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a matter of judgment, not logic. It is also fair to observe that, unlike the Court of Appeal, he was not bound by the decision in *The Glendarroch*.

It has been said that in commercial law it is more important that the law is certain than that it is correct. The courts must provide the parties with a clear basis upon which to negotiate their contracts.<sup>45</sup> The Supreme Court reasoning in *Volcafe* is both simpler and clearer than that in the Court of Appeal, and it provides certainty.

Paul Todd\*

## DEFINING EXCEPTIONS FOR INHERENT VICE

### *Volcafe v CSADV*

The proceedings in *Volcafe Ltd v Compania Sud Americana De Vapores SA*<sup>1</sup> were recently brought to a conclusion by a unanimous decision of the UK Supreme Court. This note focuses on the meaning and scope of exceptions for losses arising from “inherent vice”.<sup>2</sup> Lord Sumption delivered the sole judgment, from which a number of insights can be drawn. Inherent vice exceptions are not “true” exceptions; they differ in scope depending on the contractual context in which they occur; but, generally, the scope of an exception for inherent vice is defined by “the nature of the service contracted for”.<sup>3</sup>

### Facts and the issue of inherent vice

The relevant facts can be summarised shortly. The claimants held bills of lading for consignments of bagged green coffee for carriage from Colombia to Bremen. The bills of lading were subject to English law and incorporated the Hague Rules: it was common ground that the defendant-carriers were responsible under the bill of lading contracts for preparing the containers for carriage and stowing the cargo therein. The cargo was shipped in unventilated containers, a common practice at the time. Coffee has a natural tendency to absorb, store and emit moisture: when carried in unventilated containers from a warm to a cooler climate, the beans “inevitably” emit moisture which may condense on the inside of the containers.<sup>4</sup> Accordingly, the defendant-carriers had lined the containers with Kraft paper. Despite this precaution, upon arrival at Bremen many bags of coffee had suffered water damage from condensation.

45. Eg, *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd’s Rep 301, 304; [1978] AC 1, 8 (observations of Lord Diplock). The Hague Rules were incorporated in *Volcafe* by contract. Of course, where they or Hague-Visby apply compulsorily, there is less scope for negotiating a liability regime, but everything else remains negotiable.

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1. [2018] UKSC 61; [2019] 1 Lloyd’s Rep 21; [2018] 3 WLR 2087 (hereafter “*Volcafe*”) (Lords Reed, Wilson, Sumption, Hodge and Kitchin); reversing [2016] EWCA Civ 1103; [2017] 1 Lloyd’s Rep 32; [2017] QB 915 (“*Volcafe CA*”); and restoring [2015] EWHC 516 (Comm); [2015] 1 Lloyd’s Rep 639.

2. Other aspects of the Supreme Court’s judgment are noted *ante*, 183.

3. *Volcafe*, [35].

4. *Ibid*, [3].

In response to the cargo owners' claims, the carriers argued, amongst other matters, that the damage had arisen from "inherent defect, quality or vice" of the cargo, which afforded them a defence under the Hague Rules, Art.IV(2)(m), because "the coffee beans were unable to withstand the ordinary levels of condensation forming in containers during passages from warm to cool climates".<sup>5</sup> The claimants contended, in response, that the damage arose from the carriers' negligent failure adequately to line the containers so as to protect the cargo from its own inherent characteristics.

### Inherent vice exceptions are not "true" exceptions

The Court of Appeal's approach to the inherent vice issue was driven by two premises. First, Flaux J held that the burden of proof under Art.IV(2)(m) shifted in two stages: initially, a carrier hoping to escape liability for cargo damage had to prove that it had been caused by inherent vice; then, cargo-claimants bore the burden of showing that the negligence of the carrier was causally relevant.<sup>6</sup> To require that the carrier disprove its own negligence was held to be impermissible, as being contrary to "the weight of the authorities"<sup>7</sup> beginning with *The Glendaroch*.<sup>8</sup> Second, inherent vice was a long-recognised excepted peril,<sup>9</sup> which needed to be defined in such a way that it could apply, in appropriate cases, even where a cargo of a "normal", "extensively carried" type suffered damage whilst being carried properly and carefully in accordance with a "sound system".<sup>10</sup>

These starting premises led Flaux J to seek to identify a concept of inherent vice, analytically distinct from the question whether the carrier had been negligent, which the carrier could hope to establish at the first stage of proof under Art.IV(2)(m).<sup>11</sup> He acknowledged the difficulties:

"there is inevitably a degree of overlap, if not of circularity, given the definition of inherent vice, in the sense that one is focusing on the ability of the cargo to withstand the ordinary incidents of carriage, pursuant to obligations of the carrier under the contract of carriage, so that if the carrier has not complied with those obligations, the exception will not apply...".<sup>12</sup>

Nevertheless, Flaux J sought this distinct concept of inherent vice in cases interpreting the Marine Insurance Act 1906, s.55(2)(c),<sup>13</sup> as in his view inherent vice "should be treated similarly, in the context of both carriage by sea and marine insurance".<sup>14</sup> Regrettably, those aspects of Donaldson LJ's judgment in *Soya v White*<sup>15</sup> upon which Flaux J relied in this regard

5. *Ibid.*, [4].

6. *Volcafe CA*, [50].

7. *Ibid.*, [50].

8. [1894] P 226; discussed *Volcafe CA*, [31–50].

