Michaelmas Term
[2024] UKSC 38
On appeal from: [2023] EWCA Civ 569

JUDGMENT

Fimbank Plc (Appellant) *v* KCH Shipping Co Ltd (Respondent)

before

Lord Hodge, Deputy President
Lord Sales
Lord Hamblen
Lord Leggatt
Lord Richards

JUDGMENT GIVEN ON
13 November 2024

Heard on 17 and 18 July 2024

Appellant
Christopher Smith KC
Helen Morton
(Instructed by Campbell Johnston Clark Ltd (London))

Respondent
Simon Rainey KC
Matthew Chan
(Instructed by Reed Smith LLP (London))

LORD HAMBLEN (with whom Lord Hodge, Lord Sales, Lord Leggatt and Lord Richards agree):

Introduction

1. The international carriage of goods by sea is almost invariably governed either by the Hague Rules, a 1924 international convention for the unification of rules of law relating to bills of lading, or the Hague Visby Rules, the Hague Rules as amended by the 1968 Brussels Protocol (the "Protocol"). The Hague or Hague Visby Rules have been ratified by more than 95 states across the world. Where not compulsorily applicable, they are widely contractually incorporated into bills of lading, charterparties and other contracts of affreightment, often through a clause paramount.

2. Both the Hague Rules and the Hague Visby Rules provide in article III, rule 6 that the carrier will be discharged from "all liability" unless suit is brought within one year of the delivery of the goods or the date when they should have been delivered. The central issue on this appeal is whether this one year time limit applies to claims which arise after discharge of the goods from the vessel and specifically to misdelivery claims. Misdelivery occurs where the carrier delivers the goods without production of the bill of lading to a person not entitled to receive them.

3. Although the contract of carriage in the present case was governed by the Hague Visby Rules, it is common ground that the principal issue to be addressed on the appeal is whether the one year time limit in article III, rule 6 of the Hague Rules applies to the claims. If it does, then article III, rule 6 in the Hague Visby Rules, which is more widely expressed, necessarily does so. If it does not, then the issue is whether the amendments made to article III, rule 6 by the Protocol extend the application of the one year time limit to such claims.

Factual background

4. The claim for misdelivery relates to a cargo of approximately 85,510 mt of steam (non-coking) coal (the "Cargo"). The Cargo was shipped aboard the vessel "GIANT ACE" (the "Vessel") at East Kalimantan, Indonesia, for carriage to, and discharge and delivery at, Indian ports, under 13 bills of lading (the "Bills of Lading") all dated either 4 or 14 March 2018.

5. The cargo claimant and appellant is a bank incorporated in Malta (the "Bank").

6. The carrier defendant and respondent was the demise charterer of the Vessel and the contractual carrier under the Bills of Lading (the "Carrier").

7. The Bills of Lading were on the 1994 Congenbill form and incorporated the terms of a voyage charterparty dated 20 February 2018 between Classic Maritime Inc Ltd and Trafigura Maritime Logistics Pte Ltd (the "Charterparty"). The Charterparty was expressly governed by English law which was thereby made the law applicable to the bill of lading contracts.

8. The Charterparty provided that it would have effect subject to the Hague Visby Rules and that those Rules "shall apply to any bill of lading issued under this charterparty" (clause 13.10). The Hague Visby Rules were thereby incorporated into the Bills of Lading which also on their reverse provided in clause 2(c) that:

> "The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel [or] while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

9. The Cargo was discharged by the Vessel at the Indian ports of Jaigarh and Dighi between 1 and 18 April 2018 against a letter of indemnity and without production of the Bills of Lading.

10. The Cargo had been purchased by the Bank's customer and borrower, Farlin Energy & Commodities FZE ("Farlin"), between April and June 2018 with financing provided by the Bank. Farlin then sold it to various sub-buyers. The Bank alleges that it took security by way of a pledge of the Bills of Lading and thereby became the holders of the Bills of Lading with rights of suit under the Carriage of Goods by Sea Act 1992. The Bank further alleges that it was unable to collect payment for the cargo or of the financing provided for Farlin's purchase of the Cargo.

11. The Bank's case is that the Carrier misdelivered the Cargo to persons who were not entitled to receive it, without presentation of the original Bills of Lading. It further

alleges that such misdelivery took place after discharge; this is not accepted by the Carrier but is assumed to be factually correct for the purposes of this appeal.

12. The Carrier's case is that the Bank's claim is time-barred as suit was not brought within the one year time limit provided in article III, rule 6 of the Hague Visby Rules. Its defence has not yet been served pending the outcome of these proceedings and the determination of the time bar question.

The proceedings

13. The Bank commenced arbitration proceedings against the Carrier on 24 April 2020, claiming damages for misdelivery of the Cargo. This was more than 12 months after the Cargo was delivered or should have been delivered within the meaning of article III, rule 6 of the Hague Visby Rules.

14. In January and February 2021 the arbitral tribunal, consisting of Ms Julia Dias QC (now Dias J), Sir Bernard Eder (formerly Eder J) and Mr Timothy Young QC (the "Tribunal"), ordered the determination of a number of preliminary issues, including the questions (i) whether article III, rule 6 of the Hague Rules or the Hague Visby Rules applies in principle where delivery of the cargo only occurs after discharge and (ii) whether the claim was time-barred. Following a hearing in July 2021, the Tribunal issued a Partial Final Award dated 1 September 2021 answering both questions affirmatively.

15. Permission to appeal was granted on 22 December 2021 by Butcher J in respect of the following questions of law:

> (1) Whether article III, rule 6 of the Hague Visby Rules applied to claims for misdelivery of goods after the goods have been discharged from the vessel; and
>
> (2) Whether clause 2(c) of the 1994 Congenbill form operates to exclude the operation of the article III, rule 6 time bar.

16. The appeal was heard on 28 July 2022 before Sir William Blair sitting as a judge of the King's Bench Division. He gave judgment dismissing the appeal on 28 September 2022: [2022] EWHC 2400 (Comm); [2023] 1 All ER (Comm) 736. He granted permission to appeal from his decision to the Court of Appeal.

17. That appeal was heard on 25 and 26 April 2023 before Males, Popplewell and Nugee LJJ. In its judgment dated 24 May 2023 the Court of Appeal dismissed the appeal: [2023] EWCA Civ 569; [2023] Bus LR 1464. The lead judgment was given by Males LJ with which Popplewell and Nugee LJJ agreed. In relation to the Hague Rules the court held that article III, rule 6 did not apply to misdelivery after discharge. It reasoned that as article III, rule 6 is a part of the Rules to which the contract is made subject by article II, logically its application cannot extend beyond the scope of the Rules themselves as defined by articles I and II. Otherwise, article III, rule 6 would be "a cuckoo in the Hague Rules nest" (para 49). In relation to the Hague Visby Rules, however, it held that article III, rule 6 did apply to misdelivery after discharge, a conclusion which is "consistent with the language and purpose of the rule, as the *travaux préparatoires* make clear beyond any reasonable doubt" (para 83).

18. The Supreme Court (Lord Hodge, Lord Leggatt and Lord Stephens) granted permission to appeal on 23 October 2023.

The Issues

19. The agreed issues for determination are:

(1) Does article III, rule 6 of the Hague Visby Rules apply to claims for misdelivery of cargo occurring after discharge has been completed?

(2) If so, does clause 2(c) of the 1994 Congenbill form of bill of lading have the effect of disapplying the provisions of the Hague Visby Rules (including the time bar in article III, rule 6) to events occurring after discharge was completed?

(3) If not, does the article III, rule 6 Hague Visby Rules time bar nevertheless apply contractually under the Bills of Lading to claims for misdelivery of cargo occurring after discharge?

