

# Misdelivery in international transport law

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## 1. Introduction

International transport serves as the backbone for world trade. Cargo is constantly moved to satisfy demand, and as a result of the ever-increasing amount of international trade, the transport industry is a prime example of the economies of scale. Maritime ports in the European Union alone handled approximately 3,402 million tonnes of seaborne goods in 2023<sup>1</sup>.

In any large-scale industry some losses are inevitable. The transport industry is no exception, and with the massive transit in cargo every day, losses occur hourly. Regardless of the mode of transport, cargo may be lost, damaged or delayed during transit. A portion of these losses is a consequence of the carrier's misdelivery of the goods. Misdelivery is quite distinct from loss caused by damage or delay, as it adheres to its own rules of liability (the Delivery Liability<sup>2</sup>), contrary to transport liability in other circumstances, which is characterized by the ability to limit the carrier's liability.

The consequential damages of misdelivery can be far reaching, as the carrier cannot generally rely on any contractual exemptions, limitation rules, or P&I insurance. Due to the size of the financial loss as well as the contrast of the financial loss between a misdelivery situation and a loss situation, the carrier is incentivised to try to conceal any misdelivery by putting forward a claim of loss instead. Notwithstanding any moral reflections, the above-mentioned scenario illustrates an imbalance within the legal framework of misdelivery.

This article focuses on misdelivery within international transport law; the international aspect of this article is limited to a Scandinavian standpoint, as international transport law only refers to the international conventions on car-

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1) EUROSTAT at the European Commission. Retrieved on 31 March 2025

2) Tiberg, Hugo. Liability for wrongful delivery, Sjörettsföreningen Skrifter, 1998 (Tiberg 1998) p. 127

riage of cargo acceded to by Denmark and the other Scandinavian countries. Reference to legal practice in other countries will only be made to confirm or disprove a resemblance to Scandinavian practice.

The transport aspect of this article is limited to international carriage of cargo by sea, as it remains the most dominant mode of transport. However, reference to the other means of transport (i.e. road, air, and rail) will, however, be made to demonstrate the resemblance in practice.

This article is organized in three main sections. Following this introduction, section 2 accounts for the concept of misdelivery and introduces the current theory in practice. Relevant legislation is presented, and the delivery liability is accounted for. Section 3 analyses and evaluates the appropriateness of the current theory in practice through an assessment of the different considerations embedded within international transport law. Section 4 gives a perspective on future conduct, followed by a conclusion in section 5.

## 2. Misdelivery

In the present section the concept of misdelivery within international transport law is examined. The first part of this section includes a short introduction of the codex covering international carriage of cargo by sea (section 2.1), followed by a brief account of the relevant rules on delivery (section 2.2), and an account of the concept of misdelivery (section 2.3). Furthermore, liability for misdelivery within both carriages by sea will be set out (section 2.4) as well as other means of transportation (section 2.5).

### 2.1 Codex

In Denmark the applicable statute for transport of cargo by sea is the Danish Merchant Shipping Act of 16 March 1994<sup>3</sup> (hereafter the MSA), specifically Chapters 13 and 14 (sections 251-320 and 321-400) regarding the Carriage of Goods and the Chartering of Ships respectively. The present Danish MSA has, in respect of Chapter 13, its foundation in the Hague-Visby Rules from 1968, which was acceded to on 20 November 1975. Denmark has not ratified the subsequent Hamburg Rules, although the MSA has been altered to be as

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3) The Danish Consolidated Act no. 1013 of 29 June 2023

closely in line with the Hamburg Rules as possible, without deviating from The Hague Visby Rules.<sup>4</sup>

## 2.2 Delivery

The MSA section 292 (13:42)<sup>5</sup> first paragraph, no. 2, helps to establish the concept of a bill of lading and contains an undertaking by the carrier to only deliver the cargo in exchange for the return of the bill of lading. According to the MSA section 302 (13:52), first paragraph, delivery must only be made to an authorised receiver, i.e. the rightful holder of the bill of lading. The receiver will thus have to “*present a bill of lading and, through its wording, or in case of an order bill, through a continuous chain of endorsements or through an endorsement in blank, appears as the rightful holder*” cf. MSA section 302 (13:52), first paragraph.<sup>6</sup> When the “*bill of lading has been issued in more than one original, it is sufficient for delivery at the place of destination*”, that the carrier is presented with one original cf. MSA section 302 (13:52), second paragraph, first sentence. However, where the cargo is delivered to another place, all of the originals must be presented. Alternatively, security must be provided in case conflicting claims arise cf. MSA section 302 (13:52), second paragraph, second sentence<sup>7</sup>.

If delivery is made under a sea waybill, the MSA section 308 (13:58), first paragraph, no. 2), provides that the carrier will have to deliver the cargo to the receiver specified in the document. However, the sender may choose to change the receiver named in the document in accordance with the MSA section 308 (13:58) second paragraph, unless it has relinquished this right, which follows from the MSA section 308 (13:58) second paragraph, second sentence. Under such circumstances, misdelivery will follow unless the carrier complies with the order given<sup>8</sup>.

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4) Hedetoft, Anders, Frandsen, Henrik, and Jensen, Peter H. Transport Law in Denmark. 1st ed. DJØF Publishing, Wolters Kluwer 2012 (Hedetoft et.al. 2012) p. 102

5) Reference to the section number of the Swedish Merchant Shipping Act is done in parentheses after reference to the Danish and Norwegian section number.

6) Pedersen, Per Vestergaard. Transportret, Introduktion til reglerne om transport af gods. 1st ed. Karnov Group 2008 (Pedersen 2008) p.490

7) Pedersen 2008 p. 491

8) Pedersen 2008 p. 532 and Falkanger, Thor, Bull, Hans Jacob, and Brautaset, Lasse. Scandinavian maritime law – the Norwegian perspective. 3rd ed. Oslo : Universi-

From the above it is clear that the MSA provides a rather detailed set of rules regarding the carrier's obligations relating to the delivery of cargo. Nonetheless, the MSA omits any mention of the sanctions that will follow in cases where the carrier fails to comply with these rules. It is from this very point that the issues on misdelivery originate. Uncertainty exists with regard to freedom of contract, loss calculation, limitation, maritime lien, notice, and time bar in case of misdelivery as to which specific rules are applicable.

### 2.3 Misdelivery

Misdelivery (also referred to as *wrongful delivery*) means the delivery of goods to an incorrect party. In a broader aspect, the term of misdelivery may also refer to delivery at an improper location or delivery of goods damaged by carriage. However, in the present context, misdelivery is solely to be understood as a technical term, which entails that the party in possession of the cargo delivers it to someone not entitled to receive it or otherwise delivers it in a manner contrary to the contractual agreement.

To further narrow down the concept of misdelivery within international carriage of cargo by sea, it is necessary to identify the different types of misdelivery that occur within this mode of transport.

Firstly, misdelivery can occur as a breach of the rules on documentation, as these are rules regarding the "*exchange of goods against bill of lading*"<sup>9</sup>. Rules regarding documentation are implemented by law to secure correct exchange of cargo against a bill of lading. A breach of the rules on documentation occurs where the carrier fails to check a prospective consignee's possession of a bill of lading, where the carrier fails to check the identity of the consignee named in the bill of lading, or where there is a lack of proper indorsement on the bill of lading<sup>10</sup>. Breach of the rules regarding documentation may also occur in relation to sea waybills, as it upholds somewhat similar responsibility of control, when delivering cargo to the consignee named in the document. Misdelivery may thus occur if the carrier fails to deliver the cargo to the proper consignee<sup>11</sup>.

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tetsforlaget 2011 (Falkanger et al. 2011) p. 347

9) Falkanger et al. 2011 p. 342

10) Tiberg 1998 p. 53

11) Falkanger et al. 2011 p. 348

Secondly, misdelivery can occur where delivery is deliberately made without due presentation of a bill of lading<sup>12</sup>. According to the MSA section 292 (13:42), first paragraph no. 2, section 303 (13:53), and section 304 (13:54), in order to obtain delivery of the cargo the carrier must be given a bill of lading, which shows that the person presenting it is an authorised receiver<sup>13</sup>. Even though delivery without a bill of lading is a grave breach of the carrier's obligation, it is a rather common occurrence in practice. Misdelivery in cases where the cargo is handed over without presentation of a bill of lading by the receiver may occur where the bill of lading has been delayed in handling and thus arrives post shipment. Modern transportation faces a challenge as bills of lading often struggle to keep up with cargo shipments. Carriage is often so quick that goods arrive at destination before the bill of lading has been issued, negotiated in seller's bank, sent to buyer's bank or presented to buyer, making the buyer unable to collect the cargo at the port of destination in accordance with the planned schedule<sup>14</sup>. Misdelivery then occurs, as the buyer often persuades the carrier to make delivery without presentation of the bill of lading against a guarantee (Letter of indemnity) for any liability that the carrier may incur in relation to any competing bill of lading holder<sup>15</sup>.

To circumvent this issue in practice the method of telex release was developed. Similar to the original method of bills of lading, the shipper receives the bills of lading when cargo is loaded on board the ship. But instead of forwarding the bills of lading to the consignee, the shipper surrenders the bills of lading back to the shipping company. Once the shipping company has received the original bills of lading, it will then notify its office at the destination that the bills of lading have been surrendered and that the cargo can be released to the consignee without the receipt of a bill of lading. Whilst this method bypasses the issue of a bill of lading being delayed in handling, it still presents yet another risk of misdelivery.

