

# GIURISPRUDENZA AL VAGLIO

**UNITED KINGDOM SUPREME COURT 13 NOVEMBRE 2024**

Lord Hodge, Deputy President, Lord Sales, Lord Hamblen, Lord Leggatt, Lord Richards  
*Fimbank Plc v. Kch Shipping Co Limited*  
*Nave Giant Ace*

**Trasporto di cose – Trasporto marittimo – Regole dell'Aia/Aia-Visby – Art. 3.6 – *Time bar* – Erronea riconsegna delle merci a soggetto diverso dal legittimo possessore della polizza di carico.**



**RIASSUNTO DEI FATTI** – All'inizio del 2018, la portarinfuse «*Giant Ace*» fu designata per il trasporto di 85.510 tonnellate metriche di carbone *non-coking* da un porto indonesiano dell'East Kalimantan ai porti indiani di Jaigarh e Dighi, sulla base di 13 polizze di carico redatte su formulario Congenbill 1994. Le polizze, soggette alla Convenzione di Bruxelles del 1924, modificata dal Protocollo di Visby del 1968, incorporavano i termini di un contratto di *voyage charterparty* datato 20 febbraio 2018 ed espressamente regolato dalla normativa inglese. Il vettore (*demise charterer*) era KCH Shipping Co Ltd. La banca Fimbank Plc finanziò l'acquisto del carico, diventando così legittima titolare delle polizze di carico («*lawful holder of the bills of lading*»), nonché del connesso diritto ad agire ai sensi del *Carriage of Goods by Sea Act* 1992. Nell'aprile 2018, la merce, dopo essere stata scaricata dalla nave, fu erroneamente riconsegnata a soggetti non legittimati dietro la mera esibizione di lettere di garanzia, senza la presentazione delle polizze di carico originali. Fimbank Plc avviò un procedimento arbitrale contro il vettore KCH Shipping Co Ltd, chiedendo il risarcimento dei danni conseguenti all'erronea riconsegna del carico («*misdelivery*»). Il vettore eccepì l'estinzione dell'azione ai sensi dell'art. 3.6 delle Regole dell'Aia-Visby, essendo la domanda stata proposta oltre i 12 mesi dalla data in cui avrebbe dovuto essere eseguita la riconsegna. Il collegio arbitrale ritenne che il termine estintivo annuale di cui all'art. 3.6 delle Regole dell'Aia-Visby dovesse applicarsi anche nei casi in cui la riconsegna erronea delle merci fosse avvenuta successivamente alla scaricazione. La banca soccombente propose quindi appello, limitatamente a due questioni di diritto: in primo luogo, se l'art. 3.6 delle Regole dell'Aia-Visby potesse applicarsi anche alle azioni per erronea riconsegna avvenuta post-scaricazione; in secondo luogo, se la clausola 2(c) del formulario Congenbill 1994 escludesse l'applicazione del *time bar* previsto dal suddetto articolo. Pur sulla base di una motivazione in parte divergente rispetto a quella adottata dagli arbitri, la *Court of Appeal* respinse l'impugnazione. Fimbank Plc decise, pertanto, di adire la Corte Suprema del Regno Unito.

*Il termine estintivo di cui all'art. 3.6 delle Regole dell'Aia-Visby si applica alle pretese risarcitorie conseguenti all'erronea riconsegna delle merci anche*

*qualora quest'ultima avvenga successivamente alla scaricazione* <sup>(1)</sup>.

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

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

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

*Factual background*

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

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

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<sup>(1)</sup> V. la nota di G. MILILLO, a p. 783.

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

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

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

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

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

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

11. The Bank’s case is that the Carrier misdelivered the Cargo to persons who were not entitled to receive it, without presentation of the original Bills of Lading. It further alleges that such misdelivery took place after discharge; this is not accepted by the Carrier but is assumed to be factually correct for the purposes of this appeal.

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

*The proceedings*

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

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

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

1) Whether article III, rule 6 of the Hague Visby Rules applied to claims for misdelivery of goods after the goods have been discharged from the vessel; and

2) Whether clause 2(c) of the 1994 Congenbill form operates to exclude the operation of the article III, rule 6 time bar.

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

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

rule, as the *travaux préparatoires* make clear beyond any reasonable doubt” (para 83).

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

*The Issues*

19. The agreed issues for determination are:

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

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

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

*The legal framework*

*The Hague Rules*

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

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

22. Article I contains various definitions. These include:

«(b) “Contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such

document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

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

23. Article II provides:

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

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

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

a) Make the ship seaworthy.

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

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

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

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

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

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

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

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

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

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

27. Rights and immunities of the carrier are set out in article IV which identifies the circumstances in which the carrier shall not be responsible for loss or damage. In relation to the obligation of seaworthiness under article III, rule 1, the relevant provision is article IV, rule 1. This is limited to cases in which the carrier discharges the burden of proving that he has exercised due diligence. In relation to the obligation properly and carefully to care for the goods under article III, rule 2, the relevant provision is article IV, rule 2 which provides a list of general exceptions. 28. Article V allows the carrier to “surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities”.

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

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

#### *The Hague Visby Rules*

30. A helpful history of the developments leading to the amendments made by the Hague Visby Rules can be found in the influential article by Anthony Diamond QC, *The Hague Visby Rules* [1978] LMCLQ 225. In summary, the Hague Rules had broadly succeeded in producing standardisation of the terms and rules governing bills of lading and in redressing the imbalance which had previously existed between the risks borne by shipowners and cargo interests. Nevertheless, some 50 years after the adoption of the Hague Rules it was considered that it was time that they be reviewed. In 1959 the Comité Maritime International (“CMI”) at its

conference at Rijeka instructed a sub-committee to study amendments to the Hague Rules. The sub-committee produced a limited number of positive recommendations for possible amendments and suggested that these might be embodied in an additional Protocol to the 1924 Convention. In 1963 the CMI Conference adopted the text of a draft Protocol. This was discussed at the Brussels Diplomatic Conference in May 1967 and February 1968. The leader of the British delegation at that conference was Lord Diplock. A final Protocol was signed on 23 February 1968.

31. No major amendments to the Rules were made by the Protocol. The changes made were to limitation of liability; the availability of the defences and limits of liability provided for in the Rules to claims in tort; the conclusive effects of bills of lading when transferred to a third party acting in good faith; the time bar and the application of the amended Rules. 32. The amendment made to article III, rule 6 was to the third paragraph of the rule. This now provided:

“Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.”

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

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

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

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

2) The relevant general principles include article 31.1 of the Vienna Convention on the Law of Treaties 1969 which provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

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

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

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

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

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

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

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

*(1) Ordinary meaning*

36. The critical provision is the third paragraph of article III, rule 6 which provides:

“In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.”

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

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

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

40. Thirdly, it does not refer to loss or damage to the goods but to claims «in respect of» loss or damage. This indicates that it is not lim-

ited to physical loss or damage to the goods but covers loss or damage which is related to those goods, such as claims for financial loss.

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

(2) *Context*

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

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

44. Delivery has a particular significance in the context of carriage of goods by sea and indeed any bailment. The carrier acknowledges in the bill of lading the apparent order and condition of a stated quantity of goods on shipment (see article III, rules 3 and 4). Delivery of a lesser quantity of goods or of goods which do not reflect their acknowledged apparent order and condition is a *prima facie* breach of the contract of carriage. The rights in respect of such a breach arise at the time of delivery and it is then for the carrier to show that there has been no breach of duty or none for which it is contractually responsible. It is not necessary for the cargo owner to aver how loss or damage has been caused to the goods or when it occurred. It has a cause of action as a result of the goods not being delivered in the quantity or apparent order and condition acknowledged by the bill of lading. Given that legal context, it is entirely understandable that any time limit should be centred on and run from the time of delivery and be linked to the fact of short or damaged delivery, not the precise cause thereof. 45. The importance of delivery is emphasised in the other parts of rule 6. The first paragraph of the rule deals with giving notice of loss or damage to the goods before or at the time of delivery. Unless such notice is given the receipt of the goods is *prima facie* evidence of delivery of them as described in the bill of lading. Since delivery often occurs after discharge, in many cases the need to consider giving a notice, the giving of a notice and the deadline for so doing will relate to a period of time subsequent to discharge. This is necessarily the case in relation to the reference in the first paragraph

to the giving of a notice in respect of loss or damage which is not apparent within three days of delivery.