The legal framework

The Hague Rules

20. A detailed history of the background to the adoption of the Hague Rules can be found in the article by Michael F Sturley: *The History of COGSA and the Hague Rules*, Journal of Maritime Law and Commerce [1991] Vol 22 at pp 1-32. In summary, they involved an attempt to harmonise and standardise the terms and rules applicable to the international carriage of goods by sea under contracts of carriage covered by bills of lading. They represented a pragmatic compromise between the interests of shipowners and cargo interests. The shipowners' freedom to contract on terms involving a wide variety of liberties and exemption clauses was restricted and they were made subject to defined responsibilities and liabilities and entitled to defined rights and immunities – see, for example, *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807, 836 (Viscount Simonds); *Transworld Oil (USA) Inc v Minos Compania Naviera SA (The Leni)* [1992] 2 Lloyd's Rep 48, 52-53 (Judge Diamond QC); *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 621 (Lord Steyn).

21. The full text of the Hague Rules, as scheduled (with appropriate amendments) to the Carriage of Goods by Sea Act 1924, is appended to this judgment.

22. Article I contains various definitions. These include:

> "(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
>
> …

> (e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

23. Article II provides:

> "Subject to the provisions of Article VI, under 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."

24. The responsibilities and liabilities of the carrier are set out in article III, which provides:

> "1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> > (a) Make the ship seaworthy.
> >
> > (b) Properly man, equip, and supply the ship.
> >
> > (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
>
> 2. 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."

25. Article III, rule 6 provides for notice of loss or damage to be given and its third paragraph contains the one year time bar:

> "Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
>
> 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 the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

26. Article III, rule 8 renders null and void any attempt by the carrier to avoid or lessen the liability for which the Rules provide:

> "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. …"

27. Rights and immunities of the carrier are set out in article IV which identifies the circumstances in which the carrier shall not be responsible for loss or damage. In relation to the obligation of seaworthiness under article III, rule 1, the relevant provision is article IV, rule 1. This is limited to cases in which the carrier discharges the burden of proving that he has exercised due diligence. In relation to the obligation properly and carefully to

care for the goods under article III, rule 2, the relevant provision is article IV, rule 2 which provides a list of general exceptions.

28. Article V allows the carrier to "surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities".

29. Article VII sets out when the carrier is allowed to contract otherwise than as set out in the Rules:

> "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

The Hague Visby Rules

30. A helpful history of the developments leading to the amendments made by the Hague Visby Rules can be found in the influential article by Anthony Diamond QC, *The Hague Visby Rules* [1978] LMCLQ 225. In summary, the Hague Rules had broadly succeeded in producing standardisation of the terms and rules governing bills of lading and in redressing the imbalance which had previously existed between the risks borne by shipowners and cargo interests. Nevertheless, some 50 years after the adoption of the Hague Rules it was considered that it was time that they be reviewed. In 1959 the Comité Maritime International ("CMI") at its conference at Rijeka instructed a sub-committee to study amendments to the Hague Rules. The sub-committee produced a limited number of positive recommendations for possible amendments and suggested that these might be embodied in an additional Protocol to the 1924 Convention. In 1963 the CMI Conference adopted the text of a draft Protocol. This was discussed at the Brussels Diplomatic Conference in May 1967 and February 1968. The leader of the British delegation at that conference was Lord Diplock. A final Protocol was signed on 23 February 1968.

31. No major amendments to the Rules were made by the Protocol. The changes made were to limitation of liability; the availability of the defences and limits of liability provided for in the Rules to claims in tort; the conclusive effects of bills of lading when

transferred to a third party acting in good faith; the time bar and the application of the amended Rules.

32. The amendment made to article III, rule 6 was to the third paragraph of the rule. This now provided:

> "Subject to paragraph 6*bis* 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. This period may, however, be extended if the parties so agree after the cause of action has arisen."

33. Paragraph 6*bis* allowed for a longer time limit in prescribed circumstances in actions for an indemnity against a third person.

The approach to the interpretation of the Hague and Hague Visby Rules

34. The proper approach is set out in *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2021] UKSC 51; [2021] Bus LR 1678 at paras 34 to 42. In summary:

(1) International conventions should in general be interpreted by reference to broad and general principles of interpretation rather than any narrower domestic law principles.

(2) The relevant general principles include article 31.1 of the Vienna Convention on the Law of Treaties 1969 which provides: "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."

(3) They also include article 32 of the Vienna Convention which provides that recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" in order "to confirm the meaning" or "to determine the meaning" when it is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".

(4) Regard may therefore be had to the travaux préparatoires ("the travaux") as a supplementary means of interpretation of the Hague Rules.

(5) In considering the object and purpose of the Hague Rules it is appropriate to have regard to their history, origin and context.

(6) It may also be appropriate to have regard to the French text of the Rules, as this is the official and authoritative version.

(7) International conventions should be interpreted in a uniform manner and regard should therefore be had to how they have been interpreted by the courts of different countries. This will be particularly important if there is shown to be a consensus among national courts in relation to the issue of interpretation.

Issue 1: Does article III, rule 6 of the Hague Visby Rules apply to claims for misdelivery of cargo occurring after discharge has been completed?

35. As was common ground, in order to answer this question it is first necessary to consider whether article III, rule 6 of the Hague Rules would apply to such claims. This will be addressed under the following headings: (1) Ordinary meaning: (2) Context; (3) Object and purpose; (4) The travaux; (5) The English authorities; (6) International case law, and (7) Textbooks and commentaries.

(1) Ordinary meaning

36. The critical provision is the third paragraph of article III, rule 6 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."

37. As a matter of language, there are a number of indicators that this provision is intended to be of wide application.

38. First, it is introduced by the phrase “In any event”. This indicates that the time bar is to apply in any and every case. This is supported by the French text: “en tout cas”.

39. Secondly, it is to apply to “all liability”. This indicates that the time bar applies to any liability, however it may arise, and is not limited, for example, to liabilities arising under the Rules. As such, the time bar is not just a feature of the Hague Rules obligations and is not inextricably tied thereto. This suggests a broader purpose.

40. Thirdly, it does not refer to loss or damage to the goods but to claims “in respect of” loss or damage. This indicates that it is not limited to physical loss or damage to the goods but covers loss or damage which is related to those goods, such as claims for financial loss.

41. Fourthly, the effect of the time bar involves absolute finality. “All” liability is “discharged”.

(2) Context

42. The immediate context of the time bar provision is that it appears in a rule which is focusing on what is to happen at and from the time of “delivery” of the goods. In many cases delivery will take place after discharge of the goods from the vessel. This rule recognises the significance of the difference between delivery and discharge as it is the only rule which refers to “delivery” as opposed to “discharge”.

43. Delivery relates to the transfer of possession of the goods to the person entitled to receive them and marks the completion of the contract of carriage under the bill of lading. Discharge relates to a physical operation. Such an operation is different conceptually and often in time to delivery.

44. Delivery has a particular significance in the context of carriage of goods by sea and indeed any bailment. The carrier acknowledges in the bill of lading the apparent order and condition of a stated quantity of goods on shipment (see article III, rules 3 and 4). Delivery of a lesser quantity of goods or of goods which do not reflect their acknowledged apparent order and condition is a prima facie breach of the contract of carriage. The rights in respect of such a breach arise at the time of delivery and it is then for the carrier to show that there has been no breach of duty or none for which it is contractually responsible. It is not necessary for the cargo owner to aver how loss or damage has been

caused to the goods or when it occurred. It has a cause of action as a result of the goods not being delivered in the quantity or apparent order and condition acknowledged by the bill of lading. Given that legal context, it is entirely understandable that any time limit should be centred on and run from the time of delivery and be linked to the fact of short or damaged delivery, not the precise cause thereof.

