Onus Probandi in Art III.1 Sea Cargo Claims: Did *The Volcafe* alter the structure?

Abstract

When cargo is lost or damaged under a carriage of goods by sea contract, the cargo-interest has a sustainable cause of action against the carrier for non-delivery under the Hague/Hague-Visby Rules. The carrier's liability is fault based. The carrier may defend the action by proving it was caused by an excepted event under Art IV.2. However, the cargo-interest may respond by proving the cause of non-delivery was a breach of the carrier's obligation to take care in providing a seaworthy ship. It is implied in fact that the cargo-interest must prove this because Art IV.1 expressly requires the carrier to disprove fault under Art III.1 where the cause of non-delivery was unseaworthiness. This article argues that *The Volcafe* alters this burden of proof structure. It is based on two irreconcilable premises of causation and implied terms in fact. Disproof of negligence is an exigency of causation, so it is not necessary to imply a term that requires the cargo-interest to prove the cause of non-delivery was unseaworthiness. Where the burden of proof rests under Art III.1 should be reconciled according to first principles in the law of bailments, which requires the carrier to disprove fault and, therefore, causation exclusively.

Introduction

When cargo is lost or damaged under a carriage of goods by sea contract, the cargo-interest has a sustainable cause of action against the carrier for non-delivery under the Hague/Hague-Visby Rules.[1] The carrier's liability is fault based. They may defend this action by proving the cause of the non-delivery was an excepted event under Art IV.2. If the carrier is successful, a cargo-interest may still reply by proving it was actually caused by the carrier's breach of obligation under Art III.1, to provide a seaworthy vessel. The reasoning for this is an implied term in fact. Art IV.1 provides that the carrier is not liable for non-delivery caused by unseaworthiness unless it caused by their want of due diligence to make the ship seaworthy. It continues that the burden of proving due diligence under Art III.1 falls to the carrier. Because the carrier is expressly made responsible for proving non-delivery was not caused by want of due diligence, it is implied that the cargo-interest has already proven the cause of non-delivery was unseaworthiness.

This article argues that after the decision in *Volcafe Ltd v Compania Sud Americana De Vapores SA (The "Volcafe")*[2] implication of terms can no longer be a basis for placing the legal burden of proof under Art III.1 on the cargo-interest. That decision ruled that a carrier is a bailee who must prove non-delivery was either not caused by their want of care or that they did exercise care.[3] If disproof of negligence is an exigency of causation it is not necessary for the contract to function that the cargo-

[1] Hereinafter 'The Rules'; See, for example, *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The "Torenia")* [1983] 2 Lloyd's Rep 210, 216-17; *Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466

[2] [2018] UKSC 61

[3] *The Volcafe* [2018] UKSC 61 at [7]-[10], [25], [33]

interest proves the cause was actually unseaworthiness. For the carrier can exclusively deal with the matter of causation under their legal burden of proof. It would be superfluous to have the carrier prove it was not caused by their want of care under Art IV.2 to subsequently have the cargo-interest prove the same fact under Art III.1.

The resolution that the carrier has the burden under Art III.1 exclusively is consistent with first principles in the law of bailments, whereas the implied term is not. The principled basis in the law of bailments for why the bailee must prove it was not their lack of care that caused the non-delivery is to guard against the inherent opportunism in the bailment relationship. The bailee is best placed to explain what happened.[4] If that is the concern, requiring the cargo-interest prove what happened when it concerns seaworthiness is an unjustified departure from the norms of bailment.

Competing Perspectives on the Legal Burden of Proof: A summary

Competing perspectives exist on where the legal burden of proof rests under Art III.1. Art III.1 requires a carrier to exercise due care in providing a seaworthy vessel before and at the beginning of the voyage. If the vessel is unseaworthy the carrier is not liable, however, if the cause of non-delivery was an exception under Art IV.2. Even so, if the carrier cannot establish non-delivery was caused by an exception under Art IV.2, Art IV.1 continues that a carrier may still avoid liability for non-delivery of the cargo caused by unseaworthiness under Art III.1 if they prove they exercised due care in performance of that obligation. Who, then, if anyone, must prove it was caused by unseaworthiness under Art III.1?

The matter is resolved by common law rules. The Rules are a complete code for matters they cover but are not "exhaustive of all matters relating to the legal responsibility of carriers for the cargo".[5] Unless The Rules address the burden of proof, its application is one for the *lex fori*.[6] The Rules are silent on who bears the burden of proof under Art III.1, so it falls to be determined according to individual jurisdictions. Incorporating The Rules into a carriage contract has the effect as a matter of contract.[7] As such, "common law rules ought to apply"[8] to determine who has the burden of proof.

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[4] *The Volcafe* [2018] UKSC 61 at [10]
[5] *The Volcafe* [2018] UKSC 61 at [14]
[6] *The Volcafe* [2018] UKSC 61 at [15]; see also, *Glencore Energy UK Ltd v Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388 at [57], [64]; *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265, 271-72
[7] *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265, 271-72; *Vita Food Products Inc v Unus Shipping Company Ltd* [1939] AC 277, 286; *G E Dobell & Co v Steamship Rossmore Company Ltd* [1895] 2 QB 408, 412-13
[8] *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272

The majority opinion, or "long-route",[9] considers that the legal burden of proof rests on the cargo-interest to prove the cause of non-delivery was unseaworthiness.[10] The basis for this is implied terms in fact. If the carrier proves the cause of non-delivery was an exception to their liability under Art IV.2, the legal burden is shifted to the cargo-interest to prove the cause was actually unseaworthiness under Art III.1. Where the cause is unseaworthiness the carrier may avoid liability if they prove it was not caused by want of care, therefore it is implicit that the cargo-interest has proven the cause was unseaworthiness under Art III.1.[11] In this view the legal burden of proof shifts from the carrier to the cargo-interest and then back to the carrier.

A contrary view places the legal burden of proof entirely on the carrier.[12] It is based on causation and the law of bailments. The carrier must meet the cargo-interest's cause of action by proving either it was not caused by want of care but an excepted event under Art IV.2, or they exercised due care under Art III.1 to be relieved under Art IV.1.[13] Therefore, the matter is ultimately one of causation. The carrier must prove the cause of non-delivery was not their fault. The principled reason for requiring the carrier to disprove negligence as the cause of non-delivery arises from the nature of the contract as one of bailment. Liability is fault based but the cargo-interest may have no way of knowing what happened to the cargo. The cargo-interest is at risk of opportunism from the carrier as bailee, so the law of bailments requires the bailee to prove it was not caused by their want of care.[14] Therefore, in the absence of intention to the contrary, who bears the burden of proof under Art III.1 is the carrier exclusively.

Where the legal burden of proof rests is important if the cause of non-delivery cannot be established as a matter of fact, either because it is unknown or there are competing theories. The legal burden of proof requires the person discharging it to

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[9] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 138ff

[10] See, for example, *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2019] EWHC 481 at [57]; *The Toledo* [1995] 1 Lloyd's Rep 40, 53-4; *Phillips Petroleum Co v Cabaneli Naviera SA (The Theodegmon)* [1990] 1 Lloyd's Rep 52, 54; *Empresa Cubana Importada De Alimentos "Alimport" v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586, 588; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339; *The Flowergate* [1967] 1 Lloyd's Rep 1, 8; *Albacora SRL v Westcott and Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, 64; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 271-72; *The Glendarroch* [1894] P 226; *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) Ch 14-044; *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242; J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.109; M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) ch 12-14 particularly pp 149-51

[11] The Rules, Art IV.1; *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2019] EWHC 481 at [57]; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 271-72

[12] See, for example, *The Torenia* [1983] 2 Lloyd's Rep 210, 216-19; *The Assunzione* [1956] 2 Lloyd's Rep 468; *Phillips v Clan Line* (1943) 76 LI LR 58; *Silver v Ocean SS Co* [1930] 1 KB 416, 424–25; *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 435-37; C Ezeoke, 'Allocating Onus of Proof in Sea Cargo Claims: The contest of conflicting principles' (2001) *Lloyd's Maritime and Commercial Law Quarterly* 261; W Tetley, *Marine Cargo Claims*, (OUP 4th ed, 2008); S Mankabady, 'The Duty of Care for the Cargo' (1974) ETL 2

[13] *The Volcafe* [2018] UKSC 61 at [9]

[14] W Jones, *An Essay on the Law of Bailments*, (Hogan and Thompson, 1836) 121-22, 166, 250-51; *cf.* odd references to the bailor bearing the burden of proving negligence, see pp 108-9, 123, 249

show what the cause was on a balance of probabilities. If it falls to the carrier to prove that the cause was an exception under Art IV.2, their defence will fail if they cannot disprove fault under Art III.1. Conversely, the cargo-interest will fail if it falls to them to prove the cause of non-delivery was unseaworthiness and they cannot prove both unseaworthiness and causation.[15] This can be illustrated in *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The "Apostolis")*.[16] There were two competing causes for non-delivery arising from fire. Those were either a spark from welding, which would have rendered the vessel unseaworthy under Art III.1, or a discarded cigarette, for which the carrier would be exempt. The Court of Appeal held that since the carrier had proven there was a fire, the competing theories meant the cargo-interest had not proven the cause was unseaworthiness.[17]

