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SHIP'S DELIVERY ORDERS

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Ship's delivery orders

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ABSTRACT

This working paper looks into the current status of ship's delivery orders, essentially instruments designed to split a large shipment of (usually bulk) goods travelling under one single bill of lading into several smaller parcels. The first delivery orders were issued by merchants, usually the sellers of the goods, but over time, delivery orders were more and more often issued by representatives of the ship as well. These sellers' delivery orders thus evolved into ship's delivery orders with binding effect on the carrier. Ship's delivery orders are regulated by the Carriage of Goods by Sea Act 1992, and they arguably also qualify as similar documents of title in the sense of Article I(b) of the Hague and Hague-Visby Rules.

Keywords: Ship's delivery orders; bills of lading; rights of suit; Carriage of Goods by Sea Act 1992; documents of title; carriage of goods by sea; contracts of carriage.

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1 Introduction

The value of a ship's delivery order lies in its commercial convenience. A vessel, for instance, carries a shipment of commodities in bulk under a bill of lading from Singapore to Rotterdam. The carriage follows from an underlying sale. The buyer pays the purchase price against the documents, including the full set of the bills of lading, and the goods are delivered to it upon the presentation of one original bill of lading in Rotterdam.

This works well if the seller/shipper has sold these commodities to one single buyer. It becomes more difficult, however, when it has sold this shipment in several parcels to several buyers, and that is where the delivery order comes in. The entire shipment travelling under a single bill of lading can effectively be split into smaller parcels covered by ship's delivery orders, or in the words of Lord Denning:[1]

> This modification is made so as to enable a seller to split up a bulk consignment into smaller parcels and to sell them to different buyers while the goods are still at sea. A seller often only has one bill of lading for the whole consignment; he cannot deliver that one bill of lading to each of the buyers, because it contains more goods than the particular contract of sale; so the seller in each of his contracts of sale stipulates for the right to give a ship's delivery order. The bulk consignment can then be split up into small parcels each covered by a ship's delivery order instead of a bill of lading.[2]

There are more delivery orders than just ship's delivery orders.[3] In fact, the delivery order comes in several variations and may, in practice, also be issued by various people. A delivery order can be used to describe a release note to a warehouse, a delivery instruction between seller and buyer, a pick-up clearance from the customs office, an instruction to the terminal to release the goods to the (agent of the) consignee, an instruction to the port authorities,[4]

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1 *Colin & Shields v W Weddel & Co Ltd* [1952] 2 Lloyd's Rep 9 (CA), 19, and in similar words *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)* [1967] 2 Lloyd's Rep 315, 322.

2 Arguably, the same objective could be reached by a split bill of lading: see Elisabeth Birch & Torbjorn Claesson, 'Split Bills of Lading and Ship's Delivery Orders', <2767980-contracts-of-carriage-and-bills-of-lading-split-bills-of-lading.pdf>. Generally, on such split (or switch) bills of lading, see Miriam Goldby, 'Managing the Risks of Switch Bills of Lading' [2019] LMCLQ 458.

3 Michael Bridge (gen ed), *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell 2024) [18.397].

4 *Great Eastern Shipping Co Ltd v Far East Chartering Ltd (The Jag Ravi)* [2012] EWCA Civ 180, [2012] 1 Lloyd's Rep 637.

and a randomised series of numbers that will allow for the release of the goods from the terminal.[5]

This working paper focuses on ship's delivery orders, i.e. delivery orders that bind the carrier to their 'deliveree' and essentially operate as 'mini' bills of lading.[6] Such ship's delivery orders were regulated for the first time in the Carriage of Goods by Sea Act 1992.[7] Under the Act, the person 'to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order' acquires a statutory right of suit against the carrier.[8]

2 Delivery orders and ship's delivery orders

In one of the few contributions on ship's delivery orders in an established maritime law journal,[9] Nigel Teare traced the delivery order to 1888 in the Scottish case of *Cunningham v Guthrie*.[10] The use of a delivery order must indeed have been new as Lord Trayner referred to the 'somewhat novel mode of procuring cargo on delivery-order …'[11]

Cunningham, a merchant from Leith, had bought a shipment of nitrate of soda from Henry Bath & Son. Guthrie, the registered managing owner of the *Earl of Derby*, was instructed to carry the goods to Leith and issued a bill of lading to the shippers/producers of the cargo covering the entire shipment. The shippers/producers endorsed the bill of lading to Bath, but Bath, in turn, did not endorse the bill of lading to Cunningham. Instead, Bath forwarded the

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5 *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep 508, [5].

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

7 C 50. In Singapore, the Bills of Lading Act 1993 (2020 rev ed) is *in pari materia* with this statute: see, eg, *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd* [2002] SGCA 46, [2003] 1 Lloyd's Rep 619, [14]; *Oversea-Chinese Banking Corp Ltd v Owners and/or Demise Charterer of the vessel 'STI Orchard'* [2022] SGHCR 6, [2023] 1 Lloyd's Rep 22, [42]-[43].

8 Section 2(1)(c).

9 Nigel Teare, 'Ship's Delivery Orders' [1976] LMCLQ 29.

10 [1888] 26 Sc LR 208.

