What is needed to get rid of paper? A new look at delivery orders

Glencore International AG v (1) MSC Mediterranean Shipping Company SA and (2) MSC home Terminal NV [2015] EWHC 1989 (Comm), QBD, decided 10.07.2015 per Andrew Smith J.

This was an unprecedented case where an English court had to consider whether a carrier was liable for the loss of two containers which had been misappropriated, import pin codes having been issued by the carrier to the bill of lading holders in exchange for the bill in order to allow them (the holders) to collect the goods.

1. The Facts

1.1 The loss of the containers

Three containers of cobalt briquettes were shipped from Fremantle on the *MSC Eugenia* under a negotiable ("to order") bill of lading dated 21st May 2012, issued by MSC Mediterranean Shipping Company SA (MSC). The goods were transhipped to the *MSC Katrina* before they arrived in Antwerp, transhipment being permitted under the bill of lading. The bill named Glencore International AG (Glencore) as the shipper and C Steinweg NV (Steinweg), Glencore's agents at Antwerp, as "Notify Parties". It contained this express term:

> If this is a negotiable (To order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier … in exchange for the Goods or a Delivery Order….

On 24th May 2012 Glencore sent Steinweg two copies of the bill of lading together with other documentation. On 20th June MSC sent Steinweg an arrival notice, giving an ETA for the MSC Katrina of 24th June. Steinweg lodged one of the bills of lading, signed and stamped by itself and Glencore with Mediterranean Shipping Company Belgium NV, MSC's local agent, (MSC Belgium) and paid the handling charges. The cargo was handled under an electronic release system ("ERS") used for containerised cargo at the terminal, under which system carriers 'provide computer generated electronic numbers (or "import pin codes"), which holders of bills present to the terminal and so take delivery of their goods.'[1] Accordingly, on 22nd June MSC emailed to Steinweg a release note for the three containers, giving for each of them a code that was valid from "discharge" to 25 July. On the same day Steinweg instructed its hauliers, Carjo Trans BVBA ("Carjo Trans") about collecting the containers from MSC Belgium and bringing them to Steinweg's warehouse, without passing on the actual codes. The vessel arrived on about 26 June and the containers were discharged. The court inferred that they were placed in the MSC Terminal.[2] The role of the Port Authority with respect to goods stored

[1] [2015] EWHC 1989 (Comm), [3].
[2] [2015] EWHC 1989 (Comm), [13].

in this facility was unclear,[3] but the court found that the terminal was a 'dedicated area … *operated for MSC* by [MSC Home] Terminal NV'.[4] The codes were communicated to Carjo Trans on the same day. When Carjo Trans went to collect the containers on 27 June 2012, two of the three containers were found to be missing. It was common ground between the parties that they were '"delivered to unauthorised persons"'.[5]

Glencore claimed damages for breach of contract, bailment and conversion of cargo against MSC, without pursuing a claim against the second defendant. There was no dispute about Glencore's title to sue and damages were agreed, subject to liability at $1,109,364.78. MSC contended either that (A) it handled the cargo in accordance with (i) the express terms of the bill of lading properly interpreted or (ii) an implied term that permitted use of the ERS or (iii) an agreement varying the bill's original terms, or that (B) Glencore was estopped from disputing that MSC was entitled to act as it did because of its pattern of previous dealings with Steinweg.

1.2 The Electronic Release System (ERS)

The ERS was introduced in Antwerp with effect from the start of 2011. Upon presentation of a bill of lading and payment of due freight and other charges, the holder of the bill would receive a release note containing a pin code, sent by the carrier to a designated email address. Pin codes were automatically generated and corresponded with a code stored under encryption in the Antwerp Port Authority's (Alfaport's) database. By resolution of 3 September 2010 Alfaport approved two sets of "model terms": a "model covenant between the terminal operator and the shipping company or its ship's agent for the electronic release of containers in the Port of Antwerp" (the "operator's covenant" applicable, where adopted, between carrier and terminal operator) and a "model covenant between the shipping company or its ship's agent and forwarder for the electronic release of containers in the Port of Antwerp" (the "forwarder's covenant" applicable, where adopted, between the bill of lading holder and the carrier). It is worth reproducing here the text of Articles 1 and 2 of the operator's covenant (materially identical to that of Articles 2 and 3 of the forwarder's covenant), as reproduced in Smith J's judgement:

> Article. 1: Obligatory use of the electronic release procedure
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> For the purpose of delivering full import containers, the parties hereby agree only to use an electronic release procedure in which:
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> 1) the container is *released* by the shipping company or its ship's agent, to the consignee or the latter's representative, by communicating an electronic release code generated individually for each container, which is also communicated to the terminal operator;

[3] [2015] EWHC 1989 (Comm), [18].
[4] [2015] EWHC 1989 (Comm), [12]. Emphasis added.
[5] [2015] EWHC 1989 (Comm), [2].

