Neutral Citation Number: [2022] EWHC 2400 (Comm)

CL-2021-000563

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN ARBITRATION BETWEEN:

Royal Courts of Justice,
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 28 September 2022

Before:

Sir William Blair
(Sitting as a High Court Judge)

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Between:

FIMBANK p.l.c.	**Claimant (Claimant in the arbitration)**
- and –	
KCH SHIPPING CO., LTD	**Defendant (Respondent in the arbitration)**

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Steven Berry QC and **Helen Morton** (instructed by **Campbell Johnston Clark Ltd**) for the Claimant
Simon Rainey QC and **Matthew Chan** (instructed by **Reed Smith LLP**) for the Defendant

Hearing date: 28 July 2022

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JUDGMENT

Sir William Blair:

1. This appeal relates to claims made by the Claimant ("FIMBank"), which is a trade finance bank headquartered in Malta regulated by the Maltese Financial Services Authority, against the Defendant ("KCH"), which is a Korean-incorporated company. The appeal is brought by permission of Butcher J given on 22 December 2021 pursuant to s.69(2)(b) of the Arbitration Act 1996 against the Partial Final Award (the "Award") of an Arbitral Tribunal dated 1 September 2021. FIMBank brings claims as holder of various bills of lading for misdelivery of cargo against KCH as carrier. The charterparty chain is described by Cockerill J in *The Giant Ace* [2020] 2 Lloyd's Rep 511 and need not be explained further for the purpose of the matters to be decided in this judgment. In short, the question of law that arises in this case is whether the limitation of liability in Article III, r.6 of the Hague Visby Rules applies to claims for misdelivery of cargo after discharge from the vessel. This question has not been decided previously by the courts in this jurisdiction, having been left open in *The Alhani* [2018] 2 Lloyd's Rep 563 at [86], and raises as Butcher J pointed out a matter of general public importance.

2. The Award decided certain preliminary issues, so that the background facts have yet to be ruled upon. In brief, 13 sets of bills of lading dated 4 and 14 March 2018 on the Congenbill form were issued 'to order' for and on behalf of the Master of the M/V GIANT ACE for about 85,510MT in aggregate of coal in bulk. KCH had bareboat chartered in the vessel from Mirae Wise SA (a Panama company and the registered owner of the vessel) and the claim is brought against KCH as carrier. By way of incorporation from the charterparty, the bills of lading (as the Arbitral Tribunal held) were subject to the Hague-Visby Rules

(the "Rules" which term also includes the Hague Rules depending on context), including the time-bar in Article III rule 6 of one year after delivery which applies to claims against the carrier. The coal was loaded in Indonesia and arrived at the Indian ports of Jaigarh and Dighi around two weeks later. It was discharged between 1 and 18 April 2018 against letters of indemnity which ran up the charterparty chain. It was then placed in discharge port stockpiles. What actually happened to it has not been explored in the facts before the court, and is in dispute.

3. FIMBank is involved in the transaction as financer of one of the purchasers, pursuant to which in the usual way it is said to have taken a pledge over the bills of lading and the cargo – essentially it stands in the same position as the cargo owners. It claims misdelivery of the cargo after discharge from the stockpiles pursuant to delivery orders. In circumstances which it says led it to misunderstand the identity of the carrier, 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 – that being the time bar period. If the time bar does not apply to misdelivery after discharge, then the arbitration revives to determine, amongst others, the question whether delivery did indeed take place after the end of the discharge operation which is in dispute. If it did, the claim is barred, and the bank must bear the loss.

4. Upon these facts, Butcher J gave permission to appeal in respect of two of the five questions of law raised by FIMBank:

i) Whether Art.III, r.6 of the Hague-Visby Rules applies to claims for misdelivery of cargo after discharge (the "first question");

ii) Whether clause 2(c) of the Congenbill form disapplies the Hague-Visby Rules to the period after discharge (the "second question").

5. Section 69 Arbitration Act 1996 provides a limited avenue for appeal to the court on a question of law arising out of an award (it is not a mandatory provision of the Act and is often disapplied in the rules of arbitral institutions, but it did apply in the present case). The relevant test is in s.69(3)(c)(ii), which applies where the question is one of general public importance and the decision of the tribunal is at least open to serious doubt. In giving permission, Butcher J said of the first question that there is no English authority directly on the point, and that, as the Tribunal itself recognised, its decision in the affirmative is contrary to the view expressed in two leading textbooks and the conclusions reached in certain other jurisdictions. As regards the second question, the judge referred to the decision in *The MSC Amsterdam* [2007] 2 Lloyd's Rep 622, stating in respect of both questions that the Tribunal's decision "can be said to be open to serious doubt" adding "though of course it may be correct". I draw attention to that to make it clear that in giving permission to appeal the judge was not expressing a view as to the correctness or otherwise of the Tribunal's decision. It is clear from reading the Award that the Tribunal was concerned to explain and analyse the issues *as a matter of law* – the factual issues were largely not critical in this respect, indeed were not resolved. In particular, the facts as to delivery have not been resolved, and do not need to be on the Tribunal's approach to the case. The case is in this respect makes it particularly suitable

for the exercise of the limited powers given to the court to permit appeals on points of law where it is important that the point in question is clarified.

6. It is apparent from the parties' submissions that these points of law are not only of considerable difficulty, but are potentially of considerable commercial significance. In short, FIMBank contends that the one-year time bar which applies to claims against the carrier does not apply at all to misdelivery after discharge, i) on the wording of the Hague-Visby Rules themselves, and ii) because clause 2(c) of the bills of lading prevents their implication or application. The Arbitral Tribunal decided to the contrary, on grounds both of the wording of the Rules, and the implication of a term, and KCH's case is that it decided correctly for either or both reasons, and that the appeal should be dismissed and the Award confirmed.

7. Having made these points, it is important to state that, as the Arbitral Tribunal recognised, whatever the wider ramifications, the appeal is concerned with the particular contract at issue in the present case. As it was put, the case is concerned with the contractual application of the Hague-Visby Rules "to any Bill of Lading issued under this charterparty" and the true construction of that term (Award § 110).

The Arbitral Tribunal's Award

8. The Award was issued in the underlying arbitration on 1 September 2021 following a hearing on various preliminary issues. The Tribunal, which comprised Julia Dias QC, Sir Bernard Eder and Timothy Young QC, all (as KCH points out) leading maritime arbitrators, rejected FIMBank's position on

both the grounds which arise in this appeal. After an extensive analysis of the law, it found that: (i) the Hague-Visby Rules time bar can in principle apply to claims relating to misdelivery occurring after discharge; and (ii) Clause 2(c) of the Congenbill form did not disapply the Hague-Visby Rules time bar to the period after discharge. Accordingly, since there had not been the bringing of a "suit" within the meaning of Art.III, r.6 within the time period allowed, FIMBank's claim was time-barred, irrespective of whether delivery did occur after discharge as a matter of fact (KCH contending that misdelivery in this case was simultaneous with discharge).

9. The Arbitral Tribunal's reasoning was in summary that the contract of carriage covered by a bill of lading applies before loading, before the goods pass over the ship's rail, and persists after the goods pass over the ship's rail until right and true delivery. Delivery is contemplated by the Rules, even if not identified by name otherwise than in Art. III, r 6. Thus Art. II stipulates the carrier's "custody" obligation, which is replicated in Art. III, r. 2 in the form of the carrier's obligation to "keep" and "care for" the goods. Such an obligation of 'custody' is naturally capable in the normal course of persisting after discharge, and is thus an obligation squarely within the ambit of the Rules. Further, 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.

