In The Court Of Appeal
On Appeal From The High Court Of Justice
Business & Property Courts Of England & Wales
Commercial Court (KBD)
[2025] EWHC 1878
The Honourable Mr Justice Knowles CBE
Between:

Batavia Eximp & Contracting (S) Pte. Ltd.

Appellant

- and -

Pedregal Maritime S.A.

Respondent

The *'Taikoo Brilliance'*

Appellant's Skeleton Argument In Support Of Its Appeal In CL-2023-000147

"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."* Art.III r.6 of the Hague-Visby Rules.

Introduction

1. This is Batavia's appeal, by leave of the Judge below under S.69(8) Arbitration Act 1996 [1/1],[1], from Robin Knowles J's decision under S.69(1) of that Act on a question of law arising out of an Award of the late Ian Kinnell KC [4/14]. The question concerns what qualifies as *"suit"* in the context of the one year timebar provision in Art.III r.6 of the Hague-Visby Rules. It arises in relation to a cargo claim under a contract of carriage governed by the HVR. The claim was brought by Batavia as bill of lading holder against Pedregal as carrier.

2. Knowles J disposed of two S.69 appeals in his Judgment below, one by each party to the arbitration. Between them, those appeals raised 5 questions of law. Batavia's appeal (CL-2023-000147) raised 4 questions, all of which went to the scope of Art.III r.6. Pedregal's appeal (CL-2023-000144) raised a 5th, going to the application of Art.I(c), which excludes deck cargo from the Rules, including from the timebar, in specified circumstances.

3. Knowles J agreed with Mr Kinnell on all 5 questions, and so dismissed both appeals.

[1] References are in the form [Tab/Page].

4. Questions 1-3 are no longer in issue: they were resolved by the Supreme Court's decision in *The 'Giant Ace'* [2025] 1 Lloyd's Rep 637, which Knowles J applied.

5. Knowles J gave Batavia leave to appeal on Question 4 [3/12]:
"If an action for security is validly brought within 1 year, but has been stayed before an action on the merits is brought outside 1 year, does Art.III r.6 of the Hague-Visby Rules apply to the action on the merits?"

6. Question 4 arises because Batavia brought an action within a year to obtain security for its claim, but it did not bring an action on the merits until after the year, by when the action for security had been stayed, after Pedregal had provided security.

7. Mr Kinnell was inclined to think that an action for security does not qualify as suit. Without formally deciding that, he held that the action for security would have ceased to qualify as suit in any event when it was stayed: and that this meant that the action for security did not stop time running in relation to the later action on the merits.

8. Knowles J held that an action for security does not qualify as suit. Since that was decisive by itself, he did not rule on Mr Kinnell's alternative ground based on the stay.

9. Knowles J also gave Pedregal leave to appeal under S.69(8), on Question 5 [3/12]:
"Where cargo covered by a bill of lading is carried partly on and partly under deck, what statement must there be on the face of the bill of lading to engage the exception in Article I(c) of the Hague-Visby Rules?"

10. Question 5 arises because the bills of lading stated that part of the cargo was carried on deck, but Pedregal contended that the bills did not contain sufficient information to satisfy Art.I(c) and engage the exception. Mr Kinnell held that they did, and that the Art.III r.6 timebar therefore did not apply to the cargo carried on deck. Knowles J agreed.

11. Batavia anticipates that both appeals will be heard together. This Skeleton is directed to Batavia's appeal on Question 4. Batavia respectfully submits that Knowles J was mistaken to limit suit to actions on the merits. Actions for security are suit within the ordinary

meaning of Art.III r.6's express language: and there are no reasons of principle, policy, or authority to imply a gloss on the text which confines suit to actions on the merits.

Factual Background

12. The question of law falls to be decided on the basis of the findings of facts in the Award: S.69(3)(c). Mr Kinnell made the following findings (references to Paras are to the Award).

13. The Cargo was c.37,000m^3 / c.102,000 pieces of pine logs. It was loaded on board *'Taikoo Brilliance'* in New Zealand in August 2019, for carriage to Kandla, India: Paras 1, 85 [4/14, 57].

14. There were 4 bills of lading, Nos. 501 to 504. All of them provided that the Cargo was not to be delivered other than on presentation of an original bill: Paras 1, 73 [4/14, 51].

15. Approximately $^1/_3$ of the total number of pieces were loaded on deck, and this was recorded in Bills 502 and 504. The rest of the Cargo was loaded under deck: Paras 1, 85 [4/14, 57].

16. The terms of a charterparty were incorporated into the Bills by reference. They included a London arbitration clause, under which Mr Kinnell was appointed: Paras 14, 23, 73 [4/20, 26, 51].

17. It was common ground that, since New Zealand is an HVR contracting state, the effect of S.1(2) Carriage Of Goods By Sea Act 1971, in combination with Art. X, was that the HVR applied by force of law to the contract of carriage evidenced by the Bills: Para 14 [4/20].

18. Pedregal was the Vessel's registered owner and the contracting carrier under the Bills. Batavia was the lawful holder of the Bills, with title to sue. It retained possession of the Bills at all times, and did not endorse or release them to any third party, or authorise anyone else to take delivery of all or any part of the Cargo: Paras 1, 14, 21-22, 73 [4/14, 20, 25, 51].

19. Batavia was in substance acting as a credit provider for a company called Amrose, which supplied New Zealand timber to customers in India. Batavia bought the Cargo from the

New Zealand shipper, paying the purchase price by letter of credit. Batavia then retained the Bills as security for payment by Amrose of a refund of the purchase price, plus interest, plus a commission as reward for providing the credit: Paras 18-21 [4/23-25].

