# Management and Organisation in a Digitalised Maritime Sector

# 8

# Surrender, Release and Digital PIN Codes

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## I. Introduction

Slowly, but inevitably, the maritime world is making its way towards a paperless future.[1] Bills of lading, sea waybills, (ship's) delivery orders, and most likely all paper documents are ultimately going to be replaced by electronic equivalents.[2] One of these equivalents is already widely used: the digital PIN code for the collection of containers from the terminal in the port of discharge.[3]

An electronic release system basically operates as follows: when a ship arrives at the port of discharge, the carrier notifies the designated receiver, the consignee or notify party, who is in practice often a local forwarding agent acting on behalf of its principal. The forwarder surrenders one original bill of lading to the local ship's agent and, in return, it receives a digital PIN code that gives access to the terminal where the containers have been stored after discharge.

Obviously, such a system is not 100 per cent waterproof. Digital PIN codes can become lost and can be forgotten. But they can also be intercepted, for instance by a third party with bad intentions, and this is what must have happened in the port of Antwerp in the course of 2012.

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[1] See, Chacón (ch 10).

[2] See Girvin and Ong (ch 9).

[3] Digital PIN codes are for instance in use in the port of Jurong (Singapore), Mussalo (Finland), Rotterdam (The Netherlands), Westports (Malaysia) and, of course, Antwerp (Belgium). In fact, in view of the risks inherent to the use of digital PIN codes, the Port of Rotterdam started a pilot in the summer of 2020 whereby the PIN code is replaced by a digital signal. See www.offshore-energy.biz/port-of-rotterdam-launching-a-blockchain-pilot-project-on-pin-free-container-handling.

## II. *Glencore International AG v MSC Mediterranean Shipping Co SA*

On 24 June 2012,[4] the *MSC Katrina* arrived at the port of Antwerp carrying three containers with cobalt briquettes, completing a voyage that had originated with the *MSC Eugenia* in Fremantle (Australia). MSC had issued a bill of lading for the carriage of the cobalt briquettes. This bill of lading was made out 'to order' and named Glencore as the shipper and Steinweg as the notify party. The face of the bill of lading furthermore contained the following provision:

> 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 (together with outstanding Freight) in exchange for the Goods or a Delivery Order.

Steinweg had been Glencore's regular agent in Antwerp for more than 25 years,[5] and it handled this particular shipment as well. Glencore, therefore, sent two originals of the bill of lading to Steinweg with the instruction to arrange for the delivery of goods,[6] and upon arrival of the ship in Antwerp Steinweg surrendered one original of the bill of lading to MSC's Belgian office.

Prior to 2010, the presentation of an original bill of lading by its lawful holder would have caused MSC to issue a so-called 'laat volgen',[7] a one-page document that contains the carrier's instruction to the terminal to release the goods to a specified receiver:[8]

> This is a document by which the sea carrier (or his agent) instructs the terminal to deliver the goods to the cargo-interested party that has surrendered one original of

[4] *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep 508. The case is one of few on digital PIN codes so far, and therefore very welcome in its exploration of these still somewhat unchartered waters: see M Goldby, 'What is Needed to Get Rid of Paper? A New Look at Delivery Orders' (2015) 21 *JIML* 339; M Song and M Tsimplis, 'Innovation and the Law: Legacy v Efficiency and Optimisation' (2017) 17 *Shipping & Trade Law* 11; A Tettenborn, 'Bills of Lading and Electronic Misdelivery' [2017] *LMCLQ* 479; S Rainey, 'Pinning Down Delivery: *Glencore v MSC* and the Use of PIN Codes to Effect Delivery' in B Soyer and A Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (London, Informa, 2019) 47.

[5] Albeit without a specific contract. Apparently, Steinweg would inform Glencore of the rates for the coming year and for the rest their relationship was governed by the forwarder friendly Belgian Freight Forwarders – Standard Trading Conditions: at www.commodycentre.com/assets/b-general-conditions-final.pdf.

[6] The judgment at first instance is not very clear on this point. In his overview of the relevant facts, the judge initially talks about 'copies' instead of originals: 'Glencore sent Steinweg two copies of it and other documentation': see *Glencore* (n 5) [13]. His remark in the same paragraph clarifies that these 'copies' must really have been originals: 'Steinweg lodged with MSC Belgium one of the bills of lading, signed and stamped by itself and Glencore, and paid the handling charges'. This also makes sense, of course, as MSC would never have accepted a mere copy 'in exchange for the Goods or a Delivery Order': see also *Mitsui OSK Lines (Thailand) Co Ltd v Jack Fair Pty Ltd* [2015] FCCA 558, [2015] 1 Lloyd's Rep Plus 55; Sir G Treitel and FMB Reynolds, *Carver on Bills of Lading*, 4th edn (London, Sweet & Maxwell, 2017) [6-075], fn 636.

[7] The Dutch words *laat volgen* (in French: *laissez suivre*) would literally, and as such rather awkwardly, translate as 'let follow'.

[8] E van Hooydonk, *Proeve van het Belgisch Scheepvaartwetboek (privaatrecht), Scheepsagentuur en goederenbehandeling, Zevende Blauwdruk over de herziening van het Belgische scheepvaartrecht*

the bill of lading to the ship's agent. With the 'laat volgen' the receiver can collect the discharged goods in the port. By signing the 'laat volgen', the receiver confirms receipt of the goods and discharges the carrier.

In practice, the receiver was usually a local haulier acting upon instructions of Steinweg. The driver would present the *laat volgen* to the MSC terminal in order to collect the goods. When everything was in order and the goods had been released, the driver would sign off on the document itself in order to confirm the receipt of the goods.[9]

During the course of 2010, however, the Antwerp Port Authority began to facilitate the use of a digital equivalent, an electronic release system (ERS). The operation of the ERS was described in a 'model covenant' between the carrier and the terminal. Article 1 of this covenant outlined the system:

(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;

(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 use of the ERS was not in any way imposed by the Antwerp Port Authority, but interested carriers could opt in, and that is exactly what (the Belgian office of) MSC did. MSC informed the Antwerp forwarding community, including Steinweg of course, that it would 'no longer work with Delivery order (Laatvolgen)',[10] and that it would be using the ERS as from January 2011 instead.[11]

This new *modus operandi* meant that MSC would send Steinweg digital PIN codes on a regular basis and it asked Steinweg for an email address. Steinweg indicated that its general email address would probably be best suited for this purpose as all its relevant (15–20) employees would then have access to the same information at the same time.[12] Clearly, MSC did not have any problem with this as it went on to use this email address for the next one and a half years.

