

# TIME BARS AND MISDELIVERY: FIMBANK PLC V KCH SHIPPING CO LTD [2023] EWCA Civ 569

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## Introduction

The recent English and Wales Court of Appeal decision of *FIMbank plc v KCH Shipping Co Ltd*<sup>1</sup> settles the question of whether the one-year time bar contained in art 3, r 6 of the Hague-Visby Rules<sup>2</sup> applies to a post-discharge misdelivery of cargo. Lord Justice Males, with whom Lord Justice Popplewell and Lord Justice Nugee agreed, held that it did. The reasoning of Males LJ highlights a rare occasion where the *travaux préparatoires* was determinative in upholding a construction of its respective treaty. As Lord Steyn famously said in *The Giannis NK*, this may only occur if the *travaux préparatoires* ‘clearly and indisputably point[s] to a definite legal intention. Only a bull’s eye counts. Nothing less will do.’<sup>3</sup>

The primary judge, Sir William Blair,<sup>4</sup> and an arbitral tribunal comprising Julia Dias QC, Sir Bernard Eder and Timothy Young QC, all held that the time bar applied post-discharge. The reasoning of Males LJ, however, is markedly different from that of his counterparts. His Lordship’s reasoning clarifies that there is a temporal application to the Hague(-Visby) Rules beginning with loading and ending with discharge, but also that the amendment to the Hague-Visby time bar was for the specific purpose in extending the application of the time bar to misdelivery.

## Text of the Hague-Visby Rules and the ‘Period of Responsibility’

The Hague-Visby Rules, as an international treaty, must be interpreted according to treaty interpretation at customary international law.<sup>5</sup> This is reflected in arts 31 and 32 of the *Vienna Convention on the Law of Treaties*.<sup>6</sup> Article 31.1 states:

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.

As such, the text of the Hague-Visby Rules is a natural starting point. Article 1(e) defines the ‘carriage of goods’ as:

[T]he period from the time when the *goods are loaded on to the time they are discharged* from the ship.

Similarly, art II provides that:

[U]nder every contract of carriage of goods by sea the carrier, in relation to the *loading, handling, stowage, carriage, custody, care and discharge of such goods*, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article III, rule 2 also provides:

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<sup>1</sup> [2023] EWCA Civ 569.

<sup>2</sup> See *Carriage of Goods by Sea Act 1971* (UK).

<sup>3</sup> [1998] AC 605, 623. Cf Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2017) 383–5.

<sup>4</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736.

<sup>5</sup> See, eg, *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350 (Lord Macmillan); *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35, [34] (Lord Clarke).

<sup>6</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Which is merely a codification of the customary international law on the interpretation of treaties: see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation) (Preliminary Objections)* [2019] ICJ Rep, 1, 598 [106]; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 282 (Lord Diplock).

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

In this sense, the obligations and immunities of the carrier that are required by the Hague-Visby Rules are said to apply to the ‘period of responsibility’ beginning with loading and ending with discharge of the relevant cargo.<sup>7</sup> In *The Captain Gregos*, a case concerning the Hague-Visby Rules, Bingham LJ said in *obiter* that the:<sup>8</sup>

[D]efinition in art. 1(e) does, I accept, assign a temporal term to the ‘carriage of goods’ under the rules, supporting an argument that the rules do not apply to events occurring before loading or after discharge. (See also art VII.) I read art. II as defining the scope of the operations to which the responsibilities, rights and immunities in the rules apply.

Article VII also allows the parties to a contract of carriage to agree to their responsibility and liability for the period before loading and after discharge. In contrast, the obligations of the carrier demanded by the Hague or Hague-Visby Rules during the period between loading and discharge cannot be modified by contractual agreement.<sup>9</sup>

The Arbitral Tribunal, however, concluded that the obligation of ‘custody’ in arts II and III, r 2 was not limited temporally between loading and discharge, such that the Hague-Visby Rules, including the time bar, could apply post-discharge. The Tribunal unanimously said that ‘the contractual “custody” (under Art. II and Art. III, r.2) is an obligation that is naturally capable in the normal course of persisting after discharge and thus an obligation squarely within the ambit of the Rules’.<sup>10</sup> Similar sentiments were observed in *obiter* by President Kirby in *The Zhi Jiang Kou*:<sup>11</sup>

[Article] II of the Hague Rules does not in my opinion establish a category limited to events arising from loading to discharge, strictly so confined. It also includes custody and care, loading and handling as well as the carriage and discharge of the goods. ‘Custody and care’ are apt to cover events after the discharge and until delivery of the goods. Any other construction would artificially narrow the operation of the Hague Rules.