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

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

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

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

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

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

52. He further submitted that this is borne out by article VII under which the carrier or shipper can contract out of the Rules in respect of the care of the goods "prior to the loading on and subsequent to the

discharge from” the ship. This confirms that article III, rule 8, which renders null and void terms which avoid or lessen the carrier’s liability, only applies during the period from loading to discharge.

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

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

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

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

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

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

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

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

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

62. I should also add that, as Mr Rainey accepted, a consequence of so interpreting the Rules is that it would be possible for a different

time limit to be agreed for claims arising after discharge, since after the period of responsibility ends it is article VII rather than article III, rule 8 which applies. Given the wide international recognition and acceptance of a one year time limit for claims against a sea carrier, it is unlikely that there will be many cases where a different time limit is sought or agreed.

(3) *Object and purpose*

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

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

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

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

ery should have been given, whereas the carrier will often be unaware of such matters, but still anxious to ‘close his book’ after the relatively generous one year limitation period found in article III, rule 6.

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

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

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

67. A further way in which finality is undermined with specific reference to misdelivery claims was highlighted in the discussions leading up to the amendments made by the Protocol to article III, rule 6. Where

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

(4) *The travaux*

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

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

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

(3) The original (1921) wording proposed for article VII would have allowed carriers to exempt liability «subsequent to the unloading from

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

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

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

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

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

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

"The purpose of the Hague Rules was to achieve a balanced compromise between the interests of cargo-owners and the interests of the carriers. There were a number of objectives which article III, rule 6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims; second, to achieve international uniformity in relation to prescription periods; third, to prevent carriers from relying on 'notice-of-claim' provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year".

(5) *The English authorities*

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

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

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

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

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

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

76. In relation to the words «all liability», in *Port Jackson Stevedoring Pty Ltd. v Salmond and Spraggon (Australia) Pty Ltd.* [1981] 1 WLR

138 («*The New York Star*»), which concerned a clause in a bill of lading that was in substance identical to article III, rule 6, Lord Wilberforce stated as follows (at p 145):

«Clause 17 is drafted in general and all-embracing terms ... It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort — ‘all liability’ means what it says».

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

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

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

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

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

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

to the goods before the beginning, or after the end, of the sea carriage ... is not governed by the rules at all» (p. 425). 83. All these general statements are, however, consistent with there being a period of responsibility during which the carrier is subject to the minimum responsibilities and liabilities and entitled to the maximum rights and immunities set out in the Rules. They do not address the question of whether this means that none of the Rules operate outside that period or specifically whether the article III, rule 6 time bar does so.

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

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

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

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

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

“Where, as is alleged here, goods destined for the vessel were not loaded due to the delay, it seems to me that any resulting loss or dam-

age is manifestly ‘in relation to goods’, seeing that, adopting Devlin J’s test in the *Adamastos* case, it arises in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods.”

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

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

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

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

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

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

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

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

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

«It is generally recognised that article III, rule 6 is not limited in its applications to claims formulated as an allegation of a breach of the Hague Rules articles, it being well established that a cargo claimant cannot circumvent the limitations and exclusions in the Rules by suing the shipowner for the torts of negligence or conversion, or indeed for breach of bailment: *The New York Star* [1981] 1 WLR 138, 145; *Carver on Bills of Lading*, 4th ed (2017), para 9-183. Mr Kenny’s submission must, therefore, be qualified as a submission that article III, rule 6 only applies to claims capable of being pleaded as a breach of the Hague Rules, whatever the cause of action actually deployed».

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

(para 65).

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

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

*(6) International case law*

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

95. The leading Malaysian case is the decision of the Federal Court of Malaysia in *Rambler Cycle Co Ltd. v P & O Navigation Co* [1968] 1 Lloyd's Rep 42 («*Rambler Cycle*»). In that case it was held that article III, rule 6 did not apply to a claim brought by the shipper of a cargo of bicycles and parts against the carrier for misdelivery after the cargo had been discharged into the harbour board's warehouse. The Lord President of the Federal Court concluded at pp 46-47 that "it seems clear as a matter of construction that para 6 can only refer to claims in respect of loss or damage arising by reason of the provisions of article III and that article III in its turn can only have application within the ambit of the Act as a whole" and that the «Act has no relation to anything that happens to goods after they are discharged from the ship in which they have been carried».

96. As Mr Rainey submitted, critical to the reasoning of the Lord President (with whose judgment the other judges agreed) was his view that the time bar only applies to breaches of obligations set out in the Rules themselves. As a matter of English law, it is well established that its application is not so limited and that the time bar equally applies to breaches of obligations in contract, tort or bailment "which have a suffi-

cient nexus with identifiable goods carried or to be carried” (as stated in *The Alhani*). Wee CJ also considered that the time bar could only apply to the activities set out in article II, which do not include delivery. Again, the English authorities take a different approach. The time bar may apply to claims for misdelivery, to claims in respect of goods which are not loaded, and to events which occur before loading. Nor is there any analysis in the decision of whether there are Rules which apply outside the period of responsibility (as there clearly are) or of the significance thereof. I therefore conclude that the decision is of little assistance.

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

98. In *Teys Bros (Beenleigh) Pty Ltd. v ANL Cargo Operations Pty Ltd.* (1989) 2 Qd R 288 («*Teys*») cargo was damaged before loading began, while in the carrier’s custody. The Supreme Court of Queensland held that the Hague Rules time bar could not be relied on by the carrier, because its liability arose outside and before the period covered by the operation of the Hague Rules. It reasoned that the time bar only applies to liabilities «by virtue of the operation of the rules contained in Article III in respect of the risks contained in Article II» (at p. 296). This reflects the reasoning in *Rambler Cycle* that the time bar only applies to breaches of obligations under the Rules. The court also reasoned that the time bar only applies to «so much of the sea carriage which starts with the operation of loading and ends with the discharge of the goods from the ship» (p 296). This is similar to the Bank’s argument that all of the Rules apply only to and during the period of responsibility, which I have rejected. The decision that the time bar cannot apply to cargo damaged before loading is inconsistent with the later English decisions in *The Ot Sonja* and *The Sophie J.* 99. In *Kamil Export (Aust) Pty Ltd. v NPL (Australia) Pty Ltd.* [1996] 1 VR 538, the Supreme Court of Victoria Appeal Division held that the Hague Rules time bar did not apply in respect of loss and damage to goods occurring after discharge. Marks J (delivering the only reasoned judgment on this issue) considered that the «weight of authority» was to this effect, and cited authorities including *Rambler Cycle* and *Teys*, but did not add to the reasoning in those cases.