Misdelivery by deliberate delivery without presentation of a bill of lading

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12) Tiberg 1998 p. 53

13) Falkanger et al. 2011 p. 272

14) Tiberg, Hugo, and Schelin, Johan. Transport Law in Sweden. 1st ed. Alphen aan den Rijn : Kluwer Law International 2011 (Tiberg and Schelin 2011) p. 127

15) Tiberg and Schelin 2011 p. 127

may also occur where the bill of lading simply fails to be presented. The carrier might be inclined to make delivery despite the missing papers, either because of a trustworthy explanation of the non-availability of the bill of lading from a long-standing commercial acquaintance or because uncollected cargo can prove a practical problem for the carrier<sup>16</sup>. In case of large consignments, the ship may remain idle for an extended period until the bill of lading is presented. According to the MSA section 271 (13:21), the carrier may choose to store the cargo to avoid unreasonable pending; however, depending on the port and the type of cargo, it may not always be feasible<sup>17</sup>. In the case of consignments under liner trade, the carrier may be more inclined to make delivery without presentation of a bill of lading if no appropriate warehouse is available or warehousing will prove too lengthy for perishable goods<sup>18</sup>.

Thirdly, misdelivery can occur as a consequence of various degrees of compulsion to deliver without a bill of lading. Misdelivery by compulsion can be the result of a forged bill of lading<sup>19</sup>. As a document, a bill of lading is rather susceptible to forgery. To avoid forgery, special markings and designated signatures have been developed for the carrier to distinguish fabricated documents from originals. However, some forged bills of lading go unnoticed, resulting in misdelivery.

Fourthly, misdelivery can occur where the carrier delivers cargo against less than the full set of bills of lading. According to the MSA section 302, (13:52) second paragraph, where the bill of lading has been issued in more than one original, it is sufficient for delivery at the place of destination that the receiver demonstrates authority by presenting one original bill. However, if the cargo is delivered to another location the other originals must also be presented. When cargo is delivered at an intermediate port, the carrier will thus have to secure that the apparent consignee is the authorised receiver, by demanding presentation of the full set of the bills of lading, to avoid the rightful authorised receiver being left without its cargo at the port of destination.

Fifthly, misdelivery can occur as a consequence of the receiver's collusion

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16) Falkanger et al. 2011 p. 342 and Pedersen 2008 p. 584

17) Falkanger et al. 2011 p. 342

18) Falkanger et al. 2011 p. 342

19) Tiberg 1998 p. 53

with the carrier<sup>20</sup>. Misdelivery by collusion may occur where a fraudulent cargo receiver acts in cooperation with a carrier, master or delivering agent, to secure unlawful misdelivery of cargo against a monetary payoff at the carrier or master's convenience.

Sixthly, misdelivery can also occur as a consequence of simple handling mistakes<sup>21</sup>. Misdelivery by handling mistakes may occur where the cargo is wrongfully delivered due to handling mistakes on board or in cargo terminals, leaving the carrier unaware of the cargo's whereabouts when the authorised receiver arrives to collect the cargo against a bill of lading.

Every day, millions of tonnes of seaborne cargo are moved across the seven seas and most of them are correctly received by the rightful recipient. However, a small percentage of them will fall within one of the six types of misdelivery mentioned above.

## **2.4 Liability for misdelivery**

The MSA warrants no direct stipulation of liability for misdelivery (see section 2.2) and some uncertainty exists as a consequence of this omission. The focal point of discussion remains whether misdelivery constitutes a "loss" and thus subjects the carrier to liability for loss according to the MSA section 275 (13:25) (i.e. the transport liability) or whether misdelivery must adhere to its own liability (i.e. the delivery liability)<sup>22</sup>. In line with other countries bound by the international maritime codex, the Scandinavian countries have followed the latter approach and misdelivery is consequently subject to a delivery liability in Denmark, Sweden, Norway and Finland<sup>23</sup>. The delivery liability implies a liability for misdelivery of the cargo, regardless of whether the carriage has been agreed upon by the use of a bill of lading, sea waybill or no document at all. However, as the rules on delivery vary according to the method used, the following account of the liability regime will reflect this partitioning.

Regarding the use of a *bill of lading*; the carrier may only deliver the cargo

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20) Tiberg 1998 p. 53

21) Tiberg 1998 p. 53

22) Tiberg 1998 p. 53 See also Brækhus, Sjur. Bortfrakterens ansvar for utlevering av last til ulegitimert modtager. Arkiv for Sjørett 1955 (Brækhus 1955) pp. 141 et seq.

23) Falkanger et al. 2011 pp. 342 et seq.

upon receipt of a bill of lading pursuant to the rules in the MSA section 292 (13.42) cf. sections 302-304 (13:52- 13.54). However, the circumstances may lead the carrier to make delivery in violation of these rules. If so, it will be at the risk of the carrier, as it is deliberately violating the most fundamental rule on bills of lading. Where the carrier delivers the cargo without the receipt of a bill of lading, but to the rightful owner of the cargo, no loss will occur, unless third parties were withholding the bill of lading to secure payment, in which case the carrier will be subject to unlimited liability for the full loss suffered. See for instance the two judgments from the Maritime and Commercial High Court of Denmark, ND1995.109 S or FED.2013.1 S, where delivery was made to the correct consignee but without the receipt of a bill of lading, making the carrier subject to an unlimited liability. Where the carrier delivers the cargo without the receipt of the bill of lading, to someone else than the rightful owner, the carrier will also be subject to unlimited liability for the loss suffered<sup>24</sup>. The carrier will thus be subject to unlimited liability as a consequence of the deliberate violation of the rules on delivery regarding bills of lading. An unlimited liability will deprive the carrier of any defence and will not allow the carrier to rely on any contractual exemptions, limitation clauses, weight or package limitation, or global limitation rules<sup>25</sup>. In addition, no P&I insurance will cover the loss induced as a result of misdelivery<sup>26</sup>. The carrier may also be liable for misdelivery where delivery is rightfully made against the receipt of a bill of lading but to someone other than the rightful owner. Where the carrier delivers the cargo on receipt of the bill of lading but omits to check the identity of the holder or the endorsements on the bill of lading cf. MSA section 302 (13:52), first paragraph, the carrier will be subject to a fault-based liability, also known as negligence liability with a reverse burden of proof, see U2004.1142 S where delivery was made to someone other than the rightful owner, against an order bill of lading with a lack of proper endorsements. Similar liability will follow where the carrier delivers the cargo to someone who pretends to be the person named in the bill of lading<sup>27</sup>. A fault-based liability with reverse burden of proof will

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24) Pedersen 2008 p. 585

25) Falkanger et al. 2011 pp. 342-343

26) Falkanger et al. 2011 p. 343

27) Pedersen 2008 p. 585

make the carrier liable for the full loss suffered (i.e. unlimited liability), unless the carrier can prove that it neither knew nor ought to have known that the holder of the bill of lading was not the rightful owner<sup>28</sup>.

Any account of the delivery liability in regard to the use of a bill of lading will have to mention the special practice that has been developed to bypass the risk of »unlimited« liability and enable delivery without the presentation of a bill of lading<sup>29</sup>. It has become common practice to allow delivery against a Letter of indemnity rather than awaiting a bill of lading. The Letter of indemnity (or “back letter”) is set to safeguard the carrier from any liability that might follow as a consequence of conflicting claims from a competing bill of lading holder<sup>30</sup>. The Letter of indemnity must protect the carrier against the unlimited liability which will incur as a consequence of misdelivery and is thus often set to cover 150% of the invoice value<sup>31</sup>. In addition, a prudent carrier will request a bank guarantee to secure himself against an insolvent issuer. This practice has come to corrupt the value of the bill of lading as a negotiable instrument and a document of title; instead of functioning as a “key to the cargo” it merely functions as a “key to a claim” when delivery is made against a Letter of indemnity.<sup>32</sup>

In regard to the use of sea waybill, the carrier is under an obligation to deliver the cargo to the named consignee, or any other receiver entitled to receive the cargo according to the sender’s instruction cf. MSA section 308, (13:58) first and second paragraph. Where the carrier misdelivers the cargo in breach of this obligation, the carrier will be subject to a fault-based liability with reverse burden of proof and will be liable for the full loss suffered (i.e. unlimited)<sup>33</sup>. The carrier will thus become liable, unless it can prove that it neither knew nor ought to have known of the misdelivery. The same liability applies where no document is issued at all<sup>34</sup>.

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28) Pedersen 2008 pp. 585-586

29) Iversen, Bent. *International handelsret*. 7th ed. Gjellerup 2012 (Iversen 2012) p. 405

30) Tiberg and Schelin 2011 p. 127

31) Tiberg and Schelin 2011 p. 127

32) Ramberg, Jan. *The Law of Transport Operators in International Trade*. 1st ed. *Norstedts juridic* 2005 (Ramberg 2005) p. 65

33) Pedersen 2008 p. 586

34) Pedersen 2008 p. 587

The delivery liability within international carriage of cargo by sea is thus identified as a full and unlimited liability for the loss suffered as a consequence of the carrier's misdelivery. The statutory rules on the carrier's liability and limitation hereof pursuant to the MSA sections 274-289 (13:24 – 13:39) are generally thought inapplicable to cases of misdelivery, as the delivery liability is said to fall outside the scope of the MSA altogether. Consequently, the rules on limitation of liability pursuant to the MSA sections 280 and 281 (13:30 – 13:31) will not apply in case of misdelivery, leaving the carrier to cover the loss un-limited.<sup>35</sup> The only rule, which has been stipulated to clarify the regulation of misdelivery, is that of the time bar. According to the MSA section 501 (19:1) first paragraph no. 5: “*a claim for damages for loss suffered by cargo being delivered without presentation of a bill of lading or to the wrong person, [shall be made] one year from the day on which the good should have been delivered*”.

