

Explanations on the Typification and Right Attribute of Commercial Securities

LIU Linlin^{[a],*}; FEI Yanying^[b]

^[a]Ph.D., Master Supervisor, Lecturer, Department of Public Administration and Law, Dalian University of Technology, Dalian, China.

^[b]Ph.D., PhD Supervisor, Professor, Department of Public Administration and Law, Dalian University of Technology, Dalian, China.

*Corresponding author.

Supported by China Ministry of Education Humanities and Social Sciences Research Youth Fund Project (12YJC820063); China Central Universities Fundamental Scientific Research Fund Project (DUT14RW120).

Received 15 August 2014; accepted 30 October 2014

Published online 26 December 2014

Abstract

Different from bills, the nature of securities rights of bill of lading and warehouse receipts has always perplexed the academia. The reason is the lack of basic researches on the negotiable securities theories, which make scholars confined to specific legal departments and cannot see the complete picture. This paper analyzes bills of lading and warehouse receipts on the base of the theories of negotiable securities and bills, and clarifies their attribute of commercial securities. While affirming the attribute of debt securities, this paper advocates to admit the property rights of bills of lading and warehouse receipts through analyzing the theoretical disputes between their property rights and creditor's rights. Combined with the issue that delivery of securities has the same potency with delivery of goods, this paper argues the nature of property debt securities of bills of lading and warehouse receipts in a developmental way.

Key words: Commercial securities; Property securities; Debt securities; Property debt securities

Liu, L. L., & Fei, Y. Y. (2014). Explanations on the Typification and Right Attribute of Commercial Securities. *Frontiers of Legal Research*, 2(2), 62-72. Available from <http://www.cscanada.net/index.php/flr/article/view/10.3968/6173> DOI: 10.3968/6173

1. TYPES OF COMMERCIAL SECURITIES AND LEGISLATIVE MODE

Theories of the continental legal system explain the terms of commercial securities complexly and diversely. Some regard that commercial securities have the same implications with negotiable securities, and the two can substitute each other; some hold that commercial securities are the securities whose purpose is the payment in money, other goods or negotiable securities; some others hold that commercial securities are the negotiable securities which refer to commercial transaction objects. Differences among explanations of commercial securities terms are related to the economic and legal environments of the countries. Because negotiable security is the unique concept for countries of the continental legal system, the connotations and denotations of commercial securities should be sought from the legislation and theories of negotiable securities. Laws of many countries have attributed bills into commercial securities. Comparing bills (monetary securities) with capital securities, the former is the securities issued to specific persons at different times in different conditions, and the latter is the securities issued to unspecific persons in a certain period of time with the same conditions. Bills are called as individual negotiable securities, capital securities are called as public negotiable securities. Countries of the continental legal system all exclude public negotiable securities from commercial securities. Therefore, commercial securities should be the negotiable securities individually issued to specific persons at different times in different conditions based on certain commodity exchanges (Zhao, 1999). Like bills, goods securities such as bills of lading and warehouse receipts are the securities issued to specific persons based on the exchange of commodities, which also belong to individual negotiable securities. Therefore, bills of lading and warehouse receipts are commercial securities. From this point of view, although under different legal systems, bills, bills of lading and warehouse receipts all belong to commercial securities, but legal systems of securities have many similar provisions. It should be noted that although the United States' securities legislation provides for the terms of commercial securities, which are essentially different to the commercial securities of continental law countries. The commercial securities stipulated by *United Commercial Code* of the United States are generally close to the bills in Chinese laws, so many Chinese scholars have translated commercial securities in the US laws as commercial bills.

