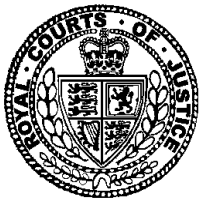

Neutral Citation Number: [2023] EWCA Civ 569

Case No: CA-2022-002168

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Sir William Blair
[2022] EWHC 1765 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between:

FIMBANK PLC	**Appellant/ Claimant**
- and -	
KCH SHIPPING CO LTD	**Respondent/ Defendant**
"GIANT ACE"	

- -
- -

Christopher Smith KC & Helen Morton (instructed by **Campbell Johnston Clark Ltd**) for the **Appellant**
Simon Rainey KC & Matthew Chan (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing dates: 25 & 26 April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 24th May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. The issue arising on this appeal is whether the one year time limit in the Hague Visby Rules applies to claims for misdelivery of cargo after discharge from the vessel. The issue arises on an appeal from arbitrators under section 69 of the Arbitration Act 1996. In an award which decided a number of preliminary issues, the arbitrators (Julia Dias QC, Sir Bernard Eder and Timothy Young QC) held that the time limit did apply. The judge (Sir William Blair) agreed and dismissed the bills of lading holder's appeal, but gave permission for a further appeal to this court.

The facts

2. The claimant (FIM Bank), the appellant in this court, was the holder of 13 bills of lading dated either 4th or 14th March 2018 covering a cargo of approximately 85,510 metric tons of steam (non-coking) coal which was shipped in bulk on board the vessel "GIANT ACE" in Indonesia and discharged in India between 1st and 18th April 2018. The respondent (KCH Shipping Co Ltd) was the demise charterer of the vessel and the contractual carrier under the bills of lading ("the carrier").

3. The bills of lading were on the Congenbill (1994) form and incorporated the terms of a voyage charterparty dated 20th February 2018 between Classic Maritime Inc Ltd as owner and Trafigura Maritime Logistics Pte Ltd as charterer. The charterparty was governed by English law and provided, in clause 13.10, that:

> "This Charterparty shall have effect subject to the Hague-Visby Rules, which shall apply to any bill of lading issued under this Charterparty. …"

4. Although there was an issue in the arbitration whether the Hague or Hague Visby Rules applied (clause 2(a) of the standard Congenbill provides for the Hague Rules to apply in some circumstances), the arbitrators held that the effect of clause 13.10 of the charterparty was to incorporate the Hague Visby Rules into the bills of lading. There is no appeal from that decision.

5. The cargo was discharged from the vessel between 1st and 18th April 2018 at Jaigarh, a port on the west coast of India.

6. The cargo had been sold by Trafigura to Farlin Energy & Commodities FZE, who in turn had on-sold it to various sub-buyers. Farlin's purchase of the cargo was financed by FIMBank ("the bank"), who took security by (among other things) a pledge of the bills of lading and who became the bill of lading holders with rights of suit pursuant to the Carriage of Goods by Sea Act 1992. However, all attempts by the bank to collect payment for the cargo have been unsuccessful and it remains unpaid. It claims damages from the carrier for misdelivery of the cargo to persons who are not entitled to receive it.

7. The award says nothing about how or in what circumstances the cargo came to be delivered without production of the bills of lading but, by agreement, the parties provided us with the bank's claim submissions in the arbitration which set out its case as to what occurred. With the qualification that these are allegations which have yet to be proved, this was helpful to put some flesh on the bare bones of the award.

8. Thus it is the bank's case that the vessel arrived at Jaigarh outer anchorage on 29th March 2018 and commenced discharging operations on 1st April 2018. The cargo was discharged over side onto the jetty, from where it was transferred by conveyor belts into a customs bonded stockpile owned and operated by JSW Jaigarh Port Ltd ("JSW"). This is the only stockpile at the port. There, it was unloaded into an assigned plot space, where it was kept apart from other cargoes, pending customs clearance and the submission of a delivery order to JSW. While it was awaiting customs clearance, it was under the control of JSW, on behalf of the carrier.

9. The bank's case is that in order to take delivery from the JSW stockpile, a receiver would need to obtain two documents, a delivery order issued by the ship's agent on behalf of the carrier which would authorise JSW to deliver the coal to the receiver named in the delivery order, and a bill of entry issued by the customs authorities confirming that all duties and taxes had been paid. On presenting these documents to JSW, the receiver would be permitted to bring its trucks into the stockpile and remove the cargo. It is at this point that delivery of the cargo takes place. Thus we are not concerned in this case with a through bill of lading whereby the cargo was to be delivered inland after further transportation following discharge from the vessel.

10. The bank says that in the present case, there were three delivery orders issued by the ship's agent, dated 3rd and 13th April 2018, and that the customs duties were paid and bills of entry obtained, on various dates between 16th April and 29th May 2018. Accordingly the earliest date for delivery of any of the cargo was 16th April 2018, while some of the cargo must have remained in the stockpile for at least six weeks after completion of discharge. On any view, therefore, whatever elasticity may be inherent in the concept of "discharge", misdelivery in this case occurred after discharge had been completed.

11. The award gives no detail of the letters of indemnity provided to the carrier in order to persuade it to authorise the issue of delivery orders without production of the bills of lading, but the use of such letters of indemnity is common practice.

The issues

12. It is well established that delivery by the carrier without production of a bill of lading is a breach of the contract of carriage: *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576; and, for a recent example, see *Unicredit Bank AG v Euronav NV* [2023] EWCA Civ 471 at [45]. Liability is strict, with no need for the bill of lading holder to prove a failure of due diligence or reasonable care on the part of the carrier: *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [2000] 1 Lloyd's Rep 211. Such liability can only be excluded by clear words: *Motis Exports* at [5] of the judgment of Lord Justice Mance.

13. The carrier contends that its liability, if any, was extinguished pursuant to Article III, rule 6 of the Hague Visby Rules because no suit against it was commenced within one year of the date when the goods should have been delivered. It was determined by the arbitrators as one of the preliminary issues that the bank only gave valid notice of arbitration on 24th April 2020 which was more than "one year after … the date when the goods should have been delivered", and the arbitrators also held that an *in rem* claim

brought by the bank in Singapore did not qualify as the bringing of suit for the purpose of Article III, rule 6. There is no appeal from those rulings.

