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ELUSIVE CARRIERS, TIME BARS, AND SALVATION THROUGH ARBITRATION

Paul Myburgh
Deputy Director, Centre for Maritime Law, NUS Law

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Elusive carriers, time bars, and salvation through arbitration

Paul Myburgh[*]

Identifying the correct carrier to sue is a perennial problem. The cargo claimant's choice of whom to sue is made even more difficult where the carriage of goods involves transport intermediaries or a complex chain of charters. Stringent time bars and the need to issue proceedings against the right party, and in a competent forum, further raise the stakes and add to the urgency of the claimant's choices. Three recent decisions of the High Court of England and Wales involving similar facts illustrate the potential pitfalls posed by the identity of carrier issue, as well as the possibilities of exercising judicial discretion to extend the time for commencement of arbitration proceedings where the carrier's misleading conduct has contributed to the time bar being missed.

Keywords: Carriage of goods by sea, identity of the carrier, time bars, limitation of actions, prescription, time extension, arbitration.

[*] Deputy Director, Centre for Maritime Law, Faculty of Law, National University of Singapore.

1 Introduction

Identifying the contractual carrier used to be a relatively simple affair. As Martin Davies succinctly puts it, 'the carrier was the one with the ship'.[1] However, in the twentieth century, the increased use of demise[2] and identity of carrier[3] clauses, as well as more complex chartering and freight forwarding arrangements[4] and the rise of NVOCCs,[5] has made the task of identifying the contractual carrier considerably more challenging. Identifying the carrier has become both 'a trap for the unwary'[6] and 'a game in itself'.[7]

The dominant international carriage of goods by sea regimes, the Hague and Hague-Visby Rules,[8] offer scant assistance to claimants in this regard. They merely provide in Article 1(a) that the carrier 'includes the owner or the charterer who enters into a contract of carriage with a shipper'.[9] However,

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1 Martin Davies, 'The Elusive Carrier: Whom do I Sue and How?' (1991) 19 *Australian Business Law Review* 230.

2 Demise clauses, which have been in use since the Second World War and were originally designed to solve charterers' limitation of liability problems, typically state that if the ship is not owned or chartered by demise to the company issuing the bill of lading, the contract of carriage evidenced by the bill of lading is entered into with the owner or demise charterer, and the party issuing the bill of lading (usually the time or voyage charterer) is merely an agent and has 'no personal liability whatsoever' in respect of the contract. See WL Tetley, 'The Demise of the Demise Clause?' (1999) 44 *McGill Law Journal* 807; Francis Reynolds, 'The Demise Clause and the Hague Rules' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 259; *Homburg Houtimport BV v Agrosin Pte Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, [2003] 1 Lloyd's Rep 571; *The Berkshire* [1974] 1 Lloyd's Rep 185. For the origins of the clause, see Lord Roskill, 'The Demise Clause' (1990) 106 *Law Quarterly Review* 403.

3 The identity of carrier clause, a 'cousin' of the demise clause, is to similar effect, but more direct. It typically states that the carrier is the shipowner, and the time or voyage charterer who issues the bill is only the agent, with no liability: see Tetley (n 2) 809.

4 See eg Peter Cain, 'Complexity, Confusion and the Multifaceted Legal Roles of the International Freight Forwarder' (2014) 14 *Macquarie Law Journal* 25; Paul M Bugden and Simone Lamont-Black, *Goods in Transit and Freight Forwarding* (4th edn Sweet & Maxwell/Thomson Reuters 2018); Simone Lamont-Black and D Rhidian Thomas (eds), *Current Issues in Freight Forwarding: Law and Logistics* (Lawtext Publishing 2017).

5 That is, a Non-Vessel-Owning Common Carrier. See generally Davies (n 1). For the historical development of the NVOCC concept and regulation of NVOCCs in the US, see David J Pope and Evelyn A Thomchick, 'US Foreign Freight Forwarders and NVOCCs' (1985) 24 *Transportation Journal* 26.

6 Reynolds (n 2) 260.

7 Davies (n 1) 230.

8 The International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted on 25 August 1924 (in force 2 June 1931), and the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted on 23 February 1968 (in force 23 June 1977) respectively.

9 The inclusive nature of the definition means that this will not always be a binary 'either/or' situation: other parties, such as ship's managers, carriage contractors, freight forwarders or freight agents may in certain

for a claimant who is a subsequent holder of a bill of lading, and was therefore not an original party to the contract of carriage, this may provide little or no guidance. The claimant is left trying to guess whom to sue from clues in the bill of lading and surrounding circumstances, which may prove confusing, misleading or inconclusive.[10] As the Hague and Hague-Visby Rules also contain stringent time bars, the stakes are high for both cargo claimants and their advisers.[11]

Three recent cases in the England and Wales High Court graphically illustrate the pitfalls posed by this identity of carrier maze,[12] as well as the potential salvation offered by choosing arbitration, rather than litigation, as the dispute resolution method for cargo claims.[13]

2 The wrong carrier: two tragedies of errors

2.1 Times Trading Corp v National Bank of Fujairah (Dubai Branch) (NBF (No 1))

In *Times Trading Corp v National Bank of Fujairah (Dubai Branch)*[14] the National Bank of Fujairah (NBF) was the holder of bills of lading on the Congenbill 1994 form under which 55,100 mt of coal were carried from Indonesia to India in 2018 on the *MV Archagelos Gabriel*, a vessel registered in Malta and owned by Rosalind Maritime LLC (Rosalind). The bills of lading contained a paramount clause incorporating the one-year Hague Rules time bar and an English law and arbitration clause. The coal

circumstances also turn out to be the contracting carrier: see Richard Aikens, Richard Lord, Michael Bools, *Bills of Lading* (2nd edn Informa Law from Routledge 2015) [10.71].

