

## BURDEN OF PROOF UNDER THE HAGUE RULES – CONFIRMATION FROM THE SUPREME COURT

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In a significant recent judgment, the UK Supreme Court has addressed the question of who bears the burden of proof in a claim against a shipowner for loss of, or damage to, cargo. The decision in *Volcafe v CSAV* confirms that where a contract of carriage of cargo incorporates the Hague Rules and a claim for damage to the cargo is brought against the shipowner, the latter must prove that: (1) he has complied with his duty under article III.2 of the Rules to exercise reasonable skill and care in caring for and carrying the cargo to the discharge port; or (2) the cargo was damaged by reason of one of the “excepted causes” listed in article IV.2 of the Rules and that the damage would have occurred despite the exercise of reasonable skill and care. This puts the burden firmly on the shipowner to prove all of the requisite requirements of a defence under articles III.2 and IV.2 of the Hague Rules.

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### BACKGROUND

In this case, a cargo of bagged coffee was carried in unventilated containers. Coffee absorbs, stores and emits moisture and so it has inherent characteristics which may cause it to perish by way of condensation. At the relevant time, the industry practice to protect against naturally occurring condensation was to line the containers with Kraft paper. The cargo was carried pursuant to a bill of lading incorporating the Hague Rules under which the owner was the carrier. Upon discharging the cargo, some of the cargo was found water damaged as a result of condensation.

The bill of lading holders/cargo owners pursued a claim for cargo damage against the shipowner. The breach they alleged was of the shipowner's duty under article III.2 of the Hague Rules to properly and carefully load, handle, stow, carry, keep, care for and discharge the cargo. The required standard, which they said was not adhered to (because of the failure to use Kraft paper), is one of reasonable skill and care.

But Article IV.2 of the Rules states the carrier will not be responsible for any loss or damage to cargo resulting from a list of specified causes, one of which is inherent defect, quality or vice in the cargo (article IV.2(m)). Inherent defect in this context refers to inherent characteristics which render the cargo unfit to withstand the ordinary incidents of a voyage despite the exercise of reasonable skill and care by the shipowner in carrying the cargo. The owners pleaded the inherent vice defence.

On reaching the Supreme Court, the issues related to whether the burden of proof in relation to the article III.2 breach and the article IV.2 defence rested on the shipowner or on the cargo owner. In particular, the issues were as follows:

#### 1. (Breach) whether article 2:

- requires the cargo owner to prove non-compliance (i.e. that the shipowner did not exercise reasonable skill and care in carrying the cargo); or
- requires the shipowner to prove compliance (i.e. that the shipowner did do so).

#### 2. (Defence/excepted perils) whether article 2:

- requires the cargo owner, if the shipowner first proves the facts triggering the exception, to show that it was only because of the carrier's negligence that the excepted peril applied (i.e. in this case it was); or
- requires the shipowner to prove that the damage resulted from one of the listed “excepted causes” despite the exercise of reasonable skill and care in carrying the cargo.

**"The same burden of proof principles should apply where the carrier's duties are governed by the Hague-Visby Rules."**

### THE RULE

The Supreme Court concluded that scenarios 1(ii) and 2(ii) apply – the burden of proof is on the shipowner in both instances. Where cargo is loaded in apparently good order and condition and is found to have been damaged on discharge, and the shipowner is faced with a cargo damage claim under the Hague Rules, he must show that: (1) he took reasonable care of the cargo but that the cargo damage occurred nevertheless; or (2) whatever reasonable steps he might have taken to protect the cargo from damage would have failed because of its inherent characteristics.

Generally, the Hague Rules are not considered an integral part of English law but English courts recognise them as a set of rules that the contractual parties may choose to incorporate into their contracts of carriage. By virtue of the Carriage of Goods by Sea Act 1971, English law incorporates the Hague-Visby Rules and these rules will apply to contracts of carriage governed by English law unless the contractual parties choose to incorporate other rules (e.g. the Hague Rules). Articles

III.2 and IV.2 of both sets of rules are materially the same and so the same burden of proof principles should apply where the carrier's duties are governed by the Hague-Visby Rules.

### PRACTICAL IMPLICATIONS

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Practically speaking, if a shipowner is faced with a cargo damage claim, this judgment reinforces the need for him to begin preparing all of the necessary components of his defence at the outset to ensure that all relevant points are covered. This will include collecting all evidence relating to loading and the care of the cargo during the voyage, in addition to evidence showing the scope of vessel's systems in place to care for cargo and that these systems were followed in respect of the relevant voyage and generally during the course of recent cargo operations and voyages. In this regard, it would help to obtain witness statements from the Master and Chief Officer in relation to cargo operations during the voyage at an early stage whilst their memories of the relevant events are still fresh.

In circumstances where the defence will necessarily involve technical issues relating to the vessel's care of the cargo and the characteristics of the cargo, it would also be helpful to instruct independent technical and cargo experts to help advise on causation and evidence gathering, including attending cargo surveys at the discharge port upon discovery of the cargo damage in order to quickly assess the full extent of the situation and generally protect the shipowner's interests vis-à-vis the cargo interests.

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