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Misdelivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar

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I
THE MANDATORY LEGAL REGIME OF HAGUE-VISBY RULES (AND HAGUE RULES)[1]

Where there is a combined or multimodal transport, the liability position is complicated because the carrier's responsibility extends from the place of receipt to the place of delivery. Once it is realized that the carriage will extend over different modes of transport, it will become apparent that different liability rules can apply at each stage. Theoretically speaking, the H/HV Rules should theoretically apply, in themselves, only to the period of sea carriage and not to the period outside sea carriage. However, the judicial interpretation of this proposition varies amongst courts of various jurisdictions. It is these variations that form the subject matter of discussion in this paper. In addition, there may be local legislation which renders the H/HV Rules applicable outside the period of sea carriage. In some circumstances combined transport operations may be governed by other mandatory Rules, e.g. the CMR.[2]

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[1]For certain particular issues to be analyzed in this article when particular textual differences between the Hague Rules and the Hague Visby Rules are not material, the Hague Visby Rules and the Hague Rules are collectively to be referred to hereinafter as "the H/HV Rules" and unless specified hereinafter, no distinction is to be made between the two in this article.

[2]Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19th May 1956).

The H/HV Rules constitute an international regime which regulates many (but not all) of the carrier's duties under a bill of lading contract. The Hague Rules are effective in the United States of America by virtue of the US Carriage of Goods by Sea Act, 1936 ("US COGSA")[3] since the United States of America has not adopted the Hague-Visby Rules and still adheres to the old Hague Rules. The Hague-Visby Rules are effective in the United Kingdom by virtue of the Carriage of Goods by Sea Act 1971 ("UK COGSA").[4] In Hong Kong, by virtue of Section 3(1) of the Carriage of Goods by Sea Ordinance (Cap.462) ("HK COGSA")[5] which was enacted in the year of 1994, the Hague-Visby Rules has been given the force of law.

Article I (b) of the H/HV defines *"contract of carriage"* as follows:-

> *"contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea . . . at which such bill of lading or similar document of regulates the relations between a carrier and a holder of the same."*

Article I (e) of the Rules defines *"carriage of goods"* under the H/HV as follows:-

> *"cover(ing) the period from the time when the goods are loaded on to the time when they are discharged from the ship."*

Article II outlines the mandatory regime of the H/HV by describing the various stages at which the carrier bears responsibilities and liabilities and is entitled to rights and immunities as follows:

> "Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

Article III Rule 8 of the H/HV provides teeth to the mandatory legal regime of Hague-Visby Rules by rendering any contractual provisions short of those required under the mandatory regime null and void by stating as follows:

> "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,

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[3]The United States COGSA is now found at Note Following 46 U.S.C. 30701.

[4]Section 1(2) of the Carriage of Goods by Sea Act 1971 in England, UK gives force to the HV Rules as contained in the Schedule to the 1971 Act.

[5]Section 3(1) of the Carriage of Goods by Sea Ordinance (Chapter 462) in Hong Kong SAR, China gives the force of law to the HV Rules as contained in the Schedule to the same Ordinance.

> goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

Article VII of the H/HV states the boundary within which the mandatory regime applies and outside which the regime may be replaced by contractual provisions as follows:

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

The Hague Rules, having been signed in Brussels in the year of 1924 has subsequently been amended by the Visby Protocol signed also in Brussels in the year 1968. The amendment to the Hague Rules to become the Hague-Visby Rules has thus left behind two outstanding legal issues: firstly, at what point the mandatory regime of Hague-Visby ceases; and secondly, even if the mandatory legal regime of Hague-Visby Rules remains applicable, whether or not the one-year time bar provision of Article III Rule 6 of the Hague-Visby Rules is applicable in the context of misdelivery of goods by a carrier. Following the Hague-Visby Rules becoming national law of the various signatory countries, these two outstanding legal issues have since been litigated for years in these countries.

II
NATURE OF THE ONE-YEAR TIME BAR UNDER THE LEGAL REGIME OF H/HV RULES

Article III Rule 6 of the Hague Rules stipulates the one-year time bar 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."*

Compared with Article III Rule 6 of the Hague Rules, the Hague-Visby Rules contain a significant change. Whereas Article III Rule 6 of the Hague Rules had provided "In any event the carrier and the ship shall be discharged from **all liability in respect of loss or damage** unless suit is brought . . . ," Article III Rule 6 of the Hague-Visby Rules provides:—"the carrier and the

ship shall in any event be discharged from **all liability whatsoever in respect of the goods** unless suit is brought . . . .” The words “**in respect of loss or damage**” are discarded and the words “**whatsoever in respect of the goods**” are added. The limitation of the carrier’s liability under the Hague-Visby Rules is therefore clearly more extensive than under the Hague Rules. This amendment means that it is no longer necessary to consider whether the relationship between the claim and the loss or damage to the goods, is the same or is in contrast to that which is required for the application of Article IV Rule 2 of the Hague(-Visby) Rules which provides “. . . the carrier . . . shall be responsible for loss or damage . . .” and Article III Rule 8 which provides “ . . . carrier . . . liability for loss or damage to, or in connection with, goods . . . .”[6] The addition of the word “whatsoever” contrasts with Article IV Rule 5(a) of the Hague-Visby Rules (which sets out the carrier’s benefit of the financial limitation on liability) and Article IV Rule 5(h) of the Hague-Visby Rules (which sets out the carrier’s exemption from liability on misstatement by shipper) since the word “whatsoever” does not appear in either Article IV Rule 5(a) of the Hague-Visby Rules which provides, “ . . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods . . . ” or Article IV Rule 5(h) of the Hague-Visby Rules which provides “Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with goods . . . ” Both paragraphs use the expression “loss or damage to or in connection with the goods.” It is further provided in Article IV Rule 5(e) of the Hague-Visby Rules that, if it can be established that the carrier has the “intent to cause damage” or has been acting “recklessly and with knowledge that damage would probably result,” he loses the benefit of the financial limitation of liability set by Article IV Rule 5(a) of the Hague-Visby Rules.

The very important question arising on the Hague-Visby amendments in the context of the one-year time-bar is whether the replacement of the words “discharged from all liability whatsoever in respect of the goods” in the Hague-Visby Rules for the former expression “discharged from all liability in respect of loss or damage” in the Hague Rules has the effect of making the one-year time-bar applicable where the carrier has misdelivered the goods. It is often said that the intention of the change was to make the time bar applicable to misdelivery and this is in accord with the travaux prèparatioires of the Visby Protocol.[7]

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[6]See Adamastors Shipping Co. v. Anglos-Sazon Petroleum Co,. [1959] A.C. 133; Renton v. Palmyra [1957] A.C. 149 (Art, III, r. 8); Freedom General Shipping S.A. v. Tokai Shipping Co. Ltd [1982] 1 Lloyd’s Rep. 73.