10 See David Foxton et al (eds), *Scrutton on Charterparties and Bills of Lading* (24th edn Sweet & Maxwell/Thomson Reuters 2019) [6.032] ff; Guenter Treitel and FMB Reynolds (eds), *Carver on Bills of Lading* (4th edn Sweet & Maxwell/Thomson Reuters 2017) [4-032] ff; Aiken, Lord and Bools (n 9) ch 7, for the general principles applied in English case law as to when a bill of lading is an owner's or charterer's bill. See also *The Starsin* (n 2); Stephen Girvin, 'Contracting Carriers, Himalaya Clauses and Tort in the House of Lords: *The Starsin*' [2003] *Lloyd's Maritime and Commercial Law Quarterly* 311; Simon Baughen, 'Charterers' Bills and Shipowners' Liabilities: A Black Hole for Cargo Claimants?' (2004) 10 *Journal of International Maritime Law* 248.

11 See Parts 2 and 3 below.

12 Davies (n 1) 247: 'Like any maze, this one contains surprises, dead ends and lost souls looking for one another.'

13 See Part 4 below.

14 [2020] EWHC 1078 (Comm) (5 May 2020), [2020] 1 Lloyd's Rep Plus 76 (*NBF (No 1)*).

was discharged in India without production of the original bills of lading against letters of indemnity (LOIs).[15]

At the relevant time, the vessel was under demise charter to Times Trading Corp (Times), and sub-time chartered to Harmony Innovation Shipping Ltd. Another Harmony company, Harmony Innovation Shipping Pte Ltd, entered into a voyage charterparty for the vessel with Trafigura Maritime Logistics Ltd, who in turn entered into a sub-voyage charter with Trafigura Pte Ltd.[16]

Through its Singapore solicitors, Rajah & Tann (R&T), NBF asserted a claim for misdelivery against the carrier, which was addressed to Rosalind 'c/o Times Navigation Inc' on 28 December 2018. Waterson Hicks (WH) replied that day. The reply stated that they acted for the owners, and took no issue with the addressing of the claim.[17]

On 2 January 2019 NBF issued in rem proceedings in the High Court of Singapore, and on 4 June 2019, NBF commenced London arbitration proceedings against the carrier for misdelivery by a notice addressed to 'Rosalind Maritime LLC, Owners of the Vessel "Archagelos Gabriel" c/o Times Navigation Inc'. Holman Fenwick Willan (HFW) replied, saying that they acted for Trafigura 'who have the conduct of the defence of your clients' alleged claims'. The letter did not identify exactly for whom Trafigura acted, and did not mention any demise charter.[18]

After the one-year time limit had expired, on 10 July 2019, Reed Smith (RS), stating that they acted for 'Owners', appointed an arbitrator for the carrier; and then, on 19 July 2019, sent a letter indicating that the bills of lading were issued by the demise charterer, Times, rather than the owner, Rosalind, and challenging the validity of the arbitration as having been commenced against the wrong party.[19]

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15 ibid [7]-[11].

16 *National Bank of Fujairah (Dubai Branch) v Times Trading Corp* [2020] EWHC 1983 (Comm) (23 July 2020), [2020] 2 Lloyd's Rep 211 (*NBF (No 2)*) [7]-[9].

17 *NBF (No 1)* (n 14) [13].

18 ibid [17].

19 ibid [18].

Times then sought an anti-suit injunction in the England and Wales High Court against NBF continuing the Singapore in rem proceedings on the basis that they were contrary to the London arbitration clause incorporated into the relevant bills of lading. The conceptual difficulty was that Times sought to eat its cake and still have it: it did not seek to have the issue of whether it was indeed the carrier determined in the context of the anti-suit injunction application, which meant that the traditional contractual basis for an *Angelic Grace* anti-suit injunction[20] had not been made out; and the facts of this case were not squarely on all fours with the so-called 'quasi-contractual' injunction cases.[21] Nonetheless, after an exhaustive analysis of the relevant case law, Cockerill J held that the case did 'in essence fall within the boundary delineated' by the 'quasi-contractual' extension:[22]

> The key point is that the Defendant has adopted a somewhat Janus-faced approach. It may on one level deny the contract, but it has also brought a claim asserting the Times demise charter in Singapore. It may be the case that the claim against Times is a secondary, 'belt and braces' case. But it asserts the contract. The claim was originally issued in the context of obtaining security for the contractual claim, even if the proceedings were apparently later served more with an eye to obtaining disclosure to bottom out the position on the asserted demise charter.

The Judge concluded that the jurisdictional basis for an anti-suit injunction had been made out, but refused to grant it in the unconditional terms sought by Times. Instead, it would be subject to Times giving an undertaking not to rely on any time-bar argument in the London arbitration.[23] Times unsuccessfully sought leave to appeal against the imposition of this condition, and then abandoned its reliance on the anti-suit injunction, thus requiring NBF to confront squarely the issue of the time bar in the arbitration proceedings and seek a time extension.[24]

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20 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (CA).

21 *NBF (No 1)* (n 14) [38] ff. See generally Thomas Raphael, *The Anti-Suit Injunction* (2nd ed Oxford University Press 2019), ch 10 'Quasi-Contractual Anti-Suit Injunctions'. For a critique of the conceptual incoherency of the 'quasi-contractual' injunction gloss, see Paul Myburgh, 'Non-Parties, Forum Agreements and Expanding Anti-Suit Injunctions' [2020] *Lloyd's Maritime and Commercial Law Quarterly* 345. See also Myron Phua, 'Injunctive Enforcement of Arbitration Agreements Against Non-Parties: Two Complications' [2019] *Lloyd's Maritime and Commercial Law Quarterly* 518.

22 *NBF (No 1)* (n 14) [75].

23 ibid [113] ff, citing *Tracomin SA v Sudan Oil Seeds* [1983] 1 WLR 1026, 1037G (CA).

24 *NBF (No 2)* (n 16) [5]-[6]. See Part 4 below.