## **2.5 Liability for misdelivery within other means of transports**

The present section will illustrate that a delivery liability is applicable to misdelivery within each of the other means of transport as well (i.e. road, air and rail freight). To properly account for this similarity in practice, each sub-section will therefore give a short account of the applicable codex and a description of the liability for misdelivery.

### 2.5.1 International carriage of cargo by road

In Denmark the applicable statute for international carriage of cargo by road is Act No. 47 of 10 March 1965 on Contracts for the International Carriage of Goods by Road (hereafter the CMR-Act). In line with the concomitant Acts of the other Scandinavian countries, the Danish CMR-Act has been revised to accommodate the CMR-Protocols of 1978 and 2008. The CMR-Convention has obtained international recognition and has been ratified by 58 countries (UN Treaty Collection).

Misdelivery is subject to a delivery liability within international carriage of cargo by road. Delivery liability is based on the common principles of transport law, as the CMR too, does not have a direct stipulation of a liability for misde-

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35) Pedersen 2008 p. 588

livery. Misdelivery is generally considered to fall outside the scope of the CMR Chapter IV on the Liability of the carrier, as it is not regarded a loss pursuant to the CMR section 24 (art. 17). On the one hand, the liability for misdelivery within international carriage of cargo by road is quite similar to the liability of misdelivery within international carriage of cargo by sea, as it also induces a delivery liability. On the other hand, the liability for misdelivery within international carriage of cargo by road differs as it distinguishes between different categories of misdelivery; i.e. (i) misdelivery, (ii) COD (cash on delivery) misdelivery and (iii) misdelivery by deception.

The first category of misdelivery is that of 'true' (i) misdelivery, covered by the delivery liability mentioned above. The delivery liability entails a fault-based liability with reversed burden of proof, making the carrier liable for the full loss suffered, unless the carrier can prove that it neither knew nor should have known of the misdelivery. Because this category of misdelivery is considered to fall outside the scope of the CMR-Act Chapter IV sections 24-42 (art. 17-29) the carrier will not be able to rely on any of the rules therein. In line with the liability for misdelivery under maritime freight, the carrier will not be able to rely on any limitation rule pursuant to the CMR-Act Section 29 (art. 23.3) second paragraph, leaving the carrier to cover the loss unlimited. This practice has been confirmed by case law, see for instance U.1996.336V where it was established that;

*“A carrier’s liability for misdelivery of goods is not covered by the CMR-Act Chapter IV, and CMR section 29 (art. 23.3) will therefore not apply”.*

The second category of misdelivery is that of (ii) COD misdelivery, covered by a strict liability derived from the principle of the CMR-Act section 34 (art. 21). The CMR-Act section 34 (art. 21) provides that the carrier is liable to the sender for any charges which the carrier neglects to collect under a COD agreement. Legal practice has extended the scope of this rule by further applying it to cases where agreements were made to deliver the cargo against presentation of a document (e.g. transport document, bank statement or receipt of payment). In U.1998.557H and U.1996.596Ø, the courts applied the *“principle of CMR-Act section 34 (art. 21)”*, where an agreement was made that the cargo should only be delivered on presentation of a FIATA Forwarders Certificate of Receipt. A similar approach was applied in U.1990.240H, where an agreement was made

that the carrier should only deliver the cargo once it had delivered an envelope to a bank and in return received a receipt of payment. Where the carrier fails to honour such agreements, i.e. the release of the cargo upon presentation of a document or the reception of a receipt for payment, the carrier becomes subject to a strict liability by reference to the principle in the CMR-Act section 34 (art. 21). Neither the CMR-Act section 34 (art. 21) nor the principle herein allows the carrier to limit the liability according to the CMR-Act section 29 (art. 23.3) second paragraph. An agreement, whereby the cargo may only be delivered on receipt of a transport document or a receipt of payment, has much the same purpose as a COD agreement. The close resemblance between ‘cash on delivery’ and ‘documents on delivery’ is most likely the reason that legal practice has chosen to extend the scope of CMR-Act section 34 (art. 21). However, the principle of the CMR-Act section 34 does not extend to cases where agreements are made that delivery may not transpire before a certain instruction or procedure has been fulfilled. The principle in the CMR-Act section 34 (art. 21) will therefore not apply in cases where the carrier is instructed to stay ‘on hold’ until a ‘release order’ has been issued. Any neglect by the carrier to comply with such an agreement is more likely to induce a fault-based liability with reversed burden of proof. See for instance FED.1998.2123 where the carrier was instructed to only release the cargo upon further instruction from the consignee in Moscow. The cargo was however released to a fraudulent receiver against the mere copy of the CMR-waybill and passport. The carrier was consequently held liable for misdelivery.

The third category of misdelivery is (iii) misdelivery by deception. This category of misdelivery is covered by the CMR-Act Chapter IV as most scholars argue that it is a “loss” in much the same way as a theft or robbery. Where the carrier delivers the cargo to someone not entitled to receive it, due to deception by a fraudulent receiver or an accomplice of his, the carrier becomes liable pursuant to the CMR-Act section 24 (art. 17), unless the carrier can prove that the misdelivery was caused by “*circumstances which the carrier could not avoid and the consequences of which it was unable to prevent*”, cf. CMR-Act section 24 (art. 17.2) second paragraph. A case by the Maritime and Commercial High Court of Denmark, FED 2022.32 S has confirmed this. In that case, the carrier was induced to deliver the goods to someone not entitled to receive them; however,

the court nonetheless found that the carrier had taken reasonable steps to try and avoid this situation and was therefore not liable for the loss.

Uncertainty exists about the scope of Chapter IV as it remains unclear whether it applies in full. No clarification is made in regard to the rules on loss calculation and limitation in the CMR-Act section 29-30 (art. 24-28), and it therefore remains uncertain whether these rules apply to this type of misdelivery.

In light of the aforementioned, it can therefore be established that misdelivery within international road freight is subject to a delivery liability. The CMR-Act warrants no direct stipulation of a liability for misdelivery, and the delivery liability is consequently based on the general principles of transport law. It can therefore be concluded that there is a high degree of similarity between the handling of misdelivery within maritime freight and road freight. Road freight has, however, taken a more schematic approach in its partitioning, and misdelivery by deception has consequently been set apart.

### 2.5.2 International carriage of cargo by air

In Denmark, the applicable statute for international carriage of cargo by air is the AO Act<sup>36</sup>. The AO Act is based on international conventions acceded to by Denmark on several occasions. The Warsaw Convention on Certain Uniform Rules Relating to International Air Transport of 12 October 1929 (WC) was ratified by Denmark in 1938 and incorporated into Danish law by Act. 123 of 7 May 1937<sup>37</sup>. Denmark later ratified the Hague Protocol of 28 September 1955, The Guadalajara Convention of 18 September 1961, The Guatemala Protocol of 8 March 1961 and The Montreal Protocols No. 1-4 of 25 September 1975<sup>38</sup>. Lastly, the 2003 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (MC) came to replace the otherwise complex system of amended conventions and protocols. The Montreal Convention was ratified by Denmark on 28 June 2004. As of March 2025,

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36) The Danish Consolidated Act no. 1036 on Aviation Operation of 28 August 2013 as amended by Act no. 736 of 25 June 2014 and Act no. 742 of 1 June 2015 (the AO Act)

37) Hedetoft et.al. 2012 p. 188

38) Hedetoft et.al. 2012 p. 35.

140 countries have ratified the Montreal Convention (including all member states of the European Union but not counting EU as a separate entity, which has also ratified the Montreal Convention). The AO Act Chapter 9 is of special importance to the subject of international carriage of cargo as it concerns the transport of cargo by air.

Misdelivery is subject to a delivery liability within international carriage of cargo by air. The delivery liability is based on the common principles of transport law as the AO Act likewise warrants no direct stipulation of a liability for misdelivery. Where the carrier delivers the cargo to someone not entitled to receive it, it will be subject to a fault-based liability with reversed burden of proof, making the carrier liable for the full loss suffered, unless it can prove that it neither knew nor ought to have known of the misdelivery. Misdelivery is generally considered to fall outside the scope of the AO Act section 108 (WC/MC. Art. 18.1) on the carrier's liability for damage sustained in the event of destruction or »loss« of or damage to the cargo. In line with this assumption, the limitation rule in the AO Act section 111 (WC/MC art. 22) fifth paragraph, is thought to be inapplicable in cases of misdelivery, leaving the carrier to cover the loss un-limited. See for instance FED 1998.2095 S, where the Danish Maritime and Commercial Court confirmed that no limitation is made available in cases of misdelivery: "*It is not possible to limit the liability for misdelivery of goods neither pursuant to the AO Act nor NSAB*"<sup>39</sup>. However, this statement is not evidence of a widely held view, applied homogenously by all members of the Warsaw and Montreal Conventions. The Oberlandesgericht in Frankfurt assumed loss pursuant to the WC Art. 18.1 where delivery was made to the wrong consignee. The cargo was deemed 'lost' as it could not be repossessed. A similar stance was taken by the Landgericht Frankfurt where a fraudulent person had obtained a transport document by deception, and delivery was therefore made to the wrong person. The Frankfurt approach has also been confirmed in German and Swiss literature by Otte Reise and Werner Guldimann, who believe that a carrier should be entitled to limit its liability, as misdelivery constitutes a loss pursuant to WC art. 18.1. The latter approach lacks general acknowledg-

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39) FED 1998.2095 Translated into English by the author, original quote: [DA] »*Der er ikke mulighed for at begrænse ansvaret for fejludlevering af gods, hverken efter Luftfartsloven eller NSAB (85), hvorfor der gives Bluecom medhold i den nedlagte påstand.*«

ment in Northern Europe, and the Norwegian professor Peter Lødrup argues that misdelivery adheres to its own liability (i.e. delivery liability) and should not bring about any limitation rule.