Bills and bills of lading originate from the trading documents in ancient Mediterranean areas, which are the products of development of commodity exchanges. They are the securities invented by merchants to overcome the special risks in international trades and to ensure international trades to be successfully conducted. However, bills have emerged earlier and their legal systems have

been more perfect, making the laws of bills become the core of modern laws of negotiable securities, while the establishment and development of legal systems of bills of lading is more reflected as the accumulation of international practices, legal precedents and theories. Although from the beginning of the 20th century jurists have sought to unify legal systems of bills of lading by way of international treaties, but due to the differences between various legal systems and the interests conflicts for shipping market, development of legal systems for bills of lading are backward compared to that of bills (Liu, 2001). From the perspective of domestic laws, US legislation to bills of lading is relatively more complete. The *Federal Laws of Bills of Lading* had been established in 1916, and has been incorporated into *United States Code* in 1994, which applies to all interstate and exported bills of lading. Bills of lading within each state are compliant with *United Commercial Code*; Britain has established *The Law of Bills of Lading* in 1855 and *Law of Carriage of Goods by Sea* in 1992, but the provisions of statute law are not so detailed as that of the US; The 4th edition of *Japanese Commercial Code* stipulates bills of lading focusing on the rules of bills of lading; The 4th Section, 4th Chapter of *Maritime Law* of China provides for that transport documents are bills of lading, but the content is not much. International Conventions which have provisions for bills of lading are *Hague Rules*, *Visby Rules*, and *Hamburg Rules*, but there's not a special convention for bills of lading. Legal researches of warehouse receipts cannot even be in comparison with that of bills of lading, Countries have more or less legal rules for warehouse receipts. Germany has enacted *Rules of Indicative Warehouse Receipts* in 1931. Japan has enacted *The Law of Warehouse Industry* in 1956; *The Law of Debt* of Swiss has provided for contract of deposit, regarding warehouse industry as a type of deposit; France has enacted *The Trading Law of Deposited Goods in Warehouse Industry*, *The Law of Warehouse Receipts for Agricultural Products Pledge*, and *The Law of Warehouse Receipts for Kerosene Storage by Kerosene Importers* in 1958; *The Uniform Commercial Code* of the US has set provisions for warehouse receipts, bills of lading, and other ownership documents; Article 385 of *The Law of Contracts* of China has only required that the depositor should be supplied with a warehouse receipt by the custodian to whom he delivers the goods, but there is short of specified rules for warehouse receipts.

As commercial securities, the bills of lading and warehouse receipts have not a relatively more complete legal system as that of bills (Chen, 2010). Securitization of rights has a particularly high requirement on credits, which needs protection by strict procedures and complete systems. Therefore, China's commercial law theories should take researches on the regulations of bills of lading and warehouse receipts based on the theories of commercial securities, abstract the securities features from monetary securities and goods securities, and design a securities legal system which is parallel to that of bills. This is of great significance to the researches of negotiable securities theories in commercial laws.

2. COMMERCIAL SECURITIES' RECOGNITION OF CREDITOR'S RIGHTS

Regarding the nature of the rights of bills, it is theoretically agreed that bills recognize monetary claims, but for the nature of the rights of goods securities, domestic and foreign scholars have disputed a lot concentrating on whether securities recognize property rights or creditor's rights. China's laws do not clearly define the right attribute of bills of lading and warehouse receipts.

2.1 The Debate Between the Theory of Property Securities and the Theory of Debt Securities

Bills of lading's recognition of property rights is the mainstream in maritime legal theories, which is known as the theory of property securities. Its core idea is that bills of lading belong to property documents, which falls into the category of title documents. The theory of property securities is subdivided into two schools, namely, the theory of ownership and the theory of possession. The theory of ownership believes that when a shipper obtains a bill of lading issued by the ship, the bill of lading can be circulated at the destination port through endorsement transfer by a negotiation bank. If the goods have not yet arrived at the destination port, the transfer of bill of lading is equal to the transfer of goods. The theory of possession believes that bills of lading recognize possession of goods, and according to commercial practices, possession of bills of lading is equal to possession of goods. The holder of the bill of lading is entitled to dispose of the goods under the bill of lading, and transfer of possession of bill of lading is the transfer of ownership of goods (Wei, 1984; Ren, 1988; Xia, 1988; Si, 1991). Different from the theory of property securities, the view of bills of lading's recognition of creditor's rights is called the theory of debt securities. Bills of lading's recognition is not property rights but the creditor claims for delivery of goods between the carrier and the holder of a bill of lading. Delivery of the bill of lading has the same effect on the delivery of goods. The nature of creditor's rights of bills of lading has experienced a developmental process from scratch, and the holder of a bill of lading is entitled to any claim against the carrier directly. However, international conventions of bills of lading avoid the question that what's the nature of bills of lading's recognition of rights, and leave it to national laws. The views about the nature of creditor's rights of bills of lading have four main schools, namely, the theory of carriage contract, the theory of implied contract, the theory of legal regulations, and the theory of securities rights.