10. Accordingly, the Rules were contractually incorporated in such a way as not to disapply them to functions performed after discharge. They applied in particular

to the obligation of giving right and true delivery. On that basis, the Tribunal held that the conclusion that the Rules continued to apply after discharge is justified either (i) on a true construction of the bills of lading, or (ii) by implying a term to that effect as envisaged in a number of authoritative sources.

Art. III r.6 of the Hague-Visby Rules

11. The Hague-Visby Rules consist of the Hague Rules as amended by the Protocol signed at Brussels in 1968 enacted in the United Kingdom by the Carriage of Goods by Sea Act 1971, the provisions of the Rules being set out in the Schedule to the Act (Flaux LJ in *Kyokuyo Co Ltd v AP Møller-Maersk A/S* [2018] EWCA Civ 778 at [15] – [16]).

12. In *Alize 1954 & Anor v Allianz Elementar Versicherungs AG & Ors* [2021] UKSC 51, Lord Hamblen sets out the approach to the interpretation of the Hague Rules at [34] – [42]. Art. III, r.6 takes its place within the scheme of the Rules of which the following were referred to in argument:

(1) Art. I(b) provides that the term "'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same".

(2) Art. I(e) provides that the term "'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship".

(3) Art. II sets out the position of the carrier: "… under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth".

(4) Art. III, r.2 directs that "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried".

(5) Art. III, r.6 is a lengthy provision stating that, "Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier of his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. …"

(6) There follows in Art. III, r.6 the time bar which is the crucial provision in the present case, and which provides (subject to paragraph 6bis which is about actions for indemnity against a third person) that "… the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. …".

(7) Art.III, r.8 provides that "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in these Rules or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

(8) Art. VII provides that "Nothing herein contained shall prevent a carrier or shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea".

The parties' contentions

13. The essence of the submissions of Mr Steven Berry QC for FIMBank is that the Hague-Visby Rules have nothing to say about misdelivery from land storage because the Rules regulate, and only regulate, carriage of goods by sea. None of the provisions of the Rules contains or regulates an obligation to deliver. This obligation is strict, and does not involve an assessment of the manner in which it is performed. Where Art. II refers to "immunities", the carrier's entitlement

is confined to its obligations up to but not beyond discharge – Art. III, r.6 is such an immunity. When read as a whole and in particular with Arts. I(e) and II, not only is delivery (as opposed to discharge) unregulated, but the 'period of responsibility' under the Rules and, it follows, the 'immunities' including the time bar, end when the goods are discharged from the ship: the liability of the carrier for loss of or damage to the goods before the beginning, or after the end, of the sea carriage is not governed by the rules at all (*Gosse Millerd v Canadian Government* [1927] 2 KB 432 at p.434, *The Arawa* [1977] 2 Lloyd's Rep 416 at pp.424-425). The Rules including Art. III, r.6 do not on their wording apply to or confer immunities in respect of any events after discharge, but it is open to the parties to contract that they do (*The MSC Amsterdam* [2007] 2 Lloyd's Rep 622 at [22]-[23]). The term "delivered" provides a marker in time for the running of the one year. The carrier is protected by taking his letter of indemnity in the knowledge that there may be later misdelivery: the letter is taken to provide indemnity against those claims. This conclusion is consistent with international consensus and supported by the leading textbooks.

14. For KCH, Mr Simon Rainey QC points out that in accordance with its wording and purpose, the time bar has consistently been given a broad construction in the courts. The purpose of the time bar, like any other, is to "achieve finality and, in this case, [to] enable the shipowner to clear his books": *The Captain Gregos* [1990] 1 Lloyd's Rep 310, per Bingham LJ. Thus the time bar does not only apply to breaches of the obligations contained in the Hague / Hague-Visby Rules, it being also now well established that, in principle, it covers misdelivery claims. The tribunal held that it applied to FIMBank's claim to misdelivery carrier after discharge on two grounds. The first ground was that the bill of

lading contract concluded between the parties applied the Hague-Visby Rules regime 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 (referred to as the "Carver" implied term after the textbook of that name). The implication happens because it is necessary and obvious. Therefore the parties simply extended the Hague-Visby Rules to cover the whole suite of contractual performance. The arbitrators found there was such an implied term, so it is very difficult to see in what respects they went wrong as a matter of law.

15. The second ground is that even if that were not the case, then on the compulsory application of the Hague-Visby Rules as found by the tribunal, on the true construction of Art. III, r.6, it applies to bar all claims of any sort arising before discharge, including a claim for misdelivery between discharge and delivery. The object and purpose of Art. III, r.6 is to produce a total closing of the books, the language being wider than the Hague Rules equivalent. It is not something unfair that needs to be read down. By article 31(1) of the Vienna Convention the court must construe the provision in the light of the object and purpose of the rules. It is not tied to the scheme of obligations and responsibilities laid down in the rules themselves but to all claims against the carriers related in any way to the contract of carriage and to the goods. The textbooks differ on the issue, and there is no international uniformity about what Art. III, r.6 of the Hague-Visby Rules means and why it was changed.

<u>The approach taken in the judgment</u>

16. Fundamentally, the issues between the parties are relatively narrow. The case of FIMBank is straightforward, namely that the "period of responsibility" under the Hague-Visby Rules and, it follows, the immunities including the time bar, end when the goods are discharged from the ship – the right reading of the Rules is that the Rules including Art.III r.6 do not on their wording apply to or confer immunities in respect of any events after discharge, but it is open to the parties to contract that they do.

17. The case of KCH is less straightforward, but is broadly that the contract of carriage covered by a bill of lading applies before loading and persists after discharge until right and true delivery, and that the time bar continues to apply up to and including the stage of delivery, either on the true construction of the Rules and particularly Art. III, r 6 itself, alternatively because it is easy to imply an agreement to adopt the Rules before loading and after discharge and the Tribunal's finding to that effect is not open to challenge. On the construction point, KCH's case appears to contemplate the "period of responsibility" under the Hague-Visby Rules as including the period from discharge to delivery, alternatively construing Art.III, r.6 as a free-standing provision which refers specifically to delivery unlike other provisions of the Rules and which includes within the time bar claims arising in the period after discharge.

18. As a matter of comment, there is, as Mr Berry showed in his submissions, authority that can be seen as solidly supporting FIMBank's argument, though he accepts of course that the issue has not been decided (at least not in this jurisdiction). If he is right, however, various issues arise (discussed below) which the Arbitral Tribunal clearly identified, these being the apparent

anomalies that arise if the time bar applies up to discharge, but the carrier's contractual obligations continue until delivery.

19. The Arbitral Tribunal considered the first and second questions together, which appears to me to be the logical way to approach the case. I shall take the same approach. The judgment will deal with (1) the nature of the delivery obligation, (2) the versions of the Art. III, r.6 time bar in the Hague Rules and as revised in the Hague-Visby Rules, (3) the object and purpose of the time bar, (4) the key English cases, (5) the authorities from other common law jurisdictions, (6) textbooks and academic material, (7) discussion, and (8) conclusion.