The bailments view, as it were, has recently received indirect support in *The Volcafe*. It affirmed that a carriage contract was one of bailment and liability was ultimately a matter of causation: the carrier had to either disprove the cause was negligence under Art IV.2 or disprove negligence under Art III.2 to meet the cargo-interest's cause of action.[18] However, *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)*[19] rejected the argument *The Volcafe* had altered the burden of proof under Art III.1 and supports the long-route and implication. The reason for this was *The Volcafe* concerned the carrier's obligation to take care of the cargo under Art III.2, and not Art III.1.[20] *The Libra* found that the defective passage plan caused the loss, so it did not need to consider where the burden of proof fell as a matter of law,[21] but on appeal Flaux LJ acknowledged the point would be arguable.[22]

Even though *The Volcafe* did not concern Art III.1, it follows from relevant rulings that that the legal burden of proof rests exclusively on the carrier under Art III.1. If one accepts these rulings, the rest should follow. Therefore, this article does not intend to dispute these rulings and are taken to be correct. Principally, it argues that the requirement that a carrier prove the cause was an exception under Art IV.2 is irreconcilable with the implied term that the cargo-interest prove unseaworthiness for two reasons. First, if liability of the carrier is a matter of causation, a carrier who does not disprove negligence under Art IV.2 is unlikely to meet civil standard of proof to discharge their legal burden. If it is evidenced that reasonable care could have avoided the effects of non-delivery and material facts regarding the care the carrier took are outstanding, this standard is unlikely to be satisfied. The court cannot simply choose between competing theories of an excepted event under Art IV.2 and

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[15] See, *Rey Banano del Pacifico CA v Transportes Nav Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd's Rep 15 – where the cargo-interest had proven unseaworthiness but not that it caused the loss

[16] [1997] 2 Lloyd's Rep 241

[17] *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The "Apostolis")* [1997] 2 Lloyd's Rep 241, 244-45, 257-58; as discussed in *The Libra* [2020] EWCA Civ 293 at [61]

[18] *The Volcafe* [2018] UKSC 61 at [25], [33]

[19] [2019] EWHC 481; as cited as authority in *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) Ch 14-044

[20] *Volcafe Ltd v Compania Sud Americana De Vapores SA (The "Volcafe")* [2018] UKSC 61; For commentary see, P Todd, 'Hague Rules and Burden of Proof' (2017) LMCLQ 169

[21] *The Libra* [2019] EWHC 481 at [33], [54], [88]-[92], [129]; [2020] EWCA Civ 293 at [24]

[22] Alize 1954 & another –v- Allianz Elementar Versicherungs AG & others, from 2:04:40 <https://www.youtube.com/watch?v=hTbLyxRcC4I> last accessed 19th Feb 2020

unseaworthiness under Art III.1. It is open to them to say the cause remains in doubt and the carrier subsequently fails in their defence. Secondly, if disproof of fault is an exigency of causation, then it is not necessary for the contract to function that the cargo-interest proves the cause was unseaworthiness under Art III.1. It would be superfluous to have the cargo-interest prove what the carrier already has done under Art IV.2. In the absence of intention, the matter of who bears the legal burden of proof under Art III.1 is then resolved by first principles. It is for the bailee to disprove negligence due to the risk of opportunism.

The structure under English law: The long-route

The long-route is a four-stage approach for establishing liability under Art III.1. The legal burden of proof shifts between carrier-cargo-interest-carrier in stages 2 to 4. This structure only requires the carrier to disprove negligence once the cargo-interest has proven the cause of non-delivery was unseaworthiness of the vessel. It does not require the carrier to disprove negligence when establishing whether the cause of non-delivery was an exception under Art IV.2.

Stage 1

It is not disputed by the long-route that the cargo-interest sets up a sustainable cause of action by evidencing non-delivery.[23] The carrier promises to redeliver the cargo in the condition they received it in.[24] The cargo-interest may satisfy this evidentiary burden by the production of clean bill of lading showing the condition the goods were shipped in against the condition they were received in.[25]

Stage 2

Recall that where the burden of proof rests is a matter for common law and contract. The intention of the parties is revealed in the first stage. The carrier "has to relieve himself of the prima facie breach of contract involved in his failure to discharge the goods in condition as received".[26] Therefore, it is implicit that the carrier has the

[23] See, *The Torenia* [1983] 2 Lloyd's Rep 210, 216; M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 159-63; *cf. Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 – which is distinguished on the basis of the loss occurring before the bailment relationship came into existence and concerned frustration rather than exceptions and implied terms. These materials differences are not fully appreciated in the literature, see, for example, S Hetherington, 'The onus of proof in cargo claims: contract or bailment? Part 2' (2019) 25 JIML 188; J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.129-131

[24] *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432

[25] *The Volcafe* [2018] UKSC 51 at [4], [9]; *The Good Friend* [1984] 2 Lloyd's Rep 586, 588; *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1928] AC 223, 230; *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) Ch 14-043; J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.125; *cf.* S Hetherington, 'The onus of proof in cargo claims: contract or bailment? Part 1' (2019) 25 JIML 105, 117 – who notes that with the advent of containerised shipping, the acknowledgement in a bill of lading that the goods were shipped in 'good order and condition' may be insufficient to discharge the initial evidentiary burden

[26] *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432

burden initially. Under The Rules, the carrier may be excused from performance by proving an exception set out in Art IV.2.[27] A carrier may legitimately rely on more than one exception.[28]

The burden cast on the carrier is a legal, and not evidentiary, one.[29] To satisfy this legal burden the carrier would have to show the exception was the "effective cause of the damage".[30] There is "a distinction between the existence of the expected circumstance on the one hand and its causative effect on the other".[31] Whether a particular event was the cause is dependent upon it being the "proximate cause" of the loss or damage.[32] It is traditionally perceived as a "but for" test. This means that the carrier must prove the cause by showing the non-delivery would not have arisen but for the exceptional event.[33] If there are concurrent causes, it may be possible to divide the loss between the excepted event and the unseaworthiness of the vessel, for which the carrier is only liable for the latter.[34]

Some confusion has emerged in the cases and opinions that obscured this as a legal burden of proof. The long-route does not deny that the carrier's liability is dependent upon causation.[35] At stage 2, a carrier who proves the cause was an exception is not

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[27] *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339

[28] See, for example, *The Theodegmon* [1990] 1 Lloyd's Rep 52; *The Good Friend* [1984] 2 Lloyd's Rep 586

[29] *The Volcafe* [2018] UKSC 61 at [10], [23], [38]-[39]

[30] *The Libra* [2020] EWCA Civ 293 at [68]-[70]; *The Volcafe* [2018] UKSC 61 at [32]; *Compania Sud Americana de Vapores S.A. v. Sinochem Tianjin Import and Export Corp. (The Aconcagua)* [2010] 1 Lloyd's Rep 1, 48-9; *The "Polessk" and the "Akademik Iosif Orbeli"* [1996] 2 Lloyd's Rep. 40, 45; *Mediterranean Freight Services v BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep. 506, 508, 510, 512, 522; *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)* [1990] 2 Lloyd's Rep 39, 48, 50; *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589, 602-3; *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997, 1004-5; *Kish v Taylor* [1912] AC 604; *The Europa* [1908] P 84; *McFadden v Blue Star Line*, [1905] 1 K.B. 697, 703; The Xantho (1887) 12 App Cas 503, 511 (HL)

[31] *The Volcafe* [2018] UKSC 61 at [32]

[32] *The Volcafe* [2018] UKSC 51 at [32]; *Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466; *The "Ruapehu"* (1925) 21 Ll L Rep 310, 315; *Thomas Wilson, Sons & Co v Owners of the Cargo per The "XANTHO"* (1887) 12 App Cas 503, 510-11; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, *passim*; *Notara v Henderson* (1872) LR 7 QB 225, 235-6

[33] *The Libra* [2019] EWHC 481 at [90]; *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 110, 114, 123; L Hoffmann, 'Causation' (2005) 121 LQR 592, 594; *Cf.* M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 190-91 – who advocates the test should be one of remoteness

[34] *Northern Shipping v. Deutsche Seereederei (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255; see also, *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import and Export Corp (The Aconcagua)* [2010] 1 Lloyd's Rep 1 at [333]; but if the loss would not have happened but for the unseaworthiness then the cause is not an excepted event. See, for example, *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997; *Mediterranean Freight Services v BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep 506; *Kish v Taylor* [1912] AC 604; see, generally, J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.129

[35] *The Libra* [2020] EWCA Civ 293 at [68]-[70]; *Compania Sud Americana de Vapores S.A. v. Sinochem Tianjin Import and Export Corp. (The Aconcagua)* [2010] 1 Lloyd's Rep 1, 48-9; *The "Polessk" and the "Akademik Iosif Orbeli"* [1996] 2 Lloyd's Rep. 40, 45; *Mediterranean Freight Services v BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep. 506, 508, 510, 512, 522; *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)* [1990] 2 Lloyd's Rep 39, 48, 50; *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589, 602-3; *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997, 1004-5; *Kish v Taylor* [1912] AC 604;

liable. But at stage 3 a cargo-interest who proves the cause of non-delivery was unseaworthiness proves the cause was not an excepted event.[36] This has led to stage 2 being cast incorrectly as an evidentiary burden only. For example, *The Glendarroch* asserted that the carrier only needs to establish an exception prima facie, but the plaintiff could complete the exception by showing "it was not satisfied, because there had been negligence".[37] *Carver* mentions the carrier needing to bring "himself prima facie within those words" of an exception.[38] However, the phrase "prima facie" is imprecise to assert that this shifts the legal burden from the carrier under Art IV.2 to the cargo-interest to prove the cause was unseaworthiness under Art III.1. Establishing a prima facie case only shifts the evidentiary burden to the other party, as opposed to shifting the legal burden of proof.[39] If further evidence is adduced that goes beyond simply showing the excepted event occurred, the cause of non-delivery, and thus whether the carrier satisfies their legal burden of proof under Art IV.2, is ultimately a matter of fact.[40]

