Neutral Citation Number: [2018] EWHC 1495 (Comm)

Claim No: CL-2017-000100

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 June 2018

Before :

David Foxton QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

DEEP SEA MARITIME LIMITED **Claimant**

- and –

MONJASA A/S

Defendant

- -
- -

Nevil Phillips and **Tom Bird** (instructed by **Campbell Johnston Clark**) for the **Claimant**
Stephen Kenny QC and **James Watthey** (instructed by **E.G. Arghyrakis & Co.**) for the **Defendant**

Hearing date: 24 May 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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David Foxton QC (sitting as a Deputy Judge of the High Court):

(1) Introduction

1. This case, which comes before the Court on the Claimant's ("Owners") application for summary judgment under CPR Part 24, raises two important issues in relation to the law of carriage of goods by sea.

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

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

2. The issues arise in proceedings commenced by Owners against the Defendant ("Monjasa") for a declaration that Owners are not liable to Monjasa as regards claims under or in relation to the bill of lading under which the cargo in question was carried. Summary judgment is sought in respect of one only of the grounds on which Owners contend that they are entitled to a declaration of non-liability, namely that any claims have been discharged pursuant to Article III Rule 6 because suit was not brought within the one year period provided for in that Rule.

3. Owners were represented before me by Mr Nevil Phillips and Mr Tom Bird, and Monjasa by Mr Stephen Kenny QC and Mr James Watthey.

(2) The background

4. Owners owned and operated the vessel ALHANI ("the Vessel"), an oil product tanker. By a bill of lading dated 12 November 2011 ("the Bill"), Owners acknowledged shipment on board the vessel of 4,844.901mt of bunker fuel, of which some 499mt was bunker fuel for the Vessel, and the balance ("the Cargo") was the subject-matter of the carrying voyage. Monjasa was the shipper of the Cargo, and the Bill stated the carriage to be from Lome, Togo to Cotonou, Benin; although it is common ground that discharge of the Cargo occurred off-shore Lome. Owners suggested that the Bill had transposed the points of departure and arrival, but Monjasa did not admit this. In the event nothing turned on this issue.

5. Clause 1 of the Bill, printed on the reverse in the usual way, provided:

   "All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and Arbitration Clause are herewith incorporated".

6. The Bill did not further identify the charterparty referred to, but it is now common ground that this was a reference to a time charterparty in amended Shelltime 4 form dated 7 July 2011 ("the Charterparty") between Owners and Unitaes Energy Sources Company Limited ("Unitaes"). By Addendum No. 1 to the Charterparty, a company called Babecca Business Links Limited ("Babecca") agreed to perform the obligations of Unitaes under the Charterparty.

7. Clause 46 of the Charterparty provided:

"THIS CHARTER SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH ENGLISH LAW AND ANY DISPUTE ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT SHALL BE REFERRED TO HIGH COURT IN LONDON, ENGLAND. IN CASES WHERE NEITHER CLAIM NOR ANY COUNTERCLAIM EXCEEDS THE SUM OF UNITED STATED (sic) DOLLARS 50,000 (OR SUCH OTHER SUM AS THE PARTIES MAY AGREE) THE ARBITRATION SHALL BE CONDUCTED IN ACCORDNCE WITH THE LMAA SMALL CLAIMS PROCEDURE CURRENT AT THE TIME WHEN THE ARBITRATION PROCEEDINGS ARE COMMENCED".

8. It is also now common ground that the words in clause 1 of the Bill were sufficient to incorporate clause 46 ("the Exclusive Jurisdiction Clause") in the Charterparty into the Bill.

9. Clause 2 of the Bill provided:

"… (2) General Paramount Clause. The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

(b) Trades where Hague-Visby Rules apply. In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 – the Hague-Visby Rules – apply compulsorily, the prvisions [sic] of the respective legislation shall apply to this Bill of Lading.

(c) 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 inrespect [sic] of deck cargo or live animals".

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

11. Monjasa sold the Cargo to Unitaes under a contract of sale dated 28 October 2011 which contained a retention of title clause. A letter of credit was established in favour of Monjasa in relation to the contract of sale, but payment under that letter of credit was declined due to alleged documentary discrepancies. Monjasa contends that property in the Cargo never passed to Unitaes, due to the operation of the retention of title clause. On 16 November 2011, Babecca entered into a contract to sell the Cargo back to Monjasa (possibly acting as agent for Unitaes). Monjasa's complaint is that it "bought" the Cargo back in ignorance of the fact that property in the Cargo had never passed from it to Unitaes.

12. On 18 November 2011, Owners discharged the Cargo through a ship-to-ship transfer into the "MARIDA MARGUERITE" off Lome, they say under instructions given pursuant to the Charterparty, without production of the Bill. Owners accept that there is an arguable case that the Cargo was not delivered to Monjasa. Monjasa contends that Unitaes could not have purported to sell Monjasa's own property back to if it Unitaes had not been able to take delivery of the Cargo without production of the Bill.

13. Monjasa have commenced four sets of proceedings in relation to the alleged non-delivery of the Cargo.

14. The first set of proceedings was before the Courts of First Instance in Bizerte, Tunisia ("the Tunisian Proceedings"). The Tunisian Proceedings were commenced by a motion for an order for the arrest of the Vessel, which order was granted on 2 April 2012. The Vessel was arrested on 20 April 2012. In addition to the arrest a claim was brought against Owners and the Master. Monjasa asserted that the Tunisian courts had jurisdiction under Article 106 of the Tunisian Maritime Commercial Code and Article 5 of the Code of Private International Law. Owners challenged jurisdiction, but not by reference to the Exclusive Jurisdiction Clause (there being some suggestion that if the Tunisian courts did otherwise have jurisdiction, the Exclusive Jurisdiction Clause would not have been given effect because it was contrary to *ordre publique*). A bank guarantee was drawn up and issued by Owners on 12 December 2012 which I am told provided that the guarantee was only payable on settlement or a final and unappealable decision of a competent Tunisian court. The Tunisian court ordered the release of the Vessel on 6 March 2013. It is clear from Monjasa's motion for an order of arrest that it was aware that there was a charterparty to which Owners were parties, and that the Bill referred to a charterparty. However, it is Monjasa's case that the Charterparty was first disclosed to a court-appointed expert at some point between July and December 2014 and Monjasa says it first saw the Charterparty in January 2015.

15. By a judgment dated 7 July 2015, the Tunisian Court dismissed the substantive proceedings for want of jurisdiction. This decision was not reached by reference to the Exclusive Jurisdiction Clause, but because none of the grounds for establishing Tunisian jurisdiction under the Tunisian Maritime Commercial Code or the Code of Private International Law were made out. The evidence before me was to the effect that this decision was upheld on appeal on 28 November 2016, although no written record of that decision was in evidence. Evidence was adduced at a late stage to the effect that Monjasa had filed a

further Tunisian appeal on 11 May 2018 which is said to be still within time and still pending.

16. Monjasa also commenced proceedings against Owners before the Wuhan Maritime Court in the People's Republic of China. The evidence suggested that Monjasa withdrew its claims against Owners on 18 October 2012 after it had reached a settlement with Unitaes and Huaming (the party who opened the letter of credit) who agreed to pay for the Cargo. When Unitaes and Huaming failed to pay the amount due under the settlement, Monjasa obtained judgment against them, but that judgment is currently under appeal.

17. Monjasa commenced a third set of proceedings by arresting the Vessel at Le Havre in January 2017. The French court ordered Owners to provide security to procure the release of the Vessel from arrest, and ordered Monjasa to commence proceedings before a competent court for substantive relief.

18. Perhaps pursuant to that order, Monjasa sought to commence an arbitration against Owners on 17 February 2017, but has since conceded there is no applicable arbitration clause. In the meantime Owners had on 15 February 2017 commenced the present proceedings, referred to in paragraph 2 above, seeking a declaration of non-liability. Finally Monjasa commenced proceedings in the English High Court on 17 March 2017. Monjasa claimed damages in contract, bailment and conversion against Owners and also sought relief against Unitaes and Babecca. The progress of that action has been slowed by attempts to serve Unitaes and Babecca out of the jurisdiction, leading Owners to bring forward the present application in an attempt to procure an early determination in its favour of both its own proceedings, and Monjasa's claims against them in the "mirror action", on the basis of Article III Rule 6.

19. Monjasa originally advanced a raft of arguments in response, but with his customary tactical acumen, Mr Kenny QC has focussed Monjasa's submissions on its two best (and in reality only) points. The first of those points – the application of Article III Rule 6 – only applied to Monjasa's claim for breach of the obligation to deliver against production of an original bill of lading. The second of those points – that suit had been brought in time – applied to all Monjasa's claims.

(3) The Hague Rules

20. As is well known, the background to the Hague Rules was increasing dissatisfaction with what were seen as the one-sided nature of contractual terms on which cargo was carried by sea and the desire to produce a "package" of terms which would be compulsorily applicable in their sphere of operation. The principal "gain" for shipowners under the Hague Rules regime was the replacement of the absolute obligation of seaworthiness which arose at common law with one of due diligence. The wide variety of exceptions which contemporary bills of lading contained were replaced with the standardised exceptions set out in Article IV Rule 2, which did not operate in cases in which unseaworthiness resulting from the shipowner's lack of due diligence caused the loss. The widely varying package limitation regimes were replaced by a standardised regime in Article IV Rule 5 and (for reasons which I will consider

in more detail) the widely differing contractual time bars which featured in bills of lading were replaced by Article III Rule 6 which provides in relevant part as follows:

> "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".

21. Within their sphere of application, it is not open to the shipowner to contract for any lesser liability than that which the Hague Rules provides. Article III Rule 8 provides:

> "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".

22. It is pertinent to note that arguments as to the scope of the Hague Rules, including, for example, of Article III Rule 6, may entail arguments as to the scope of Article III Rule 8 (with the result that the argument that a particular type of claim against the shipowner should not be subject to Article III Rule 6 because the obligation breached does not form part of the Hague Rule regime may carry with it the consequence that shipowners are free to agree more onerous time bars in relation to a breach of the obligation in question because of the non-application of Article III Rule 8).