(1) The delivery obligation

20. FIMBank's case is that the scope of the Rules is confined to carriage by sea (*The Arawa* [1977] 2 Lloyd's Rep 416 at pp.424-425, Brandon J), and that the scope of the carrier's obligations is a matter for the agreement between the relevant parties (as per *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, Devlin J), the Rules regulating the manner in which they are done if they are agreed to be done.

21. The key issue in the present case is as to delivery, and in that regard FIMBank's case is that the Rules do not regulate every aspect of the contract of carriage, and the delivery obligation is an example. The delivery obligation, it submits, is of a different nature to the obligations regulated by the Rules: it is a strict obligation, and does not involve an assessment of the manner in which it is performed.

22. It is important therefore to state the nature of the delivery obligation. The Arbitral Tribunal considered its scope as follows: " … the contract of carriage covered by a bill of lading applies before loading, before the goods pass over the ship's rail (as Devlin J held in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*) and persists after the goods pass over the ship's rail until right and true delivery which might be almost instantaneous or not according to particular circumstances which might have an element of serendipity" (para 100). By element of serendipity, the Tribunal was presumably referring to the many different types of cargo, and the many different types of regime for discharging it. Instead of "serendipity", Mr Berry preferred to say "according to the usual exigencies of a trade". Otherwise, the Tribunal's formulation of the delivery obligation as I understood it is not in dispute.

23. It is also common ground that the term "delivery" is only mentioned in the Rules in Art. III, r.6, which deals with prima facie evidence of delivery as well as the time bar.

(2) The versions of Art. III, r.6 in the Hague Rules, and as revised in the Hague-Visby Rules

24. It is the version of Art. III, r.6 in the Hague-Visby Rules, a 1968 revision of the Hague Rules, which is at issue in the present case. To see them side by side, the original 1924 version reads:

> "In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The 1968 revision reads somewhat differently:

> "… the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. …"

25. A potentially important issue is whether the revision was intended to clarify the position as regards delivery. The position on the *travaux préparatoires* was not explored in any detail at the hearing, but Judge Diamond (then Anthony Diamond QC) expressed the view that the sole or main purpose of the substitution of the words "discharged from all liability whatsoever in respect of the goods" for the words "discharged from all liability in respect of loss or damage" was to make the time limit apply where the goods had been delivered without production of bills of lading and so make it unnecessary to require an indemnity given by the receiver to be kept open indefinitely (*The Hague-Visby Rules*). If correct, this has obvious implications for the applicability of the time bar post-discharge, and in fact Judge Diamond goes on to "submit, albeit with considerable doubt, that as the first paragraph of art. III, r.6 is dealing with the effect of delivery of goods, so also the time bar should be construed as applying to events taking place after discharge. If so, I submit, again with doubt, that the limit should apply". However, as appears below, not all commentators take the same view as to the *travaux préparatoires*.

(3) Object and purpose of Art. III, r.6

26. The background to the Hague Rules of 1924 has recently been fully explained in *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)* [2018] 2 Lloyds Rep 563 by David Foxton QC (sitting as a Deputy Judge of the High Court, now Foxton J). At [49], he cites the judgment of Judge Diamond QC a "noted expert on the Hague and Hague-Visby Rules" in *Transworld Oil (USA) Inc v Minos*

Compania Naviera SA (The Leni) [1992] 2 Lloyd's Rep. 48 at 53 who described the objectives of Art. III, r.6 as follows:

> "There were a number of objectives which art. III, r. 6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims; second, to achieve international uniformity in relation to *prescription* periods; third, to prevent carriers from relying on "notice-of-claim" provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year; see also Tetley, Marine Cargo Claims 3rd ed. (1988) p. 671 note 1."

27. It is clear that a balance was sought to be achieved between the interests of carriers and cargo interests in this respect, though no doubt reflecting the balance of power between the negotiating parties (see Tomlinson J in *Linea Naviera Paramaconi SA v Abnormal Load Ltd* [2001] 1 Lloyd's Rep 763 at [19], quoting Bingham LJ in *Compania Portorafti Commerciale S.A. v Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310 at p.312 (col 2)).

28. In *The Captain Gregos*, Bingham LJ when considering Art. III, r. 6 in the Hague-Visby Rules authoritatively stated its objective, saying that it is, "like any time bar, intended to achieve finality and, in this case, enable the ship owner to clear his books" (at p.315 (col 2)). There is no dispute that this is its purpose.

(4) The key English cases

29. The submissions of the parties focused in particular on some key English cases, of which it is convenient to begin with *The Captain Gregos* which has just been considered in the context of the objective of Art. III, r.6.

30. The case concerned a claim for theft by the carrier of part of a cargo of crude oil for its own use during the voyage. It had been held by Hirst J at first instance that misdelivery of whatever kind was outside Art. III, r.6, on the basis that

delivery was outside the Art. II package, and that the stages at which the carrier bears responsibilities and liabilities and is entitled to rights and immunities begin with loading and end with the discharge of the goods (see the summary at [1990] 1 Lloyd's Rep. 310 at p.313 (col 2)). The decision was subject to criticism by commentators (Brian Davenport QC, *Limits of the Hague Rules*, (1989) 105 LQR 521; Malcolm Clarke, *Misdelivery and time bars*, [1989] LMCLQ 394).

31. In the event the appeal was allowed. In his judgment, Bingham LJ said (at p.315 (col 1)) that the "… definition in art. 1(e) does, I accept, assign a temporal term to the "carriage of goods" under the rules, supporting an argument that the rules do not apply to events occurring before loading or after discharge. (See also art VII.) I read art. II as defining the scope of the operations to which the responsibilities, rights and immunities in the rules apply". However, it may be noted that the correctness of the temporal term argument as it applies to Art. III, r.6 did not arise directly for decision, because the conversion of the cargo by the carrier for its own use (a characterisation which Bingham LJ preferred on the facts of that case to "misdelivery") took place at sea before discharge.

32. Bingham LJ went on to hold that that the carrier's acts were the "most obvious imaginable breaches" of Art. III, r.2. As regards the time bar, he stated that he could "not see how any draftsman could use more emphatic language" (referring also to Lord Wilberforce in *The New York Star* [1980] 1 Lloyd's Rep. 317 at p.322). He stated that the words "all liability whatsoever in respect of the goods" meant exactly as it said, and that, "The inference that the one year time bar was intended to apply to all claims arising out of the carriage (or

miscarriage) of goods by sea under bills subject to the Hague-Visby Rules is in my judgment strengthened by the consideration that art. III, r.6 is, like any time bar, intended to achieve finality and, in this case, enable the ship owner to clear his books" (*The Captain Gregos* (at p.315 col 2).

33. The next case chronologically is *Cargill International SA v CPN Tankers (Bermuda) Ltd (The OT Sonja)* [1993] 2 Lloyd's Rep 435. The case arose in the pre-loading context and concerned the effect of the limitation provision in the US Carriage of Goods by Sea Act, which was an exact counterpart of Art.III, r.6 of the Hague Rules. KCH relied on it for the proposition that a wide rather than a narrow construction should be given to the ambit of the provision. This is based on the judgment of Hirst LJ at p.444 (col 1) where he effectively agrees with reasons given by counsel at p.443 (col 1): "The wider construction, Mr Hamblen submitted, was fully in accordance with the purpose of the limitation clause, which like any time bar, is "intended to achieve finality"".

