Shipping

December 2016

VOLCAFE LTD V COMPANIA SUD AMERICANA DE VAPORES SA (T/A CSAV)[1]

In what has been treated as something of a test case due to the relatively small amounts at stake (around US$62,500), the Court of Appeal has now helpfully confirmed what some considered to be the commonly held view that a carrier does not need to first disprove any negligence on his part in order to rely on its defences under Article IV Rule 2 of the Hague Rules – in this particular case, the inherent vice defence.

Facts

The dispute concerned nine consignments of bagged coffee beans carried by CSAV in lined, unventilated containers from Colombia to various locations in Germany between January and April 2012. Carriage was undertaken on LCL/FCL terms (less than container/full container load), by which CSAV's stevedores were responsible for preparing and stuffing the bags into the containers.

Minor claims totalling approximately US$62,500 (2.6% of the total value of the consignments) were brought against CSAV following condensation damage to some of the bags. Each bill of lading, which incorporated the Hague Rules, recorded the shipments as being in apparent good order and condition. The cargo claimants pleaded that the loss and damage was caused by the negligence of the carrier and/or their breach of Article III Rule 2 of the Hague Rules, which provides:

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

CSAV sought to rely on Article IV Rule 2(m) of the Hague Rules, which exempts liability for loss or damage arising from *"inherent defect, quality or vice of the goods"*, or alternatively pleading that the condensation damage was inevitable.

1 [2016] EWCA Civ 1103

First Instance Decision[2]

Regarding the burden of proof under Article IV Rule 2(m) of the Hague Rules, the High Court judge considered that the onus was on the carrier to establish inherent vice or inevitability of damage and to disprove negligence, in circumstances where goods loaded in apparent good order and condition are discharged damaged. This was due to the judge's conclusion that there was *"complete circularity"* between Article III Rule 2 and Article IV Rule 2(m).

CSAV were held to be liable for the damage as they were unable to demonstrate that they had cared for and carried the goods "properly" for the purposes of Article III Rule 2. The judge cited the decisions in *The Caspiana*[3] and *Albacora SRL v Westcott & Laurence Line Ltd*[4], which equated "properly" to being "in accordance with a sound system". As CSAV had failed to establish the container lining required either by expert calculations or empirical trial, the judge held that they could not evidence the adoption of a system that would be expected to prevent the damage occurring. The carrier's alternative defence that the damage was inevitable was rejected by the judge for similar reasons.

The Court of Appeal Judgment

In upholding CSAV's appeal, the Court of Appeal set aside the majority of the first instance decision and dealt with a number of issues of principle arising from the operation of the Hague Rules:

1. **Burden of Proof:** Mr Justice Flaux, giving the leading judgment, held that once a carrier has shown a prima facie case for the application of the inherent vice exception, the burden shifts to the claimant to establish negligence so as to negate the operation of the Article IV Rule 2(m) exception.

   This ruling reversed the previous position under the Hague Rules applied at first instance and established in 1927 by *Goose Millard v Canadian Government Merchant Marine*[5] and looks to reflect the weight of the (numerous) authorities considered, as well as the common law principle that *"he who alleges must prove"*.

   By contrast, the 'catch-all' exception at Article IV Rule 2(q) expressly places the burden of proof on the carrier to disprove negligence. A carrier is therefore not required to disprove negligence in order to rely upon the Article IV Rule 2(m) exception under English law.

   Equally, the burden of proof in establishing the existence of an inherent vice remains on the carrier, however this forms an independent enquiry as to the question of whether the carrier was negligent.

2. **Inherent Vice/Inevitability of Damage:** The judge at first instance was wrong as a matter of law to equate inherent vice, which concerns damage caused by the inherent qualities of a normal cargo, with inevitability of damage, though there is an inevitable degree of overlap.

   On the basis of the expert evidence given, in particular the general consensus that the damage was caused by condensation from the coffee beans themselves, the trial judge should have concluded that CSAV had made a sustainable defence of inherent vice under Article IV Rule 2(m).

   The correct line of enquiry following such a conclusion is whether this exception is subsequently negated by the carrier's negligent failure to implement a sound system.

   In addition, CSAV's alternative defence that the damage to the cargo was inevitable should have also been upheld, as it was common ground between experts that minor condensation damage would occur where coffee bean bags were carried in unventilated containers from warmer areas to colder climates, regardless of the system of lining used.

3. **Sound System:** The decision at first instance was misdirected in relation to the correct interpretation of whether a system is 'sound' for the purposes of determining a carrier's breach of their obligation to properly care for cargo. The Court of Appeal held that Article III Rule 2 does not require a carrier to employ a system which would prevent damage. Equally, the requirement for some scientific theoretical calculation or empirical study regarding the sufficiency of lining imposed a standard that went beyond what the law requires and ignored the general industry practice.

   In this case, the evidence and expert submissions available suggest that two layers of kraft paper were used to line the containers. This represented general practice in the container industry and therefore the

2 *Volcafe Ltd v Compania Sud Americana de Vapores SA (t/a CSAV)* [2015] EWHC 516 (Comm).

3 *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama (The Caspiana)* [1957] A.C. 149.

4 [1966] 2 Lloyd's Rep. 53.

5 [1927] 2 KB 432.

Claimants failed to prove CSAV's lining of container was not a sound system.

HFW's perspective

The Court of Appeal judgment provides welcome guidance and clarity for shipowners and cargo interests alike on the application of the inherent vice exemption in the context of the Hague Rules. The decision also unanimously dismisses the notion that the onus remains with the carrier to disprove negligence before relying on the Article IV Rule 2 defence. In shifting the burden on to cargo claimants however, evidentiary issues will inevitably arise at the preliminary stage of any dispute where the carrier is in possession of documentation which may be required to establish negligence.

For more information, please contact the author of this briefing:

Baptiste Weijburg
Senior Associate, London
T: +44 (0)20 7264 8248
E: baptiste.weijburg@hfw.com

HFW has over 450 lawyers working in offices across Australia, Asia, the Middle East, Europe and South America. For further information about shipping issues in other jurisdictions, please contact:

Craig Neame
Partner, London
T: +44 (0)20 7264 8338
E: craig.neame@hfw.com

Stanislas Lequette
Partner, Paris
T: +33 1 44 94 40 50
E: stanislas.lequette@hfw.com

Pierre Frühling
Partner, Brussels
T: +32 (0) 2643 3406
E: pierre.fruhling@hfw.com

Michael Buisset
Partner, Geneva
T: +41 (0)22 322 4801
E: michael.buisset@hfw.com

Dimitri Vassos
Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Yaman Al Hawamdeh
Partner, Dubai
T: +971 4 423 0531
E: yaman.alhawamdeh@hfw.com

Paul Apostolis
Partner, Singapore
T: +65 6411 5343
E: paul.apostolis@hfw.com

Christopher Chan
Partner, Hong Kong
T: +852 3983 7638
E: christopher.chan@hfw.com

Nick Poynder
Partner, Shanghai
T: +86 21 2080 1001
E: nicholas.poynder@hfw.com

Hazel Brewer
Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Gavin Vallely
Partner, Melbourne
T: +61 (0)3 8601 4523
E: gavin.vallely@hfw.com

Nic van der Reyden
Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

Jeremy Shebson
Partner, São Paulo
T: +55 (11) 3179 2903
E: jeremy.shebson@hfw.com

Lawyers for international commerce

hfw.com

São Paulo London Paris Brussels Geneva Piraeus Beirut Riyadh Kuwait Dubai Singapore
Hong Kong Shanghai Perth Melbourne Sydney