23. There are four features, or possible features, of the Hague Rules which should be noted.

24. First, under English law at least, it has been held that the Hague Rules do not have the effect of making the shipowner responsible for the loading or discharge of the goods (that is a matter for the parties' contract), but they do determine the content of the shipowner's contractual obligation if the shipowner is contractually responsible for loading and discharging. As Devlin J famously observed in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 417-418:

> "The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in *Carver's Carriage of Goods by Sea*, 9th ed (1952), p 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were

> intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

25. The issue of what constitutes loading or discharging for the purposes of the Hague Rules is approached in a practical way and, dependent on the parties' bargain, may embrace activities which take place sometime before or after the goods have crossed the ship's rail on loading and discharge respectively. For example, in *Volcafe Ltd and ors v Compania Sud Americana de Vapores SA (trading as CSAV)* [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep. 32, the Court of Appeal held that the stuffing of containers 11 days before they were loaded, and which took place in a different part of the port, constituted "loading" for the purposes of the Hague Rules, Flaux J repeating at [109] Devlin J's observation in *Pyrene* at p.419 that:

> "Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."

26. Second, unless the parties agree to an extended operation, there is a temporal sphere of operation to the Hague Rules, usually referred to as the "period of responsibility", which do not on their own terms apply to activities occurring outside that period of responsibility. This issue arises most frequently in relation to the delivery of goods, where this occurs after the goods have been discharged from the ship (for example where the shipowner discharges the goods into a warehouse where the goods are held to his order). As Longmore LJ noted in *Trafigura Beheer BV and another v Mediterranean Shipping Company SA (The MSC Amsterdam)* [2007] EWCA Civ. 794; [2007] 2 Lloyd's Rep. 622 at [22]-[23]:

> "22. Shortly after the Carriage of Goods by Sea Act 1924 was enacted in the United Kingdom, Wright J in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* (1927) 28 Ll L Rep 88; [1927] 2 KB 432 said of the Hague Rules (at page 102 col 2; page 434):
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> > These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions.

> He then said that under the rules these liabilities rights and immunities were precisely determined and, after quoting article III rule 2, said (at page 103 col 1):
>
> > The 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.
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> 23. It must follow from this that the parties are free to agree on terms other than the Hague Rules (or the HVR) for periods outside the actual period of the carriage. No doubt if no agreement is made for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver …",

27. It was common ground before me that this was a case in which a temporal answer to the application of the Hague Rules – that the Rules did not apply because the breach in question took place at a stage of the contract of carriage when the Hague Rules period of responsibility had come to an end – was not available. This was because the very act of misdelivery to a third party – the ship-to-ship transfer – was also the means by which the Cargo was discharged from the Vessel.

28. Third, it is often suggested (and Mr Kenny QC did suggest) that the Hague Rules obligations are not exhaustive of every obligation which may be owed by a shipowner under a bill of lading contract. Mr Kenny QC argued that one example of a duty owed by the shipowner but not regulated by the Rules is the duty of the shipowner at common law not to deviate. However, the position is more nuanced. Article IV Rule 4 assumes that the duty not to deviate could constitute a breach of the Hague Rules obligations, providing:

> "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 of breach of these Rules *and the carrier shall not be liable for loss or damage resulting therefrom"*.

Further, the italicised words would suggest that, even if the duty to deviate is not a Hague Rules obligation (and I note that Lord Somervell in *G.H. Renton v Palmyra Trading Corporation of Panama* [1957] AC 149 at pp.174-175 thought it was), the Hague Rules nonetheless clearly impact it at least to some extent. The shipowner's duty to proceed with reasonable dispatch is another obligation which may fall into this category, it being suggested in Aikens, Lord and Bools, *Bills of Lading* (2nd ed., 2015) at [10.309] that:

> "the obligation [viz to proceed with reasonable dispatch] is not reflected or encapsulated in the Rules".

Cooke J did not find it necessary to decide whether, if so, the breach was nonetheless subject to the exceptions in Article IV Rules 1 and 2 of the Hague

Rules in *CHS Inc Iberica SAL, CHS Europe SA v Far East Marine SA (The Devon)* [2012] EWHC 3747 (Comm) at [58]. The crux of Mr Kenny QC's case is that the shipowner's obligation to deliver only against production of an original bill of lading is another such obligation which stands outside of the Hague Rules regime entirely, not merely when the obligation falls to be performed outside the Hague Rules period of responsibility, but in all circumstances.

29. Finally, it became common practice to incorporate the terms of the Hague Rules into charterparties, generating a host of issues as to the proper interpretation of the Hague Rules in that context. The resolution of those issues by the courts in turn impacted, to some degree, on the Hague Rules in their original bill of lading habitat. In my view, Mr Kenny QC was almost certainly right to submit that the interpretation of the expression loss and damage in the Hague Rules to encompass purely economic loss without any physical loss or damage was a consequence of the interpretation of the Hague Rules in the charterparty context. (For this principle, and a summary of the authorities, see *Cargill International SA v CPN Tankers (Bermuda) Ltd (The Ot Sonja)* [1993] 2 Lloyd's Rep. 435). This is an example of how the interpretation of the Hague Rules under English law was not fixed in 1924 by reference to some concept of "original intent", but has to some extent developed, in the light of the changing use of the Rules (and, indeed, in their contractual incarnation, changing approaches to contractual interpretation).

30. With that lengthy introduction, I turn to the first of the two issues which arise on Owners' application.

(4) Does Article III Rule 6 apply to claims for misdelivery?

Mr Phillips' argument

31. Mr Phillips' argument was as follows.

32. First, Article III Rule 6 is drafted in general and all-embracing words. The expressions "in any event" and "all liability" are sufficiently broad to cover any breach of the shipowners' obligations under the bill of lading, whatever its nature and however serious. This was particularly so given the modern approach to construction of exclusion or limitation clauses exemplified in cases such as *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57; [2017] AC 73 at [55] (Lord Toulson JSC) and *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [57] (Jackson LJ).

33. Second, an expansive construction of Article III Rule 6 was supported by the purpose of the Rule, which Mr Phillips said was to enable the shipowner to "close its books" (relying on statements to that effect by Lord Wilberforce in *The Aries* [1977] 1 WLR 185 at p.188 and Bingham LJ in *Companía Portorafti Commerciale S.A. v Ultramar Panama Inc. and ors (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310 at p.315).

34. Third, if it was necessary to establish a breach of Article III for the time bar in Article III Rule 6 to apply, then the misdelivery of the cargo was a "clear breach … of Owners' central obligation (as set out in Article III, Rule 2 of the Hague Rules) properly and carefully to load, handle, stow, carry, keep, care for and discharge the cargo" (noting that Monjasa had pleaded that the misdelivery gave rise to a breach of Article III Rule 2 in its Particulars of Claim in the mirror action).

35. Finally, the conclusion that the Article III Rule 6 time bar applied to misdelivery claims was supported by authority, in the form of the decision of the Privy Council in *Port Jackson Stevedoring Pty Limited v. Salmon and Spraggon (Australia) Pty (The New York Star)* [1981] 1 WLR 138; [1980] 2 Lloyd's Rep. 317 and the decision of the Court of Appeal of New South Wales in *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep. 493, in particular in the judgment of Kirby P.

Mr Kenny QC's argument

36. Mr Kenny QC's argument was as follows.

37. First, Article III Rule 6 creates a time bar which only applies to breaches of obligations created by the Hague Rules. Accordingly, it does not apply to a claim for a breach of the shipowners' obligation to deliver only against production of a bill of lading (hereafter "a misdelivery claim"), which obligation does not arise under and is not regulated by the Hague Rules.

38. Second, that there is what Mr Kenny QC described as a "firm understanding" that Article III Rule 6 does not apply to misdelivery claims. In this regard, Mr Kenny QC relied heavily on the *travaux préparatoires* to the amendments effected to the Hague Rules as a result of a Protocol signed by various nations (including the United Kingdom) in Brussels on 23 February 1968 ("the Hague-Visby Rules"). Among various amendments made by the Visby Protocol, Article III Rule 6 was amended as follows:

> "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.

39. Mr Kenny QC submitted that the purpose of the addition of the word "whatsoever" was an attempt to apply the Article III Rule 6 to misdelivery claims (citing Francesco Berlingieri, *The Travaux Préparatoires of the Hague and Hague Visby Rules* (CMI, 1997) pp.307-315: "Berlingieri"). He noted that there had been disagreement between experts in this field as to whether, even as so amended, Article III Rule 6 does apply to misdelivery clams (noting the view of Michael Mustill QC that it did not in (1972) Archiv for Sjørrett 684 and in *Scrutton on Charterparties* (8th ed., 1974) p.460, note 30, and the contrary view of Anthony Diamond QC in [1978] LMCLQ 225 at 226).

40. Third, Mr Kenny QC said that, properly understood, neither *The New York Star* nor the majority judgments in *The Zhi Jiang Kou*, supported the Owners'

argument (and the judgment of Kirby P. was not only a minority judgment, but open to criticism in a number of respects).

The structure of the judgment on this issue

41. I will address the issues raised by both counsel under the following headings:

    i) Approached purely by reference to its language and purpose, is Article III Rule 6 capable of applying to misdelivery claims?

    ii) Is Article III Rule 6 limited in its application to breaches of the Hague Rules obligations?

    iii) Is there a settled understanding that Article III Rule 6 of the Hague Rules does not apply to misdelivery claims?

Approached purely by reference to its language and purpose, is Article III Rule 6 capable of applying to misdelivery claims?

42. In my view, the answer to this question is clearly yes. 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. Thus in *Parsons Corporation and others v C.V. Scheervaartondern Eming (The Happy Ranger)* [2002] EWCA Civ. 694; [2002] 2 Lloyd's Rep. 357 at [38], Tuckey LJ rejected the argument that Article IV Rule 5 did not apply to loss caused by breach of the shipowner's due diligence obligation in relation to seaworthiness, holding:

    "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. A limitation of liability is different in character from an exception. The words "in any event" do not appear in any of the other art. IV exemptions including r. 6 and as a matter of construction I do not think they were intended to refer only to those events which give rise to the art. IV exemptions."

