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### Does the HVR Art.III r. 6 one year time bar apply to misdelivery cargo claims which take place after discharge from the vessel?

Managing Associate, Neila Cheeks considers the judgment handed down by Sir William Blair on 28 September 2022 of *FIMBank p.l.c. v KCH Shipping Co., Ltd [2022] EWHC 2400 (Comm)* in which the court answered "yes" to the above question on the terms of the contract in that case.

#### Introduction

The Claimant ("**FIMBank**"), who appealed the Partial Final Award of an arbitral tribunal under s.69(2)(b) of the Arbitration Act 1996, brought claims as holder of 13 bills of lading for misdelivery of a cargo of coal against the Defendant ("**KCH**"), as carrier. The S69 question was whether the one-year time bar in Art.III, r.6 of the Hague Visby Rules ("**HVR**") applies to claims for the misdelivery of cargo which occurred after discharge. This question had been left open in *The Alhani [2018] 2 Lloyd's Rep 563 at [86]* where misdelivery and discharge of the oil cargo occurred simultaneously by ship-to-ship transfer.

#### Facts

Bills of lading were issued on the Congenbill form "to order" on behalf of the vessel, which was bareboat chartered by KCH. The bills of lading were subject to the HVR and which included Art.III, r.6. This provided that cargo claims against a carrier and the vessel shall be time barred unless proceedings have been commenced within one year after delivery of the goods or the date when the goods should have been delivered.

The cargo of coal was discharged between 1 and 18 April 2018 against letters of indemnity ("**LOIs**") and subsequently placed in discharge port stockpiles. FIMBank, as financier of one of the purchasers, stood in the same position as the cargo owners and claimed misdelivery of the cargo after the coal was discharged from the stockpiles. FIMBank served its Notice of Arbitration on KCH on 24 April 2020 which would render its claims time barred, if Art.III,r.6 of the HVR applied. Two questions of law were

considered on appeal: (i) whether Art.III r.6 of the HVR applies to claims for misdelivery of cargo after discharge and (ii) whether clause 2 (c) of the Congenbill form disappplies the HVR to the period after discharge.

#### Decision:

On question (i), the court agreed with the tribunal that Art.III, r.6 applies to claims for misdelivery of a cargo after discharge. It was purposely designed to cover delivery in a broader context and address misdelivery after discharge so as to avoid confusion as to when discharge, or the period of responsibility under the HVR ended. The court cited Bingham LJ in *The Captain Gregos ([1990] 1 Lloyd's Rep. 310, "like any time bar, [it is] intended to achieve finality and, in this case, enable the ship owner to clear his books"*. Even if that was wrong, the court agreed with the decision of the tribunal that an implied term that the obligations and immunities contained in the HVR continue after actual discharge until the cargo is taken into the receiver's custody, (recognised by the Court of Appeal in *The MSC Amsterdam*), would lead to the same result in this case. On question (ii) the court upheld the tribunal's conclusion that clause 2 (c) of the bills of lading does not disapply the HVR to the period after discharge.

#### Comments:

All traders and financiers need to note this decision. Although it answered the question raised in the particular contract, this case has wider ramifications. It brings certainty to an issue that divided the legal and academic community. From now on, and when considering their own particular contracts, traders

and trade financiers should proceed on the assumption that the Art.III , r.6 time bar can apply to misdelivery claims where bills of lading are subject to the HVR and irrespective of different discharging practices. It would also be prudent to assume the same principles apply where the Hague Rules apply.

Please click [here](#) for a copy of the full judgment.

### Contact us



#### Neila Cheeks

Managing associate, London

T: +44 20 7809 4192

E: [neila.cheeks@shlegal.com](mailto:neila.cheeks@shlegal.com)