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Electronic Release System and Delivery of Cargo - MSC Mediterranean Shipping Company SA v Glencore International AG

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The English Court of Appeal has recently considered whether the provision of release codes as part of an electronic release system constituted delivery of the cargo to the receiver in accordance with the contract of carriage.

Glencore, the shipper, and claimant at first instance, made seventy shipments of cobalt briquettes between January 2011 and June 2012 to Antwerp, which were carried under negotiable MSC bills of lading. This case concerned the seventieth shipment, which consisted of three containers. After discharge at Antwerp, two of the three containers disappeared (apparently misappropriated by "unauthorised persons" who had succeeded in penetrating the port's electronic release system) before the notify party, who was Glencore's agent, had collected the cargo.



The bill of lading contained the 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*".

The port had in place an electronic release system, which was not mandatory and not used by all carriers operating at the port. The system involved the provision of a computer-generated release pin code, contained within an electronic 'Release Note', which was sent by email to receivers of cargo on presentation of the bill of lading and payment of any applicable dues. The system required the receiver of cargo (or his haulier/agent) to enter the pin code on arrival at the cargo holding terminal, in exchange for which the cargo would be released. No paper delivery order or release note was issued. The electronic release system was used for all seventy of Glencore's cobalt shipments.

Glencore claimed damages against MSC for breach of contract, conversion and in bailment. Andrew Smith J, at first instance, found in favour of Glencore and held that MSC was liable for misdelivery, and that, whether or not coupled with the pin code, the Release Note did not amount to a delivery order as required by the bill of lading, which must have been referring to a ship's delivery order within the meaning of section 1(4) of the Carriage of Goods by Sea Act 1992.¹

MSC appealed. Five grounds of appeal were advanced:

Ground 1 – pin codes as (symbolic) delivery

MSC submitted that the provision of the pin codes to Glencore's agents amounted in law to delivery of the goods. It was said that delivery can be effected by a symbolic act, the classic example of which is the giving of the keys to a warehouse where the goods are held, and that provision of the pin codes was the modern equivalent. The Court of Appeal cited with approval the judgment of Diplock J in *Barclays v Customs & Excise* [1962] where it was said that in order to deliver the cargo the carrier must divest itself of "all powers to control any physical dealing with the goods". In the present case, the Court of Appeal held that provision of the pin codes was insufficient to discharge the carrier's obligation to deliver the goods.

Ground 2 – the Release Note and pin codes as a Delivery Order

The alternative basis contemplated in the contract by which the carrier could discharge its obligations, other than actual delivery, was by providing a Delivery Order. MSC submitted that the electronic Release Note containing the pin code constituted a Delivery Order in accordance with the bill of lading. The Court of Appeal agreed with Andrew Smith J that the term Delivery Order should have the same meaning as a ship's delivery order, as defined in the Carriage of Goods by Sea Act 1992 ("COGSA 1992"), the key attribute of which is that it contains a substitute undertaking by the carrier to deliver the goods to the person identified in it. The Release Note did no more than instruct the Terminal to deliver against entry of the pin codes. The provision of the Release Note containing the pin code did not constitute provision of a Delivery Order in accordance with the bill of lading.

Ground 3 – Release Note and pin codes as ship's delivery order

MSC further submitted that the Release Note containing the pin codes was, on proper analysis, a ship's delivery order within the definition in COGSA 1992. The Court of Appeal held that it was not. A delivery order, both within the COGSA 1992 meaning and (in light of the decision on Ground 2 in the appeal) within the bill of lading definition, must contain an undertaking by the carrier to deliver the goods to the person identified in it. The Release Note could not be treated as providing any such undertaking by MSC to deliver to Glencore (or its agent). Further, it was held that no trade custom varying the general position was applicable simply because the electronic release system had been in place for some time.

Ground 4 – estoppel

MSC argued that Glencore was estopped from contending that delivery of the cargo on presentation of the pin code was a breach of contract and/or duty. It was said that the history of sixty-nine previous shipments using the electronic release system established that provision of pin codes was an acceptable alternative to a Delivery Order. The Court of Appeal upheld Andrew Smith J's view that there was no estoppel. No representation, let alone a clear one (as required to establish estoppel), was made by Glencore that delivery otherwise than to Glencore would be acceptable, provided that it was made to the first presenter of the codes. The fact that cargoes had been delivered to Glencore after presentation of pin codes many times said nothing about what the position would be if they were not.

Ground 5 – causation

MSC also sought to adduce new evidence and to have the case remitted to the first instance Court on a question of causation. The Court of Appeal refused the application because it was too late to raise the issue and because it was not convinced the new evidence would affect the result of the case.

The appeal was therefore dismissed.

The case highlights the need for the terms in parties' contracts to cater for the operating practice in fact in use by the parties. Changes in practice resulting from technological innovations require parties to consider updating their standard contracts to protect themselves. The case also demonstrates the potential vulnerabilities to criminal interference of electronic release systems for cargo.

4. References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

- a. is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and
- b. is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.



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