43. In *Daewoo Heavy Industries Ltd and another v Klipriver Shipping Ltd and another (The Kapitan Petko Voivoda)* [2003] EWCA Civ. 451; [2003] 2 Lloyd's Rep. 1, an issue arose as to whether Article IV Rule 5 applied to damage caused by the carriage of cargo on deck contrary to an agreement to carry it under deck. Longmore LJ noted at [16] that:

    "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" (whether or not the breach of contract is particularly serious; whether or not the cargo was stowed under deck). The French wording "en aucun cas" would, I think, support that view. Mr. Justice Hirst in *The Chanda* made no reference to these words at all which is surprising since he purported to treat the question before him as a pure question of construction. On any view they are highly relevant words. Mr.

Hamblen submitted that the phrase was, as he put it, "conjunctive and neutral" and meant no more than "notwithstanding the foregoing". Since the rule foregoing art. IV, r. 5 is art. IV, r. 4 disapplying the strict common law rule about deviation it does not seem to me that Mr. Hamblen's construction particularly advanced the argument."

44. Judge LJ held at [43]:

> "It is not suggested, nor could it be, that art. IV, r. 5, or any part of it, was somehow excluded from the contract. I respectfully disagree with Mr. Justice Hirst that, as the limitation clause was "repugnant to and inconsistent with the obligation to stow below deck", it was "inapplicable". The authorities on which he relied did not justify this conclusion. The limitation clause took effect "in any event". This phrase appears on three relevant occasions, once in connection with the clause creating the time bar, and twice in the limitation clause with which we are concerned. It was suggested that the words should be read to mean, "Notwithstanding the foregoing." I doubt whether this meaning greatly improves the shippers' position, but whether it does or not, "in any event" are simple words, to be read in the context in which they appear, and it would be unwise to attempt to translate these three words into three, or fewer, or more different words. As Lord Justice Tuckey pointed out in *The Happy Ranger*, [2002] 2 Lloyd's Rep. 357:
>
> > ". . . 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.""

45. In *Trafigura Beheer BV & another v Mediterranean Shipping Co. SA (The MSC Amsterdam)* [2007] EWHC 944 (Comm), Aikens J considered the issue of whether a claim for misdelivery was subject to Article IV Rule 5 and held at [104]-[106] that it was:

> "This issue arises on the assumption that the parties have agreed that the HVR regime is to apply as between shipowner and cargo owner after the discharge of the goods from the ocean carrying vessel, but whilst the goods remain in the custody of the shipowner ashore. On that assumption, Article IV(5) must apply to the potential liability of the shipowner 'in any event … for any loss or damage to or in connection with the goods …'. The same interpretation of the words '.in any event' must be given to them whether they appear in the HR, as in *The Kapitan Petko Voivoda,* or the HVR, as in *The Happy Ranger*. The words 'mean what they say', as Tuckey LJ put it in the latter case; that is, they mean 'in every case' as Longmore LJ stated in the former case. So the shipowner is entitled to limit his liability 'in every case' 'for any loss or damage to or in connection with the goods'.
>
> Lord Morton of Henryton pointed out in *Renton & Co Ltd v Palmyra Trading Corp*, that the phrase 'loss or damage to or in connection with goods' as used in Article III(8) of the HR (and the HVR), covers four different situations: loss of goods, damage to goods, loss in connection

with goods and damage in connection with goods. That gives the phrase a very broad scope. In Article IV(5) of the HVR the wording is, if anything, even wider. It refers to 'any' loss or damage etc., and it refers to 'the goods' which must mean the goods the subject of the contract of carriage.

In my view, therefore, if the HVR applied to the period after discharge, then the shipowners' duty under Article III(2) to 'keep and care for' the goods, must have extended throughout that period. By failing to do so, but giving up the goods to someone who was not entitled to take them, the shipowner breached that duty. Such 'misdelivery' is a very serious breach of duty, about as serious as there could be. But it must fall within the phrase 'in any event' in Article IV(5), if that phrase means 'in every case' . And the shipowner's liability must be limited if his liability for misdelivery is one for 'loss or damage … in connection with the goods'. To my mind a shipowner's liability to the cargo owner, whether in contract or conversion, for loss suffered by the latter as a result of misdelivery of the cargo by the shipowner, is obviously a liability for 'loss … in connection with the goods'.

Therefore, if the parties had agreed that the HVR regime continued after discharge of the goods from the ship, I would have held that the shipowner could have relied on Article IV(5) of the HVR to limit liability. It is agreed that the limit of liability is 720,816 SDRs.

The same words appear in the relevant part of Article IV(5) of the HR, although much of the remainder of that Article was radically altered in the later Convention. But it must follow that if I had concluded that the HR governed the contract of carriage and that they had governed the period after discharge, then the shipowner would have been able to limit liability under Article IV(5) of the HR".

It is right to point out that this question was expressly left open by the Court of Appeal ([2007] EWCA Civ 294; [2007] 2 Lloyd's Rep. 622 at [27]). Longmore LJ noted that Aikens J's view on this issue was *obiter*, but "deserves great respect".

46. The words "all liability" are equally wide. In a contractual provision clearly modelled on the Hague Rules, Lord Wilberforce in *The New York Star* [1980] 1 Lloyd's Rep. 317 at p.322 described the words as "general" and "all embracing". 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.

47. In *Compania Portorafti Commerciale SA v Ultramar Panama Inc and others (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310 at 315, albeit when considering Article III Rule 6 in the Hague-Visby Rules, with the addition of the word "whatsoever", Bingham LJ stressed the words "in any event" and "all liability" when finding that the time bar applied to theft of the cargo by the shipowner, stating that he could "not see how any draftsman could use more emphatic language" being "even more emphatic than the language Lord

Wilberforce considered "all-embracing" in *The New York Star"* (i.e. that of the Hague Rules).

48. Further, the object of finality which it has been held that Article III Rule 6 was intended to achieve (in the authorities referred to in [33] above and also by Tomlinson J in *Linea Naviera Paramaconi SA v Abnormal Load Ltd* [2001] 1 Lloyd's Rep. 753 at [19]) 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 from Mr Kenny QC's submission 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 where the forum treated issues of prescription as matters for the law of the forum or the *lex causae*). It also seems implicit in Mr Kenny QC's submissions that it is open to shipowners to contract for a substantially shorter time limit for misdelivery claims than one year, without falling foul of Article III Rule 8. (I return to Mr Kenny QC's argument that the terms of Article III Rule 8 support his argument that Article III Rule 6 does not apply to misdelivery claims below).

49. However, I note from the judgment of His Honour Judge Diamond QC, a noted expert on the Hague and Hague-Visby Rules, in *Transworld Oil (USA) Inc v Minos Compania Naviera SA (The Leni)* [1992] 2 Lloyd's Rep. 48 at 53 that:

> "There were a number of objectives which art. III, r. 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; see also Tetley, Marine Cargo Claims 3rd ed. (1988) p. 671 note 1. After 1924 the only effect of the carefully negotiated and complex "notice-of-claim" provision would concern the burden of proof. The "time-for-suit" provision would replace and standardize the clauses previously contained in carriers' bills of lading".

Mr Kenny QC's submissions would undermine each of the objectives which His Honour Judge Diamond QC identified. Further, while the Article III Rule 6 time bar has come to be seen as a provision benefiting the shipowner, this was not the position when the Hague Rules were agreed. As Professor Michael Sturley noted (in "The History of COGSA and the Hague Rules" (1991) 1 JMLC 1 at 23-24), the time of suit provisions were "the cargo interests' other big victory" at the Hague Conference, their effect being seen as "guaranteeing a cargo claimant a full year in which to bring suit". Mr Kenny QC's submissions would reduce the scope of that gain.

50. If, therefore, Article III Rule 6 is to be found not to apply to misdelivery claims, in my opinion the reasons for this must be found either in the context of the Hague Rules more generally, or in the fact that the Rule has acquired a

settled meaning which does not involve such application, or has been authoritatively determined not so to apply.

Is Article III Rule 6 limited in its application to breaches of the Hague Rules obligations?

51. Having regard to the overall structure of the Hague Rules, and in reliance on various statements in the authorities, Mr Kenny QC submits that Article III Rule 6 only applies to claims for breach of the duties imposed by the Hague Rules, and that the obligation only to deliver against production of an original bill of lading is not such a duty.

52. The first strand of this argument focusses on the language of Article III Rule 8 of the Hague Rules. It is convenient to set out the terms of Article III Rule 8 again:

> "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".

53. Mr Kenny QC submitted that the words "arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability" clearly refer, and refer only, to the duties imposed by Article III ("this Article"). If Article III Rule 8 is limited in its effect to obligations imposed under the Hague Rules, Mr Kenny QC submitted, then it necessarily followed that Article III Rule 6 is so limited. It would also necessarily follow from this submission that the same was true of Article IV Rule 5 and that, in respect of both, the shipowner is free to contract on both time and package limitation regimes more favourable than that provided for by the Rules so far as misdelivery is concerned.

54. Second, Mr Kenny QC referred to statements in a number of cases in which he submitted that the Courts had recognised that Hague Rule provisions, including Article III Rule 6, were solely concerned with breaches of the Hague Rules.

55. First, he referred to the judgment of Devlin J in *Adamastos Shipping v Anglo-Saxon Petroleum* [1957] 2 QB 233 at 253, who observed:

> "The last question asks whether the words 'loss or damage' in section 4(1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. *A carrier may be liable for loss caused to the shipper by delay or misdelivery,* even though the goods themselves are intact. I can see no reason why the general words 'loss or damage' should be limited to physical loss or damage. **The only limitation which is, I think, to be put upon them is to be derived from section 2 which is headed: "Risks". The "loss or damage" must, in**

my opinion, arise in relation to the "loading, handling, stowage, carriage, custody, care and discharge of such goods" but is subject to no other limitation".