14. Accordingly it is necessary to determine whether Article III, rule 6 of the Hague Visby Rules applies to the bank's claim. If it does, the claim is extinguished: *The Aries* [1977] 1 WLR 185. If it does not, the ordinary six year period specified by the Limitation Act 1980 applies and the bank's claim is in time. The arbitrators held, and the judge agreed, that Article III, rule 6 applied, either on its own terms or pursuant to an implied term, and that its application was not excluded by clause 2(c) of the Congenbill form which provides as follows:

> "The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel of [sc. or] while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

15. In these circumstances there are three issues for decision:

(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 bills of lading 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 (referred to in argument as "the *Carver* implied term")?

(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?

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?

16. Whether Article III, rule 6 of the Hague Visby Rules applies to a claim for misdelivery occurring after discharge has been much debated, but has not been decided in any English case, although it has been held that the rule applies to misdelivery occurring during the voyage (*The Captain Gregos* [1990] 3 All ER 967).

The parties' submissions in outline

17. For the bank Mr Christopher Smith KC submitted that the Hague Visby Rules apply only to carriage by sea, which ends on discharge of the cargo from the vessel, and that they have no application thereafter. Accordingly the Rules, including Article III, rule 6, do not apply to misdelivery of cargo stored on land after discharge, whether or not such misdelivery is a breach of the contract evidenced by the bill of lading. Mr Smith relied on Articles I and II as making clear that the scope of the Rules is limited to carriage by sea, up to and including discharge; on Article III, rule 2 as governing obligations which may be undertaken by the carrier during carriage by sea (including loading and discharging), but not thereafter; and on Article VII as underlining the limited scope of the Rules. He submitted that, notwithstanding its wide wording, Article III, rule 6 is an internal part of the Rules and its application cannot extend

beyond the scope of the Rules themselves as defined by Articles I and II. Moreover, the carrier's obligation to deliver the cargo against a bill of lading is strict, and thus different in kind from the obligation of due diligence imposed by Article III, rule 1 and the obligation to exercise proper care imposed by Article III, rule 2.

18. Mr Smith submitted that this view of the scope of the Rules is supported by *dicta* in the English cases, and that there is an international consensus to this effect which the English courts ought to respect. He submitted that this was the position under the original Hague Rules and that the Visby amendments take the matter no further: while the amendment to Article III, rule 6 makes clear that the time bar applies to any kind of loss occurring during the period of the carrier's responsibility, it does not extend the period during which the carrier has responsibilities under the Rules. In particular, no conclusions can be drawn from the *travaux préparatoires* which led to the Visby amendment to Article III, rule 6.

19. For the carrier Mr Simon Rainey KC submitted that, as an international convention, the Rules should be interpreted in accordance with the principles set out in the Vienna Convention on the Law of Treaties 1969, which reflected pre-existing international law. It was therefore necessary to give effect to the object and purpose of the time bar in Article III, rule 6, which was to enable the carrier to close its books in the knowledge that, if suit has not been commenced, all claims are extinguished after one year from when the goods should have been delivered. Mr Rainey advanced two alternative cases. His primary case was that the Rules as a whole apply to all obligations undertaken by the carrier under the bill of lading contract up to and including delivery, although the parties are permitted by Article VII to exclude liability in respect of the period before loading and after discharge. Alternatively, he submitted that even if the Rules as a whole do not apply, the time bar in Article III, rule 6 does apply up to and including delivery and therefore applies to a claim for misdelivery of the cargo after discharge. As to this alternative case, Mr Rainey submitted that this was already the position under the Hague Rules, but that the Visby amendment to Article III, Rule 6 puts the point beyond doubt, and that this is further confirmed by the *travaux préparatoires*.

The Hague Rules

20. In order to put Article III, rule 6 of the Hague Visby Rules in context, it is necessary to go back to the original Hague Rules. These were initially the product of negotiations between representatives of different commercial interests. They were intended to be adopted voluntarily by commercial parties, but in the event this did not happen to a sufficient degree and there was pressure for their compulsory application by legislation. The result was an international convention adopted at the Brussels Conference on 25th August 1924 as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, which then formed the basis for domestic legislation (in the United Kingdom, the Carriage of Goods by Sea Act 1924), although it remained possible for parties to agree their application as a matter of contract. The history is summarised in *The Lady M* [2019] EWCA Civ 388, [2019] Bus LR 2809 at [22] and [23].

21. The broad objective of the Rules was described by Lord Steyn in *The Giannis K* [1998] AC 605, 621:

> "This much we know about the broad objective of the Hague Rules: it was intended to rein in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility' (1992) LQR 501, 502; it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations at least in the areas which the convention covered. …"

22. Thus the Rules represent a negotiated compromise between the interests of ship and cargo interests. Within the sphere of their application, they provide an internationally accepted regime for the carriage of goods by sea which expressly limits the parties' freedom of contract, in particular by preventing shipowners from imposing unreasonable and unjust exemptions from liability. The Rules represent what has been described as "an irreducible minimum for the responsibilities and liabilities to be undertaken by" the carrier (*The Muncaster Castle* [1961] AC 807, 836, *Alize 1954 v Allianz Elementar Versicherungs AG* [2021] UKSC 51; [2021] Bus LR 1678 at [39]).

23. The Rules begin, in Article I, with some definitions. These include:

> "(b) '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.
>
> …
>
> (e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

24. Article II provides that:

> "Subject to the provisions of Article VI, 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."

25. Thus it is Article II which provides for the carrier to be subject to the responsibilities and liabilities set out in the Rules which follow, and which entitles the carrier to avail itself of the rights and immunities set out.

26. Article III, rule 1 sets out the carrier's obligation as to the seaworthiness of the carrying vessel:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—
>
> (a) Make the ship seaworthy:
>
> (b) Properly man, equip and supply the ship:
>
> (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

27. Article III, rule 2 provides 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."

28. These operations track those specified in Article II. However, it is well established that Article III, rule 2 does not impose an obligation on the carrier to carry out the specified obligations, but rather defines the manner in which (i.e. properly and carefully) those operations which the carrier does agree to carry out must be performed: *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] QB 402, 418. Thus it is open to parties to agree, for example, that the carrier will not be responsible for loading or discharging, and that these operations will be carried out by the shipper or receiver.