2.2 FIMbank plc v KCH Shipping Co Ltd (FIMBank)

Slightly less than two months after her decision in *NBF (No 1)*, Cockerill J handed down another judgment involving identity of carrier issues on broadly similar facts. In *FIMbank plc v KCH Shipping Co Ltd*[25] the claimant, a Maltese bank, brought a claim for misdelivery of about 85,000 mt of coal carried on the *M/V Giant Ace* from Indonesia to India without production of original bills of lading. The claimant, having advanced funds to the purchaser of the coal, was the lawful holder of the relevant bills of lading, which contained a London arbitration clause and were subject to the one-year Hague/Hague-Visby Rules time bar.[26]

The registered owner of the vessel was a Panamanian company, Mirae Wise SA (MW). Unbeknownst to the claimant, KCH Shipping Ltd (KCH), was the demise charterer of the vessel. KCH, in turn, time chartered the vessel to Classic Maritime Inc (Classic), who entered into a voyage charterparty with Trafigura Maritime Logistics Pte Ltd (Trafigura). The cargo of coal was discharged against a series of back-to-back letters of indemnity (LOIs) issued up the chain of charterers.[27]

The claimant was represented at the time by the Maltese firm Fenech & Fenech (F&F). Ms Ann Fenech looked into the claim and did a search on Equasis, which identified the vessel as flagged in Panama and the registered owner as MW. Equasis gave a 'c/o' address of another entity, 'Korea Line Corp', described as 'Ship manager/Commercial Manager' in South Korea. Ms Fenech claimed that 'she did not join the dots between the "SA" designation of the company and the flag of the vessel and realise that MW was a Panamanian company'.[28] Her testimony was that she saw the Korean ship management company and thought that MW was a Korean company.[29]

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25 [2020] EWHC 1765 (Comm), [2020] Lloyd's Rep Plus 85 (3 July 2020) (*FIMBank*).

26 ibid [1]-[11]. Indonesia has not ratified or implemented any of the international carriage of goods by sea Conventions: see *Indonesia: Shipping Laws and Regulations 2020* at https://iclg.com/practice-areas/shipping-laws-and-regulations/indonesia.

27 *FIMBank* (n 25) [10], [12].

28 ibid [13]. A simple Google search of the phrase 'Mirae Wise SA' brings up mirae.com, a Korean company, as the second search result, but this is clearly a technology company producing semiconductor and mask manufacturing equipment, not a shipping company. The third search result identifies Mirae Wise SA as a registered Panamanian company, albeit with Korean directors: see https://opencorporates.com/companies/pa/656571.

29 ibid [14].

On 24 January 2019, Ms Fenech sent a letter before action to MW. As Cockerill J noted, 'this letter was misdirected; the appropriate recipient of the claim was KCH. But Ms Fenech did not know about the bareboat charter. Such arrangements are not matters of record. At the same time, anyone who has been involved in such matters for any period of time will know that they are not uncommon.'[30]

Ms Fenech also sent the letter to Gard, the vessel's P&I Club. Gard then sent the letter to Grieg Shipbrokers, Classic's brokers, who sent it to Classic with the request: 'Pls check and reply us urgently and let us know C/P chain and each PNI Club'.[31]

Classic's lawyer, Mr Shepherd of Wikborg Rein (WR), responded to Ms Fenech on 21 February 2019. In that email Mr Shepherd stated as follows:[32]

> Our clients, Classic Maritime Inc have received from the owners of the m/v GIANT ACE a copy of the attached letter dated 24 January 2019. At the relevant time the vessel was on time charter to Classic and on voyage charter to Trafigura Maritime Logistics Pte Ltd. There are back-to-back LOIs in place between the Korean head owners, Classic and Trafigura.

Later on the same day, Mr Shepherd sent Ms Fenech a second email:[33]

> Can you please clarify whether you have been contacted by the Korean owners of GIANT ACE or their representatives? We understand that the cargo was discharged between 1 and 18 April 2019, so it may be advisable to obtain a time extension from the head owners. We are in correspondence with them but would need a written request from you for such time extension to forward to the Owners for their agreement.

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30 ibid [17]. The Judge at [18] left open the question as to whether Ms Fenech should have enquired whether there was a demise charter, concluding that, absent expert evidence, she did not have the material before her to conclude that Ms Fenech's action at this point was open to criticism.

31 ibid [19].

32 ibid [24].

33 ibid [31].

In a third email on the same day, Mr Shepherd asked Ms Fenech to forward him a clean message requesting that 'a time extension be granted by the carrier', which could be forwarded 'to the Owners and their Club (Gard) to seek the Owners' agreement'. As requested, Ms Fenech sent a request to WR for a time extension on 4 March 2019. Mr Shepherd contacted KCH asking for confirmation that WR had authorisation to agree a time extension with F&F. That authority was eventually granted.[34]

The claimant argued that the effect of this correspondence was to mislead Ms Fenech, or at least to contribute to, or reinforce her mistake. Cockerill J rejected this contention, characterising the correspondence as 'essentially passive':[35]

> The reality is that Ms Fenech's misapprehension at this stage had three causes. The first was her initial assessment of the situation, which was wrong, but not unreasonable. The second was what seemed to her to be confirmation of that assessment given by the correspondence; the coincidence to her (with her mind made up) of the ambivalent language in the correspondence she received from parties other than KCH. The third was her own decision not to ask about the existence of a bareboat charter or to press matters any further with MW or Gard. None of these can properly be placed at anyone else's door.

On 6 May 2019 Ms Fenech was contacted by KCH's lawyer (Mr Mallard of DLA Piper (DLA)). Mr Mallard made it clear that there was a demise charterparty in place and that KCH were the demise charterers for whom DLA was acting. The Judge found that Ms Fenech 'was surprised but grasped the implications of this information. If the Bills were demise charterers' bills, then the carrier was KCH and the claim would need to be against KCH'.[36] Moreover, this raised the unpleasant prospect that, if the time extension had been granted by MW rather than by KCH, the claim against KCH was already time-barred. Nonetheless, Ms Fenech decided not to 'wake any sleeping dogs' by clarifying this issue,[37] a decision that was criticised by Cockerill J:[38]

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34 ibid [33] ff.
35 ibid [39]-[41].
36 ibid [55].
37 ibid [59].
38 ibid [64].