This interpretation, however, is inconsistent with the textual order of events listed in art II and III, rule 2,<sup>12</sup> but is also inconsistent with art VII in allowing parties to a contract of carriage to determine their responsibility and liability pre-loading and post-discharge. Even if ‘custody’ can extend post-discharge, the framers of the Hague Rules did not intend this. For example, the Chairman at one diplomatic conference emphasised that ‘it had not been intended in this international convention to consider anything other than the time the goods were on board the ship’.<sup>13</sup> Another effect of this interpretation is that an agreement to liability post-discharge that differ from the Rules may be void pursuant to art III, r 8,<sup>14</sup> despite article VII expressly stating that the parties may, without restriction, agree on their terms and responsibilities during this period.<sup>15</sup>

<sup>7</sup> See *Gosse Miller Ltd v Canadian Government Merchant Marine* (1927) 28 Lloyd’s Law Rep 88, 103 (Wright J); *Deep Sea Maritime Ltd v Monjasa A/S* [2018] 2 Lloyd’s Rep 563, [26] (David Foxton QC) (*‘The Alhani’*).

<sup>8</sup> *Compania Portorasti Commerciale SA v Ultramar Panama Inc* [1990] Lloyd’s Rep 310, 315 (Slade LJ and Stocker LJ agreeing) (*‘The Captain Gregos’*). See also *Trafiguera Beheer BV v Mediterranean Shipping Company SA* [2007] 2 Lloyd’s Rep 622, 629 [25] (Longmore LJ, Lloyd LJ and Tuckey LJ agreeing) (*‘The MSC Amsterdam’*); *The Alhani* (n 7) [26] (David Foxton QC).

<sup>9</sup> Any attempt to do so is null and void: art III, r 8. Parties may, however, agree to *increase* the carrier’s obligations or forfeit the carrier’s immunities: art 4, r 5.

<sup>10</sup> See *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 755 [76]. See also *PS Chellaram & Co Ltd v China Ocean Shipping Co* [1991] 1 Lloyd’s Rep 493, 516 (Kirby P) (*‘The Zhi Jiang Kou’*).

<sup>11</sup> *The Zhi Jiang Kou* (n 10) 516.

<sup>12</sup> Regarding the ‘loading, handling, stowage, carriage, custody, care and discharge of such goods’.

<sup>13</sup> Berlingieri, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (Comite Maritime International, 1997) Diplomatic Conference, First Session, 19 October 1922, 140 (The Chairman). See also the question raised by the Chairman, and then answered affirmatively by the Conference, that ‘I take it that the Conference will accept, as the limitations of the period of Carriage of Goods, these limitations beginning at the time when the goods are loaded on the ship and terminating at the time when they are discharged from the ship’: at 139.

<sup>14</sup> See above n 9.

<sup>15</sup> See FMB Reynolds, ‘The Hague and Hague-Visby Rules and Wrong Delivery’ [2023] *Lloyd’s Maritime and Commercial Law Quarterly* 1, 4.

In contrast, the primary judge, Sir William Blair, accepted that there was a ‘substantial body of opinion in support of the view that the “period of responsibility” under the Hague-Visby Rules ends at discharge’.<sup>16</sup> However, Sir William Blair ultimately concluded that the time bar had specific application post-discharge.

On appeal, Males LJ upheld the ‘period of responsibility’ to which the Hague(-Visby)<sup>17</sup> Rules applied. His Lordship said that this was the effect of art II when read in the context of art I.<sup>18</sup> His Lordship rejected a submission that the carrier’s responsibilities and liabilities (in art III) and rights and immunities (in art IV) extended, of themselves, before loading and after discharge.<sup>19</sup> Further, in contrast to the view of the Arbitral Tribunal, the obligation of ‘custody’ and ‘care’ in art II was said to concern only ‘the custody and care of the goods between (and including) loading and discharge.’<sup>20</sup>

### Article III, Rule 6 Time Bar

The next question for Males LJ was whether there was something especial about the time bar that ‘demonstrate[d] that the time bar was intended to apply to claims for breaches of duty outside the scope of the Rules.’<sup>21</sup> A distinction was drawn between the time bar contained in the original Hague Rules, and the amended time bar contained in the Hague-Visby Rules.

