

THE GIANT ACE LITIGATION:

What is the latest judicial thinking on the application of the Hague-Visby rules to misdelivery claims?

Sean O'Sullivan KC



FACTUAL BACKGROUND

The Vessel and the Cargo:

- In 2018, the Vessel ("the Giant Ace") was subject to a bareboat charter.
- It was carrying a cargo of coal in bulk.
- FIMBank was the holder (as pledgee) of the thirteen bills of lading for the cargo.
- KCH Shipping Co Ltd was the disponent owner and the contractual carrier.
- The dispute arose of out misdelivery of the cargo. In brief:
 - The cargo was discharged at Jaigarh, India.
 - It remained under the control of carriers in a stockpile at the port.
 - The cargo was then collected by various sub-buyers.
 - However, the bank was unable to collect payment from any of the sub-buyers.
- FIMBank claimed damages for misdelivery of the cargo, but the arbitration notice was given more than a year after the date when the cargo should have been delivered.

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FACTUAL BACKGROUND

The Bills of Lading:

- The bills of lading were governed by English law and incorporated a voyage charterparty. Clause 13.10 of that C/P provided that:

“This Charterparty shall have effect **subject to the Hague-Visby Rules**, which shall apply to any bill of lading issued under this charterparty”
- The bills of lading were on the Congenbill (1994) form. Clause 2(c) provided that:

“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 or while the cargo is the charge of another Carrier, nor in respect of deck cargo or live animals.”

There were two key issues:

- (1) Did the HVR time bar apply to claims for misdelivery after discharge?
- (2) Did clause 2(c) of the Congenbill form disapply the HVR time bar?

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HAGUE RULES

Hague Rules, Article III, Rule 6 (“Hague Rules Time Bar”)

“6. 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 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.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

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.”



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HAGUE-VISBY RULES

As amended by Visby Protocol (1968), Article III, Rule 6 (“HVR Time Bar”)

“6. 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 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.

~~If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.~~

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 6bis, in any event the carrier and the ship shall **in any event** be discharged from all liability **whatsoever** in respect of **the goods** ~~loss or damage~~ unless suit is brought within one year **of their delivery** ~~after delivery of the goods~~ or **of the date when they the goods 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.”

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HAGUE-VISBY RULES

Interpretation of the Hague-Visby Rules:

- English courts apply the customary rules of treaty interpretation in interpreting treaties
- Enshrined in the **Vienna Convention on the Law of Treaties (1969)**:

“Article 31

General rule of interpretation

1. 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.

[...]

Article 32

Supplementary means of interpretation

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 resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

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HAGUE-VISBY RULES

Interpretation of the Hague-Visby Rules:

- The role of negotiating history (as recorded in the *travaux préparatoires*) in The *Giannis K* (quoted in The *Giant Ace* [2023] at [39]):

“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 page 278C. **Only a bull’s eye counts.** Nothing less will do.”

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(1) THE ARBITRATION

Background of Arbitration:

- Tribunal of Julia Dias QC, Sir Bernard Eder, Timothy Young KC
- Partial Final Award dated 1 September 2021 (on preliminary issues)

Findings of the Tribunal:

- (1) The HVR time bar could in principle apply to claims against the carrier and ship alleging misdelivery after discharge.
- (2) Clause 2(c) of the Congenbill form did not disapply the HVR time bar for the period after discharge.

Conclusion: The claim was time-barred.

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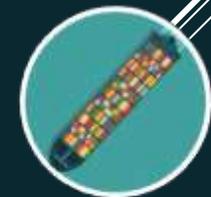
(2) THE HIGH COURT

FIMBank plc v KCH Shipping Co Ltd [2022] EWHC 2400 (Comm)

Decision of Sir William Blair (dismissing the appeal under s.69 but giving PTA)

- (1) The HVR time bar did apply to claims alleging misdelivery after discharge.
- (2) In any case, the bills of lading contract contained an implied term to the effect that the HVR time bar would apply to such claims.
- (3) Clause 2(c) of the Congenbill form presented no obstacle because it would be counterintuitive for an ineffective limitation/ exclusion clause like Clause 2(c) to deprive the carrier of the time bar.