> What in my view Ms Fenech plainly should have done was … to clarify the question as regards the extension. The worst that could have happened would be if KCH said it was an MW extension. But if so Ms Fenech would have known fairly promptly. Waiting was not going to improve matters. If she waited there was no universe in which there would somehow be a good claim against MW. All that would happen is that she would find out the truth later in an area where delay counts against a party.

Meanwhile, the claimant issued in rem proceedings in Singapore through its Singapore lawyers, R&T. On 9 July 2019, MW informed the claimant that the bills were not its bills and asked why the claim had not been commenced against the demise charterers, KCH. That made it clear that the claim had been brought against the wrong party. RS, who had taken over as KCH's lawyers, informed R&T on 29 July 2019 that 'your claims are time barred'.[39]

3 Time bars and misdelivery

The banks' claims in the *FNB* and *FIMBank* proceedings were for misdelivery of the goods without presentation of the relevant shipping documents. These claims were said by the carriers (once eventually identified) to be caught by the Hague Rules time bar. Article III rule 6 of the Hague Rules states as follows: 'In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.'[40]

In *FIMbank*, it was assumed in the arbitration claim form that the time bar did apply to misdelivery claims,[41] so Cockerill J did not dwell on this issue further, save to note that the bank was entitled to

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39 ibid [66]-[69].

40 For the amended Hague-Visby Rules wording, see text at n 56 below. See D Rhidian Thomas, 'The Perspective of English law on Limitation of Time Periods relating to Cargo Claims Pursuant to the Hague Rules and the Visby Protocol' (2019) 25 *Journal of International Maritime Law* 497; Simon Baughen, 'Misdelivery Claims under Bills of Lading and International Conventions for the Carriage of Goods by Sea' in D Rhidian Thomas (ed), *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010) ch 9.

41 *FIMBank* (n 25) [6 iv].

argue the contrary in subsequent arbitration proceedings.[42] The question was addressed more directly and in more detail in *FNB (No 2)*,[43] where Foxton J considered FNB's subsequent application for a time extension under s 12 of the Arbitration Act 1996 (UK). Foxton J referred to his own previous decision in *The Alhani*[44] to the effect that the one-year limitation period arising under Article III rule 6 of the Hague Rules does apply to actions for misdelivery where the cargo has been delivered other than against the presentation of original bills of lading.

In reaching this conclusion in *The Alhani*, Foxton J referred to the breadth of the words 'in any event'[45] and 'all liability',[46] and noted that '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'.[47] He was not convinced by the argument that Article III rule 6 only applies to claims for breach of the duties imposed by the Hague Rules, and that the obligation only to deliver against production of an original bill of lading is not such a duty; or the alternative argument that the duty to deliver against production of an original bill of lading is strict, and a duty which is still breached even if the shipowner delivers against what it perfectly reasonably believes to be a genuine bill, but which is in fact a skilful forgery.[48]

He concluded that there were 'informed observers who held the view that Article III Rule 6 did not apply to claims for misdelivery. However, what is noticeably absent is any authority from any

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42 ibid [7]; see *Grimaldi Compagnia di Navagazione [sic] SpA v Sekihyo Lines Ltd (The Seki Rolette)* [1998] 2 Lloyd's Rep (QB) 638, 646.

43 *FNB (No 2)* (n 16). Also see Part 4 below.

44 *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)* [2018] EWHC 1495 (Comm), [2018] 2 Lloyd's Rep 563 (*The Alhani*), discussed in Thomas (n 40) 504-505, 507.

45 *The Alhani* (n 44) [42]-[45], citing *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWHC 944 (Comm) [104]-[106]. The issue was expressly left open by the Court of Appeal (*Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWCA Civ 294, [2007] 2 Lloyd's Rep 622 [27]), with Longmore LJ preferring 'to leave this not entirely easy question to be decided against the background of a concrete set of facts which specifically raises the question for decision'; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep 1 [16], [43]; *Parsons Corp v CV Scheervaartondern Eming (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357 [38].

46 *The Alhani* (n 44) [46]. See *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 1 Lloyd's Rep (CA) 310, 315.

47 *The Alhani* (n 44) [48]. See too Malcolm Clarke, 'Misdelivery and Time Bars' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 314; Malcolm Clarke, 'Misdelivery and Time Bars' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 394; William 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' (2008) 39 *Journal of Maritime Law and Commerce* 205.

48 *The Alhani* (n 44) [64]. See *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg (The Motis)* [1999] 1 Lloyd's Rep 837 (QB); [2000] 1 Lloyd's Rep 211 (CA).

jurisdiction to the effect that Article III Rule 6 does not so apply, or commentary recording [that] meaning.'[49] However, a cursory comparative survey suggests that the matter is not quite as settled or free from authority as this statement in *The Alhani* might suggest.

For example, in Malaysia, the opposite view to *The Alhani* has prevailed since the landmark 1964 decision of the Federal Court of Malaysia in *Peninsular & Oriental Steam Navigation Co Ltd v Rambler Cycle Co Ltd*,[50] which preferred the view that Article III rule 6 of the Hague Rules does not encompass misdelivery after 'discharge' of the cargo, because the application of the Rules ceases upon discharge of the cargo, as opposed to delivery. That narrower interpretation of the ambit of Article III rule 6 has been more or less consistently adopted in a number of subsequent Malaysian cases.[51] In India, there are also suggestions at first instance that the Hague-Visby time bar does not extend to misdelivery claims.[52] In Portugal, the Supreme Court of Justice ruled in 2015 that the Hague Rules time bar does not extend to misdelivery.[53] The Sri Lankan courts have expressed a similar view in three cases,[54] and judgments in other jurisdictions have expressed doubts regarding the blanket applicability of the Hague/Hague-Visby Rules time bar to all misdelivery claims.[55]

Nonetheless, despite a lack of complete uniformity in the international jurisprudence on whether the time bar in Article III rule 6 of the Hague Rules applies to misdelivery claims, the predominant modern view in most maritime jurisdictions would seem to be that it does. The argument for the broad

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49 *The Alhani* (n 44) [76].

