

## Dera Commercial Estate -v- Derya Inc

[2018] EWHC 1673 (Comm)

*An arbitration claim commenced during the statutory six year period could be struck out for inordinate delay under s. 41(3) Arbitration Act 1996 where the parties had contractually agreed a shorter limitation period. The Court was bound by the decision in Hain Steamship v Tate & Lyle, so that a geographic deviation prevented the carrier from relying on the one year time bar under Article III rule 6 of the Hague Rules.*

The Defendant, Derya, was the owner of the “MV Sur”. In early 2011, the Claimant, Dera, chartered the MV Sur to carry maize from India to Jordan. The contract of carriage was subject to the Hague Rules (including the one-year time bar under Article III Rule 6 applicable to claims against a carrier) and it made provision for arbitration in London.

The vessel arrived in Jordan on 8 September 2011. Upon arrival, the Jordanian authorities concluded that the cargo did not meet Jordanian specifications and refused permission for it to enter the country. The cargo remained on board the vessel for weeks with Derya unable to discharge it or sail from the port. On 17 October 2011, Derya’s insurers issued a letter undertaking to pay to Dera any sums found by a London arbitral tribunal to be due in respect of the cargo up to the value of US\$ 9 million (“the LOU”). On 8 November 2011, Derya sailed the vessel to Turkey without Dera’s consent. Upon arrival in Turkey, Derya obtained enforcement orders against the cargo (on account of demurrage incurred while the vessel was in Jordan and during transit to Turkey). The cargo was sold and Derya kept the proceeds.

The parties appointed arbitrators in 2011. No steps were taken in the arbitration for over three years until, in 2015, Derya served particulars of its claim seeking a declaration of non-liability in respect of the cargo and an order that the LOU be released. Dera then served particulars of its claim for loss of the cargo. Following a preliminary issues hearing, the Tribunal struck out Dera’s cargo claim. The Tribunal found that a delay of over three years in progressing the cargo claim - in circumstances where the one-year time bar under Article III Rule 6 was applicable - was “inordinate” and that such delay was “inexcusable”. Dera’s cargo claim was struck out for want of prosecution under section 41(3) of the Arbitration Act 1996.

Dera obtained permission to appeal the Tribunal’s award under section 68 and section 69 of the 1996 Act. Dera’s challenge under section 68 (which was based on an allegation that the tribunal failed to act fairly and impartially contrary to section 33 of the 1996 Act) was dismissed. As were three out of Dera’s four grounds for appeal under section 69. In dismissing those section 69 grounds, Carr J gave guidance on the operation of section 41(3) of the 1996 Act. In particular, she held: (1) that where a party had commenced arbitration and later provided particulars of the claim within the statutory six year limitation period, the claim could nevertheless be struck out for inordinate delay under section 41(3) where the parties had contractually agreed a shorter limitation period; (2) the period between the time when the cause of action arose and the expiry of the Hague Rules limitation period was to be taken into account for the purposes of assessing whether there had, overall, been inordinate delay; and (3) the legal burden of proof lay on the shipowner to establish that delay was inordinate and inexcusable, though in practice it was likely that it would be the responding party that would identify what it said was an excuse for the delay and if it did not a tribunal would ordinarily conclude that there was no excuse.

Dera succeeded on one of its four grounds for appeal under section 69. The question (for which permission to appeal was granted by Leggatt J) was whether, in a contract of carriage subject to the Hague Rules, a geographical deviation precludes the carrier from relying on the one-year time bar under Article III Rule 6. The leading authority on the effect of geographical deviation is the decision of the House of Lords in *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 41 Com Cas, 350 ("*Hain Steamship*"). In *Hain Steamship* it was held that the effect of a geographical deviation is to displace the entire contract of carriage at the innocent party's election. The decision in *Hain Steamship* was last considered at the highest level by Lord Wilberforce in *Photo Production Ltd v Securicor Transport Ltd* ("*Photo Production*") [1980] AC 827. The decision in *Photo Production* is widely understood to have abolished the doctrine of fundamental breach (on which the law on geographical deviation is said to be based). However, in *Photo Production* (at p.845) Lord Wilberforce said, of the authorities on geographical deviation, "*It may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons.*" Carr J acknowledged that, applying modern contractual principles, the question would be one of construction of Article III Rule 6 which (properly construed) would clearly apply in cases of geographical deviation. That is clear from the use of the words "In any event" at the start of Article III Rule 6. This is the basis on which the Tribunal decided which limitation period was applicable to Dera's cargo claim i.e. the one-year time bar under Article III Rule 6 or the six-year period under s.5 of the Limitation Act 1980. The applicable time-bar was then used as a yardstick for assessing whether the delay in progressing the cargo claim was "inordinate". This finding was, therefore, an essential part of the decision to strike out the claim on the basis of "inordinate" and "inexcusable" delay. Carr J held that the Court was bound to follow *Hain Steamship*. Accordingly, the Tribunal was wrong to approach the question purely as one of construction of Article III Rule 6 and to strike out the claim on that basis before making any finding on the issue of election.