34. FIMBank points out that *The OT Sonja* did not address its argument in the present case, which is the confinement of the time bar to the Hague Rules period of responsibility. Nevertheless, as KCH submits, the result of the decision is that the words in Art. III, r 6 are apt to cover goods which although intended to be loaded are in fact never loaded, from which it necessarily follows that the words must likewise be capable of application to a claim in respect of events occurring before loading begins (as it was put by Tomlinson J in *Linea Naviera Paramaconi SA v Abnormal Load Ltd* [2001] 1 Lloyd's Rep 763 at [15]). KCH submits that ratio of *The OT Sonja* applies equally to cover the position of

misdelivery after discharge, a submission that found favour with the Arbitral Tribunal.

35. The third case is important in the reasoning of both parties, albeit the case did not involve the time bar provision. In *Trafigura Beheer BV and another v Mediterranean Shipping Company SA (The MSC Amsterdam)* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622, a cargo claim arose out of a fraud which resulted in the cargo getting stuck at the port of discharge – in short, although the shipowners were able to ensure that delivery did not take place to the fraudsters, the true cargo owners were unable to obtain delivery from the container terminal. At first instance, Aikens J held that the shipowners had to deliver the cargo, or pay its full value. The shipowners appealed on the basis that under the Hague Rules, their liability was limited to £100 per package or unit.

36. The Court of Appeal held that the Hague Rules (rather than the Hague-Visby Rules) were applicable ([16]), and that on the true construction of the bill of lading, the parties did not intend the Hague Rules to apply after discharge of the cargo from the vessel ([20] – [26]). The shipowners' appeal was consequently dismissed.

37. The reasoning of Longmore LJ (with whom the other members of the court agreed) so far as relevant is at [20] – [26] of his judgment. The cargo-owners' submission was that the Hague Rules, if one looked at the Rules themselves, only applied for the period between loading and discharge. The period after discharge was therefore governed by the terms of the bill of lading. Although the parties could agree that the Rules applied to any part of the shipowners'

obligation that occurred before loading and after discharge, they had not so agreed. The shipowners' submission was that the Rules – including the £100 per package or unit - continued to apply after discharge.

38. In rejecting the shipowners' submission, Longmore LJ said that the dictum in *Pyrene Co v Scindia Navigation Co* [1954] 2 QB 402, 408, that the object of the Hague Rules "is to define not the scope of the contract service but the terms on which that service is to be performed", is now accepted doctrine: he then set out what follows from this proposition:

> "23. It must follow from this that the parties are free to agree on terms other than the Hague Rules (or the HVR) for periods outside the actual period of the carriage. No doubt if no agreement is made for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver. That is the view expressed by Carver on Bills of Lading, 2nd edition (2005) by Sir Guenther Treitel QC and Professor Francis Reynolds QC, para. 9-130 and [*the shipowners*] submit that that should be the position in this case."

39. The shipowner's case was rejected because it was inconsistent with the express terms of the bill of lading the clauses of which "… make it clear to my mind that the parties did not intend the Hague Rules to apply after discharge from the vessel. The fact that clause 7 refers to loss 'after the end of the Hague Rules period' shows that there is to be a period when the Hague Rules do not apply but which will otherwise be a time when the Owners may still have the obligations of a bailee in respect of the goods and can agree that the terms of that bailment are not to be those of the Hague Rules. The Owners' purported disclaimer of liability for what happens after discharge does not make any difference to that intention" ([24]). FIMBank submits that the same applies precisely in the present case. KCH submits that (as the Arbitral Tribunal held)

the case is distinguishable. It may be noted that in *The MSC Amsterdam* the court considered the construction and the contractual questions (i.e. the equivalent of the first and second questions) together, as did the Arbitral Tribunal in the present case, which as noted above appears to me to be the logical way to approach it.

40. The last case is *The Alhani* (see above) in which the issue was whether the time bar created by Art. III, r.6 of the Hague Rules applies to claims for misdelivery at all, where the shipowner has delivered the cargo to a third party without production of the bill of lading. David Foxton QC (sitting as a Deputy High Court Judge) rejected a submission that Art. III, r. 6 only applies to breaches of the Hague Rules, as opposed to breaches of the shipowner's obligations which occur during the period of Hague Rules responsibility, and which have a sufficient nexus with identifiable goods carried or to be carried ([65]). He held that it applies to misdelivery claims, at least where the misdelivery occurs during the Hague Rules period of responsibility ([86]), and that the time bar is not limited to claims for breach of the Hague Rules obligations ([61]). On the facts of the case, misdelivery and discharge happened at the same time by way of ship-to-ship transfer ([27]). It is common ground that the judge left open the question in the present case, which is as to claims for misdelivery of cargo after discharge.

41. FIMBank draws attention to the judge's observation that "unless the parties agree to an extended operation, there is a temporal sphere of operation to the Hague Rules, usually referred to as the 'period of responsibility', which do not on their own terms apply to activities occurring outside that period of

responsibility" ([26]), and argues that this implies that he took the view that the Hague Rules do not apply post-discharge. Echoing the Tribunal's view expressed in paragraph 122 of the Award, KCH, on the other hand, submits that the obligation of 'custody' arising under Arts. II and III, r.2 is naturally capable in the normal course of persisting after discharge, and is thus an obligation squarely the ambit of the Rules: this, it is submitted, derives support from Mr Foxton Q.C.'s view in *The Alhani* that "[p]umping the Cargo out of the ship into the hands of someone who is not in fact entitled to delivery of it seems the plainest breach of the article III rule 2 obligation 'properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried'" ([62]). I would prefer to treat the issue that arises in the present case as left open (as indeed the parties accept it was), and not seek draw conclusions one way or another as the correct view of the present case.

42. What is however clear is that *The Alhani* rejected a narrow reading of the scope of the Art. III, r.6 time bar by reference to arguments based on the ambit of the Hague/Hague-Visby Rules. The same applies to *The Captain Gregos* where, as has been seen, Bingham LJ pointed to the objective of the time bar as achieving finality and enabling ship owners to clear their books. But in themselves these cases do not answer the question that arises in the present case, because the misdelivery in both cases happened before (or simultaneously with) discharge. In finding in this case that the time bar applies to misdelivery after discharge too, the Arbitral Tribunal can be seen as consciously taking the position in law one stage further on, if its view of the law is upheld.

(5) The authorities from other common law jurisdictions

43. FIMBank's case is that its contention is consistent with the international consensus (although the majority of the cases concern the Hague Rules), and that it is necessary to preserve international uniformity of interpretation, and English law should not go out on a limb. It relies on the following:

i) Australia: In *Teys v ANL* [1990] 2 Qd. R 288 the Supreme Court of Queensland held that Art.III.6 only applies to discharge the carrier from the liability in respect of the risks contained in Art.II, at p.296. Both the Supreme Court of Victoria in *Kamil Export (Aust) Pty Ltd v NPL (ralia) Pty Ltd* [1996] 1 VR 538 at pp.31-35 (of the obtained report), and the Supreme Court of New South Wales Court of Appeal in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 at pp. 3-4, 27 (of the obtained report) reached the same conclusion.

ii) Malaysia: Both the Malaysia Federal Court and the Court of Appeal also support the approach: *Rambler Cycle Company Ltd v Peninsular & Oriental Navigation Company* [1968] 1 LR 42 at p.47 col.1; *Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd* [2018] MYCA 212 at [55] and [60].

iii) Hong Kong: In *Cheong Yuk v China International Freight Forwarders (H.K.) Company Limited* [2005] 4 HKLRD 749 which concerned the Hague-Visby Rules, where delivery took place following carriage by land, after discharge from the relevant vessel. The Court emphasised that to be covered by the Rules the wrong delivery would have to occur during the period governed by the Rules at [36] (which it did not).

