

Is International Trade Prepared For Multimodal Bill Of Lading? - An Analysis Of The Usage Of Multimodal Bills In International Trade And Its Legal Impacts

(Uluslararası Ticaret Multimodel Konişmentoya Hazır mı? Multimodel Konişmentonun Uluslararası Ticarete Kullanımı ve Hukuki Etkileri Hakkında Bir İnceleme)



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ABSTRACT

The usage of containers by the transport industry allowed goods to be transported faster and in a more secure way. Most importantly, what is now referred to containerisation and the subsequent modernisation of ports allowed goods to be transported from the seller's door to directly the buyer's door. Accordingly, nowadays, more often than not, carriage of goods will involve more than one mean of transport, and such cases combining means of transport are known as "multimodal", "intermodal" or "combined" transport. This new phenomenon gave rise to new transport documents, i.e. the multimodal bill of lading. Nevertheless, this new transport document as well as this new type of transport are still pending on regulations, being now highly dependant on soft law. Thus, this raises questions about security in particular in terms of finance that this particular document might give to traders. This article intends to analyse how the UK courts have dealt with this development in transport of goods.

Keywords: *Bill of lading, multimodal transport, intermodal transport, combined transport, carriage of goods, container carriage*

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ÖZET

Nakliye endüstrisi tarafından konteynerlerin kullanılması, malların daha hızlı ve daha güvenli bir şekilde taşınmasına izin vermiştir. En önemlisi, artık konteynirleştirme ve sonradan limanların modernleştirilmesi, malların satıcının kapısından doğrudan alıcının kapısına taşınmasını sağlamıştır. Bu nedenle, günümüzde sıklıkla, malların taşınması birden fazla taşımacılık vasıtasıyla gerçekleşir ve nakliye vasıtalarını birleştiren bu tür vakalar “multimodal”, “intermodal” veya “kombine” nakliye olarak bilinir. Bu yeni olgu, yeni nakliye belgelerini, örn. multimodal konşimentoyu ortaya çıkarmıştır. Bununla birlikte, söz konusu yeni nakliye belgeleri de bu yeni taşıma tipleri gibi şu anda bağlayıcı olmayan hukuki metinlere bağlı olduğundan yeni düzenlemeler yapılmasını beklemektedir. Bu nedenle bu durum, belgenin tacirlere özellikle finans alanında sağlayabileceği güvenlikle ilgili soruları gündeme getirmektedir. Bu makale, Birleşik Krallık mahkemelerinin taşımacılıktaki bu gelişmeyi nasıl ele aldığını analiz etmeyi amaçlamaktadır.

Anahtar Kelimeler; *Konşimento, Multimodel Taşıma, İntermodel Taşıma, Kombine Taşıma, Yük Taşıma, Konteyner Taşınması*

Introduction

Shipping is the oldest still existent form of transport of cargo and still up to this date the primary one, being responsible for 90% of the world's cargo transport. Nevertheless, as the shipping industry evolved together with international trade, and definitely one of one of its most important in the last century can be easily considered the rise of containerisation.

Containerisation allowed the transportation of goods to become faster, flexible and even more secure. Besides, the increasingly usage of containers also contributed to the growth of what is today commonly referred to as “multimodal” (“combined” or “intermodal”) transport; in other words, the carriage of goods by at least two means of transport.

Nevertheless, although multimodal transport has become more and more popular among traders from all over the world due to its clear convenience, allowing the delivery of cargo from door to door, it still lacks of a satisfactory legal regulation both at the international and national level. Therefore it should be no wonder that the documents

originated from this type of transport still lacks a satisfactory legislative umbrella.

Many of the issues arising from multimodal transport have not received proper answers yet. Who to sue in the event of delay in delivery, loss or damage to goods and the extent of the carrier's liability are merely some of the questions the parties have to deal with if something were to go wrong in those transactions.

The present paper, is not aimed at providing solutions to all the problems related to multimodal transport, its focus shall be on the nature of the particular type of transport document adopted in such circumstances (hereinafter, "MTD"), in particular the impact that this might have in the finance of an international sales transaction.

Although MTDs, likewise BoLs, made their appearance as a reaction to a commercial phenomenon (namely: the so-called integration of transport operations), they cannot – unfortunately and contrariwise to BoLs - benefit of about ten centuries of established usage, which have led BoLs to be recognised as the transport documents *par excellence*, being of paramount importance over the years from traders engaged to international sale transactions and the carriage of goods over long distances. From the time of the BoL inception originating in the medieval times by individuals, who began business transactions with other individuals at such distance that the involvement of carriers¹ until recent days, the development of such commercial document has never stopped. The law of merchants and medieval municipal statutes started shaping what modern case law later had the chance to discuss in further details, but never the ability to define in an exhaustive way. Still today, no complete definition of BoL can be found neither at common law nor by statute, notwithstanding the various references contained in legislation². It should not be surprising therefore if, that is still the case to keep discussing of the BoL as 'more a creature of mercantile usage

¹ Chester B. McLaughlin, 'The Evolution of the Ocean Bill of Lading' (1925-1926) 35 Yale Law Journal 548, 550.