50 [1964] 1 LNS 133; [1964] 1 MLJ 443.

51 See eg *The Lun Yung v Sadit Timber Sdn Bhd* [1984] 1 MLJ 29 (CMI502); *PT Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd* [2016] 7 MLJ 589 (CMI139); *Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd* [2018] 1 LNS 895; [2019] 3 CLJ 198 (CMI323).

52 See eg *Jaytee Exports v Natvar Parikh Industries Ltd*, CS No 481 of 2000, MANU/WB/0244/2018 (High Court of Calcutta) (CMI383).

53 Proc No 04B4682 of the Supreme Court of Justice, 17 February 2015 (CMI598): '*O prazo de caducidade referido nos arts. 3.º, 6 da Convenção de Bruxelas de 1924 e art. 27.º, 2 do DL 352/86, de 21-10, reporta-se às perdas e danos da mercadoria transportada e não às responsabilidades derivadas do cumprimento defeituoso do contrato de transporte de mercadorias por mar*.' (The expiry period referred to in art 3 r 6 of the 1924 Brussels Convention and art 27 r 2 of DL 352/86, of 21-10, refers to the loss and damage of the transported goods and not to the responsibilities derived from the defective fulfilment of the contract of carriage of goods by sea.)

54 *Indian Bank Ltd v Sri Lanka Shipping Co Ltd* (1976) 79 NLR 1 (CMI255); *Alagasunderam Chettiar v The Indian Bank Ltd* (1969) 72 NLR 1 (CMI253); *Sri Lanka Shipping Co Ltd v The Indian Bank Ltd* (1968) 71 NLR 361 (CMI254).

55 See eg *Gea Srl v Hapag-Lloyd Container Line GmbH*, 2005 CanLII 21198 (QC CS) (CMI861), where Beaudoin JCS refused to rule that an extra-contractual claim for misdelivery based on Article 1457 of the Quebec Civil Code was time barred by Article III rule 6. See also the doubts expressed in *Computronics International v Piff Shipping Ltd* [1997] HKCA 480, [1997] 2 HKC 53.

interpretation adopted in *The Alhani* would seem to be even stronger in respect of the Hague-Visby Rules, where the wording of Article III rule 6 was amended to read as follows: '*Subject to paragraph 6bis* the carrier and the ship shall in any event be discharged from all liability *whatsoever* in respect of *the goods*, unless suit is bought within one year of *their* delivery or 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.*'[56] This amendment, it has been argued, was intended to make it plain(er) that misdelivery was covered by the time bar in the Hague-Visby Rules.[57]

Cargo claimants cannot therefore assume that they do not have to comply with the Hague/Hague-Visby time bar in misdelivery cases. Although this might seem to be particularly unjust to the cargo claimant, the counter-argument is that allowing any distinctions to be drawn between damage, loss, non-delivery and various forms of misdelivery would cause unnecessary disuniformity and uncertainty in the legal regime governing international carriage of goods by sea:[58]

> Fraud aside, it is not obvious why the carrier who loses goods en route can plead defences in the Rules but the carrier who loses them immediately after discharge cannot. While intended as uniform law, for historical reasons the Rules are not a complete code, and must be underpinned at some points by the contract of carriage and by national law. But to raise the hemline of the uniform more than necessary, revealing the common law in all its venerable varicosity, is neither useful nor elegant.

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56 Amendments indicated by emphasis. See Thomas (n 40) 505-507.

57 But see Michael Mustill QC commenting on The Carriage of Goods by Sea Act 1971 (UK) in (1972) *Archiv for Sjørrett* 684, 706, quoted in *The Alhani* (n 44) [71]: 'It is possible that the word "whatsoever" was also intended to cover liabilities arising from the delivery of goods without production of bills of lading, the intention being that the shipowner or counter-signing banker would not have to keep open the letter of intention customarily obtained on such occasions. If this was indeed the intention, it must be doubted whether the desired result has in fact been achieved. It is very questionable whether a deliberate mis-delivery after the completion of the transit is subject to the Hague Rules at all: see Article II. And even if it were, the English Court treats delivery without production of bills as a serious tort and breach of contract, and it is unlikely that any limitation of the cargo-owner's rights of action for such an act would be effective, unless very clear words are used. I suggest that "whatsoever" is not sufficiently clear for this purpose.'

58 Malcolm Clarke, 'Misdelivery and Time Bars' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 394, 396.

4 Salvation through arbitration?

The time bar under the Hague and Hague-Visby Rules is notoriously strict. Unless 'suit is brought' within one year, the time bar has the effect of extinguishing all claims against the carrier and the ship, and not merely suspending them.[59] For litigation that is brought too late, or in the wrong forum, or against the wrong party, there is thus no possibility (absent agreement between the parties) of resurrecting the claim.[60] Arbitration, however, may prove to be a different matter, with s 12 of the Arbitration Act 1996 (UK) (the Act) allowing judges to perform Easter miracles, but within carefully policed bounds. The relevant parts of s 12 of the Act provide as follows:

> (1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step—
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> (a) to begin arbitral proceedings, or
>
> (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step.
>
> (2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.
>
> (3) The court shall make an order only if satisfied—
>
> (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
>
> (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.
>
> (4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

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59 *Aries Tanker Corp v Total Transport Ltd (The Aries)* [1977] 1 Lloyd's Rep 334, 336 (HL).

60 See Nigel Meeson and John A Kimbell, *Admiralty Jurisdiction and Practice* (5th edn Informa from Routledge 2017) [5.2] ff.

Section 12 of the Act refers only to contractual time bars, and will therefore be unavailable to claimants where the Hague-Visby Rules time bar bites as a matter of statute.[61] In *NBF* and *FIMBank*, the carriage was from Indonesia, which is neither a Hague nor a Hague-Visby Rules jurisdiction:[62] the Article III rule 6 time bar was therefore incorporated into the relevant bills of lading as a matter of contract. The bills of lading were subject to English law[63] and London arbitration clauses.