29. Article III, rule 6 contains the time bar:

> "Unless notice of loss or damage and the general nature of such loss or damage be given in writing, to the carrier or 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 the 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.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
>
> 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.
>
> In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

30. Article III, rule 6 is the only provision in the Rules which refers to "delivery" as distinct from discharge. It was common ground between the parties that, as explained by Lord Hobhouse in *The Berge Sisar* [2001] UKHL 17, [2002] 2 AC 205 at [36], discharge and

delivery are distinct aspects of the international carriage of goods. While discharge is a physical operation to remove the cargo from the ship, delivery is a legal concept involving a full transfer of possession of the goods by the carrier to the receiver. Discharge and delivery may therefore occur at different times.

31. Article III, rule 8 renders null and void any attempt by the carrier to avoid the liability for which the Rules provide:

> "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 this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

32. It is this provision which ensures that the Rules comprise "an irreducible minimum" set of responsibilities and liabilities with which the carrier must comply.

33. Article IV provides exceptions to the carrier's liability and provides also, in Article IV, rule 5, for a scheme of package limitation which places a financial limit on the carrier's liability.

34. Finally, so far as relevant for present purposes, Article VII contains further clarification of the scope of the limitations on freedom of contract imposed by the Rules:

> "Nothing herein contained shall prevent a carrier or a 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 Visby Protocol

35. By the mid-1950s the Hague Rules had been widely adopted and considerable experience of their application in practice had been accumulated. In 1959 a sub-committee of the Comité Maritime International ("CMI") was formed to study possible amendments to the 1924 Convention. The sub-committee produced recommendations and suggested that these be embodied in a Protocol to the 1924 Convention. In 1963 the CMI adopted the text of a draft Protocol at its Stockholm Conference and in February 1968 the Brussels Diplomatic Conference on maritime law agreed the final text of this Protocol. The Rules thus amended are known as the Hague Visby Rules.

36. A number of changes to the Hague Rules were agreed, of which the most important for present purposes was an amendment to Article III, rule 6. None of the other provisions which I have set out above were affected by the amendments, although the package limitation regime in particular was extensively revised. The revised Hague Visby version of Article III, rule 6 provides as follows:

> "Unless notice of loss or damage and the general nature of such loss or damage be given in writing, to the carrier or 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 the 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.
>
> The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.
>
> Subject to paragraph 6*bis* 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. This period may, however, be extended if the parties so agree after the cause of action has arisen.
>
> In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

37. It can be seen that the only amendment was to the third paragraph of the rule. Instead of providing for discharge from "all liability in respect of loss or damage", the new rule provided for discharge "from all liability whatsoever in respect of the goods". In both versions of the rule the words "in any event" appeared, and in both versions the time was to run from the date of delivery or the date when the goods should have been delivered.

The approach to interpretation of the Hague Visby Rules

38. The correct approach to interpretation of the Hague Visby Rules was explained by Lord Hamblen in *Alize 1954* at [34] to [42] in a judgment with which the other members of the Supreme Court agreed. In summary, the Rules should be interpreted by reference to broad and general principles of construction, generally accepted internationally, including the principle laid down in Article 31.1 of the Vienna Convention:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

39. Further, in accordance with Article 32 of the Convention, recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" in order "to confirm the meaning" or "to determine the meaning" when it is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". However, the *travaux préparatoires* can only be determinative in limited circumstances. In this regard Lord Hamblen confirmed the approach described by Lord Steyn in *The Giannis K*, including the well-known statement that nothing less than a "bull's-eye" will do:

> "Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the *travaux préparatoires* of an international convention may be used as 'supplementary means of interpretation': compare article 31 of the Vienna Convention on the Law of treaties, Vienna 23 May 1969. Following *Fothergill v Monarch Airlines Ltd* [1981] AC 251, I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the *travaux préparatoires* to be determinative of the question of construction. But that is only possible where the court is satisfied that the *travaux préparatoires* clearly and indisputably point to a definite legal intention: see *Fothergill v Monarch Airlines Ltd*, per Lord Wilberforce, at p 278C. Only a bull's-eye counts. Nothing less will do."

40. Lord Hamblen referred also to the note of caution expressed by Lord Bingham in *The Rafaela S* [2005] UKHL 11, [2005] 2 AC 423 at [19]:

> "It must be remembered that in a protracted negotiation such as culminated in the adoption of the Hague Rules there are many participants, with different and competing objects, interests and concerns. It is potentially misleading to attach weight to points made in the course of discussion, even if they appear at the time to be accepted. In the present case, I do not think that either party can point to such a clear, pertinent and consensual resolution of the issue before the House as would provide a sure ground of decision."

41. Finally, an international convention should "be interpreted in a uniform manner and regard should therefore be had to how [the Rules] have been interpreted by the courts of different countries" (*Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] UKSC 6, [2021] 1 WLR 1436 at [42]). Lord Hamblen added that this will be particularly important if there is shown to be a consensus among national courts in relation to the issue of interpretation in question.

The language of the Hague Rules

42. As a necessary starting point, I consider first the terms of the original Hague Rules, as a matter of language and without reference to authority. In my judgment it is clear that the Rules apply only to carriage by sea, which begins on loading and ends on discharge of the cargo from the vessel, and that they have no application outside that period. Precisely when loading begins or discharge ends may be open to debate on the facts of any given case, and there may be room for the view that events which are sufficiently "related to" loading or discharging fall within these operations for the purpose of the Rules, even in a case where in the event the goods are never loaded at all (cf. *The Ot Sonja* [1993] 2 Lloyd's Rep 435 and *The Sophie J* [2001] 1 All ER (Comm) 946). However, we are not concerned with that question in the present case, which must be determined on the basis that the misdelivery occurred after discharge had been completed.

43. In my view the definitions in Article I play an important role in defining the scope of application of the Rules. The definition of "contract of carriage" makes clear that even if a contract covered by a bill of lading or similar document of title extends beyond carriage by sea, the provisions of the Rules concerning contracts of carriage apply only insofar as the contract relates to the carriage by sea, while the definition of "carriage of goods" spells out that this is limited to the period from loading until discharge.