Cheong Yuk was followed recently at first instance in *Perfect Best Asset Management Inc v ADL Express Ltd and another* [2021] HKCFI 2310.

44. KCH's case is that:

i) Many of these authorities are based on the unexamined assumption that the temporal operation of Art. III, r 6 necessarily corresponds with the so-called 'period of responsibility' as defined by the other provisions of the Rules. They accordingly contain no adequate discussion as to the significance of the word "delivery" in that provision: see e.g. *Minmetals v Nakhoda* [2018] 6 MLJ 152; *Kamil v NPL* [1996] 1 VR 538.

ii) Further, a number of the decisions relied on were based on the premise that the reference to "loss or damage" in Art. III, r 6 must be loss or damage resulting from failure by a carrier to discharge the responsibilities and liabilities set out in Arts. II or III: see e.g. *Rambler Cycle v P and O Steam Navigation Co* [1968] 1 Lloyd's Rep 42 at 46-47 and *Teys v ANL* [1990] 2 Qd R 288 at 296. KCH submits that FIMBank cites the Australian and Malaysian decisions as apparently supportive of the proposition that Art. III, r 6 "only applies to discharge the carrier from the liability in respect of the risks contained in Art.II". But that forms no part of English law, which accepts that Art. III r 6 does not only apply to breaches of the Rules, as opposed to breaches of the shipowner's obligations which have a sufficient nexus with identifiable goods carried or to be carried: see *The Alhani* at [65].

iii) Contrary to FIMBank's precis, *Cheong Yuk v China International Freight Forwarders (H.K.)* [2005] 4 HKLRD 749 does not focus on whether the wrong delivery occurred during "the period governed by the Rules". The court's holding was that the time bar did not apply to wrong delivery "after inland carriage", because the Rules apply to contracts of carriage "by sea": see [36], [51].

iv) None of the decisions discussed the fact that the delivery obligation falls within the material scope of the Hague-Visby Rules, as recognised by the Tribunal with reference to what (according to KCH) are Mr Foxton Q.C.'s views in *The Alhani*.

v) In any event, the alleged international "consensus" does not exist, given the decisions going the other way, in particular the strong and principled endorsement by Kirby P in the New South Wales Court of Appeal.

45. The present case is concerned with the interpretation of an international convention, and it has been held that uniform interpretation by courts in different jurisdictions is important particularly if there is shown to be a consensus among national courts. Regard should therefore be had as to how it has been interpreted by courts of different countries: see recently *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] UKSC 6 at [42], and *Alize 1954* at [42]). I can express my conclusion as follows.

46. I accept FIMBank's submission that the view of other common law courts applying the same provisions is of considerable persuasive effect in ascertaining

English law on the same subject, all the more so of course if they speak with a single voice.

47. However, I also accept KCH's submission that there is limited examination in these cases of the issue that arises for decision in the present case, namely the assumption that the temporal operation of Art. III, r 6 necessarily corresponds with the 'period of responsibility' as defined by the other provisions of the Rules, and in particular, where reliance is placed on English authority for the conclusions reached, whether that authority does in fact mandate that result.

48. The issue was however raised squarely in the New South Wales Court of Appeal in *China Ocean Shipping Co Ltd v PS Chellaram and Co Ltd (The "Zhi Jiang Kou")* (1990) 28 NSWLR 354; [1991] 1 Lloyd's Rep 493. In his judgment at p. 498, Gleeson CJ (with whom Samuels JA agreed) defines the issue precisely as it arises in the present case, referring to the judgment of Bingham LJ in *The Captain Gregos*, and the article by Malcolm Clarke referred to above. However, he did not find it necessary to resolve "this interesting question" because a time bar operated contractually.

49. However, Kirby P (later a Justice of the High Court of Australia) did consider this question at pp 515 to 517. His judgment travels over much of the ground that the Arbitral Tribunal considered and the judicial and academic authority at that time which is set out elsewhere in this judgment. He considered that the suggestion that the Hague Rules and in particular the time bar have no application to events occurring after the goods go over the ship's rails and are discharged is unlikely given the purpose of the Rules. He considered that it was inherent in the decision of the Court of Appeal in *The Captain Gregos* that the

Hague Rules do not establish a category limited to events arising from loading to discharge, strictly so confined, but include custody and care, loading and handling, as well as the carriage and discharge of the goods. "Custody and care" are apt to cover events after the discharge and until delivery of the goods. He took this approach to be inherent in the decision of the Court of Appeal and accepted by a unanimous decision of the Supreme Court of Canada in *Falconbridge Nickels Mines Ltd v Chimo Shipping Mines Ltd* [1973] 2 Lloyd's Rep 469 at p. 471.

50. Whilst only Kirby P considered the question that arises in the present case, the other two judges clearly identified it, and identified it as a significant question, albeit not deciding it. The case goes a considerable way to show, in my view, that KCH is right to say that an international consensus is not made out. That is the conclusion I have reached. It is however right to add that the balance of the common law authority that FIMBank cites, whilst not determinative for the reasons KCH gives, is supportive of its case.

(6) Textbooks and academic material

51. Understanding the view taken in textbooks and academic material is important in the present case, because if there is a fixed and settled understanding of the applicability of the Rules to misdelivery after discharge, the court should be slow to disturb it, even if on the authorities it is free to do so. Whether a better outcome might have been followed if one was starting from scratch is not necessarily significant in commercial matters, in which the view has long been taken that if a rule is certain, business people can safely work around it (*Vallejo v Wheeler* (1774) 1 Cowp. 143, at 153). There were echoes of this in FIMBank's

case to the effect that the system works smoothly without extending the time bar, on the basis of the practice of releasing cargo against letters of indemnity in circumstances where the original bills of lading are not immediately available. On the other hand, the benefit of the time bar (as stated in the cases) is to enable the shipowner to close its books, which is not a benefit a letter of indemnity can provide.

52. I was only taken to English law commentary, and will consider it broadly as presented to me which as not necessarily chronological.

53. *Carver on Charterparties*, Bennett, Dias QC et al., 2nd ed (2020) at [5-194] states that the time bar will operate provided the loss or damage occurs during the period covered by the rules citing *Cheong Yuk v China International Freight Forwarders (H.K.) Company Limited* [2005] 4 HKLRD 749.

54. The edition of *Voyage Charters*, Cooke, Young QC et al. referred to at the hearing was the 4th edition (2014), but at the end of August the 5th edition was published, and at my request the parties sent me the relevant paragraphs. In submissions on the earlier edition, Mr Berry referred to paragraph 85.169 stating of Art. III r.6: "the rule does not deal with the period of time between discharge from the ship, when, in the absence of contrary agreement, the carrier's obligations as governed by the Hague Rules come to an end, and the time, which may very well be later, when the goods are finally delivered". In the 5th edition, the relevant paragraph is 66.169 and is unchanged. Footnote 416 is new however, stating that whether Art. III, r.6 bears claims for wrong delivery at a time after the completion of discharge was formally left open in *The Alhani*, but

the reasons for a different view are thought to be unpersuasive: *The MSC Amsterdam* is cited.

