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# SHEDDING LIGHT ON SHADES OF GREY: TIME BAR APPLIES TO MISDELIVERY CLAIMS

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In a welcome decision for shipowners in *FIMBank plc v KCH Shipping Co., Ltd [2022] EWHC 2400 (Comm)*, the UK Commercial Court held that the time bar in Article III rule 6 of the Hague-Visby Rules (“Rules”) can apply to claims in relation to misdelivery after discharge. The Court’s decision resolves an important question which had been left undecided by the English courts in *The Alhani [2018] 2 Lloyd’s Rep 563*.

"It is apparent ... that these points of law are not only of considerable difficulty, but are potentially of considerable commercial significance."

## BACKGROUND

The M/V GIANT ACE carried a cargo of about 85,510MT of coal in bulk from Indonesia to India. 13 sets of bills of lading on the Congenbill form were issued “to order” for and on behalf of the Master. The coal was discharged between 1 and 18 April 2018 into stockpiles at the port against letters of indemnity which ran up the charterparty chain.

FIMBank was financier of one of the purchasers, pursuant to which in the usual way it took a pledge over the bills of lading and the cargo. It brought a claim for misdelivery of the cargo against KCH as carrier after discharge from the stockpiles pursuant to delivery orders. FIMBank served its Notice of Arbitration on KCH on 24 April 2020, which was more than one year after delivery of the goods or the date when they should have been delivered.

In an award on preliminary issues, the arbitral tribunal determined that FIMBank’s claim was time-barred irrespective of whether delivery post-dated discharge on the facts (which remained a matter in dispute).

## QUESTIONS BEFORE THE COMMERCIAL COURT

FIMBank brought an appeal under section 69 of the Arbitration Act 1996 and so the Commercial Court considered:

1. Whether Article III rule 6 of the Rules applies to claims for misdelivery of cargo after discharge?
2. Whether clause 2(c) of the Congenbill form disapplies the Rules to the period after discharge?

## ARGUMENTS, DECISION AND REASONING

"Art.III, r.6 of the Hague-Visby Rules, which includes the time bar but is concerned with delivery in a broader context, applies to claims for misdelivery of cargo after discharge, a conclusion which avoids the

## necessity for fine distinctions as to the point at which discharge ends."

The Commercial Court upheld the tribunal's decision on both questions and accordingly dismissed the appeal.

### **FIMBank's case**

FIMBank's argument was that the one-year time limit did not apply to limit its claim for misdelivery (with the result that the longer six-year statutory time bar would apply and its claim would not be time-barred). It submitted that the scope of the Rules is confined to and only regulates carriage by sea and so the Rules have nothing to say about misdelivery from land storage.

The "period of responsibility" under the Rules, and therefore the immunities including the time bar, end when the goods are discharged from the ship. The correct reading of the Rules is that they do not apply to or confer immunities in respect of any events after discharge, but it is open to the parties to amend this by agreeing in the contract that they do. The fact that the carrier does not know anything about what happens to the goods after discharge is another reason for disapplying the time bar.

FIMBank argued that the references to "delivery" in the Rules, which could take place sometime after physical discharge of the cargo from the vessel did not extend the period of responsibility of the carrier. The reference to delivery in the Article III rule 6 time-bar is solely there to provide a marker in time for the running of the one-year period. None of the provisions of the Rules contain or regulate an obligation to deliver. The Rules do not regulate every aspect of the contract of carriage and the delivery obligation is one example. The delivery obligation, it submitted, is of a different nature to the obligations regulated by the Rules.

In any event, the parties had contractually disappplied the Rules in respect of the period after discharge, insofar as clause 2(c) of the Congenbill form provided: "The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel ...".

### **KCH's case**

In support of its position that the time bar should apply, KCH highlighted that in accordance with its wording and for the purpose of achieving finality, the time bar has consistently been given a broad construction in the courts.

It argued that the “period of responsibility” under the Rules includes the period from discharge to delivery. Further, the bill of lading contract that had been concluded between the parties applied the Rules up to and including delivery in any event. So that even if the regime is in principle up to discharge, this is a case where there is an implied and express extension of the regime right up to delivery.

"It seems counter-intuitive that a clause which is intended to relieve the carrier of liability for loss of or damage to the cargo after discharge from the vessel should have the effect of depriving the carrier of the benefit of a time bar which would otherwise be available, particularly given the objective of the time bar, which is to enable the carrier to clear its books, and which has been construed widely."

KCH said that the Tribunal was right to hold that clause 2(c) of the bills of lading cannot operate to disapply the time bar following discharge because the clause adds nothing material to the terms of the Rules themselves. The Rules might be said to provide for a “period of responsibility” in terms of the carrier’s obligations under the Rules, which begins with loading and ends with discharge. The clause relates only to the carrier’s liability in relation to loss of or damage to the cargo. It does not purport to address the position regarding the Rules generally. Still less does it address the time bar in Article III rule 6, which: (i) speaks not of “discharge” but of “delivery”, and (ii) pertains to an immunity of the carrier, not a liability.

### **Judgment of the Commercial Court**

In deciding that the one-year time bar applied to claims in relation to misdelivery after discharge,

the Commercial Court made the following key points:

1. this conclusion avoided the need for fine distinctions as to the point at which discharge ended;
2. it seemed counter-intuitive that a clause which is intended to relieve the carrier of liability for loss of or damage to the cargo after discharge from the vessel should have the effect of depriving the carrier of the benefit of a time bar which would otherwise be available;
3. the decision accorded with the objective of the rule which was intended to achieve finality and to enable the shipowner to clear its books;
4. the parties contractually applied the Rules to “any Bill of Lading issued under this charterparty”. They therefore intended to apply the Rules to their rights and liabilities under the bills of lading and the contract contained in or evidenced by it, and not simply to the specific limited carriage by sea aspects of that contract;
5. most deliveries will be at some point after discharge over the ship’s rails and may take place in a number of different ways outside the control of the carrier. It would be odd if the critical distinction for time bar purposes depended on this. There is no obvious analytical or sound commercial reason why it should since the receiver has control over when and how it surrenders the bill of lading and organises the receipt of the goods ashore; and
6. it would be unclear on FIMBank’s case how long a period after discharge over the ship’s rail is needed before the time bar ceases to apply.

## CONCLUSION

The reasoning of the Commercial Court is robust, driven by practical and commercial considerations. No doubt there are strong “theoretical” arguments that support the view that the “period of responsibility” under the Hague-Visby Rules ends at discharge and for the Article III rule 6 time bar to be limited to the “period of responsibility” under the Rules and not apply to misdelivery after discharge. However, this issue was rightly considered in its commercial as well as its legal context, leading to the conclusion that the Article III rule 6 time-bar does apply to FIMBank’s claim against KCH for misdelivery after discharge.

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