For Scandinavian case law the general standpoint on misdelivery remains the same and the carrier will thus be held liable according to the delivery liability, where cargo is wrongfully delivered under a contract of carriage by air. The lack of clarification in the international codices (i.e. the Warsaw and Montreal Convention) has created discrepancy in case law among contracting states, leaving some countries to believe that misdelivery is a loss according to WC/MC Art. 18.1.

### 2.5.3 International carriage of cargo by rail

In Denmark, the applicable statute for international carriage of cargo by rail is the Convention concerning International Carriage by Rail (known as COTIF) and the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (known as CIM – Appendix B to the COTIF Convention). The COTIF-Convention and appendix B, which contains the CIM rules, have been implemented as Danish domestic law by mere reference to the convention. The COTIF-Convention and subsequent amendments have been noticed in the Danish law Gazette C and are therefore in force in Denmark. As of March 2025, 52 countries are parties to the COTIF.

Like the other means of transport, misdelivery is also subject to a delivery liability within international carriage of cargo by rail. The delivery liability is based on the common principle of transport law, as the CIM rules too warrant no direct stipulation of a liability for misdelivery. Where the carrier delivers the cargo to someone not entitled to receive it, it will be subject to a fault-based liability with reversed burden of proof, making the carrier liable for the full loss suffered, unless it can prove that it neither knew nor ought to have known of the wrongful delivery. Misdelivery is thought to fall outside the scope of CIM art. 23(1) on the carrier's liability for »loss or damage« to the cargo, and the limitation rules in CIM art. 30(2) and art. 32(2) are consequently thought inapplicable as well. See for instance U.1968.586H, where the cargo was wrongfully delivered to a German buyer, without the proper documentation, which

left the carrier to cover the damages in full. The practice applicable to cases of misdelivery under contracts of carriage by rail therefore corresponds rather closely to the case law of the other means of transport as well.

## **2.6 Sub-conclusion**

On the basis of section 2, it is possible to conclude that misdelivery is subject to a delivery liability within Scandinavian transport law and that this makes up the current theory in practice. Delivery liability is generally thought to fall outside the MSA, and the carrier is therefore deprived of any protection otherwise installed herein. Delivery liability is identified as a rather harsh liability because it exposes the carrier to a full and unlimited liability.

All the codices applicable to international carriage of cargo, whether by sea, road, air or rail, have all installed numerous rules on carriers' obligation to deliver the cargo, both at a general and more specific level. It is therefore rather striking that none of these codices have installed any rules, which would sanction the carrier for its breach of these obligations in cases of misdelivery.

The current theory, which establishes that misdelivery is subject to a delivery liability, is however rather controversial in practice. Firstly, because it does not enjoy a unanimous approval among all contracting states, which makes for a heterogeneous case law in an international perspective. Secondly, because the lack of any legal basis in law has been a breeding ground for discussions on which legal effects should follow in case of misdelivery, i.e. in regard to freedom of contract, loss calculation, weight and package limitation, period of limitation and global limitation.

## **3. Legal analysis**

The present section will evaluate the appropriateness of the current theory in practice, i.e. whether it is appropriate for misdelivery to be subject to a delivery liability. To properly evaluate the appropriateness of the current theory in practice, this discussion will first introduce the different considerations given to each of the legal effects applicable to the transport liability, to later question whether these should be made available to acts of misdelivery and the potential consequence hereof.

### 3.1 Freedom of contract

The carrier may exempt itself from the liability for misdelivery by contract provisions if these are made clear and unambiguous. Yet the carrier may not exempt itself from its deliberate actions of misdelivery or actions safeguarded by the mandatory provisions on bills of lading and sea waybills in the MSA. Legal practice on freedom of contract illustrates the uncertainty that characterizes the subject of misdelivery, as different contracting states hold different opinions on whether the carrier should be allowed to exempt itself by contract provisions.

The main purpose of The Hague Rules and The Hague Visby Rules was to provide the cargo interests with a minimum level of protection. This consideration of protection was first and foremost embodied in article 3(8), now implemented in the MSA section 254 (13:4) first paragraph. Prior to The Hague Rules, case law had developed in an uneven manner at the cargo owner's expense, due to the high demand for conveyance of goods. At first, a bill of lading was just a simple document, without any detailed stipulation of liability, but by the end of the nineteenth century it had become a rather complex ordeal, filled with terms at the carrier's convenience. Exemption clauses and clauses limiting the carrier's liability had gained an extensive foothold in most bills of lading, without much objection as liberalism thrived at the end of the nineteenth century. Over time, bills of lading grew quite comprehensive and biased towards the carriers, as they were always drafted by that very same party, and cargo owners were consequently left with »take it or leave it«<sup>40</sup> terms. By the turn of the century, countermeasures were taken by the cargo interests, as the situation was no longer thought fit for business. In 1921, a committee was first established to prepare private legislation, which was the first step towards the Hague Rules of 1924<sup>41</sup>. The main purpose of The Hague Rules was therefore to counterbalance the position of the parties and establish a minimum level of protection for the weaker party in need of transportation, i.e. the cargo owner. The MSA section 254 (13:4), first paragraph, upholds these considerations as the carriers are still cut off from limiting their liability by inserting exemption clauses at the cargo owner's expense. The protective character of the rule is; however, 'one way'

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40) Falkanger, Thor, Bull, Hans Jacob, and Overby, Lars Rosenberg. Søren 5th ed. Karnov Group 2019 (Falkanger et al. 2019) p. 287

41) Falkanger et al. 2019 p. 288

and the carrier may therefore increase any of its obligations provided that such increase is embodied in the bill of lading. Chartering agreements are to some extent left out of this protective sphere, as the need to protect a charterer is less than the need to protect a cargo owner under liner trade. During the CMI London Conference in October 1922 it was made indisputably clear by Danish ship owner A.P. Møller that it was not a consideration reserved for charterers because their negotiating power was equal to that of the ship owners<sup>42</sup>. The consideration of protection embodied in the MSA section 254 (13:4), first paragraph, is therefore first and foremost implemented to protect the cargo owner under liner trade, as their position is often powerless.

As the delivery liability is thought to fall outside the scope of the MSA altogether, the MSA section 254 (13:4), first paragraph, is generally thought inapplicable to cases of misdelivery. As a starting point, the carrier may thus exempt himself by 'unambiguous and clear' contract provisions. This, however, does not regard deliberate actions of misdelivery and the procedural rules on bills of lading (MSA sections 292-307 (13:42-13:57)) and seaway bills (MSA sections 308-309 (13:58-13:59)) as they still fall within the mandatory ambit of MSA section 254 (13:4). Despite the fact that the MSA section 254 (13:4) does not apply to cases of misdelivery, it still provides some level of protection by way of indirect reference to the rules on bills of lading and seaway bills.

However, for misdelivery in general, the question remains whether the same consideration of protection should be made available to cargo owners under acts of misdelivery. Said differently, what circumstances might justify the removal of this protection embedded so deeply within the maritime codex? The need to protect the cargo owner, as a potential weak party to the contract of affreightment, does not vary depending on the type of loss suffered, but rather on the parties involved. It is a consideration embedded within the maritime codex as a whole to secure that the unfair practice of the nineteenth century will not repeat itself. It is an example of a somewhat common concept in law, whereby regulation aims to balance the scales of *Justitia*, protecting a weaker party by making some of the rules mandatory (e.g. like the protection offered

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42) Berlingieri, Francesco. *International Maritime Conventions (Volume 1): The Carriage of Goods and Passengers by Sea*. 1st ed. Informa Law from Routledge 2014 (Berlingieri 2014) p. 244

to consumers in the Danish Sale of Goods Act section 1, second paragraph). Between the transport liability and the delivery liability the parties remain the same, but the losses suffered are caused by different actions. The act of misdelivery is generally thought a grave violation of the 'rules of the game', which was why misdelivery was assigned its own liability-regime in the first place. To some extent, one might therefore claim that misdelivery is a more severe neglect of the carrier's obligation than that of loss or damage to cargo, which should generally increase the need to protect the cargo owner. It is therefore questionable whether arguments, which might justify that the same consideration of protection made available under the transport liability should not apply to cargo owners under a suit for misdelivery as they remain the weaker party in both scenarios. Carriers often seek to rely on exemption clauses or clauses limiting their liability due to the hardship that follows from misdelivery.

Case law from the Maritime and Commercial High Court of Denmark shows an example of how a carrier's attempt to exempt itself is handled. ND.1995.109 S concerned the transport of milk powder from Aarhus to Abidjan. The cargo was wrongfully delivered to the buyer without the presentation of a bill of lading, at the expense of the seller. The carrier sought to exempt itself from liability, by reference to a clause printed on the back of the bill of lading, whereby a deviation was made from the obligation in the MSA section 271 (13:21), second paragraph<sup>43</sup> to give notice in the event of uncollected cargo. The seller argued that no mention was made of the special clause when the contract of affreightment was made by telephone, and it therefore sought to have the clause set aside by reference to the Contracts Act section 36. The Danish Maritime and Commercial Court chose to have the clause set aside, but on the basis that any deviation from the Merchant Shipping Act must be clear and unambiguous («...klare og entydige»). For an exemption clause to be held valid, it will have to be formulated in an unambiguous and clear way, as it otherwise runs the risk of having no legal effect at all. Any ambiguity will be interpreted against the author, which is normally the carrier<sup>44</sup>. This conclusion follows the general rules of Danish contract law. On the notion that there exists some resistance to allow exemption clauses to cover misdelivery, it seems rather

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43) ND 1995.109 S (reference was made to earlier section numbers: 114 and 115)

44) Pedersen 2008 p. 586

unintended that the carrier should be allowed to exempt himself by contract provisions in the first place.

