

## # VOLCAFE CASE - COMMON LAW VS. VISBY HAGUE RULES: IS IT ONE VERSUS ANOTHER?

(VOLCAFE DAVASI - ANGLO SAKSON HUKUK SİSTEMİ VE LAHEY KURALLARI:  
KURALLAR BİRBİRLERİYLE ÇATIŞIYOR MU?)

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### ÖZ

*Yakın tarihli önemli bir kararda, İngiltere Yüksek Mahkemesi, ispat yükümlülüğünü kimin üstlendiği sorusunu açıkça ortaya koymuştur. Volcafe Ltd and others v. Compania Sud Americana De Vapores SA<sup>1</sup> gemi sahibinin kargoda bir kayıp veya hasar meydana geldiği durumlarda, taşıyanın makul derecede özen gösterdiğini kanıtlama yükü olduğunu doğrulamaktadır. Günümüzde birçok bilim insanı, Volcafe davasının kargo hasarına ilişkin kanıt yükünü değiştirdiğini ve taşıyanın ispat yükünü ağırlaştırdığını tartışmaktadır. Fakat bu görüşlerin aksine, bu makalede Volcafe davasının taşıyan için zorlaştırıcı bir görev olmadığını ve ispat yükünü ağırlaştırmadığı noktası tartışılacaktır.*

**Anahtar kelimeler:** Lahey Kuralları, Volcafe Davası, İspat Yükü, Anglo Sakson Hukuku, Taşıyanın / Gemi Sahibinin Sorumluluğu.

### ABSTRACT

*In a significant recent judgment, the UK Supreme Court had clearly clarified the question of who bears the burden of proof. The decision in Volcafe Ltd and others v. Compania Sud Americana De Vapores SA<sup>2</sup> (hereinafter Volcafe) confirms that where the ship owner occurred a loss or damage to the cargo, the carrier now has the burden to prove that he had exercised a reasonable degree of skill and care, and the loss had happened nonetheless. Today many scholars are discussing that the Volcafe case switches the burden of proof for cargo damage and now carriers must*

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<sup>#</sup> Eserin Dergimize geliş tarihi: 11.05.2020. İlk hakem raporu tarihi: 20.05.2020. İkinci hakem raporu tarihi: 25.05.2020. Onaylanma Tarihi: 28.05.2020.

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**Esere Atf Şekli:** Sinem Ogis, Edward Kafeero, “Volcafe Case - Common Law vs. Visby Hague Rules: Is it one versus another?”, YÜHFD, C.XVII, 2020/2, s.749-757.

<sup>1</sup> (2018) UKSC 61.

<sup>2</sup> (2018) UKSC 61.

*demonstrate compliance, rather than cargo owners (cargo interests) demonstrate causative negligence. However, it is not believed that this is a challenging task for a carrier.*

**Keywords:** *Hague Visby Rules, Volcafe Case, Burden of Proof, Common Law, Responsibility of the Carrier / Cargo Owner.*

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### **A. Brief Facts of the Volcafe Case**

In the case of *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*<sup>3</sup> coffee beans were carried from Colombia to Northern Europe in nine consignments and stowed in 20 unventilated containers. Each assignment was covered by bills of lading which was issued by the carrier incorporated the Hague Rules and recorded the carrier's receipt of the cargo in good order and condition. Hague Rules is a set of international rules for the international carriage of goods by sea which was first drafted in 1924 in Brussels.<sup>4</sup>

The bills were issued on LCL/FCL terms, meaning that the carrier was contractually responsible for preparing and stuffing the containers for the voyage.

Coffee is a hygroscopic cargo which means it absorbs, stores and emits the moisture. It can be carried in ventilated or unventilated containers. It is common to use both containers for carriage. Unventilated container is indeed cheaper but while using unventilated containers, for carrying the coffee beans from warmer to cooler climates, it carries the risk that the beans might emit the moisture. For this reason, it is necessary to protect the coffee beans from condensation by dressing the container with an absorbent material such as Kraft paper which the carrier employed in this case. However, upon delivery, it was discovered that the cargo in 18 of the 20 containers had suffered wet damage as a result of the condensation which had formed inside the containers dripping onto the bagged coffee beans.

Cargo owner had claimed that under of Hague Visby Rules the carrier had failed to redeliver the cargoes in the same good order and condition which was recorded on the face of the bills of lading. He was argued about the breach of Art III. 2 of Hague Visby Rules, which states that carrier needs to take a proper care to stow, load, keep, discharge and carry the

<sup>3</sup> (2018) UKSC 61.

