

Callidus News

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CLAIM FOR MISDELIVERY OF CARGO LIABILITY OF THE CARRIER AND DEFENCE OF TIME BAR



The Commercial Court, in September 2022 handed down the judgment in **FIMBank vs KCH Shipping ([2022] EWHC 2400 (Comm))**, an Appeal under Section 69 of the Arbitration Act, 1996 holding that the time bar in Article III Rule 6 of the Hague Visby Rules can apply to claims in relation to misdelivery after discharge. This case marks an important milestone since the English Court had never decided on this important question earlier.

In this case, 13 sets of Bills of Lading dated 04 and 14 March 2018 on the Congenbill Form were issued "TO ORDER" for and

on behalf of the Master of the vessel, M/V Giant Ace for about 85,510 MT in aggregate of coal in bulk. KCH had bareboat chartered the Vessel from Mirae Wise SA (a Panama Company and registered owner of the Vessel). The consignment of Coal was loaded in Indonesia and arrived at the Indian ports of Jaigarh and Dighi around 2 weeks later. The Original Bills of Lading were not available at the discharge port, so the cargo was discharged into stockpiles at Indian Ports between 01 and 18 April 2018 against the letter of Indemnity issued to the carriers, KCH Shipping

by the Vessel Charterers. Unbeknown to KCH Shipping, FIMBANK had financed the purchase of the coal cargo by its customer and had been left unpaid under its financing arrangement. FIMBank, therefore, wanted to exercise what it considered to be its security for the financing by demanding the delivery of the cargo under the Bills of Lading, of which it claimed to be the lawful holder. Unfortunately for FIMBank, by the time it tried to exercise its security, the cargo had already been discharged from the Vessel and had been collected by the local receivers. FIMBank, therefore, brought a claim in



**THOUGHT
for the MONTH**

THE SECRET OF CHANGE IS TO
FOCUS ALL YOUR ENERGY NOT
ON FIGHTING THE OLD, BUT ON
BUILDING THE NEW

SOCRATES
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Arbitration under the Bills of Lading. However, FIMBank commenced the Arbitration against KCH Shipping on 24 April 2020, following an apparent misunderstanding over the identity of the carrier. The preliminary issue in the Arbitration was the claim by FIMBank was time-barred because the arbitration commenced after more than 12 months from the date of delivery of the cargo.

Art. III Rule 6 of Hague – Visby Rule reads as "the Carrier and the Ship shall, in any event, be discharged from all liability whatsoever in respect of the goods unless a suit is brought within one year of their delivery or of the date when they should have been delivered". While deciding the matter, the Arbitration Tribunal stated that

the claim is time-barred, and FIMBank brought an appeal to the High Court under Section 69 of the Arbitration Act, 1996 and the court dismissed the Appeal, making it clear that the provision of Time bar applies to this case.

Not only in shipping but in any transport industry, the liability under misdelivery of the cargo can have a significant impact on a carrier. A Bill of Lading is referred to as a document of title, which gives the holder of the Bill of Lading the right to possession of cargo carried under it, and the endorsement and delivery of the Bill of Lading, transfer the right of possession of the cargo to the endorsee. Thereby it is settled law that a carrier who misdelivers the cargo,

(for any reason whatsoever) is liable for any consequential loss suffered by the Holder of the Original Bill of Lading.

However, this case by FIMBank has marked a blessing to the Ship owners and the carriers under the Bills of Lading. It is also worth noting that one of the main purposes of the Visby Amendment to Article III Rule 6, which substituted the words "discharged from the liability whatsoever in respect of the goods" for the former expression "discharged from all liability in respect of loss or damage" in the Hague Rules was supposedly to ensure that the One-year time bar applied to cases of misdelivery (Deep Sea Maritime Ltd vs. Monjasa A/S, 2018) ■



INTRODUCTION TO EXPERT DETERMINATION

In disputes of technical character, expert determination is a method of dispute resolution practised under different jurisdictions. In addition to technical proficiency, an expert determination can offer a quicker

and more affordable alternative to a court or arbitration process for resolving a dispute. The ideal cases for expert determination are those involving valuation conflicts or clearly defined technical concerns, where

the pertinent facts are not really in question. For instance, expert determination might be used to determine shares in a company, and hence it can be safely said that most commercial agreements employ expert

determination to tackle specific issues.