55. *Bills of Lading*, Aikens et al., 3rd ed, (2020), at [11-98] states that there is little justification for extending the operation of the Rules into a period where the goods have been discharged but not delivered, because the wording of the Rules does not cover these periods. Again, this supports FIMBank's case, but the support is diluted because the book goes on to state that it "… may be seen as anomalous that whether a carrier may rely on provisions such as … the Article III, rule 6 time bar depend on whether an alleged default, such as misdelivery, occurs before or after the cargo passes the ship's rail (or flange). It has been suggested that the Rules might continue to apply until delivery as an implied term of the contract of bailment, and that in any event the provisions of Article III rule 6, at least of the Hague-Visby Rules, do apply to post-discharge events. These suggestions appear to be well founded given the words in Article II "in relation to"".

56. *Carver on Bills of Lading*, Sir Guenter Treitel and Professor Francis Reynolds, 4th ed (2017) at [9-130] discusses the issue at some length. It states that the Rules may appear on their face to cease operation on discharge, but that consignees will normally collect them after some period of storage. It is arguable, they say, that the carriage contract continues, and that under English law the carrier still holds the goods under the contract of carriage and under the Rules, unless again, as is perfectly permissible, he alters his responsibility for this stage by a term in the contract of carriage: "… the main practical

consequence of the continuation of the carriage contract is the application of the package or unit limitation, the fire exception and the time bar".

57. The authors continue, stating that where the Hague-Visby as opposed to the Hague rules apply, the time bar would seem to be operative in any case because of the extreme breadth of its wording. Even under the Hague Rules the time bar provision (alone) makes use of the concept of delivery – no doubt because until the receiver has taken delivery he may not know that he has a cargo claim – which suggests application up to this point. The authors submit therefore that as a matter of the English law of contract it may well be appropriate to state the position as being that the Rules may apply as implied terms after receipt of the goods but before loading, and after discharge but before delivery or up to the time of the operation of any separate warehousing arrangements, except in so far as this result has been excluded or modified. This has been referred to by the parties as the "Carver implied term", and was referred to by Longmore J in the passage from *The MSC Amsterdam* cited above, in which he says that no doubt if no agreement is made for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver. This was relied upon by the Arbitral Tribunal in its Award in favour of the cargo interests in this case based (or alternatively based) on such an implied term.

58. Coincidentally, on the day of the hearing the 5th edition of *Carver on Bills of Lading* was published with Professor Francis Rose taking Professor Treitel's place after his passing. The above passages continue in the new edition with

the exception of the statement that where the Hague-Visby as opposed to the Hague rules apply, the time bar would seem to be operative in any case because of the extreme breadth of its wording. This I think shows that the current authors do not consider that the admittedly different wording of the rule in itself settles the position in favour of the time bar applying post-discharge.

59. Mr Berry referred to paragraph 9-192 as dealing with the "withdrawn position", but it is still in the fifth edition. Whilst stating that it is possible that the correction of the view that misdelivery before discharge was outside the Rules was all that was intended to be changed in the Hague-Visby revision, it also says that the *travaux préparatoires* contain indications that some delegates saw the change of wording as intended to apply even after the goods have been discharged, which would mean that the law applicable to the bailment relationship between discharge and delivery applies uncontrolled by the Rules, but the time bar of the Rules comes in to cover claims relating to delivery. Since delivery is referred to in Art III, r.6, the possibility that under the Hague-Visby Rules the time bar is intended to apply to breach of the duties applicable to delivery in bills of lading contracts after discharge from the vessel and without extension of the Rules cannot be excluded. The authors state, "Such a result may be justified on the basis that it is desirable that after the stipulated year the carrier should be able to close its books rather than keep them open for the possibility of another sort of claim in respect of the voyage".

60. I was told that paragraph 9-192 is the equivalent of paragraph 9-185 of the 4th edition, which refers to there being a "strong argument" to this effect. So Mr Berry is correct that the current edition tones down the view more strongly

expressed in the previous edition, but the point based on the "Carver implied term", and the rationale for it is nevertheless preserved – and indeed has the approval of the Court of Appeal in *The MSC Amsterdam*. The major change seems to be that the *travaux préparatoires* are no longer being given such decisive effect in construing the time bar provision.

61. Some further passages were cited from the 5th edition of *Carver on Bills of Lading*. There is now a paragraph 9-126 dealing with the "period of responsibility" under the Rules. It says that if misdelivery occurs before or simultaneously with discharge it may be regarded as a breach of duty under the Rules. But if it occurs later, the common law duties apply unaffected by the Rules, "except possibly the time bar, the wording of which is linked to the time of or for delivery. An action for breach of this duty may arguably be subject to the time bar where the Hague-Visby rules, which are worded more widely than the Hague Rules, apply; and it has recently been held this is so under the Hague Rules also [citing *The Alhani*]".

62. Finally, I should refer to paragraph 9-191 which Mr Berry relied upon. Here, the authors state that since the rules apply from the beginning of loading to the end of discharge, they do not contain rules applicable to delivery of the goods except in that they provide that the time bar runs from the time of delivery – that of course summarises FIMBank's case. However, it has to be read with what the authors go on to say, namely that the rules do not apply unless their operation is expressly or impliedly extended, and that such extension is certainly possible and is convenient if it can be inferred, but at least where there are separate and inconsistent agreed terms relating to responsibility for the goods during this

period, the Rules will not apply. In other words, the so-called Carver implied term is reiterated.

63. *Scrutton on Charterparties and Bills of Lading*, David Foxton et all, 24th ed (2021) at 14-160 (and I am quoting the skeleton argument of Mr Berry, who is one of the authors) is neutral, referring to *The Captain Gregos*, the purpose of the amendment and the opinion set out in previous editions but not proffering any conclusion.

64. These are the textbooks. There are a number of articles cited by the parties.

65. This is not at issue in this appeal, but Michael Mustill QC (later Lord Mustill) doubted that the additional wording in Art.III, r.6 of the Hague-Visby Rules applied to misdelivery claims at all because the words are not sufficiently clear to limit the cargo-owner's right of action for such a serious tort and breach of contract (The Carriage of Goods by Sea Act 1971 published in Sweden in *Archiv for Sjørrett* 684 at p.706, 1972), a view also expressed in *Scrutton on Charterparties*, 18th ed. at p.460 ft.30. This is the point decided by David Foxton QC to the contrary in *The Alhani*.

66. I have already referenced the view of Judge Diamond QC who writing in [1978] LMCLQ 225 at p.256 submitted the contrary view, albeit with considerable doubt, because he was after all disagreeing with one of the most distinguished figures in the field, and took it a step further, saying that as the first paragraph of Art. III, r.6 is dealing with the effect of delivery of goods, so also the time bar should be construed as applying to events taking place after discharge and the limit should apply.

67. I have also already referred to articles written by Brian Davenport QC (a noted expert in the field and later a Law Commissioner), *Limits of the Hague Rules,* (1989) 105 LQR 521 (referred to with approval by Bingham LJ in *The Captain Gregos* at p. 316 col 2), and Malcolm Clarke (now Emeritus Professor of Commercial Contract Law at St Johns College, Cambridge), *Misdelivery and time bars,* [1989] LMCLQ 394, both criticising the decision in *The Captain Gregos* at first instance. In the latter article, it is stated that, "… it is not obvious why the carrier who loses the goods en route can plead defences in the Rules but the carrier who loses them immediately after discharge cannot".