Once the ERS was operational, the delivery procedure for the containers with cobalt briquettes went as follows: Steinweg received the bills of lading from Glencore and presented them to MSC while paying the freight and other charges. In return, MSC sent an electronic Release Note with the digital PIN codes to this

(Antwerp, Commissie Maritiem Recht, 2012) 118. This work contains the most recent studies underlying the new Belgium maritime code, see www.zeerecht.be (2012) 118.

[9] Since this description may be a bit abstract, see the sample *laat volgen* (courtesy MH Claringbould) in the appendix to this chapter.

[10] The wording of this notification suggests that a *laat volgen* equals a delivery order, at least in the perception of MSC.

[11] There was also a second 'model covenant', namely to regulate the relation between the carrier and the forwarder, but it was never discussed, let alone concluded, between MSC and Steinweg.

[12] This was also the address to which MSC normally sent its arrival notices.

general email address, and Steinweg then forwarded the codes to a local haulier with the instruction to collect the corresponding containers from the MSC terminal.

This release note came with terms and conditions. First, it stipulated that the PIN codes were only valid for a limited period of time, 'usually of about a month from discharge',[13] but the release note also contained (amongst others) the following conditions:[14]

> 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.
>
> 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.

Between January 2011 and June 2012 no less than 69 shipments of cobalt briquettes were handled under the new procedure, and this worked perfectly well on each occasion. And then the *MSC Katrina* arrived in Antwerp in June 2012. In line with the procedure followed until then, Steinweg presented the bill of lading, received the release note with the PIN codes by email and forwarded these to a local haulier named Carjo Trans for the collection of the containers.[15] When Carjo Trans arrived at the gate of the MSC terminal, however, it was informed that two of the three containers had already been collected. Apparently, someone else had entered the correct PIN codes, gained access to the containers, taken them from the terminal and disappeared.

## III. An Original Bill of Lading in Exchange for the Goods or a Delivery Order

Glencore sued MSC for misdelivery, and its position was very straightforward. An original bill of lading had been surrendered, but the delivery of the goods to its lawful holder had not followed. MSC was therefore liable under the contract of carriage and in bailment since the carrier must deliver the goods against the presentation of an original bill of lading. This is correct, of course, and this presentation rule has often been confirmed over the years.[16]

[13] *Glencore* (n 4) [12].

[14] ibid. The release note furthermore stipulated that it was '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'.

[15] The procedure was sharpened afterwards, and the containers from then onwards could only be released to a specific driver with a specific transport company, who could identify himself and drove a vehicle with a specific registration number: *Glencore* (n 4) [15].

[16] *The Stettin* (1889) 14 PD 142; *Carlberg v Wemyss* (1915) SC 616; *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576 (PC); *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963]

There is another side to this presentation rule as well, one that can be traced back to the sixteenth century.[17] Before that time, there really was no need for any presentation of original bills of lading. The shipper of the goods was also the owner of those goods, and he would travel together with his goods so that he could deliver them to his buyer at the place of destination or make alternative arrangements if that were necessary. Besides, these medieval (rudimentary straight) bills of lading could not be transferred to third parties, and this made it practically impossible for the carrier to deliver the goods to the wrong consignee.

This changed at the end of the Middle Ages. Instead of travelling together with their goods, merchants started to instruct agents and factors in the port of discharge to deal with the goods or their behalf.[18] As a result of this development the identity of the consignee was not always a given, and the bills of lading had to adapt to this new commercial reality as well. The bills of lading would no longer just mention the name of consignee, but they would also allow for the delivery of the goods to his assigns.[19] Over the years, the named consignee 'or his assigns' evolved into the named consignee 'or order or assigns', and ultimately into the named consignee 'or order', or just 'to order'. These bills of lading were easily transferable from one consignee to the next by endorsement and delivery.[20]

Depending on the local custom in the port of loading a bill of lading would usually be issued in three or four originals.[21] The issuance of several originals in combination with their easy transferability could, however, complicate the delivery of goods in the port of discharge. With several original documents in circulation, all of them easily transferable from one consignee to the next, a carrier could find itself confronted with more than one consignee demanding the delivery of the goods in the port of discharge.

At this point, the first rather basic attestation clauses started to appear on bills of lading. These clauses did not explicitly prescribe the surrender of one original

1 Lloyd's Rep 81; *SA Sucre Export v Northern River Shipping Ltd (The Sormovskiy 3068)* [1994] 2 Lloyd's Rep 266; *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 (CA); *Motis Exports Ltd v Dampskibsselskabet AF 1912, A/S* [2000] 1 Lloyd's Rep 211 (CA); *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2013] EWHC 808 (Comm), [2013] 2 Lloyd's Rep 338.

[17] For the development of the bill of lading, see CB McLaughlin, 'The Evolution of the Ocean Bill of Lading' (1926) 35 *Yale Law Journal* 548, 551; WP Bennett, *The History and Present Position of the Bill of Lading as a Document of Title* (Cambridge, Cambridge University Press, 1914); M Bools *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, LLP, 1997) 2; SF du Toit, 'The Evolution of the Bill of Lading' (2005) 11 *Fundamina* 16; A Polak, *Historisch-juridisch onderzoek naar den aard van het cognoscement* (Amsterdam, Gebroeders Binger, 1865) 26.

[18] Bennett (ibid) 12.

[19] *The Andrewe* (1544): RG Marsden, *Select Pleas in the Court of Admiralty*, vol 1 (London, Selden Society, 1894) 126.

[20] This formality had been borrowed from the medieval custom of merchants endorsing their bills of exchange and in due course this became a recognised custom for the transfer of bills of lading as well: Bennett, *Bill of Lading as a Document of Title* (1914) 11; *Lickbarrow v Mason* (1794) 5 TR 683, 686, 101 ER 380, 382; *Goodwin v Robarts* (1875) LR 10 Exch 337, (1876) 1 App Cas 476 (HL).

