RISK WATCH

CLAIMS AND LEGAL

Britannia

The Britannia Steam Ship Insurance Association Limited

CLAIMS AND LEGAL is a supplement for Members' claims handlers and legal departments

Volume 9: Number 1: April 2017

THE COURT OF APPEAL'S DECISION IN *VOLCAFE v CSAV*: GIVING GUIDANCE ON THE ORDER AND BURDEN OF PROOF IN CARGO CLAIMS

The Court of Appeal handed down judgment in November 2016 in *Volcafe Ltd and other v Compania Sud Americana de Vapores SA* ('CSAV') [2016] EWCA Civ 1103 upholding an appeal brought by the defendant shipowners. The Court of Appeal unanimously held that a defendant carrier need not first disprove negligence on its part before it can rely on its defences under Article IV Rule 2 of the Hague Rules.

The Facts

The claims brought were for condensation damage to 9 consignments of bagged coffee beans carried by the defendant container line in 20 unventilated 20' containers lined with kraft paper, under bills of lading incorporating the Hague Rules, from Colombia to various destinations in Northern Europe between January and April 2012. The containers were carried on 'LCL/FCL' terms pursuant to which the container line was responsible for the stevedores who prepared and stuffed the containers at the loadport. The overall outturn damage was minor, amounting to some 2.6% of the total value of the consignments.

It was common ground between the experts at trial that:

i) condensation is inevitable when hygroscopic cargo, such as coffee beans, is carried by sea from a warm climate to a cold climate; and

ii) there was no certain way to prevent condensation damage when bagged coffee is carried in lined, ventilated containers.

At trial the defendant carrier relied on the inherent vice defence conferred by Article IV Rule 2 (m) of the Hague Rules and also alleged that the condensation damage was inevitable. The carrier also argued that its obligations under Article III Rule 2 of the Hague Rules did not apply to the act of stuffing and lining the containers at the container terminal because these operations were carried out several days prior to the containers being loaded on the carrying vessels.

The Decision of the Trial Judge

The claimants' case that the bags had been negligently stowed in the containers was rejected by the trial judge.

Nevertheless, the trial judge held that the defendant carriers were liable for the damage. He did so principally on the basis that the carriers could not show that they had cared for and carried the goods 'properly' as required by Article III Rule 2 of the Hague Rules because they could not, he said, demonstrate that the goods had been carried 'in accordance with a sound system'.

The trial judge also rejected the carrier's argument that it was not responsible for the act of stuffing and lining the containers at the container terminal.

Summary of the Key Points Decided by the Court of Appeal

1) The order and burden of proof in cases to which the Hague Rules apply does not depart from the common law position prior to the adoption of the Hague Rules. In the case of the Glendarroch [1894] P. 226, the Court of Appeal had held that each party to an action at common law for damage to cargo carried by sea had to prove the factual allegations made by it, such that if the carrier could show a prima facie case that the loss was caused by perils of the sea, it was for the cargo claimant to then displace this by establishing a prima facie case in rebuttal that the damage was in fact caused by the carriers' negligence.

2) Accordingly, once the carrier has shown a prima facie case for the application of an Article IV Rule 2 exception (here 'inherent vice'), the burden then shifts to the cargo claimant to establish negligence on the part of the carrier.

3) The question as to whether there is some inherent defect, quality or vice in the cargo (on which the burden of proof is on the carrier) must be decided before the question whether the carrier was negligent or in breach of its duty to care for the cargo, on which the burden of proof falls to the cargo claimant to disprove the operation of the exception.

4) There is a degree of overlap between the 'inherent vice' defence and Art. III Rule 2, in the sense that the focus is on the ability of the cargo to withstand the ordinary incidents of carriage, however, the burden remains on the cargo claimant to establish that the carrier was negligent.

5) The inherent vice defence encompasses damage caused by the inherent qualities of a normal cargo. This is a different concept to inevitability of loss.

6) The Court of Appeal found that the trial judge ought to have concluded that the carrier had made out a sustainable defence within Article IV Rule 2 (m). He should then have considered whether the exception did not apply because the carrier had not employed a sound system in the carriage of the goods. On this issue the legal burden is on the cargo claimants.

7) On the basis of the expert evidence, which was largely agreed, as to general practice in the container trade, the trial judge should have concluded that there was a general industry practice of lining the containers with corrugated cardboard or kraft paper (1 or 2 layers depending on thickness). He should therefore have concluded that the cargo claimants had failed to establish that the carrier's system was not a sound one, and that the carrier's inherent vice defence succeeded.