45. The importance of delivery is emphasised in the other parts of rule 6. The first paragraph of the rule deals with giving notice of loss or damage to the goods before or at the time of delivery. Unless such notice is given the receipt of the goods is prima facie evidence of delivery of them as described in the bill of lading. Since delivery often occurs after discharge, in many cases the need to consider giving a notice, the giving of a notice and the deadline for so doing will relate to a period of time subsequent to discharge. This is necessarily the case in relation to the reference in the first paragraph to the giving of a notice in respect of loss or damage which is not apparent within three days of delivery.

46. The second paragraph relates to joint surveys or inspections. Again, this may often occur after discharge of the goods. Indeed, this is borne out by the fourth paragraph which concerns the giving by the carrier and the receiver of reasonable facilities for inspection and tallying of the goods. The receiver will only be in a position to give such facilities after the goods have been discharged.

47. Since the subject matter of rule 6 as a whole is delivery rather than discharge, and, in many cases, what is to be done after discharge, it supports an interpretation of the time limit in paragraph 3 by which it can apply to events after discharge and up to and including delivery.

48. Mr Christopher Smith KC for the Bank submitted that the reason that rule 6 refers to delivery is that in many cases a receiver is unlikely to know whether there is a need to give notice of loss or damage or bring suit until delivery occurs. It is therefore a sensible time deadline to impose. Even if that be so, it does not detract from the fact that the rule is regulating what is to be done after discharge and the consequences thereof, nor does it adequately reflect the contractual importance of delivery.

49. Turning to the wider context, Mr Smith's key submission was that the period of responsibility provided for under the Rules is limited to the period between the commencement of loading and the completion of discharge and that the time bar equally relates and relates only to breaches of duty which occur during that period of responsibility.

50. Mr Smith relied on the fact that article I(b) defines a "contract of carriage" as being one that only relates to "the carriage of goods by sea" and that the "carriage of goods" is defined in article I(e) as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

51. He then stressed that article II provides that in relation to "every contract of carriage of goods by sea" the carrier is to be subject to the responsibilities and liabilities, and entitled to the rights and immunities, which are set out in the Rules "in relation to the loading, handling, stowage, carriage, custody, care, and discharge of" the goods. He submitted that this clearly sets out the beginning and the end of the carrier's responsibility under the Rules by reference to loading and discharge.

52. He further submitted that this is borne out by article VII under which the carrier or shipper can contract out of the Rules in respect of the care of the goods "prior to the loading on and subsequent to the discharge from" the ship. This confirms that article III, rule 8, which renders null and void terms which avoid or lessen the carrier's liability, only applies during the period from loading to discharge.

53. In summary, he submitted that articles I and II define the scope of the Hague Rules. Article I provides that the Rules apply to the carriage of goods by sea, beginning with loading and ending with discharge. Article II provides that the responsibilities, liabilities, rights and immunities contained in the Rules (that is to say articles III and IV) apply to loading, discharging and everything in between – but not to the period before or after that period of responsibility. There is nothing in the wording of those provisions, or any others in the Rules, which indicates that the scope of the Rules extends beyond discharge, and this is confirmed by the terms and scope of operation of article VII and article III, rule 8.

54. I agree with much of Mr Smith's submissions. In particular, I agree that the Hague Rules set out what has been generally referred to as a "period of responsibility" during which the carrier is subject to minimum responsibilities and liabilities, which cannot be reduced, and entitled to maximum rights and immunities set out, which cannot be increased. During that period there can be no avoidance or lessening of such liabilities – article III, rule 8. After that period there may be – article VII. This is permissible under article III, rule 8 as that rule only applies "otherwise than as provided in these Rules" and article VII does so provide. I also agree that that period of responsibility begins with the commencement of loading and ends with the completion of discharge. Those operations bookend the period of responsibility.

55. Where I disagree with Mr Smith is in his assertion that the Rules are only concerned with that period of responsibility. As discussed above, it is clear, for example, that article III, rule 6 is concerned with the period up to delivery, including events which occur after discharge.

56. Similarly, article III, rule 3, which concerns the carrier's obligation to issue a bill of lading where goods have been received into its charge prior to shipment, is concerned with the period prior to loading and events during that time. It provides for the issue of a "received for shipment" bill which acts as a receipt for the goods before loading and shipment on board the vessel. It states: "After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading …". It therefore provides for an obligation on the carrier which arises from receipt, not loading. Rule 4 deals with the effect of such a bill as *prima facie* evidence of receipt.

57. Article III, rule 7 then provides for the issuance by the carrier upon the loading of the goods of a 'shipped' bill of lading in replacement of any 'received for shipment' bill of lading provided in accordance with Rule 3: "After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading […]".

58. A different example of the Rules being concerned with matters outside the period of responsibility is article III, rule 1 which imposes an obligation on the carrier to exercise due diligence to make the ship seaworthy "before" the voyage. This will often relate to what is or is not done prior to loading and is an obligation "independent of time" – per Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, 416.

59. Turning to article III, rule 6, its reference to "all liability" is clearly capable of applying to liabilities which arise otherwise than by reason of the breach of the Rules and, if so, to liabilities which may not be confined to the period of responsibility under those Rules.

60. Whilst the Bank does get some assistance from the general structure and content of the Rules and their identification of a period of responsibility, I do not consider that this is determinative given, in particular, the wider application of some rules, including article III, rule 6 within which the time bar is placed. Nor is this inconsistent with article II. This does not apply to the operations identified therein but "in relation to" them. This allows for a penumbra around the period of responsibility during which other rules may apply.

61. For completeness, I should record that I reject the submission of Mr Rainey KC for the Carrier that the time bar in article III, rule 6 does not fall within the "responsibilities and liabilities" or "rights and immunities" referred to in article II. I consider that it is clearly a right or immunity to which the carrier is entitled, albeit it is of a different nature to the main rights or immunities set out in article IV, such as the general exceptions in article IV, rule 2. I also do not accept Mr Rainey's submission that the rights and immunities referred to in article II are only those set out article IV. Whilst it is correct that the general scheme of the Rules is that responsibilities and liabilities are set out in article III and rights and immunities in article IV, this is not exclusively so. Article III, rule 5, for example, expressly confers on the carrier a "right" to an indemnity in respect of loss or damage suffered as a result of inaccurate particulars furnished by the shipper for the bill of lading.

62. I should also add that, as Mr Rainey accepted, a consequence of so interpreting the Rules is that it would be possible for a different time limit to be agreed for claims arising after discharge, since after the period of responsibility ends it is article VII rather than article III, rule 8 which applies. Given the wide international recognition and acceptance of a one year time limit for claims against a sea carrier, it is unlikely that there will be many cases where a different time limit is sought or agreed.

(3) Object and purpose

63. As with any time bar, the main object and purpose of the article III, rule 6 time bar is finality. It ensures that the need for factual investigation is identified reasonably close in time to the events which have to be investigated. It also ensures that once the deadline has passed accounts or books can be closed.

64. This object and purpose is best met if all related claims are covered by the time bar. It makes little sense, for example, to have a time bar for claims for breach of the Rules, but not for contractual or tortious claims based on the same or substantially the same facts. It also makes little sense to have a time bar which applies to some claims arising out of the carrier's care and custody of the goods, but not to other such claims, particularly where the dividing line will turn on factual niceties such as precisely how or when discharge has been completed. An all-embracing time bar regime serves that object and purpose much better than a split regime.