44. As the drafters have taken the trouble to define these terms, it is then necessary to see what use of them has been made in the substantive provisions of the Rules. In fact there are only two places where the defined terms are used. The first is Article II, which refers to "every contract of carriage of goods by sea". Thus one important function of these definitions is to define the scope of the carrier's responsibilities and liabilities for which Article II provides. Its purpose is to make clear that the Rules apply, and only apply "from the time when the goods are loaded on to the time they are discharged from the ship". Thus Article II provides for responsibilities during that period which arise "in relation to" the specified operations, that is to say the loading, handling, stowage, carriage, custody, care and discharge of the goods, but do not apply to other matters occurring outside that period, which has been called the Hague Rules "period of responsibility".

45. Mr Rainey submitted that although the carrier would have an obligation in relation to the "custody" and "care" of the goods during the period between loading and discharge, that obligation was capable of beginning before loading and continuing after discharge, so that the responsibilities and liabilities in Article III and the rights and immunities in Article IV would extend before loading and after discharge. However, when Article II is read in the light of the definitions in Article I, it is apparent that this is not so. The obligations to which the carrier may be subject prior to loading or after discharge, at least if not related thereto, will be a matter for the parties' contract or the law of bailment, but the Hague Rules themselves will not apply: "custody" and "care" in Article II refer to the custody and care of the goods between (and including) loading and discharge.

46. The second place in which the definitions are used is Article III, rule 8, which refers to clauses in a "contract of carriage" purporting to relieve the carrier from liability. The effect of the rule is that the carrier is not permitted to contract out of the responsibilities imposed by the Rules, that is to say those relating to the carriage of goods by sea which cover the period from loading until discharge, but is permitted freedom of contract in relation to matters outside the scope of the definition of "carriage of goods". Thus Article III, rule 8 defines the period during which the "irreducible minimum for the responsibilities and liabilities to be undertaken by" the carrier applies.

47. This is confirmed by Article VII, which states that nothing in the Rules prevents the parties from entering into any agreement as to the carrier's responsibility before loading or after discharge. I would not read this Article as providing (as Mr Rainey submitted) that the Rules apply in the period between discharge and delivery unless the parties contract otherwise, but rather as confirming what is already apparent from the definitions in Article I and from Article II, that the application of the Rules is limited to the period from loading until discharge.

48. Accordingly the Rules do not apply to misdelivery of cargo stored on land after discharge, whether or not such misdelivery is a breach of the contract evidenced by the bill of lading, at least where the misdelivery is not related to the discharge operation.

49. If, as I would hold, this is the effect of the Rules in general, the question then arises whether there is anything in Article III, rule 6 itself to demonstrate that the time bar was intended to apply to claims for breaches of duty outside the scope of the Rules. While it can be said that misdelivery after discharge gives rise to a "liability in respect of loss or damage" and that the opening words "In any event" are wide in their scope, in my judgment the better view on balance is that there is not. Article III, rule 6 is a part of the Rules to which the contract is made subject by Article II. Logically, its application cannot extend beyond the scope of the Rules themselves as defined by Articles I and II. In the original Rules, at any rate, Article III, rule 6 is not a cuckoo in the Hague Rules nest.

50. Nevertheless, the terms of Article III, rule 6 are undoubtedly wide, and this is emphasised by the words "in any event" and "all liability". In *The New York Star* [1981] 1 WLR 138, 145A Lord Wilberforce described a clause equivalent to Article III, rule 6 as "general and all-embracing". It has been said that the words "in any event" in Article IV, rule 5 are equivalent to "in every case" (*The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801 per Lord Justice Longmore at [16]; see also per Lord Justice Judge at [43]) and that is true also of the same words in Article III, rule 6. Effect must be given to these words. I would hold that the natural meaning of Article III, rule 6 of the Hague Rules is that if suit is not brought in time, the carrier will be discharged from all liability of any kind arising during the Hague Rules period of responsibility.

51. I do not think that there is anything in the object and purpose of the Rules, or of Article III, rule 6 itself, which suggests a different conclusion. While the time limit "meets an obvious commercial need, namely, to allow shipowners, after that period, to clear their books" (*The Aries* [1977] 1 WLR 185, 188G), there is a difference between a typical cargo claim and a claim for misdelivery. In the case of a typical cargo claim, the carrier will need to investigate the cause and extent of any damage and, to do so effectively, will need relatively early notice of the claim. In the case of misdelivery, however, this will not necessarily be so, at any rate to the same extent. The carrier will generally know that it has delivered the cargo without production of the bill of lading and is therefore vulnerable to a claim by the bill of lading holder if it turns out that the receiver was not entitled to delivery. It will know also, because liability is strict, that it will generally have no defence to the claim, and will need to rely on the letter of indemnity which it will usually have obtained. There will, therefore, be no need in the typical case to investigate the reason why delivery was effected without production of the bill of lading, although it may be necessary to ascertain the value of the goods thus delivered.

The cases on the Hague Rules

52. The cases on the Hague Rules broadly support the view which I have expressed based on the language of the Rules, although they are not unanimous. I shall take them in chronological order.

53. In *Gosse Millard v Canadian Government Merchant Marine Ltd*, a case concerned with the burden of proof under Article III, rule 2, Mr Justice Wright referred to the Hague Rules "period of responsibility":

> "The word 'discharge' is used, I think, in place of the word 'deliver', because the period of responsibility to which the Act and Rules apply (Art I (e)) ends when they are discharged from the ship."

54. Although the case went to the House of Lords, this *dictum* at first instance has been frequently cited.

55. In *Pyrene v Scindia* the goods were never loaded on to the ship as they were damaged during loading. The shipper argued, therefore, that the Hague Rules (and in particular the package limitation in Article IV, rule 5) did not apply, as the damage occurred outside the period covered by Article I (e). Mr Justice Devlin rejected this argument, as the loading operation as a whole (and not merely that part of the operation after the goods had crossed the ship's rail) was governed by the Rules. He observed that loading is "the first operation in the series which constitutes a carriage of goods by sea; as 'when they are discharged' connotes the last" and that "article 1(e) is naming the first and last of a series of operations which include in between loading and discharging, 'handling, stowage, carriage, custody and care'."