11 Ibid. The alternative would be a situation 'whereby one of the purchasers gets the bill of lading and the other purchaser of the split parcel gets the ship's release; and if he requires it in addition to the ship's release he gets a satisfactory form of guarantee': *Heilbert, Symons & Co Ltd v Harvey, Christie-Miller & Co* (1922) 12 Ll L Rep 455, 457 (Bailhache J).

bill of lading to the master of the ship, endorsed as follows: 'Captain Kerr will please deliver the contents of the within bill of lading against production of orders signed by us.'[12]

Indeed, following that endorsement, Bath sent delivery orders for smaller parcels to Cunningham, and each time, the master duly delivered the corresponding parcels against the presentation of the delivery orders. This went well up to the moment that the final parcel of 60 tons needed to be released. As before, Cunningham presented a delivery order to the master, but this time, delivery was refused as a claim for freight and demurrage was still outstanding. Guthrie was only willing to part with the remaining goods against settlement of his claim. He argued that he did not have a delivery obligation towards Cunningham as only the bill of lading gave access to the goods, and Lord Trayner agreed:[13]

> It is to be observed also that under a bill of lading, such as we have here, the master is not bound to deliver his cargo in parcels to number of persons as holders of delivery-orders. … In this case the master no doubt honoured several of the delivery-orders, but that was done by him *ex gratia*; he was not bound to do it, and he was entitled to decline doing so when he found or believed that to continue doing so would imperil the rights of his owners. … The pursuers' only title to the balance of cargo now claimed by them is a delivery-order by the consignees. That, I think, is no title on which they can demand delivery.

These delivery orders in *Cunningham v Guthrie* had been issued by the shipper/seller, pursuant to his contract with the carrier, and as such, they would not be able to bind the carrier to the (third party) receiver/buyer. If the buyer wanted to exercise his own rights under the contract of carriage, he would have had to present the bill of lading.

Consequently, such a 'seller's delivery order' would not qualify as good tender under a CIF contract.[14] In *Heilbert, Symons & Co Ltd v Harvey, Christie-Miller & Co*, Bailhaiche J held that the buyer in an ordinary CIF sale 'is entitled to a document which will give him a direct action

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[12] Ibid.

[13] Ibid, 209.

[14] Notably, Bankes LJ in *Denbigh, Cowan & Co v Atcherley & Co* (1921) LT 388 (CA), 390, suggested that a delivery order could qualify as good tender under a CIF contract, provided that it would be a 'delivery order in lieu of one of those documents necessary for giving possession of the goods.' Generally, as to the required type of bill of lading under a CIF sale, see Michael G Bridge, *The International Sale of Goods* (5th edn, OUP 2024) [4.77].

against the shipowner or carrier of the goods from the time that they were loaded until the time they were discharged'.[15]

After World War II, the House of Lords considered the 'commercial value' of the delivery order in *The Julia*,[16] again a delivery order issued by the seller. The events, in this case, took place on the eve of the German invasion of Belgium and the Netherlands in the spring of 1940. Luis de Ridder had sold a shipment of rye to Comptoir d'Achat en de Vente du Boerenbond in Antwerp. They had dealt with each other several times before, and the following, rather complicated modus operandi had evolved between them over time.

In anticipation of the arrival of the vessel in Antwerp, the seller's agent would give Boerenbond a delivery order. Boerenbond then passed the delivery order, together with a cheque for the freight, to its agent, Carga, to secure the delivery of the rye. Once the freight had been paid and this payment had also been recorded on the delivery order, the delivery order was presented by Carga to the seller's agent in Antwerp and exchanged for a release note, a so-called 'laissez-suivre', whereby the seller authorised the delivery of the (required parcel of) rye to Carga. However, before the actual delivery could be achieved, the master of the ship first had to agree as well. If he did, he would also issue his own laissez-suivre,[17] and only then would the goods be physically delivered.

Belgium was neutral at the time the sale was concluded, and the *Julia* sailed for Antwerp. At the end of April 1940, Luis de Ridder sent Boerenbond an invoice for the rye and a delivery order. Boerenbond paid the invoice and kept the delivery order pending the arrival of the rye, but then Belgium was invaded by Germany in May 1940. The *Julia* was directed to Lisbon, Portugal, without notifying Boerenbond, and the cargo was sold by the seller on the open market, again without notifying, let alone obtaining consent from Boerenbond. Luis de Ridder offered Boerenbond the opportunity to account for the proceeds to settle the matter, but Boerenbond insisted on reimbursement of the full purchase sum.

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15 Above (n 11), 457.

16 *Comptoir D'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Ltda (The Julia)* [1949] AC 293 (HL).

17 This concept of a 'laissez-suivre' (or in Dutch: 'laat volgen') resurfaced 70 years later in *Glencore International AG* (n 5), discussed below (text to n 49).

It was not in dispute that the procedure described above would also have been followed for this shipment of rye, which triggered the question of whether the delivery order issued by the seller gave the buyer any rights to the goods. The House of Lords did not think so. Lord Normand held that the delivery order 'was not a document of title and was ineffectual to pass the property',[18] and Lord Porter held:[19]

> There was no evidence of commercial value, and the document itself was merely an instruction by one agent of the sellers to another … The document appears to me to be no more than an indication that a promise already made by the respondents would be carried out in due course, but it in no way increases their obligations or adds to the security of the buyers.

Still, these qualifications cannot be detached from this particular (seller's) delivery order in these specific circumstances. More in general, so it seems, Lord Porter had no problem accepting in principle that a delivery order could be used in lieu of a bill of lading,[20] provided that it would be binding on the carrier:

> No doubt the contract could have been so performed as to make it subject to the ordinary principles which apply to a CIF contract. The tender of a bill of lading, or even of a delivery order upon the ship at any rate, at any rate if attorned to by the master, and a policy or a certificate of insurance delivered to or even held for them, might well put it in that category.[21]

In *Colin & Shields v W Weddel & Co*,[22] Lord Denning described the ship's delivery order as 'an order given by the consignee directed to the ship, whereby the consignee orders the ship to deliver the contract goods to the buyer or his order.' He also added that it was 'not as good a

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18 Above (n 16), 328.