Cockerill J noted at the outset in *FIMBank* that s 12 is considerably stricter than its predecessor, s 27 of the Arbitration Act 1950 (UK),[64] with the consequence that 'the test will be extremely difficult to satisfy and an extension will probably only be granted if the circumstances are entirely out of the ordinary'.[65]

When it comes to interpreting s 12(3)(a), therefore, the starting point is that a simple negligent omission to comply with the time bar is within the parties' contemplation, and it is not deemed unjust for a party to bear the consequences of its own negligence, or that of its lawyers or claims handlers. The battleground is as to 'negligence plus'; the notion that negligence with more can, if unusually, amount to circumstances outside the reasonable contemplation of the parties.[66]

Cockerill J decided that the circumstances in *FIMBank*, viewed holistically, were not outside the reasonable contemplation of the parties when the contract of carriage was entered into:[67]

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61 ie where the Hague-Visby Rules are applicable by virtue of the Carriage of Goods by Sea Act 1971 (UK), Sch 1, Article X, or by virtue of any other statute rendering the Hague-Visby Rules applicable. See Robert Merkin and Louis Flannery, *Merkin and Flannery on the Arbitration Act 1996* (6th edn Informa Law from Routledge 2019) [12.4]; Clare Ambrose and Karen Maxwell, *London Maritime Arbitration* (4th edn Informa Law from Routledge 2018) [9.14]; Aikens, Lord and Bools (n 9) [10.190].

62 See n 26 above.

63 It is not entirely clear whether s 12 of the Act applies only if the arbitration agreement is governed by English law: see *William McIlroy Swindon Ltd v Quinn Insurance Ltd* [2010] EWHC 2448 (TCC), [2011] Lloyd's Rep IR 407 [6]-[7]; Merkin and Flannery (n 61) [12.2].

64 For a magisterial analysis of s 27 of the Arbitration Act 1950 (UK), see D Rhidian Thomas, 'Commercial Arbitration: Power of Court to Extend Time for Commencing Arbitration Proceedings' [1981] *Lloyd's Maritime and Commercial Law Quarterly* 529.

65 *FIMBank* (n 25) [75], quoting Ambrose and Maxwell (n 61) [9.30].

66 *FIMBank* (n 25) [81]. See *Haven Insurance Co Ltd v EUI Ltd (t/a Elephant Insurance)* [2018] EWCA Civ 2494, [2019] Lloyd's Rep IR 128; *SOS Corporación Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345; *Harbour & General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65.

67 *FIMBank* (n 25) [92].

> The circumstances are no more than the mistake, compounded (but not caused) by correspondence with other parties innocently reinforcing that mistake, compounded by a yet further error. Further that final decision was not realistically caused by anything in the correspondence. That situation is not something the parties would not reasonably contemplate. I do not accept that a mistake on top of conduct innocently leading Ms Fenech astray is outside what would be reasonably contemplated. There is no relevant 'more' to take this case outside the normal consequences of mistakes.

As to the 'injustice' test under s 12(3)(b) of the Act, Cockerill J held that there must be 'some causative nexus'[68] between the respondent's conduct and the applicant's failure to comply with the time bar. Here, Cockerill J found that Mr Shepherd's wording of the key letter granting the extension of time was 'somewhat unfortunate' as it did nothing to disturb the misapprehension under which Ms Fenech was labouring.[69] However, this did not cause the original time bar to be missed, 'because if the full facts had been laid out in pellucid fashion Ms Fenech would have known she had an extension from the right person. What it caused was Ms Fenech's being unclear as at 6 May 2019 of from whom that extension was.'[70] This was, therefore, not a case where one could properly conclude that the conduct of the demise charterer made it unjust to hold the claimant to the time bar. As neither jurisdictional hurdle of s 12(3) of the Act had been cleared, FIMBank's application for a time extension failed.[71]

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68 ibid [98]-[101]. In *Lantic Sugar Ltd v Baffin Investments Ltd (The Lake Michigan)* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141 [52], Gross J stated that 'conduct must be shown that is causative of the failure to comply with the time bar or related to the injustice which would arise if relief is not granted'. In *Thyssen Inc v Calypso Shipping Corp SA* [2000] 2 Lloyd's Rep 243 [25] Steel J said: 'The threshold question as I see it is whether the claimants can attribute their failure to comply with the time bar to the conduct of the respondents'. Cockerill J was unconvinced that there was a relevant distinction to be drawn between these two different formulations of the test.

69 *FIMBank* (n 25) [107] ff, referring to the message set out at ibid [45]: 'We now write to confirm that the owners of the m/v GIANT ACE hereby grant FIMbank plc a time extension up to and including 1st July 2019 for the commencement of proceedings in respect of claims arising under or pursuant to the bills of lading listed in your letter dated 24th January 2019 addressed to Mirae Wise SA (copy attached). Kindly acknowledge this message. Separately, we understand that HFW Singapore will be writing to you in the near future on behalf of the voyage charterers Trafigura about the claims that FIMBank have advanced.'

70 ibid [109]. See also *Harbour & General Works Ltd v Environment Agency* (n 66) 81; *LJ Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) [21]-[22] (Toulson J): the words of s 12(3)(a) mean 'circumstances which were not only beyond the reasonable contemplation of the parties, but were also such that if the parties had contemplated them, they would also have contemplated that the time bar might not apply in such circumstances'.

71 *FIMBank* (n 25) [117].

Finally, Cockerill J made the obiter observation that even if FIMBank had cleared the jurisdictional hurdles in s 12(3) of the Act, its delay of three to four months before pursuing the time extension application meant that the Court could, and probably would, still have exercised its discretion against the claimant:[72]

> The fact that things were going on in Singapore seems a poor excuse. R&T (for the Bank) may from their perspective, have been reasonable to seek to clarify the position as to the origins of the time extension in the weeks that followed the expiry of time; but they may well not have been operating from the basis of an appreciation of the requirements of section 12 of the [Arbitration] Act [1996 (UK)].[73] It also appears that they were unaware of the existence of the demise charter — their email responding to MW's denial that it was the carrier states in terms that 'this allegation has never been raised prior, whether by Owners … or by any of the other parties in the charter or LOI chain', which was plainly not correct. This misapprehension seems to have led to correspondence being conducted in a somewhat intemperate tone, which provoked a fairly petulant set of responses. There is no explanation as to why it took until 31 August 2019 for the extension of time to be raised in the chain of correspondence.