20. The cargo was discharged at Kandla between 16th and 23rd September 2019, without production of the original Bills, and it was delivered to various third parties, still without production of the Bills, by 27th September 2019. Delivery was arranged by port agents called Arnav, who acted on instructions from Amrose. Arnav procured delivery to the third parties by presenting delivery orders, which were supported by unsigned, false, and specious bills of lading, to the port's Traffic Manager: Paras 1, 22, 62-64, 73 [4/14, 25, 45-46, 51].

21. Batavia issued a writ *in rem* in Singapore on 18th August 2020. A sister-ship, *'Navios Koyo'*, was arrested under that writ on 18th September 2020. Batavia swore an affidavit in support of the arrest, stating that it sought the Singapore Court's aid to secure and enforce its claim in respect of the loss of the Cargo, and that the claim was within the Singapore Court's admiralty jurisdiction. This was for compliance with Singapore law, which did not permit an arrest without the assertion of a substantive claim: Paras 56, 71, 74(i)-(ii) [4/41, 50, 52].

22. Batavia did not realise that the contract of carriage was subject to London arbitration when it issued the Singapore writ and effected the arrest. It had not yet approached Pedregal for a copy of the charterparty which was referred to in the Bills, for fear that such a request might cause Pedregal to take steps to evade arrest. Batavia's purpose and concern at the time was to obtain security for its claim. It was not focused on questions of the forum in which that claim might ultimately be resolved: Paras 58-59, 70-72, 80 [4/42-43, 49-50, 55].

23. Security was provided on 25th September 2020. *'Navios Koyo'* was released the same day. Batavia did not subsequently take any steps to discontinue the Singapore action, because it had become concerned by then that its claim might be subject to a time-bar. Pedregal applied for a stay in favour of arbitration, which the Singapore Court granted on 20th December 2020. The stay was subsequently upheld on appeal: Paras 71, 74(iii)-(vii) [4/50, 52].

24. The arbitration before Mr Kinnell was commenced when Batavia served a notice of arbitration on Pedregal on about 22nd-24th December 2020: Paras 2, 73 [4/15, 51].

The Arbitration & Mr Kinnell's Decisions

25. Pedregal did not dispute liability in principle: Para 14 [4/20]. But it contended that Batavia's claim was time barred on the facts by Art.III r.6: Para 75 [4/52]. This was on the premise that the Singapore action, which had been brought within the year, did not qualify as suit, so that suit was only brought when Batavia commenced the arbitration, outside the year.

26. Batavia made 5 points in response:
    (1) Art.III r.6 did not apply to misdelivery at all: Paras 24, 25ff [4/26-27];
    (2) Art.III r.6 did not apply to misdelivery occurring after discharge: Paras 24, 34ff [4/26, 31];
    (3) If Art.III r.6 would otherwise have applied to misdelivery, it had been disapplied on the facts by Clause 2(c) of the Congenbill form: Paras 24, 41ff [4/26, 35];
    (4) In any event, the Singapore action qualified as suit, and so Batavia had brought suit which had stopped the Art.III r.6 timebar running before the year expired;
    (5) Art.III r.6 did not apply to the Cargo carried on deck, by virtue of Art.I(c).

27. As at the date of the Award, the combined 1st instance decisions in *The 'Alhani'* [2018] 2 Lloyd's Rep 563 and *The 'Giant Ace'* [2023] 1 Lloyd's Rep 381 decided Points 1-3 against Batavia. Mr Kinnell followed and applied those authorities: Paras 33, 39, 54 [4/30, 34, 41].

28. In response to Point 4, Pedregal submitted that the Singapore action:
    (1) Did not qualify as suit when it was brought, because it was brought in breach of the charterparty arbitration clause which had been incorporated into the Bills; or
    (2) Ceased to qualify as suit when it was stayed on 20th December 2020, and did not stop time running in relation to the arbitration commenced 2-4 days later: Para 77 [4/53].

29. Based on his findings about Batavia's knowledge and intentions, Mr Kinnell held that the Singapore action was not brought in breach of the arbitration clause: Paras 79-80 [4/54-55] (and he accordingly dismissed Pedregal's counterclaim to recover hire lost during the arrest as damages: Para 101 [4/66].) There was no appeal against these aspects of the Award. The *"validly brought"* formulation of Question 4 reflects the finding that there was no breach.

30. However, Mr Kinnell's *"marginally preferred"* view was that even a valid action for security did not qualify as suit: Paras 80-81. And he considered that, even if it did, he was bound by *Thyssen v Calypso* [2000] 2 Lloyd's Rep 243 (David Steel J) to conclude that the Singapore action ceased to be suit when it was stayed, and that this meant that it did not stop time running in relation to the later arbitration: Paras 82-84 [4/56-57].

31. In relation to Point 5, Mr Kinnell accepted that Art.III r.6 did not apply to that part of the Cargo carried on deck, rejecting Pedregal's case that the Bills did not contain sufficient information to engage Article I(c): Para 97 [4/63]. He therefore concluded overall that Batavia's claim succeeded as to US$1,159,972.40, but was otherwise time-barred: Appendix.

Permission To Appeal

32. Bright J granted leave under S.69 for Batavia to appeal on questions of law corresponding to Points 1-4, and for Pedregal to appeal on a question of law corresponding to Point 5.

The Appeals & Knowles J's Decision

33. The appeals were adjourned pending the Supreme Court's decision in *The 'Giant Ace'* [2025] 1 Lloyd's Rep 637. That decision determined Questions 1-3, and Knowles J applied it accordingly: Judgment @ 10 [1/3]. There is no appeal on that aspect of his Judgment.

