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ТОВАРОРОЗПОРЯДЧІ ЦІННІ ПАПЕРИ ЯК ОБ'ЄКТ ЦИВІЛЬНИХ ПРАВОВІДНОСИН

Анотація. *Перехід країни до ринкової форми організації суспільного виробництва та обігу продукції викликав глибокі зміни в економіці. Утворення акціонерних товариств, перетворення державних і муніципальних підприємств в акціонерні товариства за допомогою приватизації, пов'язані з широким випуском і обігом цінних паперів. Тому основна мета роботи полягає у вивченні особливостей товаророзпорядчих цінних паперів, як об'єктів цивільних правовідносин. Визначено, що коносамент випишується на бланку встановленої форми з обов'язковим дотриманням реквізитів, які ідентифікують обсяг прав, що міститься в тексті. Встановлено, що характерною рисою товаророзпорядчого цінного паперу є його односторонньо-зобов'язуючий характер. Визначено, що коносамент як універсальний вид цінного паперу надає право на фізично поставлений товар, є розпискою, яка підтверджує доставку товару перевізнику та свідчить про договір перевезення.*

Ключові слова: коносамент, цивільно-правові зобов'язання, договірна теорія, складське свідоцтво.

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ТОВАРОРАСПОРЯДИТЕЛЬНЫЕ ЦЕННЫЕ БУМАГИ КАК ОБЪЕКТ ГРАЖДАНСКИХ ПРАВООТНОШЕНИЙ

Аннотация. *Переход страны к рыночной форме организации общественного производства и обращения продукции вызвал глубокие изменения в экономике. Образование акционерных обществ, преобразование государственных и муниципальных предприятий в акционерные общества посредством приватизации, связаны с широким выпуском и обращением ценных бумаг. Поэтому основная цель работы заключается в изучении особенностей товарораспорядительных ценных бумаг как объектов гражданских правоотношений. Определено, что коносамент выписывается на бланке установленной формы с обязательным соблюдением его реквизитов, которые идентифицируют объем прав, содержащийся в его тексте. Установлено, что характерной чертой товарораспорядительной ценной бумаги является ее односторонне-обязывающий характер. Определено, что коносамент как универсальный вид ценной бумаги свидетельствует о договоре перевозки, предоставляет право на физически поставленный товар, является распиской, которая подтверждает доставку товара перевозчику.*

Ключевые слова: коносамент, гражданско-правовые обязательства, договорная теория, складское свидетельство.

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COMMODITY SECURITIES AS AN OBJECT OF CIVILIAN RELATIONSHIPS

Abstract. *The country's transition to a market form of organizing social production and the circulation of products caused profound changes in the economy. The formation of joint-stock companies, the transformation of state and municipal enterprises into joint-stock companies, through privatization, are associated with a wide issue and circulation of securities. Therefore, the main purpose of the work is to study the characteristics of commodity-oriented securities as objects of civil legal relations. It was determined that the bill of lading is written out on the form of the established form with the obligatory observance of its details, which identify the scope of rights contained in its text. It has been established that a characteristic feature of a title-deed security is its one-sidedly binding character. It was determined that the bill of lading, as a universal type of security, testifies to the contract of carriage, provides the right to physically delivered goods, is a receipt that confirms the delivery of goods to the carrier.*

Keywords: bill of lading, civil liabilities, contractual theory, warehouse certificate.

INTRODUCTION

Development of commodity securities has a long history. Allegedly, they have appeared due to the needs of commercial transactions. Initially, only material objects participated in commercial transactions. Active circulation of commodity and money supplies was restrained by means of the traditional method of transferring property to an individual, more specifically – transferring a commodity over a distance and its actual handing over to the new owner. Acceleration of carrying out of commercial transactions required active use and transferring not material values themselves, but their *fictio*, i.e. commodity securities.