65. The practical difficulties arising out of the operation of a time bar dependent upon the completion of discharge and how they would undermine the purpose of a time bar was a point highlighted by the Tribunal. As they stated:

"126. … many, indeed most, deliveries will be at some point after discharge over the ship's rail: goods may be put into the stevedore's warehouse or customs control and delivery to the receiver will be made from there sometime later. Of course, the receiver may have his own designated stevedore and warehouse in the port or he may have a special agency relationship with the stevedore, so that delivery to the stevedore *is* delivery to the receiver. But these are matters outside the control, and often outside the knowledge, of the carrier. It would, in our view, be odd if the critical distinction (for present purposes and for the purposes of the carrier being able to 'close his books') were to be dependent on such unknown serendipities. There is no obvious analytical reason why it should and, in our view, no sound commercial reason since the receiver has control over when and how he surrenders his bill of lading and how he organises the receipt of goods ashore. He knows full well when delivery should have been given, whereas the carrier will often be unaware of such matters, but still anxious to 'close his book' after the relatively generous one year limitation period found in article III, rule.6.

127. There is a related issue on Mr Berry's case [for the Bank] of how long a period after discharge over the ship's rail is critical to the operation of the time bar if, as he accepted, precise concurrency is not required. In one sense, save in the case of the receiver using his own tackle and taking delivery from the ship's hold, every discharge involves goods passing over the ship's rail and a delivery of them to a receiver sometime after. Mr Berry did not suggest that a short period of time (from ship's rail to dock floor) would take the case outside the embrace of article III, rule 6. So, if a short period is not enough but, as Mr Berry must say, a longer period does take the case outside article III, rule 6, how long is that period? Where the goods are taken from the ship's crane into a truck operated by the port and then transported to a warehouse within the port and so on according to the particular circumstances of the receiver and/or in the port organization, there is a host of possibilities and distinctions. However, we can see no sound objective reason for applying fine distinctions to identify *when exactly* there is the watershed for the application or disapplication of article III, rule 6. There are, in our view, very

> powerful reasons for not involving fine distinctions, not least in the light of the object of the Rules…"

66. The practical importance of an all-embracing time bar was also emphasised by the Tribunal:

> "134 … misdelivery post discharge should have no special effect taking it outside the scope of article III, rule 6 of the Hague Visby Rules. Quite the reverse; it may generate a consistent 'whole' which does not descend into overrefined detail whereby a claim might be held to be time-barred if no positive assertion is made that the carrier has in fact delivered 'lost' cargo to someone else, but time-barred if such a positive assertion is made. There is nothing in article III, rule 6 which dictates that its application is dependent on what specific allegations are made or when they are made. It would be odd if a general allegation of loss out of time could be converted into a timeous allegation by the addition (perhaps later) of a plea of misdelivery. After all, article III, rule 6 is concerned with (and only with) whether 'suit' is commenced, not what the allegations are".

67. A further way in which finality is undermined with specific reference to misdelivery claims was highlighted in the discussions leading up to the amendments made by the Protocol to article III, rule 6. Where delivery is not given against presentation of a bill of lading, the carrier will almost invariably be provided with a letter of indemnity or similar guarantee. The sub-committee which produced the draft protocol noted that a "recurrent practical problem" was how long a person who provided such an indemnity or guarantee had to keep it open. It stated that a fixed time limit for misdelivery claims would be both "useful and practical", would have the "great advantage" of addressing this problem and would be in the interests of cargo owners and their insurers (Report of CMI Sub-Committee on Bill of Lading Clauses (1959) as published by the CMI Stockholm Conference (1963), p 77). This illustrates how the time bar should not be seen as being solely in the interests of the carrier. All parties concerned may benefit from finality.

(4) The travaux

68. Mr Smith relied, in particular, on the discussions relating to the use of the words "discharge" and "delivery":

(1) During the First Plenary Session in October 1923 the sub-committee considered the scope of the Rules when considering article I(b). One delegate, Mr Sindballe, "recalled that he had earlier proposed that the carrier would be held responsible for the goods until delivery". However, he did not repeat this proposal because "he saw no chance of having it adopted" (at p 118 of the travaux published by the CMI).

(2) Article I(e) had been the subject of a lengthy discussion during the earlier Conference in October 1922. The initial proposal was that it should cover the period from loading of the goods to delivery, although the word "delivery" was used to mean "delivery from the ship" as opposed to delivery at a later point (p 137). There was then a debate about the use of the word "delivery", and instead it was agreed the word used would be "discharged" (pp 138-139). In the context of that wording, there was a specific debate about the fact that in some jurisdictions the carriage of goods lasts until delivery to the consignee. During a later discussion the Chairman noted at p 140 that this varied across different jurisdictions and made it clear that "it had not been intended in this international convention to consider anything other than the time the goods were on board the ship". He went on to state that "as discharge precedes delivery and as article 3(4) dealt only with the voyage on board the ship, up to the time of discharge, any claim for later damages would have to be made under general law, national legislation or special conventions, the draft convention having nothing to do with these cases."

(3) The original (1921) wording proposed for article VII would have allowed carriers to exempt liability "subsequent to the unloading from the ship" (p 668). This was changed in 1922 to "subsequent to delivery from the ship" (p 669) and the text adopted was then changed to "subsequent to discharge" (p 669). During the discussion of article VII one delegate, Mr Rudolf, asked whether this provision was necessary given that "[i]n the definition the whole spirit of this Code is dealing with carriage of goods from the time when the goods are received on the ship's tackle till the time they leave the tackle." Sir Norman Hill, the Secretary of the Liverpool Steam Ship Owners' Association, answered that if a through bill of lading was at issue, it needed to be made "perfectly clear that the same document, the same bit of paper, will serve two purposes. One covers a contract of carriage, the whole of which comes under this Code. Other clauses in that same bit of paper cover operations which are entirely outside the Code." The Chairman agreed, noting that "[w]e are embarking on an uncharted sea, and it is better to get such certainty as can be secured" (pp 668-669).

69. Mr Smith submitted that these excerpts from the travaux show that the clear intention of the Rules was to create a regime that applied to, and only to, the period beginning with loading and ending with discharge. The intention of those involved in drafting the Hague Rules was that the carrier should be subject to the responsibilities, liabilities, rights and immunities of the Rules when they are carrying goods by sea and not when they are, for instance, a bailee of cargo stored ashore after discharge.

70. These passages confirm what I have already accepted, namely that the intention was that there should be what has become known as a "period of responsibility" during which the carrier is subject to the minimum responsibilities and liabilities and entitled to the maximum rights and immunities set out in the Rules, commencing on loading and ending on discharge, outside of which the carrier would enjoy freedom to contract. They do not, however, address the issue of whether no Rules should apply outside that period, still less whether the article III, rule 6 time bar should do so.

71. In relation to the time bar, the main debate was as to the length of the period. Given the historical context, the fixing of a one year limit was seen as a "big win" for cargo interests. As such, it would have been perceived to be in their interests for its application to be as all-embracing as possible. As to that, there are indications to support such an intention. So, for example, in the International Law Association 1921 Conference Lord Phillimore queried the Rule 6 text which was adopted and suggested:

> "I think it ought to be put in some quite different way (I have not thought how) to show that it is a contract by the shipper that he will not sue after 12 months. I think the real way to put it is something of this sort: 'and the consignee undertakes to make no claim unless he brings it within 12 months' - something of that kind."

72. The objectives which article III, rule 6 sought to achieve were helpfully summarised by Judge Diamond QC in *Transworld Oil (USA) Inc v Minos Compania Naviera SA* [1992] 2 Lloyd's Rep 48 (*"The Leni"*) as follows (at p 53):

> "The purpose of the Hague Rules was to achieve a balanced compromise between the interests of cargo-owners and the interests of the carriers. There were a number of objectives which article III, rule 6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims;

> second, to achieve international uniformity in relation to prescription periods; third, to prevent carriers from relying on 'notice-of-claim' provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year".

