheless, it seems peculiar and 'commercially inconvenient' (Thomas, 2014, p. 150) if the legal status of this bill of lading is changed when this document covers a place-to-place carriage of goods contract (Ozdel, 2012, p. 244). It can be seen that if the *status quo* of international trade practice is taken into account as the main criteria to establish

mercantile custom, there is no doubt that negotiable multimodal transport documents can be considered as documents of title at common law.

However, it can also be argued that the transferability function alone to transfer the constructive possession of goods to the transferee and the right to claim delivery from the carrier are not enough to consider multimodal transport documents as documents of title. Instead, the most significant basis to establish a document of title at common law is to be accepted as mercantile custom. In other words, according to the perceptions of all stakeholders in the commercial community, if it can be proved that multimodal transport documents are widely accepted as documents of title, then it is likely that the courts at common law will adopt and uphold this acceptance based on such proof. Obviously, many issues of fact and law are required to provide sensible grounds to obtain the legal recognition of a mercantile custom (Thomas, 2014, p. 150). It should also be borne in mind that mercantile custom is different from mere commercial practice since, in order to qualify as custom, ‘widespread acceptance and adoption, and an underpinning obligation’ must be manifested.

Other crucial criteria that must be presented to settle the commercial custom include ‘the characteristics of universality, longevity, certainty, reasonableness and absence of repugnancy’ (*Nelson, Donkin & Co v Dahl* [1879] 12 Ch D 568 [575] (Sir John Jessel MR)). With regard to transport documents, as per *Kum v Wah Tat Bank* [1971] AC 439, the court also settled the criteria for the parties to prove the mercantile custom by providing that the parties have to successfully illustrate that the use of those transport documents is ‘widespread and consistent’. The court also mentioned that acceptance in the international banking practice context is not sufficient to establish the custom; the documents have to be accepted as documents of title by all stakeholders involved. Moreover, in accordance with the UCP 600, many kinds of transport documents are accepted under letters of credit including those with a non-negotiable function which clearly cannot be documents of title at common law. It can be seen that the aforementioned counter arguments do weaken the supporting ground relating to the acceptance under the UCP 600 of those in favour of the recognition of multimodal transport documents as documents of title at common law.

4. Multimodal transport documents including a sea leg and legal status as documents of title

The next issue to be discussed is the legal status of ‘received for shipment’ bills of lading since multimodal transport documents share some of their main characteristics. For example, in both cases, the point of delivery is an inland point and the fundamental function of such documents is to confirm that the

goods have already been taken by or are in the charge of the carrier. Thus, it seems that multimodal transport documents could be categorised as ‘received for shipment’ bills of lading. To begin with the legal status of such bills of lading, due to the fact that this type of transport document is not included in the scope of port-to-port negotiable bills of lading in *Lickbarrow v Mason*, their legal status remains uncertain. In *The Marlborough Hill*,* the Privy Council held that ‘received for shipment’ bills of lading were recognised as documents of title. However, it should be noted that the question before the Privy Council concerned the legal status of a ‘received for shipment’ bill of lading as ‘any bill of lading’ within the Colonial Courts of Admiralty Act 1890. In contrast, the opposite view was proposed in *Diamond Alkali Export Corp’n v Bourgeois*** as it was asserted that ‘received for shipment’ bills of lading could not be qualified under the scope of the Bills of Lading Act 1855 which was solely applicable to negotiable shipped bills of lading. The view following the decision in *The Marlborough Hill* was re-settled in *Ishag v Allied Bank International****. The court held that a ‘received for shipment’ bill of lading which had been deposited as security was recognised as a document of title ‘within the custom proved in *The Marlborough Hill*’. Nonetheless, it must be borne in mind that in *The Marlborough Hill* proof of crucial criteria to support the mercantile custom was not established. Therefore, it is quite difficult to conclude that the legal status of ‘received for shipment’ bills of lading as document of title is judicially confirmed by the court since there has not been any concrete basis to support the establishment of mercantile custom. As mentioned earlier, multimodal bills of lading can potentially fall into the same category as ‘received for shipment’ bills of lading. Although *The Marlborough Hill* appears to support the document of title status, the decision seems to be too superficial to clarify the position of both ‘received for shipment’ bills of lading and multimodal bills of lading due to a lack of proof concerning the mercantile custom which is the crucial criteria for establishing legal recognition of document of title at common law.

Conclusion and recommendation

In terms of overseas sales, it is undeniable that transport documents play a crucial role amongst the stakeholders, namely sellers, buyers, multimodal transport operators and banks. Multimodal transport documents have become more and more prevalent particularly in the current practice when sale contracts

* *The Marlborough Hill* [1921] 1 AC 444.

** *Diamond Alkali Export Corp’n v Bourgeois* [1921] 3 KB 443.

*** *Ishag v Allied Bank International* [1981] 1 Lloyd’s Rep 92 [98] (Lloyd J).

CHAPTER 26

involve door-to-door carriage as the means to deliver the contractual goods to the buyer. However, since there has been no judicial recognition from the English courts yet on the issue of legal status as the document of title, in order to provide a proportionate mechanism to facilitate a smooth delivery process from the seller to the buyer as well as the transfer of rights to third parties or transferees, it is necessary to clarify the issues of legal status and functions of multimodal transport documents. At this stage, from the discussions in this article, it is likely that proof of the mercantile custom related to the use of multimodal transport documents as a crucial basis to establish the position of ‘document of title’ at common law is still insufficient, though this does not mean that this type of transport document will never qualify as a ‘document of title’ since there is an increase in door-to-door delivery based on multimodal transport services. In other words, the current transport practice and the constant growth of multimodal transport implies that the proof of mercantile custom can be achieved in the near future.

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