68. I have restricted this discussion to the material cited by counsel. It shows that Mr Berry is right to say that two of the leading textbooks, *Carver on Charterparties* and *Voyage Charters*, support his contentions on behalf of FIMBank, a point also made by Butcher J in giving permission to appeal. (It perhaps also bears saying that two of the arbitrators, Ms Dias QC and Mr Young QC, are among the authors so do not, or do not any longer, subscribe to the view expressed in those textbooks.) But looked at in the round, the position does not seem to me to be settled – views clearly differ among commentators, and some remain neutral, and there are clear recognitions of the convenience of treating the time bar as applicable after discharge. The commentary does not make good the proposition that there is a clear and settled view.

(7) Discussion

69. In approaching the issue, it is useful to consider what the Arbitral Tribunal identified as problems in FIMBank's contentions. There are a number of these. 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, and as the Tribunal said, it would be odd if the critical distinction for time bar purposes depended on this, and 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 (Award §126).

70. In one sense, the Tribunal pointed out, every discharge involves goods passing over the ship's rail and delivery to a receiver sometime after, unless the receiver takes delivery from the ship's hold. It is unclear on FIMBank's case, the Tribunal said, how long a period after discharge over the ship's rail is needed before the time bar ceases to apply. As the Tribunal put it, "Mr. Berry did not suggest that a short period of time (from ship's rail to dock floor) would take the case outside the embrace of Art. III, r.6. So, if a short period is not enough but, as Mr. Berry must say, a longer period does take the case outside Art. III, r.6, how long is that period?" (Award §127).

71. Mr Berry submitted that the Tribunal misunderstood his point in this respect, because it is not a question of period, it is a question of the end of the discharging operation. The discharging operation does not necessarily end at the ship's rail. It is still part of the discharging operation when the goods are travelling from the ship's rail down to the dock. So the word "discharge", he submitted, includes that bit of it but once the discharge operation is over, that is it, and carriage by sea has ended. The fact that the carrier does not know anything about the goods after discharge, he submitted, is a reason for disapplying Art. III, r. 6, not the reverse.

72. He did however accept that the discharge operation could possibly extend to when the goods are sitting on the dock before going to the warehouse. In any case, his submissions do not seem to answer the Tribunal's view that there is no sound objective reason for applying "fine distinctions to identify when exactly there is the watershed for the application or disapplication of Art. III, r. 6", not least given the object of the time bar of enabling a carrier to "close his books" (Award §127).

73. There are other anomalies identified by the Tribunal. Where (as in the present case) the claimant does not present the bill of lading to the carrier or his agent when the vessel has arrived to give discharge, this means that the carrier either has to refuse to discharge for an undefined (and perhaps un-indemnified period), or discharge into the custody of an agent and – on FIMBank's case – lose all protection of Art. III, r 6. The Tribunal considered that, "This is not commercially sensible or even reasonable" (Award §128).

74. On FIMBank's case, a claim might be held to be time-barred if no positive assertion is made that the carrier has delivered "lost" cargo to someone else, but time-barred if such a positive assertion is made. This would be odd, the Tribunal said, given that Art. III, r. 6 is concerned with whether 'suit' is commenced, not what the allegations are (Award §134).

75. Each of these considerations seemed powerful to me in arguing for a more extensive scope to the time bar than FIMBank's submissions allow. Similar considerations may underlie the views of those commentators who have expressed similar views.

76. A key point made by the Arbitral Tribunal is that Art. I(e) of the Rules defines "carriage of goods by sea" and says nothing of the *contract* of carriage. An issue of controversy at the hearing was the views of the Arbitral Tribunal expressed at §102 of the Award to the effect that: "… we do not see why the order of formulation [of the custody obligation in Arts.II and III, r.2] necessarily imposes a temporal limit on 'custody/keeping'. It seems to us that the contractual 'custody' (under Art.II and Art.III, r.2) is an obligation that is naturally capable in the normal course of persisting after discharge and thus an obligation squarely within the ambit of the Rules".

77. FIMBank submits that this was a fundamental error on the Tribunal's part ("heresy" as it was put) because, as set out in the authorities, the Rules only apply to carriage of goods by sea. KCH disagrees, submitting that §102 is perfectly proper reasoning, given where the Tribunal was starting from, which is that this is a contract of carriage that extends on its terms up to delivery and where the Hague Rules must contemplate delivery, and indeed Art. III, r. 6 does in terms contemplate delivery.

78. As to the latter point, and as already stated, FIMBank's answer is that the reference to delivery in the Art. III, r. 6 time bar is solely there to provide a marker in time for the running of the one year. I do not find that a particularly convincing answer, given that other parts of the rule are concerned with delivery more generally.

79. To recapitulate – as set out above, and citing the then current edition of *Carver on Bills of Lading*, Longmore LJ in *The MSC Amsterdam* at [23] makes clear that it must follow from the fact that the object of the Rules is to define not the

scope of the contract service but the terms on which that service is to be performed, that the parties are free to agree on terms other than the Rules for periods outside the actual period of the carriage. He continues, "No doubt if no agreement is made for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver". Again, as noted above, the court was not considering the time bar in *The MSC Amsterdam*, but it has not been suggested that the passage is not apt in principle to apply. The Arbitral Tribunal adopted this approach in §§117 and 121 of the Award albeit preferring to express it as the "proper construction of the contract in line with the Carver implied term".

80. There are two main objections which FIMBank relies on as showing that this does not apply in the present case.

81. The first is that neither the context nor the wording of the Hague-Visby Rules, nor Carver or Longmore LJ in *The MSC Amsterdam*, suggest this should apply to every contract of carriage under the Hague-Visby Rules – that would be a covert way, using implication, to rewrite the Rules. For an implied extension after discharge there must be particular facts pleaded and proved which satisfy the usual necessity test for implication of terms in fact, and there is none here.

82. I fully accept that the Carver implied term does not apply to every contract of carriage under the Hague-Visby Rules, and that implication cannot be used to rewrite the Rules. The Tribunal did not suggest otherwise. Its reasoning was as follows:

> "We see no obstacle to the Carver implied term (or, as we prefer to analyse it in this case, the true construction of the Bill of Lading), especially since it seems to have been approved at appellate level in *The MSC Amsterdam*. We think therefore that, on the terms of this Bill of Lading, the Hague-Visby Rules were contractually incorporated in such a way (unlike *The MSC Amsterdam*) as not to disapply the Rules to functions performed after discharge. They therefore apply in particular to the obligation of giving right and true delivery and this also engages the prescription period in Art. III, r.6 which is itself expressly set running as at the time of 'delivery' or when 'delivery' should have been given. There is an analytically consistent 'whole' about this view."

83. Though the Tribunal does not deal with this, in oral argument KCH also relied on the implication of the term because it is necessary and obvious in the context of this contract. It submits more generally that implication is the finding of experienced maritime arbitrators on the basis of the evidence before it, and there is no call for the court to disturb it. With considerable hesitation, I have come to the conclusion that this is correct.

84. FIMBank's second objection is based on the outcome of *The MSC Amsterdam*, and is encompassed in the second question upon which Butcher J gave leave to appeal. In that case, the Court of Appeal upheld the finding of Aikens J that the Hague Rules obligations, by agreement, ceased on discharge of the goods. Longmore LJ said that the "elaborateness and illegibility" of the bill of lading terms does not mean that it is appropriate to ignore them if they do indeed provide that the obligations and immunities of the Hague Rules do not apply after discharge of the goods carried ([24]).

