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With Volcafe invoked in virtually every cargo claim, what counts and what will sway the Court when trying to stop the burden of proof from shifting to the carrier?

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Overview

The practical implications
of the decision of the
Supreme Court in *Volcafe
Ltd v. Cia Sud Americana de
Vapores SA* [2019] AC 358



Hague Rules

- **Article III Rule 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.”

- **Article IV Rule 2(m)**

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(m)Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.”

Burden of Proof

- The bailee has the legal burden of showing that:
 - the loss of the Goods occurred even though it took reasonable care of the Goods,
 - or that any failure to take reasonable care of the Goods did not cause the loss of the Goods (i.e. that the loss was caused by something for which the bailee was not responsible)

(Volcafe Ltd v Cia Sud Americana de Vapores SA [2018] UKSC 61, [2019] AC 358 at [8]-[10]).

1. Does Volcafe apply to all Art.IV R.2 exceptions?

- **Article IV Rule 2(a)**

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”

- **Article IV Rule 2(b)**

“(b) Fire, unless caused by the actual fault or privity of the carrier.”

The Lady M [2019] 2 LR 109

- **Simon LJ**

Rejected qualification:

“Fire, unless caused by the actual fault or privity of the carrier, *or the fault or neglect of the crew*”

2. Does Volcafe apply to Art.III R.1?

- **Article III Rule 1**

“The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—
(a) Make the ship seaworthy.”

2. Does Volcafe apply to Art.III R.1?

■ Article IV Rule 1

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.”

2. Does Volcafe apply to Art.III R.1?

- CMA CGM Libra [2019] 1 LR 595 (Teare J)
- Maersk Karachi [2019] EWHC 1099 (Comm)
- CMA CGM Libra [2020] EWCA Civ 293

3. How to discharge the burden?

- The carrier must either plead and prove:
 - That it took reasonable care of the goods, but the loss or damage occurred notwithstanding the exercise of reasonable care; or
 - That any failure to take reasonable care of the goods did not cause the loss or damage, because it was caused by something for which the carrier was not responsible.

3. How to discharge the burden?

Global Dress Co Ltd v WH Boase & Co Ltd [1966] 2 Lloyd's Rep. 72 at 77 per Salmon LJ:

“No criticism is made of their system: it is said to be as good as that of any other master porters in the dock. It is not, however, sufficient for them to prove that their system, as a system, was impeccable. Part of the system was to have a watchman on duty in the shed. The defendants have to show that that watchman, for whom they were responsible, carefully performed his duty.”

3. How to discharge the burden?

Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1979] AC 580
at 591 per Lord Salmon:

“Even if the system and security precautions had been perfect, the best of systems sometimes breaks down through the human factor, viz. through negligence or misconduct on the part of those who are employed to work it. The defendants elected not to call as witnesses any of the men working in the shed whose duty it was to safeguard the goods - not even the man in charge of the shed. There was accordingly no evidence that these men had taken due care of the goods or that the 64 cases had not been lost as a result of their negligence or misconduct.”

3. How to discharge the burden?

Spriggs v Sotheby Parke Bernet Ltd [1986] 1 Lloyd's Rep. 487 at 492
per Neill LJ:

“In some cases the duty to take reasonable care will involve the establishment of a safe system of security but the establishment of a safe system is not a sufficient discharge of the duty if the system is not followed with a proper degree of diligence.”

3. How to discharge the burden?

The Santa Isabella [2019] EWHC 3152 (Comm)

- Details of sound system not pleaded
- Details of implementation system not in statements
- Ventilation logs suspect

Conclusion

- *Burden of proof seldom decisive*
- But carriers must plead and prove a positive case
- Evidence of proper system not enough
- Must be evidence of system being followed



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