² References to bills of lading may be found, for instance, in the Carriage of Goods by Sea Act 1924 (replacing the Bills of Lading Act 1855), the Carriage of Goods By Sea Act 1924 (which has incorporated the Hague-Visby Rules into English law), the Factors Act 1855 and the Sale of Goods Act 1979.

than the law³ and identifying it by reference to its three functions: (i) the receipt; (ii) the contractual; and (iii) the document of title functions.

This article will consider whether the usage of MTDs may cause any effect in respect of the payment method agreed by the parties, in particular if the latter were a letter of credit (hereinafter, “LoC”)⁴. The circumstance that such payment method is based on a bank’s definite undertaking to be honoured only against presentation of certain conforming documents⁵ shows, in fact and once again, how important carriage documentation might be also in respect of the financial aspect of an international sale transaction.

The principal reason behind discussing MTDs as documents that might be presented under a LoC lies in the fact that it still uncertain whether or not such transport documents, if tendered to a bank, might be capable to establish a valid pledge on the goods to which they relate to the extent of giving security to a bank, being such possibility a prerogative of documents of title, which are recognised as symbols of the goods and whose transfer amount to transfer of constructive possession in goods covered by them.

Furthermore, the circumstance as to whether or not a MTD presented under a letter of credit would be a good security for a bank that advanced moneys is not the only reason why such transport documents have relevance in documentary credits. In fact, issues may arise as to the tender requirements for such transport documents.

³ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th ed., Sweet & Maxwell 2013) para 6-001.

⁴ The likelihood that the parties will agree on a LoC as a payment method in international sale contracts is reasonably high. This is also evidenced by the fact that authorities usually refer to such instrument as ‘the life blood of international commerce’. In this respect, see *R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] 1 Q.B. 146, 155; *Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 2 Lloyd’s Rep. 394, 400; *Intraco Ltd v Notis Shipping Corporation of Liberia (The Bhoja Trader)* [1981] 2 Lloyd’s Rep. 256, 257; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1981] 3 W.L.R. 242, 253.

⁵ See Article 2 (definition of ‘credit’) and Article 5 UCP 600.

Therefore, this article will finish by attempting to make an analysis focusing on the potential consequences produced on the contract of carriage, the sale agreement and method of payment arising from the usage of MTDs in commercial transactions shall be made.

MTD and International Sales Transactions

The smooth running of an international sale transaction usually depends on different factors: some of them within the control of the parties, others outwith. Whether a factor fall within the first or the second category, the tendency is for the parties to attend to foresee the all the possible risks involved in the transaction.

In international sales, risks are often distinguished in: legal, physical and financial⁶. This article shall be analysing the two last categories, as they present a clear link with the transport of goods and related carriage documentation.

Physical risk relates to the possibility that certain goods may be lost or damaged, or may deteriorate, in transit⁷. As between buyer and seller, the allocation of such responsibility may depend on specific contractual provision regulating the passing of risk from one party to another. Besides, if there is a considerable distance between the places of business of the parties, as it is expected in international sales, it is reasonable that a carrier will be involved and therefore the need to establish who may go after whom arises.

On the other hand, the financial risk is not only a reason for concern between the seller and the buyer, as it also involves banks, which might have provided finance for the transaction. At its very basics, such risk can be described as the possibility for a party to lose interest in goods (in terms of possession or property, as the case may be) before the latter obtains payment for having performed part of the bargain: be that the price for the goods sold or the consideration for the moneys lent.

⁶ Michael G Bridge (edited), *Benjamin's Sale of Goods* (9th ed, Thomson Sweet & Maxwell 2014) para 18-001.

⁷ Ibid.

It is suggested that the choice of the transport document may influence the way in which the parties mitigate such risks⁸. The parties, in fact, may rely on certain characteristics of a document avoiding inserting boilerplate clauses in their contracts of sale in order to mitigate a particular risk. On the other hand, if aware of the incapability of a document of performing certain functions, a party may simply accept to bear that risk or, contrariwise, decide not enter into an agreement that appears too cumbersome.

With reference to MTDs, it seems therefore reasonable to highlight, and whether possible to propose solution to, the principal consequences that the usage of such transport documents may give rise to under the perspective of the contract of carriage, sale contract and the most common payment instrument currently in use, the letter of credit.

The first aspect that is worth considering relates to the possible consequences that may derive on international sale transaction from the usage of a transport document containing or evidencing a multimodal contract of carriage.

In this respect, it is likely that the parties will face a twofold risk: on the one hand, that concerning the doubtful status of such transport document; on the other hand, the legal uncertainty surrounding the nature of that particular contract of carriage that has to be performed by more than one mode of transport.

Transfer of Possession

First of all, it is worth questioning whether or not such document might be capable to allow the parties to transfer possession in goods while the latter are in transit and, if so, under what circumstances.

In international trade the possibility to transfer possession in goods while the latter are in transit is a prerogative of the so-called documents of title, which are recognised as symbols of the goods and

⁸ In general, see Melis Ozdel, 'Multimodal Transport Documents in International Sale of Goods' (2012) 7 *International Company and Commercial Law Review* 238.

whose transfer amount to transfer of constructive possession in goods covered by them⁹.