[21] But in fact any number of originals is possible: see, eg, *Australia Capital Financial Management Pty Ltd v Freight Solutions (Vic) Pty Ltd* [2017] NSWDC 279, where there were eight originals.

bill of lading, but they did protect the carrier to the extent that it could no longer be pursued by subsequent consignees once it had delivered the goods to the first consignee. The delivery to the first consignee ensured that any other original bills of lading in circulation had become void. The bill of lading for iron shipped from Bilbao to London in *The Mary Martyn* is one of the oldest examples of such a clause:[22] 'In wytness of the truythe I the sayde master or the purser for me have firmyd iij bylls of the one tenor the one complyed with and fulfylled the other to stand voyd'.[23] The protection of the carrier against misdelivery claims was the primary objective of the clause, and the courts initially also applied the clause in this (strict) way. The carrier was perfectly free to deliver the goods to any holder of an original bill of lading and its responsibilities ended then and there. Lee CJ held, for instance, in *Fearon v Bowers*:[24]

> That according to usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done.

This unconditional carrier friendly approach was abandoned in 1882. The House of Lords held that the carrier cannot just deliver the goods to any holder when it is (or could have been aware) of other endorsements of the bill of lading as 'it puts too much power in the master's hands'.[25] Cottam & Co (or their assigns) were the consignees of a shipment of sugar, carried on the *Mary Jones* from Jamaica to London. The bill of lading contained the common clause that 'the master of the ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void'. In need of a cash advance from its bank, Cottam & Co gave only one original bill of lading,[26] endorsed in blank, to Glyn Mills Currie & Co as security for the loan.[27] When the *Mary Jones* arrived in London, the sugar was discharged at the facilities of East and West India Dock Co awaiting payment of the freight, and only to be released against an original bill of lading. Shortly afterwards, Cottam & Co visited the warehouse to show its (second) original bill of lading.[28] Cottam & Co paid the freight a few days later, and ultimately ensured the release of the sugar to its agent, yet at the expense of the

[22] *The Mary Martyn* (1539); Marsden, *Select Pleas* (1894) 89.

[23] It is remarkable to see how little has changed over the years. Almost 500 years later, albeit with a few obvious changes modernising the wording, the clause is still widely used. See the standard MSC bill of lading: 'IN WITNESS WHEREOF the Carrier or their Agent has signed the number of Bills of Lading stated at the top, all of this tenor and date, and wherever one original Bill of Lading has been surrendered all other Bills of Lading shall be void'.

[24] *Fearon v Bowers* (1753) 1 H BL 365(n), 126 ER 214.

[25] *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 (HL).

[26] Clearly, a prudent banker would have asked for the full set: ibid 603 (Lord O'Hagan); 606–07 (Lord Blackburn). See, more recently, Treitel and Reynolds, *Carver* (2017) [6-077]: 'If a similar situation arose today, the bank would be likely to safeguard its rights against the carrier by insisting on a full set of bills of lading'.

[27] This original stipulated that it was the 'first'.

[28] This original stipulated that it was the 'second', and it was not endorsed.

bank. Glyn Mills Currie & Co sued the East and West India Dock Co for misdelivery and Lord Blackburn held:[29]

> Where he has notice or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder, or interplead. But where the person who produces a bill of lading is one who – either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill – would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to someone else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

This approach has retained its value over the years. In the later Court of Appeal judgment in *Motis Exports Ltd v Dampskibsselskabet AF 1912, A/S*, Stuart-Smith LJ went through the relevant authorities since 1882 and concluded that:[30]

> [I]t has been established for well over a century that under a bill of lading contract a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided he has no notice of any other claim or better title to the goods.

In the course of the proceedings, both Glencore and MSC therefore ended up relying on one side of the presentation rule. Whereas Glencore argued that MSC had failed to deliver the goods against the surrender of an original bill of lading, MSC argued that it was discharged from its obligations under the bill of lading contract when it communicated the PIN codes to the lawful holder, or otherwise at least when the goods were physically delivered to the first presenter of the correct PIN codes at the terminal.

## IV. The Digital PIN Code as a Symbol of the Goods

MSC's most ambitious defence was that it had delivered the goods in exchange for an original bill of lading. This was on the basis that the digital PIN code gave access to the goods themselves, and as such operated as a symbol of those goods. Just as the transfer of a 'key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be' could transfer the possession of those goods,[31] the communication of a digital PIN code with the intention to provide access to the terminal where the goods were stored then equalled the delivery of those goods. The fact that the containers had subsequently been collected by someone else was unfortunate,

[29] *Glyn Mills* (n 25) 611.
[30] *Motis Exports Ltd v Dampskibsselskabet AF 1912, A/S* [2000] 1 Lloyd's Rep 211 (CA), [19].
[31] *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 (CA), 341.

but no longer MSC's concern since the delivery to the bill of lading holder had already taken place.

The defence was rejected. At first instance, Andrew Smith J held that delivery required a transfer of possession.[32] In that respect, access to the goods by means of a digital PIN code was really just access at the discretion of MSC since it still had 'the power, albeit not the contractual right as against Glencore and Steinweg, to invalidate them'.[33] On appeal, Sir Christopher Clarke said:[34]

> In the present case, where the parties contemplated either actual delivery against presentation of a bill of lading or in accordance with a delivery order, I do not think that delivery of the code can, itself, constitute delivery. Delivery usually means actual delivery, not delivery of a means of access, and nothing is spelt out in the contract to the contrary.

It is submitted that this is indeed the correct approach. A digital PIN code is really just a number and not a document of title,[35] and the fact the carrier retained the power to invalidate the PIN codes does not help. Still, perhaps the best argument in favour of this approach is that the digitalisation of an existing release procedure should not change the rights and obligations of the parties involved without their express intention.[36] In that respect, it is submitted that the outcome would, and in fact should, have been the same under the operation of the former system whereby MSC would have issued a *laat volgen* instead of an electronic release note with digital PIN codes.

For obvious reasons, there is a lack of English case law on the legal nature of the *laat volgen*[37] but, for those same obvious reasons, the *laat volgen* has surfaced more regularly in Belgian and Dutch case law.[38]

[32] Referring to *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81, 88. See also *Powell v McFarlane* (1979) 38 P & CR 452; *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.

