

Campbell Johnston Clark

Marine & Cargo Insurance Conference  
MCI 2019

# What a burden! Volcafe v CSAV [2018]

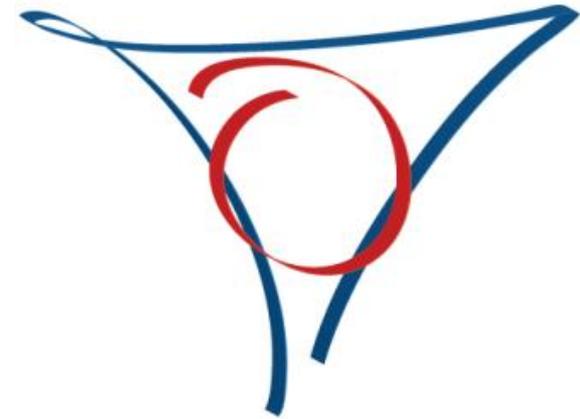
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PRESENTED BY  
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# What happened?

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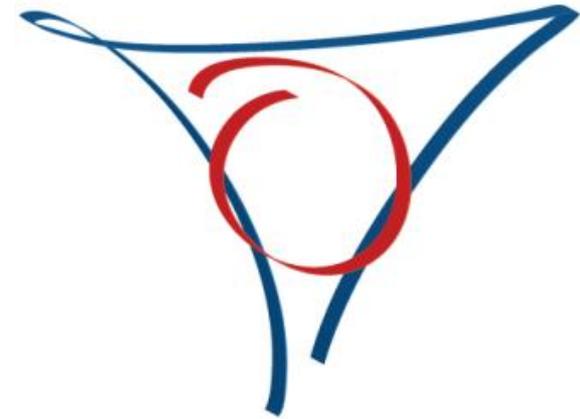
- 20 containers of Colombian coffee.
- Stuffed by the carrier
- Damaged by condensation
- About 2.6% affected.
- Total claim US\$ 62,500



# What went wrong?

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- Coffee is hygroscopic
- The containers were unventilated
- They were lined with Kraft paper
- But was it enough?



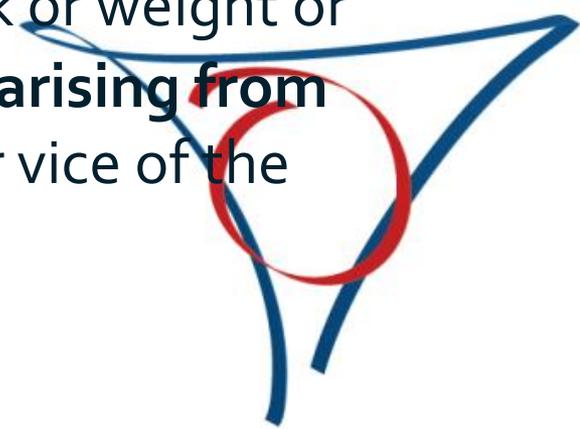
# Carrier's argument

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The carrier relied on Article IV.2 (m):

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from...

(m) Wastage in bulk or weight or any other **loss or damage arising from inherent defect**, quality or vice of the goods”

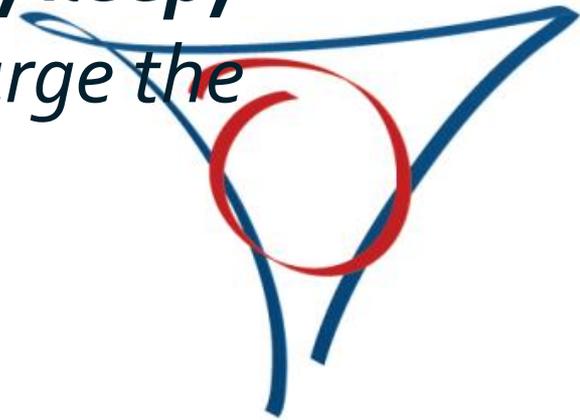


# Cargo's argument

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Cargo argued that the carrier breached its duty in Article III.2:

"Subject to the provisions of article IV, the carrier shall *properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*"

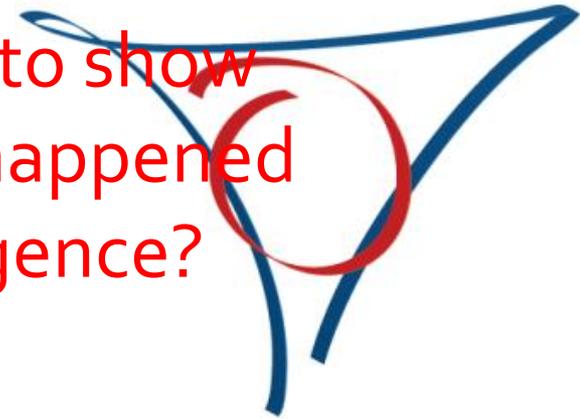


# First question of law

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If the goods which are being carried are damaged during the voyage – Article III r.2:

- is it for cargo interests to show that there was a failure by the shipowner to care for them, **or**
- for the shipowner to show that the damage happened without any negligence?