<sup>4</sup> YETİŞ-ŞAMLI, s. 479 (translated from original language).  
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goods.<sup>5</sup> In particular cargo owner alleged that the carrier did not use enough lining paper for avoiding the condensation.

Carrier on the other hand pleaded inherent vice exception that was stated under Article IV.2/m of Hague Visby Rules and stated that coffee beans were unable to withstand ordinary level of condensation during the passage from warmer to cooler climates.<sup>6</sup> Cargo owners plead in reply that any inherent characteristic of the cargo which resulted in damage, did so only because of the carrier's negligent and failure to adequately dress the containers to protect the cargoes.

The question was on whom the burden of proof was rested?

### **I. The High Court Decision**

The High Court<sup>7</sup> found that the legal burden was on the carrier to disprove negligence where the goods were loaded in apparent good condition. It was decided that there was a clear breach of the Article III.2 of the Hague Visby Rules and the burden of proof was on the carrier show that there was enough lining of the containers which could prevent damage from condensation.<sup>8</sup> However, there was no evidence on the thickness of paper or of number of layers of Kraft paper in place to avoid the condensation damage. It was only stated that the weight of the paper was more than 80 g/sq.m.<sup>9</sup> On this basis, the court held that the carrier had failed to discharge the burden of proving the exercise of due diligence and carrying the goods properly for the purposes of Article III.2.<sup>10</sup>

### **II. The Court of Appeal**

Contrary to the High Court Judge findings, the Court of Appeal took a different view of the application of the burden of proof. It was considered

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<sup>5</sup> “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,,

<sup>6</sup> “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,,

<sup>7</sup> The trial judge in this case was Mr Justice Donaldson QC.

<sup>8</sup> The Carriage of Goods by Sea Act 1971 incorporates the Hague Visby Rules and these rules will apply to contracts of carriage governed by English law unless the contractual parties choose to incorporate other rules.

<sup>9</sup> g/sq.m (gram per square meter) is a metric measurement unit of surface or areal density.

<sup>10</sup> The court cited the decision of *Albacora SRL v Westcott & Laurence Line Ltd.*, (1966) 2 Lloyd's Rep. 53, which was associated “properly” to being “in accordance with a sound system”.

that the carrier has the legal burden to prove that one of the exceptional circumstances listed under Hague Visby Rules Article IV.2 existed at the relevant time. Only then cargo owner has the legal burden of proof of the carrier's negligence. For instance, once the carrier proves that the cargo was damaged because of its inherent vice, then the cargo owner will have the burden to show that excepted peril only resulted because of the carrier's failure to take reasonable care. This is because, the Court of Appeal found that there was an accepted industry practice in 2012 for lining unventilated containers for the carriage of bagged coffee. The accepted industry practice was said to involve using two layers of paper of at least 80 g/sq.m or one layer of at least 125 g/sq.m. The use of 250 g/sq.m Kraft paper only became customary after 2012. The Court of Appeal after examining the photographs with an aid of expert had found that two layers of paper had been used.<sup>11</sup>

Therefore, the Court of Appeal reached into the conclusion that as the weight of the paper was at least 80 g/sq.m, the containers had been lined in accordance with accepted industry practice. Consequently, the Court of Appeal gave its ruling in favour of the carrier on the basis that cargo owners had not established any negligence on the part of the carrier. By doing so the Court of Appeal reversed the decision of the High Court and held that the carrier can establish the defence of inherent vice exception and it was then for the cargo owners to show that cause of the damage was not inherent vice, but a failure of the carrier to exercise a reasonable care.

### **B. UK Supreme Court Decision**

At the Supreme Court, the burden of proof was analysed at two stages. The first one was concerned whether Article III.2 left the burden of proof to the cargo owner to prove that the carrier was in breach, or whether the legal burden was on the carrier to prove the compliance of the Article III.2. The second one instead was related with the Article IV.2 (m) and the question was whether carrier borne to prove the facts which brings him to the exceptions or whether the legal burden was on the cargo owner to prove that it was the carrier's negligence which caused the exceptions (in this case inherent vice to damage the cargo).

