

Misdelivery by the carrier after discharge and the Article III Rule 6 time bar: the ‘*Alhani* gap’ is filled

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FIMBank p.l.c. v KCH Shipping Co., Ltd [2022] EWHC 2400 (Comm)

The Commercial Court (Sir William Blair) has today handed down judgment in ***FIMBank p.l.c. v KCH Shipping Co., Ltd***, an appeal under section 69 of the Arbitration Act 1996, holding that the time bar in Article III rule 6 of the Hague-Visby Rules can apply to claims in relation to misdelivery after discharge. The Court’s decision resolves an important question which had not previously been decided by the English courts, and which has divided leading academic commentators as well as judges in other common law jurisdictions.

Background

The appeal relates to a claim brought by FIMBank p.l.c. (“**FIMBank**”), as the holder of bills of lading, for the alleged misdelivery of cargo by the contractual carrier, KCH Shipping Co., Ltd (“**KCH**”). The bills were concluded on the Congenbill form, and were subject to the Hague-Visby Rules, including the time bar in Article III r 6 of one year after delivery which applies to claims against carriers.

FIMBank served a Notice of Arbitration on KCH after that time bar expired. Its position was that its claim was nevertheless not caught by the time bar, contending that: (a) on the facts, delivery took place after discharge; and (b) as a matter of law, the time bar did not apply to claims for misdelivery occurring after discharge. In its submission, this was so given that the Hague-Visby Rules do not regulate a carrier’s obligation to deliver cargo (as opposed to the carriage of goods by sea), and only relate to a ‘period of responsibility’ which ends with the discharge of cargo. FIMBank further argued that the parties had, in any event, contractually disapplied 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...’*.

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). This was because: (i) the Hague-Visby Rules time bar can apply to claims relating to misdelivery occurring after discharge; and (ii) Clause 2(c) of the Congenbill form does not disapply the Rules in respect of the period after discharge.

The Court’s reasoning

The Court upheld the tribunal’s decision on both questions, and accordingly dismissed the appeal.

On the first question, it concluded that, on its true construction, Article III r 6 of the Hague-Visby Rules applies to claims for misdelivery of cargo after discharge. The Court noted that this conclusion avoided the need for fine distinctions as to the point at which discharge ended, and accorded with the objective of the rule which was intended to achieve finality and to enable the shipowner to clear its books. It further observed that, although certain common law authorities and commentaries might be said to support the construction of Article III r 6 for which FIMBank contended (including *Carver on Charterparties* and *Voyage Charters*), there was no international judicial or academic consensus to that effect.

The Court held that, even if its conclusion above was wrong, the tribunal’s decision was in any event justified by its finding that the bills of lading contained an implied term providing that the Hague-Visby Rules obligations and immunities are to continue after actual discharge and until delivery takes place, in line with the reasoning of the Court of Appeal in ***The MSC Amsterdam*** [2007] EWCA Civ 794.

On the second question, the Court held that, on a proper construction, Clause 2(c) did not disapply the Hague-Visby Rules to the period after discharge. Although FIMBank relied in this regard on *The MSC Amsterdam*, in which the express terms of the bill of lading concerned were held to have disappplied the Hague Rules after discharge, the Judge held that that decision did not warrant a different result, insofar as it featured a bill of lading with materially distinguishable terms.

Simon Rainey K.C. of Quadrant Chambers and Matthew Chan of Twenty Essex acted for KCH, instructed by Kyri Evagora and Thor Maalouf of Reed Smith LLP.

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Simon Rainey KC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). He is acclaimed for his advocacy skills ("a stunning advocate") and his cross-examination ("excruciatingly superb") His practice focuses on five core areas: commercial litigation, commodities and international trade, energy and natural resources; international arbitration; insurance and reinsurance and shipping and maritime law.

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