This lack of precision can be seen in other authorities supportive of the long-route. *The Good Friend* accepted the carrier's argument that as a matter of fact the cargo had been quarantined, which meant the carrier had proved the quarantine exception.[41] *The Hellenic Dolphin* states the carrier only needs to *rely* on the exception to shift the legal burden to the cargo-interest to prove unseaworthiness was the *cause*.[42] Yet proof of an excepted event does not prove it was the proximate cause. Other authorities do seem to acknowledge there is a legal burden on the carrier at stage 2. In *Phillips Petroleum Co v Cabaneli Naviera SA (The Theodegmon)*, loss was described as "caused by a peril of the sea"[43] before the cargo-interest proved it was caused by unseaworthiness. *Minister of Food v Reardon Smith Line* also acknowledges that the carrier had satisfied the court that the loss was "caused by the expected peril" and there was "no evidence whether unseaworthiness had anything to do with it".[44]

This seems to lead academic sources to struggle to explain the carrier's legal burden of proof at stage 2. Hetherington refers the carrier's exceptions as 'bringing themselves within' an exception but does not offer particularity on the matter.[45]

The Europa [1908] P 84; *McFadden v Blue Star Line*, [1905] 1 K.B. 697, 703; *The Xantho* (1887) 12 App Cas 503, 511 (HL)

[36] *Smith Hogg v Black Sea and Baltic Insurance* [1940] AC 997, 1004

[37] [1894] P 226, 232; see also, *Stag Line Ltd v Foscolo, Mango and Company* [1932] AC 328, 340

[38] *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242;

[39] *The Torenia* [1983] 2 Lloyd's Rep 210, 216; see also *The Volcafe* [2018] UKSC 51 at [21]; and *Leesh River Tea Company Ltd v British India Steam Navigation Company Ltd* [1966] 1 Lloyd's Rep 450, 458

[40] See, for example, *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-023; citing *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105, 139

[41] *The Good Friend* [1984] 2 Lloyd's Rep 586, 588

[42] *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339

[43] [1990] 1 Lloyd's Rep 52, 77 – In this instance the cause was identified as a breakdown of the steering system which rendered the ship unseaworthy and the carrier's liable for failing to exercise due diligence

[44] [1951] 2 Lloyd's Rep 265, 272

[45] S Hetherington, 'The onus of proof in cargo claims: contract or bailment? Part 1' (2019) 25 JIML 105 *passim* but see particularly p 116; a phrase used in cases such as *Leesh River* [1966] 1 Lloyd's Rep 450, 457; *Silver v Ocean SS Co* [1930] 1 KB 416 *per* Scrutton LJ; C Murray *et al*,

Scrutton only refers to the carrier needing to "excuse himself under Art IV, or under some other exception in his contract permitted by the Rules".[46] Clarke expresses it in no fewer than three different ways as the carrier showing it was the "immediate cause",[47] "circumstances closely surrounding the peril",[48] and as having "raised" an exception.[49] He also asserts that if the carrier has proven the cause was an exception, the cargo-interest may still prove the underlying cause was unseaworthiness.[50] Cooke refers to it as the "operation" of an exception.[51] Cooke adds to the lack of clarity by initially asserting that the carrier cannot rely on the exceptions where loss "results" from unseaworthiness, to say only two paragraphs later that they can rely on the exceptions if the "want of due diligence was not causative of the loss or damage".[52]

Stage 3

The third stage encapsulates what is referred to as the "overriding obligation" of the carrier.[53] Where the carrier proves it was caused by an exception under Art IV.2, the cargo-interest may subsequently prove non-delivery was actually caused by unseaworthiness under Art III.1, denying the carrier reliance on their exception.

It is, perhaps, an unfortunate choice of words that has lead some to argue that the carrier is liable where the vessel is unseaworthy regardless of the cause.[54] However, regardless of who has the burden of proof, it is well settled that only if the cause of non-delivery was unseaworthiness then the carrier will be liable, subject to stage 4.[55]

Schmitthoff: The Law And Practice of International Trade (Sweet & Maxwell 12th ed, 2012) 343 – use a similar phrase "comes within an exception"

[46] *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) 14-043; *cf. The Torenia* [1983] 2 Lloyd's Rep 210, 219 citing *Scrutton*, 218 where it was noted therein that the shipowner must show the cause of the loss was one of the expected perils

[47] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 139

[48] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 166

[49] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 168-69

[50] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 183

[51] J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.113

[52] J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.255, 85.257

[53] The phrase's genesis may be traced to *Paterson SS Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] A.C. 538 at 544–545, PC

[54] *Glencore Energy UK Ltd v Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388 at [66]; *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) 14-074; J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014), 85.113; W Tetley, *Marine Cargo Claims*, (Toronto, 1965) 93 as discussed in M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 139ff

[55] For a few selected cases demonstrating this, see, *The Libra* [2020] EWCA Civ 293 at [68]-[70]; *Compania Sud Americana de Vapores S.A. v. Sinochem Tianjin Import and Export Corp. (The Aconcagua)* [2010] 1 Lloyd's Rep 1, 48-9; *The Isla Fernandina* [2000] 2 Lloyd's Rep 15; *The "Polessk" and the "Akademik Iosif Orbeli"* [1996] 2 Lloyd's Rep. 40, 45; *Mediterranean Freight Services v BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep. 506, 508, 510, 512, 522; *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)* [1990] 2 Lloyd's Rep 39, 48, 50; *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589, 602-3; *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997, 1004-5; *Kish v Taylor* [1912] AC 604;

It is a general principle of negligence claims that the court is only concerned with actual losses caused by the negligent conduct and not policing the execution of the contract.[56] The consequence of this is that the obligation under Art III.1 and its relationship with Art IV bears no distinction to that under Art III.2 and Art IV.[57] Both restrict claims to non-delivery caused by the carrier's fault and are both subject to the exceptions in Art IV.2.[58]

The basis for shifting the legal burden of proof on to the cargo-interest under Art III.1 is implication in fact. The common law authority for this position is *The Glendarroch*. It held that the carrier's obligation to redeliver the cargo was "absolute".[59] If the contract contained no exceptions and the cargo was lost or damaged, it would not matter if the carrier had been negligent or not. Therefore, if the carrier did have an exception to liability, which was 'perils of the sea' in this case, it would have to be inferred in that exception that it did not apply where the non-delivery was caused by the carrier's negligence. In a contract of carriage the justification for delimiting the carrier's exceptions in this way is that the parties could not possibly have intended to exclude liability for such a fundamental obligation of the carrier to care for the cargo in redelivering it, unless a proper construction of the contract led to that conclusion.[60] Having reached this conclusion, Lord Esher held that it lies on each party to prove the part of the exception that they claim.[61] Relying on *The Glendarroch*, McNair J stated that if a shipowner demonstrates negligent navigation "with no relevant exception of unseaworthiness" it shifts the burden of proof to the cargo-interest to prove negligence affirmatively.[62]

The Rules did not alter who bears the burden of proof in a contract of bailment because it is not a complete code. The long-route considers that the approach taken

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The Europa [1908] P 84; *McFadden v Blue Star Line*, [1905] 1 K.B. 697, 703; This is also true in the US. See, for example, US Carriage of Goods by Sea Act, §4(2); *Re M/V MSC Flaminia*, 339 F. Supp 3d 185 (2018); *Usiminas v Scindia Steam Navigation Company Ltd ("The Jalavihar")* [1997] USCA5 1466; 118 F.3d 328; *Deutsche Shell Tanker Gesellschaft v. Placid Refining Co*., 993 F.2d 466 (5th Cir. 1993);

[56] D Nolan and J Davies, 'Torts and Equitable Wrongs', in A Burrows (ed), *Oxford Principles of English Law: English Private Law* (OUP 3rd ed, 2013) 17.67

[57] Previously, M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 159-63, considered that the common law view of Art IV.1 was that it spells out the negative implications of Art III.1 and cases see that reflecting the assumption that Art III.1 is an overriding obligation. Yet the cases cited are pre-1980, when the doctrine of fundamental breach was overruled by the House of Lords, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. Once Clarke accepts causation is a necessary element of unseaworthiness liability it is difficult to see how those common law statements can be sustained, for unseaworthiness has no effect on the exceptions if it was not the cause. See also at 124-25

[58] See, *The Volcafe* [2018] UKSC 51 at [17]-[18] – where Lord Sumption appears to acknowledge this by referring to "the relationship between Art III and IV" and not specifically Art III.2 and Art IV.2.

[59] *The Glendarroch* [1894] P 226, 230

[60] *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] QB 400, 419; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (No 1)* [1968] 1 All ER 811, 822, 824

[61] *The Glendarroch* [1894] P 226, 231, 232

[62] *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 271

in *The Glendarroch* is enshrined in Art IV.1.[63] Incorporating The Rules has the effect as a matter of contract. Art IV.1 explicitly requires the carrier to disprove fault if the cause of non-delivery was unseaworthiness. Therefore, by incorporating The Rules into the contract, it is implicit that the cargo-interest has proven the cause of non-delivery was unseaworthiness. The main authority advocating the implication under The Rules is *Minister of Food v Reardon Smith Line*.[64] In obiter, it observed that ascertaining who bears the burden of proof is a matter of contract and Art IV.1 "strongly supports… that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage resulted from unseaworthiness".[65] *The Libra* supported this position:

> Article IV r.1 provides that where loss or damage results from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier. Thus it deals with the burden of proof for the purposes of Article III r.1. It is implicit in Article IV r.1 that the burden of proving causative unseaworthiness must lie upon the cargo owner. For the article assumes that such unseaworthiness has been established.[66]

Stage 4

The final stage is if the non-delivery was caused by unseaworthiness the carrier may still set up a defence of due diligence.[67] In *The Theodegmon* the stranding of a vessel was:

> A peril of the sea, the onus is on the plaintiffs to prove that the stranding was itself caused by unseaworthiness that existed when the vessel commenced her voyage… The onus will then shift to the defendants to show that the casualty was not attributable to any want of due diligence on their part.[68]

Therefore, only at this fourth stage does the carrier's behaviour become a relevant consideration in the legal burden of proof.