The circumstance that a document of title gives to its holder constructive possession of the goods as described therein has two important commercial consequences: firstly, if the document were to be tendered to a bank, it would be capable to establish a pledge of the physical goods to which it relates; and secondly, if the holder wanted to obtain delivery of the goods, he could be entitled to do so by surrendering the document to the carrier¹⁰.

The two mentioned consequences must be regarded as the main reason why there is the need today to investigate on whether or not a similar result might be achieved when goods are being carried under a MTD.

The possibility for a MTD to transfer possession in goods while the latter are being carried under a multimodal contract of carriage should be evaluated by focusing the attention on the different stages of transport where the document is to be employed.

To begin with any sea transit that a multimodal contract might provide for, it should be stressed the fact that, as far as that segment, a MTD may amount to a BoL¹¹. If this is true, it could follow that a transfer of the MTD probably allow the parties to establish a valid pledge while the goods are at sea or claim the goods at the port of destination through presentation of the document.

⁹ See Richard Aikens, *Bills of Lading* (Informa London, 2006) (para 11.34; Bridge (Supra n.6) 21-077 and 21-078; Andrew Tettenborn, 'Bills of lading, multimodal transport documents, and other things' in B. Soyer and A. Tettenborn (ed.), *Carriage of Goods by Sea, Land and Air. Unimodal and Multimodal Transport in the 21st Century* (1st ed., Informa law from Routledge 2014) 126-129; Sir Guenter Treitel, *Carver on Bills of Lading*, (3rd ed., Sweet & Maxwell 2011) para 8-079 and 8-080.

¹⁰ *Ibid*

¹¹ "Shipped" or "received for shipment", as the case may be. With specific reference to the comparison between MTDs and "received for shipment" BoLs, see The Law Commission and The Scottish Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea* (HC 250, London: HMSO, 1991) para 2.49.

Should the segment of the transport be different than sea carriage, one would reasonably be tempted to look at the provisions governing that stage and, in particular, at the carriage documentation required for land or air transport. The discourse here is whether or not a possible comparison between MTDs and other documents, such as consignment notes or airway bills, could lead to any beneficial effect.

For present purposes, it is worth noting that none of these documents have been recognised as documents of title at common law¹². Therefore, even though were to be assumed that a MTD had the characteristics, depending on the transport stage, of a consignment note or an airway bill, the lack of the document of title status of these documents would make, as a consequence, rather unlikely that from the transfer of a MTD could follow the transfer of the constructive possession in goods to the extent of establishing a pledge over them or to give the holder a right to claim delivery at destination by presentation of the document. The proposed solution according to which MTDs might be considered as documents of title only during the sea transit poses though some obvious obstacles.

As it is clear, any transfer of the MTD capable to transfer also possession in goods, to be effective, would be required to take place only within that segment. While a valid pledge might be established provided that the goods are still afloat, the right to obtain delivery following presentation of the document would be envisaged only when the sea transit were the last stage of the transport.

In particular, in the case the cargo were to be discharged following land or air carriage, a MTD – even if compared to a consignment note or an airway bill – would not give the holder a right to claim delivery by presentation of the document. Such right, in fact, would have arisen if the party had had constructive possession to the goods conferred to him by a document recognised at common law as a document of title. However, neither MTDs themselves nor consignment notes and airway bills (assuming that a similitude could be drawn) have ever been recognised as such¹³.

¹² Bridge (Supra n.6) para 21-054; 21-062 and 21-069.

¹³ In respect of MTDs, see Sir Guenter Treitel, *Carver on Bills of Lading*, (3rd ed., Sweet & Maxwell 2011) para 8-084 to 8-088; for road, rail and air carriage documentation, see Bridge (Supra n.6) para 21-054; 21-062 and 21-069.

A possible way to go around this would be to emphasise the fact that MTDs, such as the FBL or the Multidoc95, do contain specific contractual provisions according to which a copy of the document must be surrendered in exchange for the goods¹⁴ and therefore a right to claim delivery might be envisaged on the holder of the document at any stage of the multimodal route. The question as to the party, if any, which should be entitled to claim the goods at destination becomes therefore, more than a matter related to the document of title status, an issue to be dealt with on the contractual footing.

Right to Claim Delivery

Despite the right to claim delivery of the goods at destination might be considered a characteristic feature of a document of title to goods, it would not be completely impossible to claim that a consignee may nonetheless obtain delivery of a cargo by presentation of a MTD as a result of the contractual relation the shipper and the MTO enter into.

As has been argued, when the MTO takes into his charge the goods, he constitutes himself as a bailee for the shipper¹⁵. Furthermore, on the basis of the contractual provisions contained in MTDs, the MTO acknowledges to deliver the cargo exclusively to the person presenting such transport document¹⁶. When the shipper later gives the document to someone else, the latter would be in the position to present the document to the MTO and obtain delivery of the goods¹⁷. The mentioned mechanism offers the unrivalled opportunity to make

¹⁴ See the front side of FBL and Multidoc 95.

¹⁵ Andrew Tettenborn, 'Bills of lading, multimodal transport documents, and other things' in B. Soyer and A. Tettenborn (ed.), *Carriage of Goods by Sea, Land and Air. Unimodal and Multimodal Transport in the 21st Century* (1st ed., Informa law from Routledge 2014) 138.