The Hague Rules time bar relevantly read:

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.

Lord Justice Males noted the wide scope of the time bar demanded by the words ‘[i]n any event’ and ‘all liability’.<sup>22</sup> In the Privy Council decision of *The New York Star*, Lord Wilberforce described an equivalent clause as ‘general and all-embracing’.<sup>23</sup> The broad purpose of the time bar had also been said to allow ship owners to clear their books.<sup>24</sup> Justice Tomlison in *Linea Naviera Paramaconi v Abnormal Load* even went so far as to say that a presumption should be drawn that:<sup>25</sup>

[T]he Court should lean towards a conclusion which involves that a claim against a carrier which is founded upon a breach of a Hague Rules obligation is subject to the one year time bar contained in that code rather than that it is not.

The wide interpretation accorded to the time bar was one reason for the primary judge, Sir William Blair, concluded that the time bar was applicable to delivery post-discharge.<sup>26</sup>

Article III, r 6 also refers to ‘delivery’ (rather than ‘discharge’) as the point where time begins running for the purposes of the time bar. The distinction between these two concepts is well-established. ‘Discharge’ refers to the physical operation of removing cargo from the ship, while ‘delivery’ is a legal concept involving the full transfer of possession of the goods by the carrier to the receiver.<sup>27</sup>

<sup>16</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 759 [92].

<sup>17</sup> It is submitted that there is no difference between the Hague Rules and the Hague-Visby Rules as it relates to the period of responsibility established in arts I(e), 2, and 3, rule 2.

<sup>18</sup> *FIMBank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [45].

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid* [49].

<sup>22</sup> *Ibid* [50].

<sup>23</sup> [1981] 1 WLR 138, 145 (*The New York Star*).

<sup>24</sup> [1977] 1 Lloyd’s Rep 334, 336 (Lord Wilberforce) (*The Ariès*); *The Captain Gregos* (n 8) 315 (Bingham LJ, Slade LJ and Stocker LJ agreeing).

<sup>25</sup> [2001] 1 Lloyd’s Rep 763, 769 [19].

<sup>26</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 757–8 [90].

<sup>27</sup> *The Berge Sisar* [2002] 2 AC 205, [36] (Lord Hobhouse).

However, the lack of needing to draw such a distinction, at least to determine whether the time bar applied, was the second reason why Sir William Blair concluded that the time bar applied to delivery post-discharge. This would prevent any ‘fine distinctions’ needing to be made as to when discharge occurred.<sup>28</sup> Davenport has similarly expressed:<sup>29</sup>

The ... approach could, it must be suggested, go far towards destroying the purpose behind the [Hague] Rules of having standard terms of international carriage of goods by sea. If a plaintiff can find a nominal wrong (either by a tort or breach of contract) and show that involves "alien" concepts of loading, handling, stowing, carrying, keeping, caring for and discharging the goods (although the wrong involves one of those physical acts), the Rules are replaced by the common law and the limitation period of the proper law.

Further, the particular use of the word ‘delivery’ in art III, r 6 may provide a textual basis for the time bar applying outside the period of responsibility beginning with loading and ending with discharge.<sup>30</sup> It may equally suggest that ‘delivery’ is an obligation of the carrier demanded by the Rules, perhaps as a bailee, but as an obligation nevertheless part of the contract of carriage.<sup>31</sup>

Despite the wide scope of the time bar and its reference to delivery, Males LJ concluded that the time bar contained in the Hague Rules was applicable only for liability arising during the Hague Rules period of responsibility. Again, this was required by art II when read in the context of art I.<sup>32</sup> There was nothing in the ‘object and purpose of the Rules, or of Article III, rule 6 itself, which suggest[ed] a different conclusion.’<sup>33</sup>

What was dispositive for Males LJ was the amendment to the time bar in the Hague-Visby Rules and the *travaux préparatoires* of the Visby Protocol in revealing the purpose of the amendment.