100. An Australian case which contains a judgment to contrary effect is *PS Chellaram & Co Ltd. v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd’s Rep 493 in which the New South Wales Court

of Appeal held that a claim for misdelivery after discharge was time-barred. The majority (Gleeson CJ and Samuels JA) held that there was a contractual time bar which was applicable. Kirby P held that the applicable time bar was article III, rule 6 of the Hague Rules. His reasons, with which I agree, were as follows (at pp 515-516):

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

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

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

*(7) Textbooks and commentaries*

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

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

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

«The general scheme of the Rules is as follows:– Article II provides that in every contract of carriage of goods as defined in article I, with the

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

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

«The general scheme of the Rules is as follows: article II provides that in every contract of carriage of goods as defined in article I, with the exception of certain special shipments dealt with in article VI, the carrier shall be subject to the responsibilities and liabilities contained in article III and entitled to the rights and immunities contained in articles IV and IV bis. In the result:

i) the articles impose on the carrier certain minimum responsibilities which he cannot reduce, *e.g.* to exercise due diligence to provide a seaworthy ship and to issue on demand a bill of lading in a particular form;

ii) responsibility for performing other operations may be divided between the carrier and the shipper, charterer or consignee in whatever manner the parties may wish, provided that no term will be effective if it is inconsistent with the main object and intention of the particular bargain. In so far as the carrier does undertake to carry out the operations he must do so properly and carefully;

iii) the articles confer on the carrier certain maximum exceptions, which he cannot increase ...”».

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

«The Act, taking effect from January 1, 1925, has a wide application. Subject to certain exceptions of limited scope noted below, its effect is to introduce into all bills of lading issued in this country certain standard clauses defining the risks to be assumed by sea carriers for the peri-

od of the voyage, and defining also certain rights and immunities which sea carriers may enjoy. The risks – the responsibilities and liabilities – to be undertaken by sea carriers are absolute and irreducible. As set out in the rules scheduled to the Act, they become, by law, part of the terms of contract for the carriage of goods by sea evidenced by bills of lading. The rights and immunities of sea carriers under the Act, on the other hand, may be surrendered in whole or in part by a clause embodied in the bill of lading.

As a consequence of these statutory liabilities of shipowners being made irreducible, the interests of indorsees of bills of lading who are not parties to the contract for the carriage of goods by sea are protected».

*Conclusion on the Hague Rules*

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

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

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

Hague Rules “nest” which requires all the rules to apply only during the period of responsibility.

*The Hague Visby Rules*

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

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

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

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

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

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

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

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

«Were the Convention to contain a rule laying down that a time limit should operate also in respect of claims based upon wrong delivery of the goods such a rule would solve a recurrent practical problem: How long should a person who has received the goods without producing the [bill of lading] and who therefore has had to put a bank guarantee be obliged to keep the guarantee running? If a time limit for the claim is definitely fixed this would also determine the necessary duration of

the bank guarantee. The Sub-Committee felt that it would be useful and practical to have a rule on this particular point. One great advantage would undoubtedly be that a bank guarantee given against claims for wrong delivery would be reduced to more reasonable periods and would thus actually operate to the benefit of consignees as well as carriers». (p. 77)

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

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

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

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

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

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

“The object of the aforesaid amendment is to give the text a bearing as wide as possible, so as to embody within the scope of application of the one year period, even the claims grounded on the delivery of the goods to a person not entitled to them, ie even in the case of what we call a wrong delivery”.

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

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

115. As Males LJ stated (para 77):

«If they had intended to limit the new Article III, rule 6 to cases of misdelivery occurring during the carriage by sea (including the discharge operation itself), they could have been expected to say so. There is, however, no indication in the *travaux* that they intended to limit the new rule in this way. On the contrary, the instruction given to the Drafting Committee was ‘to prepare and submit a draft amendment to the third paragraph of article III, rule 6 of the Hague Rules, such amendment to provide for a one-year limitation of time to sue in the broadest possible terms’, which (it was noted) would ‘include the case of wrong delivery’. Indeed, as Mr Foxton noted in *The Alhani* at para 70, ‘the debate reflected in the *travaux préparatoires* appears to have been as much about whether article III, rule 6 should apply to misdelivery occurring *after* the period of Hague Rules responsibility than [*sic*] whether it should (or did) apply to misdelivery at all’. In choosing a time limit deliberately expressed ‘in the broadest possible terms’, the drafters plainly intended that the limit should apply to misdelivery even occurring after discharge. It is unlikely in the extreme that they intended the time limit to apply to misdelivery occurring during the voyage or simultaneously with discharge, but not to the typical case of misdelivery occurring after discharge».

116. Fourthly, as the Court of Appeal held, the majority textbook view is that the Hague Visby time bar does apply to misdelivery occurring after discharge. Statements to that effect are set out at paras 80 and 81 of Males LJ’s judgment. In a case note on the first-instance Judgment ([2023] LMCLQ 1), Professor Reynolds (one of the authors of *Carver on Bills of Lading*) considered it “fairly clear” that the Hague Visby time bar was intended to be wider than the original Hague Rules time bar, and that it could therefore be argued that «the wider wording can of itself

cover wrong delivery after discharge without any recourse to the previous understanding of the law» (see at p. 5-6). He concluded (at p 6) with the following comments, with which I agree:

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

117. I therefore agree with the Court of Appeal's decision that the Hague Visby Ruletime bar does apply to misdelivery which occurs after discharge. It does so notwithstanding that the period of responsibility under the Hague Visby Rules is defined in the same terms as under the Hague Rules. This supports the conclusion reached in relation to the Hague Rules that the period of responsibility under the Rules does not preclude the time bar from operating outside that period.

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

118. Clause 2(c) provides:

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

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

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

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

122. Thirdly, the clause is consistent with the Hague/Hague Visby Rules period of responsibility and article VII, which allows for the carrier's responsibility and liability for loss or damage to be reduced or exempted prior to loading and after discharge. As already held, that does not mean that other rules may not operate outside that period including, in particular, article III, rule 6. 123. Fourthly, the premise upon which this issue falls to be considered is that the clause does not exclude the carrier from liability for misdelivery. If so, there is no reason why the time bar should not apply to such a claim. If the language is not clear enough to exclude liability for misdelivery claims, it is equally not clear enough to exclude reliance on the time bar in relation to such claims.

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

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

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

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

#### *Conclusion*

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

**Sull'applicabilità del *time bar* di cui all'art. 3.6 delle Regole dell'Aia-Visby all'ipotesi di erronea consegna delle merci avvenuta successivamente alla scaricazione.**

SOMMARIO: 1. Inquadramento della questione controversa. – 2. La formulazione testuale dell'art. 3.6 della Convenzione di Bruxelles del 1924. – 3. Il contesto normativo – 4. Oggetto e finalità del *time bar*. – 5. La soluzione prospettata dalla *Supreme Court*. – 6. Osservazioni conclusive.

1. *Inquadramento della questione controversa* – La pronuncia in esame costituisce una delle recenti decisioni di maggiore interesse in tema di termine estintivo dell'azione ai sensi della Convenzione di Bruxelles del 1924, così come emendata dalle Regole di Visby del 1968 <sup>(1)</sup>.

Nell'ambito del contratto di trasporto marittimo di cose, l'art. 3.6 delle Regole dell'Aia-Visby prevede che il vettore venga esonerato da «ogni responsabilità in relazione alle merci» qualora un'azione <sup>(2)</sup> non sia intentata entro un anno dalla loro riconsegna o dalla data in cui le stesse avrebbero dovuto essere riconsegnate (cosiddetto «*time bar*») <sup>(3)</sup>.

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<sup>(1)</sup> Per un'analisi diacronica che ripercorre le vicende legislative della Convenzione di Bruxelles del 1924, è opportuno consultare M.F. STURLEY, *The centenary of the Hague Rules*, in *LMCLQ*, 2024, 565.

<sup>(2)</sup> Sul punto, Cass. 18 giugno 1987 n. 5357 in *Dir. traspr.*, 1987, 231, con nota di E. FOGLIANI, *Sul termine per l'azione contro il vettore secondo la Convenzione di Bruxelles del 1924*, che si è soffermato sul significato dell'articolo indeterminativo che precede il termine «azione».