> 2) *delivery* of the container by the freight handler to the consignee or the latter's representative can only be made once the latter has entered the container number together with the corresponding release code mentioned under (1) above in the terminal operator's ICT system.
>
> The release procedure mentioned in the first paragraph is governed by this covenant. …
>
> Article 2: Exclusion of other procedures and codes
>
> The release procedure mentioned in art. 1 replaces all other release procedures previously used by the parties.
>
> No right of delivery may be conferred by any codes or references other than the release code mentioned in art. 1, such as the booking number.[6]

The text of the model covenants therefore suggests that, where the model covenants were adopted:

- By communicating the electronic release code to the consignee (and the terminal operator) the carrier "released" the container to the consignee;
- Physical "delivery" of the container to the consignee or its representative was subject to the latter entering the container number together with the code;
- The release procedure described was exclusive of any other procedure for the delivery of cargo where adopted and no delivery could take place without the pin codes.

In addition to the above, both the model covenants provided that the "release" could expire or could be withdrawn by the carrier, or be cancelled on the orders of the competent authority, in which case the Terminal Operator would not deliver the container (Article 4 of the operator's covenant and articles 3 and 4 of the appendix to the forwarder's covenant that dealt with "Conditions for the electronic release of containers in the Port of Antwerp").[7] The consignee would in this case be left to its remedies against the carrier.[8] Article 1 of the operator's covenant further provided that 'these conditions apply without prejudice to the applicable legal and contractual provisions governing liability for loss and damage to cargo.'[9]

The system was available to be voluntarily adopted by carriers who wished to adopt it. MSC Belgium was among those who decided to adopt it, however there is no evidence that it entered into any agreements based on either of the model covenants (though the

[6] [2015] EWHC 1989 (Comm), [6]. Emphasis added.
[7] [2015] EWHC 1989 (Comm), [7].
[8] [2015] EWHC 1989 (Comm), [8].
[9] [2015] EWHC 1989 (Comm), [7].

court inferred that it operated the ERS broadly as the covenants contemplated).[10] In January 2011 MSC Belgium emailed Steinweg to inform them that it would no longer work with delivery orders but use the ERS instead. It requested an email address from Steinweg to which pin codes would be sent and Steinweg provided one. This was a "generic address" to which "everyone" had access, everyone meaning all Steinweg's forwarding operators, some 15 to 20 employees.[11]

1.3 The parties' relationships

Steinweg was Glencore's exclusive agent at Antwerp for handling cobalt shipments. There was no formal contract between Steinweg and Glencore, however the judge found that on the basis of communications between the parties, the Belgian Freight Forwarders – Standard Trading Conditions (the "BFF conditions") and the General Conditions for the Handling of Goods and related activities in the port of Antwerp applied and that 'Steinweg's task was to arrange that goods consigned to Glencore were duly delivered at Antwerp and it was entitled, and authorised by Glencore, to adopt any proper procedures to do so.'[12] At the end of each year Steinweg would send Glencore its proposed tariffs for the following year and the business between the parties would be conducted on the basis of these rates, which would include a charge per "delivery order". This charge was of EUR10 in 2011 and 2012.

MSC carried 69 cobalt shipments shipped by Glencore to Antwerp under bills of lading on materially similar terms to those in the bill of lading in dispute between January 2011 and June 2012. Shortly before a vessel arrived at Antwerp, MSC would send Steinweg an "Arrival Notice" which gave her estimated time of arrival which included the following note: 'Please note containers will only be released against pincode'. In each case Steinweg acted for Glencore in presenting the original bill of lading, signed and stamped by Glencore or Steinweg or both, to MSC or MSC Belgium, and in paying freight and charges. Following this MSC would send Steinweg an electronic document headed "Release Note" which gave a pin code or codes for release of the goods and stated the period of validity of the code(s) (usually one month from discharge). The following "Clauses and conditions governing subject receipt note" would appear in each case:

- All terms and conditions contained in the MSC bill of lading concerned are applicable to subject release note. The addressee of subject release note expressly confirms to have knowledge to these terms and conditions and to accept them unconditionally.