19 Ibid, 310.

20 He also held (at 311): 'My Lords, the object and the result of a CIF contract enables sellers and buyers to deal with cargoes or parcels afloat and to transfer them freely from hand to hand by giving constructive possession of the goods being dealt with. Undoubtedly the practice of shipping and insuring produce in bulk is to make the process more difficult, but a ship's delivery order and a certificate of insurance transferred to or held for a buyer still leaves it possible for some, though less satisfactory, dealing with the goods whilst at sea to take place.'

21 Ibid.

22 Above (n 1), 19.

protection for the buyer as a separate bill would be',[23] because of the absence of a statutory cause of action under the Bills of Lading Act 1855[24] against the carrier.

By 1973, the issuance of delivery orders by a representative of the ship must have become a more or less established practice.[25] 'Ship's delivery orders', according to Kerr J in *The Dona Mari*,[26] 'are usually issued by shipowners' agents addressed to the master or chief officer or other persons authorising delivery to the holder or to the order of a named person.'

Ship's delivery orders, he added one year later in *Krohn v Thegra*, must, therefore,

> be documents issued by or on behalf of shipowners while the goods are in their possession or at least under their control and containing some form of undertaking that they will be delivered to the buyers (or perhaps to the bearer) on presentation of the documents.[27]

Such a ship's delivery order that binds the carrier could 'adequately fulfil the objects of a CIF contract'.[28] It would essentially operate as a bill of lading but for smaller parcels of the goods (initially) carried under that bill of lading.

3 Rights of suit under a ship's delivery order

In *Lickbarrow v Mason*, at the end of the eighteenth century, the merchant jury recognised the custom of the merchants that the property in the goods could pass together with the transfer of the bill of lading.[29] Still, the custom only covered the property rights, and not contractual rights. Whereas the property rights could pass with the transfer of the bill of lading, the rights under the bill of lading contract stayed exactly where they were, i.e. with the

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[23] Ibid.

[24] 18 & 19 Vict, c 111.

[25] The issuance of delivery orders on behalf of the ship was probably not that 'usual' in 1952. Lord Singleton said: 'It might be, it is said, an order given by the ship. At least, it must have, in my view, some connection with the ship, or else it is not a ship's delivery order': *Colin & Shields* (n 1), 16.

[26] *Cremer v General Carriers SA (The Dona Mari)* [1974] 1 WLR 341, 349.

[27] *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146, 155.

[28] Teare (n 9), 32.

[29] (1794) 5 TR 683.

shipper. Parke B held in *Thompson v Dominy*,[30] in line with the privity of contract doctrine,[31] that the bill of lading 'transfers no more than the property in the goods; it does not transfer the contract.'

Hence, the need for a statutory remedy:[32] the Bills of Lading Act 1855.[33] There can be little doubt that the Act was a reaction to the judgment in *Thompson v Dominy*.[34] The preamble of the Bills of Lading Act 1855 states the objective:

> Whereas, by the custom of the merchants, a bill of lading of goods being transferable by endorsement, the property in goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such rights should pass with the property.

Section 1 achieved this objective by ensuring that the contractual rights under the bill of lading passed together with the transfer of the property rights:

> Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods herein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

The reference to 'every consignee of goods named in a bill of lading, and every endorsee of a bill of lading' implies that the Act applied to all kinds of bills of lading, i.e. order, bearer and straight bills,[35] but the Act did not mention any other documents. In the absence of any reference to delivery orders, it was evident that the return of a bill of lading and subsequent

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30 (1845) 14 M & W 403, 407.

31 See, eg, *Sargent v Morris* (1820) 3 B & Ald 277; *Tweddle v Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL). For detailed consideration, particularly in light of the Contracts (Rights of Third Parties) Act 1999, c 31, see Hugh G Beale (gen ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell ch 21).

32 A common law (first-aid emergency) remedy had earlier been found in *Dunlop v Lambert* by means of a 'special contract' under which the consignor, even though he had not suffered any damages as the property had already passed to the buyer/consignee, could still sue the carrier: *Dunlop v Lambert* (1839) 6 Cl & F 600.

33 Above (n 24).

34 Above (n 30).

35 *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2002] EWCA Civ 556, [2004] QB 702, [143] (per Rix LJ).

issuance by the carrier of individual ship's delivery orders for smaller parcels would not transfer to and vest any rights of suit in their intended receivers.

As so often, a common law escape was found: an implied contract. In *Brandt v Liverpool*,[36] the endorsees/bill of lading holders were not the buyers of the goods but their banks that had financed the transaction and had secured their position with a right of pledge on the goods. As such, no property had passed by the endorsement and delivery of the bill of lading to the banks, and consequently, the banks did not have any statutory rights of suit either. Still, the banks had paid the freight and obtained the delivery of the goods against the presentation of the bill of lading to the carrier. Under those circumstances, the banks had become a party to an implied contract of carriage between themselves and the carrier on the terms of the bill of lading.[37]

If this workaround held in the case of a bill of lading, then surely the outcome should be the same as when a bill of lading was carved up into several ship's delivery orders, and indeed it was. In *The Dona Mari*,[38] just as in *Brandt v Liverpool*,[39] the holder had paid the freight to the carrier and had presented the ship's delivery order (that incorporated the terms of the bill of lading) to obtain delivery of the cargo. In *The Dona Mari*, Kerr J held that, under these circumstances, 'the holder of a delivery order may in practice be in much the same position in relation to the carrier as if he had taken delivery under a bill of lading'.[40]