There are fewer researches on warehouse receipts' recognition of rights. Some scholars hold that warehouse receipts means that when a warehouse receives goods he issues a legal document to the depositor which shows that a number of goods have been received and is on behalf of the ownership rights of corresponding properties (Wang, 1999); Some other scholars believe that a warehouse receipt is the negotiable securities which a warehouse issues to a depositor to acknowledge

the receipt of a certain number of goods (Fang & Zhao, 2001). Article 387 of *The Law of Contract* of China stipulates that warehouse receipts are the certificates to take delivery of goods, and are the negotiable securities issued by the warehouse as requested by the depositor. From the above definitions of warehouse receipts, Chinese scholars regard them as property securities. As the document to take delivery of goods, the depositor obtains the ownership rights of the goods when he obtains the warehouse receipt, and delivery of the warehouse receipt means the transfer of ownership of the goods. Therefore, transfer of possession of warehouse receipts is the premise for transfer of ownership rights of the goods recorded on the warehouse receipts. Because China's contract law stipulates that transfer of rights on warehouse receipts for endorsement transfer can only be effective upon warehouse's signature or stamp, so warehouse receipts belong to incomplete property securities. The view which is different from property securities holds that warehouse receipts recognize creditor's rights. A holder of a warehouse receipt stores goods with a warehouse operator on the basis of the records of warehouse securities, and this literal effectiveness is the effectiveness of creditor's rights (Maruyama, 2005). Because warehouse receipts are issued based on warehouse contracts, the relationship of creditor's rights on warehouse receipts has to be impacted by the issue reason of the securities or the storage contract for the warehouse receipts, which is the same with the securities rights theory that bills of lading recognize creditor's rights.

2.2 Negation on the Theory of Property Securities

Commercial securities have developed from receipts by the simple proof function of securities which worked as alternatives of payment, followed by negotiable securities which have the liquidity function. As commercial securities have been widely used, the corresponding business customs have gradually formed, and social credits for commercial securities have been gradually expanded. Specifically, the most basic function of bills is to substitute cash payment and overcome the barrier of time interval for cash payment. Compared with the payment function, bills' credit function has emerged rather late, but it becomes the most important function once it has emerged and plays an important role in the development of commodity economy. Bills of lading and warehouse receipts are initially only transport and warehousing certificates, having certain similarities with the development of bills. When receipts of goods can be used to assign credits, to substitute goods delivery and to fulfill trading contracts of goods, assignment of credits actually becomes a guarantee to deliver the goods. However, bills of lading and warehouse receipts are not the same with bills which recognize monetary creditor's rights. Money is a general equivalence. Bills do not have a strict correspondence to the money which they represent; bills of lading and warehouse receipts have a strict correspondence to the goods which they represent, based on this correspondence the holder of the securities enjoys the exclusive rights of priority and recourse to the goods.