- *This release note is subject to the terms and conditions contained in the Resolution by Alfaport Antwerp dated 3rd of September 2010 concerning electronic release of containers in the port of Antwerp*. The text of this

[10] [2015] EWHC 1989 (Comm), [10].
[11] [2015] EWHC 1989 (Comm), [9].
[12] [2015] EWHC 1989 (Comm), [11].

> Resolution is available on our website…. The addressee of this release note expressly confirms to have knowledge of these terms and conditions and to accept them unconditionally.
>
> - *Discharge of the cargo will constitute due delivery of the cargo*. After discharge the cargo will remain on the quay *at risk and at the expense of the cargo*, without any responsibility of the shipping agent or the shipping company/carrier.[13]

For all 69 shipments Steinweg used a pin code to take delivery of the goods from the MSC Terminal. The court however found that Glencore, its principal, did not know that MSC used an Electronic Release System in Antwerp. There was no evidence of Glencore having been informed of it by Steinweg or that it was sent copies of the arrival notices or release notes. The EUR10 charges levied by Steinweg were described as being for "delivery orders".[14]

Following the loss of the two containers in dispute, MSC and Steinweg adjusted the arrangements for releasing containers: containers were to be released only to a driver who not only entered the correct pin code but also was from a specific transport company, who provided identification and who was using a vehicle with a specified registration number.

2. The court's reasoning: the bill of lading contract and its interpretation

2.1 Was the pin code a "delivery order" as required by the bill of lading?

MRC's first contention was that it had handled the cargo in accordance with the terms of the bill of lading properly interpreted. The bill of lading required either delivery of the goods upon its presentation or substitution of a delivery order for the bill of lading. In line with this contention MSC argued not (in spite of the wording of the release note) that it had delivered the goods[15] but that the pin code constituted a "delivery order". The court interpreted the expression used in the bill of lading to be referring to a "ship's delivery order" and found that the pin code did not constitute such a document, as such a document would have contained an undertaking given by the carrier to a person identified in it to deliver the goods to which it relates to that person, and the pin codes did not carry any such undertaking. The court also rejected the argument that the expression "delivery order" as used in the bill of lading should be interpreted more widely, for two reasons. First of all it was

[13] [2015] EWHC 1989 (Comm), [12]. Emphasis added.

[14] [2015] EWHC 1989 (Comm), [14].

[15] Indeed had it attempted to argue this it would have been unsuccessful. See [2015] EWHC 1989 (Comm), [17]-[18] where among other things the court noted (at [18]) that in accordance with the resolution of 3rd September 2010, 'MSC Belgium had at all times the power, albeit not the contractual right as against Glencore or Steinweg, to invalidate' the pincodes, therefore it had not 'divest[ed] itself of all powers to control any physical dealing in the goods.' [2015] EWHC 1989 (Comm), [18].

> 'improbable that [a shipper] would agree to a term whereby the holder of the bill of lading might surrender its rights under it against the carrier without receiving in return either the goods themselves or the benefit of a substitute undertaking from the carrier. There is no need to interpret the [bill of lading] so as to have this improbable effect.'[16]

MRC did not submit that by providing the release note and pin codes to Steinweg it undertook that it would deliver the cargo to them. Indeed its counsel submitted that MRC gave no undertaking at all with regard to delivery or that if it gave any undertaking, it was only that the goods would be delivered to whoever presented the right codes.[17]

Secondly, the pattern of previous dealings between the parties should not be taken into account for the purposes of determining the meaning of the term "delivery order" in the bill of lading as, 'although in principle the factual background can sometimes inform the interpretation of a negotiable document of title, there is an obvious difficulty about a document having "different meanings for different people according to the knowledge of the background"….'[18]