The author agrees with the opinion of the majority of researchers, which consists in the thought that the very first document of title widely used in law is the bill of lading. The reason of appearing such phenomena in law is the role of maritime trade in the medieval economy. Objectively, development of maritime trade resulted in appearance of such legal instrument, which would ensure the possibility of multiple transfers of property rights to commodity without the possibility of gaining actual title to it. Increased volumes of the carried cargoes and carrying out goods exchange operations with him, on the one hand, the impossibility for the ship master to follow strictly instructions of the consignor in matters of duration of stand stills, change of the course, on the other hand, as well as the impossibility of escorting every single consignment,

on the third hand, made presence of the cargo owner on board needless. Services of proxies begin to be used in the practice of maritime trade. Along with that, the necessity of documenting the fact of acceptance of cargo for carriage by means of issuing the appropriate confirming document arises. The goal of such novelty was the necessity of confirming assuming obligations by the carrier to the cargo owner regarding carriage of cargo and the possibility for the cargo owner to dispose of it within the time of its carriage through handling the respective certification document [1; 2].

It should be noted that a certain amount of time was needed for formation of the social stratum of merchants and ship masters before the possibility of using such document as a symbol of commodity appeared. Initially, an excerpt from a vessel's register made by a naval writer functioned as such document. Gradually this kind of document evolved into the master's receipt, which was named *cognoissment* (French) or *bill of lading* (English). By the 17th century such document took its final shape as *the bill of lading*.

Within a period of time, development of maritime trade resulted in formation of the system of warehousing the carried commodity. Many scholars refer appearance of the first commodity warehouses (*entrepots*) to France of the end of the 17th century [3]. Thus, regular movement of large consignments in the market economy environment unavoidably called for the necessity of their storage in special premises designated for sales, i.e. commodity warehouses. Historical records testify that as far back as in 1709 first small docks were built in Liverpool; they were used for warehousing of commodities pending custom dues payment. After a while other warehouses for other commodities appeared. Along with that, it should be noted that economic value of commodity warehouses is not limited by storage needs.

Irrespective of the fact that maritime trade became the key factor furthering development of warehousing, the need in crediting goods exchange operations triggered development of industrial warehousing. This resulted in commodity warehouses issuing specific documents certifying commodities acceptance for storage. Such documents did not just certify civil debts of the warehouse agent, but also for operations of granting loans under the respective commodity. The main benefit consisted in creating a new type of trade credit based on the mortgage right, not the exchange one. The owner of commodity, if he found its sale not profitable for himself, could take a loan handing over a certifying document in exchange. With that, the mortgage right to the commodity arising for the creditor was subject to cession to other people. Such cession was achieved by means of transferring the issued document certifying the ownership right to the commodity kept at a commodity warehouse. Growing needs of exchange trade boosted improvement of the system of warehousing of carried commodities, which resulted in appearance of such document as *the warehouse certificate*.

For the commodity stored at the commodity warehouse a document consisting of two parts was issued. One part of the document represented a receipt certifying the

ownership right to the commodity; the other one – the warrant, which the owner of commodity issued as a mortgage certificate when obtaining a loan.

It should be noted that the characteristic feature of such documents consisted not much in mentioning the fact of placing the commodity for storage by a certain person, but rather in the right of such person to get such commodity back at any time, or dispose of it by means of determining the legal fate of the document certifying the respective scope of rights of its titleholder. By the 16th century legislations of the majority of European states recognized the right to the existence of the institute of bill endorsement for documents certifying legal relationships in respect to cargo carriage and storage of commodities at the commodity warehouse. Disposal of commodities within the process of its transportation or warehousing without actual owning them becomes possible. In other words, the bill of lading and warehouse certificate represent securities known as *commodity securities*.

1. CHARACTERISTIC FEATURES OF COMMODITY SECURITIES

According to M. M. Agarkov, commodity securities embody the right to receipt of the commodity and its disposal by means of disposing the document itself “represent and replace the commodity in trade operations”, i.e. corresponds to “setting its transfer equal to transfer of the thing represented by it” [4].

Within the securities system commodity securities represent one of the most interesting and complex, and, in the same time, the least studied type of securities. Being the type of securities, nevertheless, the latter ones do not possess their basic classical property – *abstractness*, which means that the right expressed in a security doesn't depend on the underlying transaction. Commodity securities, which include the bill of lading and warehouse certificate, are called *causal* securities. Their *causa* is the fact of acceptance of a certain commodity by the warehouse for storage or handing over of cargo for carriage. It should be noted that this doesn't deprive such securities of the characteristic of *public reliability*. This characteristic is reflected in the fact that the person, who acquires the security *bona fide*, also acquires the right in the same scope as recorded on paper. From this it follows that against the requirement of the security holder objections not based on its invalidity cannot be raised.