(5) The English authorities

73. With regard to its ordinary meaning, a number of English authorities have emphasised the width of the wording of article III, rule 6.

74. In relation to the phrase "in any event", in *Parsons Corpn v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 All ER (Comm) 24 Tuckey LJ stated as follows in relation to the same expression used in article IV, rule 5 (at para 38):

> "I think the words 'in any event' mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning."

75. In *Daewoo Heavy Industries v Klipriver Shipping (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451; [2003] 1 All ER (Comm) 801 another case concerning article IV, rule 5, Longmore LJ stated as follows (at para 16):

> "Once the problem is treated purely as a question of construction the words 'in any event' become very important. Their most natural meaning to my mind is 'in every case'".

It should, however, be noted that he referred for support to the French text of "en aucun cas" (the French text for article III, rule 6 being "en tout cas").

76. In relation to the words "all liability", in *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 WLR 138 *("The New York Star")*, which concerned a clause in a bill of lading that was in substance identical to article III, rule 6, Lord Wilberforce stated as follows (at p 145):

> "Clause 17 is drafted in general and all-embracing terms … It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort — 'all liability' means what it says."

77. In relation to the words "in respect of loss or damage", in *Cargill International SA v CPN Tankers (Bermuda) Ltd (The Ot Sonja)* [1993] 2 Lloyd's Rep 435 (a case on section 3(6) of the United States Carriage of Goods by Sea Act 1936, which is the counterpart of article III, rule 6 of the Hague Rules) the Court of Appeal held (at pp 443-444), following *Goulandris Brothers Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, that the words "loss or damage" referred to any loss or damage related to the goods, and were not limited to physical loss or damage.

78. As to the absolute nature of the "discharge" of liability under article III, rule 6, in *Aries Tanker Corpn v Total Transport Ltd* [1977] 1 WLR 185 (*"The Aries"*) the House of Lords held that it is a time bar of a special kind which extinguishes the claim. After the expiry of the one year the claim ceases to exist and cannot be introduced for any purpose into legal proceedings, whether by defence or set off or in any way whatsoever (see the speech of Lord Wilberforce at p 188 C-G).

79. With regard to context, there are a number of authorities in which reference has been made to the carrier's period of responsibility under the Hague Rules as commencing on loading and completing on discharge.

80. In *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432 Wright J (at p 434) referred to the Hague Rules "period of responsibility" and observed that "[t]he word 'discharge' is used, I think, in place of the word 'deliver', because the period of responsibility to which the Act and Rules apply (article I (e)) ends when they are discharged from the ship."

81. In *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 Devlin J held that in that case the loading operation as a whole was governed by the Hague Rules, observing (at p 416) that loading is "the first operation in the series which constitutes the carriage of goods by sea; as 'when they are discharged' denotes the last."

82. In *The Arawa* [1977] 2 Lloyd's Rep 416 Brandon J observed (obiter) that under the Hague Rules "[t]he sea carriage is defined as … ending with their discharge from, the ship … (article I definitions (d) and (e))" (p 424) and that "the liability of the carrier for

loss of or damage to the goods before the beginning, or after the end, of the sea carriage … is not governed by the rules at all" (p 425).

83. All these general statements are, however, consistent with there being a period of responsibility during which the carrier is subject to the minimum responsibilities and liabilities and entitled to the maximum rights and immunities set out in the Rules. They do not address the question of whether this means that none of the Rules operate outside that period or specifically whether the article III, rule 6 time bar does so.

84. With regard to the object and purpose of the article III, rule 6 time bar, there are a number of authorities which emphasise that it is to achieve finality and to enable accounts and books to be closed. For example:

(1) "…. to provide for the discharge of these claims after 12 months meets an obvious commercial need, namely, to allow shipowners, after that period, to clear their books" – per Lord Wilberforce in *The Aries* at p 188.

(2) "The inference that the one-year time bar was intended to apply to all claims arising out of the carriage (or miscarriage) of goods by sea under bills subject to the … Rules is in my judgment strengthened by the consideration that article III, para 6 is, like any time bar, intended to achieve finality and, in this case, enable the shipowner to clear his books" - per Bingham LJ in *Cia Portorafti Commerciale SA v Ultramar Panama Inc* [1990] 3 All ER 967 (*"The Captain Gregos"*) at pp 973 j to 974 a.

85. In *The Ot Sonja* the Court of Appeal held that having a "split regime" of time limits, as opposed to one where the scope of the limitation provisions is co-extensive with the carrier's liabilities, would be "repugnant" to the purpose of the time bar clause (see the judgment of Hirst LJ at p 444, accepting counsel's arguments at p 443).

86. With regard to the scope of the application of article III, rule 6, in *The Ot Sonja* it was held that it applied to goods which were never in fact loaded on the vessel – ie to goods which never came within the carrier's period of responsibility under the Rules. In that case it was alleged that the vessel presented for loading with tanks that were dirty and unsuitable for the carriage of the cargo and that this necessitated the cleaning of the vessel's tanks and consequent delay which caused the claimant financial loss and expense, including in respect of goods which were not loaded due to the delay. The court held that the claim was time-barred. As Hirst LJ stated (at p 444):

> "Where, as is alleged here, goods destined for the vessel were not loaded due to the delay, it seems to me that any resulting loss or damage is manifestly 'in relation to goods', seeing that, adopting Devlin J's test in the *Adamastos* case, it arises in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods."

87. Similarly, in *Linea Naviera Paramaconi SA v Abnormal Load Engineering Ltd* [2001] 1 All ER (Comm) 946 ("*The Sophie J"*) it was held that the time bar applied to a claim "in respect of events occurring before loading begins" (per Tomlinson J at para 15). In that case a claim was brought in respect of idle time of equipment and personnel assembled in order to carry out the loading of cranes onto a barge. This was held to be sufficiently closely associated with cargo shipped or intended to be shipped to fall within article III, rule 6.

88. In *The New York Star* a contractual time bar in materially the same terms as article III, rule 6 was held to apply to goods which had been wrongly delivered to thieves without production of the bill of lading after they had been discharged from the vessel. Lord Wilberforce emphasised that the parties' contract "must be interpreted in the light of the practice that consignees rarely take delivery of goods at the ship's rail but will normally collect them after some period of storage on or near the wharf" (p 147 E). In relation to the time bar provision, he stressed the reference to "delivery" and stated that this "shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods" (p 145 C). Having stated that "all liability" means what it says, he concluded that it clearly excluded the claim (p 145 F). Although this case did not involve the Hague Rules period of responsibility, it demonstrates that the wording of article III, rule 6 is apt to cover post-discharge misdelivery claims and, indeed, that this is the paradigm case of misdelivery (as the Tribunal also observed at para 126 of its award cited at para 65 above).

89. That article III, rule 6 applies to misdelivery claims was confirmed by the decision of David Foxton QC sitting as a deputy High Court judge in *Deep Sea Maritime Ltd v Monjasa A/S* [2018] EWHC 1495 (Comm); [2018] Bus LR 1552 (*"The Alhani"*) and was common ground on this appeal. In that case the misdelivery occurred when the carrier discharged the cargo onto another vessel through a ship-to-ship transfer, without production of the bill of lading. Discharge and delivery occurred simultaneously and therefore still within the period of responsibility.

90. Mr Foxton first considered whether by reference to its language and purpose article III, rule 6 is capable of applying to misdelivery claims. He concluded that it "clearly" was. In reaching that conclusion he relied on the following factors (with which I agree):

(1) "The words 'in any event' are wide, and, in the context of article IV, rule 5 of the Hague Rules, the courts have emphasised their width, and rejected arguments that they are insufficient to apply to particular types of breach" (para 42).