34. On Question 4, Knowles J accepted that the ordinary meaning of suit can include a validly brought action for security: Judgment @ 17 [1/5]. But he thought that a more restrictive construction was appropriate in the context of the HVR. In his view, the object and purpose of achieving finality and enabling carriers to close their books suggested that suit in Art.III r.6 should be confined to an action on the merits: Judgment @ 15-20 [1/4-5].

35. Having concluded that the Singapore action did not qualify as suit when brought, Knowles J did not rule on Mr Kinnell's alternative ground based on the stay: Para 21 [1/5].

36. On Question 5, Knowles J held that Mr Kinnell had not been wrong in law to conclude that the requirements of Art.I(c) were satisfied on the facts: Para 42 [1/9].

37. Knowles J therefore dismissed both appeals. He granted leave to appeal to the Court of Appeal to Batavia on Question 4, and to Pedregal on Question 5.

Batavia's Submissions On Question 4

The Approach To The Construction Of The HVR

38. The scope of suit is a question of the correct construction of Art.III r.6.

39. As an international convention, the HVR should be interpreted by reference to broad and general principles of interpretation, rather than any narrower domestic law principles. The relevant general principles include Art.31.1 of the Vienna Convention On The Law Of Treaties 1969, which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose: *The 'Giant Ace'* [2025] 1 Lloyd's Rep 637 @ 34, citing earlier authority, including *The 'CMA CGM Libra'* [2021] 2 Lloyd's Rep 613.

40. The HVR as a whole should therefore be given a purposive rather than a narrow literalistic construction: *The 'Hollandia'* [1983] 1 AC 565 @ 572.

41. Consistent with that approach to the construction of the HVR as a whole, Art.III r.6 in particular should be given a purposive construction which reflects and promotes its object: *The 'Amazona'* [1989] 2 Lloyd's Rep 130 @ 136; *The 'Giant Ace'* @ 63ff.

42. Art.III r.6's main object is finality. The timebar protects carriers against stale claims, enables them to close their books if the year passes without suit brought, and ensures that the need for factual investigation into prospective claims is identified reasonably close in time to the relevant events: *The 'Aries'* [1977] 1 WLR 185 @ 188; *The 'Giant Ace'* @ 63.

Text: The Ordinary Meaning Of suit

43. Beginning with Art.III r.6's text, Batavia submits that Knowles J was clearly correct that a validly brought action for security is within the ordinary meaning of suit.

44. In early medieval times, suit described a tenant's obligation to attend the lord's court as a *"primordial incident of tenure"*: *Baker, 'An Introduction To English Legal History'* 5th edn @ 258. The suitors' function was to advise and participate in the court's deliberations: suit did not denote the pursuit of any action, whether on the merits or otherwise.

45. In the more modern sense of bringing suit, suit simply means suing: instituting and/or pursuing legal process before a court or tribunal. Art.III r.6 certainly requires something more formal than, eg, a letter before action. But, as a matter ordinary language, it is not prescriptive or restrictive about the nature of the legal process which qualifies.

Context: Art. III r.6*bis* & Art.IV*bis*

46. Batavia submits that this textual point is reinforced by the contextual one that other parts of the HVR refer to legal process in terms which do denote proceedings on the merits.

47. 1st, Art.III r.6*bis* extends the timebar for *"an action for an indemnity against a third person"*. This is clearly directed to substantive proceedings for recovery of money. It is notable that the noun used is *"action"*, not the suit of the more neutral Art.III r.6.

48. 2nd, action is also the noun used in Art.IV*bis*, which gives the carrier and its servants or agents the benefit of the HVR defences and limits of liability *"in any action... in respect of loss or damage to goods covered by a contract of carriage"*. Again, this is clearly directed to substantive proceedings on the merits.

49. Batavia submits that 2 relevant points arise out of this difference in language between Art.III r.6 on the one hand and Art.III r.6*bis* and Art.IV*bis* on the other.

50. 1st, on the face of it, the difference is deliberate. That in turn implies that the difference is intended to be significant. The natural inference is that the difference signifies that the suit which stops time running under Art.III r.6 is not confined to the type of action on the merits which attracts an extension under Art.III r.6*bis* and which engages Art.IV*bis*.

51. (Since Art.III r.6*bis* derogates from the basic timebar, it is not surprising that, aside from the fact that it is limited to a particular type of claim, only a particular type of legal process stops time running. The 2 qualifications restrict the ambit of the exception to the one year rule. But it would be a *non sequitur* to suggest that the express restriction to an action on the merits in Art.III r.6*bis* indicates that the same restriction is implicit in Art.III r.6.)

52. 2nd, the obvious point that, if suit in Art.III r.6 was intended to be confined to an action on the merits, that could easily have been made explicit by the use of language akin to Art.IV*bis*. The absence of appropriate language naturally implies absence of intent.

53. In fact, there was a suggestion, not ultimately pursued, at one point during the drafting of the original Hague Rules in the early 1920's to alter the text to:
"...in no event shall either ship or carrier be or become liable in respect of loss or damage, apparent or non-apparent, unless suit be instituted to recover therefor within one year". (Berlingieri, 'Travaux Preparatoires Of The Hague Rules & Hague-Visby Rules @ 302)

54. *"Recover therefor"* is indicative of a substantive claim for compensation, and illustrative of the type of language which the Comite Maritime International could, and, Batavia submits, would have used if suit was intended to be confined to an action on the merits.