56. That was a case in which the U.S. version of the Hague Rules, the Carriage of Goods by Sea Act 1936 ("US COGSA"), had been incorporated into a consecutive voyage charterparty for as many voyages as could be completed within 18 months. The charterers were able to point to a number of (non-Hague Rules) obligations arising under the charterparty which the shipowner had breached, but the issue was whether the shipowner's obligations so far as the seaworthiness of the vessel was concerned were qualified by Sections 4(1) and 4(2) of US COGSA (the equivalent of Articles III Rules 1 and 2) and, if so, whether this was only the case for laden voyages or for non-carrying voyages as well. It was eventually held by the majority of the House of Lords that this was the case for both types of voyages. I do not believe that the passage in bold, on which Mr Kenny QC relies, assists in the present context. It is not surprising that a claim for breach of the Article III Rule 2 obligation would require a nexus between the loss suffered and the activities described in that Rule. Finally, I note in passing that in the italicised passage, Devlin J appears to have contemplated that the Rules applied to misdelivery.

57. Mr Kenny QC derived more support from his second authority, which was concerned with Article III Rule 6, *Hispanica de Petroleos SA and Compania Iberica Refinadera v Vencedora Oceanica Navegacion SA (The Kapetan Marcos NL)* [1986] 1 Lloyd's Rep. 211. The issue in that case was what suit had to be brought *for* in order to satisfy the Hague Rules time bar, in circumstances in which the cargo interests had issued proceedings in time formulating their claim under the bill on the basis that the bill of contract had come into existence through one contractual mechanism but then sought to advance a different mechanism in amendments put forward after the one year period had expired. In rejecting the shipowner's argument that the initial action was not enough to meet the Article III Rule 6 requirement, Parker LJ stated at p.232:

> "One then comes to r.6. **'Discharged from all liability" must mean 'discharged from all liability under the rules**'. "Unless suit is brought" must therefore mean "**unless suit to establish liability under the rules is brought**". "In respect of loss or damage" must mean "in respect of loss or damage to goods carried under a contract of carriage by sea"."

As this had been done, suit had been brought for the purpose of Article III Rule 6, even though the cargo interests had later amended their case as to how it was that they were entitled to enforce that contract, and the obligations imposed by the Rules.

58. I accept that the language in Parker LJ's judgment supports Mr Kenny QC's submission, albeit that the issue here did not arise in that case, and indeed there was no reason for the Court even to address its mind to an obligation owed by the shipowner under the bill of lading which did not arise under the Rules.

59. This is equally true of the last authority which Mr Kenny QC relied upon in this context, a statement by Tomlinson J in *Linea Naviera Paramaconi SA v*

Abnormal Load Ltd [2001] 1 Lloyd's Rep. 763. The issue in that case was whether the Article III Rule 6 time bar applied to a claim for the loss of use of expensive lifting equipment which stood idle as a result of delay in loading a crane onto a barge. Tomlinson J held that it did, there being a sufficient nexus between the claim and identifiable goods to be loaded onto the ship (viz the crane which the lifting equipment had been specifically hired to load). At [19] he stated:

> "The Hague Rules represent a negotiated bargain between shipowners whose interest lies in maximum immunity and cargo owners whose interest lies in maximum redress. The plain intention of art. III, r. 6 is to achieve finality and to enable the shipowner to clear his books - see generally per Lord Justice Bingham in *The Captain Gregos*, [1990] 1 Lloyd's Rep. 310. I have no doubt that, where it is possible so to do, and where there is no consequent uncertainty as to when the one year period would expire, **the Court should lean towards a conclusion which involves that a claim against a carrier which is founded upon a breach of a Hague Rules obligation is subject to the one year time bar contained in that code rather than that it is not**."

60. Once again, I accept that the emboldened passage supports Mr Kenny QC's submissions. However, while the instinctive mode of expression of a judge with such a deep knowledge of shipping law is undoubtedly instructive, once again the issue before the Court in that case was very far removed from the issue which arises here.

61. Notwithstanding Mr Kenny QC's formidable submissions, I have come to the conclusion that Article III Rule 6 is not limited to claims for breach of the Hague Rules obligations in the sense that his argument requires. 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* [1980] 2 Lloyd's Rep. 317 at p.322; Sir Guenter Treitel and Professor Francis Reynolds, *Carver on Bills of Lading* (4th ed., 2017) at [9-183]. Mr Kenny QC'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.

62. Is misdelivery such a claim? If this question is asked in relation to the position where the misdelivery occurs during the Hague Rules period of responsibility, then in my view the answer is yes in the overwhelming majority of cases, including this one, a conclusion which derives forensic support from the fact that Monjasa has pleaded that the alleged misdelivery in this case was a breach of the Hague Rules. Pumping the Cargo out of the ship into the hands of someone who is not in fact entitled to delivery of it seems the plainest breach of the Article III Rule 2 obligation "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". In *The Captain Gregos* at p.315, Bingham LJ said of the acts in that case:

"It seems to me that the acts of which the cargo-owners complain are the most obvious imaginable breaches of art. III, r. 2. A bailee does not properly and carefully carry, keep and care for goods if he consumes them in his ship's boilers or delivers them to an unauthorized recipient during the voyage. A bailee does not properly and carefully discharge goods if, whether negligently or intentionally, he fails to discharge them and so converts them to his own use".

63. If the cargo-owner claims that the goods are discharged from the ship not into its hands, but into the hands of someone with no entitlement to them, there has similarly been a breach of the obligation properly and carefully to keep, care for and discharge the goods.

64. Mr Kenny QC challenges this conclusion, pointing out that the duty to deliver against production of an original bill of lading is a strict one, a duty which is still breached even if the shipowner delivers against what it perfectly reasonably believes to be a genuine bill, but which is in fact a skilful forgery (cf *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg (The Motis)* [2000] 1 Lloyds' Rep. 211). However, in the vast majority of cases, misdelivery will involve an element of fault on the shipowner's part, in consciously delivering without production of a bill of lading (and for that reason taking an indemnity against the risk of liability known to be inherent in that act). The fact that the duty assumed under a bill of lading to deliver only against production of an original bill may mean that, in rare cases, the shipowner can be liable despite having taken reasonable care and skill does not, in my view, have the effect that in those cases when the breach of the obligation could have been avoided by reasonable diligence, the claim would not be capable of being pleaded as a breach of the Article III Rule 2 obligation. Where it is so capable, in my opinion it attracts the full "Hague Rules package", giving the cargo claimant the benefit of the irreducible obligations and liabilities inherent in the Hague Rules regime, but, as part of that same package, the shipowner the benefit of the one year time bar.

65. In this case, that is a sufficient to answer Mr Kenny QC's argument on this issue. However, even leaving aside the issue of conduct which breaches both a Hague Rules and a non-Hague Rules obligation, I cannot accept Mr Kenny QC's submission that Article III Rule 6 only applies to breaches of the Hague Rules, as opposed to breaches of the shipowner's obligations which occur during the period of Hague Rules responsibility, and which have a sufficient nexus with identifiable goods carried or to be carried (the issue considered by Tomlinson J in *Linea Naviera Paramaconi SA v Abnormal Load Ltd* [2001] 1 Lloyd's Rep. 763). For the reasons I have set out above, the terms of Article III Rule 6 do not support such a limitation. In my view, Mr Kenny QC's submissions as to the implications of Article III Rule 8 prove rather too much. He accepted, and the *travaux préparatoires* which I consider below show, that one of the purposes of the Visby amendment to Article III Rule 6 was to ensure that the one year time bar applied to cases of misdelivery. And yet the terms of Article III Rule 8 were, in relevant respects, left unamended by the Visby protocol. That would strongly suggest that the answer to the question of

whether Article III Rule 6 applies to misdelivery claims is not to be found in Article III Rule 8. Mr Kenny QC's submission does raise a difficulty, under both the Hague and Hague-Visby rules, as to whether the terms of Article III Rule 8 leave it open to a shipowner to contract for a shorter time limit in respect of misdelivery claims. In my view, this answer to this difficulty, and to Mr Kenny QC's submission, is to adopt a pragmatic and teleological construction of Article III Rule 8, notwithstanding the degree of linguistic infelicity involved, and to interpret the phrase "provided in this Article" in Article III Rule 8 as meaning "as provided for". To the extent that Article III Rule 6 applies to (and therefore provides for) an obligation owed by the shipowner to the cargo interests during the Hague Rules period of responsibility where the relevant nexus with identifiable goods is present, Article III Rule 8 would prevent the shipowner from contracting for a shorter period.

66. I am pleased to have been able to reach this conclusion, because of the very fine distinctions to which Mr Kenny QC's argument would have given rise, when determining whether Article III Rule 6 was applicable. Whereas deliberate diversion of an oil cargo into the ship's bunker tanks, or discharge of stolen cargo into the shipowner's own shore tank at the port of discharge, would have been subject to the Hague Rules time bar, the delivery of the stolen oil into the hands of a third party at the port of discharge would not. Short delivery because the goods had been lost in transit, or deliberately destroyed by the shipowner, would have been subject to the Rules, but short delivery because too much cargo had negligently been delivered to another consignee would not. 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.

Is there a settled understanding that Article III Rule 6 of the Hague Rules does not apply to misdelivery claims?

67. That brings me to the question of whether there is a settled understanding that Article III Rule 6 of the Hague Rules does not apply to misdelivery claims. I accept that if there is such a settled understanding, this would constitute very strong grounds why a court (and certainly a first instance court) should be reluctant to reach a different conclusion on the basis of a *de novo* evaluation. The warnings given by Lord Esher MR in *Dunlop and Sons v. Balfour W. Williamson* [1892] 1 Q.B. 507 at p.518 and Lord Dunedin in *Atlantic Shipping v Dreyfus* [1922] 2 AC 250 at p.257 are apt, and salutary.

68. The principal material relied upon by Mr Kenny QC to establish that settled understanding was extracts from the *travaux préparatoires* to the Visby amendments to the Hague Rules. The issue was briefly canvassed in submission, but not explored, as to whether the *travaux préparatoires* of an amending convention are an admissible aid to the construction of the original convention, but, whether they are or not, in my view Mr Kenny QC is entitled to rely upon them to seek to establish the settled understanding for which he contends. It may be for that reason that Rix LJ's comment in *J I Macwilliam*

Com Inc v Mediterranean Shipping Co SA (The Rafaela S) [2002] EWCA Civ 556; [2003] 2 Lloyd's Rep. 113 at [56] that only a "bulls eye" will do when relying upon the *travaux* is not strictly applicable. Nonetheless, the comment reflects the fact that the aims of delegates at an international convention may well vary *inter se* and over time, with the resultant wording reflecting a compromise. Further, the drafting endeavour may be as much an aspiration to clarity as to reform. The result is that, in contrast to authorities, the *travaux* to an amending convention are not necessarily the most fertile territory from which to establish a settled understanding of the pre-convention law.