Commodity securities represent an object of civil law *sui generis*. In view of its causality, they serve as confirmation of conclusion of the respective civil law contract. At the same time, securities cannot be considered as the contract itself. The main arguments are as follows:

1. The characteristic feature of the commodity security is their unilaterally binding nature. The titleholder of a security just has the right of claim stated in it on behalf of the obligor. His rights are not inconsistent with the obligation of performing certain actions in favour of third persons. Meanwhile the contract represents the bilaterally binding transaction, in which – the right of one person corresponds to the scope of its liabilities towards the other.

2. The main feature of commodity securities is the possibility of exercising the right constituting its meaning by means of their presentation to the obligor. Rights and obligations being the essence of the contract shall be exercised / fulfilled by the parties without presenting it.

3. The Contract can be in oral form, and in certain cases it may be concluded by means of performing implicative actions by the parties. Commodity securities shall be issued in written form only with clearly defined requisite details, failing which they shall be invalid.

4. Commodity securities, first of all, certify the property right, i.e. represent a title document. Further on, they define relationships between their titleholder and issuer of such security – the binding document. This implies that commodity securities have complex (property – liability) nature. As regards the contract, it should be noted that it has no featured of a title document and does not certifies the ownership rights to property.

5. Rights to commodity securities shall be transferred by one person to another through the mechanism of a bill endorsement or by means of their direct handing to a third person. A party to the contract can be replaced by means of cession. With that, cession implies not only transfer of rights under the contract, but obligations, as well. Invalidity of the master contract of a transaction entails invalidity of cession, which is inconsistent with characteristics of securities [5]. Hence, *a commodity security* constitutes the grounds for arising of an obligation of property nature against its presentation by a lawful titleholder in view of his ownership rights to it.

In the private right doctrine of Ukraine commodity securities are represented by two types: the *bill of lading* and *warehouse certificate (regular and double one)* (Art. 134–135, Art. 137–140 of the Code of Maritime Trade of Ukraine (hereinafter – CMT of Ukraine), Art. 909, 961–966 of the Civil Code of Ukraine (hereinafter – CC of Ukraine), Art. 1–4 of Law of Ukraine *On certified commodity warehouses and regular and double warehouse certificates*, Art. 37–42 of Law of Ukraine *On grain and grain market in Ukraine*).

2.CHARACTERISTIC FEATURES OF A BILL OF LADING IN THE - CIVILIS TIC DOCTRINE

The bill of lading (in French – “*connaissance*” from the word “*connaitre*” – to know, to understand) – the security certifying the property right of commodity nature in accordance with the contract for sea carriage of cargo. In the civil law theory there are two self-reliant approaches to the legal nature of the bill of lading. According to the *contractual theory*, at sea carriage of cargo the bill of lading, in great – trade and small – trade coasting of the USSR, constitutes a document representing the form and essence of the contract for cargo carriage. The basis for arising such legal relationships was the administrative deed for redistribution of

consumer and industrial goods and the contract for cargo carriage [6; 7; 8]. This theory was widespread in the USSR era.

However, the need of free circulation of the commodity in the period of its carriage by means of disposal of the document certifying the title to it resulted in the *title theory of the bill of lading*. Its provisions imply that the bill of lading constitutes a security issued to the freighter upon his demand when accepting cargo for carriage. Its issuance confirms the fact of cargo carriage, which makes it somewhat similar to the contract for sea carriage of cargo. On the other hand, such cargo is subject to be handed over to the bearer of the bill of lading. Thus, the carried cargo is expressed in such document.

O. D. Keilin points out that the bill of lading is not just an evidence of conclusion of the contract for sea carriage of cargo, but also the document of title. The bill of lading contains an obligation of the carrier to hand over the commodity mentioned in it to the respective titleholder [9]. A. S. Kokin has similar position. Not rejecting dependence of the bill of lading on the contract for sea carriage of cargo, he also includes it into shipping documents underlining their mandatory characteristic – the need of presenting the document for exercising the property right expressed in it [10]). At present provisions of this theory have their regulatory substantiation and are widely used. On the legislative level the notion of the bill of lading as a security is formalized by Art. 137–141 of CMT of Ukraine, Art. 195, 334, 909 of CC of Ukraine, Art. 3 of Law of Ukraine *On securities and stock exchange*.