8) The evidence also suggested that minor condensation damage to coffee in bags carried in unventilated containers is endemic, no matter what lining was used pursuant to the general practice of the trade. The carrier's alternative defence that the damage to the consignments was inevitable should have been upheld.

9) The carrier remained under the obligation to perform such services (lining and stuffing the containers) 'properly and carefully' under Article III Rule 2, notwithstanding that this operation took place at the container terminal, days before they were loaded.

David Semark (led by Simon Bryan QC) appeared for the successful Appellant shipowners and contributed to this article.

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CLAIMS AND LEGAL is published by The Britannia Steam Ship Insurance Association Limited, and can be found on the publications page of the Britannia website: www.britanniapandi.com

THE CARRIER'S RIGHT TO CLAIM DEMURRAGE IN A CONTRACT OF CARRIAGE

On 27 July 2016 the Court of Appeal handed down a judgment in *MSC Mediterranean Shipping Co SA v Cottonnex Anstalt [2016] EWCA Civ 789*. This case concerns the carrier's right to claim demurrage (a form of liquidated damages) with respect to the contract of carriage.

From April to June 2011, the claimants (MSC) contracted with the shipper (Cottonex) to carry 35 containers of cotton to Bangladesh.

After the goods had arrived, the market for raw cotton collapsed, which resulted in a commercial dispute between Cottonex and the consignee. The dispute led to the consignee rejecting the goods and the containers remained uncollected at the port whilst under the control of the customs authorities. Due to an ongoing dispute with the customs authorities and the consignee, Cottonex was unable to have the containers de-stuffed and returned to MSC. They refused to pay the demurrage on the containers which accrued in accordance with the contract of carriage.

MSC therefore commenced proceedings against Cottonex , claiming that demurrage would continue to run indefinitely until the containers were returned. At the time the case was heard, the amount of demurrage incurred was in excess of USD1million, which was at least ten times the value of the containers themselves.

Cottonex contested MSC's claim. Firstly, on the grounds that MSC had failed to take reasonable steps to mitigate its loss, for example, by unpacking the containers themselves or by buying replacement containers. Secondly, they argued that their inability to return the containers within the foreseeable future would amount to a repudiation of the contract. As MSC did not have a legitimate interest in affirming the contract, this would bring to an end the continuing obligation to pay demurrage.

The High Court found that the doctrine of mitigation had no application in a claim for liquidated damages.

The court did ultimately agree however that the contracts had been repudiated three months after discharge. One of the judges confirmed that a carrier will only be able to affirm the contract and claim demurrage if there was a 'legitimate interest' in keeping the contract of carriage in force, failing which the contract should be considered as legitimately repudiated.

As there was no realistic prospect that the shipper could continue to perform its obligations, MSC was found to have no legitimate interest in keeping the contract alive.

MSC took the case to the Court of Appeal, insisting that their right to claim demurrage was indefinite. The Court of Appeal did not agree and instead agreed with the High Court that the contract had come to an end, albeit some three months after the date determined by the first court but for slightly different reasons. The Court of Appeal noted that, where the contracts were repudiated by a delay which *frustrated* the commercial purpose of the adventure, the carrier did not have the right to affirm the contract and that contract would be automatically terminated.

Departing from the 'legitimate interest' principle, the court's decision suggests that where performance of a contract has become impossible, the contract will automatically come to an end.

LIMITATION: INCREASE IN COMPENSATION PAYABLE IN THE UK

In April 2012, the Legal Committee of the International Maritime Organisation (IMO) agreed to increase the amounts of compensation payable under the 1996 Protocol (Protocol) to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC).

Under these amendments, the limit of liability of ship owners for claims in respect of loss of life or personal injury and for property claims, were increased by approximately 33.5%.

On 8 June 2015, under the tacit acceptance procedure, the revised limit entered into force internationally. However, some countries, including the UK and Hong Kong, required the passing of domestic subordinate legislation for this amended LLMC limit to become effective. It should not, therefore, be assumed that the tacit acceptance procedure increases the limit in all the Convention countries.

On 30 November 2016, the UK Government's Statutory Instrument for the implementation of the revised limit came into force. Accordingly, the increased limit applies to an incident occurring on or after 30 November 2016 and also applies to limitation funds constituted after 30 November 2016 in respect of earlier incidents. Additionally, the UK regulation provides for future increases to the LLMC limit to come into force as adopted by the IMO, without the need for further domestic subordinate legislation.