69. It is clear from the materials Mr Kenny QC took me to that the delegate from the United States, M.J. Moore, raised the issue of "the time limit in respect of claims for misdelivery" (Berlingieri §§448-449) in what he described as an attempt to "simplify and clarify the present rule". It is also apparent that a sub-committee had considered providing an alternative two-year limitation period for misdelivery claims or an alternative starting point from which time would run. However, there was also a dispute as to whether or not the Hague Rules applied, or did not apply, to misdelivery at all, and, if it they did apply, whether this was true not just of the prescription period but also the package limitation. It is clear that the national legal systems of some delegates (e.g. Norway, as appears from the submissions of Mr Gram at §11-20) took the view that the Hague Rules did not apply at all to misdelivery, but in my view the *travaux* do not reveal a settled consensus that Article III Rule 6 was so limited during the Hague Rules period of responsibility. Anthony Diamond QC in *The Hague-Visby Rules* [1978] LMCLQ 225, 256 footnote 88 summarises the material as follows:

> "The recommendation of the bill of lading sub-committee was that art. III, r. 6 should be altered for this purpose and no other. (There is no evidence that they had in mind the position relating to deviations). They recommended a special two-year limit in the form of a proviso to art. III, r. 6 to read "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." **However, the sub-committee were troubled as to "whether and to what extent wrong delivery may be covered by the Convention" and they made a resolution to the effect that they expressed no view on whether delivery to the wrong person was "covered by the expression 'loss or damage' in the Convention**," (p. 78 of Report of 1963 Conference). **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 being redrafted (the recommendation then read, as in the Protocol, "shall be discharged from all liability whatsoever in respect of the goods"), it was put before a plenary session of the CMI on June 14, 1963, with the explanation (p. 500) that: "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, i.e. even in the case of what we call a wrong delivery." So, also, when the formal approval of

> the session was sought. The amendment was said (p. 508) to concern "the time limit in respect of claims for wrong delivery" or "prescription en matierè de reclamations relatives a des délivrances à personnes erronées." There is no discussion of the matter in the Reports of the 1967 and 1968 Conferences."

This provides further support for the suggestion that there was no consensus on the issue of how far, if at all, the Hague Rules applied to cases of misdelivery.

70. There is the further difficulty that 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 whether it should (or did) apply to misdelivery at all. The authors of *Carver on Bills of Lading* at [9-185] so characterise their effect.

71. Mr Kenny QC also relied on the article by Michael Mustill QC on *The Carriage of Goods by Sea Act 1971*, in (1972) Archiv for Sjørrett 684 discussing the amendment made to Article III Rule 6. At p.706, he observed that:

> "Presumably the reason is that the parties to the Convention intended the limit to apply even in case of deviations. If this is correct, the monetary limit will be opened by 'wilful misconduct' and possibly also by deviation as well, whereas the time limit will not".

He continued:

> "It is possible that the word 'whatsoever' was also intended to cover liabilities arising from the delivery of goods without production of bills of lading, the intention being that the shipowner or counter-signing banker would not have to keep open the letter of intention customarily obtained on such occasions. If this was indeed the intention, it must be doubted whether the desired result has in fact been achieved. It is very questionable whether a deliberate mis-delivery after the completion of the transit is subject to the Hague Rules at all: see Article II. And even if it were, the English Court treats delivery without production of bills as a serious tort and breach of contract, and it is unlikely that any limitation of the cargo-owner's rights of action for such an act would be effective, unless very clear words are used. I suggest that 'whatsoever' is not sufficiently clear for this purpose".

72. As Mr Kenny QC noted, *Scrutton on Charterparties* (8th ed., 1974) at p.460, note 30 (of which Sir Alan Mocatta, Mr Mustill QC and Mr Boyd were the editors), was to similar effect, and, to date at least, subsequent editions of Scrutton have remained faithful to that observation.

73. I accept that it is implicit in this commentary that Mr Mustill QC understood that the Hague Rules time bar did not apply to misdelivery. The first of the two reasons he gave concerned the period of responsibility issue which does not arise in this case but which, as I have noted, emerges clearly as a live issue in the *travaux*. The second involved not his understanding of the received

interpretation of the Rule as an intentional convention, but of the effect of a rule of English law which made the limitation of liability for a "serious tort and breach of contract" very difficult. That approach undoubtedly reflected the interpretative ethos of its time, but that ethos underwent a very significant change in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (a decision which Lord Denning MR described as heralding "a revolution in our approach to exemption clauses" in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 QB 284 at p.299).

74. Mr Kenny QC also relied on Anthony Diamond QC's article *The Hague-Visby Rules* to which I have already referred. He states at p.256:

> "The only important question arising on the Visby amendments relating to the time-bar is whether the substitution of the words "discharged from all liability whatsoever in respect of the goods" for the former expression "discharged from all liability in respect of loss or damage" has the effect of making the one-year time-bar applicable where the carrier has misdelivered the goods. There is the clearest possible evidence that the sole or main purpose of this amendment was to make the time limit apply where the goods had been delivered without production of bills of lading and so to make it unnecessary to require an indemnity given by the receiver to be kept open indefinitely. Although the editors of Scrutton knew that this was one of the intentions, they considered that the amendment did not have the desired effect. I submit, albeit with considerable doubt, that as the first paragraph of art. III, r. 6 is dealing with the effect of delivery of the goods, so also the time-bar should be construed as applying to events taking place after discharge. If so, I submit, again with doubt, that the limit should apply."

75. This oft-cited commentary is largely concerned with the *period* of application of Article III Rule 6, and while it acknowledges (as is undoubtedly the case) that one aim of the amendment was to ensure Article III Rule 6 applied to misdelivery cases, it does not shed any light on the key issue of whether this was because there was a settled understanding that, pre-amendment, it did not so apply even within the Hague Rules period of responsibility, or simply to address doubt as to whether (on prevailing principles of construction) it did so.

76. I accept that there were informed observers who held the view that Article III Rule 6 did not apply to claims for misdelivery. However, what is noticeably absent is any authority from any jurisdiction to the effect that Article III Rule 6 does not so apply, or commentary recording the settled meaning for which Mr Kenny QC contends. The Privy Council decision in *The New York Star* [1980] 2 Lloyd's Rep. 317 provides support for Mr Phillips' submission that Article III Rule 6 does apply to misdelivery claims. The clause considered in that case was described by Bingham LJ in *The Captain Gregos* [1990] 1 Lloyd's Rep. 310 at p. 314 as reproducing "with one wholly immaterial difference the Hague Rules version of art. III. R.6.". The pleaded claims were "negligence in failing to take proper care of the goods, delivery of the good to an unauthorised person and non-delivery to the consignee" (p.320). At p.322, the Privy Council rejected the argument that the time bar did not apply to each of those claims, given the "general and all-embracing terms" of the clause, and noting that "the reference

to delivery of the goods" – a reference which appears in Article III Rule 6 – "shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods", noting:

> "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. The decision is treated in Cooke and others, *Voyage Charters* (4th ed., 2017) at [85.174] as authority for the proposition that Article III Rule 6 applies to misdelivery:

> "Materially identical words to those in rule 6 have been held to apply the one-year limitation period to a claim against a stevedore who delivered goods without production of a bill of lading, where the bill of lading contained those words and a Himalaya clause. In *Salmond & Spraggon v Port Jackson Stevedoring Pty (Australia) (The New York Star)* …. This must be equally true of a misdelivery claim and of claims for delay and unauthorised deck carriage and even for claims for intentional loss (theft) or damage. There seems to be no difference between the formulation in the Hague Rules and the Hague-Visby Rules in this respect".

78. Mr Kenny QC submitted that *The New York Star* is not a case of misdelivery at all, and that the effect of the case is mis-stated in *Voyage Charters*, because a full report of the facts of the case (as appears in [1980] 2 Lloyd's Rep. 317 at 318), shows that the practice was for a clerk at a delivery office to check the shipping documents and tally slip, and then issue a gate pass to permit removal by the watchman. On the facts of that case, the thief did not present any shipping documents but was permitted by the watchman to remove the goods because he had seen the thief talking to the delivery office and assumed that everything was in order and that the bill had been presented.

79. I accept that there was some argument to this effect in the earlier stages of *The New York Star*. The "fundamental breach" argument was advanced on the basis that there was a breach in "delivering the goods otherwise than in exchange for the bill of lading" (see for example Glass J in the New South Wales Court of Appeal ([1977] 1 Lloyd's Rep. 445 at 450). The New South Wales Court of Appeal upheld that argument precisely because "the duty not to deliver goods except in exchange for the shipping documents" was a fundamental duty and rejected the submission that, on the facts as found at first instance, there had been no misdelivery (ibid). In the High Court of Australia, Barwick CJ rejected the argument that there was no misdelivery (p.307), whereas Mason and Jacobs JJ took the position that there was no misdelivery on the facts of the case (pp.324-325). However, there is no trace of this issue, or any suggestion that anything turns on it, before the Privy Council, who recorded their agreement with the judgment of Chief Justice Barwick. It is noteworthy that in the New South Wales Court of Appeal decision in *PS Chellaram & Co. Ltd v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd's Rep. 492, Gleeson CJ, who appeared as counsel for the stevedores in *The New York Star*, described the case as one of misdelivery (pp.499-500).

80. Further, the essence of misdelivery is the consensual passing of possession in goods without production of the appropriate documents, which is exactly what happened in *The New York Star*. With respect, I struggle to see a meaningful distinction between a case where the voluntary transfer of possession took place because the transferor wrongfully believed that shipping documents had been presented, and a case such as *The Motis* (which Mr Kenny QC accepts is a misdelivery case) where the voluntary transfer was effected because the transferor believed that bill of lading presented to him was genuine when it was not.

81. In my judgment, *The New York Star* supports Mr Phillips' submission that Article III Rule 6 applies to misdelivery claims, and that decision, and the commentary upon it, are not consistent with the settled understanding of the scope of Article III Rule 6 for which Mr Kenny QC contends.