[33] *Glencore* (n 4), [18]. That risk would arguably also be present in the case of paper document. See, eg, *Great Eastern Shipping Co Ltd v Far East Chartering Ltd (The Jag Ravi)* [2012] EWCA Civ 180, [2012] 1 Lloyd's Rep 637 [45] (Tomlinson LJ): 'The facts here show a shipowner may attempt to revoke the authority given by a delivery order and may succeed in doing so'.

[34] *Glencore International AG v MSC Mediterranean Shipping Co SA* [2017] EWCA Civ 365, [2017] 2 Lloyd's Rep 186 [31].

[35] *Sanders* (n 31).

[36] See J Delen, *Elektronische handel in het Zeevervoer: Is het Belgische recht voorbereid op de komst van elektronische transportdocumenten?* (Masterproef, Gent, 2014) saying (at 103): 'The notification of the code forms the equivalent of the issuance of a "laat volgen" … in the classic system'.

[37] A search on I-law of 'laat', 'volgen', 'laissez' and 'suivre' produces exactly one hit: *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia)* [1949] AC 293 (HL).

[38] See for the Belgian cases, eg, Hof van Beroep Antwerpen 19 Juni 1993, ETL 1993, 894; Rechtbank van Koophandel Antwerpen 15 Maart 1983, ETL 1983, 911. See also Van Hooydonk, *Proeve van het Belgisch Scheepvaartwetboek* (2012) 118; Delen, *Elektronische handel in het Zeevervoer* (2014) 102; H Heirbaut 'Het electronisch laat-volgen en cognossement' in I de Weerdt (ed), *Grondbeginselen van het Belgisch Privaatrechtelijk Zeerecht* (Antwerp, ETL, 2003) 188, 191; F Stevens, *Vervoer onder cognossement* (Brussels, Larcier, 2001) 156.

The leading case in the Netherlands on the relation between the issuance of a *laat volgen* and the delivery of the goods is *The Sriwijaya*.[39] The *Sriwijaya* had sailed from Padang (Indonesia), carrying bundles of 'dark red meranti sawn timber' under a bill of lading, and arrived in Rotterdam in October 1989. The bundles were discharged from the ship by a local stevedore, Hanno, and subsequently stored at its premises awaiting collection. Suedex, the lawful holder of this bill of lading, had instructed its local forwarder Betramy to collect the bundles from Hanno. In accordance with these instructions, Betramy presented the bill of lading to Anthony Veder, the carrier's agent in Rotterdam, and against the surrender of the bill of lading Anthony Veder issued a *laat volgen* in November 1989. When Betramy presented the *laat volgen* to Hanno in December 1989, however, a number of bundles had mysteriously disappeared and could not be collected.

Suedex was reimbursed by its insurers, who then turned to Hanno to recover the loss. Hanno rejected all liability and, in particular, relied on the Himalaya clause and the exonerations in the bill of lading.[40] Conversely, Suedex's insurers argued that Hanno was unable to rely on any provisions from the contract of carriage as that contract had already come to a full stop, namely when the *laat volgen* was issued against the surrender of the bill of lading.

Ultimately, the court had to decide whether the issuance of the *laat volgen* was equal to the delivery of the goods. The Court of Rotterdam and the Court of Appeal in The Hague did not think so and held that:

> The delivery of carried goods implies that the receiver can actually dispose of the goods. The issuance of the 'laat volgen' is not the same as the delivery of the goods … It is furthermore irrelevant that … the bill of lading had already been surrendered since that presentation did not lead to any actual disposal of the carried goods on the part of the receiver in this case.[41]

[39] *The Sriwijaya* HR 9 September 1997, NJ 1998, 63 (ann RE Japikse), S&S 1997/121 (Sriwijaya). Also of interest, but for the question whether the acceptance of a *laat volgen* could trigger an accession to the contract of carriage, see Hof 's-Gravenhage, 28 July 2009, S&S 2010/108 (*MSC Claudia*).

[40] It is hereby expressly agreed that no servant or agent of the carrier including every independent contractor from time to time employed by the carrier and every servant or agent of every such independent contractor shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect from default on his part while acting in course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid … The responsibility of the carrier, whether as carrier or as custodian or as bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom and no liability shall attach to the carrier before the said loading and after the said discharge. … all responsibility is to cease as soon as the cargo is lifted from and leaves the ship's deck. Goods in the custody of the carrier or his servants before loading and after discharge … whether awaiting shipment or landed or stored … are in such custody at the sole risk of the shipper and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.

[41] Hof' s-Gravenhage 23 January 1996, S&S 1996/110 (Sriwijaya).

The Supreme Court agreed, and held that:[42]

> Delivery can take place because the carried goods are brought into the actual possession of the person entitled thereto or into the possession of a third party acting on his behalf. Furthermore, it cannot be ruled out that the goods upon arrival at their destination pursuant to a different agreement with the person entitled thereto either remain in the custody of the carrier or in the custody of someone who held the goods on the basis of an agreement with the carrier, and that in these cases the contract of carriage ends at the time that this different agreement enters into force. … The reasoning of the Court of Appeal must apparently be understood in this way that it had agreed with and adopted the decision of the Court that these shipments of timber were only delivered on 11 and 13 December 1989 when they were collected by Betramy on instruction of Suedex. … These decisions do not reveal an incorrect opinion of the law, more in particular not an incorrect opinion of the concept of 'delivery'.

This view of the concept of 'delivery' as applied in *The Sriwijaya*[43] and *Glencore International AG v MSC Mediterranean Shipping Co* SA[44] was also the view adopted by the Hamburg Court of Appeal in a recent German decision on the delivery of containers against digital PIN codes.[45] The facts and circumstances were very much in line with the events in Antwerp, with the difference that the goods were discharged at and subsequently misdelivered from the ECT terminal in Rotterdam. At first instance, the Hamburg Landesgericht held that:[46]

> The loss, caused by the collection of the goods by someone unauthorised thereto, falls within the timeframe between receipt and delivery in accordance with § 498 (1) of the German Commercial Code (GCC). Bringing the time of delivery forward to the moment the container was ready for collection and the PIN had been communicated is barred by the fact that the terminal is an 'extension of the ship' under German law.