It is unlikely that expert determination will be suitable in cases where there are major disputed facts and disputed legal questions. In contrast to technical expertise, experts typically lack formal legal expertise, and expert decision procedures are typically not built to handle a sizable volume of disputed evidence, legal documents, etc.

Arbitration & Expert Determination

A major distinction between Arbitration and expert determination is found in the scope of authority the parties are conferring to the decision-maker. The power delegated to the Expert can only decide on a particular factual issue, involving a subject that falls under the decision maker's area of expertise. On the other hand, in arbitration, the parties typically seek to provide the arbitrator broad authority to make decisions regarding all legal and factual matters necessary to settle any claims that are covered by the arbitration clause.

Another significant difference is reflected in the procedural aspect. Under arbitration, the only evidence

considered by the arbitrator will be the evidence presented by the parties. Arbitrators must conduct hearings or otherwise provide the parties with a fair chance to present their evidence. The most notable restriction is that an arbitrator is not permitted to conduct any independent inquiry, hear any evidence away from the parties, or take part in any ex-parte communications. These procedural limits do not necessarily apply in an expert determination. Using their own specialized knowledge and expertise, experts may take action. Subject to restrictions set forth by the parties in the contract, the expert has the authority to obtain information from any source that, in the expert's opinion, is necessary to resolve the issue, including independent investigation and ex-parte communication.

The legality of Expert Determination

The enforcement of expert determination is strongly encouraged by the courts in legal regimes like Australia and the United Kingdom. Since expert determination is seen

as a recognized form of ADR, courts are hesitant to overturn them unless there has been a substantial procedural error, fraud, or bias. On the contrary, the Court of Cassation in the UAE addressed the application of expert determination and ruled that although the parties had agreed that the expert conclusion would be final and binding, it cannot have the effect of tying the parties together and can only be seen as a technical evaluation or opinion of the situation. Even if the expert's conclusion is deemed unenforceable by the courts, the expert's decision would nevertheless carry a lot of weight if the matter were submitted to arbitration or litigation if the parties still opt to use expert determination as a form of ADR. Hence, it can be rightly said that due to the lack of a global framework for expert determination, the impact of such expert agreements is governed by the legal regime of a country. The relevance of arbitration and mediation is being more widely acknowledged by the global society. Giving the same momentum for the growth of expert determination by formulating an international convention would be the ideal way forward for the growth of ADR ■





HOT NEWS



THE LATEST TALK OF THE TOWN IS THE GOLF TOURNAMENT BY DSAA

GOLF TOURNAMENT

Dubai Shipping Agents Association (DSAA) announces its much-awaited maiden GOLF TOURNAMENT, which is scheduled to be held on the 12th of January 2023; the venue being the highly acclaimed Dubai Creek & Golf Club, located at Dubai, UAE, from 12.45 pm onwards.

We have been informed by DSAA that registration for Players & Teams is now open and is strictly limited to 108 players; registration is on a first come first serve basis.

The enrolment process at the venue will commence at 10.00 am on the 12th of January 2023.

The other pre-requisites and criteria set by DSAA, for participants and those interested are as below:

- Player & Team Playoffs will be randomly selected and allocated.
- All necessary health and safety protocols will need to be complied with before participation.
- Player registration fees shall include tournament t-shirts / Caps / Golf Balls, green fees, and on-course refreshments.
- "Happy hour" and A DINNER PARTY along with Prize Distribution, have been arranged at PARK HYATT Ballroom, at Dubai Creek Golf & Yacht Club on the 12th of January 2023 from 6.00 pm onwards, in connection with DSAA Gala Dinner.
- Sponsorship for this maiden event will be a perfect opportunity to show your support and showcase your brand and image.

For all queries on Player Participation, Registration, Prizes, Happy Hours, Dinner and Sponsorship please contact the DSAA help desk at - dubaisaa@eim.ae

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