¹⁶ *Ibid.*

¹⁷ *Ibid.* It should be noted, however, that the said author refers to a slight different case, according to which by the transfer of the document the shipper transfers also his rights as a bailor and, *inter alia*, the right to claim delivery of the goods from the MTO/bailee. Contrariwise, in the case discussed here no transfer of rights as a bailor is expected to take place. Delivery could be obtained by presentation of the document only as a result of the MTO fulfilling his obligations assumed towards the original shipper.

the presentation of the document required whatever the last segment of the multimodal transport may be¹⁸.

Nevertheless, the holder of the document would be entitled to obtain delivery of the goods not because, depending on the transport stage, the MTD had or not conferred to him such right on the basis of an indirect recognition as a document of title to goods, but merely because the MTO fulfilled his obligation, assumed towards the consignor, not to deliver to anyone else different than who was in possession of the document.

The consequences of the construction above are quite predictable. Even though a holder of a MTD might obtain delivery as a result of the presentation of the document, he might be left without any remedies in case something occurred in transit. Because the MTD is not a document of title to goods, the holder may not argue to have acquired the constructive possession of the goods by means of the document, being prevented, for example, to establish a cause in action in bailment against the MTO/bailee¹⁹. Likewise, except with use of certain expedients²⁰, he would not have any claim under the contract of carriage because he has never become party to that contract.

The said mechanism fails therefore when it comes to evaluate the possibility for a holder of the document to exercise certain rights under the contract of carriage as made between the shipper and the MTO.

Parties to the Contract and Right to Sue

The feasibility to rely on a mechanism on the basis of which a consignee may obtain delivery by presentation of the document,

¹⁸ It is interesting to note that the RR have also recognised the possibility that a negotiable transport document may state expressly that the goods might be delivered without surrender of any transport document. See Article 47(2) Rotterdam Rules.

¹⁹ It is well known, in fact, that until the time the bailee attorns to another person, the right and duties as well as the constructive possession in goods remain on the original bailor. In this respect, see Paul Bugden, *Goods in Transit and Freight Forwarding* (3rd ed., Sweet & Maxwell, 2013) para 4-008.

²⁰ See para 3.1.3.

irrespective of the fact that he has not become party to the multimodal contract of carriage seems to fall some way short.

Bearing in mind that, as in the case of the BoL, such result could be achieved only by way of recognition of a certain document as a document of title to goods or by an express statutory recognition allowing a party to do so²¹, the possibility that this occurred in respect of MTDs is - once again - a matter of construction.

It is therefore worth discussing some of the solutions that have been elaborated in order to overcome the privity gap, which - whether successful - would allow the consignee to exercise not only the right to claim delivery of the goods, but also other rights as embodied in the multimodal contract of carriage.

“Mixed” Contract Solution

A way to go around the privity gap might be found - first of all - via the mixed nature²² of the multimodal transport contract. As has been said, in fact, a multimodal transport contract might be considered as a “chain of unimodal contracts”²³ whose single stage of transport may have the characteristics of a certain contract of carriage (e.g. sea, road, rail or air) regulated by its own provisions²⁴. If the provisions regulating each segment of transport were to allow the person named as a consignee to exercise the rights as embodied into the contract of carriage the shipper and the carrier entered into, there might be chances also for a consignee of a MTD to do so with the terms embodied in the multimodal contract of carriage. The matter is therefore to look at the applicable law for each transport stage to the extent of examining whether such possibility might be established or not.

To begin with that part of the transport involving the carriage of goods by sea, the answer to the question above seems to be affirmative.

²¹ With reference to the BoL, see Charles Debattista, *Bills of Lading in Export Trade* (3rd ed., Tottel 2009) para 2.7, 2.8 and 2.9.

²² See Hoeks (nt. 19) 55; *Quantum Corporation Inc v Plane Trucking Ltd* (nt. 125) para 33.

²³ Marian Hoeks, *Multimodal Transport Law: the law applicable to the multimodal contract for the carriage of goods* (Kluwer, 2009)55.

²⁴ *Ibid.* 56.

On the one hand, nothing should prevent a MTD to be considered as a BoL²⁵ for the purpose of applying both the COGSA 1971/Hague-Visby Rules and the COGSA 1992. On the other hand, the COGSA 1992 expressly gives the consignee, lawful holder of the document, all the rights of suit under the contract of carriage as if he had been party to that contract²⁶.

Likewise, if the multimodal route were to involve rail transport, the application to that segment of the COTIF/CIM, as incorporated by English law in the Railways (Convention on International Carriage by Rail) Regulations 2005, could lead to a similar result because the latter confers to the consignee the right to bring actions against the carrier based on the contract of carriage²⁷.

Furthermore, even if the multimodal transport were to encompass road carriage, the CMR, as incorporated by the Carriage of Goods by Road Act 1965, would give the consignee a statutory claim against the carrier²⁸ in the case of loss, damage or delay²⁹.

In the light of the above, it seems that - in theory - the consignee would be, in the most of the cases, capable to bridge the privity gap by relying on the provisions governing the unimodal segment and enforce the terms of the multimodal transport contract, to which is not party³⁰.