On appeal, the Hamburg Senat said that 'the delivery in the sense of § 498(1) GCC requires the carrier to relinquish his possession in an orderly way with the consent of the entitled receiver and to enable him to exercise the possession of the goods'.[47] Further, it held that:

> The terminal is a servant of the carrier in as far as its obligation to deliver the goods to the entitled receiver is concerned. Against this background, it is hard to imagine how a transfer from the care of the carrier to the receiver can be achieved before the terminal has physically handed the goods to the receiver or his authorised agent.

Clearly, neither the issuance of a *laat volgen* nor the communication of a digital PIN code is equivalent to the delivery of the goods under the contract of carriage. They are just means to an end because the concept of delivery requires the carrier

[42] HR 9 September 1997, NJ 1998, 63 (ann RE Japikse), S&S (Sriwijaya).
[43] See above, n 39.
[44] See above, n 4.
[45] Hanseatisch Oberlandesgericht Hamburg 6. Zivilsenat, 4 May 2017, 6 U 133/16.
[46] LG Hamburg 6. Zivilsenat, 10 June 2016, Az: 412 HKO 51/15.
[47] Hanseatisch Oberlandesgericht Hamburg 6. Zivilsenat, 4 May 2017, 6 U 133/16.

to enable the bill of lading holder or his agent to actually exercise the possession of those goods.[48]

## V. The Digital PIN Code as a 'Delivery Order'

If the communication of the release note with the PIN codes could not amount to a symbolic delivery of the goods, MSC argued that the release note with the PIN codes qualified as a delivery order. Since the attestation clause allowed the carrier to exchange the bill of lading for the goods *or* a delivery order, the issuance of the release note to Steinweg ensured its compliance with the clause. Andrew Smith J found that a delivery order was used to describe a number of different documents,[49] and held that the correct meaning of 'delivery order' must be interpreted within the context of the bill of lading contract. He then moved on to say, however:[50]

> To my mind, the parties must be taken to be referring to what is commonly called a 'ship's delivery order', an expression used and defined in the Carriage of Goods by Sea Act 1992, section 1(4). It is an essential feature of such a delivery order that it contains an undertaking given by the carrier who is party to it … to a person identified in it to deliver the goods to which it relates to that person. This is required by the statutory definition, and is in accordance with usage before the 1992 Act: … It strikes me as improbable that it 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 B/L so as to have this improbable effect.

The Court of Appeal followed the same line of reasoning,[51] and reached the same conclusion. Sir Christopher Clarke held that:[52]

> The Delivery Order is to be provided by the owners of the ship as an alternative to actual delivery in exchange for the B/L and in substitution for it. It seems to me implicit in those circumstances that the parties intended that the Delivery Order should have the key attribute of a bill of lading, namely an undertaking by the carrier to deliver the goods to the person identified in it, which would, here, have to be Glencore or Steinweg, Glencore's agent. As the judge found, it is improbable that a shipper would agree to a term whereby he might surrender the bill without receipt of either the goods or the benefit of a substitute undertaking in his favour from the carrier.

[48] See, eg, *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81, 88–89; *The Jag Ravi* (n 33) [45].

[49] The judge referred to M Bridge (gen ed), *Benjamin's Sale of Goods*, 9th edn (London, Sweet & Maxwell, 2014) [18-212]. See, however, also Carver (n 6) [8-029]: 'The term "delivery order" is used to describe documents of various kinds'.

[50] *Glencore* (n 4) [19].

[51] Referring to *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146; *Colin & Shields v W Weddel & Co Ltd* [1952] 2 Lloyd's Rep 9 (CA); *Cremer GmbH v General Carriers SA* (*The Dona Mari*) [1973] 2 Lloyd's Rep 366.

[52] *Glencore* (n 34) [194].

It is submitted, however, that it is not very likely that any of the parties involved really had a ship's delivery order in mind. First, this already follows from the ratio behind the document. A ship's delivery order is designed to split bulk shipments into separate parcels to be received by different consignees.[53] In the case at hand, however, there was no need to split the cargo as Glencore was the shipper of these three containers, and with the help of Steinweg and Carjo Trans, was going to receive these containers in the end as well. Steinweg was just a forwarding agent in this process, not the owner of the goods. If anyone would have wanted to exchange the bill of lading for a ship's delivery order, it surely would have been the owner/shipper, Glencore.[54]

Second, Steinweg presented only one original of the bill of lading to MSC, not the full set. This is relevant because the surrender of one original bill of lading against a ship's delivery order would not have caused the remaining two originals to stand void.[55] A ship's delivery order, according to the Law Commission, is 'really designed to act like a "mini" bill of lading, the main difference being that a ship's delivery order is issued after shipment and is usually issued in respect of a smaller cargo'.[56] This also implies that MSC would never have agreed to it.[57] MSC would only have issued a ship's delivery order in exchange for the full set,[58] because it could never take the risk of (one of) the remaining two original bills of lading being presented afterwards.[59] The term 'delivery order' in the attestation clause on the bill of lading,[60] requiring the surrender of one original in exchange for a delivery order, cannot have meant ship's delivery order.[61]

Third, it is not as 'improbable' as it seems for a bill of lading holder to accept a mere document in exchange for a document of title. Surely, there must have been a time when the lawful holder surrendered an original bill of lading to the master of

[53] *Colin & Shields v W Weddel & Co Ltd* [1952] 2 Lloyd's Rep 9, 17 (CA).

[54] Glencore would not have needed Steinweg if it wanted to split the cargo. As the shipper and lawful holder of the bill of lading, it could simply have surrendered all three original bills of lading to MSC in exchange for delivery orders instead of going through the process of sending only two originals of the bill of lading to Steinweg.

[55] See also *The Dolphina* [2011] SGHC 273, [2012] 1 Lloyd's Rep 304, [139], referring to *Glyn Mills* (n 25) and *Motis* (n 16): '"Accomplished" or "accomplishment", in this context, means completing the performance of the contract of carriage by delivery of the cargo against the surrender of one of the original bills of lading' (Belinda Ang J).

[56] *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No 196, Scot Law Com No 130, 1991) [5.29].