The characteristic feature of the bill of lading underlining its legal nature is unconditional character of an obligation constituting its essence. In this case unconditionality means that the obligation to hand over the commodity stated in the security to the titleholder doesn't depend on the existence of legal facts, which may influence fulfillment of terms and conditions of the contract for carriage of cargo. It should be noted that the unconditional nature of the bill of lading as a security is not absolute. Particularly, Art. 163 of CMT of Ukraine grants the cargo carrier the right to refrain from handing over cargo until all expenditures incurred by the carrier under the contract for cargo carriage are compensated. In this case handing over of cargo depends on fulfillment of contractual obligations.

It should be noted that the peculiar feature of the bill of lading as a security consists in the fact that being the object of property right it has no value by itself. Such value has property rights secured in it, which can be exercised by the property owner by means of presenting the bill of lading.

When considering the contents of the bill of lading, one should distinguish notions the "right to the bill of lading", which has title nature and is the object of title, and the "right based on the bill of lading", which has legally binding nature and is the object of the right to claim the commodity fixed in such security.

The structure of legal relationships under a bill of lading is based, on the one hand, on relationships between the cargo carrier and consignor. Such legal relationships have

legally binding nature, and in accordance with them presentation of the bill of lading entails the obligation under such document to hand over the property stated in it. On the one hand, the bill of lading certifies property-based legal relationships in respect to property.

Such duality of the legal structure of the bill of lading results in the discussible question about categorizing it whether as objects of commodity rights [11;12;13] or objects obligation rights [14; 15; 16], and, respectively, referring it to the group of commodity or obligation securities.

R. Savatier pointed out this problem noting that "...appearance of the notion of abstract property (which securities also belong to – note by the author A. K.) resulted in appearance of the notion of ownership rights to the right of claim..."[17].

3.SPECIFIC FEATURES OF THE BILL OF LADING AS UNIVERSAL SECURITY

Considering this question, it should be noted that M. M. Agarkov underlined that "...commodity securities carry both obligation and commodity powers. More than any other securities they eliminate the distinction between commodity and obligation right". It is really so, as commodity security certifies only the ownership right to the document [14]. It should be noted that besides commodity and obligation ones, there are also legal relationships, which are somewhere in-between them, in which specific features of the above-mentioned legal relationships blend together in different proportions and make them closer to one or another [18].

Hence, the bill of lading is the object of both commodity and obligation legal relationships.

The subject of rights recorded on paper (the right to paper) is acknowledged by its titleholder. Occurrence of legal facts (the term of cargo delivery or its delivery to the destination point) gives rise to the creditor's right of claim for receipt of the property mentioned in the bill of lading from the carrier (the right from paper).

Finally, there is an important question about primary and secondary nature of commodity and obligation rights. There is no doubt that only the ownership right gives the possibility to own, use and dispose of the property stated in the bill of lading. Implementation of this provision leads to arising of obligation legal relationships further on, which gives the possibility to say that the property right has primary nature.

Within the context of the title theory, the bill of lading shall be categorized as universal securities. Depending on terms of its issuance defined by the contract of sea carriage of cargoes, the bill of lading can be transformed into a registered security, order security or security to the bearer.

The bill of lading shall be issued on the established blank form with mandatory details identifying the scope of rights specified in its text. Current laws of Ukraine

(Article 138 of CMT of Ukraine) prescribes the following mandatory details: 1) name of the vessel; 2) name of the carrier; 3) the point of cargo acceptance and loading; 4) name of the consignor; 5) the point of destination of cargo; 6) name of the consignee (the registered bill of lading) or statement that the bill of lading is issued “by order of the consignor”, or name of the consignee with statement that the bill of lading is issued “by order of the consignee” (the order bill of lading), or statement that the bill of lading is issued to the bearer (the bill of lading to the bearer); 7) description of cargo, its marking, number of packages, description of appearance, condition and external peculiarities; 8) freight and other payments owing to the carrier; 9) time and place of issuance of the bill of lading; 10) the number of counterparts of the bill of lading; 11) signature of the captain or other representative of the carrier.