In what may be described as a fifth stage, the carrier may still avoid liability where they have not exercised due diligence if they prove non-delivery would have occurred anyway. In *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)*, the cargo-interest was liable to contribute in general average despite the absence of due

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[63] See, for example, *The Libra* [2019] EWHC 481 at [57]; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272; S Hetherington, 'The onus of proof in cargo claims: contract or bailment? Part 1' (2019) 25 JIML 105, 109 – who points out that given it was unclear where the burden of proof rested before The Rules, this could be interpreted either way; *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242; M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 159-63

[64] [1951] 2 Lloyd's Rep 265; It is cited by several sources for the position that the cargo-interest has to prove the cause was unseaworthiness including: *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) 14-072; *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242; J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.254; C Murray *et al*, *Schmitthoff: The Law And Practice of International Trade* (Sweet & Maxwell 12th ed, 2012) 343

[65] *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272

[66] *The Libra* [2019] EWHC 481 at [57]; Another example advocating this implication can be found in, *The Polessk and the Akademik Iosif Orbeli* [1996] 2 Lloyd's Rep 40, 45

[67] HVR, Art IV.1; *Smith Hogg v Black Sea & Baltic General Insurance Co* [1940] AC 997, 1001; The traditional test for whether due diligence has been exercised would apply, see, *McFadden v Blue Star Line* [1905] 1 KB 697, 706

[68] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54

diligence by the carrier in inspecting the ship's gearbox. It rendered the ship unseaworthy and the ship subsequently disabled, requiring the cargo to be salvaged. Had the check been carried out diligently it is unlikely the fault would have been noticed in any event.[69] Therefore, the failure to exercise due diligence was not the cause of non-delivery.

A Matter of Contract: Is it implied that the cargo-interest prove causative unseaworthiness?

For the long-route to work, it requires reconciliation between causation and implication of terms. On the one hand the carrier has to prove the cause of non-delivery was an exception at stage 2. On the other it says it is implied that the cargo-interest proves the cause was unseaworthiness at stage 3 because the carrier has to disprove fault at stage 4. Yet, if the carrier is required to prove the cause of the non-delivery was an exception under Art IV.2, the exigencies of causation include disproof of negligence. If that is correct, the test for implication of terms in fact, that the term must be necessary for the contract to function, cannot accommodate a term requiring the cargo-interest to prove the cause of non-delivery was unseaworthiness. In light of *The Volcafe*, we can see that the contract can function perfectly well by having the carrier prove causation under stage 2 exclusively.

The Volcafe

The first ruling from *The Volcafe* to acknowledge is that the contract is one of bailment for reward.[70] The first principle of this type of contract is that the carrier must exercise due care in the performance of the contract.[71] The second principle is that the legal burden of proof is cast upon the bailee.[72] We have seen in stage 2 that it is implied that the carrier has to prove they were not at fault under Art IV.2 to meet the cause of action established in stage 1.

This leads to the second and third ruling. The second is that exceptions under Art IV.2 are a matter of causation.[73] Unlike Lord Esher who cast the carrier's liability as

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[69] *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)* [1990] 2 Lloyd's Rep 39; see also, *Papera Traders v Hyundai Merchant Marine (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719, 735–38

[70] *The Volcafe* [2018] UKSC 51 at [8]

[71] *The Volcafe* [2018] UKSC 51 at [8]

[72] *The Volcafe* [2018] UKSC 51 at [9]

[73] *The Volcafe* [2018] UKSC 51 at [9], [25]; While contractual exclusions exclude liability and exceptions do not exclude liability but define the duty of the carrier, *Trade and Transport Inc v Iino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210, both, generally, have the outcome of precluding reliance them if the cause was of the breach was negligence, *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] QB 400, 419; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (No 1)* [1968] 1 All ER 811, 822, 824 (common law); *The Volcafe*; *Mediterranean Freight Services v. BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep. 506, (The Rules), except where the contract, on a proper construction, permits it, *Madras Electrical Supply Co v P & O Steam Navigation Co* (1924) 18(4) LI L R 93, 96, which would not be possible under The Rules, Art III.8; *The Hollinda aka The Morviken* [1983] 1 Lloyd's Rep 1. As such, it is unnecessary to draw any such distinction here between exclusion clauses and exceptions that lawfully excuse performance

absolute in the absence of contractual exceptions, a carrier may meet the cause of action by either proving the cause was not an absence of reasonable care, i.e. caused by an exception under Art IV.2, or that they did exercise care under Art III.2.[74] Of the former, Lord Sumption stated that "where absence of fault is part of the test for the exception … if an exception is subject to an exception for cases where it was avoidable by the exercise of due care, then the issue must ultimately be one of causation".[75] Absence of fault was not an implied exception upon exception. That would "import a refinement of some subtlety, unrelated to any commercial purpose which the parties can sensibly be thought to have had in mind".[76] Therefore, a carrier must prove facts that show the exception "was the effective cause of the damage".[77] If the carrier has to prove the cause was an exception under Art IV.2, it would be "incoherent" to have the cargo-interest prove the same fact under Art III.2.[78] This meant that for the carrier to prove the exception was the effective cause they would have to disprove negligence as the cause for the "purpose of invoking an exception under article IV.2, just as he has for the purpose of article III.2".[79]

This second ruling meant the third was to overrule *The Glendarroch* as providing any *general* rule on where the burden of proof rests.[80] Previously, Art III.1 and Art III.2 cases have used *The Glendarroch* without discrimination, that is, both obligations of the carrier were seen as exceptions to the carrier's exceptions.[81] Thus, *The Volcafe* did not overrule *The Glendarroch* specifically in relation to Art III.2 but generally. Since the long-route draws significant support from *The Glendarroch* for its position, it throws those authorities and the long-route into doubt. It means that Art IV.2 requires the carrier to disprove fault regardless of which obligation in question. While *The Volcafe* does not expressly state that Art IV.1 does not imply that the cargo-interest prove the cause of non-delivery was unseaworthiness, that is the consequence of the second and third ruling. That is what we shall now turn to.

Implication of Terms and Art III.1: Causation and balance of probabilities

If stage 2 places a legal burden of proof on the carrier to prove the cause was an excepted event, a carrier must meet the civil standard of proof to discharge this burden: on a balance of probabilities non-delivery was caused by the excepted event. The civil standard shows why disproof of negligence is an exigency of proving causation under Art IV.2 and subsequently why it cannot be implied that a cargo-interest proves the cause of non-delivery unseaworthiness under Art III.1.

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[74] *The Volcafe* [2018] UKSC 51 at [9], [25], [33]; See also, M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 159-63
[75] *The Volcafe* [2018] UKSC 51 at [32]
[76] *The Volcafe* [2018] UKSC 51 at [32]
[77] *The Volcafe* [2018] UKSC 51 at [32]; citing *Coldman v Hill* [1919] 1 KB 443; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (No 1)* [1968] 1 All ER 811, 822, 824; see also *The Torenia* [1983] 2 Lloyd's Rep 210, 216; *Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466
[78] *The Volcafe* [2018] UKSC 51 at [18]
[79] *The Volcafe* [2018] UKSC 51 at [33], see also at [17]-[18], [25]
[80] *The Volcafe* [2018] UKSC 51 at [33]
[81] For a general exposition of this see, *Paterson SS Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] A.C. 538 at 544–545, PC

As we have seen in *The Volcafe*, an exception to an exception is ultimately a matter of causation. The court must decide if the non-delivery was caused by the excepted event or the absence of due care in providing a seaworthy vessel. Making this assessment against the carrier's legal burden under Art IV.2, whether cause was an excepted event on a balance of probabilities, the court applies "common sense".[82] This may loosely translate into a person caused the harm complained of if they ought to be responsible for it because it would not have happened but for their want of due care.[83] A particular strong case can be made for this when a breach of duty is involved in the non-delivery.[84] To prove they should not be responsible for it, this requires the carrier to "condescend to particularity in the matter".[85] They cannot simply rely on a "ritual incarnation" of an excepted event,[86] or point to one as a cause.[87] The carrier must prove the effective cause of non-delivery was an exception and, therefore, were not at fault for non-delivery.[88]

What the long-route does is put the cart before the horse. It assumes the carrier took care when they look to prove the cause of non-delivery was an excepted event and only if the cargo-interest proves the cause was unseaworthiness must they prove they exercised care. But a carrier cannot just prove an excepted event occurred to discharge their legal burden.[89] They must show it was the cause on a balance of probabilities. Disproof of negligence is an exigency of causation because excepted events do not happen in a vacuum. Exceptions under Art IV.2, such as perils of the sea, inherent vices, quarantine restrictions apply only when they are the cause of non-delivery. If there is evidence that reasonable care under Art III.1 could guard against non-delivery and we do not know material facts regarding the care exercised by the carrier, can we say the cause has been proven on a balance of probabilities? The answer must be no.[90] Thus, while the carrier proving an excepted event occurred may place an evidentiary burden on the cargo-interest to produce evidence that puts