[7]See Diamond [1978] L.M.C.L.Q. 225 at 256.

Any claim against the carrier by the cargo owner must therefore be made within one year, a relatively short period of time, from "delivery" or when "delivery" ought to have occurred. (This time period is referred to as the "one-year time-bar (period)"). Any clause, contractual or not, that seeks to reduce this period will be contrary to the H/HV Rules and therefore null and void.[8] The reason normally given is that a carrier cannot be expected to keep records for long periods and must know rapidly while the events are still reasonably fresh in the memory and on the record to what claims they may be subjected. Lord Bingham in the English Court of Appeal in an English case of Compania Portorafti Commerciale S. A. v. Ultramar Panama Inc. and others, Captain Gregos[9] explained the purpose of Article III Rule 6 as "like any time bar intended to achieve finality, (Article III Rule 6) enable the shipowner to clear his books." A point to note is that this one-year time bar does however create an imbalance as between the carrier and the cargo owner: there is no such special time limit in claims by the carrier against the cargo owner whether for freight or in respect of dangerous goods and such claims are subject to normal national limitation periods, which is usually of much longer time period than the one-year period stipulated in the H/HV Rules.

If a carrier wishes to rely on Article III Rule 6 of the H/HV Rules in discharging from liability, he must establish firstly, that the goods were carried under a contract of carriage by sea; secondly, the mandatory legal regime of H/HV Rules have been operative; and finally that suit to establish liability under the Rules in respect of "loss of or damage to the goods" (as in the Hague Rules) or "liability whatsoever in respect of the goods" (as in the Hague-Visby Rules) under the contract has not been brought within a year. The one-year time bar in Article III Rule 6 of the H/HV Rules is absolute, that is, once the one-year time-bar period has passed, the claim ceases to exist in law[10] and it has the special legal effect of extinguishing the claim by the shipper against the carrier and not one which " . . . bars the remedy while leaving the claim itself in existence."[11] The time bar runs from the time of delivery, which may be varied where the parties have made special arrangements as to the moving of the cargo.[12] In the English case of

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[8]See Article III Rule 8 of the H/HV Rules.

[9][1990] 1 Lloyd's Rep. Pg 310.

[10]Mediterranean Freight Service Ltd v. BP Oil International Ltdl The Fiona [1994] 2 Lloyd's Rep. 506; Aries Tanker Corp v. Total Transport; The Aries [1977] 1 Lloyd's Rep. 334; Compania Portorafti Commerciale SA v. Ultramar Panama Inc; The Captain Gregos [1990] 1 Lloyd's Rep. 310 (an action for conversion was time-barred); Win's Marine Trading Co. v. Wan hai Lines (HK) Limited [1993] 3 HKC 701.

[11]*T*he Aries [1977] 1 WLR 185 at 188, per Lord Wilberforce.

[12]See Trafigura Beheer v. Golden Stavraetos Maritime Inc. [2003] 2 Lloyd's Rep. 201.

Aries Tanker Corporation v. Total Transport Ltd,[13] where a carrier sued a cargo owner for freight after one year and was met by a cross-claim for cargo damage, the Hague Rules (which was then applicable in England) only applied the time bar to actions which fall within them, that was, the cross-claim for cargo damage. The main action's claim of freight under the contract will fall to be decided under the general law applicable, that was, Section 5 of the Limitation Act 1980 in England being a much longer six-year contract time bar period. The House of Lords held that the effect of the expiry of the Hague Rules (and similarly the Hague-Visby Rules) time bar was not merely to bar the remedy, but to extinguish the cross-claim for cargo damage and the same cross-claim thus no longer existed. Moreover, as a matter of authority in English law, a cargo claim could not be made by a deduction from freight; it had to be brought by way of a separate claim. Nor could the cargo owner set off the cargo damage as a defence to the freight claim. Section 5 of the English Limitation Act 1980 has its Hong Kong equivalent provision in Section 4 of the Limitation Ordinance (Cap.347).

The time limit for any action by a cargo owner against a carrier starts to run from the moment of "delivery," rather than from the moment of "discharge" from the vessel and has to be commenced "within one year after delivery of the goods or the date when the goods should have been delivered,"[14] and "within one year of their delivery or of the date when they should have been delivered."[15] Neither the term "delivery" nor the term "discharge" is defined in the H/HV Rules. "The term 'delivery' in a bill of lading is ordinarily taken to refer to transfer of possession to the consignee or the consignee's agent. It certainly does not mean the same thing as 'discharge.'"[16] "Delivery" appears to occur "either when the goods are freed from the ship's tackle or at the very latest as soon as the consignee has an opportunity to take possession of the goods and not necessarily when it has actual possession."[17] "Delivery" is therefore of particular relevance in a situation of a through bill of lading or combined transport bill of lading involving inland transport after the sea transport since there will be a gap

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[13][1977] 1 W.L.R. 185.

[14]Article III Rule 6 of the Hague Rules.

[15]Article III Rule 6 of the Hague-Visby Rules.

[16]*The Zhi Jiang Kou* (1990) 28 N.S.W.L.R. 354 at 364, [1991] I Lloyd's Rep. 493 at 499, *per* Gleeson C.J.

[17]*The Beltona* [1967] 1 Lloyd's Rep. 531 at 540; followed in National Packing Corp. v. Nippon Yusen Kaisha (NYK Line)[1973] 1 Lloyd's Rep. 46 (N.D.Calif.) ("the consignee should receive notice that the goods have been discharged and should have an opportunity to remove the goods or place them under proper care and custody"); American Hoesch Inc. v. SS Aubade 316 F. Supp.1193; Iwai Aust. Ltd v. Malaysian Intl. Shipping Corp. (1998) 167 C.L.R. 219; Brocsonic v. Mathilde Maersk [2001] A.M.C. 506 at 516. However, the different contexts in which the points arise in these cases prevent them from providing clear authority.

between discharge and delivery in terms of place and time with discharge taking place at an earlier place and time and delivery taken at a later place and time.