82. The second decision which Mr Phillips relied upon is *The Zhi Jiang Kou* to which I have just referred. One of the issues in that case does not arise for decision here – whether Article III Rule 6 applies to claims for misdelivery where the misdelivery takes place outside the Hague Rules period of responsibility. It is that issue which is the subject of a judgment by Kirby P (Gleeson CJ and Samuels JA did not find it necessary to decide that issue, holding that on the construction of the bill of lading, it was clear that the specific (and shorter) time period in clause 10(2) of the bill of lading was intended to apply). It is implicit in Kirby P's decision that the Hague Rules time bar applied to misdelivery outside of the period of responsibility that Article III Rule 6 also applies to misdelivery within that period. However, the judgment is largely directed to the former issue (and it would appear from p.515 that the Hague Rules issue had been abandoned by the appellants, before being resurrected in written submissions after the oral hearing). In these circumstances, I have derived limited assistance from it.

83. There are two further arguments advanced by Mr Kenny QC as to why Article III Rule 6 of the Hague Rules does not apply to misdelivery claims which I should address.

84. First, Mr Kenny QC submits that the Hague Rules are frequently incorporated into seaway bills, under which the carrier does not assume an obligation only to deliver against an original bill of lading, which he submits makes it unlikely that Article III Rule 6 of the Hague Rules applies to that obligation. However, while a sea waybill does not require delivery against production of a bill of lading, it does require delivery to a named person. Article III Rule 6 is capable of applying to misdelivery in both forms of contract. The fact that the nature of the delivery obligation differs between these two forms of document does not, in my view, assist on the application of Article III Rule 6.

85. Second, Mr Kenny QC suggested that there would be uncertainty in determining "the date when the goods should have been delivered" for the purposes of Article III Rule 6 in circumstances where the bills were caught up in disputes inside the banking chain as to who should be the holder of the bills of lading. However, in my view the issues raised by Mr Kenny QC arise equally when cargo is short-landed for some reason other than misdelivery, and

I do not believe that the courts are any less capable of determining when the goods should have been delivered if the short-landing arises from wrongful delivery to someone else than where it arises from, for example, theft during transit. I would note that exactly the same issue arises under Article III Rule 6 of the Hague-Visby Rules.

Conclusion

86. For these reasons, I have concluded that Article III Rule 6 of the Hague Rules does apply to misdelivery claims, at least where the misdelivery occurs during the period of the Hague Rules period of responsibility, and there is no fixed or settled interpretation of the Hague Rules to contrary effect which requires the alternative conclusion.

87. In these circumstances, it is necessary for me to consider the second of Mr Kenny QC's two arguments.

Was suit brought within the one-year period for the purposes of Article III Rule 6?

The issue restated

88. It is helpful to restate this issue against the background of the particular facts of this case. The only suit which Mr Kenny QC now relies upon as having been brought within the one-year period is the Tunisian Proceedings, which have currently been dismissed – on grounds, as I understand the position, of want of jurisdiction independently of the Exclusive Jurisdiction Clause - but have been the subject of a recent (and, as I am told, still timely) appeal to the Cour de Cassation.

89. The effect of the Tunisian Proceedings falls to be considered in the following contexts:

    i) The position in proceedings commenced by Monjasa outside of the one year period (including the English proceedings).

    ii) The position in the Tunisian Proceedings themselves (because, at least on one view, Mr Phillips appears to be asking for a declaration here that the Tunisian Proceedings cannot constitute the bringing of suit for the purposes of Article III Rule 6 because the suit was brought in breach of the Exclusive Jurisdiction Clause which Owners might then seek to deploy in, or in response to, the Tunisian Proceedings).

The position of the authorities

90. Two "bright line" answers were available to the question of what effect of bringing suit in one set of proceedings had on the application of the Article III Rule 6 time bar in another set of proceedings.

91. First, it would have been possible to adopt the same position as prevails in a domestic litigation context: the issue of whether proceedings have been commenced in time for limitation purposes is resolved by considering the date

of commencement of the very proceedings in which the limitation issue arises. It was this answer which Roskill J applied when the issue of when suit was brought for the purposes of Article III Rule 6 came before the Commercial Court in *Compania Colombiana de Seguros v Pacific Steam Navigation Co.* [1965] 1 QB 101 at p.126:

> "I have to construe the Carriage of Goods by Sea Act 1924, to which this and other rules are scheduled. In the end the question is this: Does `unless suit is brought within one year' mean `unless suit is brought <u>anywhere</u> within one year' or does it mean `unless the suit <u>before the court</u> is brought within one year?' Applying ordinary canons of construction to the rule I think that it must mean `unless the suit <u>before the court</u> is brought within one year".

92. However, the circumstances of international litigation are too complex and diverse for that simple answer to prevail. Issues arose as to the treatment of actions for the arrest of ships (functionally often applications for security, which are generally permitted to run alongside substantive proceedings in other jurisdictions, but which take the form of a fresh action on the merits); the position where a court with jurisdiction decided that another court with jurisdiction was a more convenient forum for the determination of the dispute; or clauses which gave an option (perhaps an asymmetric one) to elect for a particular forum which might only be exercised after proceedings had been commenced. Court decisions grappling with these issues have led to a considerable gloss on the words of Article III Rule 6. The authors of *Voyage Charters* (4th ed., 2014) at [85.185] describe the position as follows:

> "It was once thought that suit must be brought in the same jurisdiction in which the dispute is ultimately decided and that the bringing of suit in other jurisdictions did not prevent a claim being time-barred before the correct court if suit before that court was not brought in time; it was thought that the words 'unless suit is brought within one year' mean 'unless the suit before the court is brought within one year' and not 'unless the suit is brought anywhere within one year … The universal application of that approach was undermined and its underlying correctness challenged such that it may be said with some confidence that the law is now that proceedings do not have to be brought in the same forum as that in which the claim is ultimately determined".

93. Second, it would have been possible to adopt the position that once proceedings had been brought by a competent claimant against a competent defendant in a court competent at the date of commencement (whether that be issue or service), the Article III Rule 6 time bar was rendered inapplicable for all time and for all purposes in relation to that claim, regardless of where and when subsequent proceedings were commenced (a view for which His Honour Judge Diamond QC clearly had considerable sympathy in *The Leni* [1992] 2 Lloyd's Rep. 48). However, this argument has also proved unattractive because of the inability to impose any, or any effective, protection against stale claims in the second set of proceedings. Indeed as a matter of English law, if the first proceedings (whatever their eventual fate), are sufficient to satisfy the Article III Rule 6 requirement for all purposes, there is no statutory limit on the time within which

a second action might be brought where the Hague-Visby Rules apply as a matter of statute (as a result of s.39 of the Limitation Act 1980).

94. As a result, the English decisions have adopted an intermediate position which allows some room for debate as to the positon on the facts of any particular case.

Enforced substitution of the proceedings brought in time by proceedings in another forum

95. The suggestion that the bringing of suit in one jurisdiction might defeat an Article III Rule 6 defence raised in proceedings brought in a different jurisdiction first received judicial support in *Hispanica de Petroleos SA v Vencedor Oceanica Navegacion S.A. (The Kapetan Markos NL*) [1986] 1 Lloyd's Rep. 211 at 213, where Parker LJ said *obiter* of Roskill J's decision in *Compania Colombiana*:

> "It appears to us at least arguable that in certain circumstances a defence under art. III, r. 6, might be defeated by the fact that another suit had been brought elsewhere. Suppose for example that a cargo-owner were to sue in New York within time and that there was no doubt but that the New York Court had jurisdiction to hear the claim. Suppose further that the shipowner, whilst acknowledging jurisdiction, applied for a stay on the ground that New York was a forum non conveniens and that the forum conveniens was London. Finally suppose that the shipowner lost at first instance but won by a majority in the Court of Appeal and that, time having expired in the meantime, the cargo-owner then issued a writ in London. In such circumstances it would appear at least arguable that art. III, r. 6, did not apply. If such a situation ever arises the matter will then fall for decision".

96. The position which Parker LJ contemplated might be described as one of "enforced substitution" of proceedings in one forum for proceedings in another, where the action commenced by the claimant in a jurisdiction came to an end for reasons arising independently of the claimant's conduct because a court decided that if the claim was to be pursued, it should be pursued in another forum. In the context of forum conveniens stays, the problems to which enforced substitution gives rise in the context of the Hague Rules are generally capable of resolution by requiring, as a term of any stay, that the defendant waive any Article III Rule 6 defence which might otherwise follow. However, this option is not always available in cases of enforced substitution.

97. One context in which it is not available is where the bill of lading contract gives the parties, or the defendant, a right to elect in favour of arbitration after a dispute has arisen, and the election is exercised both after proceedings have been commenced timeously in court and after the expiry of the Article III Rule 6 period. This was the position in *Government of Sierre Leone v Marmaro Shipping Co. Ltd. (The Amazonia and the Yayamaria)* [1989] 2 Lloyd's Rep. 130, a case in which the contract provided for the jurisdiction of the English courts, but with both parties having a right to elect in favour of London arbitration. Parker LJ held at p.135:

> "In the present case the contract expressly provided for the jurisdiction of the Courts here, unless and until either party exercised a valid election for arbitration. When the writs were issued, neither party had done so. The proceedings, or "suits" when brought were therefore the very suits provided for by the contract. To the question: Was "suit" brought within the year? the answer must inevitably be "Yes". If thereafter the proceedings, as a result of election, have to be restarted in arbitration, the answer to the question remains the same. The very suits contemplated were so brought. The situation is different from the case of a simple arbitration clause. There the suit contemplated is at all times arbitration. As with r. 8, r. 6 must be given a purposive construction. It cannot, in my view, be within the purpose so to construe it as to enable a defendant to set up a time bar when the plaintiff has commenced the very suit which the parties had agreed upon, and the shift to arbitration results from the defendants' own contractual election."

98. The reasoning would not be directly applicable in those cases where the contract contained no default court jurisdiction clause (or perhaps only a non-exclusive one), but a symmetric or asymmetric option to arbitrate, but the outcome must surely be the same.