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[82] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 956

[83] See, L Hoffmann, 'Causation' (2005) 121 LQR 592; but see, *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, which recognised 'but for' is only one way of proving the test for causation; as acknowledged in D Nolan and J Davies, 'Torts and Equitable Wrongs', in A Burrows (ed), *Oxford Principles of English Law: English Private Law* (OUP 3rd ed, 2013) 17.68

[84] J Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, 392

[85] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 954

[86] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 953-54; see also, *The Torenia* [1983] 2 Lloyd's Rep 210, 215

[87] *The Volcafe* [2018] UKSC 51 at [32]

[88] For examples where the bailee sought to satisfy the court they had taken care on a balance of probabilities, see, *Arlington Productions Ltd v Pinewood Studios Ltd* [2004] EWHC 32, QB at [46]-[48]; or *The City of Baroda* (1926) 25 Ll L Rep 437 – where the defence focused on the security in operation to show they exercised reasonable care against theft after cargo went missing

[89] *La Compania Martiartu v Royal Exchange Assurance Corporation* [1923] 1 KB 650, 657

[90] As held in *La Compania Martiartu v Royal Exchange Assurance Corporation* [1923] 1 KB 650; and affirmed by the House of Lords in *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 956

the seaworthiness of the vessel in question, it would not shift the legal burden of proof to them to prove it was caused by unseaworthiness.[91]

We can look at the example exceptions of inherent vice, negligent navigation and management, perils of the sea, and fire to illustrate how absence of material facts regarding the care taken would mean the carrier should fail to establish them as the cause of non-delivery under Art IV.2. In these instances where competing theories exist as to causation between Art III.1 and Art IV.2, or the cause is simply unknown, the court cannot simply choose what happened. A third route remains open to them. That is, the cause cannot be determined and ultimately whoever has the legal burden of proof fails. Since it falls to the carrier to prove the cause was an excepted event, it is they who should fail, not the cargo-interest.[92]

Inherent Vice

We can start with the example of inherent vice. In *The Volcafe*, the fact coffee beans emit moisture when shipped from warm to cold climates can only be considered an inherent vice "if the effects cannot be countered by reasonable care".[93] The industry practice in taking reasonable precaution against the inherent vice was to line the shipping containers with two layers of Kraft Paper. All the carrier had established was moisture damage at an evidentiary level. They could not establish if they had lined the containers with two layers of Kraft Paper. Where the carrier does not exercise care to prevent that type of damage occurring, if the cargo suffers damage the cause is not inherent vice but failure to take care of the cargo, unless the contract provides otherwise.[94] On a balance of probabilities the court could not determine if the carrier was not at fault and, therefore, has not discharged their legal burden of proof.

While *The Volcafe* concerned Art III.2, the same can be seen in the Art III.1 case of *The Good Friend*. A ship that is not fit to receive the cargo, the cause is not the inherent vice but unseaworthiness. Seaworthiness "includes an obligation to see that the ship is fit for cargo service. Where the particular service is specified in the contract, it is an obligation to see that the ship is fit to carry the specified cargo on the specified voyage".[95] A carrier cannot rely on inherent vice when reasonable care in providing a seaworthy ship could guard against it. The carrier has not discharged the burden of proof in establishing inherent vice by merely evidencing the soya bean meal was infested with insects when evidence is produced to show that there may have been an infestation already onboard.[96] For example, the infestation's life-cycle could not be completed at the port of loading due to insufficient temperatures, so

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[91] See, for example, *The Makedonia* [1962] 1 Lloyd's Rep 316, 337; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272; M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 159-63

[92] *Rhesa Shipping Co SA v Edmunds; Rhesa Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 951, 954; see also *Compania Martiartu v Royal Exchange Assurance Corporation* [1923] 1 KB 650, 657

[93] *The Volcafe* [2018] UKSC 51 at [34]

[94] *Albacora SRL v Westcott and Laurance Line Ltd* (1966) SC (HL) 19

[95] *The Good Friend* [1984] 2 Lloyd's Rep 586, 592; see also *G E Dobell & Co v Steamship Rossmore Company Ltd* [1895] 2 QB 408, 414

[96] *The Good Friend* [1984] 2 Lloyd's Rep 586, 590, 591, 595

there was evidence that the infestation was already aboard the ship.[97] If we do not know the care they took in dealing with possible infestation prior to loading to make the ship seaworthy for the particular cargo, inherent vice as the cause of non-delivery has not been established on a balance of probabilities.

Navigation and Management of the Vessel

The next example is navigation and management of the vessel. In both *Standard Oil of New York v Clan Line Steamers* and *The Libra*, while the carriers' crews had been negligent in the management and navigation of the vessel,[98] which was the immediate cause of the loss, they would not have been but for unseaworthiness of the vessel.[99] Where a master steers the vessel outside the buoyed fairway into a "no-go" zone, as the depths less than chartered existed outside the fairway,[100] or pumps out water that keeps the ship afloat,[101] a court and cargo-interest would want to know why they would do something that clearly endangers the safety of the ship and its cargo. In both instances it was evidenced that the crew had not been given the proper information. If it cannot be evidenced the care taken by the carrier in furnishing the crew with the proper information in managing and navigating the ship, the civil standard of proof cannot be satisfied. In *The Libra* the passage plan had not been updated by the carrier.[102] In *Clan Line Steamers* the master had simply not been told the turret ship's ballast tanks required 290 tons of water to give the ship stability.[103] Therefore, the cause of non-delivery was not negligent management and navigation of the vessel but unseaworthiness.[104] Presented with such facts, it raises the possibility that the carrier's negligence in not informing the master before the voyage was the cause of non-delivery.[105] To prove that negligent management and navigation was the cause of non-delivery on a balance of probabilities, the carrier would need to satisfy the court it was not caused by negligence under Art III.1.

Perils of the sea

Evidencing a peril of the sea is not enough to satisfy a balance of probabilities test in the absence of material facts about the care taken by the carrier in avoiding such perils. Ships do not simply run aground or let in seawater, for example. In *Rhesa Shipping*, an unexplained aperture in the side of the ship did not establish on the balance of probabilities that the cause was a peril of the sea, in this case an unconfirmed submarine collision.[106] There was no evidence that there was a

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[97] *The Good Friend* [1984] 2 Lloyd's Rep 586, 590
[98] *The Libra* [2019] EWHC 481 at [54]; *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 120; see also *The Theodegmon* [1990] 1 Lloyd's Rep 52
[99] *The Libra* [2019] EWHC 481 at [90]; *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 110, 114, 123
[100] *The Libra* [2020] EWCA Civ 293 at [3]-[9]
[101] *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 111
[102] *The Libra* [2020] EWCA Civ 293 at [3]-[9]
[103] *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 111
[104] *The Libra* [2019] EWHC 481 at [90]; *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 107-8, 110, 114
[105] *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 114
[106] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 953-55, 957

submarine collision.[107] This left the court in doubt about the cause and held the carrier had not proven non-delivery was caused by perils of the sea. Only if all material facts had been known and the submarine theory, however improbable, was the only explanation remaining, would the court have been satisfied the burden had been discharged.[108]

In *Dobbie v Williams*,[109] cargo was damaged by severe weather. It could not be established whether sufficient dunnage was used to protect the cargo. If the court had approached the question on a balance of probabilities, without any evidence about dunnage it indicates the carrier did not exercise care or know whether or not they did. Therefore, they should fail on a balance of probabilities unless they could show that even if they had used sufficient dunnage the severe weather would have caused non-delivery anyway.

The same approach should have been taken in *The Hellenic Dolphin* and *The Theodegmon*. In *The Theodegmon* the mere evidence that the ship had run aground should not satisfy the test, if the care taken by the carrier is unknown at that point. *The Theodegmon* rejected the cargo-interest's submission that the burden rested entirely on the carrier. Counsel had argued it was for "the defendants to show that the stranding of *The Theodegmon* was of a type which did constitute a peril of the sea".[110] They added they had to "demonstrate how the stranding occurred. An unexplained stranding was not a peril of the sea".[111] The contention was that the carrier had to do more than show the ship had run aground.[112] Phillips J described the loss as "caused by a peril of the sea", when a stranding remained unexplained, but later acknowledged the cause was the unseaworthiness of the vessel once proven by the cargo-interest that it ran aground due to a steering gear breakdown.[113] It is difficult to see how Phillips J was satisfied the carrier had discharged their legal burden of proof under Art IV.2 if there was evidence that the ship had a steering gear breakdown. The issue of unseaworthiness is clearly in point because we do not know if the carrier exercised due diligence in checking the gearbox. But even if there was no evidence about the state of the ship, in light of *Rhesa Shipping*, counsel's submission was correct. The carrier cannot rely on a ritual incarnation of "peril of the sea" to justify a grounding. They must provide particulars to satisfy their legal burden of proof. That would have revealed a gearbox breakdown. In such an instance the carrier would most likely look to prove they exercised care under Art III.1. As such, the rejection by Phillips J of counsel's submission was wrong in law.