[57] The practice is equally 'fraught with danger': see *Glencore* (n 4) [19]; *Noble Resources Ltd v Cavalier Shipping Corp* (*The Atlas*) [1996] 1 Lloyd's Rep 642, 644. MSC might have taken the chance if Glencore would have offered to provide it with a letter of Indemnity, but there is no mention of this in either of the judgments. See also M Goldby, 'Managing the Risks of Switch Bills of Lading' [2019] *LMCLQ* 457.

[58] P Todd, *Bills of Lading and Bankers' Documentary Credits*, 4th edn (London, Informa, 2007) 70.

[59] *Elder Dempster Lines v Zaki Ishag* (*The Lycaon*) [1983] 2 Lloyd's Rep 548, 552: 'It seems to me that the whole problem goes back to one single event, namely, the issue of the February bill of lading while the January bill of lading was still in circulation. Whether or not I am right in my view that the January bill of lading is a document of title, it was clearly wrong that two sets of what looked like original bills of lading should have been allowed to have been in circulation at the same time. … The point is even stronger if, as I have held in the earlier proceedings, the January bill of lading is a transferable document of title' (Lloyd J).

[60] Drafted, no doubt, by MSC's own legal team.

[61] Article 8:440(1) DCC stipulates: 'The shipper – or, when a bill of lading has been issued, only the lawful holder thereof in the sense of article 441 and then only against the surrender of all transferable

the ship on the quay in the port of discharge and immediately received his goods in return. Over time, however, with the increased number of ships and the increased capacity of these ships, this has simply become impossible.

In the Netherlands, this has led to the development of a custom whereby the bill of lading is first signed for discharge on its reverse and only then surrendered to the local ship's agent in exchange for a *laat volgen*.[62] The custom has been codified in article 8:481(1) of the Dutch Civil Code (DCC) which provides that the 'holder of the bill of lading, who has applied for the receipt of the goods, is held, before he has received them, to mark the bill of lading with a discharge and to surrender it to the carrier'.[63]

It is submitted, therefore, that the 'delivery order' referred to on the bill of lading is not a ship's delivery order within the framework of the Carriage of Goods by Sea Act 1992, but a delivery order in the sense of a *laat volgen*, an instruction from the carrier to the terminal to release the goods to a specific receiver.[64] Apart from the arguments above, additional evidence thereof is also found in MSC's notification that it would use the ERS and that it would 'no longer work with Delivery order (Laatvolgen)'.[65] This notification, and Steinweg's obvious understanding thereof, implies that the two documents are the same, at least in the perception of MSC and Steinweg.[66]

Since the release note with the digital PIN codes is really nothing more or less than the modern successor of the old-fashioned *laat volgen*, it qualifies as a delivery order in the sense of the attestation clause on the bill of lading.

## VI. The Agreement to Deliver the Goods to the First Presenter of the PIN Codes

Apart from the qualification of the release note with the digital PIN codes, MSC also relied on estoppel. It argued that Glencore had given the impression to have

originals of this bill of lading – is entitled, in as far as the carrier can reasonably comply, to demand the delivery of the goods, or when a bill of lading has been issued, all goods mentioned thereon jointly, prior to the arrival at the destination' The same would apply, mutatis mutandis, to a variation in the paperwork, eg the issuance of a new bill of lading or a ship's delivery order.

[62] Admittedly, it is somewhat odd to confirm good receipt before receipt, but this is not uncommon. German law, for instance, also prescribes in the first part of the first sentence of § 521(2) of the German Commercial Code (GCC) that 'The carrier shall be obliged to deliver the goods only in exchange for a bill of lading in which delivery has been confirmed'.

[63] MH Claringbould, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek* (Deventer, Kluwer, 1992) 495; H Boonk, *Zeevervoer onder cognossement* (Kluwer, Deventer, 1993) 106; M Spanjaart, 'The Surrender of the Bill of Lading "Duly Endorsed"' (2014) 20 *JIML* 327.

[64] For a recent example of such a delivery order in another jurisdiction, see for instance the wording of the delivery order discussed in *The Jag Ravi* (n 33) [26].

[65] *Glencore* (n 4) [9].

[66] Steinweg also kept on invoicing Glencore for it, see ibid [14]: 'Steinweg routinely levied €10 charges when it used the ERS and Glencore paid them, but there is no evidence that it would have reason to know that they were for electronic release notes: the charges were described as being for "delivery orders"'.

been happy enough with the ERS for the first 69 shipments, and therefore could not complain about its application this time around. That in turn implied that MSC could not have been in breach of contract because it had in fact given, and its agent Steinweg had in fact accepted, a release note with the PIN codes in exchange for an original bill of lading on the understanding that the delivery would be made to the first presenter of the PIN codes. Both Andrew Smith J and the Court of Appeal dismissed the defence. Sir Christopher Clarke held:[67]

> No representation let alone a clear one was made by Glencore or on its behalf that delivery otherwise than to it 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 on many occasions did not say anything about what the position would be if they were not.
>
> In addition, I would not accept that Steinweg had any authority to make such a representation. It had no express authority. Nor is one to be implied. Authority to make arrangements to ensure delivery to Glencore pursuant to the B/L or Delivery Order did not impliedly extend to accepting that delivery pursuant to the B/L would validly be made by delivery to the first presenter of the codes whether that was Glencore or a thief, especially when Glencore was not even aware of the ERS system.

Glencore was the party that suffered the loss, and it was also the claimant in these proceedings. It is rather likely, though, that Glencore was not exercising its own rights, but in fact the rights of its forwarding agent, Steinweg. This would not affect Glencore's rights of suit in the proceedings. Indeed, the parties settled that discussion before going to court.[68] Nevertheless, it might have an impact on the 'authority to make arrangements to ensure delivery to Glencore pursuant to the B/L or Delivery Order'.

The bill of lading in question was an order bill of lading. It is not clear from the judgments how many originals were issued to Glencore,[69] but there were clearly more than one because Glencore later sent two originals of the bill of lading to Steinweg. Steinweg then surrendered one original bill of lading to MSC and the judge noted that this bill of lading was signed and stamped by both Glencore and Steinweg.