<sup>(3)</sup> Il tema risulta essere complesso e non certo esauribile in questa nota di commento, che non ha la pretesa di individuare e di circoscrivere la natura (prescrittiva ovvero decadenziale) del *time bar* di cui all'art. 3.6 delle Regole dell'Aia e dell'Aia-Visby. In tal senso, il dettato normativo tace, non contenendo specificazione alcuna circa la natura da attribuirsi al termine annuale in parola, cedendo a dottrina e giurisprudenza l'onere di classificarlo e di individuarne i principi di riferimento. Per un approfondimento sul tema si rimanda, tra gli altri, a: F. BERLINGIERI, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, I ed., Milano, 2009, 227, che rimarca come la giurisprudenza italiana prevalente riconosca al suddetto termine una natura decadenziale (cfr., a titolo meramente esemplificativo, Cass. 5 marzo 1984, n. 1536, in *Dir. mar.*, 1985, 312; in questo senso anche L. TULLIO, *Responsabilità del vettore nel trasporto marittimo di cose*, in *Trattato breve di diritto marittimo* (a cura di A. Antonini), II, Milano, 2008, 205) contrapponendosi a parte della dottrina che lo inquadra nella prescrizione (in tal senso, si vedano G. RIGHETTI, *Trattato di diritto marittimo*, II ed., Milano, 1990, 785 ss. che riprende G. RIGHETTI, *Sulla natura del termine estintivo ex art. III, n. 6 della Convenzione di Bruxelles sulla polizza di carico e sulla sua applicazione*, in *Dir. mar.*, 1966, 140; F. CAGETTI, *Prescrizione e decadenza nella Convenzione di Bruxelles 25 agosto 1924 sulla polizza di carico*, in *Riv. dir. nav.*, 1960, I, 203). La dottrina internazionale sembra propendere per una natura decadenziale del termine: cfr. W. TETLEY, *Marine Cargo Claims*, vol. II, Cowansville, 2008, 1624, che, a supporto della sua tesi, tra le altre, menziona *Mediterranean Freight Services Ltd v. BP Oil International Ltd* [1994] 2 Lloyd's Rep 506, 520, nonché *Zainalabdin Payabi and Baker Rasti Lari v. Armstel Shipping Corporation and Panthai*

L'applicazione del predetto *time bar* è senz'altro pacifica con riferimento alle controversie sorte nel cosiddetto «periodo di responsabilità del vettore» relativo al contratto di trasporto <sup>(4)</sup>, intercorrente tra il momento della caricazione e quello della scaricazione delle merci <sup>(5)</sup>, ossia nei casi in cui la riconsegna avviene prima (raramente) o contestualmente (più di frequente) alla scaricazione stessa. Resta da comprendere se vi sia effettiva applicabilità del suddetto termine di «sbarramento» rispetto a pretese sorte dopo la scaricazione delle merci dalla nave, in particolare con riferimento alle cosiddette «*misdelivery claims*» (pretese per erronea riconsegna) <sup>(6)</sup>, ossia nei casi in cui la merce è riconsegnata dal vettore a soggetti non legittimati a riceverla.

La questione è stata sottoposta ai giudici della *United Kingdom Supreme Court* nel giudizio che ha dato origine alla sentenza in commento, i quali hanno chiarito che le pretese per erronea riconsegna debbano essere soggette al termine estintivo di cui all'art. 3.6 delle Regole dell'Aia-Visby. Nel pervenire a tale conclusione, i giudici inglesi hanno intavolato un corposo ragionamento, muovendo dall'analisi dell'art. 3.6 delle Regole dell'Aia sino al vaglio del suo rinnovato enunciato normativo contenuto nelle Regole dell'Aia-Visby <sup>(7)</sup>.

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*Shipping Ltd* [1992] 2 Lloyd's Rep 62, 69. Per un esame delle diverse teorie, cfr. T. CARVER, *Carriage of Goods by Sea*, II, XIII ed., London, 2005, 707 ss.; B. BIRCH REYNARDSON, *Period of responsibility*, in *Dir. mar.*, 1983, 178.

<sup>(4)</sup> Cosiddetto «*tackle-to-tackle*».

<sup>(5)</sup> L'art. 1.e della Convenzione di Bruxelles del 1924 statuisce che il trasporto di merci comprende lo spazio di tempo che decorre dal momento in cui le merci sono caricate al momento in cui sono scaricate dalla nave. Sulla delimitazione temporale del «periodo di responsabilità» vedasi F. BERLINGIERI, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, cit., 26. Per una critica alla delimitazione temporale prevista dall'art. 1.e delle Regole dell'Aia, cfr. P. BONASSIES-C. SCAPEL, *Traité de droit maritime*, Paris, 2006, 592. Per un'analisi del suddetto «periodo di responsabilità» in questa Rivista, cfr. Cass. 6 giugno 2006, n. 13253, in *Dir. trasp.*, 2007, 527, con nota di F. MANCINI, *Sul periodo di responsabilità del vettore marittimo ai sensi delle Regole dell'Aia-Visby*.

<sup>(6)</sup> La «*misdelivery*» si verifica quando il vettore riconsegna le merci, senza la presentazione della polizza di carico, a una persona non legittimata a riceverle. La riconsegna a soggetto diverso dall'aveute diritto può avvenire per diversi motivi, quali un errore, un disguido, o più spesso, per l'affidamento, imprudente, che il vettore fa sulla base di una «dichiarazione di chi richiede la consegna di essere l'aveute diritto ma di non avere ancora ricevuto le polizze di carico», cfr. F. BERLINGIERI, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, cit., 237. Per un approfondimento sul tema vedasi W. LEUNG, *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*, in *J. Mar. Law Comm.*, 2008, 205.

<sup>(7)</sup> Nel merito, la Corte ha enfatizzato il fatto che le convenzioni internazionali richiedano un'interpretazione conforme a principi di matrice ampia e generale, a discapito di principi di diritto interno più restrittivi, circoscritti a istituti non comuni a tutti gli stati contraenti. Ha rimarcato, infatti, che il corretto approccio ermeneutico alle convenzioni internazionali è delineato in *Alize 1954 v. Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2021] UKSC 51, 2 Lloyd's Rep 613.

2. *La formulazione testuale dell'art. 3.6 della Convenzione di Bruxelles del 1924* – Già da una celere lettura delle due norme in esame si comprende che la portata del testo originale dell'art. 3.6 della Convenzione di Bruxelles del 1924 è meno ampia rispetto al medesimo articolo così come novellato dal Protocollo del 1968. Su tutti, emerge come la disposizione più recente non circoscriva il *time bar* alla responsabilità del vettore in relazione alla perdita o per il danneggiamento delle merci, bensì estenda il proprio raggio d'azione a qualsivoglia responsabilità («*all liability whatsoever*»).

Questa considerazione ha indotto i giudici a ritenere che, se la norma più risalente si applica alle pretese per erronea riconsegna, allora anche la disposizione più recente trova necessariamente applicazione al caso di specie. In altre parole, se il termine estintivo previsto dalle Regole dell'Aia si applica alla *misdelivery* successiva allo scarico, anche il *time bar* delle Regole dell'Aia-Visby si applicherà alla medesima fattispecie, considerata la portata testuale inconfutabilmente più estesa di queste ultime.

Per tale ragione, la motivazione dei giudici si è preminentemente incentrata sull'analisi del tenore letterale dell'art. 3.6 del testo originario della Convenzione di Bruxelles del 1924<sup>(8)</sup>, da cui si è mossa la *Supreme Court*: «*In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered*».

Lord Hamblen ha, innanzitutto, sottolineato l'assenza di elementi che facciano propendere per un'interpretazione restrittiva dell'art. 3.6 delle Regole dell'Aia: a suo dire, i termini «*in any case*»<sup>(9)</sup> e «*all liability*» suggeriscono una ampia portata della norma e non paiono precludere alcuna forma di responsabilità, neppure circoscrivendo l'ambito di applicazione a quelle responsabilità direttamente derivanti dalle Regole stesse alla stregua degli art. 3 e 4<sup>(10)</sup>.