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(2) THE HIGH COURT

Reasoning of Sir William Blair on Scope of HVR Time Bar (Issue 1):

- The authorities and textbooks did not dictate the answer.
- Reasoning from first principles:
 - (i) Words wide enough
 - (ii) Might be fine distinctions about when discharge comes to an end. It would be odd if the HVR time bar depended on precise factual circumstances
 - (iii) The same claim for “lost” cargo could be time-barred if there was no positive assertion that the carrier had delivered cargo to a third party, but not time-barred if a positive assertion as to misdelivery was made
 - (iv) Not clear what carrier is to do if bill of lading not presented when vessel arrives to give discharge: refuse to discharge or lose benefit of time bar?
 - (v) Uncertainty: it would be unclear when the carrier could close its books
- **Approach:** Not drawing distinction between HR and HVR. Limited reliance upon *travaux préparatoires*

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(3) COURT OF APPEAL

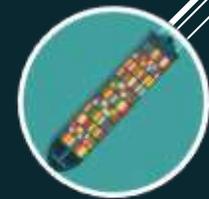
Fimbank Plc v KCH Shipping Co Ltd [2023] EWCA Civ 569

Judgment of Males LJ (Popplewell LJ and Nugee LJ agreeing):

- (1) The HVR time bar did apply to claims alleging misdelivery after discharge.
- (2) It was doubtful that such a time bar term could be implied into the contract, at least without some factual basis for doing so.
- (3) Clause 2(c) of the Congenbill form was irrelevant.



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(3) COURT OF APPEAL

Reasoning of Males LJ on Scope of HVR Time Bar :

(1) Hague Rules Time Bar

- Text and Context (Article 31 VCLT)
 - The text and context of the Hague Rules made clear that Rules were intended only to apply to carriage of goods by sea: i.e. from the point of loading until the point of discharge.
 - The Hague Rules therefore would not apply to misdelivery of cargo stored on land after the point of discharge
 - Nothing in Art III r.6 to show that intended to apply to claims for breach of duty outside the scope of the Rules. Not a cuckoo in the Hague Rules nest
- The Authorities:
 - The English authorities were inconsistent, but largely in support of the above position



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(3) COURT OF APPEAL

Reasoning of the Court of Appeal on Scope of HVR Time Bar (Issue 1):

(2) HVR Time Bar

- Text and Context (Article 31 VCLT)
 - The text of Article III, Rule 6 of the HVR was broader than the HR. It provided for “all liability whatsoever in respect of the goods”.
 - At [71]: “It is a reasonable inference that the new rule is intended to apply even in cases outside of the sphere of application of the [Hague] Rules [...] but at the very least, some ambiguity can be said to exist.”
- Travaux (Article 32 VCLT)
 - At [73]: The redrafted text had been put before a plenary session of the CMI on 14 June 1963 with the explanation 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, ie even in the case of what we call a wrong delivery’.”
 - At [75]: “This is, in my judgment, the necessary bull’s eye”.
- The authority from Hong Kong was persuasive, but not determinative.

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(4) SUPREME COURT

- UKSC 2023/0085: PTA granted (on 13 October 2023)
- Listing of 1.5 days before 5 justices
- Not listed for Easter Term (9 April 2024 to 24 May 2024)

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(4) SUPREME COURT

Likely outcome in the Supreme Court?

- (1) The Tribunal, the High Court, and the Court of Appeal all came to the same conclusion.
- (2) Very different reasoning Tribunal/ High Court v Court of Appeal.
- (3) Points which may be considered further by the Supreme Court:
 - Was the Court of Appeal right about the Hague Rules time bar? Was The Alahani [2018] EWHC 1495 (Comm) correctly decided?
 - Was the Court of Appeal overly reliant on the travaux? Is this really a “bull’s eye”?
 - Wider implications and consequences:
 - Inconsistency between the Hague Rules and the HVR?
 - Inconsistency and uncertainty between different jurisdictions?

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PRACTICAL EFFECTS

(1) Commercial Realities

- **Certainty:**
 - Greater certainty if one-year HVR time bar default applies to claims for misdelivery
 - Safest to assume that 1 year time bar will apply to all claims
- **Party autonomy and choice:**
 - Can the shipowner opt out of HVR regime (post discharge) by express wording?
 - Yes: see Art. VII of the HVR.
 - Note the reminder of the High Court that clause 2(c) was “insufficiently clear” to relieve the carrier from liability for misdelivery.

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PRACTICAL EFFECTS

(2) Inconsistency between Hague Rules and HVR

- Should the situation be different under Hague Rules and HVR?
- Making it more important to know which regime applies
- Can be difficult and may depend on regime in loadport/ disport
- Arising in cases such as The Superior Pecadores [2016] EWCA Civ 101 for package limitation
- But now (subject to the Supreme Court) makes a difference to time bar...
- Increasing number of misdelivery claims (because of practice of providing LOI), so whether time bar applies ever more important.

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