When a bill of lading is issued 'to order' and nothing else, it is assumed to have been issued to the order of the shipper,[70] Glencore in this case. Glencore is then the lawful holder of the bill of lading, and Glencore stays the lawful holder of that bill of lading until it transfers the bill of lading to someone else. The transfer of order bill of lading requires its endorsement and delivery,[71] and Glencore basically then has two options. Glencore can endorse the bill of lading to the order of the transferee,[72] and then the bill of lading remains an order bill of lading, but

[67] n 34 [67].
[68] n 4 [2].
[69] Probably three, which is common, and Glencore would then have kept one original for itself.
[70] Carver (n 6) [1-011]. This rule has been codified in the Dutch Civil Code in art 8:412 DCC.
[71] Carriage of Goods by Sea Act 1992, s 5(2)(b); arts 3:93 and 8:416 DCC.
[72] Writing 'deliver to Y or order' or similar words on the reverse of the bill of lading, see SD Girvin *Carriage of Goods by Sea*, 2nd edn (Oxford, Oxford University Press, 2011) 66.

it can also endorse the bill of lading in blank. The endorsement in blank merely consists of a signature and often a company stamp without further instructions or remarks on the reverse. Such an endorsement in blank converts the order bill of lading into a bearer bill of lading,[73] and this is common in practice as it makes the process a lot easier. Whereas the transfer of an order bill of lading requires its endorsement, the transfer of a bearer bill of lading merely requires its delivery, ie the transfer of possession to the transferee.[74] The consignee of a bearer bill of lading is simply its bearer. The consignee is the party with possession of the bill of lading,[75] and ultimately the party presenting the bill of lading at the port of discharge.[76]

This would explain the presence of the Glencore stamp and signature on the bill of lading: it is an endorsement in blank. When Glencore sent that signed and stamped bill of lading to Steinweg, there were again two options. If, for instance, Glencore had sent the bill of lading to Steinweg with the instruction to keep it safe pending further instructions, there would not have been a transfer of rights, simply because they had no intention to transfer any rights. Steinweg would then only hold the bill of lading as a custodian for Glencore, and the rights of suit would have remained exactly where they had always been, with Glencore.[77]

That is not very likely, though. Steinweg did not keep the bill of lading safe pending further instructions. Steinweg presented the bill of lading to MSC in its own name, as a transferee,[78] and this is where the second stamp and signature comes in. This second stamp and signature is the discharge of the carrier, and its presence on the bill of lading identifies Steinweg as the presenter/lawful holder in the process.[79]

Section 2(1)(a) of the Carriage of Goods by Sea Act 1992 provides that 'a person who becomes … the lawful holder of a bill of lading … shall … have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'. This implies that Steinweg was the only one with rights under the bill of lading contract at that point. It makes no difference that Steinweg acted as an agent for Glencore when it presented the bill of lading as 'there is no

[73] Carver (n 6) [1-012].

[74] *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2002] SGCA 46, [2003] 1 Lloyd's Rep 619 [22]: 'Reverting to the instant case, it would be recalled that Shweta indorsed the B/Ls in blank and the bills eventually came into the hands of Keppel TL. The effect of such an indorsement was that each of the B/Ls had become a bearer bill, transferable with the mere passing of the bill' (Chao Hick Tin JA).

[75] Carver (n 6) [1-010].

[76] Spanjaart, 'The Surrender of the Bill' (2014).

[77] D Foxton (gen ed), *Scrutton on Charterparties and Bills of Lading*, 24th edn (London, Sweet & Maxwell, 2020) [3-013].

[78] *East West Corp v DKBS AF 1912 A/S* [2003] EWCA Civ 83, [2003] QB 1509.

[79] Obviously, a forwarding agent will not have suffered any loss or damage, but that is not a requirement under the 1992 Act. Circumventing *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] AC 774 (HL), s 2(4) provides that an agent 'shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised': see *Rights of Suit* (n 56) [2.27]; DR Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights under the English Carriage of Goods by Sea Act 1992 and the Rotterdam Rules' (2011) 17 *JIML* 437, 444.

exception to the extinction rule of s 2(5) in favour of a principal that transfers a bill of lading to its own agent in circumstances where s 2(1) operates in favour of an agent'.[80] In fact, the Court of Appeal in *East West Corp v DKBS AF 1912 A/S* held that[81] there was nothing 'in the statutory scheme of the 1992 Act to lend any support to the idea that, after a statutory transfer of contractual rights by a principal to its agent, the principal can still sue in contract in its own name'.

This means that Glencore cannot have been exercising any rights of its own. Glencore did not have any rights under the bill of lading contract anymore as these had already passed to Steinweg together with the bill of lading. Effectively, Glencore was exercising the rights of Steinweg, and subject to equities. All defences available to MSC against Steinweg were equally available against Glencore in these proceedings.

Again, this does not matter for the rights of suit because this was agreed upon beforehand, but it does matter for the estoppel defence. Steinweg may not have had the authority to agree on Glencore's behalf that the goods could be delivered to the first presenter of the PIN code,[82] but surely it could bind itself to that agreement. When Steinweg in full awareness of the operation of the ERS exchanged the bill of lading for the release note with the PIN codes it may just have done so.

## VII. Conclusions

If the electronic release note with the PIN codes is really a modernised *laat volgen*[83] and if Glencore was really just exercising the rights of Steinweg subject to equities, including for instance a variation of the contract to the extent that the goods could be delivered to the first presenter of the PIN code, could MSC then perhaps have escaped liability?[84]

[80] *Scrutton* (n 77) [3-018]. The outcome would have been the same under Dutch law, see HR 8 November 1991, NJ 1993, 609 (ann JC Schultsz), S&S 1992, 37 (Brouwersgracht).

[81] *East West* (n 78) [18] (Mance LJ).

[82] Although that is not entirely unlikely. Glencore and Steinweg did not have a formal contract, but they had agreed that their relations would be governed by the BFF Standard Trading Conditions, art 9 of which stipulates: 'In the absence of precise instructions to the contrary or special agreements, the Freight Forwarder shall be at liberty in his choice of means to be used to organise and perform the services to the best of his abilities according to normal business practice'. Albeit not a 'formal' authority, as such, Steinweg surely had a rather free hand in the performance of its obligations towards Glencore. See also M Goldby, 'The Impact of New Commercial Practices on Liner Contracts of Carriage: New Wine in Old Skins?' in J Chuah (ed), *Research Handbook on Maritime Law and Regulation* (Cheltenham, Edward Elgar, 2019) 246 and her reference to *Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore* [2017] EWCA Civ 1703, [2018] 1 Lloyd's Rep 17.