99. The Court of Appeal decision in *Baghlaf Al Zafer Factory Co. Br for Industry Ltd v Pakistan National Shipping Co. and another* [1998] 2 Lloyd's Rep. 299 can also be interpreted as a case in which there was "enforced substitution" resulting from action taken by the defendant after suit had been commenced in time. The claimant brought a timely suit in England in the face of an exclusive jurisdiction clause in favour of the courts of Pakistan, but where the Hague Rules package limit as applied in Pakistan would have been substantially less than the limit applicable here, allowing the claimant to contend that the Pakistan jurisdiction clause was null and void by reason of Article III Rule 8 of the Hague-Visby Rules. An undertaking by the defendant at the hearing of the stay application not to rely on that limit neutralised the point. In the event, the Court made it a condition of a stay that the defendant undertake not to raise a time-bar defence in Pakistan.

100. The other context in which there is enforced substitution of proceedings by reason of a court order is where proceedings are commenced in breach of an arbitration agreement, and a stay is sought (now, in this jurisdiction, under s.9 Arbitration Act 1996). There had at one point been some suggestion that the High Court proceedings might nonetheless defeat an Article III Rule 6 time bar defence in the arbitration (Parker LJ in *The Kapetan Markos* at p.232 suggested that *The Merak* [1964] 2 Lloyd's Rep. 527 may have proceeded on this basis). However, it is now clear that when enforced substitution comes about because the claimant is held to a promise it made only to bring proceedings in some other forum, the first suit will not prevent time running in the second. In *The Havhelt* [1993] 1 Lloyd's Rep. 523 at 525, Saville J said of proceedings commenced in England in breach of an exclusive jurisdiction clause in favour of the Norwegian courts:

> "Mr. Havelock-Allan's first submission was that the present proceedings were not a "suit" within the meaning of art. III, r. 6 of the Hague Rules -

the plaintiffs having proceeded in the wrong Court. In other words, the present suit was not a competent suit. As a matter of English law it seems to me that Mr. Havelock-Allan's submission is correct and that, looking at it as an English lawyer, in the face of the exclusive jurisdiction clause to which I have referred, the proceedings here are not competent proceedings and so they do not amount to a suit within the meaning of art. III, r. 6 of the Hague Rules".

101. Where the proceedings first commenced by the claimant are dismissed because they were commenced in breach of promise to bring the claims elsewhere, the abortive nature of those proceedings can be said to be the claimant's own fault. There are strong similarities with the position where the claimant is forced to commence a second suit because the first suit has been or will be struck out for some form of procedural default on the claimant's part. In *Fort Sterling Ltd and another v South Atlantic Cargo Shipping NV and others (The Finnrose)* [1994] 1 Lloyd's Rep. 559, Rix J considered such a scenario in the context of an argument that the court should not strike out the claimant's claim for want of prosecution, because the claimant had (in anticipation of such an order) commenced fresh proceedings, it being suggested that the first suit would prevent the operation of Article III Rule 6 in the second. Rix J rejected that argument, for reasons which I address below.

Parallel proceedings

102. The other context in which the effect of proceedings commenced timeously in one jurisdiction on an Article III Rule 6 defence advanced in another jurisdiction arises is where the claimant has chosen to pursue parallel claims.

103. This issue appears to have been addressed for the first time in *The Nordglimt* [1987] 2 Lloyd's Rep. 470. Timely proceedings had been commenced and were being pursued in Antwerp, when the claimant brought an action *in rem* in England for the purposes of securing that claim. One of the defendant's answers to the action *in rem* was that the claimant's cause of action against the shipowner had been extinguished by operation of the Hague-Visby Rules time bar. Hobhouse J identified the relevant question as being "whether the cargo-owner has done something within the year sufficient to prevent the liability of the carrier from being discharged at the end of that year" (p.476), which required suit by a competent plaintiff against a competent defendant before a competent court. As the Belgian proceedings were before a competent court, he held that sufficient had been done to prevent the claim from being discharged. Hobhouse J anticipated that the outcome in *The Nordglimt* (whereby a claimant in a later action could defeat an Article III Rule 6 defence because of a previous action) would be a rare one, observing (at p.447) that "it is likely that in virtually all cases the answer to the question whether or not the carrier has been discharged from liability will be answered by reference to the suit in which liability is ultimately decided".

104. The outcome in *The Nordglimt* – that a well-recognised method of obtaining security for timely proceedings being actively pursued to a trial in a competent court is not defeated by Article III Rule 6 - seems obviously correct. However, achieving that outcome in the context of Article III Rule 6 raised some novel

issues. As Rix J noted in *The Finnrose*, it was the first case which considered the application of Article III Rule 6 in a two-suit context which "did not involve an earlier suit, commenced in time, but which had been dismissed or had otherwise failed at the time when the art III r.6 defence fell to be considered" (p.567) and the case introduced the "doctrine that, in the case of two sets of proceedings, one looks to the first as well as to the second set, in determining whether suit has been brought in time" (p.574). It might have been possible to limit the approach in *The Nodrglimt* to actions brought for the purpose of obtaining security (just as a distinction has been drawn in the context of arbitration agreements between actions *in rem* seeking securities, and actions brought in court with a view to a determination on the merits: *The Rena K* [1979] QB 377).

105. However, that is not how the law has developed, and there would have been obvious difficulties if it had. As Rix J noted in *The Finnrose* at p.575, if a court had held in the second action that Article III Rule 6 provided a defence while the first (timeous) action was still underway, this would have involved a finding that the right being enforced in the second action had been extinguished at the very same time as that right was being pursued in the first action. While it might be possible for Schrödinger's cat to be both alive and dead at the same time, the same is not true of cargo claims. As a result, it has become necessary to consider the circumstances in which an earlier action can be relied upon to preclude an Article III Rule 6 time bar in a later action. As Rix J also noted, the answers to those questions have been arrived at on a pragmatic basis.

106. The application of the Hague Rules time bar in the context of parallel actions, one brought in time, and one not, raises two obvious questions. The first is whether the termination of the first action other than in a judgment on the merits - for example due to a stay, dismissal for want of prosecution, strike out for procedural default or failure to provide security for costs - precludes the first action from defeating any Article III Rule 6 time bar in the second. The second is the point in time at which this issue is assessed in the second action: only at the date of commencement of the second action, or when the tribunal rules on the Article III Rule 6 issue, or when a decision is given on the merits?

107. There are authorities which have identified these issues, but a number of points remain open for argument. In *Bua International Ltd v Hai Hing Shipping Co (The Hai Hing)* [2000] 1 Lloyd's Rep. 300, in the context of various challenges to the extension of a claim form, Rix J had to consider the effect of prior timely proceedings in Nigeria which had been struck out for want of prosecution. Rix J was only concerned with the arguability of the various alternatives, noting that the point before him was "not an easy one" (p.302). He thought there was a "strong argument" that a second action commenced at the time when the first set of proceedings had been struck out would be time-barred (p.307), and indeed this seems to follow from his own decision in *The Finnrose*. The position when the second action was commenced at a time when the Nigerian proceedings were still "in good order" (p.302) was more arguable. The judgment proceeds on the basis the position is to be assessed at the date when the second set of proceedings are commenced (e.g. p.309), but the point does not appear to have been the subject of argument.

108. In *Thyssen Inc v Calypso Shipping Corporation S.A.* [2000] 2 Lloyd's Rep. 243, in the context of a request for an extension of time to commence arbitration proceedings if necessary, David Steel J considered the positon when US proceedings had been brought in time but stayed in favour of London arbitration. It would have been possible to resolve the case by reference to the "enforced substitution" cases considered above, with the claimant's conduct in commencing the original proceedings in breach of the arbitration clause precluding the US proceedings from constituting the bringing of suit. However, Steel J addressed the issue on a wider basis. He rejected the suggestion that the commencement of proceedings in a court with jurisdiction to determine the issue on the merits was sufficient, for all time, to prevent Article III Rule 6 operating in subsequent proceedings, describing this as a proposition "of breathtaking proportions" ([14]) which would give "rise to absurd results" ([15]). Having referred to Rix J's comments in *The Finnrose* on the need for a pragmatic approach, he continued (at [22]):

> "In accordance with that pragmatic approach, where, as here, the first suit is brought in breach of an arbitration clause, the Courts do not regard that as a suit for the purposes of the rule (unless of course there is no application for a stay) …
>
> It is not enough for the correct claimant to commence proceedings before a competent court against the correct defendant. The proceedings must remain valid and effective at the time when the carrier seeks to rely on r.6 in the second set of proceedings. Thus where the first action has been dismissed for want of prosecution, or stayed by reason of the invocation of an arbitration clause, suit has not been brought. So also if there had been breach of an exclusive jurisdiction clause and a stay obtained".

109. It will be noted that David Steel J identified as the relevant time for determining whether the first suit provided an answer to the operation of Article III Rule 6 in the second suit "the time when the carrier seeks to rely upon r.6 in the second set of proceedings". That decision is relied upon in *Voyage Charters* at [85.188] as the basis for the assertion that

> "Giving the rule a purposive construction, therefore, it is submitted that the 'suit' which is said to have been brought so as to protect the cargo claimant's position must be validly commenced and still in existence at the time when the defence is raised in the subsequent suit".

110. In the *Thyssen* case, the reference to arbitration occurred 7 days after the New York proceedings had been stayed, so that there was no point in the life of the second proceedings when the first set of proceedings remained "valid and effective". As noted above, this issue was considered in *The Finnrose,* in which cargo interests had responded to the application to strike out for want of prosecution by issuing fresh proceedings. Rix J noted at p.575:

> "In this context, I do not think it matters that at the moment when the second action is commenced, the first action has not yet been dismissed by the Court. The summons to dismiss had already been served and, if

the application was justified, the first action was already in peril of dismissal".

111. Difficulties arise because once it is recognised that the status of the first action is not fixed when it is commenced, it inevitably follows that the answer to the question of whether the second set of proceedings are time-barred may depend on when it is asked. As a result, as noted in *Voyage Charters* at para. 85.186, "if the [first] suit is actively in existence, but it is incompetently pursued, it may not be a once-and-for-all answer to a defence raised under the rule". There is the further difficulty that the status of the first action may not be fixed when the issue of time bar falls to be determined. Indeed this is the position here, where there is an outstanding appeal in relation to the Tunisian proceedings.