56. *Rambler Cycle Co Ltd v Peninsular & Oriental Steam Navigation Co* [1968] 1 Lloyd's Rep 42 was decided by the Malaysian Federal Court (Appellate Jurisdiction). It was a case of misdelivery after discharge on facts materially the same as the assumed facts in the present case. The Hague Rules applied. Sir James Thomson LP decided that the Article III, rule 6 time limit did not apply for two reasons. The first (which has since been held not to represent English law) was that the time limit can only apply to claims for breach of the obligations imposed by Article III, rule 2. The second, arrived at after citing *Gosse Millard* and *Pyrene v Scindia*, was that the Rules only apply between loading and discharging, but the liability of the carrier only arose after discharge, "that is to say after the expiration of the period during which the Hague Rules applied, and in the circumstances the period of limitation applicable is the ordinary period of limitation of six years". Chief Justice Wee and Chief Justice Wylie agreed with Sir James Thomson's second reason. This case is, therefore, directly in point so far as the Hague Rules are concerned. It has been followed in Malaysia (*Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd* [2018] 6 MLJ 152).

57. One of the issues in *The Arawa* [1977] 2 Lloyd's Rep 416 concerned bills of lading which incorporated the Hague Rules as enacted in New Zealand, but also contained an exclusion of liability for damage occurring prior to loading or after discharge. Mr Justice Brandon found that the goods were damaged as a result of delay in discharging from lighters into which the cargo had been discharged. He held that, if the carrier's liability had been governed by the bills of lading, the Hague Rules would not have applied as the carriage by sea had ended when the cargo was discharged into lighters. In the course of his judgment, he described the scheme of the Hague Rules in the following way:

> "The scheme of the Hague Rules can, I think, be summarised as follows:-

> (i) The rules apply only to contracts for the carriage of goods contained in or evidenced by bills of lading, and only to so much of such contracts as relate to the carriage of the goods by sea ('the sea carriage') (art I, definition (b)).
>
> (ii) The sea carriage is defined as beginning with the loading of the goods on, and ending with their discharge from, the ship used for such carriage ('the carrying ship') (art I, definitions (d) and (e)).
>
> (iii) The parties are free to decide by their contract what parts of the operations of loading the goods on, and discharging them from, the carrying ship are to be performed by the carrier, and what parts by the shipper or receiver, and the rules will then apply only to such parts of those two operations as it has been agreed that the carrier shall perform and he does perform. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402; *G. H. Renton v Palmyra Trading Corporation of Panama* [1957] AC 149.
>
> (iv) The liability of the carrier for loss of or damage to the goods during the sea carriage, as defined in (ii) and (iii) above, is governed by arts III and IV of the rules. Further, while the parties may agree terms with regard to such liability less favourable to the carrier than those contained in those articles, any purported agreement providing for terms more favourable to the carrier is null and void (arts II, V and III (8)).
>
> (v) The liability of the carrier for loss of or damage to the goods before the beginning, or after the end, of the sea carriage, as defined in (ii) and (iii) above, is not governed by the rules at all, the parties being free to agree whatever terms with regard to such liability they may choose (art VII)."

58. It is convenient at this point to refer to *The Captain Gregos*, although that was a case concerned with the Hague Visby and not the Hague Rules. The assumed facts were that the carrier had misappropriated part of an oil cargo during the course of the voyage in one or more of three ways: by using it to bunker the vessel, by transhipping cargo during the voyage, and by failing to discharge cargo at the discharge port, concealing it in hidden recesses aboard the vessel and sailing away with it still on board for its own use. This was characterised as a claim for misdelivery. Giving the leading judgment, Lord Justice Bingham held that the acts of which the cargo owner complained were "the most obvious imaginable breaches of art III, para 2". That being so, the question whether the time limit applied to claims for breach of duties not imposed by the Hague Visby Rules themselves did not strictly arise. Nor did the question whether it applied to claims arising out of events occurring before loading or after discharge. However, Lord Justice Bingham's observations at p.973 about the width of Article III, rule 6 of the Hague Visby Rules are important:

> "Article III, para 6 provides 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 the year. I do not see how any draftsman could use more emphatic language. It is even more emphatic than the language Lord Wilberforce considered 'all-embracing' in *The New York Star*. Like him, I would hold that 'all liability whatsoever in respect of the goods' means exactly what it says. 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, para 6 is, like any time bar, intended to achieve finality and, in this case, enable the shipowner to clear his books (see *Aries Tanker Corp v Total Transport Ltd, The Aries* [1977] 1 All ER 398 at 402. [1977] 1 WLR 185 at 188."

59. *Teys Bros (Beenleigh) Pty Ltd v A.N.L. Cargo Operations Pty Ltd* (1989) 2 Qd.R 288 was an Australian case, decided in the Supreme Court at Brisbane. The intended cargo was damaged before loading had begun, while in the carrier's custody. Although no bill of lading was issued, it had been intended that a bill would be issued incorporating the Hague Rules. The court held, however, that the Article III, rule 6 time bar did not apply to any liability arising outside the period covered by the operation of the Rules.

60. *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 was another Australian case, decided in the Supreme Court of New South Wales Court of Appeal. The bill of lading was issued, subject to the Hague Rules, but the cargo was delivered after discharge without production of the bill. The claim was not brought within one year after the date when the cargo should have been delivered. The majority (Chief Justice Gleeson and Justice of Appeal Samuels) found it unnecessary to decide whether the Article III, rule 6 time limit applied, on the basis that the bill of lading contained a clause expressly providing for a time limit to apply after discharge and up to delivery, which should be given effect. However, Justice Michael Kirby, the President of the Court, rejected the submission that Article III, rule 6 has no application to events occurring after discharge, referring to "the very wide language" of the Rule and the practical implications of so holding. It should be noted that to some extent his reasoning was based on the decision of the English Court of Appeal in *The Captain Gregos*, although that was a decision on the Hague Visby Rules and not the original Hague Rules, and that he acknowledged that there was some authority to the contrary.