### Visby Protocol and the *Travaux Préparatoires*

In 1963, Comité Maritime International adopted the text of a draft Protocol to the Hague Rules at its Stockholm Conference. The final text of this Protocol was then agreed at the Brussels Diplomatic Conference on Maritime Law in February 1968, which ultimately became the Hague-Visby Rules.<sup>34</sup>

The only amendment to the time bar in the Visby Protocol was the change of discharge from ‘all liability in respect of the loss or damage’ to ‘all liability *whatsoever* in respect of the goods’. Commenting on the effect of this change, Males LJ said ‘[u]nless the new rule applies in cases where the original rule did not, therefore, the amendment achieves nothing. That is not a conclusion which should be reached lightly.’<sup>35</sup>

Given the ‘all embracing’<sup>36</sup> width of the Hague Rules time bar, in what new circumstances did the Hague-Visby time bar apply? Lord Justice Males said that it was a ‘reasonable inference’ that the change was for the time bar to apply outside the Hague Rules period of responsibility, but in the very least there was some ‘ambiguity’ as to the relevant construction.<sup>37</sup>

<sup>28</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 759 [93].

<sup>29</sup> BJ Davenport, ‘Limits on the Hague Rules’ (1989) 105 *Law Quarterly Review* 521, 523.

<sup>30</sup> See FMB Reynolds, ‘The Hague and Hague-Visby Rules and Wrong Delivery’ [2023] *Lloyd’s Maritime and Commercial Law Quarterly* 1, 4; *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 740 [9], 755 [77].

<sup>31</sup> See Malcolm Clarke, ‘Misdelivery and Timebars’ [1989] *Lloyd’s Maritime and Commercial Law Quarterly* 394, 395; Anthony Diamond, ‘The Hague Rules’ [1978] *Lloyd’s Maritime and Commercial Law Quarterly* 225, 256.

<sup>32</sup> [2023] EWCA Civ 569, [45].

<sup>33</sup> *Ibid* [51].

<sup>34</sup> The history is set out by Lord Justice Males in *FIMbank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [35].

<sup>35</sup> *Ibid* [70].

<sup>36</sup> *The New York Star* (n 23) 145 (Lord Wilberforce).

<sup>37</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [71].

This led to analysis of the *travaux préparatoires*, consistent with art 32 of the *Vienna Convention on the Interpretation of Treaties*. After being put before a plenary session of the Comité Maritime International at the Stockholm Conference on 14 June 1963, the amendment was explained such as to:<sup>38</sup>

[G]ive 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*.

This was then confirmed at the stage of formal approval, where the amendment was said to concern ‘the time limit in respect of claims for wrong delivery’.<sup>39</sup> This was said to be the requisite bull’s-eye in the Hague-Visby time bar applying post-discharge — the change was such that the time bar applied to misdelivery.<sup>40</sup>

Implicit in this reasoning is that the drafters intended that the amended time bar applied not merely to delivery before<sup>41</sup> or simultaneous<sup>42</sup> with discharge, but also to *post-discharge* delivery, such as to disregard the ‘period of responsibility’ for the purposes of the time bar. As Males LJ explained, however, in most cases delivery will occur post-discharge, after the cargo has been stored by the carrier or its agents.<sup>43</sup> This would have been ‘understood by the drafters’, and it was ‘unlikely in the extreme’ that the time bar was inapplicable to the typical case of delivery post-discharge, but applied to delivery before or simultaneous with discharge.<sup>44</sup>

### Implications of Reasoning

There are several practical implications from the time-bar applying post-discharge. These all relate to the odd effect produced if the time bar applied for a delivery until discharge, but is inapplicable to delivery post-discharge. The Arbitral Tribunal provided these implications as supporting the conclusion that the time bar applied post-discharge.<sup>45</sup>

First, most deliveries occur after discharge, and depend not on any action of the carrier, but on when it is effected by the receiver or consignee. It would be odd if the distinction as to whether the time bar applies depends on when the receiver intends to effect delivery.

Secondly, there is no need for ‘fine distinctions’ to be drawn as to when discharge occurs, as would be the case if the time bar was only applicable to discharge and not delivery.<sup>46</sup> The precise time when discharge occurs may be a contentious fact in certain circumstances.

Thirdly, the carrier would be required to refuse to discharge the cargo for an undefined period, or else discharge the cargo and lose all protection of the time bar. Where there are numerous receivers or consignees, the carrier would also have to wait for each receiver or consignee to effect delivery, and not be able to discharge all cargo at one point in time.

These practical implications also follow from Males LJ’s ultimate conclusion that the time bar applies post-discharge.

However, it also follows from the reasoning of Males LJ that the time bar in the *Hague Rules* is inapplicable to a post-discharge delivery. That is because his Lordship accepted the temporal application of the Hague(-Visby) Rules between loading and discharge, but also concluded that the Hague-Visby time bar was amended specifically to apply to misdelivery. The odd effects flowing from the time bar applying to a delivery before or simultaneous with discharge, but not to a post-discharge delivery of goods, remain so far as the unamended *Hague Rules* are concerned.

