Inherent vice and burden of proof: the Volcafe appeal

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The issue in a nutshell

- If the goods which are being carried are damaged during the voyage, is it for cargo interests to show that there was a failure by the shipowner to care for them, or for the shipowner to show that the damage happened without any negligence?
- In particular, if the damage results from a characteristic / natural propensity of the cargo, can shipowner rely upon “inherent vice” exception without proving that he took due care to protect the goods from damage arising from that characteristic?

Pump Court

Hague Rules

- Art. III r.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*"
- Art.IV r.2: "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"

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Facts of Volcafe v CSAV

- Unventilated containers of bagged coffee beans shipped from Columbia to Germany. Going from warm to cold climate, coffee beans will emit moisture, leading to condensation in container.
- LCL/ FCL terms, so carrier CSAV responsible for preparing and stuffing the containers. Needed to line the roof and walls of containers with absorbent material – here “Kraft” paper – to prevent water damage.
- Upon delivery in Germany, water damage found: condensation had dripped onto bagged coffee beans.

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The claim, the defence… and the problem

- Cargo interests complained that CSAV had breached duties as bailee and/or breached Art. III.2 of the Hague Rules.
- CSAV relied upon Art. IV.2(m) and the exclusion for damage caused by inherent vice.
- The problem was that there was limited evidence about the Kraft paper used – disputes about how many layers, how thick, etc.
- Cargo said it was for CSAV to rebut the presumption that damage caused by negligence.
- CSAV said it was for Cargo to show that containers negligently lined.

Pump Court

First instance: [2015] EWHC 516 (Comm)

- Mr David Donaldson QC (Deputy HCJ) decided that:
  - factual presumption that damage ascertained on discharge was due to negligence;
  - CSAV unable to rebut presumption because no evidence that it had adopted a sound system; and
  - there was no generally accepted commercial practice about protecting coffee beans in containers, so CSAV could not say had complied.

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Court of Appeal: [2016] EWCA Civ 1103

- The Court of Appeal allowed the appeal. Flaux J gave lead judgment, holding that:
  - if carrier showed that damage caused by relevant exception, it was for cargo interest to prove that did not apply because of negligence (exception to exception);
  - no basis for concluding that CSAV negligent;
  - on the contrary, there was an accepted industry practice: namely, use two layers of paper of at least 80gsm. CSAV had done that.

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Supreme Court decision: [2018] UKSC 61

- Different approach to burden of proof:
  - Starting point was law of bailment. Bailee usually only liable if fails to take reasonable care… but burden of proof on him to show that he took reasonable care of the goods, or that any want of reasonable care did not cause damage.
  - That is legal burden, not mere evidential burden.
  - Justified by fact that bailee is in possession of the goods and best placed to explain what happened.

Pump Court

Supreme Court (cont.)

- Disagreed with submission that Hague Rules provides complete code.
- Observed that burden of disproving negligence is on custodian of goods in a number of legal systems.
- Criticised the logic of treating a failure to use reasonable care which results in the inherent vice causing damage as an exception to an exception: "*a refinement of some subtlety unrelated to any commercial purpose which the parties can sensibly be thought to have had in mind*".

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Supreme Court (cont.)

- Instead, identified that concept of “inherent vice” depends on what kind of transit is envisaged by the contract: e.g. bananas may ripen quickly if not refrigerated.
- If the carrier could and should have taken precautions which would have prevented characteristic from resulting in damage (e.g. carried in refrigerated hold), that is not “inherent vice”.
- Follows that carrier must show he took reasonable care, or that same damage would have happened even if had done so. Impossible to separate propensity to deteriorate from standard of care.

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Supreme Court (cont.)

- The Supreme Court was critical of the Court of Appeal's findings about:
  - industry practice; and
  - what CSAV had actually done.
- Not enough to say that appeal court would have taken different view of evidence; must be able to say judge fundamentally misunderstood issue or evidence, ignored evidence, or reached a conclusion which evidence could not on any view support.
- Here Court of Appeal simply substituting its view for that of the deputy judge.

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Unusual scenario? Deciding cases on burden of proof

- Lord Sumption observed in 1st paragraph of judgment that "*the courts very rarely decide issues of fact on the burden of proof*"
- So is this clarification of the law of interest to practitioners or just to academics?
- Suggest will have wider impact:

  - How the issue is set up can influence the decision-maker.
  - Especially maritime arbitrators concerned about being said to have got the law wrong.

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All exceptions or just Art.IV.2(m)?

- Legitimate to ask whether analysis relevant to all Art.IV.2 exceptions? E.g. what about Art.IV.2(b): fire?
  - Expressed as extending to all exceptions.
  - But imp to SC analysis is the circular nature of concept of "inherent vice": damage which is suffered notwithstanding carrier taking reasonable care.
  - Other exceptions have their own regime: e.g. "*Fire, unless caused by the actual fault or privity of the carrier*". See The *Lady M* [2019] EWCA Civ 388.
  - But location of burden probably the same.

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Looking wider

- Further SC guidance on treatment by CoA of 1st instance decisions: will it increase certainty/ reduce number of appeals?
- Long tradition of CoA paying lip service to importance of respecting 1st instance decisions… then reversing if disagree.
- More common for cargo claims to be subject to arbitration, where findings of fact simply not susceptible of appeal. If arbitrated, unlikely this case would ever have reached SC.

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