61. This reasoning was not followed by the Supreme Court of Victoria Appeal Division in *Kamil Export (Aust) Pty Ltd v NPL (Australia) Pty Ltd* [1996] 1 VR 538. In that case the bill of lading incorporated the Hague Rules, but also provided expressly that the carrier's obligations were limited to the period between loading and discharge and excluded liability for loss and damage occurring outside that period. Giving the only reasoned judgment on this issue, Justice Marks held that the weight of authority favoured the Hague Rules being confined in their application to the period between loading and discharge. Accordingly the case provides some support for the view which I have expressed, although it could equally have been decided on the basis that the parties were permitted to exclude, and had excluded, liability arising after discharge pursuant to Article VII.

62. *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* [1998] NSWLR 371, a decision of the Supreme Court of New South Wales Court of Appeal, is to the same effect.

63. *The MSC Amsterdam* [2007] EWCA Civ 794, [2008] 1 All ER (Comm) 385 was a claim by the bill of lading holders against the carrier which resulted from the customs authorities' refusal to release the cargo. Strictly speaking, therefore, it was not a case of misdelivery, although the complaint was that the carrier was in breach of contract for failing to deliver the cargo. The case was not concerned with time bar, but with package limitation. There was an initial issue whether the bill of lading was subject to the Hague or the Hague Visby Rules. Disagreeing with Mr Justice Aikens, this court held that it was the Hague Rules which applied. However, the bill of lading contained detailed clauses making clear that the parties did not intend the Rules to apply after discharge from the vessel. Lord Justice Longmore (with whom Lord Justices Tuckey and Lloyd agreed) held that the effect must be given to this clause and that the words "in any event" in Article IV, rule 5 dealing with package limitation did not show any intention that the Hague Rules should continue to apply after discharge:

> "25. Mr Parsons emphasised the words 'in any event' in art IV, r 5 as being apt to extend the Hague Rules period in respect of the package limitation. Article IV, r 5 begins with the words: 'Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding £100 per package or unit …' But that is to put too much emphasis on the words 'in any event': they are part of the Hague Rules obligations, but if those obligations, by agreement, cease on discharge of the goods, the concept of 'in any event' must also cease."

64. This is the same logic as I described at [49] above. For the same reason, the words "in any event" in Article III, rule 6 cannot support an argument that the time bar applies even when the Rules do not.

65. I shall have to return to *The MSC Amsterdam* when I deal with the issue whether there is an implied term that the Rules should apply after discharge.

66. Finally, in *The Alhani* [2018] EWHC 1495 (Comm), [2018] Bus LR 1552, discharge and delivery without production of the bill of lading occurred simultaneously, when the cargo was discharged onto another vessel by ship-to-ship transfer. Mr David Foxton QC held that the words "in any event" and "all liability" in Article III, rule 6 of the Hague Rules were wide enough to encompass liability for misdelivery and that the object of finality which the rule was intended to achieve would be seriously undermined if it did not apply to misdelivery claims. He rejected the argument (which had been accepted by Sir John Thomson LP in *Rambler Cycle Co Ltd v Peninsular & Oriental Steam Navigation Co*) that the rule was limited to claims for breach of the Hague Rules obligations themselves. Rather, "article III, rule 6 of the Hague Rules does apply to misdelivery claims, at least where the misdelivery occurs during the period of the Hague Rules period of responsibility …" (see at [86]). I respectfully agree.

67. As discharge and delivery occurred simultaneously, it was not necessary in *The Alhani* to consider whether the Hague Rules time bar applied to misdelivery occurring after discharge had been completed and Mr Foxton was careful to leave that question open.

The language of the Hague Visby Rules

68. I come now to the language of Article III, rule 6 of the Hague Visby Rules. As I have explained, instead of providing for discharge from "all liability in respect of loss or damage", the new rule provides for discharge "from all liability whatsoever in respect of the goods". The words "in any event" are retained.

69. It is immediately apparent that the new rule was intended to be of wider scope than the original rule. To repeat what Lord Justice Bingham said in *The Captain Gregos*:

> "I do not see how any draftsman could use more emphatic language. It is even more emphatic than the language Lord Wilberforce considered 'all-embracing' in *The New York Star*."

70. The change from "all liability in respect of loss or damage" to "all liability whatsoever in respect of the goods" weakens or even removes the nexus with loss or damage to the cargo which was previously required. The word "whatsoever" is not merely emphasis, although it is that, but indicates the absence of any limit on the term which it qualifies, here "all liability". Unless the new rule applies in cases where the original rule did not, therefore, the amendment achieves nothing. That is not a conclusion which should be reached lightly.

71. The question then arises, given the width of the original rule ("all-embracing", as Lord Wilberforce described it in *The New York Star*), in what cases where the original rule did not apply is the new rule intended to do so? If, as I have held, the natural meaning of Article III, rule 6 of the Hague Rules is that the carrier will be discharged from all liability of any kind arising during the Hague Rules period of responsibility, it is a reasonable inference that the new rule is intended to apply even in cases outside the sphere of application of the Rules – in effect, to jettison in the specific case of the time limit the logic to which I referred at [49] above. From a comparison of the original and amended versions of Article III, rule 6 , I would be inclined to accept that this is the meaning which the drafters of the new rule intended, but at the very least, some ambiguity can be said to exist.

The travaux préparatoires

72. Reference to the *travaux préparatoires* in accordance with Article 32 of the Vienna Convention confirms that Article III, rule 6 of the Hague Visby Rules is intended to apply to misdelivery claims (or, if necessary, resolves the ambiguity whether it is intended to do so). Two points appear, and leave no room for doubt. The first is that there was no settled understanding among the members of the CMI who proposed the Visby amendments whether the time limit in the original Hague Rules applied to misdelivery claims at all. The second is that the new rule was intended to apply to such claims.