55. (Judicial enthusiasm for the *travaux* appears to have ebbed and flowed: *Aikens et al, 'Bills Of Lading'*, 3rd edn @ 11.16-11.17. The tide currently favours Lord Wilberforce's *"bullseye"* test: *The 'CMA CGM Libra'* [2021] 2 Lloyd's Rep 613 @ 37-38. Batavia does not suggest that there is a bullseye answer to Question 4 in the *travaux*. But the extract above does provide a real-life illustration of the point that any intention to confine suit to an action on the merits could easily have been reflected in the drafting.)

Object & Purpose: Putting The Carrier On Notice

56. Batavia submits that it is not surprising that the drafting does not confine the ambit of suit, given Art.III r.6's object and purpose. An ordinary-meaning construction which includes an action for security is in fact wholly consistent with the main object of finality.

57. Since Art.III r.6 is intended to give the carrier certainty to close its books if there is no

suit within the year, suit must signify something which puts the carrier on notice that it is not safe to close its books. An action for security for a claim on the merits does that. A carrier which is confronted, within the year, by an action to obtain security for an underlying cargo claims knows that it cannot safely close its books until that claim has been resolved one way or the other. If it closes its books regardless, it does so at its peril.

58. In principle, a clear letter before action would achieve the same effect. Art.III r.6 plainly requires the bill of lading holder to make a more definite commitment by instituting legal process. That may be understandable: it might be difficult to define what letter should be sufficient to stop time running, particularly in the context of an international convention drafted for adoption by countries with diverse legal traditions and practices. The initiation of legal process represents an inherently more definite criterion for the stopping of time. But that does not imply that only an action on the merits qualifies. Any action which puts the carrier on notice not to close the books harmonises with Art.III r.6's object.

59. Indeed, even an action brought in breach of a jurisdiction or arbitration clause achieves that object: *The 'Sibi'* [1988] 2 Lloyd's Rep 229 @ 238, where P sued in England, which would apply the HVR, because Pakistan, the contractual forum, applied the HR, with lower package limitation. The CoA granted a stay on condition that D waive both the HR package limitation and Art.III r.6. It dismissed D's argument that it should not have to waive timebar because P should have brought a parallel action in Pakistan within the year as *"a pointless technicality"*, since the English action had already put D on notice.

60. It is true that English law has decided, for reasons of principle and policy, that an action which should never have been brought in the first place because it was brought in breach of a jurisdiction or arbitration clause does not deprive the carrier of the benefit of the timebar: *The 'Havhelt'* [1993] 1 Lloyd's Rep 523. But those considerations are not applicable here, where the Singapore action was not brought in breach of contract.

61. Knowles J considered that confining suit to an action on the merits does promote finality, on the basis that, if an action for security stops time running, delay in bringing a subsequent action on the merits will mean that the carrier cannot close its books at the year end. Knowles J suggested that this would frustrate Art.III r.6's object and purpose.

62. With respect, this expands the object and purpose beyond its true scope. It implies that Art.III r.6 is meant to enable carriers to close their books after a year, or at least fairly quickly, in all cases, ie whether or not any suit is brought. But that is not correct.

63. *Per* Hobhouse J in *The 'Nordglimt'* [1987] 2 Lloyd's Rep 470 @ 476, the question under Art.III r.6 is whether a claimant has *"done something within the year sufficient to prevent the liability of the carrier from being discharged at the end of that year"*. It is only when it has not done so that time runs to expiry and the carrier knows that it is discharged.

64. This means that it is only inaction by the bill of lading holder which gives the carrier certainty to close its books with confidence that it will be protected from stale claims. If a holder does do *"something sufficient"* within the year, the carrier will necessarily have to keep its books open for the time being: and nothing in Art.III r.6 purports to control or affect how long *"for the time being"* may turn out to be.

65. In short, if a holder does do something sufficient within the year, Art.III r.6 does not purport to offer the carrier any confidence that it will be able to close its books one way or the other at the end of the year, or within any specified period after the end of the year.

66. By way of example, the evidence in *The 'Sibi'* [1998] 2 Lloyd's Rep 229 @ 235 was that a judgment might take 6-7 years in the contractual forum. But, short of settlement, the carrier would simply have to keep the claim on its books for as long as it took. Nothing in Art.III r.6 would have mitigated the position. Art.III r.6 is simply not concerned with delay arising after a claimant has done something sufficient to stop time running. The carrier must look elsewhere for a remedy: eg, applying for release of the security, if the claimant delays bringing an action on the merits; or applying to strike out, or for case management sanctions, if the claimant delays the prosecution of an action on the merits.

67. In this sense, Art.III r.6 puts the risk of delay on the holder of the bill until it does something sufficient to stop time running, but then shifts it to the carrier. Batavia submits that, given this structure, it is misguided to define what qualifies as something sufficient to stop time with an aim of trying to minimise the delay which the carrier may face once time has stopped. What is sufficient should rather be defined by reference to the ordinary meaning of the word which Art.III r.6 employs to describe what qualifies, viz, suit.

68. Batavia submits that Knowles J was therefore mistaken to think that Art.III r.6's object and policy demanded a departure from what he (correctly) recognised as the ordinary meaning of the text. Art.III r.6's object is that the carrier is entitled to know by the end of the year if it should keep its books open: nothing more. An action for security, which is within the ordinary meaning of suit, achieves that. Art.III r.6 does not entitle the carrier to know when it will be able to close its books after it is on notice to keep them open.

Practical Considerations

69. Batavia submits that the conclusion that an action for security qualifies as suit is supported by 2 practical considerations. They are to some extent inter-connected.