In an international perspective, the courts of northern Europe have upheld much the same approach.<sup>45</sup> English courts have rendered The Hague and Hague Visby Rules article 3(8), which sets out the mandatory character of the rules on The Hague and Hague Visby Protocol in much the same way as MSA section 254 (13:4), inapplicable to cases of misdelivery under the assumption that such claims are not covered by the Conventions<sup>46</sup>.

The German courts; however, have not followed the same approach as the English and Scandinavian courts. In Germany, misdelivery is regarded a breach of The Hague and Hague Visby Rules and consequently covered by the German version of article 3(8)<sup>47</sup> on mandatory provisions. According to H. Tiberg “...corresponding reasoning seems to be presently accepted by French Court of Cassation”.<sup>48</sup>

As the MSA section 254 (13:4) already offers some degree of protection by indirect reference to the procedural rules on bills of lading and seaway bills, and Scandinavian case law does not allow for the carrier to exempt itself deliberate acts of misdelivery<sup>49</sup>, any change in case law would therefore be of a lesser consequence, as many cases of misdelivery already fall within these two scenarios. It would, however, remove any chance for the carrier to barricade himself against any unintended misdelivery. Sustaining the current position, however, will deprive the cargo owner of the protection bestowed upon its otherwise weak position in general.

In light of the above-mentioned, it is possible to conclude that the consideration of protection embedded in the MSA section 254 (13:4) is given to cargo

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45) *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [2000] 1 Lloyd's Rep. 211.; *The Ines* [1995] 2. Lloyd's Rep. 144 (QB); *The Sormovskiy* 3068, [1994] 2 Lloyd's Rep. 266

46) Rhidian, Thomas. *The Carriage of Goods by Sea under the Rotterdam Rules*. 1. ed, Informa Law from Routledge 2010 (Rhidian 2010) p. 172

47) Tiberg 1998 p. 59

48) Tiberg 1998 p. 59

49) Ussing, Henry and Kruse, A Vinding. *Obligationsretten – Almindelig del*. 4th ed. Juristforbundets Forlag 1961 (Ussing and Kruse 1961) p. 162 and Benitz, Ulf. *Standard Avtalsrätt*. 5th ed. Marknadsrättsförl. 1991 (Benitz 1991) p. 47

owners due to their relatively weak position in the contractual relationship with the carrier. A position which is constant despite any losses that might occur. It therefore seems rather inappropriate that this consideration should not be made available to cargo owners where cargo is misdelivered, as the party composition remains the same. It seems, however, that court precedence has sought to uphold some degree of this protection by demanding that any attempt on the carrier's behalf to try to exempt himself would have to be made indisputably clear.

### 3.2 Loss calculation

The standardized loss rule in the MSA section 279 (13:29) differs from general Danish law on loss calculation, as it operates with a system of standardized damages. The system of standardized damages implies that damages will only cover the normal loss and not the actual loss suffered. The normal or standard loss in the MSA section 279 (13:29) first paragraph is therefore the “value of the goods of the same kind at the same place”, rather than the actual value of the goods lost or damaged. The standardized loss rule was first embedded in the international maritime codex in article 4(5)(b) of The Hague Visby Rules in 1968. The *travaux préparatoires* of The Visby Protocol have left the purpose of this rule unknown and it has therefore been the subject of some speculation. According to Professor Reynolds of Oxford University<sup>50</sup>: “*The purpose of the provision [article 4(5)(b)] is uncertain, but it seems likely that it was intended to make clear that the only damages calculation was to be on the basis of difference in value, and that consequential loss was excluded*”. This line of thought is consistent with the view taken by Diamond<sup>51</sup> “*It seems that purpose [of article 4(5)(b)] is to harmonize the rules as to measure of damages in all contracting States. What it does is to lay down a prima facie measure of damages*”. One might therefore argue that the standardized loss rule is an attempt to try to standardize measure of damages in more than one way. First, because it provides for a standardized

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50) Reynolds, Francis Martin Baillie. The Package or Unit Limitation and The Visby Rules [2005] LMCLQ 1, 3: *El Greco v. Mediterranean Shipping* (Reynolds 2005) p. 5-6

51) Diamond, Antony William. The Hague-Visby Rules. 1st ed. Lloyd's of London Press 1978 (Diamond 1978) p. 248

loss to be covered, and second, because it is an attempt to try to secure a harmonized method of loss calculation among contracting States. However, since the standardized loss rule provides that damages shall only cover the normal loss, it is also regarded as a form of limitation of the carrier's liability<sup>52</sup>. On the one hand, because it deviates from the principle of full compensation and, on the other hand, because it generally precludes any recovery of consequential or indirect damages<sup>53</sup>. It is not sure whether this was a consideration intended for the carrier in preparation of The Hague Visby Rules art. 4(5)(b), but there has been a general tendency to spread and allocate risk on the carrier's behalf.<sup>54</sup>

The standardized loss rule in the MSA section 279 (13:29) is inapplicable to cases of misdelivery due to the fact that misdelivery is generally thought to fall outside the scope of the MSA altogether. Instead, 'another method' of loss calculation has been developed, which calculates damages based on the concrete interest inflicted. One might therefore draw attention to the fact that there exists a considerable difference between the method applicable to cases of loss or damage and the method applicable to cases of misdelivery. One method refers to the normal loss while the other method refers to the actual loss suffered. The question however remains, whether it is well-founded and appropriate for practice to subject misdelivery to such differential treatment. In other words: is there really basis for such divergence in practice? In cases where the carrier simply hands out the wrong cargo, maybe because of a mix up in papers or because of a wrong unit being collected for unloading, the distinction between loss caused by misdelivery and loss caused by other negligent acts which trigger loss of or damage to cargo seems too close to justify such divergence in practice. For such instances, one might compare misdelivery to theft, which is considered a loss pursuant to the MSA section 275 (13:25). A stolen cargo is not lost in a physical sense, but it is lost to the consignee otherwise entitled to receive it, much like cargo lost as a consequence of misdelivery. However, in cases where the carrier delivers the cargo without the receipt of a bill of lading, often against a Letter of indemnity, it deliberately sets aside its obligation in the MSA section

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52) Falkanger et al. 2011 p. 187 and p. 310

53) Appel, Peter; Martens, Jesper; Mathiasen, Jens V.; and Rasmussen, Jens Skude. *Søloven med kommentarer*. 5th ed Djøf Forlag 2020 (Appel et al. 2020) pp. 601-602

54) Falkanger et al. 2011 p. 187

292 cf. section 302 (13:42 cf. 13:52) to only deliver the cargo to an authorised receiver. It is a grave violation of the ‘rules of the game’ and its common occurrence in case law has shaken the bill of lading to its very foundation. For these deliberate acts of misdelivery, one might argue that the current divergence in case law is appropriate. On this account, one might think it clever to separate the acts of misdelivery, so that the negligent act of misdelivery falls within the transport liability and the deliberate act of misdelivery adheres to the delivery liability. This idea would sit well with Brækhus, who believed that negligent acts of misdelivery should be subject to the transport liability: ”*Liability for negligent acts of misdelivery corresponds rather closely to the transport liability and should therefore fall under the same rules*”<sup>55</sup>. However clever in theory, it might prove a rather difficult task to separate the acts of misdelivery in practice. It is rather difficult to draw a line between negligent acts of misdelivery and the transport liability; but so it is to separate deliberate and negligent acts of misdelivery. As Hjalsted stated, if one takes the step to separate the delivery liability from the transport liability, it seems rather natural to let the liability for negligent acts of misdelivery follow<sup>56</sup>.

In regard to the general purpose embedded within article 4(5)(b) of The Hague Visby Rules, to “*harmonize the rules as to measure of damages*” and to “*lay down a prima facie measure of damages*”, it seems quite contradictory to make an act, such as misdelivery, subject to a different method of loss calculation. This is by definition the opposite of “harmonizing”. This practice; however, makes one wonder whether its adoption was intended as a preventive measure, for an otherwise inappropriate consequence of the use of the standardized loss rule in cases of misdelivery. If loss caused by misdelivery were to be calculated on the basis of the standardized loss rule, damages would be limited to the value of the goods of the same kind – i.e. the normal loss, further assessed in accordance with the relevant valuation criteria in the MSA section 279 (13:29)

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55) Brækhus 1955 p. 341: Translated into English by author, original quote: [NO], »Ansvaret for den uaktsomme fejludlevering av gods står derimot det egentlige transportansvar meget nær, og bør behandles efter de samme regler som dette«

56) Hjalsted, Finn. Sørenlige ansvarsproblemer. Ugeskrift for Retsvæsen 1969B.168 (U.1969B.168). Translated into English by the author, original quote: [DA] »*Har man først taget det skridt at udskille udleveringsansvaret fra transportansvaret, forekommer det naturligt at lade også ansvaret for uagtsom fejludlevering følge med*«

second paragraph. In most cases, these criteria would present a lower value than the one available under current case law. For negligent acts of misdelivery, it would provide a more appropriate outcome for the carrier, as envisioned by Brækhus. But for deliberate acts of misdelivery, it would, however, compromise the punitive nature of the otherwise aggravated liability for misdelivery.

In light of the above-mentioned, one can therefore establish that the standardized loss rule in the MSA section 279 (13:29) encompasses more than one consideration, as it is both an attempt to try to lay down a *prima facie* measure of damages and an attempt to try to allocate risk on the carrier's behalf. Negligent acts of misdelivery are quite similar to acts of loss or damage under the MSA section 275 (13:25), and no reason seems strong enough to justify their differential treatment. Case law, however, has thought it more 'natural' to let these acts of misdelivery follow the deliberate acts of misdelivery into the delivery liability, even if it makes for a less appropriate practice in this regard.