The court also thought relevant to this decision, its finding of fact that 'Glencore did not know until the loss that gives rise to this claim, and so did not know when it entered into the [bill of lading], that MSC was using the ERS for cargo discharged at Antwerp'[19] and that, though Steinweg, its agent, did of course know, 'Steinweg was not Glencore's agent for the purpose of entering into bills of lading or making contracts for the carriage of goods, and I am not persuaded that its knowledge is relevant to determining the contractual intention evinced by Glencore when it made the bill of lading contract.'[20]

2.2 Was a term to be implied into the bill of lading that allowed the use of the pin code?

The court cited *Carver on Bills of Lading*, according to which while normally the carrier's obligation was not to deliver the goods except on production of the bill of lading, '[t]he general rule may, however, not apply where delivery without the bill is required or authorised by law at the port of discharge or by a custom prevailing there.'[21] However no reliance was made by MSC's counsel on any custom or practice at Antwerp

[16] [2015] EWHC 1989 (Comm), [19].
[17] [2015] EWHC 1989 (Comm), [25].
[18] [2015] EWHC 1989 (Comm), [22], citing Lord Hoffmann in *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749, 779. See also reference (ibid) to Lord Hoffmann's pronouncement in *The Starsin* [2003] UKHL 12, [76]: '"As it is common knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will usually also determine the meaning it would be given by any other reasonable person, including the court. The reasonable reader would not think that the bill of lading could have been intended to means one thing to the merchant or banker and something different to the lawyer or judge."'
[19] [2015] EWHC 1989 (Comm), [23].
[20] Ibid.
[21] *Carver on Bills of Lading* (3rd edn, 2012), [6-008], as cited in [2015] EWHC 1989 (Comm), [16].

(where in any case the use of the ERS was voluntary) and the argument that a term ought to be implied into the bill of lading was not pursued.[22] In any case, had it been pursued the court indicated that it would have been rejected, for three main reasons: first, the term which, it was suggested, should be implied[23] sat awkwardly with or even contradicted the express provision in the bill of lading.[24] Secondly, the argument that a term is to be implied into a document of title from a course of dealings between its original parties, faced the same objections as discussed under sub-heading 2.1 above. Finally, there was no proper reason to introduce a term that by providing the pin code MSC fulfilled its obligations (in contract and bailment) with regard to delivering the cargo.

2.3 Was the bill of lading contract varied?

MSC pleaded that its exchanges with Steinweg in January 2011 (notice that it would henceforth be using the ERS and sending pin codes to a designated email address chosen by Steinweg) varied the bill of lading contract so as to permit MSC to perform the delivery obligation simply by issuing the pin codes. The court did not accept this contention either, as the bill of lading was entered into *after* January 2011, and the pattern of dealings that followed the January 2011 exchange could not constitute a series of offers to vary the bill of lading contract on the part of MSC and acceptances of such offers by Steinweg, as at the time it received the emails with the pin codes, Steinweg 'had already paid freight and charges and surrendered the [bill of lading]'[25] and 'there is no evidence that Steinweg responded to the email sending the pin codes.'[26] In addition the court did not accept that Steinweg had authority as agent to vary the bill of lading contract by accepting the terms of the release note sent by MSC Belgium.[27] Smith J held that 'I can accept that Steinweg was impliedly authorised to use the ERS, but it does not follow that it was entitled to agree that, if it did so, MSC was to be regarded as having completed delivery of the cargo otherwise than in accordance with the bill of lading.'[28]

2.4 Was Steinweg (and Glencore as its principal) estopped from disputing that MSC was entitled to act as it did?

Smith J observed that the estoppel argument could not assist MSC as Glencore's complaint was not that an ERS system was being used but that the cargo had been delivered to someone other than it or its representative. The court held that:

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[22] [2015] EWHC 1989 (Comm), [16] and [26].

[23] Namely, a term that '"upon surrender of the bill of lading by the lawful holder, a carrier or its agent may provide an import pin code … (so that thereafter the recipient of the import pin code can present the import pin code to take delivery of containerised cargo, provided always that the import pin code matches the corresponding [electronic data interchange] pin code)"' [2015] EWHC 1989 (Comm), [26].

[24] [2015] EWHC 1989 (Comm), [27], citing Lord Hoffmann in Johnson v Unisys [2001] UKHL 13, [35].

[25] [2015] EWHC 1989 (Comm), [30].

[26] [2015] EWHC 1989 (Comm), [30].

[27] [2015] EWHC 1989 (Comm), [31].

