

TO BE OR NOT TO BE: The Electronic Bill of Lading

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- Functions of a Bill of Lading
- Current legal framework
- Does it apply to eBills
- Can the functions be replicated
- What barriers remain
- Rotterdam Rules

- Receipt for goods shipped
- Evidence of the contract of carriage
- Negotiable document of title

- Bills of lading are governed by the Carriage of Goods by Sea Act (COGSA) 1992 in conjunction with COGSA 1971 which incorporates the Hague-Visby Rules
- No definition of a Bill of Lading
- BUT does not automatically apply to eBills s1(5)
- THEREFORE if eBills are to work they must do so by relying on old law

- Yes an electronic document can function as a receipt
 - English courts accept evidence in electronic format
 - Document is “anything in which information is recorded”
 - Electronic signatures recognised (Electronic Communications Act 2000 and Electronic Signatures Regulations 2002)

- BUT
- Because COGSA 1992 does not apply old law governs the receipt function – in particular s4 which overruled certain confusing sections of old law will not apply
- Therefore it is not clear that the indorsee will be in the same position as the shipper

- Again as evidence of the terms of contract of carriage, electronic documents have no legal barriers
- But the transfer of these rights and liabilities happens because of sections 2 and 3 of COGSA 1992 – which does not apply
- Therefore simple indorsement will not transfer rights and liabilities
- Solution: novation of the bill of lading every time there is an indorsement

- Long explanation by Lord Hobhouse of Woodborough in the *Berge Sisar* [2001] UKHL 17 of the transfer of goods by way of a Bill of Lading through the principles of *bailment* and *attornment*
- Bailment – the law relating to holding goods for third parties
- Attornment – written recognition that these goods are held for the benefit of the third party

Function 3 – document of title

- But the transfer of goods happens because a Bill of Lading is a document of title
- They are documents of title because merchants have treated them as documents of title for centuries and English law has recognised that (*Lickbarrow v Mason* (1793) 2 HBI 221)

Function 3 – document of title

- Can an electronic document be a document of title?
 - Under the US Uniform Commercial Code (which is in force in California) it is recognised that electronic documents are capable of being documents of title.
 - This is not the case under English law
- However, if you follow the procedures set out in Lord Hobhouse's judgment in the *Berge Sisar* it would be possible to replicate the transfer of goods by attornment. But this would have to happen each time there was an endorsement.

- 23/09/09 UNCITRAL will sign and ratify the Rotterdam Rules
- Number of provisions that relate to the implement use of eBills
- However, provide simply a framework of requirements and no practical solutions

- Technically possible but:
 - Practicality – the carrier to be involved at every stage of the indorsement process
 - Uncertainty – it is not clear that the indorsee will have the same rights against the carrier as the shipper
 - Security – this talk has not addressed very important and serious issues relating to
 - Creation of individual, non transferable e-signatures
 - Documentary integrity
 - System failure
 - Lack of technology

To be or not to be?

- Mercantile Custom – paper Bills have been in circulation for centuries and are recognised and understood. Electronic documents have not been around for long enough
- Banks – the question remains open as to whether or not banks will accept eBills in relation to LCs and any other documentary credits – especially since banks have been slow in accepting the eUCP

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