(2) "The words 'all liability' are equally wide …. Taken together, the words 'in any event' and 'all liability in respect of loss or damage' are clearly wide enough to encompass liability for delivering the goods to someone not entitled to take delivery of the same" (para 46).

(3) "… the object of finality which it has been held that article III, rule 6 was intended to achieve … would be seriously undermined if the rule did not apply to misdelivery claims. Assuming that there was no applicable contractual limitation period, it would seem to follow … that the prescription period applicable to misdelivery claims would vary according to the proper law of the bill of lading contact and the law of the forum (in particular whether the forum treated issues of prescription as matters for the law of the forum or the lex causae)" (para 48).

(4) It would be undesirable, and contrary to its purpose, for the applicability of article III, rule 6 to turn on fine distinctions between different categories of claim. "The one-year time bar under the Hague (and [Hague Visby]) Rules is an internationally accepted and universally understood condition of claims against carriers for damage to goods during sea transit. The clarity of that position would be substantially undermined if its application turned on such fine distinctions" (para 66).

91. Mr Foxton then considered and rejected an argument that article III, rule 6 is limited in its application to breaches of the Hague Rules obligations. As he stated (at para 61):

> "It is generally recognised that article III, rule 6 is not limited in its applications to claims formulated as an allegation of a breach of the Hague Rules articles, it being well established that a cargo claimant cannot circumvent the limitations and

> exclusions in the Rules by suing the shipowner for the torts of negligence or conversion, or indeed for breach of bailment: *The New York Star* [1981] 1 WLR 138, 145; *Carver on Bills of Lading*, 4th ed (2017), para 9-183. Mr Kenny's submission must, therefore, be qualified as a submission that article III, rule 6 only applies to claims capable of being pleaded as a breach of the Hague Rules, whatever the cause of action actually deployed".

He concluded that misdelivery was such a claim, at least during the period of responsibility. He held that article III, rule 6 applied to all breaches of the carrier's duty which occur during that period "which have a sufficient nexus with identifiable goods carried or to be carried" (para 65).

92. The English authorities are therefore to the effect that as a matter of language article III, rule 6 applies to misdelivery claims and that this accords with the purpose of the rule. The Bank is therefore driven to submit that when considered in context the rule is not to be applied as widely as its language suggests, notwithstanding that so to restrict its scope would undermine the purpose of the rule. Such a submission critically depends on the assertion that the period of responsibility limits the application of all the Rules, including article III, rule 6. I have already set out above why I do not consider that to be correct.

93. Further, if, as the English authorities establish, the language of article III, rule 6 is sufficiently widely expressed to cover claims for misdelivery by the carrier, it would be surprising and anomalous if it did not cover the paradigm case of such misdelivery – ie misdelivery after discharge. This, however, is the necessary consequence of the Bank's case.

(6) International case law

94. The Bank relies on authorities in Malaysia and Australia in support of its case that article III, rule 6 has no application to matters after discharge. While it may be instructive to have regard to the reasoning in such cases, authorities from two countries do not establish an international consensus.

95. The leading Malaysian case is the decision of the Federal Court of Malaysia in *Rambler Cycle Co Ltd v P & O Navigation Co* [1968] 1 Lloyd's Rep 42 ("*Rambler*

Cycle"). In that case it was held that article III, rule 6 did not apply to a claim brought by the shipper of a cargo of bicycles and parts against the carrier for misdelivery after the cargo had been discharged into the harbour board's warehouse. The Lord President of the Federal Court concluded at pp 46-47 that "it seems clear as a matter of construction that para 6 can only refer to claims in respect of loss or damage arising by reason of the provisions of article III and that article III in its turn can only have application within the ambit of the Act as a whole" and that the "Act has no relation to anything that happens to goods after they are discharged from the ship in which they have been carried".

96. As Mr Rainey submitted, critical to the reasoning of the Lord President (with whose judgment the other judges agreed) was his view that the time bar only applies to breaches of obligations set out in the Rules themselves. As a matter of English law, it is well established that its application is not so limited and that the time bar equally applies to breaches of obligations in contract, tort or bailment "which have a sufficient nexus with identifiable goods carried or to be carried" (as stated in *The Alhani*). Wee CJ also considered that the time bar could only apply to the activities set out in article II, which do not include delivery. Again, the English authorities take a different approach. The time bar may apply to claims for misdelivery, to claims in respect of goods which are not loaded, and to events which occur before loading. Nor is there any analysis in the decision of whether there are Rules which apply outside the period of responsibility (as there clearly are) or of the significance thereof. I therefore conclude that the decision is of little assistance.

97. *Rambler Cycle* was followed and applied more recently in *Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd* [2018] MYCA 212; [2018] 6 MLJ 152 at paras 55 and 60, which concerned a claim against the carrier for non-delivery of a cargo of timber. The judgment, however, adds nothing to the reasoning in *Rambler Cycle*.

98. In *Teys Bros (Beenleigh) Pty Ltd v ANL Cargo Operations Pty Ltd* (1989) 2 Qd R 288 (*"Teys"*) cargo was damaged before loading began, while in the carrier's custody. The Supreme Court of Queensland held that the Hague Rules time bar could not be relied on by the carrier, because its liability arose outside and before the period covered by the operation of the Hague Rules. It reasoned that the time bar only applies to liabilities "by virtue of the operation of the rules contained in Article III in respect of the risks contained in Article II" (at p 296). This reflects the reasoning in *Rambler Cycle* that the time bar only applies to breaches of obligations under the Rules. The court also reasoned that the time bar only applies to "so much of the sea carriage which starts with the operation of loading and ends with the discharge of the goods from the ship" (p 296). This is similar to the Bank's argument that all of the Rules apply only to and during the period of responsibility, which I have rejected. The decision that the time bar cannot apply to cargo

damaged before loading is inconsistent with the later English decisions in *The Ot Sonja* and *The Sophie J*.

99. In *Kamil Export (Aust) Pty Ltd v NPL (Australia) Pty Ltd* [1996] 1 VR 538, the Supreme Court of Victoria Appeal Division held that the Hague Rules time bar did not apply in respect of loss and damage to goods occurring after discharge. Marks J (delivering the only reasoned judgment on this issue) considered that the "weight of authority" was to this effect, and cited authorities including *Rambler Cycle* and *Teys*, but did not add to the reasoning in those cases.

100. An Australian case which contains a judgment to contrary effect is *PS Chellaram & Co Ltd v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd's Rep 493 in which the New South Wales Court of Appeal held that a claim for misdelivery after discharge was time-barred. The majority (Gleeson CJ and Samuels JA) held that there was a contractual time bar which was applicable. Kirby P held that the applicable time bar was article III, rule 6 of the Hague Rules. His reasons, with which I agree, were as follows (at pp 515-516):

> "Leaving aside authority on the point, the suggestion that the Hague Rules, and in particular article III, rule 6 should have no application to events occurring after goods go over the ship's rails and are discharged appears on the face of it unlikely given the purpose of the Hague Rules to govern the incidents of sea carriage of goods. The argument is doubly unattractive when the very wide language of discharge from liability referred to in article III, rule 6 is considered. It is most unattractive of all when consideration is given to the practical implications of so holding."

He held that there was no authority which compelled a contrary conclusion and concluded that "I should prefer to adopt the construction which gives the Hague Rules a sensible operation which does not artificially terminate their effect at the ship's rail".

101. In summary there is no international consensus that article III, rule 6 does not apply after discharge and, although the Bank can derive some support from decisions in Malaysia and Australia, their approach differs from that taken by the English courts and none of them addresses the core arguments in this case.