Likewise, in *The Hellenic Dolphin*, the court ruled the carrier had satisfied the peril of the sea defence because there was a leak aboard the ship and the cargo-interest

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[107] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 953

[108] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 956

[109] *Dobbie v Williams* (1884) 21 Scotch LR 667

[110] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54

[111] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54

[112] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54

[113] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 77 – In this instance the cause was identified as a breakdown of the steering system which rendered the ship unseaworthy and the carrier's liable for failing to exercise due diligence

had failed to prove that leak existed before and at the beginning of the voyage. But there was evidence that suggested the ship may not have been seaworthy at the beginning of the voyage. It merely could not be ascertained when it occurred.[114] If we do not know about the care the carrier took in assessing the ship for potential sources of leaks before setting sail we cannot say that, on a balance of probabilities, the cause was a peril of the sea. As mentioned, there are two possibilities here, one that absolves the carrier and one that does not. The court cannot simply choose one theory over the other as they did here. It has a third option to say the precise cause remains unknown. Since it is the carrier's legal burden to prove cause of non-delivery was the excepted event, they should fail unless they prove the exercised due care under Art III.1, which in any case they had.[115]

That was the conclusion in *The Torenia*. While the incursion of seawater may of itself be a peril of the sea, a structural defect in the ship contributed to the loss. Where a ship lets in seawater through excessive corrosion there are competing theories about the cause of the damage to the cargo: peril of the sea or unseaworthiness. If a carrier does not prove that they exercised care under Art III.1 a carrier has not yet satisfied that on a balance of probabilities the cause was peril of the sea. For ships do not normally have holes in them before and at the beginning of a voyage.[116]

Fire

The final example is fire.[117] In *The Apostolis* the court was faced with two competing theories about how the loss was caused. One was fire from a discarded cigarette and the other was a spark from welding. The court found that because the carrier had proven the fire, the cargo-interest had failed to prove it was caused by unseaworthiness. The mistake made by the court should be evident. If the court is faced with competing theories about causation it cannot simply choose one over the other. A carrier must prove on a balance of probabilities that the fire was caused by the discarded cigarette. If they have not proven that they took care in the welding

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[114] *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 338ff

[115] *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 343

[116] *The Torenia* [1983] 2 Lloyd's Rep 210, 215, 221-22, 225

[117] It may be that the 'fire' exception takes on special considerations because it covers negligently started fires. See, *Glencore Energy UK Ltd v Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388 at [41]-[43], [45], [51], [64]-[66], [68]-[79], [86], [99]-[100] – where argument was rejected that "fire" excluded deliberately or negligently started fires in breach of Art III.2. This finding does not change the fact that the carrier must prove the cause was an expected peril under Art IV.2. The case only considers that negligently started fires are covered by Art IV.2(b). It is considered that this interpretation is wrong. By wrongly referring to Art III.1 as overriding, it does not properly consider the causative element. If we accept "fire" means "fire" however started, all exceptions could follow the same reasoning. "Quarantine" means "quarantine". "Inherent vice" means "inherent vice". Such circular reasoning does not explain why Art III.1 would "override" the fire exception while Art III.2 would not. There must be causative unseaworthiness and not unseaworthiness generally. Limited assertions about Art III.2 expressly being subject to Art IV.2 do little. However, it is beyond the scope of this article to consider the fire exception in detail, as there is authority that accepts the position taken in *The Lady M*; see also *The Torenia* [1983] 2 Lloyd's Rep 210, 219

operation to provide a seaworthy ship, we cannot say that a balance of probabilities that this was not the cause of non-delivery and the cigarette theory was.[118]

Does the carrier always have to disprove negligence?

If the carrier has to prove the cause was an exception under Art IV.2 the carrier may not have to go as far as disproving negligence in every case, as Wright J contended.[119] It is enough that they establish the cause was an exception, which still has the same consequence of proving they were not at fault. Lord Bankes stated "it is sufficient to show that in fact it was not caused by the absence of reasonable care and skill on the part of the bailee".[120] Likewise, in *The Volcafe* the carrier could prove *either* that it was not caused by want of care or that they did exercise care.[121] As such, it is possible that cause may be established without proof about the care taken by the carrier in providing a seaworthy ship. Such instances may well be rare. As we have seen, disproof of fault is an exigency of causation. Carriers cannot rely on a ritual incarnation of peril of the sea, and inherent vice that can be countered by reasonable care would both require some degree of proof on the carrier's part to show what care they took, for example.

Yet, under the long-route, stage 3 allows the cargo-interest to benefit from what may be described as an evidentiary "presumption" that non-delivery was caused by the unseaworthiness of the vessel if it sinks or the cargo suffers damage shortly after setting sail.[122] However, that fact simply forms part of the factual matrix once all other facts are taken into account.[123] We may infer that this is the same for the carrier's legal burden under Art IV.2. In fact there is support for it in *Reardon Smith Line*.[124] While McNair J supported the long-route, he acknowledged that there had been no evidence that unseaworthiness had anything to do with the damage to the cargo.[125] Therefore, if the carrier has not put the matter of Art III.1 in point by trying to prove an exception under Art IV.2, the cargo-interest would need to do so. For example, in *The Libra*, had the carrier proved that the ship was steered into a "no-go" zone and nothing else, the cargo-interest would, at least, have to raise the point that the crew

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[118] For other examples of the error made in applying the burden of proof to the fire exception, see *Mediterranean Freight Services v BP Oil International (The Fiona)* [1994] 2 Lloyd's Rep 506, 520, 523 – flammable goods shipped without notice but explosion caused by failure to clean the ship's holds; *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, 600 – crewman not informed of danger of defrosting scupper pipes with acetylene torch

[119] *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538, 545-46

[120] *The Ruapehu* (1925) 21 Ll L Rep 310, 315; see also *The Volcafe* [2018] UKSC 51 at [25] – the carrier can prove either loss without fault or cause was an expected peril; approved in *Glencore Energy UK Ltd v Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388 at [59]; *The City of Baroda* (1926) 25 Ll L Rep 437 – where the defence focused on the security in operation to show they exercised reasonable care against theft after cargo went missing

[121] *The Volcafe* [2018] UKSC 51 at [9], [25], [33]

[122] *Lindsay v Klein* [1911] AC 194, 197

[123] *The Torenia* [1983] 2 Lloyd's Rep 210, 215; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339-41; *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105, 139; *Pickup v Thames & Mersey Insurance Co* (1878) 3 QBD 594, 599

[124] See also, *The Makedonia* [1962] 1 Lloyd's Rep 316, 337

[125] *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272; see also *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 953

may have done so due to the carrier's breach of Art III.1, which may require them to satisfy an evidentiary burden that the passage plan was defective as a matter of fact.

Therefore, it is only those situations where there is no evidence or suggestion of unseaworthiness that the carrier may not have to disprove negligence under Art III.1. Otherwise, if reasonable care could counter the effects of the excepted event and material facts regarding the care exercised by the carrier remain outstanding, it would be difficult to conclude causation has been established on a balance of probabilities and the carrier was not at fault.

Implication of Terms and Art III.1: Necessity

If disproof of negligence is an exigency of causation under Art IV.2, the long-route wishes us to reconcile this with the proposition that at stage 3 Art IV.1 implies that the cargo-interest must subsequently prove the actual cause was unseaworthiness. Recall, the long-route's contention is that The Rules imply that the cargo-interest proves the cause of non-delivery was unseaworthiness because Art IV.1 expressly puts the burden of proof to disproving want of care under Art III.1 onto the carrier if the cause of non-delivery was unseaworthiness.

To imply a term into a contract, there are several expressions that act as a proxy for determining the parties' intention had they thought about it. However, and somewhat paradoxically, Lord Esher held in a case predating *The Glendarroch* that for a term to be implied in fact it must be necessary for the contract to function.[126] This proxy gives the court sufficient certainty that the implied term is what the parties would have agreed to had they thought about it.[127] In a commercial context, Lord Neuberger reconfirmed this high bar for implication, adding that a "term can only be implied if, without the term, the contract would lack commercial or practical coherence".[128] Reasonableness is insufficient to establish an implied term in fact.[129] This means that, for the long-route to work, it must be necessary for the contract to function that the cargo-interest proves the cause of non-delivery was unseaworthiness.

It is not necessary for the contract to function that the cargo-interest proves the cause was unseaworthiness under Art III.1. It is irreconcilable with the requirement that the carrier meets the cause of action by proving the cause of non-delivery was an exception under Art IV.2. As Lord Sumption said of Art III.2 and Art IV.2, there is

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[126] *The Moorcock* (1889) 14 PD 64 (CA); see also, *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 *Shirlaw v Southern Foundries* (1926), Ltd [1939] 2 KB 206 (CA)

[127] Similar tests of 'certainty' can be found across the common law world, *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 (PC) (New Zealand); *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 (HCA) (Australia); *Energy Fundamentals Group Inc v Veresen Inc*, 2015 ONCA 514 (Ontario Court of Appeal) (Canada); The US tends to rely on English authority E Farnsworth and Z Wolfe, *Farnsworth on Contracts* (4th edn, Wolters Kluwer 2019) 351 but see, for example, *Spinelli v NFL*, 903 F 3d 185, 128 USPQ 2d 1069 (2d Cir 2018); *City of Yonkers v Otis Elevator Co*, 844 F 2d 42 (2d Cir 1988) (America)

[128] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at [21]

[129] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at [23]

no real commercial purpose to implying a term upon an exception for liability that the carrier is not exempt if non-delivery was caused by their fault.[130] The matter is ultimately one of causation.

The same must be true between Art III.1 and Art IV.2. We have seen that the carrier must meet the cause of action by proving the cause of non-delivery was an excepted event.[131] That would require disproving negligence because liability is fault based. They must prove it was not caused by their want of care but some other excepted cause under Art IV.2. Disproof of negligence is an exigency of that burden because it is unlikely a carrier could meet the relevant civil standard of proof otherwise; that is if it is evidenced that due care could prevent the excepted event and material facts remain outstanding about the care taken by the carrier under Art III.1 the cause has not been established on a balance of probabilities.