### **3.3 Weight and package limitation**

The shipping industry is subject to a large degree of risk, and there has therefore been a general tendency to spread and allocate risk. This is most apparent in the weight and package limitation rule pursuant to the MSA section 280 (13:30), as it limits the carrier's liability to a fixed amount per kilogram (SDR 2) or per package (SDR 667).

The main purpose of the weight and package limitation rule is to provide the carrier with protection against unanticipated large losses. At first, the rule was only intended to cover packages, as the carrier could not know the value of packaged goods. However, in preparation of the rules at the 1921 Hague Conference, it became rather clear that a consideration of proportionality had come into play, and weight limitation was consequently embedded within the rule as well. As Tiberg reflects on the decision to enclose the weight limitation: “..*[it] clearly does not envisage any unanticipated losses but merely reflects a wish to give proportionality to the losses a carrier can be charged with*”<sup>57</sup>. Carriers are charged with the transport of thousands of packages, and it is thus unreasonable to expect that every package is subject to an individual risk assessment based on the

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57) Tiberg 1998 p. 63

values involved. In a more general and modern context, one might therefore say that the weight and package limitation rule in the MSA section 280 (13:30) is based on an economic consideration of foreseeability to bring both proportionality and protection against unanticipated high losses.

The weight and package limitation rule is thought inapplicable to cases of misdelivery, as the delivery liability is thought to fall outside the scope of the MSA altogether. Although case law is sparse on this issue, there are some judgments that support this conclusion. See for instance ND.1995.109 S concerning the transport of milk powder from Aarhus to Abidjan. The cargo was wrongfully delivered to the buyer without the presentation of a bill of lading, causing the seller loss of payment. The court found that the carrier could not rely on an exemption clause on the back page of the bill of lading and was therefore set to pay damages in full. In FED.2000.1572 S, concerning the transport of frozen shrimp from Hanstholm to Xingang, China, one of 6 containers was not agreed upon but was however transported and delivered to the buyer without the proper receipt of a bill of lading. The court found that both carriers were liable for the wrongful delivery of cargo and set to pay damages in full (jointly). In FED 2004.697 S, concerning the transport of one container with soft drinks from Hvidovre to Brisbane, Australia. Delivery should have been made to »A c/o« but was wrongfully made to the »c/o« which later went into bankruptcy. »A« was set into the bill of lading as a favour to »c/o« which was in arrears with the seller and therefore unable to secure another shipment of soft drinks. The court found that delivery to any other party than to »A« was wrongful. The carrier was therefore liable for misdelivery and set to pay damages in full.

This case law creates a rather large disparity between the recoverable damages in respect of the ordinary transport liability and the delivery liability, as only one of them enjoys the benefit of the MSA section 280 (13:30). This difference in case law only becomes more severe, as P&I insurances will not cover cases of misdelivery. Not only will the carrier have to compensate the loss in full, but it will not be able to mitigate its loss through insurance. The question therefore remains whether it is thought just and appropriate for case law to subject the carrier to such differential treatment in cases of misdelivery. Or said quite differently: is there really a basis for such divergence in case law?

The argument most put forward is that misdelivery falls outside the scope of the MSA altogether, as it is neither considered a loss nor a damage under the MSA section 275 (13:25), which is the main provision of the transport liability. The MSA sections 254 (13:4), 279 (13:29), and 280 (13:30) are all therefore thought reserved for losses caused by loss, damage or delay, and not misdelivery.

The delivery liability originates from this point, as misdelivery was excluded from the scope of the transport liability, and consequently in need of its own liability-regime. This argument has been put forward in both case law and legal writing in relation to both the former MSA and the current MSA. However, if one examines the preparatory work of the former MSA drawn up during the 1936 revision, one might think it strange that case law would come to such conclusions. Under the review of the MSA section 118 (former MSA section 275) the following statement was made: *“while the wording „damage” only regards the physical impairment of the cargo, the wording „loss” also includes cases where the cargo is stolen, confiscated, delivered to an unauthorised receiver [emphasis added], disposed of, cf. section 49 or other similar cases, which prevent the carrier from its obligation to deliver the cargo”*<sup>58</sup>.

The 1972/1973 revision of the former MSA neither reaffirms nor rejects the 1936 statement, as no clarification was made of the wording “loss or damage”<sup>59</sup>. The preparatory work of the current MSA (1994) provides no clarification as to the meaning of “loss or damages” but states that the MSA section 275 (13:25) mainly corresponds to the former MSA section 118<sup>60</sup>. The same can be said of the preparatory work to the current MSA in both

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58) Legislative material: Aarsbog for Risdagssamlingen 1936-37.503 Lov om Ændringer i Søloven cf. Rigsdagstidende Tillæg A.1936-37 A. Sp. 4115-4203. Translated into English by the author, original quote: [DA] »Medens Udtrykket „Beskadigelse” kun sigter til Godsets fysiske Forringelse, dækker Udtrykket „Tab” ogsaa saadanne Tilfælde, at Godset stjæles, konfiskeres, udleveres til en uberettiget, sælges for Skibets Behov jfr. § 49 eller lignende Forhold, der bevirker, at Bortfragteren ikke kan opfylde sin Pligt til Udlevering af Godset«.

59) Legislative materiale: Aarsbog for Risdagssamlingen 1972-73 Lov om ændring af søloven og loven om gennemførelse af konnossementskonventionen af 1924 cf. Rigsdagstidende Tillæg A. (1972-73) Sp. 3169-3226.

60) 2nd Report of the Maritime Law Committee (KBET 1990.1215) see section 275 »Paragraffen svarer til § 118 i den gældende sølov [fra 1892]«.

Sweden<sup>61</sup> and Norway<sup>62</sup>. The *travaux préparatoires* of The Hague Rules & The Hague Visby Rules and the Hamburg Rules address the subject of »wrong delivery«, however, only in regard to article 3(6) on the time bar. The notion that “delivery to an unauthorized receiver” falls within the main provision of the transport liability (i.e. the MSA section 275) as a “loss” has never been reaffirmed and legal practice holding the opposite notion, has subsequently outweighed its force of law.

The notion in the 1936 revision of the former MSA would therefore have no current interest, had it not been for the reopening of the question during the preparatory work of the Rotterdam Rules, almost seventy years later. The Rotterdam Rules article 59 is a renewal of the present MSA section 280 (13:30) on limitation of liability. In an international context article 59 is supposed to replace The Hamburg Rules article 6 cf. article 26 and The Hague-Visby Rules article 4(5)(a). Article 59 of the Rotterdam Rules states that the “... *carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher...*”. The current phrase “*loss or damage in connection with the goods*” in article 4(5)(a) of The Hague Visby Rules has therefore been replaced with the much broader phrase “*for breaches of its obligation under the Convention*”. According to the *travaux préparatoires* of the Rotterdam Rules, the motive for this change was “*that the phrase deleted has caused considerable uncertainty and a lack of uniformity in interpretation following its use in The Hague Rules and The Hague Visby Rules, particularly concerning whether or not it has been intended to include cases of misdelivery and misinformation regarding the goods*”<sup>63</sup>. During the Working Groups discussions on the rephrasing of “*in connection with the goods*”, misdelivery was touched upon several times. One of the Working Groups preparing the Rotterdam Rules also made it clear that misdelivery was in fact a loss intended to be covered by the Hague Visby Rules:

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61) Sweden: SOU 1993:103 see section 13:25 »*Denna paragraf jämte 26 och 28 §§ motsvarar 118 § i 1891 års sjölag*«.

62) Norway: NOU.1993.36 see section 275 »*Paragrafen inneholder hovedreglene om transportørens ansvar for tap av eller skade på godset og er i samsvar med sjøloven § 118*«.

63) United Nations Commission on International Trade Law Working Group III (Transport Law) Twenty-first session (A/CN.9/WG.III/WP.101) note 169.

*“misdelivery which was also [emphasis added] included in the Hague Visby Rules, although not expressly”*<sup>64</sup>.

The current MSA section 280 (13:30) is set to implement article 4(5)(a) of The Hague Visby Rules, however, as mentioned earlier, no case law in Denmark and most countries in Scandinavia, has ever allowed the carrier the benefit of the limitation rule in the MSA section 280 (13:30) under a suit for misdelivery. It is therefore safe to assume that it was not an intention contemplated by the legal scholars in Scandinavia. Additional comments of interest were made by the Working Group preparing the Rotterdam rules, further underlining the intent: *“Under The Hague and The Hague Visby Rules, it was generally thought that misdelivery was intended to be covered, but there was uncertainty regarding whether misinformation was intended to be covered. [...] Therefore, the clear inclusion of misdelivery of the goods in the limitation on liability is not a novelty [emphasis added], but the clear inclusion of misinformation regarding the goods represents a change from the original text...”*<sup>65</sup>.

In regard to the need to protect the carrier against any unanticipated losses, one might put forward the argument that the need is less so in cases of misdelivery, especially where cargo is delivered without the receipt of a bill of lading, but against a Letter of indemnity. Any liability following from the act will not come as an unexpected and unpleasant surprise. The carrier’s act is deliberate, and it therefore has time to consider any risks that might follow, at its or the bill of lading holder’s expense. The potential misdelivery is made conditional on the receipt of a Letter of indemnity often accompanied by a bank guarantee, which demonstrates the risk assessment taken by the carrier. The weight and package limitation rule therefore has little relevance if the security provided is legitimate.

