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CIRCULATED TO ALL MEMBERS, BROKERS AND DIRECTORS **15 NOVEMBER 2016**
ATTENTION INSURANCE DEPARTMENT

NORTH SUPPORTS MEMBERS IN OVERTURNING CARGO CARRIAGE JUDGMENT

We would like to advise Members of a recent successful appeal by North, on behalf of Members CSAV, against a UK High Court decision relating to the carriage of cargo in the case *Volcafe Ltd and others v CSAV.*

The Court of Appeal has this week overturned a decision of the High Court and restored the balance between the competing interests of shipowners and cargo interests in disputes over cargo damage. The first instance judgment handed down on 5 March 2015 overturned around 100 years of legal precedent, effectively penalised shipowners for following shipper's instructions and discarded well-established industry practise regarding the carriage of coffee in containers.

Had the High Court decision been allowed to stand, shipowners would have faced a significant increase in claims relating to hygroscopic cargos, including rice, coffee and other grains. Unable to rely on the defence of "inherent vice" save in very limited circumstances and subject to an enhanced definition of "*a sound system",* shipowners' liability would have increased to the level approaching that of a cargo insurer.

Identifying these risks CSAV, with the support of North P&I Club and acting on the advice of Mills & Co Solicitors mounted an appeal. Yesterday, this vision, determination and insight was rewarded as The Court of Appeal overturned the commercially unrealistic High Court decision and restored the contractual equilibrium between the opposing interests of shipowners and cargo interests in cargo damage disputes.

For more information, please refer to the background in Appendix A and read our press release at www.nepia.com/pressreleases/cargo

North has also published a new Loss Prevention Briefing *Carrying Coffee Beans in Containers* which Members can download from our website: http://www.nepia.com/media/500046/LP-Briefing-Cargo-Coffee-Cargo-November-2016.PDF

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APPENDIX A

The case involved the carriage of coffee in non-ventilated containers from South America to Northern Europe on LCL/FCL terms, meaning the carrier was responsible for stuffing the containers. This was done in accordance with shipper's instructions and established industry practice of the time. This involved un-ventilated containers being lined with two layers of Kraft paper to protect against the inevitable condensation.

During the voyage, as the containers moved from the warm South American summer to the cold North Europe winter, the coffee released water. Condensation kept forming throughout the voyage and soaked through the kraft paper before coming into contact with the bagged coffee. On outturn, around 2.6% of the coffee in each container suffered minor wet damage.

CSAV and North P&I Club obtained expert evidence from Brookes Bell confirming the cargo has been carried in accordance with established industry practise. Documentary evidence from the Stevedores at the port of loading also demonstrated that the containers were lined in strict accordance with the shipper's own instructions.

Notwithstanding this cargo interests sued the shipowners for damages alleging that the shipowners were negligent and in breach of their obligations under the Hague Rules to care for the cargo.

At first instance cargo interests failed to make good their technical criticisms against shipowners and the Judge made no finding of negligence against shipowners. However, instead of finding in favour of shipowners, the Deputy Judge changed the definition of what constitutes a "sound system" and found against shipowners on this ground. Vastly expanding what a "sound system" means the Deputy Judge imposed an obligation on shipowners to conduct an empirical study to ascertain exactly how much condensation would form on the walls of each container over the course of the voyage from South America to Northern Europe. Taking into account the relevant climatic conditions the Deputy Judge required Shipowners to independently determine the "correct" thickness of Kraft paper, notwithstanding shipper's instructions, to ensure that no coffee was damaged at all.

The Deputy Judge held that without undertaking such measures shipowners could not have adopted a "sound system" to care for the cargo. By holding this the Deputy Judge effectively changed the law on the Carriage of Goods by Sea and found shipowners liable.

This put an unrealistically and impossibly high threshold on shipowners in terms of care for the cargo. This is of particular concern for those in the container trade who carry thousands of different cargoes in millions of containers (of various types) every year. Taking this into account it would simply be impossible for container operators to undertake a detailed empirical study for every different type of cargo, carried via every potential method and in all potential environmental conditions in order to establish that they have adopted a "sound system". The container trade would grind to a halt.

Mr Justice Flaux, an experienced shipping judge, gave the leading judgment in the Court of Appeal and needless to say was critical of the first instance judgment. He re-confirmed that Shipowners are only obliged to take "reasonable" care of cargoes carried. "Reasonableness" is to be determined through reference to industry practice, which in this case, shipowners had followed.

Mr Justice Flaux accepted the expert evidence from the first instance hearing, finding that some wet damage to the cargo was inevitable in these particular climatic conditions and that even when following industry guidance it was impossible for the shipowners to ensure that there was no damage to the cargo whatsoever. Taking this into account Mr Justice Flaux confirmed shipowners only need take reasonable care of the cargo, which by following industry practise, CSAV had done.

Whilst the case has a clear relevance to any cargo claims involving hygroscopic cargoes, of which there are many, the case also has wider implications for many other cargo claims. The case also provides guidance on where the burden of proof lies in cargo claims. The Court of Appeal has confirmed that the burden lies on the cargo interests to establish negligence or unseaworthiness where the shipowners can come within the inherent vice exception under the Hague Rules.

These days it is relatively rare for shipping cases to come before the Court of Appeal, particularly given that most shipping contracts provide for arbitration rather than high court jurisdiction.

Therefore, the judgment provides welcome clarity from an experienced shipping judge in an appellate court that restores the balance between cargo interests and shipowners under the Hague Rules. It is this balance that has ensured that the Hague Rules (and the later Hague-Visby Rules) continue to be used around the world since their inception in 1924.