112. So far as concerns the date when the issue is to be determined in the second action, once it is accepted that the issue of timeliness in the second action does not depend on when the second action was commenced, but on the (continuing) efficacy of the first action there does not seem to be any obvious reason why the issue of time bar in the second action should be determined on a "once and for all" basis on that date of commencement of that action. In my view, the issue should be tested at least at the date when the time bar issue in the second action is finally determined rather than some earlier date. This has the potential to throw up difficulties where the time bar issue is determined in favour of the cargo interests at that point, but the first set of proceedings is struck out before a final decision on the merits, which I leave to be resolved if and when they arise. In cases where it appears as though this might be an issue, the tribunal could consider whether or not it was appropriate in the exercise of its case management powers to determine any issue of time bar in advance of a final decision on the merits.

113. The issue which the tribunal in the second action would need to determine at that date is whether first action was brought in a competent jurisdiction and remains an "effective action". Where these issues remain uncertain in the first action – for example because a pending application to strike out has yet to be determined, or because a challenge to the continuing efficacy of those proceedings awaits final determination – the tribunal in the second action will need to determine the issue on the balance of probabilities on the evidence before it. The proper approach when it falls to one tribunal to determine an issue which is a live one between the parties (or related parties) in another jurisdiction, and the dilemma as to whether the tribunal should make its own determination or "wait and see", is not an unfamiliar one (cf. *SCM Financial Overseas Ltd v Raga Establishment* [2018] EWHC 1008 (Comm)).

114. Finally, in *Golden Endurance Shipping SA v RMA Watanya SA and others* [2016] EWHC 2110 (Comm), Phillips J held that Moroccan proceedings which had ended in judgment in favour of the cargo interests were themselves sufficient to defeat the owners' application in England for a declaration that the claims were time barred (even though the Moroccan judgment was held not to be enforceable in England because the requirements for enforcement at common law were not met). I should mention that although this is not clear from the judgment, the status of claims under the one bill of lading which

incorporated an arbitration agreement was no longer live by the time of the hearing in that case.

Conclusions

115. Drawing these strands together, in my view the position on the authorities can be summarised as follows.

116. **First,** where the claimant commences proceedings before a court of competent jurisdiction, but is then required to proceed in alternative forum for reasons which are not the claimant's responsibility, the first action will constitute the bringing of suit for the purposes of Article III Rule 6. This would include cases in which:

  i) The first action ends because of an election made by the defendant to require proceedings to be pursued in another forum, which election is made at a time when it is no longer practicable for the claimant to commence proceedings in that forum within the Article III Rule 6 period.

  ii) An exclusive jurisdiction clause requiring proceedings to be brought in another court only becomes enforceable because of an undertaking offered by the defendant when it is no longer practicable for the claimant to commence proceedings in the contractual forum within the Article III Rule 6 period.

  It may well be, though it is strictly unnecessary to decide this point, that the same principle should apply when the claimant has acted reasonably in bringing proceedings in the first jurisdiction, but they have been stayed on grounds of forum conveniens (although the Article III Rule 6 issue will ordinarily be addressed by making it a condition of the stay that the defendant waive any Article III Rule 6 defence which might otherwise arise: cf *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 464F, 465G-466A, 487G-488A and *The Eleftheria* [1970] P. 94).

117. **Second**, subject to para. 116(ii) above, if the first proceedings are brought in a particular court in breach of an agreement to bring claims in another forum, then, save perhaps in exceptional circumstances, they will not constitute proceedings before a competent court for the purpose of the preceding paragraph.

118. **Third**, when the claimant commences proceedings before a court of competent jurisdiction, those proceedings will be capable of defeating an Article III Rule 6 time bar in another set of proceedings, providing that, at least at the time when the time bar defence is determined in the second proceedings:

  i) the first set of proceedings remain effective proceedings; and

  ii) the shipowner is unable to prove on the balance of probabilities that the first set of proceedings will be found to be ineffective proceedings in the forum in which they were brought.

119. **Fourth,** the first set of proceedings will remain effective proceedings for the purpose of the preceding paragraph if they have culminated in a judgment in the claimant's favour on the merits.

120. Against that background, I return to the two questions I identified at [89] above.

Can the Tunisian Proceedings be relied upon by Monjasa as the bringing of suit for the purposes of Article III Rule 6 in other proceedings commenced outside the one year period (including the English proceedings)?

121. The answer to this question is, in my opinion, no, because the Tunisian proceedings were brought in breach of the Exclusive Jurisdiction Clause. While it is possible that in exceptional circumstances, this would not conclude the issue, in my view there are no such circumstances here. While Mr Kenny QC understandably sought to suggest his clients were not to be criticised for failing to ascertain the existence of the Exclusive Jurisdiction Clause in time to comply with its terms, the Bill expressly incorporated the terms of a charterparty including the "Law and Arbitration Clause" and met the heightened standard which English law requires for the incorporation of arbitration and jurisdiction clauses into bills of lading given their negotiable character. Further, it seems to me that there is some justification in Mr Phillips' submission that, as the original shipper of the cargo, Monjasa have even less entitlement to complain that it was insufficiently aware of the jurisdiction clause. As Colman J noted *in OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep. 160 at 163:

> "The bill of lading cases proceed upon the basis that the original bill of lading holders must be taken to have had access to the terms of the charter-party at the time when they entered into the bill of lading contract".

122. In circumstances in which it is clear from the terms of the Tunisian arrest application that Monjasa knew that there was a charterparty to which Owners were parties, and that the Bill referred to it, it is striking that there is no evidence of Monjasa ever asking Owners for a copy of the Charterparty. Had they done so, and Owners had refused to provide it, it seems likely that additional arguments would have arisen as to the legal consequences of that refusal. However, it is unnecessary to explore what those consequences might be, because there is no evidence that any such request was made.

Were the Tunisian proceedings brought within time for the purposes of Article III Rule 6?

123. It might be thought that the answer to this question necessarily followed from the answer to the previous question. However, the issue of whether the English Court should give declaratory relief as to whether or not a claim currently being litigated before the courts of another country has been extinguished raises issues of comity, as well as an issue of principle of whether the commencement of proceedings in breach of an exclusive forum clause should have the *same* effect for the purposes of Article III Rule 6 of the Hague Rules, regardless of whether the question arises in the proceedings so commenced, or later proceedings.

124. Support can be found for the view that the effect of incorporating the Hague Rules into a contract containing an exclusive jurisdiction clause, is that Article III Rule 6 and the exclusive jurisdiction clause should be read together so that only a suit brought in a contractual forum could constitute the bringing of suit within 12 months: for example *The Havhelt* [1993] 1 Lloyd's Rep. 523 at 525. However, Roskill J was not attracted by the same argument in *Compania Colombiana de Seguros v Pacific Steam Navigation Co.* [1965] 1 QB 101 at 126-7

> "It seems to me, as at present advised, that the two provisions, one creating a time limit within which claims must be made, the other creating exclusive jurisdiction in the courts of a particular country, are dealing with separate and distinct subject-matters. Had it been necessary finally to decide this point, I should have decided it adversely to the defendants."

125. Further, the logical consequence of the argument would seem to be that in those extremely rare cases in which the English court allowed proceedings to be pursued here notwithstanding the fact that they had been brought in breach of an exclusive jurisdiction clause (*Donohue v Armco Inc* [2001] UKHL 64), the Article III Rule 6 time bar would operate nonetheless within the English proceedings. This is a very counterintuitive outcome. Further, as Rix J noted in *The Finnrose* at p.570, "an action brought in breach of an exclusive jurisdiction or arbitration clause, is not, at any rate under English law, a nullity".

126. In summary, therefore, I conclude that:

i) Ordinarily the English Court will not regard proceedings commenced in a foreign court in breach of an exclusive jurisdiction or arbitration clause as "suit" for the purposes of Article III Rule 6 in respect of the issue of whether proceedings before the English Court are time-barred.

ii) That will be the case even if the foreign court might itself allow the proceedings there to continue notwithstanding the clause (e.g. because they adopt a different test of incorporation of jurisdiction or arbitration clauses or because of different concepts of *ordre publique*).

iii) However it does not follow that the English Court should always be willing to give a declaration that a claim brought in a foreign court in breach of an arbitration or exclusive jurisdiction clause is time-barred in the proceedings before a foreign court.

iv) In particular, it might be argued that the particular issue of what constitutes the bringing of "suit" in a jurisdiction involves questions peculiar to that jurisdiction, rather than simply issues of English law as the proper law of the bill of lading contract.

v) A further reason for caution is that it is possible to conceive of circumstances in which an English Court might allow proceedings commenced here in breach of an exclusive jurisdiction clause to continue, and, if it did so, it seems eminently arguable that those

proceedings could be relied upon as an answer to any Article III Rule 6 defence advanced in that action.

127. If Owners' complaint is that the foreign proceedings should never have been commenced, then it had the option of seeking an anti-suit injunction to stop those proceedings, but no such application was made. As matters stand, I have evidence that there is an outstanding appeal in Tunisia, but otherwise I have no evidence of Tunisian law, and no reason to suppose that any declaration I might make would have any impact on the Tunisian proceedings.

128. The granting of a declaration is discretionary relief. On the facts of the case, and on the state of the evidence before me, I am not persuaded that it would be appropriate for me to grant a declaration as to whether Monjasa's claims are time-barred in the Tunisian proceedings. The distinction in the approach I have adopted as between the first and second questions, is intended to reflect a pragmatic compromise between the strong policy of the English court of giving effect to forum selection agreements, and considerations of judicial comity.

(8) Conclusion

129. For the reasons set out, I suspect at rather too great length above:

i) All of Monjasa's claims against Owners are subject to Article III Rule 6.

ii) Save for any claim being pursued in the Tunisian Proceedings, to the extent that those proceedings continue to a judgment in Monjasa's favour, Monjasa's claims against Owners are extinguished by operation of Article III Rule 6.

I will ask the parties to seek to agree declarations that reflect the conclusions in this judgment.

130. Finally, I would like to record my gratitude to Mr Phillips, Mr Kenny QC and their respective teams for their efforts in this matter. Hearing advocacy of this quality, on points of this interest, has been a privilege.