73. Although we were rightly taken to the *travaux* themselves, the position is accurately summarised by Mr Anthony Diamond QC in his paper, *The Hague-Visby Rules* [1978] LMCLQ 225, 256, fn 88, quoted in *The Alhani* at [69]:

> "The recommendation of the bill of lading sub-committee was that art. III, r. 6 should be altered for this purpose and no other. (There is no evidence that they had in mind the position relating to deviations). They recommended a special two-year limit in the

> form of a proviso to art. III, r. 6 to read 'provided that in the event of delivery of the goods to a person not entitled to them the above period of one year shall be extended to two years from the date of the Bill of Lading.' However, the sub-committee were troubled as to 'whether and to what extent wrong delivery may be covered by the Convention' and they made a resolution to the effect that they expressed no view on whether delivery to the wrong person was 'covered by the expression "loss or damage" in the Convention,' (p. 78 of Report of 1963 Conference). The draft was altered partly because of objections to a separate two-year time limit and partly to meet the point that 'loss or damage' might not cover the wrong delivery of the goods. After being redrafted (the recommendation then read, as in the Protocol, 'shall be discharged from all liability whatsoever in respect of the goods'), it was put before a plenary session of the CMI on June 14, 1963, with the explanation (p. 500) that: 'The object of the aforesaid amendment is to give the text a bearing as wide as possible, so as to embody within the scope of application of the one year period, even the claims grounded on the delivery of the goods to a person not entitled to them, i.e. even in the case of what we call a wrong delivery.' So, also, when the formal approval of the session was sought. The amendment was said (p. 508) to concern 'the time limit in respect of claims for wrong delivery' or '*prescription en matierè de reclamations relatives a des délivrances à personnes erronées*.' There is no discussion of the matter in the Reports of the 1967 and 1968 Conferences."

74. The same statement, that the object of the amendment was "to give the text a bearing as wide as possible, so as to embody within the scope of application of the one year period, even the claims grounded on the delivery of the goods to a person not entitled to them, i.e. even in the case of what we call a wrong delivery", was cited by Lord Justice Bingham in *The Captain Gregos*.

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

76. Mr Smith accepted that the object of the amendment was to ensure that the time limit applied to misdelivery claims, but submitted that the new rule applies only to claims for misdelivery occurring during the voyage or simultaneously with discharge, and not where the misdelivery occurs after discharge. In order to evaluate this submission, it is right to bear in mind that it has for many years been common for delivery to take place some time after discharge has been completed. Although misdelivery can occur during the voyage or simultaneously with discharge, as illustrated by *The Captain Gregos* and *The Alhani*, misdelivery after discharge is the paradigm case. As Lord Wilberforce explained in *The New York Star* [1981] AC 138, 147E, it was even then "the practice that consignees rarely take delivery of goods at the ship's rail but will normally collect them after some period of storage on or near the wharf". As a practical matter, that storage has to be arranged by the carrier or its agents in order to avoid the ship being delayed at the discharge port. The typical case of misdelivery is where cargo is then released from the place of storage without production of a bill of lading, usually against a letter of indemnity.

77. All this would have been understood by the drafters of the Visby amendments to the Hague Rules. If they had intended to limit the new Article III, rule 6 to cases of misdelivery occurring during the carriage by sea (including the discharge operation itself), they could have been expected to say so. There is, however, no indication in the *travaux* that they intended to limit the new rule in this way. On the contrary, the instruction given to the Drafting Committee was "to prepare and submit a draft amendment to the third paragraph of Article III (6) of the Hague Rules, such amendment to provide for a one-year limitation of time to sue in the broadest possible terms", which (it was noted) would "include the case of wrong delivery". Indeed, as Mr Foxton noted in *The Alhani* at [70], "the debate reflected in the *travaux préparatoires* appears to have been as much about whether article III, rule 6 should apply to misdelivery occurring *after* the period of Hague Rules responsibility than [*sic*.] whether it should (or did) apply to misdelivery at all". 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.

International consensus

78. Mr Smith submitted that the bank's position, i.e. that the Hague Visby time limit does not apply to claims for misdelivery occurring after discharge, is consistent with an international consensus among courts which have considered this issue. However, as Mr Smith recognised, most of the international cases on which he relied, which I have considered above, concerned the Hague and not the Hague Visby Rules. Mr Smith submitted that the reasoning in those cases applies equally to the Hague Visby time limit, but for the reasons already explained that is not so. The wording of the two provisions is critically different and, as I have shown, the reason for the change was expressly to ensure that the time limit did apply to misdelivery claims. Accordingly, while those cases provide some support for the view which I have formed as to the meaning of the original Hague Rules time limit, they cannot contribute to any international consensus as to the meaning and effect of the differently expressed Hague Visby time limit.

79. It is true that there is Hong Kong authority (*Cheong Yuk Fai v China International Freight Forwarders (H.K.) Co Ltd* [2005] 4 HKLRD 749 and *Perfect Best Asset Management Inc v ASL Express Ltd* [2021] HKCFI 2310) that Article III, rule 6 of the Hague Visby Rules does not apply to a claim for misdelivery occurring after discharge. However, two cases from one jurisdiction are not capable of amounting to an international consensus. In any event, the judgments in those cases did not consider either the significance of the language used in the Visby amendment to Article III, rule 6 or the impact of the Visby *travaux préparatoires*. There is, therefore, nothing in those cases to call into question the view which I have formed as a result of those matters.

The textbooks and the commentaries

80. The textbooks note the issue and, on balance, suggest that the Hague Visby time limit does apply to misdelivery occurring after discharge, although this is not unanimous:

(1) Previous editions of *Scrutton on Charterparties* (including those edited by Sir Bernard Eder, one of the arbitrators in the present case) acknowledged that "one purpose of the amendment was to apply the time limit to cases of delivery without production of bills of lading, and hence to enable banks and other parties issuing letters of indemnity to regard themselves as discharged after the expiry of one year", but doubted whether the Hague Visby Rules apply to misdelivery cases and suggested that, even if they do, "the words of the new Rule scarcely seem strong enough to cover such a claim". That reflected the view of Mr Michael Mustill QC, expressed in an article in "*The Carriage of Goods by Sea Act 1971*" (1972) Arkiv for Sjorrett 684, but the current 24th edition of *Scrutton* (of which Mr Justice Foxton is the senior editor) notes at para 14-060, fn 152 the decision in *The Alhani* "that even art III r.6 of the Hague Rules applied to misdelivery claims, at least where the misdelivery occurred during the Hague Rules period of responsibility" and says nothing about misdelivery after discharge in a Hague Visby Rules case.