(7) Textbooks and commentaries

102. Neither party suggested that the textbooks and commentaries answer the issue raised on the appeal in so far as it relates to the Hague Rules. Most of the modern textbooks and commentaries concentrate on the Hague Visby Rules time bar.

103. As Mr Rainey submitted, there is some support in the main textbooks at the time of the introduction of the Hague Rules for the view that the essential scheme of the Rules was to impose on the carrier minimum responsibilities which cannot be reduced and maximum exemptions which cannot be increased. This is consistent with the Carrier's case as to how the Rules apply during the period of responsibility.

104. *Scrutton on Charterparties and Bills of Lading* 12th ed (1925: S L Porter KC and William McNair), which edition immediately followed the bringing into effect of the Hague Rules by the Carriage of Goods by Sea Act 1924 ("COGSA"), sets out the position as follows (at p 488, emphasis in original):

> "The general scheme of the Rules is as follows:– Article II provides that in every contract of carriage of goods as defined in article I, with the exception of certain special shipments dealt with in article VI (extended by section 4 of the [1924] Act to the coasting trade therein defined) the carrier shall be subject to the responsibilities and liabilities contained in article III and entitled to the rights and immunities contained in article IV. These articles appear to impose on the carrier certain *minimum* responsibilities, which he cannot reduce, *eg*, to exercise due diligence to provide a seaworthy ship, to load, handle, stow, carry, keep, care for and discharge the goods, and to issue a bill of lading in a particular form, and to throw upon the carrier the liability for the proper and careful conduct of these operations, while giving him certain *maximum* exemptions, which he cannot increase."

105. This has essentially remained the text up to the current, 25th ed (2024: Foxton, Bennett, Berry, Smith, Walsh) where the relevant statement (at para 14-005) is in the following terms:

> "The general scheme of the Rules is as follows: article II provides that in every contract of carriage of goods as defined in article I, with the exception of certain special shipments dealt with in article VI, the carrier shall be subject to the responsibilities and liabilities contained in article III and entitled to the rights and immunities contained in articles IV and IV bis. In the result:
>
> > (i) the articles impose on the carrier certain minimum responsibilities which he cannot reduce, e.g. to exercise due diligence to provide a seaworthy ship and to issue on demand a bill of lading in a particular form;
> >
> > (ii) responsibility for performing other operations may be divided between the carrier and the shipper, charterer or consignee in whatever manner the parties may wish, provided that no term will be effective if it is inconsistent with the main object and intention of the particular bargain. In so far as the carrier does undertake to carry out the operations he must do so properly and carefully;
> >
> > (iii) the articles confer on the carrier certain maximum exceptions, which he cannot increase …"

106. Similarly, the leading alternative textbook until the 1980s, *Carver's Carriage by Sea*, in the 12th edition (1971: Colinvaux), summarised the position as follows (at para 222, in a passage materially unchanged since the 7th edition of 1925):

> "The Act, taking effect from January 1, 1925, has a wide application. Subject to certain exceptions of limited scope noted below, its effect is to introduce into all bills of lading issued in this country certain standard clauses defining the risks to be assumed by sea carriers for the period of the voyage, and defining also certain rights and immunities which sea carriers may enjoy. The risks – the responsibilities and liabilities – to be undertaken by sea carriers are absolute and irreducible. As set out in the rules scheduled to the Act, they become, by law, part of the terms of contract for the carriage of goods by sea

> evidenced by bills of lading. The rights and immunities of sea carriers under the Act, on the other hand, may be surrendered in whole or in part by a clause embodied in the bill of lading.
>
> As a consequence of these statutory liabilities of shipowners being made irreducible, the interests of indorsees of bills of lading who are not parties to the contract for the carriage of goods by sea are protected."

Conclusion on the Hague Rules

107. For all the reasons set out above I conclude that the article III, rule 6 time bar in the Hague Rules does apply to breaches of duty by the carrier which occur after discharge but before or at the time of delivery, including misdelivery. It may equally apply to breaches of duty which occur before loading. In all such cases it needs to be shown that the claim has a sufficient nexus with identifiable goods carried or to be carried.

108. This conclusion is supported, in particular, by the wide wording of article III, rule 6 and its application to breaches of obligation arising otherwise than under the Rules; the immediate context of article III, rule 6 which concerns matters occurring after discharge and focuses on the time and importance of delivery; the wider context of the Hague Rules containing rules which apply outside the period of responsibility; the purpose of the time bar of ensuring finality and enabling accounts and books to be closed; the English authorities on the width of the wording, the purpose of the time bar and on its application outside the period of responsibility; and the fact that if it is intended to apply to misdelivery, as the wording and the English authorities make clear, one would reasonably expect it to apply to the paradigm case of misdelivery – ie after discharge.

109. There is nothing in the travaux, the English authorities, the international case law or the textbooks which calls for, still less compels, a contrary conclusion. There is a defined period of responsibility under the Rules during which there are minimum liabilities and responsibilities and minimum rights and immunities for the carrier, but that does not mean that all the rules concern and operate only during that period. On this issue I therefore disagree with the Court of Appeal. There is no Hague Rules "nest" which requires all the rules to apply only during the period of responsibility.

The Hague Visby Rules

110. If the Hague Rules time bar applies to misdelivery occurring after discharge then the Hague Visby Rules time bar necessarily does so, given its still wider wording. That the Hague Visby time bar was meant to apply to such misdelivery is borne out by a number of matters.

111. First, the wider wording in which it is expressed covering all liability "whatsoever" and "in respect of goods" rather than "in respect of loss or damage". As Bingham LJ observed in *The Captain Gregos* at p 973 j:

> "I do not see how any draftsman could use more emphatic language. It is even more emphatic than the language Lord Wilberforce considered 'all-embracing' in *The New York Star.* Like him, I would hold that 'all liability whatsoever in respect of the goods' means exactly what it says."

112. Secondly, the addition of article IV *bis* which provides:

> "The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort…"

This makes it clear that the application of the Rules is not limited to claims for breaches of obligations under the Rules but extends to all breaches of duty, whether in contract, tort or bailment. This includes misdelivery claims.

113. Thirdly, the travaux make it clear that the reason for broadening the wording of article III, rule 6 was to cover misdelivery, which they referred to as "wrongful delivery". In summary (see also Anthony Diamond QC's article, *The Hague Visby Rules* p 256, fn 88):

(1) The sub-committee appointed in 1959 by the CMI noted that differing views were held as to whether the Hague Rules time bar applied to wrongful delivery claims. It considered that the time bar should so apply, explaining as follows:

> "Were the Convention to contain a rule laying down that a time limit should operate also in respect of claims based upon wrong delivery of the goods such a rule would solve a recurrent practical problem: How long should a person who has received the goods without producing the [bill of lading] and who therefore has had to put a bank guarantee be obliged to keep the guarantee running? If a time limit for the claim is definitely fixed this would also determine the necessary duration of the bank guarantee. The Sub-Committee felt that it would be useful and practical to have a rule on this particular point. One great advantage would undoubtedly be that a bank guarantee given against claims for wrong delivery would be reduced to more reasonable periods and would thus actually operate to the benefit of consignees as well as carriers". (p 77)

It proposed a two year limit for such claims through the addition of the following wording:

> "…provided that in the event of delivery of the goods to a person not entitled to them the above period of one year shall be extended to two years from the date of the Bill of Lading."

(2) The draft was altered partly because of objections to a separate two year time limit and partly to meet the point that "loss or damage" might not cover the wrong delivery of the goods. After further discussion and debate this was changed to a one year time limit for all claims.

(3) At the Opening Plenary Session of 10 June 1963, the United States delegate (Mr Moore) said that the United States: "finds itself in the large majority, which would simplify and clarify the present rule by specifically making the carrier's liability with respect to the goods subject to a limitation as to time, not only as regards loss or damage but in other respects as well".