70. The 1st is illustrated by this case. If the bill of lading is a charterparty bill incorporating charterparty terms by reference, the holder of the bill may not have a copy of the charter. (The fact that the bill is a charterparty bill does not oblige a seller to tender the charter as well as the bill: *Bridge et al, 'Benjamin's Sale Of Goods'*, 12th edn @ 19.71-19.72.) If not, the holder will not know whether there is a contractual forum for claims, as Batavia did not know here. That is a potential impediment to bringing an action on the merits within the year. It is not a sufficient answer that the holder can ask the carrier for the charter, because that may cause the carrier to take steps to avoid arrest, as Batavia feared here.

71. The 2nd is that it may be futile in practice for the holder of the bill to pursue an action on the merits without security (making Batavia's concern that Pedregal might seek to evade arrest entirely rational). But if an action for security does not qualify as suit, a holder may be compelled to bring an action on the merits within the year in circumstances where the cost and effort will be thrown away if security cannot be obtained.

72. Knowles J considered that Art.III r.6 should be understood in a commercial way: Judgment @ 20 [1/5]. Batavia submits that his sentiment was correct but that, with respect, commercial factors support a different conclusion to the one which he reached.

English Authorities

The 'Leni' & Thyssen v Calypso

73. Batavia anticipates that it will be common that there is no authority binding on this Court

which decides whether or not an action for security qualifies as suit.

74. Pedregal sought to convince Knowles J that *The 'Leni'* [1992] 2 Lloyd's Rep 48 (HHJ Diamond QC) and *Thyssen v Calypso* [2000] 2 Lloyd's Rep 243 (David Steel J) decided at 1st instance that an action for security does not qualify. Since Knowles J did not refer to either case, the inference is that he was not persuaded about that. Batavia submits that he was right not to be. (The usual textbooks consider suit, but Batavia has not identified any suggestion that either *The 'Leni'* or *Thyssen* is authority on the status of an action for security, or, indeed any discussion of whether an action for security qualifies as suit.)

The 'Leni'

75. An action on the merits was brought within the year. The writ named entities which were not party to the contract of carriage as claimants, and omitted the company which was party. An application to amend was made outside the year. The issue was whether the Art.III r.6 timebar had already accrued, or whether the action had qualified as suit when it was brought, notwithstanding that it was brought by a party without title to sue.

76. The late Judge Diamond QC was a recognised authority on the HVR: *Foxton et al, 'Scrutton On Charterparties'*, 25th edn @ 14.01, fn 1; *Rose, 'Carver On Bills Of Lading'*, 5th edn @ 9.62, fn 266; *Aikens et al, 'Bills Of Lading'*, 3rd edn @ 11.8, fn 6; *Young et al, 'Voyage Charters'*, 5th edn @ 66.381, fn. 788. This makes it the more telling that his preferred answer was that the action did qualify: [1992] 2 Lloyd's Rep 48 @ 52-54.

77. Absent authority, Judge Diamond would have adopted a purposive construction and have held that, since the action put the carrier on notice of the need to investigate and deal with a claim, it achieved Art.III r.6's object. He thought that it would be *"contrary to the purpose of the Convention and to the wholly untechnical wording of Art.III r.6"* that the carrier should be discharged by a mistake which did not affect its ability to investigate and verify the claim. He would have accepted the submission (p.51) that to confine suit an action brought by a party with title to sue would put an unjustified gloss on the text.

78. But Judge Diamond held that the issue was not free from authority. In particular, he concluded (p.57) that Hobhouse J's reasoning in *The 'Nordglimt'* [1987] 2 Lloyd's Rep 470, generally approved by the CoA in *The 'Amazona'* [1989] 2 Lloyd's Rep 130, dictated

that an action is only suit if it is brought by the person properly entitled to bring it.

79. If that is right, it may imply that an action for security brought by a party which does not have title to sue on the underlying claim does not qualify as suit either. But that is not in point here, because Batavia did have title to sue. And whether or not an action for security brought by the correct party qualifies as suit did not arise in *The 'Leni'*, because the relevant action in that case was an action on the merits, albeit a defective one.

80. Pedregal suggested below that Judge Diamond had nevertheless determined that an action for security does not qualify as suit by the terms in which he formulated the test which, free from authority, he would have preferred to adopt: *"It seems to me that all that is necessary is that a* suit *must have been brought to enforce the claim within the one year period. For the* suit *to qualify as one brought to enforce the claim it must, I think be one to enforce a claim in respect of loss or damage arising under 'a contract of carriage' as defined in Art.I(b) of the Convention"* (p.53).

81. Pedregal suggested that Judge Diamond's reference to *"enforcing"* a *"claim in respect of loss or damage"* denoted (only) an action on the merits. But it is commonplace, and entirely natural, for the terms in which a Court expresses its conclusions to be closely directed to, and therefore to reflect, the specific nature of the issue in question. The issue for Judge Diamond was what requirements an action on the merits must satisfy to qualify as suit, or, conversely, what defect(s) disqualify it from being suit.

82. It is unexceptional, perhaps inevitable, that Judge Diamond phrased his conclusions by reference to the type of action with which he was concerned. It is unrealistic to suggest that his formulation implies a conscious decision to resolve a point which did not arise, is not mentioned in the judgment, and is inherently unlikely to have been in his mind.

83. The *ratio* of a case, however broadly the judgment is expressed, is to be ascertained by reference to the facts and issues in question, and should not be taken to extend to matters which did not arise and were not mentioned: *Frozen Value v Heron* [2013] QB 47 @ 54, 117, citing Lord Halsbury's comments in *Quinn v Leatham* [1901] AC 495 @ 506. On that basis, *The 'Leni'* is no authority on whether an action on the merits qualifies as suit.

Thyssen v Calypso

84. The holder of the bill of lading brought proceedings *in rem* in Texas within the year. Security was provided, the vessel was released, and the action was transferred to New York. The carrier filed *"affirmative defences"* and procedural applications were made.