(2) *Voyage Charters* (5th Ed, 2023), para 66.205, fn 416 (of which Mr Timothy Young KC, another of the arbitrators, is the senior author) notes that the decision in *The Alhani* formally left open whether Article III, rule 6 applies to claims for misdelivery after the completion of discharge, but suggests that the reasons for saying that it does not apply are "thought to be unpersuasive".

(3) *Carver on Charterparties* (2nd Ed, 2022), para 5-216 (of which the third arbitrator, now Mrs Justice Dias, is one of the authors) notes the decision in *The Alhani*, but says nothing about whether the time limit applies to claims for misdelivery occurring after completion of discharge.

(4) *Carver on Bills of Lading* (5th Ed, 2022), para 9-126 notes the argument that a claim for misdelivery after discharge may be subject to the Hague Visby time limit, but expresses no view on the question.

(5) *Aikens, Bills of Lading* (3rd Ed, 2020), para 11.98 suggests that the time limit does apply to post-discharge events.

81. In the paper already referred to, Mr Diamond commented ([1978] LMCLQ 225, 256) that:

> "There is the clearest possible evidence that the sole or main purpose of this amendment was to make the time limit apply where the goods had been delivered without production of bills of lading and so to make it unnecessary to require an indemnity given by the receiver to be kept open indefinitely. Although the editors of *Scrutton* knew that this was one of the intentions, they considered that the amendment did not have the desired effect. I submit, albeit with considerable doubt, that as the first paragraph of art III, r. 6 is dealing with the effect of delivery of the 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."

82. Great respect is due to any view of Lord Mustill and Judge Diamond in this field, but in my view there is now a better understanding of the role which *travaux préparatoires*

can legitimately play in the interpretation of an international convention such as the Hague Visby Rules than existed at the time when they were writing. Indeed, Article 32 of the Vienna Convention means that it is likely to be a comparatively rare case where, despite "the clearest possible evidence" of the purpose of a provision in such a convention, the court is forced to the conclusion that the drafters have failed to achieve their object. Moreover, the doubt previously expressed by *Scrutton* whether the Rules were capable of applying to misdelivery at all has now been held (ironically by the current senior editor) to be misplaced.

Conclusion

83. For these reasons I would hold, despite Lord Mustill's doubts and Mr Diamond's hesitation, that there is no reason why effect should not be given to the clear intention of those who drafted the new rule that it should apply to claims for misdelivery occurring after discharge. That conclusion is consistent with the language and purpose of the rule, as the *travaux préparatoires* make clear beyond any reasonable doubt. Accordingly the rule applied to extinguish the carrier's liability in the present case, subject only to the two remaining issues which I now consider.

Was there an implied term in the bills of lading 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?

84. Mr Rainey submitted that even if Article III, rule 6 did not apply on its own terms, it was nevertheless 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", and was based on a passage in *Carver on Bills of Lading*, para 9-135:

> "As has already been stated, the main practical consequence of the extension or continuation of the carriage contract is the application of the package or unit limitation, the fire exception, the time bar and the prohibition of reducing liability of Art III.8. The duty of care of cargo would usually exist under the bailment rules in any case. It is submitted 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 during the period before delivery or up to the time of the operation of any separate warehousing arrangements, except insofar as this result has been excluded or modified by the parties. Such an interpretation is beneficial to third parties such as stevedores, who act at such times and may look for the carrier's protections when they do so."

85. A footnote in the current edition suggests that there is support for such a proposition in the judgment of Lord Justice Longmore in *The MSC Amsterdam*. It will be recalled that this case was concerned with package limitation under the Hague and not the Hague Visby Rules. The case was decided on the basis that the Hague Rules applied only to the period from loading until discharge (the Hague Rules "period of responsibility") and that the bill of lading expressly excluded any liability of the carrier outside that

period, which is permitted by Article VII. It was in that context that Lord Justice Longmore said:

> "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 in *Carver on Bills of Lading* (2nd edn, 2005), pp 565-566 (para 9-130) by Sir Guenter Treitel and Professor Francis Reynolds QC and Mr Parsons submits that should be the position in this case.
>
> 24. Like the judge I consider that this submission is inconsistent with the express terms of the bill of lading. …"

86. For my part, I have considerable doubt whether it is possible to imply a term to the effect suggested. Terms can be implied into a contract in fact or in law. To the extent that the proposed term rests on an implication in fact, there are no factual findings in the award on which such an implication could be founded. To the extent that it is an implication in law, that is to say that it represents the default position in any case where the Hague or Hague Visby Rules apply to a bill of lading and the goods are not delivered until some time after discharge, it seems to me to be difficult to imply a term that the Rules should apply if, on their own terms, they do not.

87. However, as I have concluded that Article III, rule 6 of the Hague Visby Rules does apply on its own terms to the claim in the present case, it is unnecessary to reach a final conclusion on this issue.

Does clause 2(c) of the Congenbill form have the effect of disapplying the time bar in Article III, rule 6?

88. The final issue is whether clause 2(c) of the standard Congenbill form disapplies the Hague Visby time bar so far as events occurring after discharge are concerned. The clause provides:

> "The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel of [sc. or] while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

89. Mr Smith submits that this clause is effective to disapply Article III, rule 6 (or, if necessary, to prevent the implication of the *Carver* implied term). However, this issue arises on a somewhat artificial basis because we are not asked to decide (and it is not a question of law arising out of the award) whether clause 2(c) is effective to exclude liability for misdelivery after discharge altogether, regardless of any time bar defence, although the judge did say at [87] that "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". If clause 2(c) does exclude such liability, despite cases such as *Motis Exports*, the issue of time bar will not arise.

90. On the other hand, if the carrier remains liable for misdelivery after discharge despite clause 2(c), which we must assume to be the case as the point is otherwise irrelevant, there is no reason why the one-year time limit for such a claim should not apply.

Disposal

91. For these reasons I would hold that Article III, rule 6 applies to claims for misdelivery of cargo after discharge and that clause 2(c) of the Congenbill form does not disapply Article III, rule 6 to the period after discharge. I would therefore dismiss the appeal.

Lord Justice Popplewell

92. I agree.

Lord Justice Nugee

93. I also agree.