And if the holder of a delivery holder was indeed in more or less the same position as the holder of a bill of lading, there was obviously no reason to deny him the protection of *Brandt v Liverpool*[41] either. Leaning (amongst others) on the judgments in *The Julia*[42] and *Colin & Shields v W Weddel & Co*,[43] Kerr J held:[44]

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[36] *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co* [1924] 1 KB 575 (CA).
[37] Ibid, 599.
[38] Above (n 26).
[39] Above (n 36).
[40] Above (n 26), 349.
[41] Above (n 36).
[42] Above (n 16).
[43] Above (n 1).
[44] Above (n 26), 350.

> Following those authorities, I not only consider that there is nothing in them which prevents me from reaching the same conclusion on the facts of this case as was reached in *Brandt v Liverpool*, but that the only sensible inference is that a contract in the terms of the two original bills of lading came into effect between the defendants and the second plaintiffs so far as concerns that portion of the bulk which was delivered to the second plaintiffs. It does not, of course, follow that the same conclusion would be reached on the facts of other cases involving delivery orders which are not ship's delivery orders and where there are no facts from which a direct contract between the holder and the carrier can be implied. But the facts of the present case appear to me to be as strong as they can be in favour of inferring such a contract. I also consider that the buyers' right to claim damages for breach of that contract is unaffected by the fact that prior to delivery they were not owners of any part of the undivided bulk. First, the whole of the bulk was affected uniformly by damage due to one cause, so that no difficulty arises in that connection. Secondly, the plaintiffs in *Brandt's* case … had also not been the owners of any part of the cargo at any time but nevertheless succeeded in contract.

4 Ships delivery orders under the Carriage of Goods by Sea Act 1992

When the 1855 Act came up for revision, following the decision in *The Gosforth* in the District Court in Rotterdam,[45] the Law Commission recommended that the Act should not only regulate bills of lading and sea waybills but ship's delivery orders as well.

According to the Law Commission,[46] ship's delivery orders were

> either (a) documents issued by or on behalf of shipowners while the goods are in their possession or under their control and which contain some form of undertaking that they will be delivered to the holder or to the order of a named person; or (b) documents addressed to a shipowner requiring him to deliver to the order of a named person, the shipowner subsequently attorning to that person.[47]

[45] BJ Davenport, 'Ownership of Bulk Cargoes: The Gosforth' [1986] LMCLQ 4.
[46] Above (n 6).
[47] Ibid [5.26]. Really not that different from the two options suggested by Lord Porter in *The Julia* (n 16).

A ship's delivery order was not a bill of lading, of course, but it could be good tender under a CIF contract if the holder of a ship's delivery order was, as much as possible, brought in the same position as the holder of a bill of lading.[48] In fact, the Law Commission advised:[49]

> We take the view that, where the carrier undertakes to deliver the goods let us say on presentation of the delivery order, commercial expedience requires that the carrier, having given the undertaking, should be bound by it. A ship's delivery order 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.

Following the recommendation, the ship's delivery order was then indeed included in the Act. Section 1(4) defines the ship's delivery order as

> '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.

It is submitted that this definition of a ship's delivery order does not really do justice to the idea behind the document, the underlying reasons for its regulation, the recommendations of the Law Commission, or a century of case law on delivery orders for that matter.

A ship's delivery order is an instrument to split a single shipment of commodities into smaller parcels. Admittedly, that objective does not necessarily have to be returned in the definition. Still, this definition is too wide as it covers any documented delivery undertaking by the carrier, just as long as it is not a bill of lading or sea waybill. This can lead to misunderstandings, and it has, in fact, caused a misunderstanding in *Glencore v MSC*.[50]

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[48] Ibid [5.27].

[49] Ibid [5.29].

[50] Above (n 5). The case has been discussed extensively: see Miriam Goldby, 'What is Needed to Get Rid of Paper? A New Look at Delivery Orders' (2015) 21 JIML 339; Meixian Song and Mikis Tsimplis, 'Innovation and the Law: Legacy v Efficiency and Optimisation' (2017) 17 Shipping & Trade Law 11; Andrew Tettenborn, 'Bills of Lading and Electronic Misdelivery' [2017] LMCLQ 479; Simon Rainey, 'Pinning Down Delivery: Glencore v MSC and the Use of PIN Codes to Effect Delivery' in Barış Soyer & Andrew Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Informa Law from Routledge, 2019)

In the summer of 2012, the *MSC Katrina* arrived in Antwerp with (amongst others) three containers with cobalt briquettes. These were carried under a bill of lading issued by the carrier MSC 'to order'. The bill of lading named Glencore as the shipper and Steinweg, Glencore's regular agent in Antwerp, as the notify party. The face of the bill of lading 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.

Until 2010, the delivery procedure was always as follows: Steinweg would present the bill of lading, and in return, MSC would issue a so-called 'laat volgen',[51] a one-page document containing MSC's instruction to the terminal to release the goods to a named receiver, namely the haulier instructed by Steinweg to pick up the container for Glencore. The driver would present the document to the MSC terminal, and when everything was in order, he could collect the container.

