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Young MLAANZ Case Note – Rosalie Van Dael

FIMBank Plc v KCH Shipping Co Ltd [2022] EWHC 2400 (Comm): *The Carver Implied Term and Commercial Sensibility*

In *FIMBank Plc v KCH Shipping Co Ltd [2022] EWHC 2400 (Comm)*, an appeal was brought by FIMBank Plc (FIMBank), the claimant, against KCH Shipping Co Ltd (KCH), the defendant, under s69 of the Arbitration Act 1996 (United Kingdom) of the Partial Final Award of an Arbitral Tribunal made up of leading London maritime arbitrators (Tribunal).

Issues on Appeal

The questions of law at issue in the case were:

- (i) whether the limitation of liability in Article III, r6 of the Hague-Visby Rules (HVR) applies to claims for misdelivery of cargo after discharge
- (ii) whether clause 2(c) of the Congenbill form disapplies the HVR to the period after discharge

This article focuses primarily on the first question.

Article III, r6 of the Hague-Visby Rules

“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.”

Background

KCH was the bareboat charterer of the MV Giant Ace. A claim was brought against it as carrier in relation to a cargo of coal carried from Indonesia to India. Thirteen sets of bills of lading, dated 4 and 14 March 2018, on the Congenbill form were issued “to order” and signed for and on behalf of the master. By way of incorporation from the charterparty, the bills were subject to the HVR. The coal was discharged between 1 and 18 April 2018 against letters of indemnity and placed on discharge port stockpiles. What ultimately happened to the cargo was in dispute but the facts were not otherwise discussed.¹

FIMBank, as financier of one of the purchasers, was said to have taken a pledge over the bills of lading and cargo. It served its Notice of Arbitration on KCH on 24 April 2020, claiming misdelivery of the cargo after discharge. This was more than one year after delivery of the cargo or the date when it should have been delivered. If the HVR time bar applied, that was the end of the case. If it didn't then the arbitration would be revived.



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FIMBank argued that the “period of responsibility” under the HVR and the immunities, including the time bar, end when goods are discharged and that the immunities do not apply to events after discharge.

The Arbitral Tribunal’s Finding

The Tribunal found that the HVR time bar could in principle apply to claims relating to misdelivery occurring after discharge. The Tribunal also found that Clause 2(c) of the Congenbill form² did not disapply the HVR time bar to the period after discharge. Therefore, FIMBank’s claim was time-barred irrespective of whether delivery did or did not occur after discharge.

Authorities

The Court considered key English cases, authorities from other common law jurisdictions, and textbooks and academic material as the question of whether the HVR time bar applied to misdelivery after discharge had not previously been answered. In particular, this question was left unanswered in the *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)* [2018] 2 Lloyd’s Rep 563.³ The Judge concluded that an international consensus in case law from common law jurisdictions was not made out on this question. He held that the Court should be slow to disturb any fixed and settled understanding of the applicability of the HVR to misdelivery after discharge, “even if on the authorities it is free to do so”⁴. English legal commentary on the issue was also found to lack clarity.

The Carver Implied Term

As part of the Court’s consideration of textbooks and academic material, it looked at the “Carver implied term”⁵, whereby it may be appropriate that the HVR apply “as implied terms after receipt of the goods but before loading, and after discharge but before delivery or up to the time of the operation of any separate warehousing arrangements, except in so far as this result has been excluded or modified.”⁶ The Carver implied term was previously considered by Longmore J in *Trafigura Beheer BV and another v Mediterranean Shipping Company SA (The MSC Amsterdam)* [2007] 2 Lloyd’s Rep 622, which accepted that if no agreement was made for the period after discharge, the parties could be taken to have impliedly agreed that the HVR continue after discharge. However, the HVR time bar was not at issue in *The MSC Amsterdam* (which was distinguishable in any event including on the basis that the terms of the bill of lading in that case materially differed from the terms of the bills considered in the case before the Court).

The Court agreed with the Tribunal’s decision that a term could be implied into the contract. It noted, however, that the Carver implied term will not apply to every contract for carriage under the HVR and that the usual test for implication must be met.

Not “Commercially Sensible or Even Reasonable”

The Court reflected on the realities of the discharge of cargo identified by the Tribunal. In particular, in cases such as the FIMBank case where the claimant does not present the bill of lading to the carrier or his agent when the vessel has arrived to give discharge, the carrier can either refuse to discharge or discharge into the custody of the agent. In the latter, the carrier would lose the protection afforded under Article III, r6 of the HVR. The Tribunal considered that, “[th]is is not commercially sensible or even reasonable”⁷, and the judge further stated that:⁸

“ ... it seems counter-intuitive that a clause which is intended to relieve the carrier of liability for loss of or damage to the cargo after discharge from the vessel should have the effect of depriving the carrier of the benefit of the time bar which would otherwise be available, particularly given the objective of the time bar, which is to enable the carrier to clear its books, and which has been construed widely ... ”

Brief Bio

Rosalie Van Dael was admitted to the bar in May 2021 and recently joined MLAANZ. She developed an interest in international and maritime law during a year-long university exchange in Madrid, Spain. Rosalie works in the litigation department at Lowndes Jordan.

Outcome

The appeal was dismissed. The Court upheld the Tribunal's decision that Article III, r6 of the HVR, which includes the time bar but is concerned with delivery in a broader context, applies to misdelivery of cargo after discharge, thus avoiding the need for fine distinctions as to the point when discharge ends. The Court also saw no reason to differ from the Tribunal's finding that the same result could be reached "in the present case"⁹ by implication of a term dependent on the terms of the contract as a whole.

The decision provides some clarity on the application of the HVR time bar to claims relating to misdelivery, however, it remains open to parties to agree on terms other than the HVR for periods outside the actual period of carriage.

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¹ The factual issues of the case were not of primary concern to the Tribunal. The Commercial Court confirmed these "[did] not need to be [resolved] on the Tribunal's approach to the case." Notwithstanding the absence of established facts, the Commercial Court was careful to reiterate that the appeal was concerned with the particular contract at issue. See [5] – [7] of the judgment

² For a discussion of clause 2(c), see *FIMBank Plc v KCH Shipping Co Ltd* [2022] EWHC 2400 (Comm) at [85] – [91]

³ *FIMBank Plc v KCH Shipping Co Ltd*, above n 2, at [1]

⁴ At [51]

⁵ After the textbook of that name

⁶ At [57]

⁷ *FIMBank Plc v KCH Shipping Co Ltd*, above n 2, at [73]

⁸ At [89]. The idea of clearing the books reflects the statement of Bingham LJ in *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 1 Lloyd's Rep, 310 at 315

⁹ *FIMBank Plc v KCH Shipping Co Ltd*, above n 2, at [94].