In *NBF (No 2)*,[74] the focus was on s 12(3)(b) of the Act and whether Times' conduct rendered it unjust to hold NBF to the time bar. Foxton J meticulously analysed the parties' correspondence, finding as follows:[75]

> i. In relation to the period before 18 January 2019, Times (through WH) communicated in a manner which implied, and I find contributed to R&T's belief, that WH acted for the carrier liable under the Bills of Lading, and for the entity to whom the claims were appropriately addressed. While I accept that WH acted innocently (in that the impression they gave reflected their own understanding), Times (on whose behalf the communications were sent) knew the true position, and WH could have made more detailed enquiries to ascertain the correct position (once the initial urgency of responding to the 28 December email from R&T had passed).

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72 ibid [124].

73 The Singapore Arbitration Act, Cap 10 (Rev ed 2002), s 10 is still framed in terms of the 'undue hardship' test of s 27 of the Arbitration Act 1950 (UK).

74 *National Bank of Fujairah (Dubai Branch) v Times Trading Corp* (n 16).

75 ibid [47].

ii. In relation to the period after 18 January 2019, the conduct of WH, and of Times, is open to more criticism. The attempt to avoid revealing Times' involvement, against the background of the communications sent when WH was unaware of Times' involvement, was an extremely challenging strategy. While I am sure WH tried hard to walk that difficult line without crossing it, the objective effect of the communications of WH and HFW which I have referred to was to convey an impression which did not accord with the facts as Times and the parties acting for them understood them.

In terms of the 'causative burden', Foxton J was satisfied that the impression given on Times' behalf, in ignorance of the true position up to 18 January 2019, and with knowledge of it thereafter, was a significant factor in NBF missing the time bar, so that the requisite causative nexus was established which made it unjust to hold NBF to the strict terms of the time bar.[76]

Foxton J then dealt with s 12(3)(a) more briefly, noting that he would not have regarded the effect of communications sent on behalf of persons other than Times to be matters outside the reasonable contemplation of the parties which the parties might have thought made it unjust for Times to rely on the Hague Rules time bar. As the time bar took effect as a term of the contract between Times and NBF, the parties would not regard conduct by any third party who was not acting on behalf of Times as a matter which might make it unjust for Times to rely on the time bar, thereby depriving Times of the benefit of one of the terms of the contract of carriage.[77]

Foxton J thus concluded that he had jurisdiction under s 12(3)(b) of the Act to exercise his discretion to extend the time for NBF to commence arbitration proceedings. However, he still had to consider whether the lengthy delay on NBF's part before bringing an application for an extension, even after it had been notified by RS on 18 July 2019 that Times, rather than Rosalind, was the carrier, should lead the Court to refuse to exercise its discretion in NBF's favour.[78] However, Foxton J was swayed by the

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76 ibid [49], comparing the case with *The Lake Michigan* (n 68), where Gross J noted [47] that 'some of the responsibility' fell on the applicants, but that the conduct of the respondent, however inadvertent, was 'misleading — and none the less so because its effect was to reinforce [the applicant's] own error': ibid [52].

77 *NBF (No 2)* (n 16) [51], comparing *FIMBank* (n 25) [92], [95]-[96]: that would be a case which the parties to the contractual time bar would have regarded as falling 'well within the ambit of circumstances where a time bar may bring a windfall to the owners'.

78 *NBF (No 2)* (n 16) [52].

fact that Times, or those acting for Times, had misled NBF into believing that they were dealing with the carrier under the bills of lading, and in the period after 18 January 2019 this impression was continued even though those acting for Times were aware that NBF was operating on the basis of a mistaken understanding. That conduct, his Honour held, cleared the jurisdictional hurdle by an appreciable margin.[79] Moreover, it continued to have effect after 18 July 2019, because it contributed to NBF's firm belief that Rosalind was the carrier. Further, Times contributed to NBF's failure to seek relief more promptly by refusing to provide a copy of the demise charterparty, even though Times, or those acting for it, must have appreciated that R&T might well discount the suggestion of Time's involvement for as long as the charterparty was not produced.[80]

NBF (No 2) is, therefore, noteworthy as one of the rare instances where an extension of time application has successfully cleared the relatively high hurdles of s 12 of the Act.[81]

5 Conclusions

Identity of carrier issues have seemingly wrong-footed cargo claimants for ever,[82] allowing carriers to shield behind a confidential web of commercial relationships and thereby escape liability on the most unmeritorious and unattractive of technicalities. Although it is understandable that the issue was not tackled in the 1920s when the Hague Rules were drafted, it does the international shipping industry little credit that claimants still face the same old problem in 2020.

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79 ibid [58], referring to Cockerill J's statement in *FIMBank* (n 25) [119] that the Court's discretion regarding delay would be 'affected by the exact nature of the conclusions on the jurisdictional hurdles, and the margin by which the relevant hurdle was cleared'.

80 *NBF (No 2)* (n 16) [59].

81 For other examples, see *Haven Insurance Company Ltd v EUI Ltd (t/a Elephant Insurance)* (n 66); *P v Q* [2018] EWHC 1399 (Comm); *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC*); The Lake Michigan* (n 68); *Union Trans-Pacific Co Ltd v Orient Shipping Rotterdam BV* [2002] EWHC 1451 (Comm).

82 'The Eternal Question: Just Who is the Bill of Lading Carrier?' *Maritime Risk International*, 1 June 2000.

