

HITTING THE BULL'S EYE

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"This is, in my judgment, the necessary bull's-eye"

The UK Court of Appeal has provided clarity on the important issue of whether the one-year time bar under Article III Rule 6 of the Hague-Visby Rules applies to misdelivery of cargo after discharge. The judgment in *FIMBank PLC v KCH Shipping Co Ltd [2023] EWCA Civ 569* confirmed that the time bar does apply and resolves a question which was left unanswered by Mr Justice

Foxton in *The Alhani* [2018] EWHC 1495 (Comm).

BACKGROUND FACTS

A cargo of coal (the "Cargo") was shipped on the GIANT ACE (the "Vessel") in March 2018 under bills of lading on the CONGENBILL form ("B/Ls"). FIMBank PLC ("FIMBank") financed the purchase of the Cargo and as holder of the B/Ls, brought claims for the alleged misdelivery of the Cargo against the contractual carrier, KCH Shipping Co Ltd ("KCH"). The B/Ls were subject to the Hague-Visby Rules, including the time bar in Article III Rule 6 that required suit to be brought within one year of delivery or the date when cargo should have been delivered. Original B/Ls were not available at the discharge ports in India, so the Cargo was discharged into stockpiles in mid-April 2018 against letters of indemnity issued to KCH by the charterers.

FIMBank was left unpaid under its financing arrangement and wanted to exercise its security by demanding delivery under the B/Ls. By the time FIMBank tried to exercise its security, the Cargo had already been discharged from the Vessel and collected from stockpiles at the Indian discharge ports by local receivers.

"Reference to the travaux préparatoires... confirms that Article III, rule 6 of the Hague Visby Rules is intended to apply to misdelivery claims."

FIMBank brought a claim in arbitration against KCH under the B/Ls. However, FIMBank only commenced arbitration against KCH on 24 April 2020, i.e. two years after discharge. The application of the time bar was dealt with as a preliminary issue in the arbitration.

JUDICIAL HISTORY

The arbitration tribunal decided that the claim was time-barred because Article III, Rule 6 of the Hague-Visby Rules applied, even if the misdelivery happened after discharge. This was subsequently affirmed by the High Court (see our previous article on that decision [here](#)).

ISSUES BEFORE THE COURT OF APPEAL

FIMBank appealed to the Court of Appeal with the following questions:

1. Does Article III, Rule 6 of the Hague Visby Rules apply to a claim for misdelivery occurring after discharge of the cargo has been completed?
2. If not, was there an implied term in the B/Ls to the effect that the Hague Visby Rules including Article III, Rule 6 would apply to govern the parties' relationship after discharge of the cargo?
3. If the answer to either of these questions is "yes", does clause 2(c) of the Congenbill form have the effect of disapplying the time bar in Article III, Rule 6?

DECISION AND REASONING OF THE COURT OF APPEAL

"The new rule was intended to apply to such claims."

The Court of Appeal agreed with both the Tribunal and High Court that FIMBank's claim was time barred. It rejected the suggestion that clause 2(c) of the CONGENBILL form disapplied Article III, Rule 6 from the period after discharge and it was unnecessary to reach a final conclusion on question (2) in light of the affirmative answer to question (1).

In coming to its decision on the interpretation of the time bar at Article III, Rule 6 of the Hague-Visby Rules, the Court of Appeal relied on the "*travaux préparatoires*" (preparatory works) for the Hague-Visby Rules. It found that they made it clear that the object and purpose of the drafters of the Visby revisions to the Hague Rules was to extend the application of the time bar at Article III, Rule 6 to claims for non-delivery or misdelivery occurring after discharge. It was immediately apparent from the wording of Article III, Rule 6 of the Hague-Visby Rules that it was intended to be of wider scope than the original rule, but this "bull's eye" from the drafters indisputably pointed to a definite legal intention.

The Court of Appeal also decided that that clause 2(c) did not disapply the Hague-Visby Rules time bar. Clause 2(c) either completely excluded KCH's liability for misdelivery (in which case FIMBank would not have a claim) or KCH remained liable for misdelivery after discharge in spite of clause 2 (c).

"In the original Rules, at any rate, Article III, rule 6 is not a cuckoo in the Hague Rules nest."

As well as the overall conclusions reached on the time bar, the decision is interesting for its commentary on the use of preparatory materials and the approach to interpretation of international treaties.

KEY TAKEAWAYS

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- the Court of Appeal concluded that, in contrast with the Hague-Visby Rules, under the Hague Rules Article III Rule 6 does not apply to misdelivery after discharge. It appears that the addition of “whatsoever” after the words “discharged from all liability” in the Hague-Visby Rules was the clincher;
- this may lead to negotiations in the future between parties as to whether Hague Rules or Hague Visby Rules ought to apply;
- shipowners have the comfort of some certainty. It would have been 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; and
- financing banks ought to be wary and diarise 12 months from discharge irrespective of delivery.

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