From the perspective of international conventions of bills of lading, *Hague Rules* and *Visby Rules* have not given a clear connotation to bills of lading, and *Hamburg Rules* has made a definition which has been commonly accepted in a number of countries. Article 71 of *The Law of Maritime* of China has inherited the definition of *Hamburg Rules*: bills of lading are securities to prove the contract of carriage of goods by sea and that the goods have been received or shipped by the carrier, and as per which the carrier undertakes to deliver the goods. This definition does not specify that bills of lading are property securities, but regards bills of lading as the documents based on which the carrier undertakes to deliver the goods, and for the holder they are the documents based on which he can take the goods from the carrier. Because the question of ownership has a certain complexity, international conventions tend to avoid it. The Chinese courts judge the transfer and attribution of ownership of goods based on the possession of bills of lading. However, bills of lading can neither promote nor stop the ownership change of goods. Delivery of goods and delivery of a bill of lading do not take place simultaneously, and the ownership of goods does not necessarily transfer with the transfer of the bill of lading, so a bill of lading does not recognize the rights of ownership. Similarly, bills of lading do not recognize possession rights of goods. The rights on the base of possession are not stable, because they cannot oppose the original rights, and the possession becomes instantly inactive when the original rights are proven. If regarding the rights recognized by bills of lading as the rights of possession, the rights transfer of bills of lading will be in an unstable state, which is not conducive to the protection of the bills of lading holder. As commercial securities, bills of lading are actually a carrier of rights securitization rather than the goods themselves. The relationship between the carrier and the holder of a bill of lading takes effect based on the context of the bill of lading, which is the reflection of the relationship between the creditor and the debtor. Similarly, Article 387 of China's *Contract Law* only provides for that warehouse receipts are the certificates to collect goods, and does not clarify on the nature of the rights recognized by warehouse receipts. Although some scholars believe that warehouse receipts recognize property rights or even ownership rights (Fang, 2002), from the perspective that the holder of a warehouse receipt can request the warehouser to fulfill obligations in accordance with the storage contract, warehouse receipts reflect the effectiveness of creditor's rights. If a person cannot present the securities, he cannot request to collect goods from the warehouser, which reflects the characteristics that the request rights of goods delivery combine with the creditor's rights of securities. The nature of property securities' recognition of rights is not property rights, but it cannot deny that the rights have some property characteristics. These arguments have elaborated that the rights of property securities have the characteristics of securities disposal and securities delivery.

2.3 Supports for the Theory of Debt Securities

The property rights have been liberated from old concepts and have been placed in a special and independent status. They are directly manifested as specialization

and technicalization, which are known as the specialized trend of property rights. In the process of rights securitization the most important thing is the securitization of claims. It is an unrealistic expectation right on the base of mutual trust, and is a credit which can be expected. Therefore, creditor's rights and credits are closely linked. Monetization of debts can better reflect the characteristics of debts as the credit system.

Bills and goods securities are the products of rights of securitization which are closely linked with credits. Taking bills of lading as an example, many views of goods securities' recognition of creditor's rights can be analyzed. Firstly, the creditor relationship of bills of lading is a different legal relationship to the carriage contract. The subjects of a creditor relationship are the carrier and the holder of a bill of lading, and the subjects of a contract of carriage are the carrier and the shipper. The debt relationship of a bill of lading takes effect when the bill of lading is issued and it ceases when the bill of lading is cancelled, while the relationship of a carriage contract takes effect before the bill of lading to be issued, but at the time the shipper and carrier have reached the agreement to charter the vessel on a certain transport conditions. Under a debt relationship of bills of lading the obligations of the carrier is to deliver particular goods to the holder, while under a carriage contract the obligations of the carrier are to fulfill the delivery of goods. The content of a debt relationship of a bill of lading is entirely determined by the record of the bill of lading, but the content of a carriage contract is not only reflected in the bill of lading because the bill of lading is only a preliminary proof for the carriage contract, and the agreement made between the shipper and carrier before the issue of the bill of lading can always overthrow the bill of lading. Therefore, the theory of carriage contract is not logical. Secondly, the debt relationship of bills of lading is not an implied contract. Agents say that the buyer does not care about the carriage contract signed between the seller and the carrier, he is only interested in the acquisition of the bill of lading without regard to the conclusion of the contract, and he does not have any agency intention with the seller. The theory of contract assignment cannot explain that why the contractual obligation is able to be assigned without notice to the creditor, also cannot explain that why the rights and obligations of the consignee may differ from that of the shipper. The theory of beneficiary of the third party holds that as a third party beneficiary, the consignee's rights and obligations depend entirely on the agreement between the shipper and carrier. The right of the consignee is not an independent claim, and is not conducive to protecting the consignee. Therefore, the theory of implied contract requires every bill of lading to have an implied contract, which is in lack of legal certainty and stability (Guo, 1999), and does not meet the Chinese practices. Finally, the debt relationship of bills of lading is a securities debt. The theory of securities rights advocates that the creditor's right of bills of lading is a request right for goods delivery based on the theory of negotiable securities. Securities rights take effect upon the issue of securities. The transfer and enforcement of the rights are all linked with the securities. The liquidity of securities rights requires a high level

of credit whose base is from the context of the securities. Therefore, the theory of securities rights accurately describes the commercial securities characteristics of bills of lading and warehouse receipts.