After delivery (from which the time bar will run), if the carrier continues to hold the goods, it is clear that, as the mandatory legal regime of Hague-Visby Rules has ceased to be applicable, he must hold as a bailee, either on any specific terms of the contract or on general principles of bailment. This would mean that no provision of the Hague-Visby Rules including excepted perils, time bar or package or unit limitation applies. The carrier's duty would be a non-delegable one.[18] Under the bailment contract to which the carrier is party, he must redeliver the goods to the bailor or to "deal with the goods in accordance with the (bailor's) instructions."[19] The specification of the commencement of the time-bar period by reference to "delivery" rather than by reference to "discharge" may be a deliberate one since the point of delivery may be distant from the point of discharge especially in a combined transport bill involving inland transport after sea transport and hence the time of delivery may happen long after the time of discharge.

The time limit of any action by a cargo owner against a carrier starts to run from the first date of the date of actual "delivery" and the second date being "when (the goods) should have been delivered." The latter is probably for providing a variant, principally for the case where the goods are lost or in some other way not delivered (e.g. because they are so damaged as to have lost their commercial character as goods of the type shipped;[20] or possibly because they are, for example, misdelivered not against original bill of lading[21] though there is great scepticism whether this is so. The choice, where there is one, of the first date or the second date for the time limit to run must, however, be that of the claimant. Thus, if the goods are delivered late, even though there may be a date at which they should have been delivered, it will be to the claimant's advantage to take the date of actual delivery for the purposes of the time bar.

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[18]Morris v. C.W. Martin & Sons Ltd. [1966] 1 Q.B. 716 at 725. One of reasonable care s*ee* Bourne v. Gatliffe supra; Gilchrist Watt & Sanderson Ltd v. York Products Pty Ltd [1970] 1 W.L.R. 1262; Crystal v. Cunard SS Co. [1965] A.M.C. 39 (2d Cir), affirming [1965] A.M.C. 1292; The Bischofstein [1974] 1 Lloyd's Rep. 122 (S.D.N.Y.).

[19]See Reyes J. in Starlight Exports Limited and others –v- CTO (HK) Limited HCCL 55/2004, date of judgment on 19th July 2006.

[20]See Asfar & Co. v. Blundell [1896] 1 Q.B. 123 (a case on freight).

[21]The date is that "when the consignment ought to have been delivered by the appellant to the respondent": Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust.) Pty Ltd (1978) 139 C.L.R. 231 at 238, per Barwick C.J. (diss.) (where the goods were stolen before delivery was possible) (actual decision reversed. Sub nom. The New York Star [1981] 1 W.L.R. 138); The Zhi Jiang Kou (1990) 28 N.S.W.L.R. 354, [1991] 1 Lloyd's Rep. 493 at 499.

III
IN THE CONTEXT OF MISDELIVERY OF CARGO WITHOUT PRODUCTION OF AN ORIGINAL BILL OF LADING, AT WHAT POINT DOES THE MANDATORY LEGAL REGIME OF H/HV RULES CEASE AND PRIVATE CONTRACTUAL OBLIGATIONS OR THE LIMITATION PERIOD PRESCRIBED BY THE PROPER LAW RESUME SWAY?

The issue of at what point the mandatory regime of the H/HV Rules commences and at what point ceases in a contract of carriage has been argued in various instances in different jurisdictions signatory to the H/HV Rules, in particular, in authorities concerning time-bar. The issue is of particular significance because whether or not the one-year time bar period specified in Article III Rule 6 of the H/HV Rules can be said to apply depends upon firstly, whether or not, at the time of the misdelivery of goods in question, the mandatory legal regime of H/HV Rules remains applicable. If not so, the one-year time bar period specified by Article III Rule 6 will not apply. Instead, private contractual obligations within the bill of lading (if any) or the limitation period prescribed by the proper law shall resume sway.

In the context of misdelivery of cargo without production of an original bill of lading, the issue is whether misdelivery at the port of discharge falls within the operational ambit of the H/HV Rules, If so, Article III Rule 6 of the H/HV Rules affects the contractual time-bar period within the bills of lading and displaces the limitation period prescribed by the proper law. Or, to put the matter more specifically, as at the moment of misdelivery of goods without production of the bill of lading, can it properly be said that "discharge" was complete, and thus at that point the element of carriage of goods for the purpose of the H/HV Rules had ended, thereby permitting the carrier to place reliance upon the contractual provisions of time-bar under the relevant contract of carriage (which may well be of a shorter time-bar period than the one-year prescribed under Article III Rule 6 of the H/HV Rules)? Alternatively, absent the aforesaid contractual time-bar provisions stipulated in the relevant contract of carriage, the cargo owner may be permitted to place reliance on the limitation period prescribed by the proper law which way well be of a much longer time-bar period than the one-year prescribed under Article III Rule 6 of the H/HV Rules.

In Hong Kong, the normal time-bar period for a contractual or tortious claim possibly by a cargo-owner against a carrier is, under the Limitation Ordinance (Cap.347), much longer (six years) as compared with the much shorter time-bar period of one year under Article III Rule 6 of the Hague-Visby Rules (being applicable under Hong Kong laws). One may argue that "discharge" finally had been completed when the goods (or the container

containing the goods) had safely been deposited on the wharf, or, at the latest, within the relevant storage area. On the contrary, one may otherwise argue that the misdelivery took place when the "care and custody" element of the H/HV Rules was still in force by citing in this connection Article II of the H/HV Rules, which provides: "*Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried*." This significant question of law has yet remained to be answered. Despite the H/HV Rules being international conventions having been ratified by the majority of trading nations around the globe, the point at which the mandatory regime of the H/HV Rules cease remains far from settled.

Losses resulting from misdelivery of goods may not arise until *after* the goods have perhaps been handed over to the land carrier and been hauled by road a considerable distance from the discharge port. The misdelivery may have occurred at the very end of the combined transport operation which will clearly be *subsequent* to the discharge of the goods from the ship upon which the goods had been carried to port of discharge. The sole issue is, arguably, whether the carrier's misdelivery (wrongful release) of the consignment was within "carriage of goods" as defined in the H/HV Rules, and as such covered by the time limit under Article III Rule 6.

Article I(e) defines "carriage of goods" covered under the H/HV Rules as covering:-

> " . . . the period from the time when the goods are loaded on to the time when they are discharged from the ship."