The number of counterparts of the bill of lading is of a certain interest, as well. Thus, O. D. Keilin noted that the bill of lading shall be issued in several counterparts forming the bill of lading set. Each of them shall state the serial number of the counterpart. Their number shall not be less than two; with that, one of them shall be issued to the consignor, and the second one shall accompany cargo. For avoidance of abusive activity with the large number of counterparts of the bill of lading, the right of claim under the latter shall be preserved under one counterpart only. Other counterparts of the bill of lading shall contain a reservation about the impossibility of carrying out commercial transactions by means of the bill of lading [19].

Thus, this poses a reasonable question: why issue several counterparts of the bill of lading, if all of them constitute a single document – *the bill of lading set*? If with that for exerting rights specified in the bill of lading presentation of all of its counterparts is required? This testifies that handing over at least one counterpart to another person deprives the titleholder of the right of claim under the bill of lading.

We believe that answer to this question lies in the possibility of using the *fractional bill of lading (delivery order)* transfers to the third person his counterpart of the bill of lading with all necessary details for the cargo carrier regarding the quantity of cargo subject to release against presentation of the delivery order. With that, information on changes in the content of rights specified in the bill of lading shall be entered into all its counterparts with the purpose of avoiding abuse. This helps to avoid the situation when cargo is released in full under two fractional bills of lading (delivery order), and the titleholder continues circulation of its further counterparts for non-existing cargo.

4. TYPES OF BILLS OF LADING

Cargoes can be carried by one transportation mode along the defined route. In the theory of maritime law this route is known as liner carriage. The document issued to confirm acceptance of cargo is known as *master bill of lading*.

Meanwhile, in the practice of maritime trade can occur the situation, when at cargo carriage appears the necessity of using various transportation modes. This may be explained by the absence of direct transportation corridor between the point of departure and point of destination. Such legal relationships shall be recorded in the contract for carriage of cargo in direct intermodal traffic¹. Respectively, the commodity security within the framework of such contract is called *direct* or *through bill of lading* [20].

Traditionally, there are two types of direct (through) bills of lading: regular and direct (through) bill of lading for the combined (intermodal) cargo carriage [21]. The first one is characterized by using the bill of lading during cargo carriage by one transportation mode by different agents. The bill of lading for the combined (intermodal) carriage – direct (through) bill of lading – is used at carriage of cargoes by different transportation modes. The use of such type of bill of lading gives the consignor the possibility to avoid additional burden of transportation and forwarding nature.

In compliance with Part 2 Art. 917 of CC of Ukraine, Art. 137 CMT of Ukraine, fulfillment of obligation of a person as regards handing over cargo for carriage shall be completed not at its loading, but handing over to the carrier for performing respective actions. This gives the opportunity to speak about *board* and *non-board bill of lading*. The essence of the board bill of lading consists in confirmation of the actual acceptance of cargo on board of the vessel. At cargo acceptance for carriage the consignor has to document two different transactions: the contract for cargo carriage and contract for its warehousing preceding conclusion of the contract for carriage. Performing such operations artificially complicated the procedure of recording cargo carriage, made cargo delivery longer and, respectively, put the consignor in the position, which sometimes exceeded the limits of his commercial estimates. These circumstances evoked the necessity of elaboration of such shipping document, which might combine the reality of fulfillment of obligations under the contract for cargo carriage and contract for its warehousing – handing over cargo for carriage – *non-board bill of lading*.

At such form of organization of the process of carriage, at first cargo was subject to placement in warehouses or at berths of the carrier for its further loading on board of the vessel. Against cargo accepted for shipping the bill of lading shall be issued with the mark “accepted for carriage” or with another similar indication: “at the wharf”, “in the harbor”, “in the custody of” and other.

Pre-established contradiction of information on the quality and quantity composition of cargo entered into the bill of lading determined its division by such types as *clean bill of lading* and *bill of lading with reservations*.