There can be no commercial purpose that makes it necessary to limit the carrier's legal burden of proof under Art IV.2 to only proving excepted circumstances occurred, excluding considerations of the care they took under Art III.1 until after the cargo-interest has proved the cause of non-delivery was unseaworthiness. The contract can function perfectly well by having the carrier prove the cause of non-delivery exclusively, either by proving cause was an excepted event under Art IV.2, thus disproving negligence under Art III.1, or showing they did exercise care under Art III.1.

Existing authorities for the long-route

It is worth adding a brief discussion about the existing authorities that support the long-route. They are in the majority and may add more substantive grounds for placing the burden of proving the cause of non-delivery was unseaworthiness on the cargo-interest. However, they rely heavily on the now overruled decision in *The Glendarroch* and the implication of terms approach, rather than adding more substantive reasons. They are also often only obiter observations because cause had already been established as a matter of fact.[132] As such, the majority of opinions that support the long-route under The Rules fall away.

Recall that where the burden of proof rests under Art III.1 is determined by common law rules. At common law, who had to prove the cause of non-delivery was the carrier's negligence was uncertain under the different approaches discussed. Clarke has argued the long-route was the structure under common law.[133] Yet, other than *The Glendarroch*, reliance is placed on *Madras Electrical Supply Co v P & O Steam Navigation Co*.[134] Scrutton LJ was postulating about the possible structure of

[130] *The Volcafe* [2018] UKSC 51 at [32]
[131] *The Volcafe* [2018] UKSC 51 at [18], [32]
[132] *The Libra* [2019] EWHC 481 at [33], [54], [88]-[92], [129]; [2020] EWCA Civ 293 at [24]; *The Toledo* [1995] 1 Lloyd's Rep 40, 53-4; *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54, 77; *The Good Friend* [1984] 2 Lloyd's Rep 586, 588 590-91, 595 *Leesh River* [1967] 2 QB 250, 275; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272
[133] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 128
[134] *Madras Electrical Supply Co v P & O Steam Navigation Co* (1924) 18(4) LI L R 93

pleading and expressly stated "I do not propose to answer that interesting question".[135]

As mentioned, *Reardon Smith Line* is considered the main authority for the long-route and the implied term under The Rules. McNair J expressly relies upon the implication in The Rules and a bald acceptance of *The Glendarroch*.[136] A fleeting observation that Art IV.1 "strongly supports" such an implication does not make up for a rigorous analysis on whether it can be implied as a matter of fact. It is difficult to reconcile his approval of the long-route with his other observation, which noted that there were no facts evidenced that the damage had anything to do with unseaworthiness.[137] McNair J does not consider how, if there were such facts, this would impact the burden of proof structure he had approved. As we have seen, if there were such facts and we do not know the care the carrier took, we would have difficulty concluding the cause was negligent management of the vessel on a balance of probabilities. The carrier would have to disprove negligence to rely on the exception, making it unnecessary to imply a term that the cargo-interest prove the cause of non-delivery was unseaworthiness.

Subsequent cases to *Reardon Smith Line* have not developed the point. *The Hellenic Dolphin*, despite hearing argument on the point,[138] accepts *Reardon Smith Line* as "the truth" without further discussion.[139] In *The Polessk and the Akademik Iosif Orbeli* Clarke J gave a provisional view on the burden of proof without hearing argument on the point.[140] In *The Albacora* the judgments rejected Wright's J view[141] that the carrier had the burden of disproving negligence, but do not express any reasoning for doing so.[142]

In *Carver*, the authors say the "prevailing view" of where the burden of proof rests is the one that follows *The Glendarroch*.[143] Yet, authorities cited include *The Albacora*, *Reardon Smith Line*, *The Hellenic Dolphin* and the overruled Court of Appeal decision in *The Volcafe*. That leaves *The Theodegmon* and *The Good Friend*.[144] Neither case fell to be determined on onus of proof, as cause had been established, and they simply adopt restatements of the long-route.[145]

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135 *Madras Electrical Supply Co v P & O Steam Navigation Co* (1924) 18(4) LI L R 93, 96
136 *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 271-72 – McNair J said he need "only to refer to the well-known cases", which effectively support the position in *The Glendarroch*
137 *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265, 272
138 *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 338-41, see also *The Torenia* [1983] 2 Lloyd's Rep 210, 218
139 *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339
140 See, J Cooke *et al*, *Voyage Charters* (Routledge 4th ed, 2014) 85.109
141 *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 435-37
142 *Albacora SRL v Westcott and Laurance Line Ltd* (1966) SC (HL) 19, 27, 29-31; see also *The Volcafe* [2018] UKSC 51 at [26]-[27]
143 *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242; see also *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 24th ed, 2019) 14-072 who cites two cases one of which is *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265; and *Walker v Dover Navigation* (1950) 83 Ll L R 84
144 *The Good Friend* [1984] 2 Lloyd's Rep 586
145 *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54, 77; *The Good Friend* [1984] 2 Lloyd's Rep 586, 588 590-91, 595

The Theodegmon rejected plaintiff counsel's submission that the burden rested entirely on the carrier without giving reason beyond an acceptance of the long-route.[146] The rejection of this was based on accepting *The Hellenic Dolphin* and *The Glendarroch*. The "discussion" of the long-route that *Carver* refers to in *The Good Friend* is no more than a restatement of the long-route.[147] Particularly, when it comes to discussion of quarantine restriction, Staughton J only stated "it is proved that the discharge of the cargo at Havana was prevented by quarantine restrictions".[148] This then shifted the burden to the cargo-interest to prove the cause was unseaworthiness.[149] But if there was evidence that suggested the infestation was on board before the loading began and we do not know the care the carrier took at stage 2, this cannot be reconciled with Staughton J being satisfied that the carrier had discharged their legal burden.

While the long-route relies heavily on accounts adumbrated, often from single judges sitting in the High Court, where cause has been established, those advocating that the burden rests on the carrier often come from authoritative sources where the onus of proof was directly in point. *The Glendarroch* itself was not a reserved judgment. *Rhesa Shipping* offers a *per curiam* statement from a five strong bench in the House of Lords where the matter was directly in point. While Lord Sumption gave the only judgment in *The Volcafe*, Lords Reed, Wilson, Hodge, and Kitchin all agreed and the issue regarding proof where cause remained in doubt was directly applicable in the case. In *Gosse Millard*, onus of proof was important as "a matter of law".[150]

The Law of Bailments: A principled solution

The conclusion that no legal burden of proof is cast on the cargo-interest under Art III.1 and the carrier proves either cause of non-delivery under Art IV.2 or that they took care under Art III.1 is consistent with the principle of bailments that the bailee proves they were not at fault. The long-route, conversely is an unjustified departure from this principle. While intention may displace the principles of bailment, we have seen there is no such intention implied that the cargo-interest prove unseaworthiness was the cause of non-delivery. Therefore, the principle remains intact.

The principle that the bailee proves the cause of non-delivery was not their fault is expressly recognised by Lord Sumption. It is justified "on the ground that because the bailee is in possession of the goods it may be difficult or impossible for anyone else to account for the loss or damage sustained by them".[151] The bailee "must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage".[152] The principled basis for having the bailee disprove negligence is prevention of opportunism inherent in contracts of bailment. In

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[146] *The Theodegmon* [1990] 1 Lloyd's Rep 52, 54, 77
[147] *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-242
[148] *The Good Friend* [1984] 2 Lloyd's Rep 586, 588
[149] *The Good Friend* [1984] 2 Lloyd's Rep 586, 588
[150] *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 433-34
[151] *The Volcafe* [2018] UKSC 51 at [10]
[152] *The Volcafe* [2018] UKSC 51 at [9]; for another example, see, *Standard Oil of New York v Clan Line Steamers* [1924] AC 100, 116

a contract of bailment the carrier is in control and/or possession of the cargo.[153] In such contracts, there is a risk of things such as fraud, theft, or negligence. As early as *Woodlife's Case* it was recognised that where a defendant bailee alleges robbery with no facts a plaintiff can neither deny or admit those facts.[154] The cargo-interest may have no way of knowing what really happened to the cargo, so the burden is shifted on to the carrier to explain the cause of the loss or damage to mitigate such risks.[155]

Even if bailment principles did not apply, and the matter of who bears the legal burden of proof is to be resolved as a matter of contract or tort alone, the burden may still be placed on the carrier. Burden of proof should be determined out of common sense, policy, and logic.[156] McMeel recognised that having the carrier prove they were not at fault for non-delivery may simply be viewed as a pragmatic response to the information asymmetries that exist between the carrier and the cargo-interest once possession is transferred to the carrier.[157]

Other than implied intent, there is no justified reason offered by the long-route as to why non-delivery under Art III.1 could depart from the principle in bailment that the carrier proves the cause of non-delivery. Both obligations under Art III.1 and Art III.2 serve the same function. They emerged at common law to function as a counterbalance to the carrier's stronger bargaining position in the allocation of risk through exclusion clauses. The court ruled that unless a proper construction of the contract concluded that the parties intended to exclude liability for negligence, the exceptions did not cover non-delivery caused by the carrier's fault.[158] That would normally require an express statement that it did.[159] Therefore, both obligations are designed to ensure the carrier carefully delivers the cargo. Art III.1 is not taking on some distinct function. The cargo-interest has no particular interest in the ship used

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[153] *Cf. Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 – in executory bailment contracts, the carrier does not have to disprove fault because the carrier is not yet in possession of the goods. This case also concerned the doctrine of frustration and not non-delivery and implied terms