(4) The drafting was then taken into a further sub-committee with the aim of drafting an amendment "to provide a one year limitation of time to sue in the broadest possible terms" to cover the case of "wrong delivery", with the United States inspired text being ultimately adopted in a meeting on 12 June 1963, against French and Portuguese objections.

(5) At the Final Plenary Session (14 June 1963) the sub-committee's proposal was put to the Conference in these terms: "[…] the Subcommittee moves an amendment to the present text of the Convention, more exactly to the present text of Article III, par 6, relating to the one year period for the entering of claims." Its object was explained as follows:

> "The object of the aforesaid amendment is to give 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, ie even in the case of what we call a wrong delivery".

(6) When the formal approval of the session was sought, the amendment was said to concern "the time limit in respect of claims for wrong delivery" or "prescription en matierè de réclamations relatives à des délivrances à personnes erronées."

114. It is therefore very clear from the travaux that the amendments made were intended to cover claims for misdelivery. In discussions and in drafting misdelivery was referred to in generalised terms. There was no discussion of limiting the categories of misdelivery claim to which the amended rule would apply, still less of excluding the paradigm case of misdelivery. Further, although the possibility of amending the period of responsibility under the rules was raised, it was decided to leave articles I(e) and article VII unchanged. No issue was therefore seen to arise in having a time bar which applied to misdelivery claims and a period of responsibility which continued to be defined by reference to loading and discharge.

115. As Males LJ stated (para 77):

> "If they had intended to limit the new Article III, rule 6 to cases of misdelivery occurring during the carriage by sea (including the discharge operation itself), they could have been expected to say so. There is, however, no indication in the *travaux* that they intended to limit the new rule in this way. On the contrary, the instruction given to the Drafting Committee was 'to prepare and submit a draft amendment to the third paragraph of article III, rule 6 of the Hague Rules, such amendment to provide for a one-year limitation of time to sue in the broadest possible terms', which (it was noted) would 'include the case of wrong

> delivery'. Indeed, as Mr Foxton noted in *The Alhani* at para 70, 'the debate reflected in the *travaux préparatoires* appears to have been as much about whether article III, rule 6 should apply to misdelivery occurring *after* the period of Hague Rules responsibility than [*sic*] whether it should (or did) apply to misdelivery at all'. In choosing a time limit deliberately expressed 'in the broadest possible terms', the drafters plainly intended that the limit should apply to misdelivery even occurring after discharge. It is unlikely in the extreme that they intended the time limit to apply to misdelivery occurring during the voyage or simultaneously with discharge, but not to the typical case of misdelivery occurring after discharge."

116. Fourthly, as the Court of Appeal held, the majority textbook view is that the Hague Visby time bar does apply to misdelivery occurring after discharge. Statements to that effect are set out at paras 80 and 81 of Males LJ's judgment. In a case note on the first-instance Judgment ([2023] LMCLQ 1), which Professor Reynolds (one of the authors of *Carver on Bills of Lading*) considered it "fairly clear" that the Hague Visby time bar was intended to be wider than the original Hague Rules time bar, and that it could therefore be argued that "the wider wording can of itself cover wrong delivery after discharge without any recourse to the previous understanding of the law" (see at pp 5-6). He concluded (at p 6) with the following comments, with which I agree:

> "On the merits it is submitted that the effect of the decisions of the distinguished arbitral tribunal and Sir William Blair is both correct and desirable. If there is to be a time bar it is unsatisfactory if the carrier is protected by it in respect of some claims but not other similar ones. … A point often made is that it was not safe for a carrier delivering the goods without bill of lading but under letter of indemnity to release it and its security before it is clear that all claims against it were barred by limitation. All this of course approaches the matter from the position of carriers. But cargo owners are aware of the time bar and should make inquiries as to whether ships have arrived, and not be entitled to rely on a general time bar of perhaps six years if their goods, about the arrival of which they ought to know or check, have gone astray."

117. I therefore agree with the Court of Appeal's decision that the Hague Visby Rules time bar does apply to misdelivery which occurs after discharge. It does so

notwithstanding that the period of responsibility under the Hague Visby Rules is defined in the same terms as under the Hague Rules. This supports the conclusion reached in relation to the Hague Rules that the period of responsibility under the Rules does not preclude the time bar from operating outside that period.

Issue 2: Does clause 2(c) of the 1994 Congenbill form of Bill of Lading have the effect of disapplying the provisions of the Hague Visby Rules (including the time bar in article III, rule 6) to events occurring after discharge was completed?

118. Clause 2(c) provides:

> "The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel [or] while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

119. The Bank argues that the effect of this clause is to exclude the operation of the Hague/Hague Visby Rules and of the article III, rule 6 time bar. It relies on the Court of Appeal decision in *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWCA Civ 794; [2008] 1 All ER (Comm) 385 in which the applicable bill of lading terms were held to demonstrate an intention that the Rules should not apply after discharge, including the package limitation rule – article IV, rule 5. I agree with the Court of Appeal that this argument should be rejected.

120. First, clause 2(c) is a clause which is clearly intended to protect the carrier and relieve it from liability for loss or damage. It would be counter-intuitive, if not perverse, for it to have the effect of preventing the carrier from relying on an otherwise applicable time bar so as to increase rather than reduce the carrier's liability.

121. Secondly, the clause does not refer to the Hague/Hague Visby Rules, still less to article III, rule 6 or the time bar.

122. Thirdly, the clause is consistent with the Hague/Hague Visby Rules period of responsibility and article VII, which allows for the carrier's responsibility and liability for loss or damage to be reduced or exempted prior to loading and after discharge. As

already held, that does not mean that other rules may not operate outside that period including, in particular, article III, rule 6.

123. Fourthly, the premise upon which this issue falls to be considered is that the clause does not exclude the carrier from liability for misdelivery. If so, there is no reason why the time bar should not apply to such a claim. If the language is not clear enough to exclude liability for misdelivery claims, it is equally not clear enough to exclude reliance on the time bar in relation to such claims.

124. Fifthly, the *MSC Amsterdam* is clearly distinguishable, as the Tribunal and Sir William Blair held. In particular, the bill of lading terms referred to loss "after the end of the Hague Rules period". This was interpreted to mean that the parties did not intend the Hague Rules to apply as a whole after discharge from the vessel – see the judgment of Longmore LJ at para 24. There is no equivalent provision in this case.

125. In agreement with the Tribunal, Sir William Blair and the Court of Appeal, I would therefore reject the Bank's case on clause 2(c).

Issue 3: Does article III, rule 6 of the Hague Visby Rules time bar apply contractually under the Bills of Lading to claims for misdelivery of cargo occurring after discharge?

126. In the light of my conclusion on Issue (1), this question does not arise and it is unnecessary to address it.

Conclusion

127. For all these reasons, I would hold that both the Hague Rules and the Hague Visby Rules time bars apply to claims for misdelivery occurring after discharge. I would therefore dismiss the appeal.

APPENDIX

The Hague Rules
(as scheduled (with appropriate modifications) to the Carriage of Goods by Sea Act 1924)

Article I

DEFINITIONS

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say:

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Article II

RISKS

Subject to the provisions of Article VI, under 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

RESPONSIBILITIES AND LIABILITIES

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy.

(b) Properly man, equip, and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. 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.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

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 the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such

goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a “shipped” bill of lading.8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint or princes, rulers or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Article V

SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article VI

SPECIAL CONDITIONS

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

Article VII

LIMITATIONS ON THE APPLICATION OF THE RULES

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Article VIII

LIMITATION OF LIABILITY

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

Article IX

The monetary units mentioned in these Rules are to be taken to be gold value.