85. The carrier then obtained a stay on grounds that the bill incorporated a London arbitration clause. The holder commenced arbitration outside the year, and applied for a declaration that its claim was not time barred under Art.III r.6. David Steel J held that the US action did not qualify as suit, and that therefore the claim was time barred.

86. Below, Pedregal stressed David Steel J's rejection of a *"breathtaking"* submission that suit was brought if a claimant *"instituted proceedings in rem in any jurisdiction in the world"* within a year. Pedregal seemed to suggest that this included a rejection of the possibility of an action for security qualifying as suit. But David Steel J's comments were not focussed on the nature of the action, and his emphasis in the quoted text was not on *"in rem"*, but rather on *"instituted"*: see his protest that the submission involved the *"absurd"* result that *"the mere institution"* of proceedings would stop time running under Art.III r.6 *"regardless of whether service of those proceedings could in fact be effected"*.

87. The time at which suit counts as *"brought"* for Art.III r.6 is a question in itself. Actions begin on issue in England & Wales. But applying that to Art.III r.6 would conflict with the object and purpose that the carrier is entitled to know by the end of the year if it should keep its books open. *'Carver On Bills Of Lading'* @ 9.194 therefore suggests that service should be required. David Steel J's comments reflect the same sentiment. But that point does not arise here, where the Singapore writ was issued and served within the year. Conversely, whether an action for security qualifies as suit was not a point in *Thyssen.*

88. David Steel J ultimately held in *Thyssen* that the US action was disqualified from being suit by the stay: Para 22. Mr Kinnell relied on that aspect of *Thyssen* for his alternative ground of decision, on which Knowles J did not rule, but which is addressed below.

Other English Authorities

89. Although no English case decides whether an action for security qualifies as suit, Batavia submits that several epitomize a flexible approach to Art.III r.6 which is faithful to a

purposive construction and supports a positive answer to the question. By way of preface, Batavia submits that there are 3 reasons, aside from the general point about purposive construction being the correct approach, why a flexible approach is appropriate.

90. 1st, Art.III r.6 is a draconian timebar. Unlike the Limitation Act, it extinguishes the right, and does not merely bar the remedy: *The 'Aries'* [1977] 1 WLR 185 @ 188. (Hobhouse J particularly emphasised this factor in *The 'Nordglimt'* [1987] 2 Lloyd's Rep 470.)

91. 2nd, the timebar is short. True, the point has been made that contractual timebars were sometimes even shorter before the HR, and a year was seen as a win for cargo interests in 1924: *The 'Alhani'* [2018] 2 Lloyd's Rep 563 (Dr Foxton QC). But the fact remains that Art. III r.6 is far more stringent than the standard 6 years of the Limitation Act.

92. 3rd, Art.III r.6 creates an *"imbalance",* because there is no corresponding timebar for claims against the carrier (*'Carver On Bills Of Lading'* @ 9.186), and *"it is not clear why the carrier is especially deserving"* of such protection (*'Bills Of Lading'* @ 11.192).

93. Batavia submits that these factors justify (and the more so when they are taken together) the Court taking a relatively robust approach to objections that an action should not be recognised as suit, and that the following authorities are consistent with that.

The 'Aiolos' [1983] 2 Lloyd's Rep 25 (CoA)

94. Insurers indemnified bill of lading holders, took an assignment from them, and brought an action within the year. The writ asserted a claim in insurers' own right, not as assignees, but as subrogees. That was unsustainable in English law. Insurers applied outside the year to amend to base their title to sue on the assignment. The carrier opposed the amendment on the grounds that it sought to raise a new cause of action after the timebar had accrued.

95. In allowing the application, the CoA commented that *"there could not be any doubt at all about what the claim was that was being asserted"* (p.33). The fact that the writ misdescribed insurers' title to bring that claim was not a bar to the amendment.

96. Batavia submits that the CoA's comment supports an analysis that, given Art.III r.6's object and purpose, what is required to qualify is an action which puts the carrier on notice

that it is not safe to close its books. The decision reflects a philosophy that an action which sufficiently puts the carrier on notice qualifies, even if it is procedurally defective. That was also Judge Diamond's preferred approach in *The 'Leni'*, albeit that he felt constrained by authority to hold that a defect as to party is fatal. But the Singapore action was not defective as to party or in any other way, and it did put Pedregal on notice (see above).

97. Batavia therefore submits that *The 'Aiolos'* reflects a judicial approach which supports recognising an action for security as suit. So do the 2 cases following next below.

The 'Kapetan Markos' [1986] 1 Lloyd's Rep 211 (CoA)

98. An action was brought within the year on the basis that the claimant had title to sue as holder of the bill of lading. In fact, for technical reasons under Bills Of Lading Act 1855, it had not acquired any rights under the bill. It applied outside the year to amend to plead a *Brandt v Liverpool* contract and title to sue in bailment. As in *The 'Aiolos'*, the carrier objected that this would raise new causes of action after the timebar had accrued.

99. The CoA held that the timebar had not accrued: *"From first to last the plaintiffs have set up carriage by sea under a bill of lading incorporating the Hague Rules, breach of such rules, and resulting damage. To hold* suit *was not brought within a year in respect of such breaches of such rules would in our judgment be an abuse of language"* (p.233). Again, the material point being made is that the carrier had been put squarely on notice.

The 'Pionier' [1995] 1 Lloyd's Rep 223 (N Phillips J)

100. The claimant sued within the year by reference to the bill of lading, then amended outside the year to rely on a voyage charter instead. That was a mistake, because the carrier was not party to the charter. The claimant sought to re-amend to reinstate its original claim. The carrier argued that that claim had been abandoned by the original amendment, and that it was now time barred under Art.III r.6 and could not be reinstated.

