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20 June 2023

CIF Weekly – issue 34

FIMBank v KCH Shipping (The "GIANT ACE") – Court of Appeal confirms that one-year time limit in Art III r.6 Hague-Visby Rules applies to post-discharge misdelivery claims

On 24 May 2023, the Court of Appeal handed down judgment in *FIMBank p.l.c. v KCH Shipping Co. Ltd (The Giant Ace) [2023] EWCA Civ 569* finding that the one-year time limit in Art III r.6 of the Hague-Visby Rules ("**HVR**") applies to claims for misdelivery of cargo after discharge from the Vessel.

Facts

FIMBank (as appellant), was the holder of 13 bills of lading (the "**Bills**") covering a cargo of 85,510 MT of non-coking steam coal (the "**Cargo**"), shipped on board the vessel "GIANT ACE" in Indonesia and discharged in India between 1-18 April 2018. FIMBank held the Bills as security by way of a pledge, having financed the buyer's purchase of the cargo.

KCH (as respondent) was the demise charterer and the contractual carrier under the Bills. The Bills were on the Congenbill 1994 form and incorporated the terms of a voyage charterparty dated 20 February 2018, governed by English law. Clause 13.10 of the charterparty read: "*This Charterparty shall have effect subject to the Hague-Visby Rules, which shall apply to any bill of lading issued under this Charterparty*" and was held by the arbitrators to incorporate the HVR into the Bills (which finding was not appealed).

The Cargo was sold on to various sub-buyers but FIMBank did not receive payment for the Cargo and commenced proceedings against KCH on 24 April 2020 for misdelivery of the cargo to persons not entitled to receive it.

The Court of Appeal noted that misdelivery had occurred following discharge between 16 April and 29 May, the Cargo having been discharged on to the jetty at Jaigarh port and held in a customs bonded stockpile, from which delivery was made on presentation of delivery orders and bills of entry.

KCH's position was that FIMBank's claim was timebarred pursuant to Article III rule 6, HVR, para 3, which reads, in relevant part: "*… 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 …*".

The Previous Decisions

Both the LMAA Tribunal and the Commercial Court rejected FIMBank's claims and found that (a) the time bar in Art III r.6 HVR applied; and (b) the parties had not contractually disapplied the time bar by virtue of clause 2(c) of the Congenbill. (Please click here for our full analysis of the Commercial Court's decision). Permission was, however, given to FIMBank to appeal to the Court of Appeal.

The Court of Appeal's Decision

The three questions for determination by the Court of Appeal were:

1. Does the time bar in Art III r. 6 HVR apply to a claim for misdelivery occurring after discharge of the Cargo?
2. If not, can a term be implied into the Bills that Art III r.6 HVR applies to govern the parties' relationship after discharge of the Cargo?
3. If the answer to (1) or (2) is "yes", such that the time bar in Article III r.6 *prima facie* applies, does clause 2(c) Congenbill disapply it?

The Court of Appeal (Males LJ giving the leading decision) upheld the decision of each of the LMAA Tribunal and the Commercial Court and dismissed the Appeal, giving the following reasons:

1. <u>The answer to question 1 was "yes":</u> while the Hague Rules ("**HR**") only applied between loading and discharge and did not extend to post-discharge misdelivery, the Visby revision to Art III r.6 (which, *inter alia* replaced the words "*all liability in respect of loss or damage*" with "*all liability whatsoever in respect of the goods*") was "*intended to be of wider scope than the original rule*" and (subject to some ambiguity) seemed to apply to misdelivery claims.
2. To confirm the drafters' intentions, the Court reviewed the *travaux préparatoires* to the Visby revision (Article 32, Vienna Convention, applied). According to Supreme Court authority (*Alize 1954*, citing *The Giannis K*) the *travaux* would only be determinative where they *"clearly and indisputably point[ed] to a definite legal intention …. Only a bull's-eye counts.*" Records of a plenary session of the sub-committee that drafted Art III r.6, confirmed that the amendment's purpose was to *"embody … even claims grounded on … a wrong delivery"*, confirming the Court of Appeal's interpretation. Further, nothing in the *travaux* suggested that r.6 (as amended) was limited to misdelivery occurring during discharge only, and there was no international consensus or academic commentary strongly suggesting otherwise.
3. <u>The answer to question 2 was "no"</u>: the Court doubted that any such term could be implied, on the bases that: (a) no findings in the award suggested such an implied term in fact; and (b) the Court found difficulty implying a term by law that the Rules should apply if, on their own terms, they did not.
4. <u>The answer to question 3 was "no"</u>: the Court reasoned that if the effect of clause 2(c) Congenbill was to exclude liability for misdelivery, then the time bar issue would not arise. If instead the carrier remained liable for misdelivery after discharge, despite clause 2(c), there was no reason why the one-year time limit should not apply. Accordingly, clause 2(c) did not disapply Art III r.6 after discharge.

Comment

The Court of Appeal's decision has confirmed an aspect of English law not previously addressed by the Courts. Given the distinction now drawn between the scope of Art III r.6 in the HR and HVR, parties (including banks as holders of bills of lading under financing arrangements) should closely review which of the two regimes applies, to ensure that any claims for misdelivery are commenced in time.

An interesting secondary feature of the case is the lack of detail available in the Award addressing: (a) how the Cargo was delivered without presentation of bills of lading; and (b) the letters of indemnity provided to KCH. To avoid such claims altogether carriers should ensure they have in place thorough processes to trace indorsements made to bills of lading issued, alternatively secure and robust letter of indemnity arrangements, prior to issuing delivery orders in the absence of the bills of lading.

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