[28] [2015] EWHC 1989 (Comm), [31].

> I can see no basis on which it could be said that Glencore represented, or so conducted itself as to let it be understood, that it was or would be content for the goods to be delivered to anyone who presented the correct pin code: still less did it make a sufficiently clear representation along these lines, or sufficiently indicate that it would be so content, as to give rise to an estoppel. The estoppel arguments are also answered by my findings about the limited knowledge that Glencore had about the use of the ERS.[29]

3. Decision

The court found that MSC was liable for breach of contract and bailment and gave judgment accordingly.

4. Comment

4.1 The contract and its interpretation

While Smith J was probably correct to interpret "delivery order" within the bill of lading to mean "ship's delivery order", and not to broaden artificially the meaning of the term to encompass an electronic message and pin code that did not contain an equivalent undertaking,[30] it must be borne in mind that not only are electronic processes being developed and used more widely in ports throughout the world, as part of a powerful push towards trade facilitation and the increase of efficiency in import and export procedures,[31] but efficient electronic alternatives to transport documents have in recent decades been developed and their use is increasing,[32] so much so that they are being referred to in standard terms being promulgated by the industry. A case in point is the Baltic and International Maritime Council (BIMCO)'s model clause on Electronic Bills of Lading (EBL clause) for use in its charterparties, adopted in 2014. Where this clause is adopted '[a]t the Charterers' option bills of lading, waybills and delivery orders … shall

[29] [2015] EWHC 1989 (Comm), [33].

[30] In this regard see *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146.

[31] The history of these developments now spans a number of decades. See United Nations Commission on Trade and Development (UNCTAD), *Electronic Data Interchanges Concerning Ports*, UNCTAD Monographs on Port Management No.11, Doc Ref. UNCTAD/SHIP/494(11), United Nations, New York 1993, available electronically at http://unctad.org/en/Docs/ship49411_en.pdf. See also UNCTAD, *Trade Facilitation Handbook Part II: Technical Notes on Essential Trade Facilitation Measures*, Doc. Ref. UNCTAD/SDTE/TLB/2005/2, United Nations, New York and Geneva, 2006, available electronically at http://unctad.org/en/Docs/sdtetlb20052_en.pdf.

[32] See M Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013), chapter 11.

be issued, signed and transmitted in electronic form with the same effect as their paper equivalent.'[33]

It is not therefore correct to dismiss the idea that delivery orders can be replaced by electronic records and processes, and it is submitted that it would be unfortunate indeed if this case were to be read in this way. Had the electronic alternative adopted provided the same rights to the consignee as a delivery order would have done, then it is submitted that the court might well have considered that MRC had complied with its obligations and issued a delivery order (although admittedly there might still have been the hurdle of proving that 'merchants and bankers' understood the term "delivery order" to include the electronic system being used).[34] Had this been the case, and in view of the fact that, as the court observed, 'it seems to me most likely that the loss occurred after someone had learned of the codes and used them to steal the containers', the question for the court to answer would then have been: how was the risk of fraud allocated as between the users of the electronic system? Would it be equivalent to the risk of delivering against a (i) stolen (but genuine) delivery order or (ii) forged delivery order? The simplest way to introduce predictability in this situation is of course for the risk to be allocated in advance by the adoption of appropriate contractual terms.

The lesson to be drawn is that system providers (in this case Antwerp Port Authority (or Alfaport)) and users (in this case MSC as carriers and Steinweg as consignees) should make clear their intentions both with regard to the functions to be performed by the newly developed electronic process that is substituting paper documents, as well as with regard to the risk-allocation to be applied in case of unauthorised access and/or misappropriation and misuse of data. This was not properly done in this case. First, as was emphasized in Smith J's judgment the bill of lading did not make any reference to any alternative electronic process to be used instead of a delivery order. No evidence was brought regarding "merchants and bankers[']"[35] understanding of the release note and pin codes but it is very doubtful that they would have been generally understood as constituting a delivery order as they did not carry the undertaking that would have been found in such a document. Secondly, the way in which use of the system affected the obligations and liabilities that would otherwise have applied as between its users was unclear. The model covenants that had been drafted were merely voluntary and users could transact using the system without them (or alternative terms) having been agreed. Further, the resolution whereby the covenants had been adopted was referred to in the release note which stated that it was subject to the 'the terms and conditions contained in the Resolution … dated 3rd of September 2010.' This led to a contradiction within the release note: the note expressly stated that '*discharge of the cargo will constitute due delivery of the cargo*' but as seen above[36] (and as the court noted)[37] the September Resolution terms and conditions distinguished clearly between "release" and "delivery"