101. Phillips J noted (p.227) that the claimant had *"throughout alleged breach of duty as bailees, negligence, and breach of contract"*. Explicitly recognising that *"the object of the Hague Rules time limit is to protect shipowners from stale claims"*, he held that confusion about the exact basis and precise terms of the contract and the bailment *"cannot have the effect of rendering the* suit *one which fails to satisfy the requirements of Art.III r.6"*. Again,

the object and purpose of putting the carrier on notice had clearly been satisfied.

The 'Nordglimt' [1987] 2 Lloyd's Rep 470 (Hobhouse J)

102. The bill of lading holder brought an action in Belgium within the year, and then an *in rem* action in England to obtain security outside the year. The carrier applied to set the *in rem* action aside on the grounds that it was time barred under Art.III r.6. The holder relied on the prior Belgian action as suit which had stopped time running.

103. Roskill J had decided 22 years earlier that a prior action did not qualify as suit: *The 'Salaverry'* [1965] 1 QB 101. Reasoning by analogy with how the Limitation Act operates, he held that timebar was always a question of whether the very action in which the defence was raised had been brought in time: that action was the only relevant suit.

104. If Roskill J's view had prevailed, it might have followed almost by definition that only an action on the merits qualified as suit. But the CoA had indicated *obiter* in *The 'Kapetan Markos'* [1986] 1 Lloyd's Rep 121 that an action brought in Forum A within the year, but stayed in favour of Forum B on *conveniens* grounds outside the year, would prevent a later action in B from being time barred. In *The 'Nordglimt'*, Hobhouse J stated as *ratio* that a prior action in another jurisdiction could qualify as suit: the requirement for suit was satisfied if a competent claimant brought proceedings in a competent court (p.476).

105. Hobhouse J's approach was generally approved by the CoA in *The 'Amazona'* [1989] 2 Lloyd's Rep 130 @ 135, and is accepted by the textbooks: *'Scrutton'* @ 14.61; *'Carver On Bills Of Lading'* @ 9.194; *'Bills Of Lading'* @ 11.195; *'Voyage Charters'* @ 66.186.

106. *The 'Nordglimt'* illustrates, consistent with the approach to the construction of treaties (see above) that the application of Art.III r.6 is not dependent on domestic English approaches to timebar. It also establishes that suit is not confined to the very action on the merits in which the underlying claim will be decided. And Batavia submits that that supports the proposition that suit need not be confined to an action on the merits at all.

Foreign Authorities

107. For completeness, in *RM v EMS* [2003] SLT 133, the ship was arrested *ad fundandam jurisdiction* within a year. It was released on provision of security, and the summons was

served outside the year. Lord Dawson held that suit was only brought on service, so that the claim was time barred. But his focus seems to have been more on *"brought"* than on *"suit"*. Further, he reasoned by reference to what steps are necessary to stop time running under the Scottish Limitation Acts. That mirrors Roskill J's approach in *The 'Salaverry'*, which is no longer applicable in England & Wales following *The 'Nordglimt'* (see above).

108. A South African Court reached the opposite conclusion to *RM v EMS* in *Dave Zick v Progress* 1974 (4) SA 381 (D), where the ship was attached *"to found and confirm jurisdiction"* within the year, and a summons was issued outside it. There too, however, the analysis appears to have proceeded by reference to domestic law.

109. (Consistent with the HVR's status as an international treaty, foreign cases may be taken into account on issues of construction. But they are most likely to carry weight if they indicate a consensus, and are less potent if they diverge: *The 'CMA CGM Libra'* [2021] 2 Lloyd's Rep 613 @ 42; *'Carver On Bills Of Lading'* @ 9.98; *'Voyage Charters'* @ 66.9.)

Conclusions On suit

110. In *The 'Golden Endurance'* [2017] 1 All ER (Comm) 438, the holders of 3 bills of lading brought actions in Morocco. As a matter of English law, the bills were subject to the HR. But in Morocco, the Courts applied the Hamburg Rules, which, so the carrier asserted, were more favourable to cargo claimants than the HR were.

111. The carrier sued in England for a negative declaration on grounds that liability had been extinguished by expiry of time under Art.III r.6. It contended that the Morocco action did not stop time running, because suit was implicitly confined to an action to establish a liability under HR/HVR themselves, and excluded a Hamburg Rules claim.

112. S Phillips J held that this submission was an unjustified *"overreach"*, which exceeded the true object and purpose of the timebar, as explained by the authorities: Para 62.

113. Batavia respectfully submits that the same conclusion applies to Knowles J's decision here To confine suit to an action on the merits is to impose on the ordinary meaning of the express text an implied gloss which is not justified by any purposive construction, and which exceeds Art.III r.6's object. In fact, for the reasons above, the conclusion that an

action for security qualifies as suit gives effect to the timebar's true object and purpose.

The Stay

Introduction

114. This leaves Mr Kinnell's alternative ground of decision, based on the stay. Although Knowles J did not rule on this aspect, Batavia anticipates that Pedregal will raise it by way of Respondents' Notice, and Batavia will therefore addresses it briefly.

115. Mr Kinnell based this part of his decision on *Thyssen v Calypso* [2000] 2 Lloyd's Rep 243, which has already been mentioned. In *Thyssen*, David Steel J was in turn guided by Rix J's analysis in *The 'Finnrose'* [1994] 1 Lloyd's Rep 559.