Nonetheless, the construction at hand should not be considered immune from criticisms. To this regard, the most relevant seems related to the applicability of those specific bodies of law that, as far as the CMR and the COTIF/CIM are concerned, require - *inter alia* - the carriage to be international.

²⁵ For the clarity of discussion, it should be immaterial whether the MTD amounted to “shipped” or “received for shipment” BoL. Both the COGSA 1971/Hague-Visby Rules (see nt. 155) and the COGSA 1992 (see Section 1(2) COGSA 1992) seem to apply to “received for shipment” BoLs.

²⁶ See Section 2(1) COGSA 1992.

²⁷ See Article 44(1) Appendix B (CIM) COTIF/CIM (1999).

²⁸ See Article 13 Schedule Carriage of Goods by Road Act 1965.

²⁹ Tettenborn (Supra n.14) 134 notes that, strictly speaking, the CMR does not refer to damage, but scholars and case law seem to include the concept of damage in that of loss.

³⁰ Similarly, see Tettenborn (Supra n. 14) 134.

Assuming that one of these international conventions were applicable to a given transport stage, then it would be necessary to establish that that specific provision allowing the consignee to exercise rights under the unimodal contract of carriage also applies. Here, it is important to note that, as opposed to cases where it is irrelevant that a consignee were or not in possession of a certain carriage documentation³¹, there might be cases where the possession of a specific transport document is for the consignee a condition precedent to the exercise of the rights under the contract of carriage³². As a matter of example, while the COGSA 1992 states that the consignee must be in possession of the BoL³³, in the COTIF/CIM the right conferred to the consignee to take action based on the contract of carriage might be subject to the fact that the latter had taken possession of the related consignment note³⁴. When the transport document at stake is a MTD, this means not only establishing that, at sea, the document acquires the characteristics of a BoL and, at land (*i.e.* rail), those of a consignment note, but also that such right would not be conferred to him if he were not in possession of the MTD.

Contracts (Rights of Third Parties) Act 1999

According to other authors³⁵, a consignee would be capable to enforce terms under the multimodal contract of carriage also as a result of the Contracts (Rights of Third Parties) Act 1999 (hereinafter, “**Contracts Act 1999**”).

It is well known that under the Contracts Act 1999 a right to enforce a term of a contract may, if specific requirements are met, be

³¹ It is, in fact, irrelevant according to the CMR. See Article 13 Schedule Carriage of Goods by Road Act 1965.

³² As in case of carriage of goods by sea and rail. See Section 5(2)(b) COGSA 1992 and Article 44(1)(b)(1) Appendix B (CIM) COTIF/CIM (1999), respectively.

³³ Where required, duly endorsed. In this respect, see Section 2(1) and Section 5(2)(b) COGSA 1992.

³⁴ See Article 44(1)(b)(1) Appendix B (CIM) COTIF/CIM (1999).

³⁵ In general, see Simon Baughen, *Shipping Law* (5th ed., Routledge 2012) 167; Bridge (Supra nt. 6) para 21-079; Tettenborn (Supra nt. 14) 133; Sir Guenter Treitel, *Carver on Bills of Lading*, (3rd ed., Sweet & Maxwell 2011) para 8-082.

conferred on a person who is not a party to that contract³⁶. Such a possibility might be established if the contract at hand expressly provides that he may do so or if a term purports to confer a benefit on him³⁷. In any case though, such party must be identified in the contract³⁸.

Indeed, if the terms and conditions usually contained in MTDs, such as FBL and Multidoc 95, were read together and if the consignee were named within the transport document³⁹, it is likely that the applicability of the Contracts Act 1999 would be pretty undisputed. However, this without taking into consideration that the Contracts Act 1999 provides two exceptions on the basis of which no right can be conferred on a third party when the contract of carriage of goods is one by sea and when the contract is of carriage by rail, road or air, which is subject to the appropriate international transport convention⁴⁰.

Thus, the simplest way seems to be to regard such solution as a valid alternative in case the nature of a multimodal transport contract were proved not to be a “mixed” one. Nevertheless, it should be worth bearing in mind that the Contracts Act 1999 could still be considered applicable, even though the “mixed” nature of the multimodal contract were confirmed, to cases where the international unimodal transport conventions did not apply, for example, because their territorial requirements were not satisfied or the contract should not be recognised as one by sea according to the COGSA 1992⁴¹.

Assignment, Implied Contract and Specimen Contractual Provisions

For the clarity of discussion, it should be noted that other solutions have been proposed in order to allow a consignee to exercise rights

³⁶ See Section 1 Contracts Act 1999.

³⁷ See Section 1(1)(a) and (b) Contracts Act 1999.

³⁸ See Section 1(3) Contracts Act 1999.

³⁹ Probably, the mere completion – in the FBL or Multidoc 95 - of the box “to the order of” with the name of the consignee would be sufficient to that effect. See also Baughen (nt. 180) 167.

⁴⁰ See Section 6(5)(a) and 6(5)(b) Contracts Act 1999, respectively.

⁴¹ See Bridge (Supra n. 6) para 21-079.

under the multimodal contract of carriage. Due to the lesser complexity they give rise to, they will be discussed all in the same paragraph.