Distinguishing such types of the bill of lading as *full bill of lading* and *fractional bill of lading (delivery order)* is characterized by defining the scope of property rights,

¹ The contract for cargo carriage in direct intermodal traffic is one of the self-standing civil transport contracts. Its meaning and role consist in legal regulation of carriage process, which two or more transportation modes participate in.

which arose as a result of its issuance. *Full bill of lading* is the security, the titleholder of which has commodity and obligation right to all commodity stated in it.

In the practice of maritime trade may occur the situation, when, in view of conditions of selling cargo already shipped under one bill of lading, there is the necessity to have, instead of one bill of lading for entire cargo, several bills of lading for its separate parts, i.e. the need in splitting this document. For instance, if the cargo consignment of 1,000 t after its shipment under one bill of lading will be sold to three buyers at retail (by 500 t, 300 t and 200 t each), then for ensuring the possibility for each buyer to obtain the part of commodity purchased by him directly from the carrier, the original bill of lading of 1,000 t shall be split to three corresponding parts.

One of options of releasing cargo can be its receipt by its owner by means of clearing off the bill of lading, warehousing cargo with its further release to the third person. However, such operation will entail additional expenditures related to cargo carriage and warehousing. To avoid the above-mentioned, the theory of maritime law provides the possibility of splitting the bill of lading. With that, each of prospective buyers has the possibility to obtain the part of commodity purchased by him directly in the point of destination of cargo delivery. Such splitting can be performed by means of fractional bills of lading – delivery orders) [22]

The doctrine of merchant shipping of foreign countries distinguished several kinds of fractional bill of lading (delivery order). The first one is characterized by presentation by the holder of the bill of lading an obligation towards the third person regarding releasing a part of cargo carried under it. In this case fractional bill of lading (delivery order) was used not as a document of title, but represented just an order on releasing a part of cargo. The second kind of fractional bill of lading is the order given to the cargo carrier by the holder of fractional bill of lading (delivery order) defining a part of cargo subject to release to the third person by the carrier.

The third group includes fractional bills of lading (delivery order) issued by the carrier himself in exchange of returning full bill of lading. In other words, full bill of lading is replaced by several fractional bills of lading (delivery order) [9; 20; 23; 24]. Depending on the method of recording property rights, the bills of lading can also be divided to paper and paperless ones. At present in the civil law doctrine the classical concept of the documentary security prevails. Enhancement of the level of scientific and technical development leads to gradual transformation of perception of a security as a materially separate object. The concept of the non-documentary security appears, and the reason for its appearance is explained by the necessity of unification and speeding up of carrying out financial and economic transactions regarding them.

It is noteworthy that in 1990 the Comité Maritime International adopted Rules for Electronic Bills of Lading. According to such Rules, the cargo carrier has to send to the consignor an electronic message about acceptance of cargo for carriage. This message contains the necessary details of the hard-copy bill of lading, as well as an identi-

fication key used for further messages (Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission 1987 UNCID). The holder of the identification key shall have the right to claim from the carrier receiving the cargo, nominate or replace the recipient of commodity/consignee) [25].

Another important question is the one of distinguishing the bill of lading from allied legal concepts, including the warehouse certificate. Same as the bill of lading, the warehouse certificate has in its essence the right of claim to commodity, which can be handed over to new consignee without actual receipt by means of transferring the document of title to it. The warehouse certificate may consist of two separate parts. The first one is the warehouse certificate itself, which availability confirms a certain person's ownership of the commodity, defines its major characteristics, obligations of the bailor and certifies acceptance of the commodity for storage. The second part – the warrant – can certify right of pledge, and its titleholder can hand over the commodity to another one himself. Owing to that, the warehouse certificate is more complex legal concept than the bill of lading.

As a whole, the difference between these securities is as follows: in the *field of application of the bill of lading and double warehouse certificate*. Thus, the bill of lading is used when it concerns obligations of sea carriage of cargo, while the warehouse certificate – obligations of commodity warehousing; *the subject – matter of legal relationships related to circulation of these securities*. At circulation of the bill of lading, its subject – matter is conditioned by the field of its application, i.e. the cargo carrier, consignor and consignee. At circulation of the warehouse certificate: the bailor, recipient, holder of document; *the structure of each document*. As was noted above, the warehouse certificate consists of two parts: the warehouse certificate and warrant. The bill of lading is the only document, however, in the theory and practice of civil law its certain types are distinguished. Moreover, the warehouse certificate is widely used at crediting commodities in circulation, while the bill of lading is the subject of alienation, not crediting. Thus, distinction of the bill of lading from the warehouse certificate lies in the field of exercising of commodity rights to such security.