As of 2010, however, the Antwerp Port Authority facilitated using an electronic release system (ERS). Its use was not mandatory, but MSC had opted in and informed Steinweg that it would 'no longer work with Delivery order (Laatvolgen)'.[52] Under the new system Steinweg would still present the bill of lading, but in return MSC would now generate a digital release not with a PIN code that gave access to the terminal.[53] Steinweg would forward the PIN code to the

47; Michiel Spanjaart, 'Surrender, Release and Digital PIN Codes' in Stephen Girvin and Vibe Ulfbeck (eds), *Maritime Organisation, Management and Liability A Legal Analysis of New Challenges in the Maritime Industry* (Hart Publishing 2021) 177.

[51] Such a 'laat volgen' is not a document of title (for an example, see Spanjaart, ibid, 194). The Dutch Supreme Court held in *The Sriwijaya*: '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'. HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, NJ 1998, 63, S&S 1997/121 (Sriwijaya).

[52] Above (n 5) [9].

[53] The release note contained the following provision: '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': Ibid, [12].

haulier for entry at the gate, and when everything was in order the driver could collect the container.

This went well on 69 occasions,[54] but when the haulier reported to the gate of the terminal to pick up the three containers with cobalt briquettes, two of these containers had already been 'collected'. Apparently, someone else had earlier entered the correct PIN codes, gained access to the terminal, and loaded the two containers, but they were never seen again.[55]

The misdelivery proceedings that followed raised the question of the qualification of the PIN code. MSC argued that the release note holding the PIN codes qualified as a delivery order.[56] The surrender clause on the face of the bill of lading allowed for two options: the goods or a delivery order. The latter option had apparently been chosen, and that was where the responsibilities of MSC ended.

Andrew Smith J found that a delivery order was used to describe a number of different documents and held that the correct meaning of 'delivery order' must be interpreted within the context of the bill of lading contract, saying:[57]

> 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.

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54 Ibid.

55 It is not too hard to retrace what went wrong. MSC sent the release note with the code to a more or less general mail account, to which more than 20 people had access: ibid, [9]

56 Its primary argument had been that the issuance of a release note with the PIN codes amounted to a symbolic delivery of the goods.

57 Above (n 5), [19].

The Court of Appeal[58] followed the same line of reasoning and subsequently reached the same conclusion. Sir Christopher Clarke[59] held that:

> 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.

However, it is submitted that the 'delivery order' in this case was not meant to be an alternative to actual delivery. Glencore did not intend to exchange the bill of lading for a ship's delivery order. It simply wanted to take delivery of its three containers with the cobalt briquettes, and with that objective, its agent Steinweg presented the bill of lading in exchange for the goods. The events in Antwerp support this view.

First, the ERS built on the already existing practice in the port. Since it is no longer logistically possible anymore to receive the goods at the quay against the presentation of an original bill of lading to the ship, the goods must necessarily be collected at a later stage. Whereas Steinweg would receive a 'laat volgen' against the presentation of an original bill of lading before 2010, it received a release note with a PIN code against the presentation after 2010. The former was a traditional paper document, the latter an electronic document, but at the end of the day, they were just instruments to give the designated haulier access to the goods themselves.[60]

Second, the haulier sent to collect the containers was instructed by Steinweg, Glencore's agent, and not by a third-party buyer of the goods. The fact that Glencore attempted to take

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

[59] Ibid, [46].

[60] *The Sriwijaya*, above (n 48).

delivery of the three containers themselves implies that it had no intention to split them into smaller parcels.

Third, the issuance of ship's delivery orders was not very likely anyway, as the cobalt briquettes were carried in three containers. In theory, it would, of course, be possible to split the shipment into smaller parcels (for instance, into three individual containers), but (ship's) delivery orders are in the commercial practice generally used to split large shipments of commodities in bulk.[61]

Fourth, if Glencore had really wanted to split the three containers upon arrival, Steinweg would not have needed to be involved in that process. In fact, there was no need to wait for the arrival of the ship. As the shipper and lawful holder of the bill of lading, Glencore could simply have surrendered all three original bills of lading to MSC in exchange for delivery orders.[62]

Finally, the correspondence between MSC and Steinweg clearly shows that they both considered the paper 'laat volgen' to be a delivery order.[63] Once MSC had decided to switch to the ERS, it informed Steinweg that it would 'no longer work with Delivery order (Laatvolgen)'.[64] This means that a delivery order and a 'laat volgen' were, therefore, one and the same document in the eyes of the relevant protagonists: useful tools to achieve actual delivery of the goods, and not ship's delivery order in the sense of the Act.

It is submitted that the definition of a ship's delivery order in s 1(4) should be read in the context of the Law Commission's Report, and in particular, its description of a ship's delivery order as '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.' [65]

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[61] Stephen Girvin, *Carriage of Goods by Sea* (3rd edn, OUP 2022) [4.17].

[62] At any point prior to arrival in Antwerp, MSC would not have issued a ship's delivery order in exchange for just one original. A prudent carrier would not take the risk of one of) the remaining two original bills of lading being presented by an endorsee after all.

[63] It is not very likely that a Belgium forwarding agent (Steinweg) and a Belgium carrier's agent (MSC Belgium) would in any way be guided in their actions by the definition of a 'ship's delivery order' in a UK statute!

[64] Above (n 5) [9].

[65] Above (n 6) [5.29].

5 The bill of lading and its delivery orders

The Law Commission recommended that the person to whom delivery was made under a ship's delivery order must be given a statutory right of suit but only briefly explored the possible consequences thereof for the (rights of suit under the) bill of lading contract.

The rights of suit under a bill of lading contract are linked to the 'holdership' of that bill of lading. Section 2(1) stipulates that

> a person who becomes—(a) 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.