To begin with the first proposed solution, it has been argued that rights on third parties might also be created by invoking the law of assignment⁴². As has been suggested, although the transfer to a consignee of a MTD will not amount to an implied assignment of any rights under it, the parties may notwithstanding make the transfer follow by an explicit assignment of certain rights⁴³. The assignment, it is suggested, could be made either in writing or entirely informally in equity⁴⁴.

Such a theory has probably been proposed as a gap-filling remedy to cases where the “mixed” contract solution does not permit the consignee to enforce peculiar terms of the multimodal transport contract, such as those related to the form of carriage, the route to be used, arbitration and the possible documentation to be provided⁴⁵.

Along with the theory of assignment, another attempt has been made arguing that between the carrier and the consignee would arise an implied contract as a result of the request for delivery of the goods made to the carrier⁴⁶. As has been noted, however, the scope of this device might be limited in that it could apply only between the consignee and the carrier from whom delivery was taken, that is to say: the last of the carriers involved in the multimodal transport operation⁴⁷.

Lastly, an involvement of the consignee in the multimodal transport contract might be inferred as a result of certain specimen provisions inserted in MTDs. To this respect, particularly relevant are those referring to the word “merchant”, which is said to include the shipper, the receiver, the consignor, the consignee, the holder and the owner of the goods⁴⁸.

⁴² Tettenborn (Supra n. 14) 134.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Bridge (Supra n. 6) para 21-080; Ozdel (nt. 244) 241.

⁴⁷ Bridge (Supra n.6) para 21-080.

⁴⁸ Melis Ozdel, ‘Multimodal Transport Documents in International Sale of Goods’ (2012) 7 *International Company and Commercial Law Review* 238245. See also

Nonetheless, as has been maintained, such clauses fall some way short in establishing a valid link between the consignee and the MTO. They are contractual in nature and insufficient to give the MTD all the necessary attributes to fulfil the conditions of a document of title to goods as such capable to transfer contractual rights through the transfer of the document itself⁴⁹.

International Sale Contracts

After having discussed the major difficulties arising from both the uncertain nature of the multimodal contract of carriage as well as the doubtful status of the document that is expected to contain or evidence that, it is worth turning the attention on the possible consequences arising from the usage of MTDs in international sale contracts.

International sale contracts, as has been seen, give rise to special problems in terms of risks faced by the parties, generally due to the circumstance that there is often a considerable lapse of time between the dispatch of the goods and their arrival at the agreed destination⁵⁰.

The parties will often make specific contractual provisions for allocating between them such risks to the extent of reaching a fair bargain. However, they may still rely on standard trade terms, such as those elaborated by the International Chamber of Commerce (hereinafter, “ICC”) in its publication entitled INCOTERMS 2010, to which certain legal incidents are attached unless a contrary intention appears⁵¹.

Because it cannot be excluded that sales of goods to be carried by multimodal container transport might be concluded on such terms, it seems useful to question whether or not such terms might be compatible with a multimodal carriage of goods covered by a MTD.

Compatibility of Standard Trade Terms with MTDs

As suggested by the ICC, in choosing the appropriate standard terms for their international sale contracts, the parties are - first of

the definition of ‘merchant’ in the FBL and Article 2 Multidoc 95.

⁴⁹ Ozdel (Supra n. 48) 245.

⁵⁰ Bridge (Supra n.6) para 18-001.

⁵¹ Ibid.

all - suggested to have regard to factors such as the goods to be sold, the means of their transport and other additional obligations on the parties⁵².

Because the present paper is concerned to the carriage of goods by more than one mode of transport and the related carriage documentation, it seems reasonable to focus the attention only on that terms that can be used irrespectively of the specific mode of transport and in cases where one or more means might be employed⁵³. The following discussion therefore will be particularly concerned with those terms known under the labels CPT and CIP⁵⁴.

The most important aspect that is worth discussing is related to the notion of 'delivery' and the compatibility of the latter with the usage of a MTD. The matter here is questioning whether or not the parties should rely on the standard position set forth in CPT and CIP or, otherwise, agree on an amendment.

In case of CPT and CIP terms, the default position is that the goods are considered delivered once handed over the first carrier. It is on delivery that the risk of cargo loss or damage is transferred to the buyer and that the seller's obligation to provide goods as per contractual description will be assessed⁵⁵.

In the light of the above, the parties should pay attention: as far as the buyer is concerned, to obtain a transport document that since delivery will allow to seek redress against the carrier in case something occurred in transit; and as far as the seller is concerned, to obtain a transport document that since then will evidence that the goods were received to the carrier in good conditions and as described in the contract of sale.

If the parties did not amend the rule according to which 'delivery' occurs at the moment in which the goods are delivered to the first

⁵² International Chamber of Commerce (ICC), *Incoterms 2010* (ICC Publication No. 715E, 2010) 5.

⁵³ *Ibid.*

⁵⁴ For an analysis of the matter in respect of standard (marine) trade terms such as f.o.b. and c.i.f., see Bridge (nt. 101) para 21-099 to 21-108.