[33] Baltic and International Maritime Council (BIMCO), *Electronic Bills of Lading Clause for Charterparties*, BIMCO Special Circular No. 3, 20th May 2014 (hereinafter "Special Circular").
[34] See [2015] EWHC 1989 (Comm), [22].
[35] [2015] EWHC 1989 (Comm), [22], citing Lord Hoffmann in *The Starsin* [2003] UKHL 12, [76].
[36] Sub-heading 1.2.
[37] [2015] EWHC 1989 (Comm), [24].

of the cargo and indicated that "delivery" took place to the consignee or its representative when the latter had entered the correct pin code. In this context, it is highly doubtful whether the statement in the release note that '[a]fter discharge the cargo will remain on the quay at risk and at the expense of the cargo…' could effectively change the allocation of the risk from that which had been agreed in the bill of lading contract (particularly as the court found that the release note had not varied this contract).

It is therefore fair to state that there was not effective re-allocation of the risk between MRC and Glencore, and that any electronic system set up to substitute procedures based on paper documents needs to be more carefully designed if it is effectively to establish with predictability the allocation of risk between the parties.

4.2 The Agency Question

As noted above the court addressed the questions of what Steinweg was authorized to do as agent for Glencore, what knowledge Glencore actually had and whether Steinweg's knowledge could be imputed to it, but it is submitted that an important aspect of the agency question was in fact not addressed by this case. Specifically, it was not argued (and therefore not considered by the court) whether by its behaviour Steinweg (with Glencore's authority) might have waived MSC's breach of the bill of lading contract at the time it surrendered the bill of lading, by not insisting on the issue of a delivery order in its place. This point seems to me to be at least arguable.[38] MSC had after all successfully operated the ERS system in place of delivery orders for eighteen months only to find, as soon as things went wrong, that it was in breach of contract for not issuing a delivery order every single time it did so. So in effect it had breached similar contracts 69 times without having been held to task. Indeed, not only had Steinweg for years 'acted as Glencore's agent to present … original bill[s] of lading to MSC or MSC Belgium'[39] but had for 69 consecutive shipments surrendered such bills of lading without insisting upon a delivery order. This argument would not have fallen at the hurdle of having to prove that Steinweg had the authority (actual or apparent) to vary contracts made by Glencore (which the court found it did not).[40] MSC would only have needed to show that Steinweg had the authority, on behalf of Glencore, to waive a breach of contract. *The Happy Day* shows that waiver by an agent may be successfully argued even where contract variation is not,[41] and it is a pity that this course was not attempted as, while the result would not necessarily have been any different had this point been argued,[42] it would have given the court the opportunity to consider the agency question more fully.

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[38] In this regard, see *The Happy Day* [2003] 1 CLC 137, [64]-[78].

[39] [2015] EWHC 1989 (Comm), [12].

[40] [2015] EWHC 1989 (Comm), [23] and [31].

[41] *The Happy Day* [2003] 1 CLC 137, [61]-[78].

[42] The risk of misappropriation of the goods might still have been found to lie with MSC even if it was found that its breach (in not issuing a deliver order) had been waived.

4.3 Electronic alternatives to transport documents

In this section I will be asking, what features would have needed to be present in the ERS for it to be able to replicate the functions of a procedure based on delivery orders in accordance with the Rotterdam Rules?[43]

Under the Rotterdam Rules, the carrier's delivery obligation is tied to what is known as the "right of control". Under Article 1 of the Rules, "right of control" of the goods is defined as the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10,[44] and "controlling party" is defined as the person that pursuant to article 51 is entitled to exercise the right of control.[45] Under article 50 the right of control includes 'the right to obtain delivery of the goods at a scheduled port of call'. Thus the right clearly attaches to the goods themselves and not to a pin code or number in place of the goods.[46] The identification of the controlling party is dealt with under article 51, and depends on the kind of documentation that has been issued to cover the carriage. Two routes are available where paperless methods are being used to transact.