5. PECULIARITIES OF CIRCULATION OF THE BILL OF LADING IN CIVIL COMMERCE

In the process of the bill of lading circulation its specific features as a security unfold. Civil – legal circulation of the bill of lading consists of the stage of issuing the bill of lading, its placement and clearing off. Issuance of the bill of lading is the initial stage of its circulation in civil commerce. The basis for the initial stage shall be conclusion off the contract of sea carriage of cargo and handing – over the bill of lading to the cargo carrier. From the moment of handing over cargo for carriage, its owner loses the right of its actual disposal. By means of legal fiction such right acquires status quo. Issuance of the bill of lading means substitution of the carried cargo by the respective document of title.

It means transition to the next stage – placement of the bill of lading in civil commerce. From this perspective, placement of the bill of lading in civil commerce constitutes its handing over to third persons within the period of cargo being aboard. At this stage a separate model of civil legal relationships is formed, the object of which is the present type of a commodity security. At this stage the bill of lading is circulated in civil commerce by means of bill endorsement. It should be noted that such position was presented by Cesare Vivante back in 1904 and named as “the theory of the basis for the rights fixed in a security” [26]. As applied to the type of securities described herein, provisions of this theory envisage that legal relationships between obligors under the bill of lading and its titleholder are determined by the contract concluded by them. At the same time, legal relationships of the obligor with the further holder of the bill of lading constitute a unilateral will expression fixed in the content of such document.

C. Vivante points at the analogy between the dualistic basis for legal relationships under a security and the position formed in the field of the contract of the company and legal representation. Members of the company are bound by contractual relationships, but as regards third persons formation of the company shall be considered as unilateral, although collective one, expression of will. Third persons can be considered as such only after duly announced expression of will regarding formation of the company. Equally, in case of representation third persons need not to be wary of objections based on relationships between the represented and representative, if such relationships were not expressed in powers of the representative. In all these cases the legislator cares about protection of interests of third persons from unexpected objections based on the unknown contractual relationships between counter-agents. To this end, as applied to securities, the debtor’s will shall be considered as having different content depending on whether its aim is creating an obligation in respect to the direct counter-agent or the further holder of the security.

Circulation of the bill of lading is completed with its clearing off by means of presentation of the security to the obligor for cargo acceptance in the port of destination.

CONCLUSIONS

Taking into account the stated above, only those documents shall be considered as securities recognized as such by law. Thus, securities do not include documents certifying monetary or any other property right (for instance, lottery tickets, rail way tickets), but are not securities in view of the fact that law does not qualify them as securities. Along with that, in compliance with EU Directive, “securities subject to circulation” mean those types of securities, which may be the subject of transaction at the capital market, except for such payment instruments as shares of companies and other securities equivalent to shares of securities or other subjects, and depositary receipts in respect to shares; bonds and other debt liabilities in the form of securities,

including depositary receipts as regards such securities; any other securities granting the right to purchase or sale of any securities subject to circulation, or pre-condition payment in cash for securities subject to circulation, foreign currency, interest rate or interest income, commodities or other indices or measures. This definition of securities allows drawing a conclusion that the list of securities can be open and not exhaustive to be set in law.

In this work the bill of lading is considered as the universal type of securities. With the purpose of satisfying needs related to giving the bill of lading characteristics of the security, one shall use standard forms split by types depending on the mode of shipping the bill of lading is used for. It has been established that on this basis the bills of lading are divided by liner and charter party ones. The master bill of lading is a self-standing document certifying the availability and content of the contract for cargo carriage, acceptance of cargo for carriage and the ownership right (title) to cargo. The charter party bill of lading constitutes a receipt of the carrier against acceptance of cargo for carriage, and conditions of the contract for carriage depend on correspondence of provisions of the bill of lading and charter for the vessel.