⁵⁵ Ozdel (Supra n.48) 248.

carrier and the multimodal route at stake were to involve both land and sea transit, it is likely that the major risk would rest on the buyer.

While the MTD may well amount to a receipt for the goods to the extent of discharging the seller for having provided goods as described in the contract of sale, the buyer, in turn, will be uncertain whether or not the document that has received allowed him to sue the MTO on the multimodal contract in case of loss or damage to goods. This is particularly risky because, if something occurred to the goods in transit, the possibility to seek redress against the MTO for the buyer will depend on the reliance on one of the solutions mentioned above (e.g. mixed contract, Contracts Act 1999, etc.), which might be proved unsuccessful.

Alternatively, the parties may wish the risk to pass at a later stage than 'delivery' and they may do so by a specification in this respect on the contract of sale⁵⁶. To this regard, it should be noted that it might be wise for the parties to identify as the stage at which the risk is deemed to pass an ocean port⁵⁷. If it were so, this would give rise to fairer bargain as between the seller and the buyer. Assuming the multimodal route were to be the same as above (land and sea transit), if something occurred in transit, the first land leg would be at the risk of the seller, who would well have – in turn - a claim against the MTO as both of them are parties to the contract of multimodal carriage⁵⁸. Conversely, the second sea leg would be on the buyer, who – in case of loss or damage at sea - might have the possibility to seek redress against the MTO if it were proved that the MTD acquired the characteristics of a BoL.

In conclusion, if the parties (in particular the buyer) wanted to minimise the risk of obtaining a transport document that does not allow him to sue the MTO under the multimodal contract of carriage, it is suggested that the traditional meaning of 'delivery' under CPT or CIP terms were amended as to shift the passing of risk at an ocean port. From that point onwards, there should be a greater probability that the buyer will be vested with the right to sue the MTO on contract as a

⁵⁶ International Chamber of Commerce (ICC), *Incoterms 2010* (ICC Publication No. 715E, 2010) 33.

⁵⁷ *Ibid.*

⁵⁸ In the vast majority of cases, there should be privity of contract between them.

result of the fact that - at that stage - the MTD would acquire the status of a BoL.

Letters of Credit and MTDs

Ultimately, it is now worth considering whether the usage of MTDs may cause any effect in respect of the payment method agreed by the parties, in particular if the latter were a letter of credit (hereinafter, “LoC”)⁵⁹.

The circumstance that such payment method is based on a bank’s definite undertaking to be honoured only against presentation of certain conforming documents⁶⁰ shows, in fact and once again, how important carriage documentation might be also in respect of the financial aspect of an international sale transaction.

The principal reason behind discussing MTDs as documents that might be presented under a LoC lies in the fact that it still uncertain whether or not such transport documents, if tendered to a bank, might be capable to establish a valid pledge on the goods to which they relate to the extent of giving security to a bank.

As has been seen, such possibility is a prerogative of documents of title, which are recognised as symbols of the goods and whose transfer amount to transfer of constructive possession in goods covered by them.

Despite in multimodal transport a holder of a MTD may, by way of some expedients, achieve results similar to those that he could have obtained if he had been the holder of a document of title to goods (such as, the right to claim delivery or the possibility to sue the MTO under the contract of carriage), it is suggested that the transfer of

⁵⁹ The likelihood that the parties will agree on a LoC as a payment method in international sale contracts is reasonably high. This is also evidenced by the fact that authorities usually refer to such instrument as ‘the life blood of international commerce’. In this respect, see *R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] 1 Q.B. 146, 155; *Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 2 Lloyd’s Rep. 394, 400; *Intraco Ltd v Notis Shipping Corporation of Liberia (The Bhoja Trader)* [1981] 2 Lloyd’s Rep. 256, 257; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1981] 3 W.L.R. 242, 253.

⁶⁰ See Article 2 (definition of ‘credit’) and Article 5 UCP 600.

constructive possession to goods to the extent of establishing a valid pledge following the mere transfer of a document is something he is prevented to do⁶¹.

Such possibility, therefore, must be confined to the terrain of documents of title and the only solution that could be proposed is that goods might be pledged to a bank only for that part of a multimodal route that is to be performed by sea, where the MTD would probably be regarded as a BoL and document of title to goods⁶².

For the remaining part of the carriage, a bank in possession of a MTD would have an inferior security, which were limited to the possibility, if named as a consignee, to exercise some of the rights arising out the multimodal contract of carriage by way of the solutions proposed above (e.g. mixed contract, Contracts Act 1999, etc.).

However, the circumstance as to whether or not a MTD presented under a letter of credit would be a good security for a bank that advanced moneys is not the only reason why such transport documents have relevance in documentary credits.

Issues, in fact, may arise as to the tender requirements for such transport documents. As has been seen, in LoCs regulated by the UCP 600, the criteria according to which MTDs must be examined are those set out in Article 19. Such provision seems based on the following Article 20, which has regard to the examination of BoLs, but with the appropriate amendments necessitated by the fact that this document envisages the use of more than one means of transport⁶³.

There is one aspect that leads to a substantive difference between checking a MTD and a BoL, respectively. While a BoL must bear the indication as to the date of shipment, port of loading and the name of the vessel⁶⁴, the latter is not required in respect of MTDs. A MTD to be

⁶¹ Tettenborn (Supra n.14) 143 suggests, however, a mechanism that could lead to similar effects.