[154] *Woodlife's Case* (1597) Moore, 462, Owen, 57

[155] *Levison v Patent Steam Carpet Cleaning Ltd* [1978] QB 69; *BRS Ltd v Arthur V Crutchley Ltd* [1968] 1 All ER 811; *The "RUAPEHU"* (1925) 21 Ll L Rep 310, 315; *Bennett v Mellor*, 5 T. R. 276; see also, C Ezeoke, 'Allocating Onus of Proof in Sea Cargo Claims: The contest of conflicting principles' (2001) *Lloyd's Maritime and Commercial Law Quarterly* 261, 262-65; S Stoljar, 'The Early History of Bailment' (1957) 1 *American Journal of Legal History* 5, 30-1; W Jones, *An Essay on the Law of Bailments*, (Hogan and Thompson, 1836) 121-22, 166, 250-51; but *cf.* odd references to the bailor bearing the burden of proving negligence, see pp 108-9, 123, 249

[156] J Thayer, 'The Burden of Proof' (1890) 4(2) *Harvard Law Review* 45, 58-59; citing J. Bentham, *Works*, vi 139, 136

[157] G McMeel, 'The Redundancy of Bailment' (2002) *Lloyd's Maritime and Commercial Law Quarterly* 169, 183; However this article presumes *The Volcafe* was correct in its ruling that this is a bailment contract and thus governed by bailment principles and does not seek to discuss if there are any differences between bailment and contract and tort

[158] *The Torenia* [1983] 2 Lloyd's Rep 210, 217; *Paterson SS Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538, 544-45; see also *Carver on Bills of Lading* (Sweet & Maxwell 4th ed, 2017) 9-011; see also, *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] QB 400, 419; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (No 1)* [1968] 1 All ER 811, 822, 824

[159] *Madras Electrical Supply Co v P & O Steam Navigation Co* (1924) 18(4) LI L R 93, 96

beyond that.[160] The obligation in Art III.1 is there to make sure the carrier takes care of the cargo. There is no point in the carrier complying with their obligation to care for the cargo under Art III.2 if the vessel cannot safely carry the cargo according to Art III.1. Since the purpose of the obligation in Art III.1 is to have the carrier take care, the concerns emerging from opportunism in a bailment relationship do not disappear. There is still the risk that the carrier pleads an exception, such as peril of the sea, and the cargo-interest may have no way of knowing how that peril arose. It should still fall to the carrier to explain the non-delivery was not caused by their want of care.

Some have argued that the information asymmetries that justify the principle that the carrier disproves fault have been mitigated by modern advancements in the shipping industry.[161] Therefore the cargo-interest should prove causation. However, Lord Sumption acknowledged those concerns had not been completely eliminated.[162] It is considered here that calls to abandon the principle that the carrier proves the absence of fault as the cause of non-delivery too readily discount valid practical, structural, and sociological concerns in litigation.[163]

A cargo-interest is not normally going to commence a claim without some reasonable degree of certainty that they will win.[164] If the cargo-interest has to prove the cause of non-delivery was unseaworthiness, carriers may sense a low incentive for the cargo-interest to litigate and "will rationally be inclined to exploit information and positional advantages".[165] For example, they may engage in dilatory tactics, challenge pre-action disclosures, or simply refuse to call evidence. Legal complexities may also make bringing a claim within one year, as required by The Rules, impossible. For example, proving who the carrier is[166] or that unseaworthiness was the effective cause.[167] The long-route permits the carrier to plead what *Woodlife's Case* was concerned about. They plead an excepted event occurred and produce no further evidence about actions they took.[168] The cargo-interest is then forced to go on a phishing expedition to not just produce evidence the ship was unseaworthy but demonstrate it was the effective cause of non-delivery. Thus, the long-route runs the risk that the carrier will act opportunistically by forcing the carrier to prove causation and undermining their attempt to do so by delaying the action beyond a year.

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[160] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 139-42

[161] *The Volcafe* [2016] EWCA Civ 1103 at [50]-[51]; M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 177

[162] *The Volcafe* [2018] UKSC 51 at [10]

[163] For further discussion on these see, for example, W Tetley, *Marine Cargo Claims*, (OUP 4th ed, 2008) 889ff

[164] W Landes and R Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1

[165] M Moore, 'Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism' (2014) *Oxford Journal of Legal Studies* 1, 11.

[166] The Rules, Art III.6; For example, *Homburg Houtimport BV v Argosin Private Ltd (The Starsin)* [2003] UKHL 12; [2003] 1 Lloyd's Rep 571 – where it took four years to establish who the cargo-interest had an action against

[167] *The Isla Fernandina* [2000] 2 Lloyd's Rep 15

[168] As was the case in *The Glendarroch* [1894] P 226

The facts of *Rhesa Shipping* can illustrate this. The ship had sunk due to a large aperture in the ship, flooding the engine room and later flooding two after holds.[169] It was too deep for inspection.[170] If we follow the long-route, the carrier may plead peril of the sea and this is accepted as the legal cause at stage 2. The risk is that the cause of non-delivery was actually that the carrier had failed to perform their obligation to take care. The cargo-interest has no way of proving causation through their own inspection of the ship. They are reliant on the carrier being forthcoming with information. The cargo-interest is not going to commence the action without sufficient information. Sensing this lower incentive, the carrier may provide spurious reasons or engage in dilatory tactics to disguise their want of care and deter the action being brought. As such, only the most obvious actions would ever be brought.

Requiring the carrier to prove the cause of non-delivery was unseaworthiness does not carry the same level of concern. The carrier may not hold all the relevant facts where the loss is unexplained, but they are in a better position to assess and record the measures taken to care for the cargo and ship to show either the cause or that they took care. In most cases the immediate cause will be known, such as a defective passage plan,[171] a fire,[172] inherent vice,[173] or tank lids not being closed.[174] Indeed it is initially on the carrier to explain at least a cause. Therefore, the carrier is not required to prove they took all reasonable care to make the entire ship seaworthy. It is only aspects of the ships that are relevant to the non-delivery of the cargo where they need to show they exercised reasonable care. For example, in *The Libra* it was a finding of fact that the defective passage plan caused the loss and this amounted to unseaworthiness.[175] Therefore, placing the burden of proof on them only requires them to prove they exercised due diligence in furnishing the master with the correct passage plan or that it would have made no difference if they had done so.

It will only be in those rare cases where cause cannot be determined at all that the carrier may have to go as far as proving they exercised care in providing a seaworthy ship entirely.[176] The likelihood of such an event arising is reduced in the industrialised age of shipping where industry practice has developed from rudimentary ships navigating uncharted waters to, highly sophisticated means of tracking and transporting ships and their cargo.[177] It is more possible to explain non-delivery, at least in part, to allow the carrier to "condescend to particularity in the matter".[178]

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[169] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 952, 953, 954
[170] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 952, 953, 956
[171] *The Libra* [2019] EWHC 481
[172] *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The "Apostolis")* [1997] 2 Lloyd's Rep 241; *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589;
[173] *The Volcafe* [2018] UKSC 51, The Good Friend
[174] *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265
[175] *The Libra* [2019] EWHC 481 at [33], [54], [88]-[92], [129]; [2020] EWCA Civ 293 at [24]
[176] See, for example, *La Compania Martiartu v Royal Exchange Assurance Corporation* [1923] 1 KB 650, 657
[177] *The Torenia* [1983] 2 Lloyd's Rep 210, 214-15
[178] *Rhesa Shipping Co SA v Edmunds; Rhesea Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 954

Conclusion

The Volcafe has ruled that the carrier's liability is ultimately a matter of causation. The carrier must prove the cause of non-delivery was not due to their want of care under Art IV.2. If it is the carrier who must prove that the cause of non-delivery was not their fault, there can be no implied term that requires the cargo-interest to prove it was actually caused by the unseaworthiness of the vessel under Art III.1. The carrier must prove the cause was an excepted event under Art IV.2 on a balance of probabilities, which requires them to disprove it was caused by negligence. It is not necessary for the contract to function to have the cargo-interest prove the same fact under Art III.1. The matter of causation can be, and has been, dealt with exclusively by the carrier under their legal burden of proof.

That no burden is cast on the cargo-interest under Art III.1 is consistent with first principles in the law of bailment. In the absence of contrary intention, there is no reason to depart from the principle in bailment under Art III.1 that the carrier disprove fault. Requiring the cargo-interest to prove causation puts them at a significant disadvantage for they may have no way of proving what really happened. If all the carrier has to do is plead peril of the sea, the legal and non-legal obstacles will strike out all bar the strongest of actions, regardless of whether we know what actions the carrier actually took.

If the carrier wishes to escape liability for non-delivery they may make alternative pleadings. They may initially seek to explain the cause of non-delivery as an excepted event under Art IV.2. If they fail to do so the carrier may still look to Art III.1 or Art III.2 to absolve themselves of liability by arguing that they exercised due care. The outcome does not appear to offer any substantive difference to pleading Art IV.2(q). A simple explanation may well be any overlap between Art IV.2(q) and Art IV.1 is to calm concerns from litigation-averse shipowners and an overlap is not uncommon in The Rules.[179] Yet, even if this does fail, the carrier is still left with the possibility of explaining that, while they had not exercised care where the cause was unseaworthiness, had they done so the loss would have occurred anyway.

It is time to expressly recognise that common law does dictate, as a matter of intention and principle, a standard requirement on the legal burden of proof under Art III.1. That requirement is on the carrier.

[179] M Clarke, *Aspects of the Hague Rules: A comparative study in English and French Law*, (Marinus Nijhoff, 1976) 158