The H/HV Rules seems to apply, according to Article I (b), Article I (e) and Article II taken together, "*from the time when the goods are loaded on to the time when the goods are discharged from the ship*." This seems to begin with "*loading*" and ends with "*discharge"* of goods, with the intermediate stages of "*handling, storage, carriage, custody, and care*" in between. All these are functions of the carrier beginning at the moment when the goods start to be put on board the vessel and ending with the moment when they are finally unloaded from the vessel. From a strict reading of the H/HV Rules, it would appear that the H/HV Rules do not apply before "*loading*" or after "*discharge*." It is, therefore, arguable from the wording of Article II that the mandatory regime of the H/HV Rules ceases at the point of discharge whenever that is to be identified as so being.[22] It has therefore been said that the H/HV Rules govern only during the time between the goods having been hoisted on board over the ship's rail (or

[22]See Mustill, Archiv fur Sjorett 1972, 684; Diamond [1978] L.M.C.L.Q. 225 at 256, 257.

shortly before that time when the ship's tackle is attached to a container of goods for hoisting on board) and the goods having been hoisted over the ship's rail and placed on the quay (or shortly after that time when the ship's tackle is removed from a container of goods deposited quayside). It has, therefore, been argued that the one-year time bar should not apply to misdelivery because delivery (as opposed to discharge) is arguably outside the scope of the H/HV Rules.[23]

There are authorities as early as in the year of 1977 to the effect that some of the carrier's contractual duties or operations in dealing with the goods fall outside the scope of "carriage of goods" such that the carrier could not rely on the time bar under Article III Rule 6 of the H/HV Rules. In *The "Arawa"*[24] there was a contract for carriage of frozen meat from New Zealand to London. The defendant shipowner contracted a lighter to transport the goods from the ship's side to the wharf. Owing to industrial actions, there were considerable delays in landing the goods from the lighters to the warehouse at the wharf, as a result of which part of the goods suffered damage from defrosting and softening. Barndon J. (as he then was) held, at 425, as follows:-

> "This being the scheme of the rules, the question which arises in the present case is whether the discharge of the goods was completed, so that the sea carriage ended, when the goods were transferred from the ship into the lighters: or whether the lighterage was all part of the operation of discharge, so that the sea carriage did not end until the goods had been carried in the lighters to Chambers Wharf and landed there . . . While there is no direct English authority on the matter, and it is treated in *Scrutton on Charterparties* 18th Edition, pp. 419-20, as an open point, I am of the opinion that the former of the two views, namely, that discharge was completed, so that the sea carriage ended, when the goods were transferred from the ship to the lighters, is the correct one. This view seems to me to accord with the ordinary and natural meaning of the words "when they are discharged from the ship" as used in definition (e) of Article 1."

On the other hand, the applicability of the H/HV Rules may thus be extended by the terms of the contract between the parties since Article VII of the H/HV Rules specifically permits "*agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier*"

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[23]This appears to be the view of *Scrutton on Charterparties* (20th ed., 1996), p. 435 n.43; Mustill, 1972 Archiv for Sjørett at p. 710; see also Chong [1995] 1 M.L.J. v, citing *Rambler Cycle Co. v. P&O S.N. Co.* (1964) 30 M.L.J. 443, [1968] 1 Lloyd's Rep. 43; *TheKapetan Markos N.L.* [1986] 1 Lloyd's Rep. 211 at 232 ("discharged from all liability" must mean "discharged from all liability under the Rules") *per* Parker L.J.; *contra,* Diamond [1978] L.M.C.L.Q. 225 at 256; Davenport (1989) 28 N.S.W.L.R. 354, [1991] 1 Lloyd's Rep. 493 at 516, *per* Kirby P., where however the matter did not have to be decided.

[24][1977] 2 Lloyd's Rep.416.

in respect of "*custody and care*" operating before loading and after discharge. The H/HV Rules apply to the whole contract of carriage, including the entire loading and discharging, if the parties so agree. This indicates that the H/HV Rules do not apply before loading and after discharge. Indeed, clauses in many standard contract forms take advantage of this provision. However Article VII is equivocal. It might be taken to suggest that the application of the H/HV Rules survives, but its application (other than that of the one-year time-bar) can be modified or excluded. Or it can be taken as intended to confirm that the H/HV Rules have at such times not started operating (before loading) or ceased to operate (after discharge), so that there can be no objection to such clauses.

Apart from the aforesaid time-bar authorities, there is even an Australian authority which contains statements within its judgment which appear unequivocally to support the proposition that the obligation to deliver (as opposed to discharge) was under the terms of the bill of lading and not under the Hague Rules (and should be equally true for Hague-Visby Rules). In *Nissho Iwai Australia Ltd v. Malaysian International Shipping Corporation Berhad,*[25] the High Court of Australia, at pages 224-5, said:

> "By force of Cl. 3 of the Bill of Lading and the place where it was accepted, the contract contained in the bill was subject to the Hague Rules as set out in the Carriage of Goods by Sea Order of the State of Sarawak. As a result, the carrier was subject to the obligations contained in the Hague Rules in respect of the carriage of the goods from the time they were loaded onto the vessel until they were discharged. Otherwise the obligations of the carrier depended upon the terms of the bill of lading and not the Hague Rules . . . The obligation to deliver was under the terms of the bill of lading and not under the Hague Rules . . . "

The debate as at what point the mandatory regimes of the H/HV Rules cease to be applicable and thus the private contractual obligations resume sway began to intensify towards the end of the year of 1988 when the English High Court in the English case of *Compania Portorafti Commerciale S. A. v. Ultramar Panama Inc. And Others, The* "*Captain Gregos*"[26] supported the proposition that the Hague-Visby Rules do not apply to events after the discharge from the ocean vessel. The "*Captain Gregos*" was a time-bar case in which the plaintiff carrier had issued an originating summons seeking a declaration that the cargo interests' claim for damages arising out of the theft of part of the cargo (being crude oil) had been extinguished by Article III, Rule 6 of the Hague-Visby Rules on the ground that suit was not brought within one year of the date when the cargo

[25][1989] 167 CLR 219.