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<sup>11</sup> (2016) EWCA Civ. 1103.  
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### **I. Article III.2 of the Hague Visby Rules: Does cargo owner have the burden to prove the breach or the carrier?**

On the first issue, the Supreme Court observed that under English law, the delivery of goods for carriage by sea has historically been regarded as a bailment for reward on the terms of the bill of lading and eventually the bailee is under the obligation to take reasonable care and he bears the legal burden of proving the absence of negligence. While the Supreme Court was discussing this argument, referred to the case *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)*<sup>12</sup> which supports the contract of carriage by sea as a species of bailment.<sup>13</sup>

Therefore, where the cargo was loaded in good condition but was found to be damaged upon discharge, the legal burden was on the carrier to prove that the damage was not caused by a breach of the duty of care imposed by Article III.2. Accordingly, the Supreme Court agreed that the Hague Visby Rules imposes on the carrier the obligation of disproving negligence in respect of the damage to the goods sustained during the carriage. Art III.2 thus imposes a carrier a general duty to take a reasonable care.<sup>14</sup>

### **II. Article IV.2 (m) of the Hague Visby Rules**

On the second issue relating to the inherent vice defence under Article IV.2 (m), the Supreme Court stated that: “in order to be able to rely on the exception for inherent vice, the carrier must show either that he took reasonable care of the cargo but the damage occurred nonetheless; or else that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities.”<sup>15</sup>

Therefore, the UK Supreme Court held that in order to rely on the defence inherent vice listed in the Article IV.2(m) of the Hague Visby Rules, the carrier bears the legal burden of proof to show that the damage

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<sup>12</sup> (1983) 2 Lloyds Rep 210.

<sup>13</sup> “The relationship between the present parties is contractual. It follows [...] that the question of legal burden of proof has ultimately to be decided by construing the contract between them. [...] In ascertaining the effect of the contract one must take into account the nature of the contract. The contract here is a contract in a bill of lading; it is a contract of carriage - that is to say, a species of a contract of bailment.” (1983) 2 Lloyds Rep 210 at 216. See also *Spurling Ltd v Bradshaw*, (1956) 1 WLR 461, at 466.

<sup>14</sup> See also *Glencore Energy UK v. Freeport Holdings* (“The Lady M”) (2019) EWCA Civ. 388. The Court of Appeal’s judgment in the “The Lady M” provides definitive guidance on the scope of the “fire” defence in Article IV.2(b) of the Hague Visby Rules, and the proper approach to the construction of the Article IV defences more generally.

<sup>15</sup> (2018) UKSC 61.

arose from inherent vice and that he took reasonable care to protect the goods from damage, or that damage arose despite the exercise of due diligence to care for the cargo.<sup>16</sup> This is because the cargo's inherent propensity to deteriorate or manifest itself in damage depends on the ambient conditions of stowage. If the carrier takes reasonable care, the cargo's inherent propensity from causing damage would be easily prevented. So that the cargo would be fit to withstand to ordinary incidents of the carriage contracted for.<sup>17</sup>

The UK Supreme Court while concluding its judgement also gave a definition of the inherent vice as "the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required by the contract to exercise in relation to the goods." That is to say, the existence of inherent vice depends on the appropriate standard of care.<sup>18</sup>

### III. The Decision

Consequently, with the *Volcafe* case the UK Supreme Court has clarified the position on the burden of proof under the Art III.2. The carrier, after this decision can no longer rely on the excepted perils listed in Art IV.2. The carrier must now also show that the damage was incurred without a breach by its duty of care. If the carrier fails to discharge the burden of proving the exercise of reasonable care, the carrier then will be held liable for the loss or damages sustained by the cargo owner.<sup>19</sup>

<sup>16</sup> Therefore, overturned *the Glendarroch*, (1894) P 226.

<sup>17</sup> Under this context the Supreme Court cited *the Albacora*, (1966) SC 19, which is important mainly for its analysis of the meaning of inherent vice exception.

<sup>18</sup> Once can discuss that where the shipper is contractually liable, the *Volcafe* case does not apply. Therefore, it is important to analyze the scope of the contract. See for instance, *Jindal Iron and Steel Co Limited and others v. Islamic Solidarity Shipping Company Jordan Inc*, (2003) 2 Lloyds Rep. 87 (*the Jordan II* case).

<sup>19</sup> See *the Hellenic Dolphin*, (1978) 2 Lloyds Rep. 336 case which applied four stages approach on burden of proof. That is briefly: first, the cargo owner claims the loss or damage to the cargo; later, the carrier prima facie relies on the exceptions listed under Article IV.2; burden then shifts to cargo owner to show that the loss or damage was due to carrier's fault; the carrier then needs to show that he acted diligently and he applied reasonable degree of care.

