the charterers P&I club

E-Bulletin – November 2016

Re: The Court of Appeal finally settles the application of the burden of proof issue in cargo claims and provides useful guidance on the application of the inherent vice defence under the Hague Rules and what needs to be shown to establish "a sound system" for the care and carriage of goods[1].

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Background

Since 1927 and the non-binding comments of Mr. Justice Wright in *Gosse Millard v. Canadian Government Merchant Marine [1927] 2 KB 432* there has been considerable controversy and criticism as to how the burden of proof should be applied in cargo claims and particularly whether a carrier must first disprove negligence before it can rely on the defences under Article IV Rule 2 of the Hague Rules[2]. In the first significant judgment of Lord Justice Flaux since he went up to the Court of Appeal this debate has now been resolved in a unanimous decision which also provides helpful guidance on establishing whether a system adopted for the care and carriage of goods is sound as established in the leading case of *G.H.Renton v. Palmyra Trading Corporation [1957] A.C 149*, as well as considering how Article III Rule 2[3] of the Hague Rules operates together with Article IV Rule 2 (m).

The decision provides very important clarification to the law which will protect Charterers who are deemed to be carriers under the prevailing contracts of carriage.

The facts

Compania Sud Americana de Vapores SA ("CSAV") were carriers of nine consignments of washed Columbian green coffee beans carried in twenty unventilated TEU's each containing 275 70kg hessian bags of coffee beans from Buenaventura in Columbia to various consignees in North Germany.

The relevant Bills of Lading were on LCL/FCL basis whereby stevedore operations including stuffing of the containers and lining with craft paper were to be carried out by the stevedores appointed by CSAV.

Upon arrival the beans were found to be condensation damaged. It was not in dispute between the parties that the cargo was hygroscopic in nature such that it would be susceptible to condensation effects of moving from warm to cold air climates. Additionally, the final loss was not significant being only 2.6% of total value, equivalent to approximately

[1] *Volcafe Ltd and Others v. CSAV [2016] EWCA Civ 1103*

[2] *2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:… (m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.*

[3] *2. 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.*

US$62,500. However, the finding of the Judge at first instance raised significant issues for the container trade which lead to the appeal.

The first instance decision

The case first came before David Donaldson QC sitting as a Deputy High Court Judge in the London Mercantile Court. He found in favour of the cargo claimants holding that on the evidence the claimants had been unable to show that they had adopted a sound system for protecting the cargo for carriage. More importantly that if goods are received in a damaged condition this was sufficient for there to be an inference that there had been a breach of Article III Rule 2 with the burden of proof then moving onto the carrier to produce evidence which would negative the finding of negligence against them and their breach.

Grounds of appeal

The Court of Appeal considered 5 grounds of appeal as follows, the first dealing with the burden of proof issue and sub divided into 4 sub issues:

1. Burden of Proof
    i. When goods are received in good condition but delivered in a damaged condition does this raise a sustainable cause of action or the inference of a breach of Article III Rule 2?
    ii. If a sustainable cause of action is the burden on the carrier to show the burden of proof of inherent vice or that the damage was inevitable (cargo's position), or merely an evidential burden to show a prima facie case of inherent vice (carrier's position)?
    iii. If only an inference of a breach what does the carrier have to show to establish a prima facie case of inherent vice?
    iv. If reliance on inherent vice or any other exception in Article IV Rule 2 can be negated by negligence or failure properly and carefully to carry, where does the burden lie?
2. Was there complete circularity between Article IV Rule 2 (m) and Article III Rule 2 such that Rule 2 (m) was not a true exception?
3. What is needed to be shown to establish a "sound system"?
4. What was needed to reject a defence of inevitability?
5. Did the Hague Rules apply to the act of preparing a container?

Decision

1. **Burden of proof**

    The Court of Appeal agreed with Leading Counsel for CSAV that Hobhouse J had gone too far in the *Torenia [1983] 2 Lloyds Law reports 210*

that evidence of arrival of goods in a damaged condition gave rise to a sustainable cause of action. Such evidence only gave rise to an inference of breach. What then followed was a four stage process, passing the burden in the manner of a pendulum swinging between the cargo claimant and the carrier.

- Stage one was to show an inference of breach – damaged goods, the burden being on the claimant;
- Stage two was for the carrier to raise a prima facie defence such as inherent vice;
- Stage three moved the burden back to the claimant to rebut the defence and establish negligence;
- Stage four is that it is then for the carrier to disprove the negligence if this has been established.

Accordingly, the Court of Appeal found that the burden of proof in Hague Rule cases follows the common law approach as set out by Lord Esher MR in the *Glendarroch [1894] P 226.*

2. Circularity

The view of the Judge at first instance was similarly rejected. Having established the way in which the burden of proof would be applied, it followed that there was a clear separation between, on the one hand, establishing whether there was some inherent vice (on which the burden is on the carrier) and, on the other, establishing negligence on the part of the carrier for breach of the duty properly to care for and carry, where the burden would be on the claimant to disprove the operation of the exception.

It was an erroneous approach to say that the carrier cannot rely upon the exception unless they can disprove negligence. It was similarly wrong to consider that the inherent vice defence could not apply in circumstances where the cargo was deemed to be "normal". An inherent vice defence will include the consideration of inherent qualities of an otherwise sound cargo.

3. A sound system

A "sound system" is not one which must prevent damage, but an appropriate manner looking to the actual nature of the consignment. Something, *"which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods." per Lord Reid in the Albacora [1966] 2 Lloyds Rep 53.*

It was wrong to impose upon the carrier an obligation which went beyond what was required by the law. In this case evidence of industry

practice, advanced by an accepted expert witness was sufficient. A requirement of independent scientific study was misplaced.

4. **Inevitability of damage**

It was not necessary to produce a scientific study as to the absorption rates of craft paper, or thickness of card to raise a defence of inevitability. Again, having followed industry practice, the evidence from experts that some degree of condensation damage was inevitable was sufficient. The test in such cases was not one of absolute perfection but a realistic consideration of the steps to be taken by a prudent carrier.

5. **Temporal application of the Hague Rules**

Following the leading decision in *Pyrene v. Scindia [1954] 2 QB 402* the parties to a carriage contract are free to decide what acts or services will fall within the operation of "loading". The effect of an LCL/FCL shipment is that the carrier will assume responsibility for the dressing and stuffing of containers and that this will accordingly (as forming part of the "loading") be caught by the operation of the Hague Rules. As such, the operation must be carried out properly and carefully within the meaning of Article III Rule 2.

In this limited context the appeal was dismissed.

Conclusion

The case has finally resolved an often criticised view as to the operation of the burden of proof in cargo claims and the application of the Hague Rules defences. In order to raise an inherent vice defence the carrier does not first have to disprove negligence.

The case further assists in setting out what is required in order to show a "sound system" of caring for goods and what needs to be established in order to mount a defence of either inherent vice or inevitable damage.

Finally, useful guidance as to the temporal application of the Hague Rules and the extent to which they may govern operations prior to cargo passing the ship's rail has been provided.

Assureds are invited to contact the claims department in London or Shanghai if they have any queries concerning this Bulletin.

The MECO Group, Managers
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Dated London 25 November 2016