REFERENCES

- [1] Kokin, A. S. (1987). *Bill of Lading: Legal Aspects*. Moscow: Vodnyy Transport.
- [2] Shershenevich, G. F. (1909). Course of trade law. In G. F. Shershenevich (Ed.), *Bills of exchange. Law of the Sea* (pp. 115–127). St. Petersburg: Izdatel'stvo Brat'yev Bashmakovykh.
- [3] Belov, V. A. (2004). *Civil law*. Moscow: Tsentr YurInfoR.
- [4] Agarkov, M. M. (1925). *Duplicate waybill*. In *Main problems of railway law*. Moscow: Tsentr YurInfoR.
- [5] Kostruba, A. V. (May, 2003). The ratio of the bill of lading and the contract of carriage of goods (taking into account the provisions of the new civil law of Ukraine). New legislation of Ukraine and questions of its application: Abstracts add. and Sciences. message sciences conf. young scientists. Kharkiv, Ukraine.
- [6] Dryabin, Y. M. (1957). *Cargo transportation by sea*. Moscow: Morskoy Transport.
- [7] Tarasov, M. A. (1968). *Transport Law*. Rostov: Publishing house of Rostov University.
- [8] Fadeeva, T. A. (1971). *Cargo transportation agreement*. Leningrad: Leningrad State University.
- [9] Kailin, A. D. (1954). *Soviet law of the sea*. Moscow: Vodtransizdat.
- [10] Kokin, A. S. (1987). *Connaissance: Legal Aspects*. Moscow: Vodnyy transport.
- [11] Vakulina, G. A. (1993). *Securities as objects of civil rights* (Candidate thesis, Institute of Legislation and Comparative Law at the Supreme Council of the Russian Federation, Moscow, Russian Federation).
- [12] Makeyeva, N. S. (1995). *State regulation of the stock market* (Candidate thesis, Institute of Legislation and Comparative Law at the Supreme Council of the Russian Federation, Moscow, Russian Federation).
- [13] Trofimenko, A. V. (1997). *Ownership of securities* (Candidate thesis, REU named after G. V. Plekhanov, Saratov, Russian Federation).
- [14] Agarkov, M. M. (1994). The doctrine of securities. In M. M. Agarkov (Ed.) *Fundamentals of banking law. The doctrine of securities*. Moscow: BEK.

- [15] Dzery, O. V., Kuznetsovoy, N. S. (2000). *Ownership in Ukraine*. Kyiv: Yurinkom Inter.
- [16] Murzin, D. V. (2001). *Securities as legal constructions of civil law* (Candidate thesis, Ural State Law Academy, Ekaterinburg, Russian Federation).
- [17] Savate, R. (1972). *Theory of obligations: legal and economic essay*. Moscow: Progress.
- [18] Kavelin, K. D. (1879). *Rights and obligations on property and liabilities in application to Russian legislation: the experience of a systematic survey*. St. Petersburg: Tipografiya M. M. Stasyulevicha.
- [19] Kailin, A. D. (1954). *Soviet law of the sea*. Moscow: State Water Law Publishing House.
- [20] Kailin, A. D. (1933). *Bill of lading in international trade turnover*. In A. D. Kailin *Proceedings of the Merchant Shipping and Maritime Law Commission*. Moscow: Vneshtorgizdat.
- [21] Egorov, K. F. (1960). Polish direct mixed bill of lading. *Law of the Sea and Practice*, 56, 60–62.
- [22] Vyshinsky, S. A., Kaylin, A. D., Scheffer, M. G. (1937). *Carrying trade*. Moscow – Leningrad: V / O International Book.
- [23] Behlert, H. (1930). *Der Konnosament*. Berlin: Teilschein.
- [24] Boyd, N. E., Harris, J. H., Lic, B. An update on speculation and financialization in commodity markets. *Journal of Commodity Markets*, 10, 91–104.
- [25] Ivanova, G. G. (Ed.) (2000). *Commentary to the Code of Merchant Shipping of the Russian Federation*. Moscow: Spark.
- [26] Vivante, C. (1904). *Trattato di diritto commerciale*. Milano: Piccin-Nuova Libreria.

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