



Bull's-eye! The Hague-Visby Rules time bar applies to post-discharge misdelivery

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FIMBank p.l.c. v KCH Shipping Co. Ltd (The Giant Ace) [2023] EWCA Civ 569

Overview

The Court of Appeal (Males; Popplewell and Nugee LJJ) has today handed down judgment in ***FIMBank p.l.c. v KCH Shipping Co. (The Giant Ace)***, which started life as an appeal under section 69 of the Arbitration Act 1996, confirming that the time bar in Article III rule 6 of the Hague-Visby Rules will apply to claims in relation to misdelivery after discharge.

The Court's decision upholds the previous decisions of the LMAA tribunal (Julia Dias KC, Sir Bernard Eder and Tim Young KC) and of the Commercial Court (Sir William Blair).

In so holding, the Court found that the travaux préparatoires to the Visby Protocol which amended, inter alia, the Hague Rules text of Article III, Rule 6 to give it very wide scope, gave a clear "bull's-eye" for the purposes of Article 32 of the Vienna Convention on Interpretation of Treaties and the English law threshold (see e.g. ***The Giannis NK*** [1998] AC 605) and made it clear that this was the intention of the drafters.

The decision confirms the closing of the "gap" left by the previous decision (on the Hague Rules) in ***The Alhani*** [2018] EWHC 1495 (Comm) in which it was held that misdelivery occurring before or simultaneously with discharge was covered by the Article III Rule 6 Hague Rules time bar but where the Court specifically left open the question of its application to misdelivery occurring after discharge.

Background

The appeal related 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...'*.

Those arguments were rejected by the arbitrators, by the Commercial Court and now, again, by the Court of Appeal. The Court of Appeal refused permission to appeal to the Supreme Court.



The Court of Appeal's reasoning

The Court's reasoning on the first Hague-Visby Rules question proceeded in two stages.

First, on the true construction of the language of the unamended Hague Rules, the Court held that, "on balance", "the better view" was that Article III Rule 6 did not apply to misdelivery after discharge but only in relation to all liability of any kind on the part of the carrier which arose during the Hague Rules period of responsibility, i.e. between shipment and discharge.

Secondly, the Court held that position was however different under the Hague-Visby Rules.

The very wide language which was adopted in the amendment of Article III Rule 6 by the Visby Protocol supported the textual conclusion that "the new rule is intended to apply even in cases outside the sphere of application of the Rules".

When regard was had under Article 32 of the Vienna Convention to the travaux préparatoires which explain why that text was changed as it was, there was "no room for doubt" and there was a clear "bull's eye". As Males LJ put it, "In choosing a time limit deliberately expressed "in the broadest possible terms", the drafters plainly intended that the limit should apply to misdelivery even occurring after discharge. It is unlikely in the extreme that they intended the time limit to apply to misdelivery occurring during the voyage or simultaneously with discharge, but not to the typical case of misdelivery occurring after discharge." This was especially so when "it has for many years been common for delivery to take place some time after discharge has been completed" and "although misdelivery can occur during the voyage or simultaneously with discharge ... misdelivery after discharge is the paradigm case".

On the second question, the Court held that Clause 2(c) did not disapply the Hague-Visby Rules time bar.

Either as a matter of construction it applied to exclude all liability including that for misdelivery, in which case the time bar issue did not arise, or it did not apply to liability for misdelivery at all, in which case there was no reason to conclude that the time bar, specifically applicable to misdelivery after discharge, was excluded by it.

Although it was not necessary to decide the point, the Court of Appeal expressed "considerable doubt" that, if Article III Rule 6 of the Hague-Visby Rules did not apply to misdelivery after discharge on the text of the convention, nevertheless there was an implied term of the bills of lading that the Hague Visby Rules including Article III, rule 6 would apply to govern the parties' relationship after discharge of the cargo. This was referred to in argument as "the Carver implied term" (see Carver on Bills of Lading, 5th Edn (2022), para 9-135 and The MSC Amsterdam [2008] 1 All ER (Comm) 385.

Simon Rainey K.C. of Quadrant Chambers and Matthew Chan of Twenty Essex acted for the carrier KCH, and were 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. He is acclaimed for his advocacy skills and his cross-examination. But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care

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