As there can only be one bill of lading holder, the rights of suit under a bill of lading contract are exclusive rights. Initially, the rights of suit rest with the shipper to whom the bill of lading is issued, but it loses those rights when the bill of lading is transferred to its new holder. Section 2(5)(a) of the Act reads:

> Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage;

The rule is different for ship's delivery orders. The Law Commission recognised that these may be issued to (the) order (of a named person), [66] but the 'holdership' of the ship's delivery order is not required for the exercise of rights of suit.[67] Although the presentation of the ship's delivery order to the carrier is arguably the only way for an order or bearer 'deliveree' to identify himself as such,[68] it is not a condition.

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[66] Ibid, [5.26].

[67] The Law Commission does occasionally refer to the 'holder' in its Report, for instance when it recommends 'that the holder of a ship's delivery order to whom a sea carrier has undertaken to deliver the goods be given statutory rights of suit against the carrier': ibid, [5.30].

[68] That is different for 'straight' ship's delivery orders, of course. Whereas straight bills of lading are subject to the presentation rule, it makes less sense for a straight ship's delivery order. The identity of the 'deliveree' is already given, and the mere fact that the ship's delivery order was issued implies that the seller/shipment has been paid under the underlying sales contract.

Section 2(1)(c) of the Act just stipulates that

> a person who becomes—(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the (…) the person to whom delivery is to be made) 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.

The rule is also different regarding exclusivity. The Law Commission only spent a few words on the matter in its report, but it advised: 'If it is correct to give a right of action to the person who has acquired a right of delivery against the carrier, this should apply indifferently to the bill of lading holder and to the person to whom delivery is due under a ship's delivery order.'

This indifference, in combination with 'and', suggests a cumulation of rights of suit against the carrier, and this also appears to be in line with s 2(5)(b):

> Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—
>
> (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;
>
> but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

The drafting is not very accessible, but the first part of s 2(5) refers to rights that 'are transferred'. In the case of a bill of lading transferred from one holder to the next, the transferee acquires his rights of suit at the expense of the former holder, and its rights of suit are therewith extinguished. In the case of issuing a ship's delivery order against the presentation of an original bill of lading, however, nothing is transferred, and nothing is

extinguished.[69] The bill of lading has merely run its usual course, ending with presentation at the port of discharge.

Assuming, however, that the 'transfer operation' encompasses the issuance of ship's delivery orders as well, this provision can hardly be read in any other way than saying that the acquisition of rights of suit under a ship's delivery order is without prejudice as to the rights under the contract of carriage. In other words, if the carrier has issued ship's delivery orders in order to split the shipment of cargo carried under a bill of lading, then the bill of lading holder has a right of suit for that entire shipment and the person to whom delivery of his parcel must be made under the ship's delivery order has a right of suit for loss of or damage to that parcel.

This is certainly practical,[70] but it does sit somewhat uncomfortably with s 2(5)(a) of the Act. If a bill of lading is exchanged by its holder for ship's delivery orders, then the 'deliverees' under these ship's delivery orders essentially replace the holder of the underlying bill of lading. And if the replacement of the holder has the same effect as a transfer of the bill of lading to the holders of and/or receivers under several 'mini' bills of lading, there really should not be any rights of suit left under the bill of lading contract. Still, the issuance of ship's delivery orders leaves the rights of suit under the bill of lading contract untouched.

6 The contract of carriage

It seems safe to assume that the Law Commission foresaw that disputes could arise between the carrier under a bill of lading contract and the 'deliveree' under a ship's delivery order issued pursuant to that bill of lading contract. Again, however, the Law Commission only spent a few words on the matter, and they were not extremely helpful: 'The question of the terms of the relationship between the carrier and the holder will depend on the facts of the particular case, although usually the bill of lading will be incorporated by reference.' [71]

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[69] The same applies, *mutatis mutandis*, to the 'transfer' of a sea waybill. Since the shipper does not lose its right of suit, the named consignee acquires its rights of suit through an accession to the contract.

[70] The rule is then essentially the same as for sea waybills, and the cumulative right of suit of the shipper and the consignee under a sea waybill contract is, in practice, hardly ever an issue.

[71] Above (n 6) [5.30].

Suppose the terms of the bill of lading are indeed validly incorporated. In that case, they will obviously regulate the relation between the carrier and the claimant under the ship's delivery order as well.[72] If not, however, it really does not depend on the facts of the case. It is submitted that whenever ship's delivery orders are issued against the presentation of the bill of lading, that bill of lading contract would regulate their relationship.[73]

A shipment of 880 mt UCO (used cooking oil), for example, is carried in 22 mt flexibags from Singapore to Rotterdam under a bill of lading issued 'to order'. By the time the vessel arrives in Rotterdam' the shipper/seller has found four buyers for his UCO. The shipper/seller presents an original bill of lading, but instead of taking delivery, instructs the carrier to issue four ship's delivery orders for 220 mt each to supply its buyers. The carrier complies, and the UCO is delivered to the buyers.

Unfortunately, the UCO proves to have been contaminated in the course of the voyage and both the shipper/seller and the four buyers claim damages from the carrier.

Because of s 2(5)(b), the issuance of the ship's delivery orders has not affected the shipper's rights of suit under the bill of lading contract. Also, because of the operation of s 2(4), it does not matter either that he does not own the goods anymore and will not have suffered the damages. The shipper/seller still has the rights of suit, and his relation with the carrier is regulated by the bill of lading and the Hague or Hague-Visby Rules.[74]

In addition, the buyers have their own rights of suit pursuant to s 2(1)(c). They are not a party to the bill of lading contract, of course, but they are bound by it all the same if they sue the carrier for damages. The ship's delivery orders have been issued pursuant to the bill of lading, and that bill of lading contract regulates the buyers' relation with the carrier. Section 2(1)(c) is very specific: the buyer shall have 'all rights of suit under the contract of carriage as if he had been a party to that contract.'