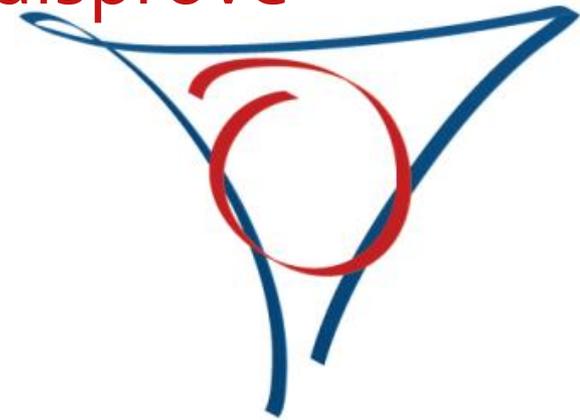


## Second question of law

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Once the carrier has proved facts coming within the inherent vice exception – Article IV.2 (m)

- is it for Cargo to prove negligence? **or**
- **for the carrier to disprove negligence.**

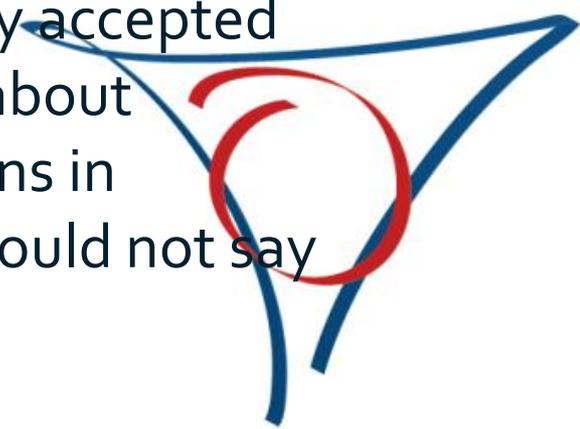


# First instance: [2015]

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Mr David Donaldson QC (Deputy HCJ) decided that:

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

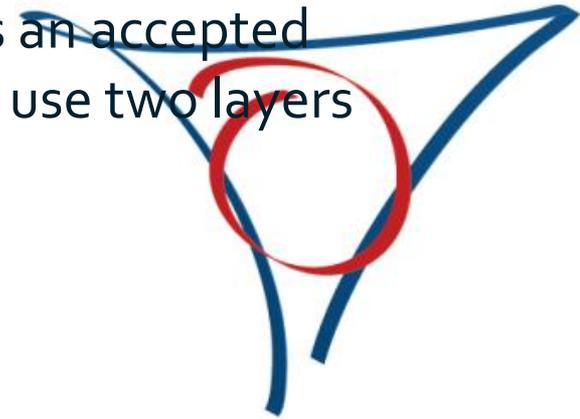


# Court of Appeal: [2016]

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The Court of Appeal - Flaux J gave lead judgment, holding that:

- if carrier showed that damage caused by relevant exception, it was for cargo interest to prove that did not apply because of negligence (exception to exception);
- no basis for concluding that CSAV negligent; and
- on the contrary, there was an accepted industry practice: namely, use two layers of paper of at least 80gsm

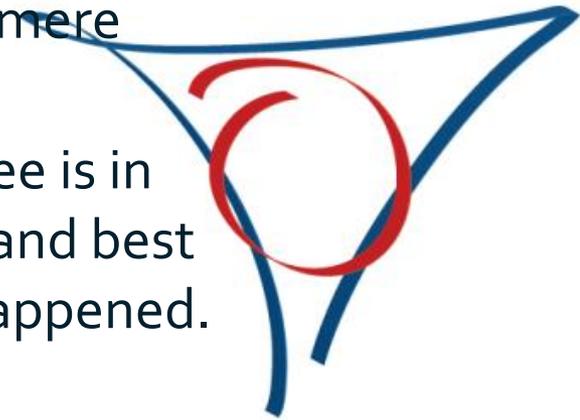


# Supreme Court decision: [2018]

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## Different approach to burden of proof – Article III r.2:

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



# Supreme Court: Cont...

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## Article IV r.2(m) "Inherent Vice":

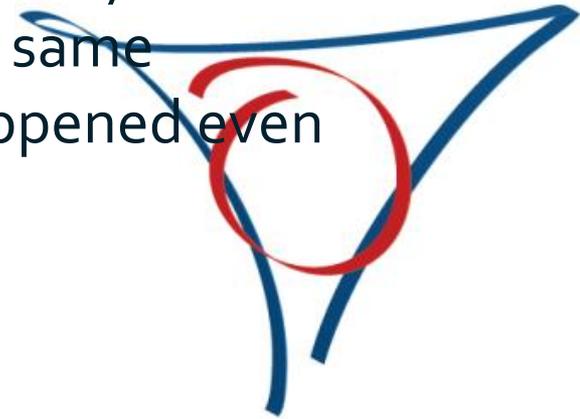
- If the carrier could and should have taken precautions which would have prevented characteristic from resulting in damage (e.g. carried in refrigerated hold), that is not "inherent vice".
- Follows that carrier must show he took reasonable care, or that same damage would have happened even if had done so. Impossible to separate propensity to deteriorate from standard of care.



# Summary of Volcafe

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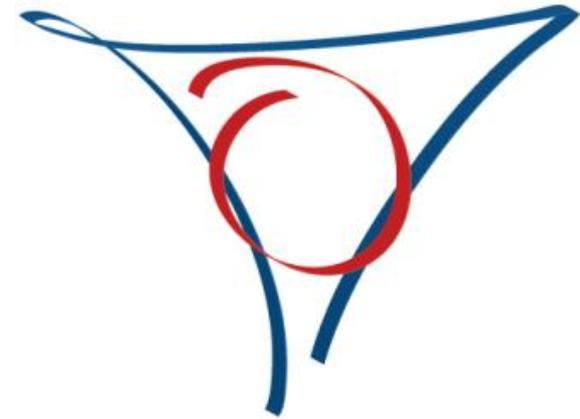
- If the goods which are being carried are damaged during the voyage the shipowner must show that the damage happened without any negligence – Article III r.2
- In order to rely on the Article IV r.2(m) “inherent Vice” exception, owners must prove that they took reasonable care, or that same damage would have happened even if had done so.



# Impact: industry practice - I

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- “Properly and carefully” means in accordance with a sound system.
- The sound system needs to be in place before the goods are loaded.



# Impact : industry practice -II

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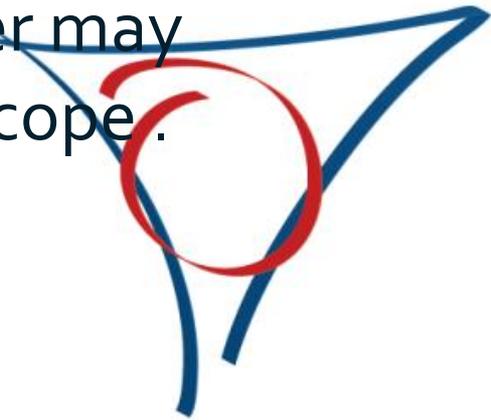
- The carrier needs to research the current industry “sound system” and ensure that the ship/the stevedores are aware of it and directed to follow it.
- The need for loss prevention work by P&I insurers and other industry leaders is enhanced.



# Impact: evidence gathering

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- Gather evidence early even if no specific allegations made.
- Include all aspects of the care of the cargo.
- Witness statements from the Master and Chief Officer may need to be broader in scope.



# Impact: pleadings

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- Current practice is for cargo to plead detailed allegations of negligence in Claim submissions, if they can.
- *Volcafe* means that they can just plead damage on outturn and leave it to the carrier to explain in the Defence what they did...
- And then reveal their actual case in the Reply.



# Impact: settlement

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- Carriers need to put forward evidence of proper and careful carriage.
- The standard of proof remains the balance of probabilities.
- *"courts very rarely decide issues of fact on the burden of proof. The trial judge is usually able to find some persuasive evidence, however exiguous, to break the impasse"*.

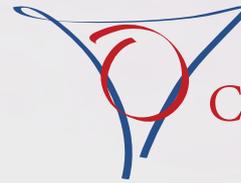


# And another thing...

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- The containers were stuffed ashore in a container yard.
- Hague Rules apply only from loading to discharge : Article I (e).
- Trial judge and CA held that carriage on “LCL/FCL” terms extended the scope of the Rules to the stuffing operation.
- An argument that this might cut across the application of the CMR was rejected.
- Not appealed in the Supreme Court.





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# Thank you

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