Delivery of a PIN Code is Not Proper Delivery of the Goods Under a Bill of Lading

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Glencore International AG v MSC Mediterranean Shipping Co SA [2017] EWCA Civ 365

Many shipping lines in Canada and around the world make use of a PIN code system to release cargo to merchants, as part of their standard operating procedures. Lines often take the position that delivery of the PIN code to the merchants constitutes proper delivery of the goods. The terms and conditions of the bills of lading also provide protection to carriers in this regard. However, this position was untested and the Court of Appeal of England and Wales, in *Glencore International AG v MSC Mediterranean Shipping Co SA*, [2017] EWCA Civ 365, recently held that delivery of a PIN code does not constitute proper delivery of the goods. As a result, the carrier is liable to pay for the merchants' losses if part of the shipment is stolen.

Facts

The plaintiff, Glencore International AG ("Glencore"), made regular shipments of drums of cobalt briquettes which were carried by the defendant, MSC Mediterranean Shipping Co SA ("MSC"). During one of the shipments, two of the three containers were stolen after the cargo was discharged in Antwerp, Belgium.

The bills of lading were marked "to order", which means that, under MSC's terms and conditions, one original bill of lading had to be tendered to the carrier in order for the merchants to obtain either the goods or a delivery order. Under an automated system, MSC did not issue paper delivery orders or release notes, but rather issued a PIN code, which holders of the bill of lading could then take to the terminal in order to obtain the cargo.

After the bill of lading was presented and freight and charges were paid, MSC sent Glencore's agent an electronic document headed "Release Note", which contained the PIN code required to obtain the cargo at the terminal. However, when the agent arranged for pick-up of the cargo, he found that two of the three containers in the shipment had already been collected by an unknown party.

Issues

Glencore argued that the PIN code should not have sufficed to take delivery of the goods, but rather that MSC should have delivered the cargo only on presentation of an original bill of lading.

MSC argued that the bill of lading contained express clauses as to delivery allowing the usage of the PIN system, and, alternatively, that Glencore had made use of the PIN code system in over 60 shipments without complaint, so that it was perfectly aware of the delivery proceedings based on its experience with the system.

The trial judge ruled in favour of Glencore.

MSC appealed and argued that providing the PIN code amounted to symbolic delivery of possession of the goods under the bill of lading. It also argued that the electronic release note was a delivery order and amounted to a ship's delivery under section 1(4) of the *Carriage of Goods by Sea Act* 1992.

Decision

A unanimous Court of Appeal dismissed MSC's appeal.

First, the Court of Appeal held that providing a PIN code does not constitute proper delivery of the goods. The PIN code is only a means to access the goods and delivery of the PIN code cannot be equated to delivery of the goods themselves. "Delivery" means *actual delivery of the goods*. The bill of lading provided for explicit terms in that the parties agreed to delivery of the goods in return for the tendering of an original bill of lading with MSC. Therefore, symbolic delivery of the goods by means of a PIN code could not constitute proper delivery under the terms of the contract.

Secondly, the document MSC issued under the title "release note" was not properly speaking a delivery order nor a ship's delivery order. Under English law, a delivery order has the same implication as a ship's delivery order as defined under COGSA 1992 – namely a document which contains an undertaking by the carrier to deliver the goods to the person identified in the document.

The document sent by MSC did nothing more than instruct the terminal to deliver cargo against the entry of a PIN code. It contained no undertaking on the part of MSC to deliver the goods to Glencore or its agent. Moreover, there was no explicit mention in the bill of lading that PIN codes used to release cargo equated to a "delivery order".

Finally, MSC's estoppel argument was rejected. In the first sixty-odd shipments, no issues arose that would have required Glencore to take an official position as to the delivery system through PIN codes, or to react to a situation where delivery was made to a person who had stolen the PIN codes. Glencore did not attack the system of delivery by PIN code as such, but rather that delivery had been made to a third party.

Comment

Many shipping lines make use of PIN code systems to facilitate cargo delivery. BLG's standing advice to carriers has been that they would ultimately be liable for loss should cargo go missing. This case appears to confirm that advice. It should also be noted that this case may be headed to the Supreme Court and an updated summary will be provided once the Supreme Court has had an opportunity to review the matter.

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