[26][1989] 2 Lloyd's Law Rep. Pg. 63.

should have been delivered. At first instance, Hirst J. in the Commercial Court concluded that the concept of 'delivery' was held to fall outside the scope of Article II and that the Hague-Visby Rules therefore were inapplicable, and thus that one-year time bar provision within Article III Rule 6 did not apply to the misdelivery complained of (in that case, the theft of the crude oil). Hirst J. explained his views in this judgment as follows:-

> "The first question which I have to decide is whether delivery is in any way within the scope of the Art. II "package." Article II describes the various stages at which the carrier bears responsibilities and liabilities, and is entitled to rights and immunities; this begins with loading and ends with discharge of goods, with the intermediate stages of handling, stowage, carriage, custody, and care in between. All these are functions of transportation beginning at the moment when the goods start to be put on board, and ending with the moment when they are finally unloaded. The "package" so described thus seems to me to be inherently inapt to embrace delivery, which imports concepts of possessory or proprietary rights, alien in my judgment to these carefully listed transportational stages. This view seems to me to be reinforced by the definition of "Carriage of goods" in Art.1(e). Once the conclusion is reached that delivery is outside the scope of art. II, which is of course the key article, it must inexorably follow that misdelivery of whatever kind is outside the scope of Article III, R.6, since the carrier is under no "liability" in that respect. There is, moreover, in consequence no need for any saving clause comparable to Art. IV Rule 5(e)."

However, towards the end of the year of 1989, the English Court of Appeal in *The Captain Gregos*[27] having taken a different view, reversed the decision of Hirst J. by holding that the Hague-Visby Rules in general and hence Article III Rule 2 and the one-year time bar in Article III Rule 6 in particular, were applicable during the time of the theft of the cargo by the carrier and upheld the appeal of the plaintiff carrier. Bingham LJ (as he then was) held that the acts of which the cargo owners complained "are the most obviously imaginable breaches of art. III, r.2," whilst Slade LJ noted (at 319) that the failures of the carrier in that case "fall within art. III, r.2, and claims in respect thereof are correspondingly subject to the time limit imposed by art. III, r.6." Bingham L.J. in the English Court of Appeal in *The Captain Gregos*[28] expressed his purposive approach in interpreting the one-year time bar in a shipper's claim against a carrier provided in Article III Rule 6, in sharp contrast to that of Hirst J., as follows:-

> "Apart from the obligation of seaworthiness imposed by art. III r.1 (not in issue here), the carrier's central obligation is (per art. III rule 2) properly and

[27][1990] 1 Lloyd's Law Report, Pg 310-319.
[28][1990] 1 Lloyd's Law Report Pg 310-319.

> carefully to load, handle, stow, carry, keep care for and discharge the goods carried. 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 boiler 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 discharged them and so converts them to his own use. If the cargo-owners were to establish the fact they allege, and had brought suit within the year, I cannot see how a claim based on breach of the rules could fail. Both the cargo-owners and the Judge tended to treat their claim as one of misdelivery, but that does not strike me as an apt or helpful way of characterizing it. Article III r.6 provides that the carrier and the ship shall . . . in any event be discharged from all liability whatsoever in respect of the goods (my emphasis) unless suit is brought within the year . . . I do not see how any draftsman could use more emphatic language. It is even more emphatic than the language Lord Wilberforce considered "all embracing" in The New York Star. The New York Star, Port Jackson Stevedoring & Lighterage Services Ltd v. Salmond & Spraggon Pty Ltd (The New York Star) [1981] 1 W.L.R. 138. Like him, I would hold that "all liability whatsoever in respect of the goods" means exactly what it says. The inference that the one year time bar was intended to apply to all claims arising out of the carriage (or miscarriage) of goods by sea under bills subject to the Hague-Visby Rules is in my judgment strengthened by the consideration that art. III, r.6 is, like any time bar, intended to achieve finality, and in this case, enable the shipowner to clear his books (The Aries [1977] 1 Lloyd's Rep. 334 at p.336) . . . "[29]

In the course of his judgment in the Court of Appeal (with which Stocker and Slade LJJ agreed), Bingham LJ acknowledged that:

> "The definition in art. I(e) does, I accept, assign a temporal term to the "carriage of goods" under the rules, supporting an argument that the rules do not apply to events occurring before loading or after discharge . . . I read art. II as defining the scope of the operations to which the responsibilities, rights and immunities in the rules apply . . . "

Despite the English Court of Appeal decision in *The Captain Gregos* that the Hague-Visby Rules in general and the one-year time bar, in particular, was held to apply at the time of short-delivery of the cargo concerned by the carrier, the context was far from conclusive, since it was held that the breach (moving oil cargo within the ship) actually occurred before discharge: the goods (crude oil) were misappropriated in transit. Bingham LJ (as he then was) noted that to characterize the theft which had occurred as "misdelivery" neither was apt nor helpful. The case was therefore arguably not one of misdelivery and the decision did not touch upon the position as

[29][1990] 1 Lloyd's Law Report, Pg 315.

to whether the carrier's operations when the goods arrived at the port of delivery constituted "discharge" as defined in Article I(d).

The approach of the Court of Appeal in *The Captain Gregos* was followed *obiter dictum* by Kirby P. in *PS Chellaraam & Co. Ltd v. China Ocean Shipping Co., The "Zhi Jiang Kou,"*[30] a time-bar case before the Court of Appeal of New South Wales, wherein the learned President of the Court observed, at 516:

> "I . . . agree that the Courts must be on their guard against the reintroduction of the discredited doctrine of fundamental breach 'by the side door' . . . That doctrine is not the law of Australia. Our law simply requires that provisions in contracts or international conventions limiting or excluding the liability of those concerned must be given their ordinary and natural meaning. They are not to be distorted by reference to a supposed preconception about liability for fundamental breaches . . .
>
> But is such an inconvenient and unexpected argument required by the language of the Rule [Article II] itself? Looking at the rule, in its context, I think not. Contrary to the opinion of Mr. Justice Hirst in *The Captain Gregos*, art. II of the Hague Rules does not in my opinion establish a category of events arising from loading to discharge, strictly so confined. *It also includes custody and care, loading and handling as well as the carriage and discharge of the goods. 'Custody and care' are apt to cover events after discharge and until delivery of the goods. Any other construction would artificially terminate their effect at the ship's rail . . .*" (emphasis added).

However, in the year of 1995, the approach in *The Zhi Zhang Kou* appears to have attracted approval, albeit obiter, in the Hong Kong Court of Appeal by Liu JA in *Wily Products Co. Ltd v. Hecny Shipping Ltd,*[31] a case which involved the loss of cargo after discharge in a Brazilian port and before the cargo was delivered to the land carrier. The plaintiff cargo owner obtained summary judgment against the defendant, Hecny, for the FOB value of the goods, and the defendant appealed, contending that the sum awarded was wrong and that damages should be assessed. Litton VP and Patrick Chan J (as he then was) decided the case on the basis that in the absence of evidence to the contrary, the FOB value of the goods constituted good evidence of the market value at delivery. However, Liu JA went on to consider Article I(e) of the Hague Rules—namely that "'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship"—and, after citing with approval the dictum of Kirby P. in *The Zhi Jiang Kou*, Liu JA observed (*op cit*, at p 52):

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[30][1991] 1 Lloyd's Rep.493.