The 'Finnrose'

116. The holder of the bill in *The 'Finnrose'* brought an action in England within time, but then failed to prosecute it. The carrier applied to strike it out. The holder resisted the application on the basis that Art.III r.6 became spent for all time when the action was brought: since the 6 year Limitation Act timebar was still running, the holder would be entitled to commence a new action, and striking out would therefore be fruitless.

117. Rix J rejected the premise that bringing a qualifying suit made Art.III r.6 redundant for all time. Building on the established law that an action which is initially incompetent (eg, because brought in breach of a jurisdiction or arbitration clause, or by or against the wrong party) does not qualify as suit, he introduced a theory of supervening incompetence, by which an action which is validly brought within time, but is so misconducted that it is struck out, cannot be relied on as suit (p.574). In *Thyssen*, David Steel J expressed the *'Finnrose'* principle as being that the suit which is relied on as stopping time under Art.III r.6 must *"remain valid and effective at the time when the carrier seeks to rely on r.6"*.

Primary Submission: *The 'Finnrose'* Is Inapplicable

118. Even if this is correct, it does not apply here. The action in *The 'Finnrose'* ceased to exist when it was struck out, and so obviously ceased to be valid and effective: The US action in *Thyssen* was stayed because it was *"brought in breach of an arbitration clause"*: [2000] 2 Lloyd's Rep 248 (and see the facts at p.245, showing that the holder brought the US action intending to pursue it on the merits). The stay therefore reflected, and responded

to, initial incompetence: as Dr Foxton QC noted in *The 'Alhani'* [2018] 2 Lloyd's Rep @ 108 *Thyssen* could have been resolved without reference to the *'Finnrose'* principle.

119. This case is different. The Singapore action was not struck out, and did not cease to exist. It was not initially incompetent, and was not stayed because it was brought in breach of contract. It was stayed because it had served its purpose. It was brought to obtain security. Security was obtained (and retained). There was no need for the action to go further.

120. If Singaporean procedural rules had provided for an action for security to be automatically stayed on provision of security, it could hardly have been suggested that such a stay of an action which it had secured its goal rendered the action invalid and ineffective. The fact that the stay was made by order on Pedregal's application does not alter the position.

121. The action in *The 'Finnrose'* could never achieve its purpose once it had ceased to exist. The action in *Thyssen* was brought for an improper purpose in the first place, in breach of contract. Here, by contrast, the Singapore action was *"valid"* when brought, because it was not brought in breach of contract. It was also *"effective"* when brought, in the sense that it was competent. And it became effective in the further sense of proving effective to obtain security, which was its purpose. It remained effective after the stay, because the security was retained, and the action continued (and continues) to achieve its purpose.

122. Batavia submits that it is inaccurate and unrealistic to describe as *"invalid and ineffective"* an action which has (and continues to) achieved the purpose for which it was brought, and which has been stayed not for any incompetence (either initial or supervening), but simply because, its purpose being achieved, there is no need for it to proceed further.

Secondary Submission: *The 'Finnrose'* Is Incorrect

123. *The 'Finnrose'* is therefore simply inapplicable here. If necessary, however, Batavia will submit in the alternative that Rix J's supervening incompetence theory is not good law.

124. 1st, it is inconsistent with the HVR's text. As a matter of ordinary language, the only condition which has to be met to stop time running under Art.III r.6 is that suit is brought. There may be sound reason why an action which never should have been brought should not qualify as suit. But, if an action does qualify, then the condition is satisfied once and

for all when the action is brought, and time stops running. There is no additional, and continuing, condition that the prior suit must remain valid and effective after it is brought.

125. 2nd, it generates theoretical problems: *The 'Alhani'* @ 112. In particular, for how long must the prior suit remain valid and effective? Is its continuing validity and effectiveness to be judged by reference to the date when the 2nd action is commenced, or when Art.III r.6 is pleaded in the 2nd action, or when the timebar defence is decided in the 2nd action?

126. 3rd, it generates practical problems: *The 'Alhani'* @ 113. If an application to strike the prior suit out is pending when the timebar defence falls to be decided in the 2nd action, the Court or tribunal in the 2nd action must determine *"on the balance of probabilities on the evidence before it"* whether the suit is susceptible to strike out. That may not be an easy task, particularly if the suit is proceeding abroad under foreign law and procedure. And what if the Court or tribunal in the 2nd action mistakenly predicts that the suit will be struck out, but, in the event, it is not (or, indeed, *vice versa*)?

127. 4th, it makes Art.III r.6's application subject to vagaries of timing. An application to strike out the prior suit may succeed at 1st instance but fail on appeal, or *vice versa*. *The 'Finnrose'* makes the outcome of the timebar defence in the 2nd action dependent on the stage during the strikeout process at which the defence falls to be decided in the 2nd action (or, possibly, is pleaded, or the 2nd action is brought: see above). That is not very satisfactory. *The 'Finnrose'* also implies that the status of the prior suit may change over time, from valid and ineffective, to invalid and ineffective, and back again. A simple rule which focuses on when the prior suit is brought promotes certainty and avoids paradox.

128. 5th, Rix J's endorsement of supervening incompetence was influenced by a perception that part of Art.III r.6's object and purpose is to ensure the speedy resolution of claims after suit has been brought. But that is incorrect, for reasons addressed above. Art.III r.6's object is that the carrier is entitled to know by the end of the year if it should keep its books open: nothing more. Art.III r.6 does not entitle the carrier to know when it will be able to close its books after it is on notice to keep them open.

Conclusions

129. For these reasons, Batavia respectfully asks the Court to allow its appeal, and to hold that

no part of its claim in the arbitration was time barred. Mr Kinnell's Award should be varied accordingly, to hold that Batavia's claim succeeds in full.

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