[83] And, as such, a delivery order in the sense of the attestation clause on the MSC bill of lading.

[84] Sir Christopher Clarke: 'If there had been a variation of the contract to the effect that delivery to the first presenter of the code was a fulfilment of the delivery obligation under the contract, Glencore would have no claim: (n 34) [67].

It is submitted that, in spite of a different analysis and dissenting opinion on these two points, the outcome of the case is correct. As to the road to that outcome, however, another perhaps more principled approach would have been preferable.

The carrier's key obligation under a bill of lading contract is the delivery of the goods against presentation of the bill of lading, namely the transfer of possession of the goods to the lawful bill of lading holder. This obligation is so fundamental that the carrier cannot be excused if he delivers against a letter of indemnity, against a forged bill of lading, or against the entry of a correct, albeit stolen, PIN code. It cannot be set aside by carrier friendly provisions in the bill of lading or release note either, whether a 'before and after' clause,[85] a clause that equals discharge to delivery, a 'variation' of the contract as argued in this particular case, and, it is submitted, not by any other 'appropriately worded clause' at all.[86]

That does not, however, mean that the carrier's period of responsibility cannot be shortened at all; it just cannot be shortened this way. The German Court of Appeal and the Dutch Supreme Court have both suggested an opening, though, namely an agreement between the terminal and the receiver.[87] Having just said that the terminal was a servant of the carrier and that the delivery required the physical handover of the goods to the receiver or its authorised agent,[88] the Court of Appeal in Hamburg then went on to remark:[89]

> A requirement for that would be that all participants agree that the terminal, upon the receipt of the goods from the carrier, no longer operates for the carrier within the framework of the terminal contract concluded with him, but only for the receiver now. From that point on, the receiver would then be liable for the payment of the terminal, which would then operate as a warehouse for him. This would then constitute a transfer of constructive possession from the carrier to the receiver.

[85] *Sze Hai Tong Bank* (n 16) 587: 'For the contract, as it seems to their Lordships, has as one of its main objects, the proper delivery of the goods by the shipping company, "unto order or his or their assigns," against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to someone else, to someone not entitled at all, without being liable for the consequences' (Lord Denning).

[86] See in this respect *Motis* (n 16) [5]: 'There is no dispute that an appropriately worded clause could achieve the result for which the shipowner contends' (Mance LJ). The mere fact that such a clause has not surfaced in case law since then gives a certain support to the idea that it is in fact a fundamental obligation, and one that the courts are (as yet) reluctant to relax.

[87] Rainey, 'Pinning Down Delivery' (2019) 55 also remarks that 'there is nothing inconsistent with the terminal or sub-bailee acting as the carrier's agent during the initial stages of discharge and then the consignee's agent at the point in time at which the carrier divests itself of any control and the terminal/sub-bailee attorns to the consignee'.

[88] The Dutch Supreme Court made the same observation in *The Sriwijaya*, adding that 'it cannot be ruled out that the goods upon arrival at their destination pursuant to a different agreement with the person entitled thereto either remain in the custody of the carrier or in the custody of someone who held the goods on the basis of an agreement with the carrier, and that in these cases the contract of carriage ends at the time that this different agreement enters into force'.

[89] Hanseatisch Oberlandesgericht Hamburg 6. Zivilsenat, 4 May 2017, 6 U 133/16.

# Appendix

A sample *laat volgen* (courtesy MH Claringbould)

Herfurth & Boutmy n.v.

| | |
|---|---|
| O/REF – 705/044123 | 11a |
| DATUM | 18/10/94 |
| NR. DOC. | TLC/009288 |

TEL : 03/221.27.80
TLX : 72175
FAX : 03/226.35.36

Herfurth & Boutmy
via Westerlund!

**LAAT - VOLGEN AAN**

| OMSCHRIJVING – DESCRIPTION | VRACHTLIJST ART. NR. |
|---|---|

VSL/VOY...: HEERENGRACHT/44123 — ETA ANR.: 21/10/94
LAADHAVEN.: RIO DE JANEIRO, RJ — B/L NR..: RIOANR0001
LIGPLAATS.: KAAI 414 — DEPOT...: WESTERLUND
ONTVANGER.: KARLSTEIN — DEM.....: 20,000000

001 CSN 204 PIECE(S) 1719279 KG
MADE IN BRASIL TINPLATES
LAAT-VOLGEN DIENT AFGETEKEND TE WORDEN VOOR ONTVANGST TEN
LAATSTE 48 UUR OF TWEE WERKDAGEN NA LOSSING DER GOEDEREN
DIT BEWIJS VAN AFLEVERING MAG NIET GEENDOSSEERD WORDEN.
EVENTUELE WAAKKOSTEN TE REGELEN OP KADE.

"Wanneer de goederen na het aftekenen van dit laat-volgen, door de ontvanger en/of zijn aangestelde niet worden weggevoerd verblijven zij op kade of waar dan ook op eigen kosten, risico en gevaar, zonder enige verantwoordelijkheid van de receptienatie, de stuwadoor, de kapitein, de rederij en/of de scheepsagent".

De Rederij aanvaardt geen verantwoordelijkheid omtrent de identiteit van de persoon die, voorzien van deze L/V, de goederen in ontvangst neemt. De Rederij beschouwt de afgetekende L/V zodra deze terug in haar bezit is als wettelijk bewijs van aflevering.

Ondergetekende erkent hiermede bovenvermelde goederen in goede staat te hebben ontvangen.

Datum: 21/10/94 as per outturn report

Coil nr. 4170 820408-85464
damaged

Behoudens alle bepalingen v.h. connossement. Onder voorbehoud van goede aankomst v.h. schip en van averij-grosse.

Waakkosten op kade ~~te regelen~~.

20/10/94

Herfurth & Boutmy n.v.

MAATSCHAPPELIJKE ZETEL CASSIERSSTRAAT 19 – B-2060 ANTWERPEN 6
H.R.A. 183012 K.B. 410-0643411-33
W. 406.963.302