### **C. Conclusion: Reasonable care or more than reasonable care?**

Therefore, it is clear, following this decision that if a carrier wishes to rely on the defence of exceptions, the burden of proof will be on the carrier to show that he had exercised a reasonable degree of skill and care and the loss or damage occurred in any event. The literature is in the opinion that Volcafe case increases the carrier's evidential burden to detail precisely what the carrier did to take care to protect the cargo and how the damage or loss occurred despite him taking proper care.

However, this case actually re-emphasises the carrier's obligation to care for and carry the goods properly. That is to say, this decision does not require a carrier to adopt a system which would prevent damage, but merely a system which constitutes a sound system in relation to the general practice. It is only insofar as the carrier agrees to carry out any of the functions mentioned in Article III.2 of Hague Rules, that he agrees to perform "properly and carefully" with "reasonable care". In fact, which means that Article III.2 already imposes on the carrier a general duty to take reasonable care of the cargo during the carriage. Therefore, with the Volcafe case only practical consequences is subject to change.

Indeed, it is true that the burden after this case is on the carrier in any cargo claim to disprove causative negligence. But the carrier can do so by proper record keeping, checking the internal and external container condition before loading. Where there is industry awareness of the risk of a particular type of goods, appropriate precautions must be taken in accordance with the type of goods and those precautions must be such as a rational and adequate.

On the other hand, it is believed that today market provides best practice, commercial guidelines. Therefore, it would be enough for the carrier to follow such a guideline and do proper record keeping with standard reasonable care which is stated in Article III.2 of Hague Visby Rules. Let's assume there is no such a guideline for type of the good, so that carrier can request a specific instructions from the cargo owner as to how to take care of the goods and how to carry, and if carrier does a proper recording of which steps he followed or what he did to take care of the goods, the negligence could be easily disapproved.<sup>20</sup> Contrary to the literature opinion, the Volcafe case does not bring a challenging task for a carrier.<sup>21</sup>

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<sup>20</sup> There are physical safety codes, such as the IMDG (international maritime dangerous goods code), IMSBC (international maritime solid bulk cargoes code) and Grain Code.

<sup>21</sup> Germany for instance, remains a party to the 1924 Hague Rules but not the Hague Visby Rules. However, Germany incorporated the Hague Visby Rules 1968/1979 into its  
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Will this practice become a unified principle for all the exceptions listed under Article IV.2? Surely, to consider the UK Supreme Court judgement, it can be said that for the inherent vice exception the rule is clearly established with this *Volcafe* case. But for the other exceptions such as perils of the sea, the answer is debatable. This is because there is a distinction between the peril which is existed and the standard of care required of the carrier.<sup>22</sup> Accordingly, to conclude within the words of the UK Supreme Court “in order to be able to rely on the exception for inherent vice, the carrier must show either that he took reasonable care of the cargo but the damage occurred nonetheless; or else that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities.”

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Commercial Code (the *Handelsgesetzbuch*, or HGB.) Germany therefore remains a contracting state of the original Hague Rules, involving certain obligations under international law to other Hague Rules states, but nevertheless attempts to give the widest possible application to the Hague Visby Rules by incorporating into its HGB. German Commercial Code (HGB) entered into force on 25th April 2013. One of the major deviations from the Hague Visby Rules is the abolition of the liability exclusion for damages due to fire or navigational fault. Under the new HGB regime, acts or omissions in the navigation or management of the vessel as well as fire and explosion on board are no longer statutory exemptions from liability. These two exemptions may, however, be agreed individually or by way of express agreement. Turkey on the other hand, did not incorporate Hague Visby Rules into the Turkish Commercial Code (TCC), numbered 6102. However, even though the rules were not incorporated into TCC, all the rules follow a correspondent patent as Hague Visby Rules. Therefore, the ratio of the *Volcafe* case might be considered before Turkish Courts.

<sup>22</sup> In fact, the Supreme Court while given its judgement referred the case of *Nugent v Smith*, (1876) 1 CPD 423 in which a mare carried was dead as a result of a combination of bad weather and the fright of the animal herself which caused her to struggle and injure herself. *YÜHFD Cilt: XVII Sayı:2 (2020)*



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