



# SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



## Hague Rules Time Limit Applies To Misdelivery Claims

David Foxtton QC, sitting as a Deputy Judge of the English High Court, has determined that the time bar created by Article III Rule 6 of the Hague Rules applies to misdelivery claims, where a shipowner has delivered cargo to a third party without production of the bill of lading.

The June 15 decision follows a hearing on May 24, whereby Nevil Phillips and Tom Bird (instructed by Campbell Johnston Clark) acted for claimant Deep Sea Maritime, and Stephen Kenny QC and James Watthey (instructed by EG Arghyrakis & Co) acted for defendant Monjasa A/S.

### **Background**

The background to the case was that Deep Sea Maritime, as owner and operator of the oil product tanker Alhani, had been engaged by Monjasa to ship a consignment of bunker fuel between Lome (Togo) and Cotonou (Benin) in late 2011.

Neither Benin nor Togo are parties to the Hague or Hague-Visby Conventions. Accordingly, the Hague Rules as set out in the 1924 Convention were incorporated into the bill of lading, “taking effect as a matter of contract”.

The bill of lading did not identify who the charterparty referred to. But it subsequently became “common ground” this was between Deep Sea Maritime and Unitaes Energy Sources Company, with an addendum identifying Babecca Business Links as having “agreed to perform the obligations of Unitaes”.

The charterparty provided a clause that any dispute would be referred to the High Court in London, with it also ultimately becoming common ground the wording of the bill of lading was sufficient to incorporate the charterparty’s “exclusive jurisdiction clause”.

Monjasa sold the cargo to Unitaes under a contract of sale dated October 28, 2011, which contained a retention-of-title clause. A letter of credit was established in favour of Monjasa in relation to the contract of sale, but payment under that letter of credit was declined due to alleged documentary discrepancies. Monjasa contended that property in the cargo never passed to Unitaes, due to the operation of the retention-of-title clause.

On November 16, Babecca (possibly acting as agent for Unitaes) entered into a contract to sell the cargo back to Monjasa. Monjasa’s complaint has been that it “bought” the cargo back in ignorance of the fact that property in the cargo had never passed from it to Unitaes.

On November 18, Deep Sea Maritime discharged the cargo through a ship-to-ship transfer from the Alhani into the Marida Marguerite off Lome — which it claimed was performed under instructions given pursuant to the charterparty, without production of the bill of lading.

Deep Sea Maritime accepted that there was an arguable case that the cargo was not delivered to Monjasa. Monjasa contended that Unitaes could not have purported to sell Monjasa’s own property back to if it Unitaes had not been able to take delivery of the cargo without production of the bill of lading.

Monjasa commenced four sets of proceedings in relation to the alleged non-delivery of the cargo in the courts of Tunisia, China, France and England — which saw the *Marida Marguerite* twice placed under arrest — with Deep Sea Maritime also filing proceedings before the English High Court seeking a declaration of non-liability.

Deep Sea Maritime had sought summary judgment for a negative declaration pursuant to Article III Rule 6 of the Hague Rules, which provides: “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 his decision on the latter proceedings, Judge Foxton noted “two important issues” had been raised in relation to the law of carriage of goods by sea.

“The first is whether the time bar created by Article III Rule 6 of the Hague Rules applies to claims for wrongful misdelivery, where the shipowner has delivered the cargo to a third party without production of the bill of lading,” stated his judgment.

“The second is whether the requirement in Article III Rule 6 that ‘suit is brought within one year after delivery of the goods or the date when the goods should have been delivered’ can ever be satisfied if proceedings are commenced in the courts of one country, when the bill of lading incorporates a clause from a charterparty giving exclusive jurisdiction to the courts of another country.”

### **Decision**

On the first issue, Judge Foxton outlined the key questions of law that had to be determined as being:

1. approached purely by reference to its language and purpose, is Article III Rule 6 capable of applying to misdelivery claims?
2. is Article III Rule 6 limited in its application to breaches of the Hague Rules obligations?
3. is there a settled understanding that Article III Rule 6 of the Hague Rules does not apply to misdelivery claims?

In summary, he determined that the words “in any event” and “all liability” contained within the Rule were “wide” and that the object of finality (which the time limit was intended to achieve) would be “seriously undermined if the Rule did not apply to misdelivery claims”.

Judge Foxton stated Article III Rule 6 was not limited in its application to breaches of the Hague Rules obligations (though even if it were, the misdelivery claim in the present case was capable of being pleaded, and had in fact been pleaded, as a breach of the Hague Rules). The time limit applied 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”.

He also determined there was no “settled understanding” that Article III Rule 6 does not apply to misdelivery claims.

“For these reasons, I have concluded that 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, and there is no fixed or settled interpretation of the Hague Rules to contrary effect which requires the alternative conclusion,” stated the judgment.

On the second issue the case had raised in relation to the law of carriage of goods by sea, Judge Foxton held that if the first proceedings are brought in a particular court in breach of an agreement to bring claims in another forum, then, save perhaps in exceptional circumstances, they will not constitute proceedings before a competent court.

Monjasa could not rely on the Tunisian proceedings as the bringing of suit because they had been brought in breach of the exclusive jurisdiction clause in favour of the English courts.

Campbell Johnston Clark described Judge Foxton's determination an "important decision" on the scope of the Article III Rule 6 time bar, which "resolves an issue which has long been the subject of divergent views — whether the time limit applies to misdelivery claims".

"It is submitted that the result would have been no different had the Hague-Visby Rules been incorporated into the bill of lading: the language of the Hague-Visby Rules time bar is, if anything, even more emphatic, providing that the carrier and the ship shall 'in any event be discharged from all liability whatsoever in respect of the goods'," stated the firm's review.

"One question that remains open, however, is whether the Hague Rules time limit applies to wrongful delivery which occurs after the discharge of the cargo from the vessel, as when a container is discharged onto the quayside and delivered some weeks later. That issue will have to be determined in another case."

A copy of the report can be found [here](#).

September 2018