For the rightful holder of the bill of lading, a limitation of the carrier’s liability for misdelivery might prove more disadvantageous than the normal limitation of the carrier’s transport liability. The preventive measures embedded within the weight and package limitation rule do not necessarily sit well with the delivery liability. The transport liability follows as a consequence of the

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64) United Nations Commission on International Trade Law Forty-first session (A/CN.9/642) para 153.

65) A/CN.9/WG.III/WP.101 note 169.

carrier's unwanted acts, while most deliberate acts of misdelivery follow as a consequence of the carrier's attempt to accommodate the practice. For example; where the carrier delivers the cargo against security (eg. Letter of indemnity and bank guarantee) because the bill of lading has been delayed in handling and arrives post shipment. Under such circumstances, misdelivery is not subject to any moral or commercial disapproval but rather thought in accordance with practice and good customer service<sup>66</sup>. Where the security provided is legitimate, the carrier need not worry as its liability will be covered by the Letter of indemnity. In the end, it is therefore the issuer of the Letter of indemnity that must cover the damages, rather than the carrier. If the carrier's liability were to be limited in accordance with the weight and package limitation rule, so would the amount payable under the Letter of indemnity, as it would only amount to the monetary risk that the carrier runs by delivering the cargo without the receipt of a bill of lading. At this point, the consideration and protection embedded within the MSA section 280 (13:30) would thus benefit the wrong receiver of the cargo (i.e. the issuer of the Letter of indemnity), rather than the carrier. Such practice would easily become subject to misuse, as cargo would often be released against less than the actual value of the cargo.

If the weight and package limitation rule is applied to acts of misdelivery, the risk of concealed collusion between the carrier or local agents and third parties is further introduced. Valuable cargo would fraudulently be delivered to an accomplice of the carrier, while the rightful receiver of the cargo would be left cargo-less, with a claim for damages worth less than the actual value of the cargo, as the limitation rule in the MSA section 280 (13:30) would establish an upper limit of coverage. Any difference between the claim for damages and the actual value of the cargo could then be divided among the fraudulent parties involved.

Based on these considerations, one might think it appropriate that the carrier has been precluded from the benefit of the weight and package limitation rule in the MSA section 280 (13:30) in cases of misdelivery. However, this practice comes at a cost. Once again, it seems that any consideration for negligent acts of misdelivery has been compromised by the deliberate ones. The arguments put forward on negligent acts of misdelivery can therefore be ap-

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66) Brækhus 1955 p.348

plied in relation to the weight and package limitation rule as well. There exists a common notion among juridical scholars that negligent acts of misdelivery should enjoy the protection embedded within the weight and package limitation rule. According to Tiberg; “.. *if the delivery was merely negligent, such as in particular the mistaken delivery due to mixture of cargo or the mistaken discharge of goods at an intermediate port, [...] There seems to be no serious reason why the limitation should not app[l]y in such cases*”<sup>67</sup>. Once again, it seems that Hjalsted’s understanding of practice rings true.

For the weight and package limitation rule, however, it seems that case law might be about to give in to this dilemma. It was made clear in both the national<sup>68</sup> and international<sup>69</sup> preparatory work of the Rotterdam Rules<sup>70</sup> that the weight and package limitation rule is set to apply to cases of misdelivery when the Rotterdam Rules come into force. Unfortunately for the carrier, it has been a long time coming, and case law has yet to reveal how it intends to tackle deliberate acts of misdelivery. According to S. Baughen, practice will ensure that no deliberate acts of misdelivery will enjoy the benefit of the limitation rule by reference to article 61. Article 61 has made it even more difficult for a claimant to invoke the rule than its predecessor (i.e. Hague Visby Rules article 4(5)(e)) by adding “personal” to its wording. Despite this limitation of the rule, S. Baughen believes that article 61 will set aside any deliberate acts of misdelivery: “*However, a deliberate delivery of cargo without surrender of one original of the negotiable transport document would surely fall within the second part of this sentence, even with the addition of the word “personal”*”<sup>71</sup>.

In light of the above, one can therefore conclude that the weight and package limitation rule in the MSA section 280 (13:30) is first and foremost based on an economic consideration of foreseeability. It is set to safeguard the carrier from unexpected high losses and provide a general proportionality to help spread and allocate risk. To allow the limitation rule to cover deliberate acts of

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67) Tiberg 1998 p. 63-64

68) 4th Report of the Maritime Law Committee (KBET 2013.1536) see the MSA Section 282

69) A/CN.9/WG.III/WP.101, see art. 59

70) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (The Rotterdam Rules)

71) Rhidian 2010 p. 172

misdelivery would endanger the very purpose of the rule and make a basis for an inappropriate practice. Nonetheless, current case law is less than ideal, as no reason seems to be able to justify the inapplicability of the limitation rule to negligent acts of misdelivery. Preliminary steps have been taken to correct this practice, but lack of accession to The Rotterdam Rules might jeopardize the effort made.

### 3.4 Period of limitation

The time bar for acts of misdelivery has been settled in the MSA section 501 (19:1), first paragraph, no. 5, and therefore no uncertainty exists regarding the scope of this legal effect. Still, the decision to enclose misdelivery within the general one-year time bar in article 3(6) of The Hague Visby Rules in 1968 met strong Scandinavian objection. Such opposition to current practice must surely warrant a short discussion on its appropriateness. The one-year time bar in article 3(6) of The Hague Visby Rules is rather short compared to the normal limitation period of three years provided for in the Danish Limitation Act<sup>72</sup>. The rule is yet another example of the general tendency to spread and allocate risk on the carrier's behalf, as the short time bar makes it more manageable for the carrier to determine which claims might be brought to trial. See for instance TOLSO.2012.13932: "*The reason behind the short period of limitation is the specific conditions, which characterize the shipping industry and the need to establish whether claims will be prosecuted or not*"<sup>73</sup>. A consideration also made available to the carrier in case of misdelivery cf. MSA section 501(19:1) first paragraph, no. 5.

Like any other consideration discussed in section 3, it is not the negligent act of misdelivery that is a cause for concern, but rather the deliberate one. For cases where the carrier delivers the cargo without the receipt of the bill of lading, but against a Letter of indemnity, one might put forward the argument that the consideration embedded within the one-year time bar benefits the

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72) The Danish Consolidated Act no. 1238 of 9 November 2015 Section 3

73) TOLSO.2012.13932: Translated into English by the author, original quote; [NO] »*Bakgrunnen for de korte foreldelsesfristene er de særlige forhold som preger sjøfarten og det antatte behov for raskere enn vanlig å kunne konstatere om eventuelle krav vil bli forfulgt eller ikke*«

unauthorised receiver. The reason for this is that a guarantee provision only becomes costlier over time. To reduce the time bar to one year, this favours the unauthorised receiver, as it reduces its expense for a bank guarantee. This concern has been raised by both Brækhus and Tiberger. For the reason mentioned above, Brækhus thought that the one-year time bar should not apply for cases of misdelivery<sup>74</sup>. Tiberger, on the other hand, admitted to the fact that it would make for an inappropriate practice, but thought it best to install a separate time bar for such cases of misdelivery<sup>75</sup>.

It is a rather unfortunate practice, when a consideration intended for the carrier has become an unintended advantage to the unauthorised receiver. Nonetheless, it is inconceivable that the removal of the one-year time bar from cases of misdelivery would prevent the occurrence of these deliberate acts of misdelivery, as it would still prove a profitable move for an unauthorised receiver. The consideration embedded within the MSA section 501, (19:1) first paragraph, no. 5 thus outweighs the reservation presented above. From a general standpoint, one might therefore conclude that the one-year time bar for misdelivery makes for a more appropriate practice.

### **3.5. Global limitation**

The global limitation rule in the MSA section 172 (9:2) first paragraph, no.1 encompasses much the same purpose as the weight and package limitation rule in the MSA section 280 (13:30), although to a much greater extent. The global limitation rule acts as a last resort for the carrier to try to confine the loss inflicted. Despite the fact that it operates on a much larger scale, it still encompasses the same consideration – to spread and allocate risk on the carrier's behalf<sup>76</sup>.

No legal practice on misdelivery helps clarify the matter, which in itself indicates the poor relevance of global limitation to misdelivery in practice. Brækhus, Hjalsted and Tiberger are some of the few legal scholars, who have made an attempt to clarify the matter. Brækhus<sup>77</sup> generally thought the global limitation inapplicable to cases of misdelivery but made a special remark to the

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74) Brækhus 1955 p. 349- 350

75) Tiberger 1998 p. 64

76) Falkanger et al. 2011 p. 187

77) Brækhus 1955 p. 341

Danish position on the matter, as statements during a parliamentary discussion in 1929<sup>78</sup> suggested that global limitation was in fact available to carriers in cases of misdelivery. Hjalsted later addressed the standpoint taken by Brækhus, but established that the delivery liability was not subject to global limitation in Denmark after the 1964 revision of the MSA section 254 (13:4) (the former MSA section 172)<sup>79</sup> “...it is however natural to presume, that the delivery liability falls outside the limitation of shipowners’ liability [also known as global limitation]”<sup>80</sup>. The statement was unsupported by any argument and the preparatory work of the 1964 revision reveals no clue to the otherwise decisive statement<sup>81</sup>. Tiberg generally seems to think the global limitation inapplicable to cases of misdelivery but argues for a theoretical linkage between the requirement of a “direct connection” and misdelivery: “If there is a misdelivery directly from a ship, or from a warehouse alongside taking over the goods from the ship, there may be reason for limitation...”<sup>82</sup>. Even though a theoretical standpoint might allow for a carrier to benefit from the global limitation rule in MSA section 172 (9:2), first paragraph, no.1, it seems rather unlikely that case law would support such notion, but it remains to be seen.