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<sup>(8)</sup> Per coerenza con l'impostazione della *Supreme Court* si farà riferimento alla versione inglese della Convenzione. Occorre comunque rammentare che il testo originario della Convenzione è redatto in lingua francese, mentre il Protocollo di Visby è venuto alla luce sia in lingua francese che in lingua inglese.

<sup>(9)</sup> In relazione all'espressione «*in any event*», nel caso *Parsons Co v. CV Scheepvaart Onderneming Happy Ranger* [2002] EWCA Civ 694 si è ritenuta illimitata la portata della locuzione sulla base del suo «significato naturale». Nello stesso segno anche *Daewoo Heavy Industries v. Klipriver Shipping* [2003] EWCA Civ 451.

<sup>(10)</sup> Con riferimento all'espressione «*all liability*», nel caso *Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138, riferito ad una clausola convenzionale contenuta in una polizza di carico sostanzialmente identica all'articolo 3.6 in esame, Lord Wilberforce ha valorizzato il *wording* impostato in termini generali e onnicomprensivi, che non sembrano concepire una distinzione tra obblighi contrattuali e responsabilità extracontrattuale. Il significato di «*all liability*» pare, pertanto, pacifico.

È stata poi posta al vaglio la locuzione «*in respect of*»<sup>(11)</sup>. Anche in questa circostanza, il Collegio ha ravvisato un'estesa portata del dettato, che non soltanto contemplerebbe (tutte) le responsabilità per la perdita e per il danneggiamento delle merci<sup>(12)</sup>, ma altresì la totalità delle vicende di perdita o di danneggiamento in senso ampio ricollegate a tali merci, ricomprendendo così, tra le altre, anche le perdite finanziarie.

Infine, i giudici hanno posto l'accento sul termine «*discharged*», evidenziando un chiaro obiettivo di definitività e di certezza del diritto da parte del legislatore, da cui traspare la volontà di escludere la responsabilità del vettore qualora l'azione sia proposta tardivamente<sup>(13)</sup>.

3. *Il contesto normativo* – Vagliati gli aspetti testuali, la Corte ha indi passato in rassegna il contesto normativo in cui si inserisce l'art. 3, trattandosi dell'unica disposizione delle Regole dell'Aia che fa riferimento alla «consegna» delle merci, intesa quale momento in cui esse vengono trasferite al soggetto legittimato a riceverle<sup>(14)</sup>, piuttosto che alla «scaricazione» delle stesse, quale mera operazione materiale che pone il carico al di là della battagliola della nave.

Invero, attraverso l'emissione della polizza di carico, il vettore riconosce, ferma la facoltà di apporre riserve, lo stato e la condizione apparente delle

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<sup>(11)</sup> È interessante notare come la versione originale in francese e la relativa traduzione italiana delle Regole dell'Aia non offrano il medesimo spunto rinvenibile nel testo anglosassone, riferendosi meramente a «*responsabilité pour pertes ou dommages*» o a «responsabilità per perdite o danni». A parere di chi scrive, sarebbe meno immediato, nel nostro ordinamento ed in quello francese, giungere alle medesime conclusioni raggiunte dalla *Supreme Court* nella sentenza qui annotata.

<sup>(12)</sup> Cfr. *Goulandris Brothers Ltd v. B Goldman and Sons Ltd* [1958] 1 QB 74, che ha chiarito la portata dei termini «*loss*» e «*damage*» con riferimento all'art. 3.6 in esame.

<sup>(13)</sup> Sul punto, nel caso *Aries Tanker Corporation v. Total Transport Ltd (The Aries)* [1977] 1 WLR 185 la *House of Lords* ha stabilito che si tratta di un termine di decadenza speciale che estingue l'azione; così anche *The Virgo* [1978] 2 Lloyd's Rep 167. Nel merito, cfr. anche G. RIGHETTI, *Trattato di diritto marittimo*, cit., 791, nonché J. F. WILSON, *Carriage of Goods by Sea*, IV ed., Harlow, 2008, 209.

<sup>(14)</sup> Più correttamente alla «riconsegna». In tema di riconsegna delle merci cfr. F. BERLINGIERI, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, cit., 232. Nel merito, come sottolinea autorevole dottrina, la giurisprudenza italiana (cfr., tra le altre, Cass. 9 settembre 1959 n. 2569, in *Riv. dir. nav.*, 1960, II, 274) è solita identificare il momento della riconsegna in quello in cui l'avente diritto al carico «è posto nella concreta possibilità di verificare il carico stesso dopo lo sbarco». Sempre in ottica nazionale, interpretando letteralmente tanto le Regole dell'Aia-Visby quanto l'art. 438 del Codice della navigazione, sembrerebbe corretto ritenere che il vettore sia liberato (con contestuale inizio del decorso del termine di prescrizione o di decadenza) quando il destinatario «abbia effettivamente ricevuto la prestazione del vettore», coincidente con il subentro nel possesso del carico; cfr., per un approfondimento esaustivo sul tema, L. TULLIO, *Responsabilità del vettore nel trasporto marittimo di cose*, cit., 207.

merci dopo averle prese in «consegna» (art. 3.3); dunque, la riconsegna di una quantità inferiore o di merci difformi rispetto a quanto attestato dalla polizza costituisce inadempimento contrattuale e l'interessato al carico dispone di un'azione già per il fatto che le merci non gli siano state rimesse nella quantità o nello stato apparente riconosciuti dal vettore nella polizza di carico. In tal contesto, è del tutto comprensibile (e logicamente coerente) che il *time bar* debba decorrere dal momento della riconsegna, restando comunque irrilevante la causa che ha determinato il danno o la perdita delle merci. L'oggetto globale dell'art. 3 nella sua interezza parrebbe dunque essere la riconsegna a discapito della scaricazione<sup>(15)</sup>.

Per questi motivi, la *Supreme Court* ha ritenuto non pertinente l'eccezione sollevata dall'appellante, che rimarcava l'inscindibile correlazione delle Regole dell'Aia al «periodo di responsabilità del vettore» relativo al contratto di trasporto<sup>(16)</sup>. La tesi della banca, assunta ad argomento cardine della sua difesa, muoveva da un'interpretazione restrittiva dell'art. 2 della Convenzione asseritamente avvalorata dal principio di inderogabilità relativo al «periodo di responsabilità vettoriale» di cui all'art. 7 della Convenzione di Bruxelles del 1924. Secondo questa esegesi, il termine estintivo di cui all'art. 3.6 non si applicherebbe alla *misdelivery* successiva allo scarico, in quanto estranea al «periodo di responsabilità»<sup>(17)</sup>.

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<sup>(15)</sup> Dello stesso avviso, in Italia, si poneva già Cass. 19 marzo 2015 n. 5488, in *Dir. mar.*, 2016, 93, con nota di M. MENICUCCI, *Un (non condivisibile) orientamento della Suprema Corte sui limiti di applicazione alle Regole dell'Aia-Visby*, il quale ribadiva che «le Regole dell'Aia-Visby possano e debbano applicarsi fino alla riconsegna della merce al destinatario».

<sup>(16)</sup> Il punto 58 della sentenza qui annotata rammenta come l'art. 3.1 delle Regole dell'Aia si occupi altresì di questioni estrinseche al «periodo di responsabilità», imponendo al vettore l'obbligo di esercitare la dovuta diligenza per rendere la nave adatta alla navigazione «prima dell'inizio del viaggio», al riguardo, la giurisprudenza ha chiarito che si tratta di un'obbligazione «senza tempo» («*independent of time*»), anche anteriore alla caricazione delle merci: cfr. *Pyrene Co Ltd v. Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, 416.