[31][1995] 3 HKC 47.

> "It is reasonably clear that for our purposes, art I(e) would not materially affect art II. In order words, despite art I(e), the period of 'carriage of goods' by sea envisaged in art II should not be strictly construed, limiting it to 'events from loading to discharge.' *Article II would therefore extend the period beyond discharge*. In this situation the parties faced, art II is quite capable of standing on its own. The sea carriage did not therefore terminate after discharge and the Hague-Visby Rules still applied at the time of the loss before the goods were handed over to the land carrier . . . " (emphasis added).

In the year of 1997, the Supreme Court of Australia held in favour of the view that completion of discharge results in the ending of sea carriage and hence the ending time bar provisions under the regime of Hague-Visby Rules. In *Anglo Irish Beef Processors International v. Federated Stevedores Geelong & Ors,*[32] Phillips, JA made the following observations:-

> "Next, there is the way in which the Hague Rules operate. It is plain that their operation is circumscribed . . . Secondly, the rules operate only in respect of a particular period of time. By virtue of the definition in Article I, the "carriage of goods" is limited to " . . . the period from the time when the goods are loaded on to the time when they are discharged from the ship." It has been said, on that account, that the Hague Rules govern only ' . . . during the time between which the goods pass from "ship's rail to ship's rail"'[33] so that loss and damage occurring either before or after that time is altogether outside the Hague Rules. The concept of dividing the process of loading and unloading into two parts (before and after the ship's rail) has attracted criticism . . . The detail of that criticism is not presently relevant . . . What is important is that there is some limitation. It suffices for present purposes to say that the Hague Rules apply to the carriage of goods by sea from loading until discharge. Yet the contract governing that carriage may be far from so limited. A single contract may readily cover the transport of the goods by land as well as their transport by sea and then, as Mr. Justice Devlin, pointed out in *Pyrene*, it may be more accurate to speak of the Hague Rules attaching "to a contract or part of a contract." Either way, however, the point is plain enough: the Hague Rules apply only to that portion of the overall journey to which the rules apply and beyond that the Hague Rules do not govern, but the contract as otherwise written by the parties does . . . There may well be no contract to which the plaintiff and the defendant are both parties, or, if there is such a contract . . . it may be such that the Hague Rules do not apply or, if they do, the loss or damage may have occurred before the goods were loaded on the ship or after they were discharged. In short, the Hague Rules may or may not be applicable."[34]

At the same time in the year of 1997, the Hong Kong Court of Appeal in *Computronics International v. Piff Shipping Limited*[35] has held *obita* that the

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[32][1997] 1 Lloyd's Rep. 207 (C.A., Supreme Court of Victoria).

[33][e.g. *Kamil Export* at p. 554].

[34][1997] 1 Lloyd's Rep.207 (C.A., Supreme Court of Victoria) at 219.

[35][1997] 2 HKC Pg 53 C.A.

Hague-Visby Rules ceased to be applicable after discharge and before loading. In that case, the plaintiff's business includes the purchase of goods such as video cassette recorders and reselling them to its own customers. One of those customers was L & S. In September 1990, the plaintiff agreed to sell a quantity of such recorders to L & S at a price CIF Hamburg. The Plaintiff came to an agreement with the Defendant by which they were to be put into a container and sent to that port. The recorders were so sent and arrived in Hamburg on 25 October 1990 when they went into the control or custody of Rohde & Liesenfeld GMBH and they appeared to have been released by Rohde & Liesenfeld sometime in November of 1990 and without the Plaintiff's authority. Ching JA (as he then was) observed as follows:-

> "Under para 6 of art III of (the Hague-Visby Rules) the period is one year and the question is whether or not the goods, in Hamburg and in the possession or control of Rohde & Liesenfeld, were still within the contract of carriage. Our attention was drawn to the decision of another division of this court in *Wily Products Co Ltd. v. Hecny Shipping Limited* [1995] 3 HKC 47 per Liu JA. The other two members of the court proceeded on the basis that there was no relevant limitation period which could assist the defendant. Liu JA, however, held that 'carriage of goods' as defined in paragraph 1(e) of article I of the Rules should not be strictly construed . . . Liu JA, relied upon a decision in the Australian case of *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 wherein it was observed that the words 'custody and care' are apt to include events after discharge and until delivery. We are not at all convinced that that is correct. There is, in our view, a strong argument that the goods were not under a 'contract of carriage' at the time of any misdelivery . . ."[36]

The Hong Kong Court of Appeal has effectively disapproved *The Zhi Jiang Kou*.

Hence, the issue of whether or not the carrier's release of the goods at the port of delivery against presentation of bill of lading was held to be part of its operations under the "contract for carriage" or as part of the "discharge" of the goods from the ship is far from settled. Ching JA (as he then was) was not alone in this regard. *The Zhi Jiang Kou* decision had in fact been criticized at nearly the same time in two Australian cases, neither of which was the approach which Kirby P in *The Zhi Jiang Kou* adopted. To the contrary, the approach of Kirby P in *The Zhi Jiang Kon* was specifically rejected. The first Australian case is *Kamil Export (Aust.) Pty Ltd v. N.P.L. (Australia) Pty Ltd*.[37] In this case, the Appeal Division of the Supreme Court of Victoria in the year of 1993 ruled that the Hague Rules applied only to the

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[36]at pg 62I to 63D.