<sup>38</sup> Comité Maritime International, Report of the 26<sup>th</sup> Conference (Stockholm, 1963) 500 (Mr Van Ryn, Belgium).

<sup>39</sup> Comité Maritime International, Report of the 26<sup>th</sup> Conference (Stockholm, 1963) 77 (Sub-Committee), 111 (Swedish Maritime Law Association), 115–16 (British Maritime Law Association), 124 (Netherlands Maritime Association), 128 (Italian Maritime Association), 140 (Yugoslav Marine Association), 154 (Argentine Maritime Law Association), 195 (Spanish Maritime Law Association), 206 (The Maritime Law Association of the United States).

<sup>40</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [75].

<sup>41</sup> As occurred in *The Captain Gregos* (n 8) when crude oil was misappropriated onboard the vessel during the voyage. The claim was pleaded as one of misdelivery.

<sup>42</sup> As occurred in *The Alhani* (n 7) when the cargo was discharged onto another vessel by ship-to-ship transfer, which was the relevant receiver.

<sup>43</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [76].

<sup>44</sup> *Ibid* [77].

<sup>45</sup> These are outlined by Sir William Blair at first instance. See *Fimbank v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 754–5 [69]–[74].

<sup>46</sup> This was one reason for Sir William Blair concluding that the time bar, on its own terms, applied post-discharge. See n 28.

Lord Justice Males' adherence to the Rules only applying between loading and discharge may also have the effect that the package limitation in art IV, r 5 applies only to causes of action arising during this period.<sup>47</sup>

### Carver Implied Term

In *The MSC Amsterdam*, the English Court of Appeal accepted that, absent an express contrary indication, the Hague (or Hague-Visby) Rules impliedly extended outside the period of responsibility such as to cover the period between discharge and delivery (and between receipt of the goods and loading).<sup>48</sup> This has been coined the 'Carver implied term' based on a passage from *Carver on Bills of Lading*.<sup>49</sup>

At first instance, Sir William Blair in *obiter* said that even if he was incorrect in concluding that the time bar applied outside of the period of responsibility, the Hague-Visby Rules impliedly extended to the period between discharge to delivery, such that the time bar could apply.<sup>50</sup> On appeal, Males LJ in *obiter* expressed 'considerable doubt as to whether it is possible to imply a term to the effect suggested [by the Carver implied term]', and that terms could only be implied in fact or in law, both of which could not be established.<sup>51</sup>

### Conclusion

Lord Justice Males' reasoning is significant for two reasons. First, it clarifies that the Hague and Hague-Visby Rules only apply between the period beginning with loading and ending with discharge. This was in contrast to the Arbitral Tribunal's conclusion that the 'custody' obligation in art II extends post-discharge. Secondly, it clarifies that, notwithstanding this period of responsibility, the time bar in the *Hague-Visby* Rules specifically extends to post-discharge misdeldelivery because of an intention in the *travaux préparatoires* to broaden the time bar to misdeldelivery. This was in contrast to the reasoning at first instance of Sir William Blair, who held that the broad interpretation afforded to the time bar, and the lack of needing to make 'fine distinctions' as to when discharge occurred, warranted the time bar, on its own terms, applying post-discharge. The effect of Lord Justice Males' reasoning is that time bar in the Hague Rules may only apply to a delivery occurring before or simultaneous with discharge.

While the Court of Appeal, Sir William Blair, and the Arbitral Tribunal all concluded that the time bar in the Hague-Visby Rules applied post-discharge, the reasons for coming to that conclusion was different at each stage of the proceedings. An appeal to the United Kingdom Supreme Court may very well be on the cards.

<sup>47</sup> See also *The MSC Amsterdam* (n 8).

<sup>48</sup> *Ibid* 629 [23] (Longmore LJ, Lloyd LJ and Tuckey LJ agreeing).

<sup>49</sup> Francis D Rose and FMB Reynolds (eds), *Carver on Bills of Lading* (Sweet & Maxwell, 2022) 666–7 [9-135].

<sup>50</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] 1 All ER (Comm) 736, 759 [94].

<sup>51</sup> *FIMbank plc v KCH Shipping Co Ltd* [2023] EWCA Civ 569, [86].