<sup>(17)</sup> La portata del «periodo di responsabilità» è indubbia, come si può evincere dal dettato legislativo e dalla consolidata giurisprudenza (cfr. *Gosse Millard Ltd v. Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 434; *Pyrene Co Ltd v. Scindia Steam Navigation Co Ltd*, cit., 416; *The Arawa* [1977] 2 Lloyd's Rep 416, 424). Tuttavia, in questa sede non si dibatte tanto sulla portata di tale periodo, bensì sull'applicabilità del termine annuale per proporre l'azione giudiziaria nei confronti del vettore, tema che nessuna delle pronunce richiamate affronta. Peraltro, l'applicazione del termine estintivo di cui all'art. 3.6 delle Regole dell'Aia al di fuori del «periodo di responsabilità» non sarebbe una novità assoluta: già in *Linea Naviera Paramaconi SA v. Abnormal Load Engineering Ltd (The Sophie J)* [2001] 1 All ER (Comm) 946, il giudice Tomlinson aveva riconosciuto la sua rilevanza in relazione ad eventi verificatisi antecedentemente all'inizio delle operazioni di caricazione delle merci, ritenendo tale fase sufficientemente connessa alle vicende relative alle merci in procinto di essere caricate «*emphasizing the necessity for a demonstrable*

La *Supreme Court* ha respinto l'eccezione in questione, osservando che, sebbene il concetto di «periodo di responsabilità» abbia un rilievo centrale, non può essere interpretato come criterio assoluto capace di limitare l'applicazione complessiva delle Regole dell'Aia<sup>(18)</sup>.

4. *Oggetto e finalità del time bar* – Dal punto di vista teleologico, è evidente come la predisposizione da parte del legislatore di un termine estintivo non possa che sottintendere un eminente obiettivo di certezza del diritto. Nel contesto trasportistico, ciò senz'altro favorisce, per un verso, la circoscrizione delle vulnerabilità giudiziarie ad un periodo di tempo specifico ben conoscibile dalle parti, e, per altro, garantisce una maggiore prevedibilità nella gestione delle vicende finanziario-contabili per gli *stakeholders* interessati<sup>(19)</sup>.

Tali esigenze sono ottimizzate nel momento in cui la maggior parte dei diritti e delle azioni possono essere esercitati nella medesima cornice temporale: sarebbe inopportuno – e disagiata sul piano probatorio<sup>(20)</sup> – permettere ad un soggetto di avanzare una pretesa inerente l'erronea riconsegna di un collo successiva alla sua scaricazione, quando, nella medesima data, non avrebbe diritto ad esercitare alcuna azione a tutela di un eventuale danno occorso al collo stesso durante la scaricazione.

A ragion veduta, la *Supreme Court* ha sposato una linea interpretativa all'insegna dell'onnicomprendività del regime estintivo, enfatizzandone un'esigenza pragmatica: di norma, la consegna avviene in un momento successivo alla scaricazione, sotto la murata della nave e sovente non dipende nemmeno dall'attività del vettore<sup>(21)</sup>. Pertanto, la riconsegna erronea successiva alla scaricazione non dovrebbe sortire effetti particolari tali da sottrarla dall'ambito di applicazione dell'art. 3.6, ma, anzi, sarebbe preferibile vederla rientrare in un sistema unitario

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*link between the claim and the goods under carriage*». Sul concetto di «*demonstrable link*» tra la violazione di un obbligo vettoriale e le merci da trasportare si erano altresì soffermate *The New York Star*, cit., 145 e *Noranda Inc. And Others v. Barton (Time Charter) Ltd And Another* [1996] 1 Lloyd's Rep 301.

<sup>(18)</sup> Tra l'altro, in un *obiter dictum*, il giudice Hamblen ha dissentito rispetto alla soluzione proposta dal vettore KCH Shipping, secondo cui l'art. 3.6 non rientrerebbe negli «obblighi e responsabilità» o nei «diritti e immunità» di cui all'art. 2 delle Regole dell'Aia.

<sup>(19)</sup> Dello stesso avviso Lord Justice Bingham in *Compania Portorafi Commercial SA v. Ultramar Panama Inc and Others (The Captain Gregos)* [1990] 1 Lloyd's Rep 310, che ha affermato «*the carrier must be able "to clear his books"*». Sul punto si veda T. CARVER, *Carriage of Goods by Sea*, cit., 709.

<sup>(20)</sup> È infrequente la presenza fisica del destinatario delle merci al momento dell'arrivo della nave o al tempo della scaricazione: è verosimile che le merci giacciono sul molo, in depositi per container ovvero in magazzini limitrofi, venendo concretamente riconsegnate al termine di un periodo di giacenza e pertanto in seguito alla scaricazione. Cfr. *The New York Star*, cit., 147.

<sup>(21)</sup> Ancora, come ribadito in *The New York Star*, cit., 148.

(<sup>22</sup>) e coerente che preveda una tempestività di prospettazione dell'azione giudiziaria (<sup>23</sup>), soddisfacendo così evidenti esigenze commerciali e probatorie (<sup>24</sup>).

A corollario, sulla scia dell'impostazione perseguita dalla *Court of Appeal* (<sup>25</sup>), anche la Corte Suprema si è impegnata – pur senza giungere alle medesime e decisive conclusioni – a ricercare le intenzioni originarie del legislatore all'interno dei *Travaux Préparatoires*, contenenti le trattative e le bozze prodromiche all'adozione delle Regole dell'Aia (<sup>26</sup>).

Dall'analisi dei lavori preparatori è emerso che, effettivamente, un acceso dibattito era stato sollevato con riferimento all'utilizzazione del termine «scaricazione» contrapposto a quello di «consegna» nella qualificazione del «periodo

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(<sup>22</sup>) Taluni giudici hanno addirittura definito un doppio regime estintivo come «*re-pugnant*» rispetto agli obiettivi della norma cfr. *Cargill International SA v. CPN Tankers (Bermuda) Ltd (The Ot Sonja)* [1993] 2 Lloyd's Rep 435. Nel merito, la giurisprudenza inglese ha affermato che l'obiettivo di certezza del diritto perseguito dall'art. 3.6 sarebbe gravemente compromesso se la regola non si applicasse anche alle pretese per erronea riconsegna: ne deriverebbe che il termine di prescrizione applicabile a tali pretese varierebbe a seconda della legge regolatrice del contratto di trasporto e della legge del foro, generando incertezza e diffidenza da parte degli stakeholders. Dunque, se l'intenzione del legislatore è quella di applicare il *time bar* all'erronea riconsegna, ci si attenderebbe ragionevolmente che esso si applichi proprio al caso paradigmatico di *misdelivery*, ossia quella che avviene successivamente alla scaricazione delle merci, proprio perché il legittimo destinatario delle stesse non è presente nella fase di sbarco, cfr. *Deep Sea Maritime Ltd v. Monjasa A/S (The Alhani)* [2018] EWHC 1496 (Comm).

(<sup>23</sup>) (1) Nel merito, certamente rilevante è il caso *Transworld Oil Inc v. Minos Compania Naviera SA* [1992] Lloyd's Rep 48 in cui si evidenzia come: «*The purpose of the Hague Rules was to achieve a balanced compromise between the interests of cargo-owners and the interests of the carriers. There were a number of objectives which article III, rule 6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims; second, to achieve international uniformity in relation to prescription periods; third, to prevent carriers from relying on 'notice-of-claim' provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year*». Si veda anche F. BERLINGIERI, *Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules*, 1997, 299.

(<sup>24</sup>) Sarebbe inopportuno demandare al vettore di tenere pedissequa traccia di tutte le vicende relative a ciascun trasporto per periodi indefiniti, anche al fine di preconstituirsì una soltanto plausibile difesa.

(<sup>25</sup>) Dipanata muovendo dal contributo A. DIAMOND, *The Hague-Visby Rules*, in *LMCLQ*, 1978, 225; la Corte sosteneva che l'art. 3.6 delle Regole dell'Aia non dovesse applicarsi alle ipotesi di erronea riconsegna, affermando che tale norma non poteva configurarsi come «*a cuckoo in the Hague Rules' nest*», sostenendo che l'intero corpus normativo della Convenzione di Bruxelles del 1924 – nella sua versione originale – fosse incentrato sul «periodo di responsabilità vettoriale» intercorrente tra la caricazione e la scaricazione delle merci.