On a practical level, the rule has very little relevance to acts of misdelivery and any question regarding its appropriateness in current case law therefore rapidly turns into a question of its relevance or the lack hereof. First, because modern day carriage of goods often involves the delivery of the goods from onshore terminals and the linkage between the requirement of a “direct connection with the ship” (cf. MSA section 172 (9:2), first paragraph, no. 1) and misdelivery therefore seems to diminish. Second, because any claim for damages which arise as a consequence of misdelivery is rather unlikely to ever amount to such colossal loss as the MSA section 172 (9:2), first paragraph, no 1, calls for.

This section will; however, not attempt to reason on its appropriateness in cur-

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78) Legislative material: Rigsdagstidende 1928-29 [Forhandlingerne] (Folketinget) page 5016

79) The Danish Act. No. 159 of 27 May 1964

80) U.1969B.169, page 168. Translated into English by the author, original quote: [DA] » ...det er imidlertid naturligt at antage, at udleveringsansvaret falder uden for det begrænsede rederansvar«

81) 1st Report of the Maritime Law Committee (KBET 1962.315), p. 20-24

82) Tiberg 1998 p. 65

rent case law but briefly refer to the arguments set out in section 3.3 as they cast a theoretical perspective on global limitation as well, due to the high resemblance between the two limitation rules and their common consideration for the carrier.

### **3.6 Sub-conclusion**

In light of section 3, it is possible to draw some conclusions on the appropriateness of the current theory in practice. By reference to the above-mentioned it is therefore possible to conclude that no reason seems to justify that the consideration of protection embedded in the MSA section 254 (13:4) should not be made available to cargo owners in cases of misdelivery. Furthermore, it seems rather inappropriate for case law to make acts of misdelivery subject to another method of loss calculation, when the standardized loss rule in the MSA section 279 (13:29) is an attempt to try to secure a harmonized method of loss calculation among contracting states. It also makes for an inappropriate case law that negligent acts of misdelivery are subject to a different method of loss calculation, when they are quite similar to acts of loss or damage under the MSA section 275 (13:25). Additionally, the consideration embedded in the MSA section 280 (13:30) should not be available to the carrier under deliberate acts of misdelivery, as it would only favour an unauthorised receiver of the cargo and make for an inappropriate case law. It is therefore possible to state that current theory is somewhat appropriate in this regard. The same, however, cannot be said for cases of negligent acts of misdelivery, as case law once again remains less ideal on their behalf. Lastly, the application of the one-year time bar rule in the MSA section 501 (19:1) first paragraph, no. 5 to cases of misdelivery makes for an appropriate practice, despite the fact that it might benefit an unauthorised receiver at a minor level.

An assessment of the current theory in practice reveals that the delivery liability makes for an inappropriate practice for cases of misdelivery in general. However, for cases where the carrier delivers the cargo to an unauthorised receiver against a Letter of indemnity, current theory on misdelivery (i.e. the delivery liability) might seem the more appropriate practice. It appears that the inconsistency brought to current practice by this theory is an unintended consequence of the attempt to safeguard the function of the bill of lading.

## 4. Perspectives on future developments

At the time of writing, there are two possible outcome scenarios for rules relating to misdelivery.

The first scenario would provide no change in practice, or at least not in the near future. If the Rotterdam Rules do not come into force, it is very unlikely that the issue will be resolved in the near future. As of March 2025, there are twenty-five<sup>83</sup> signatories to the Rotterdam Rules, but only four<sup>84</sup> of them have ratified it, and one<sup>85</sup> has acceded to it, which means that it is still fifteen short, as the requirement for the convention to come into force is twenty, cf. the Rotterdam Rules article 94(1). For good reason, there is doubt whether these rules will ever see the light of day. In this scenario, it is very unlikely that the clarification made on misdelivery in preparation of the Rotterdam Rules will ever come to carry any weight without the convention in force. For now, the clarification made in regard to the weight and package limitation rule in the Hague Visby Rules article 4(5)(a)<sup>86</sup> has made no impact on the current practice, and it is therefore hard to imagine that it ever will.

The second scenario would resolve the issue to some degree. If the Rotterdam Rules were to come into force, it would provide a change in practice. Special arrangements have been made to prevent misdelivery by incorporating new methods of delivery. These methods seek to establish a new and more flexible practice, whereby delivery can be made against an instruction. This practice is embedded within Chapter 9 of the Rotterdam Rules. Of special importance to cases of misdelivery are articles 46 and 47. For non-negotiable bills of lading (also known as recta bills of lading), article 46(1)(b) and (c) provides that the carrier may deliver the cargo upon instruction from the shipper or the documentary shipper, where the bill of lading has been delayed in handling and ar-

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83) Signatories to the Rotterdam Rules, as of March 2025: Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo, United States of America.

84) Congo (28/01/2014), Spain (19/01/2011), Togo (17/07/2012), and Cameroon (11/10/2017)

85) Benin (07/11/2019)

86) A/CN/WG.III/WP.101, see article 4(5)(a)

rives post shipment or where the consignee does not properly identify himself. For negotiable bills of lading, article 47(2)(a) and (b) provide the same practice if the bill of lading "*expressly states that the goods may be delivered without the surrender of the transport document*"<sup>87</sup>. For negotiable bills of lading, where no such statement is made, the carrier may only deliver the cargo upon receipt of the bill of lading (as is currently applicable). Where delivery is made upon instruction, the "*carrier is discharged from its obligation to deliver the goods under the contract of carriage*"<sup>88</sup> and will therefore not risk any liability for misdelivery. It is rather apparent that this method has been installed to bypass the current practice, where a late bill of lading causes the carrier to deliver against a Letter of indemnity. However, since the original function of the bill of lading remains available, (i.e. if no statement is made according to article 47(2)), it largely rests on the shipping industry to change practice.

The Rotterdam Rules would also make available the weight and package limitation rule to the carrier's liability for misdelivery cf. article 59(1). This change in practice would most likely undermine the delivery liability over time, as it removes one of its main pillars. However, as mentioned in section 3.3, this change would not necessarily make for a more appropriate practice, as it might benefit the unauthorized receiver, where delivery is made against a Letter of indemnity. It would therefore be interesting to see how case law would tackle such types of misdelivery. As mentioned in section 3.3, S. Baughen suggests that practice will insure that no deliberate acts of misdelivery will enjoy the benefit of the limitation rule by reference to article 61 on "*personal act or omission*". However, at the moment, Scandinavian case law is rather reluctant to use the parallel rule in the MSA section 283 (13:33)<sup>89</sup> on such cases of misdelivery, as it only encompasses the carrier itself and senior management and not employees, such as a captain or shipmaster<sup>90</sup>.

It will therefore remain rather interesting to see what defence Scandinavian case law might put up under such circumstances, if the Rotterdam Rules (and the new MSA) were ever to come into force. The commencement of The

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87) The Rotterdam Rules article 47(2)

88) The Rotterdam Rules article 47(2)(b)

89) Appel et al. 2020 p. 611

90) Falkanger et al. 2011 p.311

Rotterdam Rules would therefore only resolve the issue of misdelivery to some degree.

On a more hypothetical level, one might suggest a third scenario.

On the notion that it might not prove unproblematic to simply allow the weight and package limitation rule to cover all types of misdelivery, as it might benefit an unauthorized receiver where cargo is delivered against a Letter of indemnity, this article suggests a separation of these 'deliberate types of misdelivery' from the mere 'negligent types of misdelivery'. From a practical standpoint, a separate rule would have to be implemented into the MSA, much like the current MSA section 300 (13:59), which provide a separate liability-regime for misleading information in a bill of lading. For those cases of misdelivery, where cargo is released to an unauthorized receiver against a Letter of indemnity, a separate liability regime would therefore apply, while other types of misdelivery (e.g. mix up in papers or mistaken discharge of goods etc.) would fall within the normal transport liability-regime. This scenario would sit well with Brækhus<sup>91</sup> and Tiberg<sup>92</sup>, as they both believed that negligent acts of misdelivery should not adhere to the delivery liability. This suggestion is made from a hypothetical standpoint, and nothing seems to suggest that case law have any such separation in mind at the moment.

## 5. Conclusion

Despite the general lack of regulation on misdelivery within international transport law, the delivery liability has become a rather defined theory in Scandinavian case law. Clearly, the theory still struggles to attain unreserved recognition, as the legal basis remains unclear and the consequence of misdelivery grave. Few legal scholars<sup>93</sup> have dared to comment on the matter beyond common acknowledgement of the theory, and even though their comments were made several decades apart, the question of the discussion still remains the same: i.e. which rules are applicable to misdelivery of cargo? If one examines the question more closely, one will however find that no rules are made appli-

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91) Brækhus 1955 p. 341

92) Tiberg 1998 p. 63-64

93) Inter alia; Brækhus 1955, Tiberg 1998, and Rhidian 2010

cable, apart from the MSA section 501 (19:1) no. 5. It is a theory supported by legal practice but mostly deduced from and represented in legal writing. One might therefore conclude that the delivery liability rests on a rather fragile legal foundation.

The delivery liability differs quite substantially from the normal transport liability as the carrier is deprived of much protection otherwise installed in the transport liability to spread and allocate risk on its behalf. This difference creates a rather large discrepancy in case law. An assessment of the current theory; however, reveals that there is little basis for such divergence in the court rulings. One might therefore also conclude that the current theory on misdelivery results in an inappropriate precedence, except in cases where the cargo is delivered against a Letter of indemnity. On this basis, it can thus be concluded that current theory must change to accommodate a more appropriate practice for misdelivery cases in general. The most beneficial way for this change to be facilitated would be if the Rotterdam Rules were to come into force. The lack of accession to these Rules, however, is likely to jeopardize the chance that this will actually result in a change of practice.