[37][1996] 1 V.R. 538 (Victoria, C.A.).

contract of carriage by sea during the time between which the goods pass from ship's rail to ship's rail, and thus that an obligation to deliver goods *after* discharge was not covered by the part of the contract to which the Hague Rules applied; accordingly, the time bar in Article III, Rule 6 did not apply to the proceedings in that case. In the course of his judgment, Marks J. commented on *The Zhi Jiang Kou*:[38]

> *"Chellaram* (*The "Zhi Jiang Kou"*) was a time bar case. Kirby P was of the opinion that the time bar in the Hague Rules applied to a loss of goods after discharge. Gleeson CJ, with whom Samuels A.J. agreed, rested his decision on the operation of Cl.10(2) being independent of the Hague Rules and it was this opinion that was followed by the court. Gleeson CJ found it unnecessary to decide the reach of Art. III, rule 6 . . . The Hague Rules are expressed to apply only to the sea-carriage of the goods, that is, to the period after the goods pass the ship's rail on lading to the time they pass it on unloading. Thus the expression 'from ship's rail to ship's rail . . . "

Marks J further stated, at 554 (line 45) as follows:-

> "It was submitted on behalf of the appellant that the time bar in Article III, R.6 does not apply to loss and damage which occurs, as it did in the present cases, after the goods have been discharged from the ship . . . The weight of authority favours the Hague Rules being confined in their application to the contract of carriage by sea, that is, during the time between which the goods pass from 'ship's rail to ship's rail . . . In the present case, it can fairly be said that the bill of lading does no more than incorporate the Hague Rules and the Sea Carriage of Goods Act, the latter relevantly doing no more than give statutory force to the former. The bill of lading in this case evidences not only the contract to which the Hague Rules apply but also an obligation on the part of the respondent to deliver '*after discharge*.' The latter obligation is accordingly not covered by the carriage contract to which the Hague Rules apply. As I have mentioned, Kirby P in *Chellaram* (*The "Zhi Jiang Kou"*) expressed a contrary opinion. As presently advised, his view stands alone among other judicial pronouncements . . . "

The second Australian case is *Nikolay Malakhov Shipping Co. Ltd v. Seas Sapfor Ltd*[39] being yet another time bar case in which goods under a bill of lading incorporating the Hague Rules and making the law of Malaysia the proper law of the contract of affreightment were shipped from Malaysia and, in a deviation caused by an industrial dispute, were unloaded at a different New South Wales port from that nominated in the bill. The carrier arranged for bond storage and for road transport of the goods to their contractual destination. The goods were damaged by rain while being held in open

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[38] *[1996] IVR (Victoria, C.A.)*, at 554-555.

[39] (1998) 44 N.S.W.L.R 371.

storage before transport by road. This was a case of discharge in inappropriate circumstances, such as, for example, discharge onto an unsafe wharf resulting in damage to the goods, thus attracting the arguments of whether or not to impose responsibility on a carrier, under Article III Rule 2, to carefully and properly discharge, and thus to impose liability for damage done to the goods referable to the actual process of discharge. The interest in this case lies in the observations of the New South Wales Court as to the ambit and extent of the duty of a carrier under Article III, Rule 2 of the Hague Rules, which provides:

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

Sheller JA disagreed with the conclusion of the judge below that discharge of the goods into open bond storage was a serious breach of the obligation 'properly' or 'carefully' to discharge the cargo under Article III Rule 2 of the Hague Rules by saying that:

> "With the greatest respect I disagree with his Honour's conclusion. In my opinion, the last operation for which the carrier was responsible by force of the Hague Rules was the discharge of the goods from the ship. That operation was complete either when the goods crossed the ship's rail or when they were delivered from the ship's tackle, if the ships tackle was used. From that moment any operations undertaken were not subject to the Hague Rules and the obligation of the carrier in respect of them must be found elsewhere. If the carrier had by its own employees, rather than by an independent contractor, removed the goods to store from the place where they left the unloading tackle, and had done so negligently, the terms of the contract evidenced by the bill of lading would have exempted it from liability . . . *In my opinion, the responsibilities placed upon the carrier by application to the contract of the Hague Rules cease, in the circumstances of this case, when the goods crossed the ship's rail or were delivered from the ship's tackle. At that point within the meaning of the expression 'carriage of goods' and art II and art III, r 2, and art VII the goods had been discharged from the ship in due fulfillment of the contract*. The parties had agreed that subsequent to the discharge from the ship, goods in the custody of the carrier or his servants should be at the sole risk of the merchant and the carrier should not be liable for loss or damage arising or resulting from any cause whatsoever (cl3) . . . " (emphasis added)[40]

Cole JA approached this specific issue by asking rhetorically "When was discharge complete?" and observing that " . . . at that time of functional performance . . . the limits of operation of the Hague Rules was reached, leaving the carrier free to rely upon any contractual provisions negating or

[40](op cit, at page 389 – 390).

restricting liability in respect of any remaining obligations under the contract of carriage."[41] Cole JA concluded that:-

> " . . . the Hague Rules apply to operations from tackle to tackle, unless the parties to the contract of carriage have varied that arrangement to impose different obligations on the shipper, owner, or consignee in relation to loading or discharge. One looks to the particular contract to see if that has occurred. If it has, the Hague Rules have application to the operations encompassed by that variation, *but not beyond that which can properly be regarded as either loading or discharge, those terms expressing the outside functional boundaries of application of the Hague Rules because that is the scope of 'carriage of goods' within the definition and meaning of the Hague Rules . . . The bill of lading constituting the contract of carriage in this instance does not purport to extend the responsibility of the carrier beyond tackle to tackle* . . . " (emphasis added)[42]

Handley JA dissented. He thought that in principle it was not possible to conclude, as had Shelley JA and Cole JA, that the carrier's responsibility under the relevant bill of lading for the continued safety of the goods had ceased when they were safely discharged on to the wharf,[43] and concluded[44] that:

> "The carrier's responsibility for the careful and proper discharge of the cargo must, in my judgment, include the making of proper arrangements for the reception and care of the goods on shore. The discharge of cargo by the use of the ship's gear onto a wharf in good condition, without proper arrangements for the cargo to be stored and looked after until collected by the consignee, would not fulfill the carrier's obligation under art III, r 2 . . . "

A recent Hong Kong Commercial Court Judgment, *Carewins Development (China) Limited v. Bright Fortune Shipping Limited and Hecny Shipping Limited*[45] is a misdelivery case (which does not concern the issue of time-bar under Article III Rule 6) relating to the shipment of footwear by the plaintiff from Hong Kong to Los Angeles, California, USA. The goods, being the subject of carriage by the defendant carrier, Bright Fortune, had been sold by the plaintiff, Carewins, on FOB terms to its buyer in Los Angeles, California, USA named Artist Fashion, Inc. ('Artist Fashion'). After the completion of manufacture, Carewins would make arrangements for the transportation of the finished goods from the factories

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[41](op cit, at 411),
[42](op cit, at 414-415).
[43](op cit, at 380).
[44](op cit, at 382).
[45][2006] 4HKLRD Pg 131.

in the People's Republic of China ("PRC") to Hong Kong and then to Los Angeles.