85. In the present case, FIMBank relies on clause 2(c) of the bills of lading, which is brief and reads:

> "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 of [*which must mean "or"*] while the cargo is the charge of another Carrier, nor in respect of deck cargo or live animals."

86. In concluding that the Art. III, r. 6 time bar applies in the present case to claims relating to misdelivery after discharge, the Tribunal found that Clause 2(c) did not present a relevant obstacle (Award §114). Its view was based, first, on Art. III, r. 8 of the Rules which provides that if a contract term purports to relieve the carrier from liability in connection with the goods otherwise than in accordance with the Rules, such a term shall be null and void and of no effect (Award §115).

87. Second, it is well established that such words as are in the bills of lading are insufficiently clear to relieve the carrier from liability for misdelivery. As it put it, it would be odd, counterintuitive and wrong if a clause that, ex hypothesi, did not deal with misdelivery, should have the effect of taking misdelivery outside Art. III, r. 6 (Award §116).

88. KCH argues that these points were correctly decided, and further 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:

(1) The clause adds nothing material to the terms of the Rules themselves, which 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. If the Rules do not cease to apply on their own terms upon discharge, it would be strange if they ceased to apply merely because the parties have, in essence, repeated virtually verbatim the same language which the Rules themselves adopt.

(2) Further, 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 Art. III. r.6, which: (i) speaks not of "discharge" but of "delivery", and (ii) pertains to an immunity of the carrier, not a liability.

89. In my view, simply put, 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. Unless *The MSC Amsterdam* requires a different result, I consider that the Tribunal decided this point correctly.

90. FIMBank submits that *The MSC Amsterdam* (considering both the judgments on first instance and on appeal) does require a different result, and that the contractual provisions are in substance indistinguishable in the two cases. It submits that whilst it may be correct that clause 2(c) is not sufficiently clear to relieve the carrier from liability for misdelivery in general, it is sufficiently clear to disapply the Hague-Visby Rules generally (including Art.III, r.6) post-discharge.

91. With some hesitation, I have concluded in agreement with the Tribunal that *The MSC Amsterdam* is distinguishable. The following points as submitted by KCH appear to me to be pertinent:

(1) As noted above, the court in *The MSC Amsterdam* was not considering Art. III, r. 6 but the differently worded Art. IV, r. 5 on package limitation. It was in that context that the issue arose.

(2) The bill of lading in that case was concluded on the MSC standard form, which was materially different to the bills of lading in the present case. The relevant terms are summarised by Longmore LJ at [24]:

> "Clauses 4(ii) and (iii) provide:-
>
> > "(ii) The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and including discharge from the vessel and the Carrier shall not be liable for loss of or damage to the goods during the period before loading onto and the period after discharging from the vessel, howsoever such loss or damage may arise. Loading and discharge take place when the goods pass the vessel's rail or ramp.
> >
> > (iii) When the goods are in the custody of the Carrier and/or his subcontractors before loading and after discharge, whether being forwarded to or from the vessel or whether awaiting shipment landed or stored, or put into hulk or craft belonging to the Carrier, or pending transhipment, they are in such custody for the risk and account of the Merchant without any liability of the Carrier."
>
> Clause 7 provides, inter alia:-
>
> > "The vessel may commence discharging immediately on arrival without notice to the consignee or any other party . . . . on to quay or into shed, warehouse, depot, ... vehicle, vessel or craft as the Carrier or his agents may determine. Such discharge shall constitute due delivery of the goods under this Bill of Lading . . . . Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery onto Quay or otherwise, any loss of, of damage to the goods . . . shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever . . . ."
>
> These clauses make it clear to my mind that the parties did not intend the Hague Rules to apply after discharge from the vessel. The fact that clause 7 refers to loss "after the end of the Hague Rules period" shows that there is to be a period when the Hague Rules do not apply but which will otherwise be a time when the Owners may still have the obligations of a bailee in respect of the goods and can agree that the terms of that bailment are not to be those of the Hague Rules. The Owners' purported disclaimer

> of liability for what happens after discharge does not make any difference to that intention."

(3) Clause 7 of the MSC bill is set out in full in Aikens J's judgment at Appendix 2 ([2007] 1 CLC 594 at 636) and it is lengthy. FIMBank submits that the operative provision in both bills of lading, for present purposes, is the exclusion of all responsibility after discharge, so that this is irrelevant. But as KCH submits, the MSC bill made very specific provision for responsibility for loss of or damage to goods "*after the end of the Hague Rules period*", and expressly provided that "discharge shall constitute due delivery of the goods under this Bill of Lading".

(4) As the Tribunal noted (Award §107), it is not surprising that both Aikens J and the Court of Appeal held that the parties were held to have agreed to a specific period of application of the Hague-Visby Rules ending with discharge. As Longmore LJ held at [24], "The fact that clause 7 refers to loss "after the end of the Hague Rules period" shows that there is to be a period when the Hague Rules do not apply".

(5) This distinguishes the case from clause 2(c) of the bills of lading in the present case, because clause 2(c) contains no reference to any Hague-Visby Rules period. Whatever the parties might have intended in relation to the liability of the carrier after discharge, they have said nothing about the carrier's ability to rely on its immunity under Art. III, r. 6, or about the applicability of the Hague-Visby Rules generally.

(8) Conclusion

92. I now draw the above considerations into my conclusion. Although it is common ground that the point is up to now undecided, I recognise that there is a substantial body of opinion in support of the view that the "period of responsibility" under the Hague-Visby Rules ends at discharge, and that the Art.III, r.6 time bar is limited to the "period of responsibility" under the Rules, and does not apply to misdelivery after discharge. It is however also right to say that this was a particularly well constituted tribunal – consisting of a former commercial court judge and the authors of two of the leading textbooks all specialists in the field – to consider how this undecided point should be resolved, putting it in its commercial as well as its legal context.

93. Be that as it may, in my view, the tribunal was correct to decide that on its true construction 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, and which is consistent with the authoritative statement of the objective of the article by Bingham LJ in *The Captain Gregos* ([1990] 1 Lloyd's Rep. 310 at p.315 (col 2)) that it is, "like any time bar, intended to achieve finality and, in this case, enable the ship owner to clear his books". For reasons given above, there is not shown to be a consensus to the contrary among the courts of other jurisdictions, and there is not a clear and settled view to the contrary in the commentary, where support can be found for both conclusions.

94. In any case, and even if that is wrong, I would further uphold the decision of the tribunal to the effect that the same result can be reached in the present case by

the implication of a term, as was recognised by the Court of Appeal in *The MSC Amsterdam* as a possibility, dependent on the terms of the contract as a whole. I see no reason to differ from the tribunal in this respect. That answers the first question that arises on the appeal.

95. It follows that I would also uphold the tribunal's conclusion on the second question, namely that clause 2(c) of the bills of lading in the present case does not disapply the Hague-Visby Rules to the period after discharge, and that the terms of the bills of lading in *The MSC Amsterdam* which led to a different result in that case were materially different from those in the present case. That answers the second question that arises on the appeal.

96. It follows that the appeal from the Award of the Arbitral Tribunal must be dismissed. I am grateful to the parties and particularly grateful to counsel for their submissions on this appeal, which as one would expect from such advocates, were of the highest value and assistance to the court. I shall now hear them as to matters consequential on this judgment, including the precise form that the order of the court should take.