⁶² For interesting aspects as to the possibility, for a bank, to exercise the statutory rights arising out the possession of a BoL obtained under a LoC, see *Standard Chartered Bank v Dorchester Lng (2) Limited "Mt Erin Schulte"* [2014] EWCA Civ 1382.

⁶³ Debattista (nt. 202) 351.

⁶⁴ See Article 20(a)(ii) UCP 600.

accepted, in fact, may indicate alternately the place and date on which the goods have been dispatched, taken in charge or shipped on board⁶⁵.

Although the absence of any mandatory requirement within the UCP 600 as to the date in which the goods are put on a vessel, it has been suggested that there might be cases where the so-called ‘on-board notation’ becomes necessary⁶⁶.

According to an ICC Opinion⁶⁷, an ‘on-board notation’ will be always required when either the parties expressly so required or when the credit requires shipment to be effected from a port to a place of final destination (*i.e.* the first leg of the journey, as required by the credit, is by sea). In the latter case, the dated on board will require the addition of the name of the vessel and port of loading⁶⁸.

It is suggested that the introduction of the requirement at hand has had a twofold importance. On the one hand, the parties are today well advised to tender MTDs bearing an ‘on-board notation’ if they do not want the bank refuse the documentation presented. The lack of indication as to the date and name of the vessel may, in fact, result in a rejection of a MTD either because the document is not compliant with that stipulated in the credit or because does not meet the clarifications provided in case the first leg of the multimodal transport were by sea. In this respect, it must be noted that MTDs – similarly to other documents – are not exempted from the principle of strict compliance⁶⁹.

On the other hand, the circumstance that in certain cases the parties are required to present a MTD bearing an ‘on-board notation’

⁶⁵ See Article 19(a)(ii) UCP 600.

⁶⁶ In this respect, see ICC, ‘Recommendations of the Banking Commission in respect of the requirements for an On board Notation’ (Recommendation Paper, Document no. 470/1128rev final, 22 April 2010) available at http://www.hsbc.com.tr/tr/kurumsal_isletme/dis_ticaret/duyurular/pdf/on_board_notation.pdf.

⁶⁷ ICC Opinion R.641 (TA.650rev).

⁶⁸ ICC ICC, ‘Recommendations of the Banking Commission in respect of the requirements for an On board Notation’ (Recommendation Paper, Document no. 470/1128rev final, 22 April 2010) available at http://www.hsbc.com.tr/tr/kurumsal_isletme/dis_ticaret/duyurular/pdf/on_board_notation.pdf. 8.

⁶⁹ See Article 14 UCP 600. In general on the principle of strict compliance, see also Chuah (nt. 98) para 11-083 to 11-089.

gives even more support to the argument according to which, while at sea, such transport documents acquire the status of document of title to goods. The completion of the document by the insertion as to the name of the vessel and the date on which the goods have been loaded on that ship makes a MTD almost indistinguishable from a 'shipped' BoL with the obvious consequence that all the parties in the transaction (seller, buyer and banks) would have access - during the sea transit - to all the benefits that are attached to that status.

Conclusion

At the end of this article it should be clear how multimodal transport, despite being a well-established practice in international trade, still gives rise to a great number of legal issues. It is a matter of fact that, with specific reference to carriage documentation, the attention paid towards the development of the BoL cannot even be compared to that received by MTDs.

At the international level, one of the most important attempts, the MT Convention, is today commonly referred to as a "failure"⁷⁰. At the national level, English law seems too attached to the idea that a single transport document could not cover more than one mode of transport so to miss the opportunity to pass legislation⁷¹ or to rule on the subject⁷².

Despite all the above, in this article the questioning really relied on the nature of MTDs and what consequences these documents may give rise to when adopted in international sale transactions. The parties must be aware that, beyond the soft-law regulation of such transport documents as provided by the UNCTAD/ICC Rules (later incorporated in MTDs such as the FBL and the Multidoc95) or the provisions of the UCP 600, the law may not be of any assistance. The parties therefore should carefully evaluate the possibility of conducting business under MTDs and decide whether it might be more or less convenient doing so.

⁷⁰ Tettenborn (Supra nt. 14) 143.

⁷¹ As opposed to India, see Indian Multimodal Act 1993 and Chapter 2, para 2.1.3.2.b.

⁷² Surely missed in *Bathia Shipping and Agencies Pvt. Limited v Alcobex Metals Limited* (nt. 137); arguably, in *Quantum Corporation Inc v Plane Trucking Ltd* (nt. 125).

Under English law, the principal suggestion that it might be given to the parties is to look at such transports documents as if they were, as far as the sea transit is concerned, BoLs. Although it is true that MTDs may perform particular functions even without the need of being compared to BoL, it is nevertheless undisputable that the life for trader would be far easier if the MTDs were to be considered as documents of title to goods along the entire multimodal route. Unfortunately, it is not the case (yet) and when a certain result cannot be achieved otherwise, the tendency is to attribute that to the document of title status and, as a consequence, admit its feasibility only if the goods were being carried at sea and the MTD were considered a BoL.