It was held by Stone J. that unlike the position, for example, under the US Harter Act, which expressly extends the obligation of the carrier beyond discharge to delivery, the ambit of the obligations imposed by the Hague-Visby Rules ceases upon '*discharge*'—which on the facts "must be regarded as having been concluded prior to the misdelivery now in question." In the terms of the operational scope of the Hague-Visby Rules, Stone J. held that " . . . (I) respectfully agree with the approach which was taken at first instance by Hirst J in the Commercial Court in *The* "*Captain Gregos,*" [1989] 2 Lloyd's LR 63 – which approach resonates, perhaps more vigorously, in the subsequent Australian cases of *Kamil Export and Nikolay Malakhov Shipping*, although there is no necessity, for present purposes, to decide whether the 'ship's rail' or the potentially broader 'final unloading' formulation is to be preferred." After citing the reference to the inaptness of "package" of Article II in embracing delivery, Stone J. expressed his view as follows:

> " . . . there is in principle no justification for extending the concept of 'discharge' beyond final unloading to embrace every act up to and including delivery of the goods, which would be tantamount to regarding the carrier both as carrier and warehouseman, and which not only would extend the Rules to the entire contract of carriage, including a period of storage ashore, but also possibly may serve to confuse the proper ambit of the Hague-Visby Rules with, for example, particular contractual provisions often found within contracts of carriage by sea entitling the carrier to warehouse the goods, usually at the merchant's risk and expense, if the consignee does not take delivery . . .
>
> It seems to me that Article II, which states the scope and purpose of the succeeding articles, and Article III, Rule 6 require to be read consistently and together, and I have concluded, therefore, that (the cargo owner Counsel's) primary submission that in this case the misdelivery took place when the "care and custody element" of the Rules was still in force is plainly wrong . . . the operational ambit/reach of the Rules does *not* extend to the misdelivery on the present facts . . . "

The Hong Kong Commercial Court's view comes nearly to the point of rejecting the English Court of Appeal decision in *The "Captain Gregos"* and in fully adopting the lower hierarchy English High Court's decision by Hirst J. Despite that, Stone J. remarked that, " . . . this is an issue which would reward appellate consideration . . . "

The Hong Kong Court of Appeal in *Carewins Development (China) Limited v. Bright Fortune Shipping Limited and Hecny Shipping Limited*[46] did in a year's time in July 2007 consider this issue of when the H/HV Rules begin or end. Reyes JJ. noted that the term "discharge" has not been defined by either the Hague or Hague-Visby Rules. Despite so, Reyes JJ noted that Devlin J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*[47] has pointed out that the Hague Rules left it open to the parties to define the content of obligations such as "loading" and "discharge" in relation to a carriage of goods. He said:

> "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."

In other words the period of application of the H/HV Rules may be extended well beyond the narrow sense of "discharge" (tackle to tackle) by agreement of the parties and hence the terms of the bill of lading contract.

Clause 2 was the key clause in the Bill of Lading therein which reads as follows:

> "2. Carrier's Responsibility
>
> (a) . . . the liability (if any) of the carrier in respect of the Goods during the period commencing with their being loaded onto any sea going vessel and continuing up to and during discharge from that vessel . . .
>
> . . .
>
> (c) In the event of any loss or misdelivery or delay in deliver[y] of or damage to the Goods occurring between the time that the Goods are received by the Carrier at the Place of receipt and the time of delivery at the Intended Place of delivery the onus of proving that such loss misdelivery delay in delivery or damage (or any part thereof) occurred during the period specified in Clause (a) hereof shall be upon the Merchant . . . "

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[46][2007] 3 HKLRD Pg 396.

[47][1954] 2 QB 403 (at 418).

Upon commenting that Stone J. was using "*discharge*" in the narrower sense and having noted that the "Port of Discharge," "the Place of Delivery" and the "Final Destination" are all described in identical terms at the front of the Bill of Lading, that was, "Los Angeles, California," Reyes J. held that the Bill of Lading might be construed as to its reference to "Los Angeles" to the entirety of Los Angeles as a port city and the place of "delivery" would be the same as the place of "discharge" and the two periods of time, firstly, the period in Clause 2(a) being "*commencing with (the goods) being loaded . . . and continuing up to and during discharge . . .* " (the period within which the Defendant carrier accepts liability) and, secondly, the period in Clause 2(c) being "*between the time that the Goods are received . . . at the Place of Receipt and the time of delivery at the Intended Place of Delivery*" (the period within which the event of misdelivery took place) as being equivalent period of time. Having concluded that, within the terms of Clause 2, "*discharge from that vessel*" in Clause 2(a) would equate with "*the time of delivery at the Intended Place of Delivery*" in Clause 2(c) by referring to cargo having been "*fully discharged*." Reyes J. thus overcome the past legal straitjacket of the term "loading" and "discharge" being corresponding to loading upon the vessel and discharge from the vessel by adopting a wider and more flexible sense of construction by defining the operation of "*discharge from a vessel*" more widely to encompass the entire process of getting the goods off a vessel and delivering them to a consignee. Reyes J. went even as far as concluding that the parties contractually regarded "*discharge*" and "*delivery*" as equivalent operations.

IV
CONCLUSION

With the advent of globalization and liberalization of international trade and hence the rapid flow of cargoes across oceans and continents coupled with the proliferation of multinational logistic companies deploying sophisticated supply chain management techniques and information technology, multimodal transportation of cargoes involving land, sea and air in a contract of carriage has become a common phenomenon. In multimodal transportation, the modern concept of "delivery" seldom mean "ship's tackle to ship's tackle" or even "ships rail to ship's rail" but rather mean "door the door" or "factory to door." This means that the place of delivery may in fact be tens or even hundreds of miles inland and way beyond the place at which the goods are discharged from vessels, cleared through customs, and warehoused near the port. This poses a serious challenge to the Hague-Visby Rules (and equally to the Hague Rules). The Hague-Visby Rules were com-

piled at a time some forty-five years ago in 1963 when globalization of trade had not yet taken place and when information technology and the logistics industry were in their infancy. The scenario contemplated by the drafters at that time, being transportation only by sea, has become very different from that in the real world nowadays.

The unsatisfactory wording of the Hague-Visby Rules in general, and its Article III, Rule 6 in particular, resulting in continuous world-wide legal debates as to the applicability of the Hague-Visby Rules and the construction of Article III Rule 6 necessitates an updating of the Hague-Visby Rules, a point the UNCITRAL together with the CMI should bear in mind when finalizing the Draft Instrument on Transport Law.[48]

[48]Referring to the latest Draft Convention on Carriage of Goods [wholly or partly] [by sea] by the UNCITRAL:A/CN.9/645.