(<sup>26</sup>) F. BERLINGIERI, *Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules*, cit.

di responsabilità» ai sensi dell'art. 1.e. La *Supreme Court* ha, tuttavia, ritenuto tal disputa del tutto inconferente con il fulcro della vicenda, dal momento che i suddetti lavori preparatori, invero, non avevano affrontato la questione concernente l'applicazione (o meno) del termine estintivo di cui all'art. 3.6 al di fuori del «periodo di responsabilità vettoriale».

Da ultimo, l'analisi della Corte Suprema britannica ha vagliato la giurisprudenza internazionale in tema di erronea riconsegna post-scaricazione delle merci trasportate, non ravvisando un consenso internazionale consolidato secondo cui l'art. 3.6 delle Regole dell'Aia debba essere applicato esclusivamente a vicende anteriori allo sbarco.

Soltanto alcune risalenti e circoscritte pronunce hanno proposto un'applicazione della norma relegata al «periodo di responsabilità per il danneggiamento e per la perdita delle merci», ritenendo l'intero assetto normativo arroccato intorno ad esso <sup>(27)</sup>.

5. *La soluzione prospettata dalla Supreme Court* – Il *wording*, il contesto normativo, nonché l'oggetto e la finalità dell'art. 3.6 delle Regole dell'Aia fanno propendere per un'interpretazione quanto più estensiva e non sembrano in alcun modo circoscrivere l'applicazione del *time bar* al periodo antecedente o contestuale alla scaricazione delle merci.

In ragione dei ragionamenti sopra esposti, la *Supreme Court* ha quindi condivisibilmente ritenuto che il *time bar* previsto dall'art. 3.6 delle Regole dell'Aia si applichi anche a quelle pretese che sorgono successivamente alla scaricazione, sino al momento della riconsegna, includendo la fattispecie dell'erronea

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<sup>(27)</sup> Cfr. *Rambler Cycle Co Ltd v. P & O Navigation Co* [1968] 1 Lloyd's Rep 42, in cui la *Federal Court of Malaysia* ha ritenuto che l'art. 3.6 non dovesse applicarsi a una domanda proposta dallo *shipper* di un carico di biciclette contro il vettore per erronea riconsegna dopo che il carico era stato sbarcato ed immagazzinato nel deposito portuale; siffatta pronuncia è stata di recente richiamata, senza apportare alcuna considerazione aggiuntiva sufficientemente persuasiva, da *Minmetals South-East Asia Corp Pte. Ltd v. Nakhoda Logistics Sdn Bhd* [2018] 6 MLJ 152, 55; *Teys Bros (Beenleigh) Pty Ltd v. ANL Cargo Operations Pty Ltd* [1989] 2 Qd R 288, in cui il carico è stato danneggiato prima del caricamento, mentre era sotto la custodia del vettore. Qui, la *Supreme Court of Queensland* ha ritenuto che il vettore non potesse avvalersi della decadenza prevista dalle Regole dell'Aia, poiché la sua responsabilità era sorta al di fuori e antecedentemente al «periodo di responsabilità vettoriale». Questa tesi veniva poi richiamata soltanto in *Kamil Export Pty Ltd v. NPL Pty Ltd* [1996] 1 VR 538, in relazione ad un danno occorso alle merci successivamente allo sbarco Di avviso contrario – e a supporto della tesi sostenuta dalla *Supreme Court*. nella pronuncia in commento – *PS Chellaram & Co Ltds v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd's Rep 493, 515, ove i giudici hanno criticato l'ampiezza e, in un certo senso, anche la promiscuità del *wording* utilizzato dal legislatore, pur comunque riconoscendo un'unica e indubitabile interpretazione estensiva del termine estintivo in esame; v. anche *The Ot Sonja*, cit. e *The Sophie J*, cit.

riconsegna delle merci <sup>(28)</sup>. Del resto, esiste un «periodo di responsabilità» definito dalle Regole dell'Aia durante il quale sono previsti obblighi e responsabilità, nonché diritti e immunità per il vettore, ma ciò non implica che tutte le disposizioni del *corpus* normativo riguardino ed operino esclusivamente con riferimento a quel periodo <sup>(29)</sup>.

Accertata l'applicabilità dell'art. 3.6 delle Regole dell'Aia alle pretese per erronea riconsegna la Corte non ha potuto che affermare l'applicabilità della medesima fattispecie altresì alle Regole dell'Aia-Visby alla luce di un dettato certamente più ampio e onnicomprensivo <sup>(30)</sup>.

Il testo del 1968, infatti, estende l'esonero del vettore da qualunque responsabilità inerente alle merci <sup>(31)</sup> – e non più soltanto in relazione alla perdita o al danneggiamento delle merci – qualora l'azione venga intentata successivamente allo spirare del termine annuale, che decorre dalla data della consegna delle merci o da quella in cui avrebbero dovuto essere consegnate <sup>(32)</sup>.

Si tratta di elementi che incontestabilmente depongono per l'estensione del *time bar* oggetto di analisi anche alle ipotesi di *misdelivery* successiva alla scaricazione delle merci. Il testo emendato delle Regole dell'Aia-Visby, da un lato, aggiunge enfasi e conferisce incisività alla disposizione <sup>(33)</sup>, rendendo indubbia la portata del *time bar*, risultando esso applicabile a tutte le pretese sorte dal trasporto delle merci via mare <sup>(34)</sup>; dall'altro, consente un esercizio dell'azione

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<sup>(28)</sup> Per analogia, tal disposto può parimenti applicarsi a pretese riferite a responsabilità vettoriali inerenti alle merci trasportate originate anteriormente al caricamento. Coerentemente, in tutti questi casi, occorre dimostrare che la domanda abbia un sufficiente nesso con le merci identificabili trasportate o da trasportare.

<sup>(29)</sup> L'affermazione della *Court of Appeal* secondo cui l'art. 3.6 delle Regole dell'Aia non costituisce «a cuckoo in the Hague Rules' nest» non sembra quindi pertinente: già dal dettato del 1924 sono rinvenibili norme che dispongono in merito a diritti e responsabilità esulanti dal «periodo di responsabilità vettoriale».

<sup>(30)</sup> In questo senso si esprime anche una autorevole dottrina: cfr. F. BERLINGIERI, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, cit., 226.

<sup>(31)</sup> Sul punto, si veda W. LEUNG, *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*, cit., 208.

<sup>(32)</sup> Nel merito, E. VOLLI, *Modifica al regime della prescrizione*, in *Dir. mar.*, 1986, 632 ha affermato che la disciplina modificata dal protocollo di Visby del 1968 non si è allontanata in modo significativo da quanto emerso dall'interpretazione giurisprudenziale dell'art. 3.6 della Convenzione di Bruxelles del 1924, ma ha solamente meglio definito il fatto che la prescrizione fissata dalla nuova norma riguarda ogni genere di responsabilità, anche di carattere extracontrattuale.

<sup>(33)</sup> Ne è un lampante esempio la locuzione «*whatsoever*».

<sup>(34)</sup> In *The Captain Gregos*, cit., 315, si è sostenuto che la circoscrizione temporale annuale all'azione di cui all'art. 3.6 delle Regole dell'Aia-Visby fosse ammissibile anche con riferimento ad una pretesa di furto delle merci da parte del vettore-armatore durante il trasporto. J. F. WILSON, *Carriage of Goods by Sea*, cit., 207, ha precisato che tale previ-

che prescinde dalla tipologia di responsabilità ascritta al soggetto convenuto in giudizio, scollegandosi dal portato dell'art. 4 del medesimo *corpus* normativo.