The Hamburg and Rotterdam Rules[83] have both made significant advances and improvements in this area. Article 15(1)(c) of the Hamburg Rules provides that a bill of lading issued under the Rules must contain the name of the carrier and its principal place of business.[84] Articles 36 and 37 of the Rotterdam Rules deal with the identity of carrier issue even more comprehensively. Article 36(2)(b) requires that the contract particulars in the transport document or electronic transport record must include the name and address of the carrier. Article 37(1) provides that where the carrier 'is identified by name in the contract particulars' any other information that is inconsistent with that identification 'shall have no effect', which would presumably put an end to most demise and identity of carrier clauses. Article 37(2) further generates a presumption that 'the registered owner of that ship [carrying the goods] is … the carrier where the carrier is not identified'. That presumption can only be rebutted by identifying the demise charterer or other carrier and providing their address.[85]

However, the identity of carrier provisions in the Hamburg and Rotterdam Rules, which would greatly assist cargo claimants and their lawyers in most cases, except perhaps where there are fundamental disputes between potential candidates as to who the contractual carrier was, are unlikely to gain much traction in the real world, where international carriage of goods by sea is still overwhelmingly governed by the Hague and Hague-Visby Rules.

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83 United Nations International Convention on the Carriage of Goods by Sea, adopted on 31 March 1978 (in force 1 November 1992), and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted on 11 December 2008 (not yet in force), respectively.

84 See also Article 10 on the liability of actual and contractual carriers. See generally Časlav Pejović, 'The identity of carrier problem under time charters: Diversity despite unification of law' (2000) 31 *Journal of Maritime Law and Commerce* 379; Jan Ramberg, 'The Vanishing Bill of Lading & the "Hamburg Rules Carrier"' (1979) 27 *American Journal of Comparative Law* 391, 392-403; Francis Reynolds 'Transport documents under the international conventions' in D Rhidian Thomas (ed), *Carriage of Goods under the Rotterdam Rules* (n 40) [13.14]: 'The stated requirement that the bill state the name of shipper and carrier could at the very least assist in determining the contracting parties independently of national law, because a party so named would find it difficult to evade responsibility in the role to which he was named even if national law provided that another was the contracting party.'

85 See generally Anastasiya Kozubovskaya-Pellé and Yang Wang, 'Who is the Carrier in the Carriage of Goods by Sea? Rotterdam Rules Response from a French and English Perspective' (2011) 17 *Journal of International Maritime Law* 382, 389, describing art 37 of the Rotterdam Rules as 'a rather successful example of a relatively well-balanced solution for different legal systems'; Filippo Lorenzon 'Transport Documents and Electronic Transport Records' in Yvonne Baatz et al (eds) *The Rotterdam Rules: A Practical Annotation* (Informa Law from Routledge 2009) [36-07]: 'The new requirement reflects modern commercial practice and it is to be welcomed as — at any rate when the underlying sale contract provides for payment via a letter of credit — the indication of the name, although not the address, of the contractual carrier on the face of the bill is required by the Uniform Customs and Practice for Documentary Credits for multimodal transport documents, bills of lading and non-negotiable sea waybills alike.'

Another recent development which may have more widespread practical impact, however, is the adoption of BIMCO's new Law and Arbitration clause 2020.[86] In addition to adding Hong Kong to the existing three arbitration venues of London, New York and Singapore, the clause will require parties to identify who is authorised to receive arbitration notices and communications, and to provide an address for service.[87] As one would expect from a generic dispute resolution clause, the new BIMCO Law and Arbitration clause does not address the identity of carrier issue in explicit and direct terms. However, if the clause is incorporated into a bill of lading and correctly filled in, it will presumably be much more difficult for the party identified in the clause to argue that it has not held itself out as being the contractual carrier, or at the very least the contractual carrier's agent for the purposes of service. This will hopefully allow cargo claimants to slice through the Gordian knot by simply serving a notice of arbitration proceedings on the party identified in the BIMCO clause.

The *NBF* and *FIMBank* litigation provides a salutary reminder to cargo claimants' lawyers to act as expeditiously as possible in pursuing claims subject to the Hague or Hague-Visby Rules time bar, and, more importantly, to ask insistent questions about the identity of the carrier in pursuing those claims. The standard assumption should always be that the bill of lading may have been issued by or on behalf of a charterer or other party, instead of the registered shipowner, and that this is a possibility that needs to be proactively ruled out in all cases. *FIMBank*, in particular, graphically illustrates the dangers and potential costs of a more passive and unquestioning approach to this issue.

By contrast, these cases also demonstrate that, while there is no general duty on carriers or those acting for them to disabuse cargo claimants of their mistaken assumptions,[88] actively misleading conduct on the part of the carrier that is either 'causative of the failure to comply with the time bar

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86 Grant Hunter, 'New BIMCO Law & Arbitration Clause will Clarify Arbitration Processes', 26 June 2020, at https://www.bimco.org/news/contracts-and-clauses/20200626-new-law-and-arbitration-clause.

87 ibid: 'Communication is a key element in the new clause. Who should the notices be sent to and what means can the parties use to convey the message? We are also clarifying the important distinction between notices being served as opposed to just sent,' says Francis Sarre, Chairman of BIMCO's Documentary Committee.

88 *Harbour & General Works Ltd v Environment Agency* (n 66) 73 (Colman J): 'For it to be held that the conduct of one party makes it unjust to hold the other party to the strict terms of the time bar, there must, in my judgment, at the very least be conduct which is proved somehow to have led the claimant to omit to give notice in time. … [M]ere silence or failure to alert the claimant to the need to comply with the time bar cannot render the barring of the claim unjust.'

or related to the injustice which would arise if relief is not granted', [89] is likely to see the Court exercise its discretion in favour of setting aside a contractually incorporated Article III rule 6 time bar in the context of arbitration proceedings.

[89] *The Lake Michigan* (n 68) [46]. The conduct need not, however, amount to an estoppel or something akin to it: see Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996* (5th edn Wiley Blackwell 2014) 89-90. Similarly, the mere fact that a party took part in settlement negotiations would not be conduct making it unjust for that party to rely upon the time bar: Ambrose and Maxwell (n 61) [9.28].