3. THE ATTRIBUTE OF PROPERTY DEBT SECURITIES FOR GOODS SECURITIES

Because of bill's standardized forms, the transfer of securities rights has especially strict legal rules. Bills have been used in the field of commercial debts very commonly (Liu, 2010). In the use practices of bills of lading and warehouse receipts, due to the same effect of delivery of goods and delivery of securities, securities rights have been historically endowed with the property effectiveness. In order to accurately represent their securities debt nature, bills of lading and warehouse receipts are called as property debt securities. Property effectiveness has the following four meanings: Firstly, without actually taking possession of goods, the goods being delivered can be disposed in accordance with the transfer of securities. Secondly, goods cannot be out of the domination of debts, the transport instruction and delivery request can only be claimed by the holder of the securities. Goods cannot be disposed without securities, which are called as securitization of disposal. Goods cannot be claimed for delivery without presentation of securities, which is called as redemption of securities. The delivered goods are dominated by the debt attribute of securities. The delivery of securities does not produce a delivery effectiveness of the transported goods, but can change the property rights of the goods. Thirdly, goods are to be acquired or the rights to dispose of the goods are to be acquired upon the presentation of securities, which are known as the delivery of securities. Fourthly, if transported goods are to be released without the presentation of securities, it is called as release of goods without bills of lading. The buyer who is based on the delivery of securities can obtain the ownership of goods and can oppose a third party. According to the reason why securities delivery and goods delivery have the same effect, there are the absolute theory and relative theory, and the relative theory is divided into the solemn relative theory and the representative theory. Absolute theory holds that without goods possession, the securities themselves which recognize creditor's rights are the independent methods for property changes under commercial laws. The delivery of securities has the same effectiveness with the delivery of goods. Commercial laws confer the delivery of securities to work as an alternative for the transfer of possession. Relative theory holds that because of the debtor who directly possesses goods, property rights have been established based on the possession, and the delivery of securities is regarded as the transfer of indirect possession of the delivered goods. Solemnly relative theory considers that when this transfer of indirect possession goes through the formalities, namely through an agent, and if a person instructs a

third person to possess the goods and this third person has made a commitment, this third person acquires the possession rights. Solemnly relative theory represents that the delivery of securities loses the property rights, which this paper does not agree. Representative theory believes that it is no need to perform the above formalities, and the delivery of securities is the transfer of indirect possession. Firstly, bills of lading and warehouse receipts are debt negotiable securities. The delivery of securities has the effectiveness of property rights. When the goods on the securities are received and possessed by the carrier or warehouse, securities debts are interrelated with the property possession of goods. Secondly, taking possession as the premise, if goods are lost or instantly acquired by a third person, or the carrier or warehouse loses the possession of goods, the effectiveness of property rights ends. Thirdly, although the securities are in the hands of the holder, when a third person instantly acquires the goods, the ownership or pledge for the securities holder loses the resistance to the third person. Fourthly, if taking the effectiveness of property rights as the premise, goods can only be disposed according to the securities, a direct disposal of goods without securities constitutes an instant acquisition. Therefore the delivery of securities does not have the property effectiveness. Although securities less the effectiveness of property rights, they do not lose the effectiveness of creditor's rights. When goods are lost, the holder can claim to the carrier or warehouse for damages.