Perdipiù, anche sulla base di una rilettura dei *Travaux Préparatoires* prodromici all'adozione delle Regole dell'Aia-Visby<sup>(35)</sup>, è cristallina la volontà di conferire la più ampia portata al testo emendato, in modo tale da ricomprendere nell'ambito di applicazione del *time bar* anche le pretese fondate sull'erronea riconsegna di merci (definita nei *Travaux* quale «*wrong delivery*»). E, anche in tal senso, non si ravvisa alcuna previsione che escluda l'applicazione della norma qualora l'erronea riconsegna avvenga successivamente alla scaricazione delle merci<sup>(36)</sup>. L'emendamento, in definitiva, trae origine dalla necessità di ricomprendere in termini univoci nel contesto applicativo della disposizione proprio le azioni avverso l'erronea riconsegna delle merci; pertanto, l'art. 3.6 delle Regole dell'Aia-Visby deve applicarsi al caso di specie.

La pretesa dell'appellante Fimbank Plc, per questi motivi, è stata conseguentemente respinta, in quanto avanzata ben oltre il termine di 12 mesi dal momento in cui la consegna avrebbe dovuto avere luogo.

6. *Osservazioni conclusive* – La posizione della *Supreme Court* appare condivisibile anche da un punto di vista pragmatico-empirico.

Il rischio sulle merci coperte dalla polizza di carico non si esaurisce certamente con la mera scaricazione delle stesse, che sovente non coincide con la riconsegna del carico al destinatario, titolare della polizza di carico. Un'appli-

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sione è stata interpretata ben aldilà dell'ordinaria pretesa per la perdita o per il danneggiamento del carico, venendo altresì ricomprese azioni sorte a causa di una «*fundamental breach of contract*», nonché derivanti dalla condotta del vettore prevista all'art. 4.5.e delle Regole dell'Aia-Visby; vedasi *Kenya Railways v. Antares Co Pte Ltd* [1987] 1 Lloyd's Rep 424. Critici, nel merito, T.E. SCRUTTON, *Scrutton on Charterparties and Bills of Lading*, XX ed., London, 1996 e W. TETLEY, *Marine Cargo Claims*, cit., 1640, che sostengono come un'interpretazione estensiva della norma non circoscritta al periodo di «*tackle-to-tackle*» sia scarsamente supportata in giurisprudenza, se non in sporadici *obiter dicta*. La sentenza annotata si pone in contrasto a tali considerazioni.

<sup>(35)</sup> F. BERLINGIERI, *Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules*, cit., 308, ove, durante la Plenaria del *Committee on Bills of Lading Clauses* del 12 giugno 1963, Mr. J. C. Moore ha affermato che «*The Sub-Committee having fully considered the question of the time limit for claims by cargo owners against carriers directs the Drafting Committee to prepare and submit a draft amendment to the 3rd paragraph of Article 3(6) of the Hague Rules, such amendment to provide a one year limitation of time to sue in the broadest possible terms*». Nel merito si era dibattuto se la durata del termine estintivo dovesse essere annuale o biennale.

<sup>(36)</sup> Cfr. anche F. REYNOLDS, *The Hague and Hague-Visby Rules and Wrong Deliver*, in *LMCLQ*, 2023, 4, in commento alla sentenza di primo grado relativa alla controversia qui esaminata. Si veda anche J. FUKUSHIGE, *Time bars and misdelivery: «Fimbank Plc v KCH Shipping Co Ltd»* [2023] *EWCA Civ 569*, in *Australian and New Zealand Maritime Law Journal*, 2023, 65.

cazione dell'istituto del *time bar* limitata al tempo della scaricazione ostacolerebbe quelle che sono le esigenze economico-contabili del trasporto, generando notevoli incertezze e disarmonie ordinamentali relative al termine ultimo utile per avanzare una pretesa sulle merci <sup>(37)</sup>.

D'altra parte, la sussistenza di un periodo estintivo certo per l'esercizio di tutte le azioni relative alle merci costituisce una convenienza altresì per l'ulteriore titolare della polizza di carico, che sarà parimenti incentivato ad attivarsi tempestivamente, non potendosi riservare tempistiche sovrabbondanti prima di far valere giudizialmente ogni suo buon diritto <sup>(38)</sup>. Inoltre, si tutela la parte contraente che intenda esercitare un'azione nei confronti del vettore, garantendole un periodo minimo inderogabile per far valere i propri diritti. In mancanza, il vettore si vedrebbe riconosciuta la facoltà di emettere polizze di carico limitanti l'azione dell'interessato al carico (titolare della polizza) a brevi o brevissimi termini, andando sostanzialmente a comprimere, ingiustificatamente, i diritti processuali di quest'ultimo <sup>(39)</sup>.

Sul punto è opportuno innestare una riflessione.

Esclusivamente con riferimento alle pretese relative al «periodo di responsabilità vettoriale», qualsiasi clausola, convenzionale o legale, che miri a ridurre il periodo annuale del *time bar* è contraria alle Regole dell'Aia e dell'Aia-Visby, pertanto, nulla e priva di efficacia ai sensi dell'art. 3.8 dei medesimi testi normativi.

Occorre, dunque, domandarsi se le previsioni di cui all'art. 3.6 delle Regole dell'Aia e dell'Aia-Visby siano razionalmente concepite, assodato che l'intenzione del legislatore è quella di includervi altresì le vicende patologiche inerenti alle merci successive alla scaricazione ma antecedenti o contestuali alla riconsegna.

*De jure condito*, a parere di chi scrive, estendere l'applicazione dell'art. 3.8 delle Regole dell'Aia e dell'Aia-Visby all'ipotesi di *misdelivery* successiva alla scaricazione potrebbe apparire una forzatura ermeneutica. L'art. 3.8, infatti, espressamente limita la sua applicazione al «periodo di responsabilità del vettore», intercorrente tra la caricazione e la scaricazione delle merci.

Si potrebbe, quindi, auspicare l'adozione in futuro di un emendamento che tenga conto delle peculiarità <sup>(40)</sup>, rispetto alla normativa nel suo complesso,

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<sup>(37)</sup> Sul punto anche W. TETLEY, *Marine Cargo Claims*, cit., 1623. Tra le varie finalità della siffatta impostazione dell'articolo 3.6 delle Regole dell'Aia/Aia-Visby non manca senz'altro quella di voler contribuire all'uniformità del diritto internazionale convenzionale, onde evitare un'insostenibile discrepanza tra le discipline nazionali, incline ad incoraggiare pratiche di *forum shipping*.

<sup>(38)</sup> Per un'approfondita analisi dei vantaggi e dei soggetti che possono trarre beneficio dal termine estintivo annuale vedasi W. TETLEY, *Marine Cargo Claims*, cit., 1643.

<sup>(39)</sup> Cfr. W. TETLEY, *Marine Cargo Claims*, cit., 1624.

<sup>(40)</sup> Sul piano contestuale, cfr. *supra* par. 3. Sull'«*unsatisfactory wording*» delle Rego-

dell'art. 3.6, garantendo un'inderogabilità della disposizione, in via eccezionale, sino al momento della riconsegna delle merci, con il fine di valorizzare una necessaria certezza del diritto e di garantire una sostanziale parità d'armi ai contraenti.

In assenza di un simile intervento, l'autorevole posizione assunta dalla *Supreme Court* inglese appare, invero, idonea a colmare sul piano interpretativo quella stessa esigenza di coerenza sistematica che il legislatore potrebbe in futuro formalizzare. Resta ora da verificare se l'orientamento in parola troverà adesione anche in altri ordinamenti – tanto di *common law* quanto di *civil law* – contribuendo a delineare una giurisprudenza più uniforme in materia di responsabilità vettoriale e a consolidare, nel tempo, una più compiuta certezza del diritto nei traffici marittimi internazionali.

GIANDOMENICO MILILLO

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le dell'Aia e dell'Aia-Visby, vedasi anche W. LEUNG, *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*, cit., 227.