The first involves the issuance of what under the Rules is termed a "negotiable electronic transport record" defined as

> … an electronic transport record:[47]
> (*a*) that indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and
> (*b*) the use of which meets the requirements of article 9, paragraph 1.[48]

This route is an option for issuing a ship's delivery order as where, under a ship's delivery order, the carrier undertakes to deliver to a named person or his order, the ship's delivery order is deemed to be transferable.[49] Article 51(4)(c) provides that 'when a negotiable electronic transport record is issued … in order to exercise the right of control,

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[43] *United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea* (New York, 2008) (the Rotterdam Rules).

[44] Rotterdam Rules art 1(12).

[45] Rotterdam Rules art 1(13).

[46] See also Rotterdam Rules art 47.

[47] This is defined by Rotterdam Rules Article 1(18) as 'information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (*a*) evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (*b*) evidences or contains a contract of carriage.'

[48] Rotterdam Rules art 1(19).

[49] See M Bridge (ed), *Benjamin's Sale of Goods* (9th edn with first supplement, Sweet & Maxwell, 2015), para 18-219.

the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.' "Holder" is in turn defined as 'the person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.'[50] The issuance of a negotiable electronic transport record is defined as the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.[51] Similarly, the "transfer" of a negotiable electronic transport record is defined as the transfer of exclusive control over the record.[52] Finally under Article 9(1) the use of negotiable electronic transport records requires that certain procedures be put in place between the parties to the contract providing, among other things, for 'the manner in which the holder is able to demonstrate that it is the holder.'

It is submitted that the ETR in use in the *Glencore* case would not have met these requirements. First of all it did not contain the required wording indicating that the goods "have been consigned to the order of the shipper or to the order of the consignee". This would have constituted an undertaking to deliver to such persons or their indorsees, which, as we have seen, was absent. Secondly, the release note was not issued in such a way as to be subject to exclusive control from its creation until it ceased to have any effect or validity. It was merely issued in the form of an email that could easily have been forwarded to countless recipients, with the information contained in it being under the control of all of them simultaneously. The ETR system in dispute therefore would have needed considerable adaptation in order to comply with the requirements applicable to the first route towards identifying the controlling party by paperless means under the Rotterdam Rules.

The second route bypasses the question of negotiability or otherwise of the electronic records relating to the contract. Article 51(1) provides that the following rules are to apply in the *absence* of either (i) a negotiable transport (paper) document, or (ii) a non-negotiable transport (paper) document requiring surrender or (iii) a negotiable electronic transport record:

> (*a*) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;
> (*b*) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and
> (*c*) The controlling party shall properly identify itself when it exercises the right of control.

[50] Rotterdam Rules art 1(10)(b).
[51] Rotterdam Rules art 1(21).
[52] Rotterdam Rules art 1(22).

Whether or not the ERS in dispute would have complied with these requirements would have depended on the court's interpretation of the expression "properly identify itself" in paragraph (c). What constitutes "proper identification" can of course be contractually agreed by the parties, however here the statements regarding the use of the pin codes did not state that they would be the method for identifying the person entitled to delivery, only that they were required if delivery was to take place. In the absence of such explicit agreement, the question arises whether simply entering the pin code would constitute "proper identification". In this regard it is submitted that the arrangements subsequently made between MRC and Steinweg were much more in line with the concept of "proper identification". As indicated under heading 1.3, following the loss, containers were to be released only to a driver who (i) entered the correct pin code (ii) was from a specific transport company, (iii) provided identification and (iv) was using a vehicle with a specified registration number. These procedures are also in line with the decision in *The Bremen Max*.[53]

5. Concluding remarks

Glencore v MSC is an unprecedented case and a useful reference for anyone wishing to design and adopt successful paperless systems for dealing with maritime cargo. Such systems are potentially hugely beneficial in terms of speeding up cargo processing and reducing costly paperwork and delays, however they will inevitably carry risks that will need to be in the first place minimised (by building secure electronic systems) in the second place mitigated (by supplementing such systems with external safeguards, such as layered identification procedures) and, for those risks that cannot be eliminated, in the third place, appropriately allocated and insured against.

The case is currently under appeal and whether any further insights may be gleaned from it after the appeal has been decided remains to be seen.

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[53] [2008] EWHC 2755 (Comm), [34]-[35].