For the proposition of relative theory, even if legal theories have recognized direct agency possession, they cannot recognize indirect agency possession. Under the legal principle of property, relative theory is questionable and can be justified. Therefore, this article approves the absolute theory. Although the carrier or warehouse temporarily loses possession of goods due to steal or loss, as long as the goods are not instantly acquired, the property effectiveness of securities is not eliminated. As per the delivery of securities during this period, the debtor is able to establish pledge on the goods once he retrieves possession. For the representative theory which based on direct possession of goods, though the carrier owns the claim rights for possession recovery, when he loses direct possession his appeal for approval on the property of the securities becomes very difficult. The absolute theory believes that the delivery of securities has the exact same effect with the transfer of possession of goods, without considering whether in reality the goods are under the direct possession of the carrier or warehouse or not. The effectiveness of creditor's rights of securities is restricted to maintain the possibility of goods delivery, and there is no need to regard the possession theory in civil laws as the premise for the property effectiveness of securities. According to commercial laws, delivery of securities has the exact same effect with delivery of goods. If the transferee of goods accepts securities delivery, he gets the ownership rights against a third person. He can also establish pledge on the securities, even though the carrier or warehouse loses possession of goods, the goods can still arrive or be delivered according to the effectiveness of creditor's rights of the securities. The effectiveness

of securities property rights is established on the base of the effectiveness of securities creditor's rights, taking the possibility of goods arrival or delivery at the premise. When goods are lost or occupied by a third person in goodwill without faults or instant acquisition are established, the delivery of securities no longer has the effectiveness of property rights. Similarly, regardless of the fact that a pledgee possesses the securities, due to the failure of resistance to a third person because of goods lost, the pledgee can only obtain damages according to subrogation and cannot establish a new creditor's rights by the securities. The securities have only creditor's rights effectiveness, and the rights can only be realized based on the effectiveness of securities creditor's rights.

CONCLUSION

Based on the theory of negotiable securities in continental legal systems, the commercial securities attributes of bills, bills of lading and warehouse receipts should be clarified, which is the negotiable securities issued to specific persons in different periods on different conditions. The proposal for the establishment of a legal department for bills of lading and warehouse receipts parallel to that of bills system has been advocated. This article focuses on the nature of securities rights of bills of lading and warehouse receipts based on bill rights, analyzes the scientificity and applicability of the theory of property securities and the theory of debt securities, negates the property securities attribute of bills of lading and warehouse receipts, discusses the rationality of the theory of debt securities based on the defects of the theory of property securities, analyzes many views on the theory of debt securities one by one, and ultimately supports the proposition of the theory of securities rights. For the same effectiveness problem of securities delivery and goods delivery in the theory of securities rights, this article advocates to confer effectiveness to the inherent property rights of bills of lading and warehouse receipts, namely, the effectiveness of securities property rights is established on the base of the effectiveness of securities creditor's rights, taking the possibility of goods arrival or delivery as the premise. When goods are lost or occupied by a third person in goodwill without faults or instant acquisition are established, the delivery of securities no longer has the effectiveness of property rights. Therefore, the theory of securities rights should be developed, and the legal attributes of property debt securities for bills of lading and warehouse receipts should be discussed.

REFERENCES

- Chen, F. (2010). Theoretical discussions on the concept of bills of lading. *Exploration*, (10), 166.
- Fang, S. K. (2002). Discussions on many issues of warehouse receipts. *Seeking Truth*, (1), 75.

- Fang, S. K., & Zhao, Z. Y. (2001). Discussions on the pledge of warehouse receipts. *Laws and Social Development*, (4), 41.
- Guo, Y. (1999). Discussions on the debt relations of bills of lading. *Chinese and Foreign Laws*, (2), 84.
- Liu, N. (2010). Researches on the structured trade financing development of our country's commercial banks. *Exploration*, (7), 12.
- Liu, X. (2001). A comparative study between bills of lading and bills. *Maritime Law Annually*, (12).
- Maruyama, S. (2005). *Commercial law I – General principle & commercial practice law / bills & cheque law* (2nd ed., p.146). The New World Press.
- Ren, J. X. (1988). *Maritime law course* (p.58). The People's Court Press.
- Si, Y. Z. (1991). *The new maritime law* (p.151). China Communications Press.
- Wang, W. L. (1999). *Storage Contract & Warehousing Contract* (p.127). Law Press.
- Wei, W. D. (1984). *Maritime law* (p.36). Law Press
- Xia, D. Y. (1988). *Basic maritime law* (p.74). Law Press.
- Zhao, X. H. (1999). *The law of bills* (p.21). The People's Court Press.