# Burden of Proof in Cargo Damages Under the Hague and Hague-Visby Rules- Current Developments

*Recently, the English Supreme Court has overturned the decision of the Court of Appeal during the trial held on December 5TH, 2018, in which the issue of who shall bear the burden of proof in case of damage to the cargo under Hague and Hague-Visby Rules was discussed and a ruling case, where a decision in contrary to the established interpretation of these set of rules was awarded, has been formed. (Volcafe v. CSAV [2018] UKSC 61). This decision is also important for Turkish ship-owners, as aside from the close relationship between maritime transport and insurance issues with English law, English law can easily be applied to disputes arising from bill of lading with a "jurisdiction clause" that can be added to bill of lading and charter parties.*

Under the case referred, an exceptional examination was carried out, in which the diligence liability of the carrier stipulated under the Rule No. IIV.2 and the relationship between the circumstances allowing exception of liability for the carrier as stipulated under the Rule No. IV.2, were analyzed. Supreme Court accepted the appeal application of the plaintiffs and asserted that the carrier, acting in the capacity of a "bailee", must prove that the damage or loss in question had not caused by any violation of its diligence obligation stipulated under the Rule No. IV.2. In other words, in order to benefit from the faultlessness clause under the Rule No. IV.2, the carrier must demonstrate that the damage had not been caused by its own negligence or violation. This decision constitutes a contradiction to many other case-law practices (for decisions awarded in contrary see: The Glendarroch [1894] P 226, Albacora SRL v Westcott & Laurence Line Ltd 1966 SC(HL) 19 and Great China Metal Industries Co Ltd v Malaysian International Shipping Corpn Bhd (The Bunga Seroja) [1999] 1 Lloyd's Rep 5.).

If we take a look at the merits and the details of the case, the Volcafe incident had arisen from an incident where the cargo, which was composed of coffee bean carried in the container, was damaged due to moisture. It was indicated that, if barriers were established by placing paper or cardboard between the containers, the damage would actually not occur or be less. Although the carrier, claiming that, such moisture-related damage was a defect inherent to the cargo,

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intended to rely on the “Inherent defect, quality vice of good" faultlessness exception set out under Rule IV.2 (m), the owner the cargo held the carrier responsible by asserting that the above-mentioned paper / cardboard placement measure was not taken.

Initially, the local court concluded based on the evidences submitted that, the damage had taken place due to the failure of the carrier to fulfill its obligations stipulated under Rule No III.2 and the carrier could not be relieved from such liability as it had failed to provide any evidence refute that conclusion. Court of Appeal, on the other hand, overturned the judge's decision and, based on "Glend The Glendarroch, Flaux J" award, which constituted established case-law, decreed that when the carrier claimed that the damage had been caused inherently by the cargo as the “prima facie”, the burden of proof had shifted to the cargo side and that they had to prove violation of the carrier.

The Supreme Court decided that it was fair that the burden of proof shall be borne by the carrier. It is anticipated at the starting point that, none of the provisions of the Hague Rules, stipulates elimination of shifting of the burden of proof to the carrier, which acts as the bailee. In this case, it was concluded that the carrier, just like the person who accepts delivery of any bailment, would be liable for the damage to the cargo under its custody unless it proves the opposite. For the avoidance of any doubt, proving the opposite means is to prove by the carrier that, such damage has not been caused by any action that was in contrary to its standard diligence obligation or the carrier is in a position that allows it to claim any exemption.

The significant impact of Lord Sumption's decision was that the question of burden of proof, which is often discussed in the case of cargo damage in transports to which the Hague and Hague Visby Rules apply, was clarified by Supreme Court through the English "Common law of bailment" provisions and the burden to disprove its negligence was attributed to the carrier. In other words, while the burden of proof related to the carrier's failure and how the carrier shall not rely on the exemptions that will allow it to flee from the causing liabilities was at the cargo side, it has been shifted to the opposite party with this decision.

Although all these developments and the legal trend may appear to be against the carrier, this burden of proof underlines the measures that need to be taken in practice before loading. The immediate detection of any defects observed in the condition of the cargo shall be protective for the future.