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[72] Although the question is perhaps better reserved for another day, this suggests that the standard surrender clause on the face of the bill of lading would then apply to the ship's delivery order as well.

[73] *Leduc & Co v Ward* (1888) 20 QBD 475 (CA).

[74] Art X (a) and Art X(b) of the Hague-Visby Rules. This would be different, of course, if the bill of lading had been issued pursuant to a charterparty: see, eg, *Rodocanachi v Milburn Brothers* (1886) 17 QBD 316; *The President of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1970] 1 QB 289 (CA).

Section 5(1)(b) of the Act then ensures that this is, in fact, the bill of lading contract as it defines the contract of carriage in relation to ship's delivery orders: 'In this Act – … "the contract of carriage" – (…) (b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given.'

Based on these statutory provisions, it is therefore submitted that it does not make a difference whether the bill of lading terms are incorporated by reference in the ship's delivery order or not.[75]

7 A similar document of title

The more challenging question, perhaps, is whether a ship's delivery order is a similar document of title in the sense of Art I(b) of the Hague and Hague-Visby Rules:

> 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

The Law Commission did not think so, it seems, saying that a ship's delivery order is not a transferable document of title at common law and observing that the holder of a ship's delivery order had no rights of suit under the 1855 Act. The latter point is obviously correct,[76] but that point was on the table for revision anyway, and the Law Commission recommended bringing ship's delivery orders within the operation of the Act.[77]

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[75] In the absence of provisions such as s 2(1)(c) and s 5(1)(b), the result would probably not be any different. The buyers are essentially the (partial) consignees under the bill of lading contract; their rights of suit from the bill of lading contract, and the bill of lading contract represents the terms and conditions under which the carrier has accepted his obligations. Under those circumstances, the implied contract in *The Dona Mari* (n 26) works the other way around as well.

[76] *The Dona Mari* option was still open, of course, but the Law Commission preferred a positive rule: 'We do not think that the holder of a ship's delivery order to whom the carrier has undertaken to deliver should be left to the vagaries of a *Brandt v Liverpool* contract in order to assert contractual remedies against the ship': above (n 6) [5.30].

[77] Ibid.

It is also correct that a ship's delivery order is not a document of title at common law, i.e. 'a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may if so intended operate as a transfer of the property in them.'[78] It would, in theory, seem possible to use a ship's delivery order in this way, but there is indeed no evidence that it was also used in this way, let alone there being an established custom.[79]

On the other hand, the ship's delivery would certainly seem to qualify as a document of title in the wider view,[80] namely 'a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading.' In fact, enabling the holder of the document to take delivery would appear to be the sole 'raison d'être' of the ship's delivery order.

Furthermore, the ship's delivery order displays a number of 'document of title' features. A ship's delivery order can be issued 'to order' and can also be endorsed (in blank).[81] This implies that they are also transferable documents, just not transferable documents of title at common law.

More importantly, however, the entry into force of the 1992 Act does not affect the operation of the Hague-Visby Rules. Section 5(5) stipulates that 'the preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules).'

The meaning of a 'similar document of title' was extensively discussed in The Hague, but not always equally helpful for the question at hand. The underlying problem was that the French text of Art I(b) refers to a 'document similaire formant titre pour le transport'. Whereas the English wording specifically refers to a 'document of title', the French text translates into 'a

[78] Francis D Rose and Francis MB Reynolds, *Carver on Bills of lading* (5th edn, Sweet & Maxwell 2022) [6-002].
[79] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 (PC).
[80] The view of the House of Lords in *The Rafaela S* with regard to straight bills of lading: *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423, [38] (Lord Steyn).
[81] See, for instance, the ship's delivery order in *Krohn v Thegra* (above, n 27) and *The Dona Mari* (above, n 26).

document that forms the cause for the transport'. Such a document, however, is something completely different as it covers every contract for the carriage of goods by sea.[82]

Still, some promising candidate documents were discussed by the delegates. The ship's delivery order did not feature in the discussion, but the following exchange is rather telling:[83]

> **Mr Ripert** asked what this similar document might be.
>
> **Sir Leslie Scott** replied that it might be, for example, the 'Mate's Receipt'. The desire was to avoid the possible side-stepping of the convention by the parties through the adoption of a similar document that was not called a bill of lading.
>
> **The Chairman** added that, in effect, there could be a non-signed bill of lading as used in small coastal trades and that sometimes carriage occurred on a simple statement of goods. Such means should not be allowed to circumvent the convention.
>
> **Mr Richter** asked whether a 'mate's receipt' was a similar document.
>
> **The Chairman** felt it was, if used like a bill of lading. …

In view of this discussion, the Law Commission's reference to the ship's delivery order as a 'mini' bill of lading suggests that it is a bill of lading or similar document of title. In fact, most of the arguments for and against the qualification of a straight bill of lading in *The Rafaela S*[84] are relevant to this discussion as well. As Rix LJ held on appeal: [85] 'At the end of the day, I do not think that there is anything in the travaux préparatoires which I have seen which unequivocally states that such a case is outside the scope of the rules, and there is much in that material which points in the opposite direction.'

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[82] Francesco Berlingieri (ed), *The Travaux Préparatoires of the Hague Rules and the Hague-Visby Rules* (CMI 1997) 142: 'Mr Berlingieri, in agreement with Professor Ripert, found that the text did not agree with the concepts and principles of the Italian and French codes. For example, the expression: document similaire formant titre pour le transport (document giving title for the carriage of goods) and its translation as 'document of title'. But what difference was there between the charterparty and the document of title for the carriage of goods by sea? The French expression does not say.'

[83] Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* vol 1 (Fred B Rothman & Co 1990) 433.

[84] Above (n 35).

[85] Ibid, [75].

The House of Lords held:

> There is simply no sensible commercial reason why the draftsmen would have wished to deny the CIF buyer named in a straight bill of lading the minimum standard of protection afforded to the CIF buyer named in an order bill of lading. The importance of this consideration is heightened by the fact that straight bills of lading fulfil a useful role in international trade provided that they are governed by the Hague-Visby Rules since they are sometimes referred to as order bills of lading on the basis that there is a lesser risk of falsification of documentation. On a broader footing, it is apparent that the interpretation advanced by the carrier depends on fine and technical distinctions and arguments. Traders, bankers, and insurers would be inclined to take a more commercial view of straight bills of lading.

It is submitted that a ship's delivery order is a similar document of title in the sense of Art I(b) of the Hague and Hague-Visby Rules, and it is also submitted that this is not just an academic discussion. The qualification becomes relevant when an extra variation is introduced into the UCO example above. The vessel arrives in Rotterdam, the shipper/seller presents the bill of lading, and again, four ship's delivery orders are issued, but this time, three parcels stay in Rotterdam, and the fourth parcel needs to be delivered to a buyer in Antwerp, luckily the vessel's next port of call .

The three Rotterdam parcels are delivered to the buyers. The remaining UCO can stay in the ship for transport to Antwerp. The carrier does issue a new bill of lading but just incorporates the terms of the Singapore/Rotterdam bill of lading into the ship's delivery and sets sail for Antwerp.

Unfortunately, the UCO in Antwerp has proven to be contaminated. It must have happened on the voyage to Antwerp because the three Rotterdam parcels were all delivered to the buyers in good condition.

All in all, that does not significantly change the regime. The voyage from Singapore under the bill of lading was already governed by the Hague-Visby Rules, and so was the voyage from Rotterdam under the ship's delivery order. Singapore and the Netherlands are both contracting states, and those Rules apply pursuant to Art I (b), Art I (e), and Art X (a)(b).

But if we change the port of loading from Singapore to the Philippines, the liability regime changes in the process. Since the Philippines is not a party to the Hague-Visby Rules,[86] the initial voyage under the bill of lading to Rotterdam will no longer be governed by mandatory rules pursuant to Art X (a) or (b) of the Hague-Visby Rules.[87]

It then depends a bit on the drafting of the (Paramount) clause, of course, but if we take the standard MSC bill of lading again, the relevant provisions are as follows:

> '5. This Bill of Lading shall be subject to the Hague Rules unless the governing law makes the Hague or the Hague-Visby Rules compulsorily applicable in which case the said Hague or Hague-Visby Rules will apply to this Bill of Lading only to the extent that they are compulsorily applicable.
>
> 7.2.1 (a) If and to the extent the Hague Rules or Hague-Visby Rules are compulsorily applicable to this Bill of Lading … the Carrier's liability for breaches or wrongs occurring during such period of compulsory application shall in no event whatsoever exceed the amounts provided in the Hague Rules or Hague-Visby Rules, whichever are compulsorily applicable.
>
> 7.2.1 (b) If and to the extent the Hague Rules apply only contractually pursuant to clause 5, the Carrier's maximum liability shall in no event whatsoever exceed GBP 100 sterling lawful currency per package or unit.

Arguably, the 22 mt flexibag qualifies as a 'package or unit',[88] and in the absence of mandatory law, the carrier can effectively rely on its terms and conditions as stipulated on the reverse of

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[86] Nor the Hague Rules.

[87] This would arguably be different if the bill of lading were to choose the Hague-Visby regime pursuant to Art X(c), but general paramount clauses are (for obvious reasons) often not drafted in a way that they reach that objective, see for instance the (reluctant) conclusion of Longmore LJ in *Mediterranean Shipping Co SA v Trafigura Beheer BV (The MSC Amsterdam)* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622, [16]: 'I, therefore, agree with Mr Parsons that the scheme of the bill of lading in the present case is that the owners, as a matter of contract, accept Hague Rules (1924) obligations but only accept HVR obligations if they are forced to do so. … Whether that is an attractive way for a shipowner to do business 40 years after the Hague-Visby Protocol was internationally agreed is a different matter and cannot be of any relevance to the construction of this contract of carriage.'

[88] *Kyokuyo Co Ltd v AP Møller-Maersk A/S (T/A Maersk Line) (The Maersk Tangier)* [2018] EWCA Civ 778, [2018] 2 Lloyd's Rep 59.

the bill of lading. As such, the carrier's liability for the voyage to Rotterdam is limited to 100 pounds sterling per flexibag.

The incorporation of those bill of lading terms and conditions, however, will only have a limited effect on the voyage from Rotterdam to Antwerp. Suppose the ship's delivery order qualifies as a similar document of title under Art I(b). In that case, Art X triggers the Convention's application and Art III, r 8 renders those defences and limitations that infringe on the liability regime of the Rules null and void, leaving the carrier exposed to the more generous 2 SDR weight limitation instead.