9. *Volcafe CA*, [54].

10. *Ibid.*, [56–57], [68–73].

11. *Ibid.*, [53].

12. *Ibid.*, [55].

13. "... the insurer is not liable for ... inherent vice or nature of the subject-matter insured ..."

14. *Ibid.*, [58]. Writing extrajudicially, Flaux LJ (as he had become) confirmed that marine insurance reasoning was applied in *Volcafe CA*: Flaux LJ, "Doomed from the start: Inevitability of loss in commercial law—inherent vice and external causes" (The Lords Goff and Hobhouse Memorial Lecture, 7KBW, London, 18 January 2018) <https://7kbw.co.uk/wp-content/uploads/2018/01/The-Lords-Goff-and-Hobhouse-Lecture.pdf>, paras 36, 50.

15. *Soya GmbH Mainz Kommanditgesellschaft v White* [1982] Lloyd's Rep IR 136 (CA) (hereafter "*Soya CA*"); upheld [1983] 1 Lloyd's Rep 122 (HL) ("*Soya HL*")

had been authoritatively disapproved in *The Cendor MOPU*.<sup>16</sup> Moreover, from a second authority,<sup>17</sup> Flaux J could draw obtained only that inherent vice was conceptually different from inevitability of damage and could “include inherent qualities of an otherwise normal cargo”.<sup>18</sup>

Ultimately, the position reached by the Court of Appeal was “that the carrier need only prove that the cargo had an inherent propensity to deteriorate, but not that he took reasonable care to prevent that propensity from manifesting itself”.<sup>19</sup> This was unacceptable to Lord Sumption. One reason for this, it would seem, was that it effectively meant that the carrier would not bear the burden of proving that any such inherent propensity was the proximate cause of the damage. This emerges from Lord Sumption’s general rejection of the approach to the burden of proof in *The Glendarroch*: “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 ... If ... the burden of proving facts bringing the carrier within the exception lay on him, that must extend not just to the question whether the sea conditions were perilous, but also to the question whether that was the effective cause of the damage.”<sup>20</sup>

(In Lord Esher MR’s defence, it might be observed that his approach to the burden of proof in *The Glendarroch* seems naturally to complement that way of thinking about causation, acceptable at the time but now rejected, which emphasised isolating and labelling a series of discrete events in time—“distinct from one another as beads in a row or links in a chain”<sup>21</sup>—with the last in time being the “*causa proxima*”, etc.<sup>22</sup>)

Lord Sumption’s second reason for rejecting the Court of Appeal’s position stemmed from his view that it was “impossible” to identify an analytically distinct concept of inherent vice: “A cargo does not suffer from inherent vice in the abstract, but only in relation to some assumed standard of knowledge and diligence on the part of the carrier.”<sup>23</sup> Article IV(2)(m) applies only where the carrier establishes either that the damage to the cargo occurred despite its having taken reasonable care, or that taking reasonable steps to care for the cargo would have been ineffective “in the face of its inherent propensities”.<sup>24</sup> Barring rare cases of inevitable deterioration, the existence of inherent vice depends on the carrier’s fulfilling its obligation to exercise the appropriate standard of care.<sup>25</sup>

In this way, Lord Sumption seems to have reached the same position as the judge at first instance, who had observed that there was “complete circularity” between Art.IV(2)(m) and the carrier’s obligations under the Hague Rules, Art.III(2), such that inherent vice was “not in any real sense ... an excepted peril” but was “no more than a category of case ... in which

16. *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor MOPU)* [2011] UKSC 5; [2001] 1 Lloyd’s Rep 560; [2011] Bus LR 537 (hereafter “*The Cendor MOPU*”); see *infra*, fn.38.

17. *Noten BV v Harding* [1990] 2 Lloyd’s Rep 283; discussed *Volcafe CA*, [58–63].

18. *Volcafe CA*, [58].

19. *Volcafe*, [39].

20. *Ibid.*, [32].

21. *Leyland Shipping Co Ltd v Norwich Union Fire Ins Soc Ltd* [1918] AC 350, 369 (Lord Shaw of Dunfermline).

22. See Lord Esher MR on this approach to causation in, *inter alia*, *The Xantho* (1886) 11 PD 170, 172–173 (reversed on other grounds (1887) 12 App Cas 503 (HL)), and *Hamilton Fraser & Co v Pandorf & Co* (1886) 17 QBD 670, 674–675 (reversed (1887) 12 App Cas 518 (HL)). See also Lord Sumner, dissenting, in *P Samuel and Co Ltd v Dumas* [1924] AC 431 (HL), 467–474.

23. *Volcafe*, [34].

24. *Ibid.*, [37].

25. *Ibid.*, [39].

breach of the [carriers'] obligations is necessarily negated".<sup>26</sup> Allowing for the different contractual contexts, this is strikingly similar to the position reached by the Supreme Court in *The Cendor MOPU*, in matters of marine insurance, according to which s.55(2)(c) of the 1906 Act constitutes a "limitation on cover" but not a "true exception",<sup>27</sup> a "clarification on the scope of cover" which "provides an example of a circumstance of a loss not proximately caused by a peril insured against", but not a "contractual exclusion".<sup>28</sup>

### Inherent vice exceptions differ in scope

Accordingly, while there *is* thus a similarity in the treatment of inherent vice exceptions in the contexts of carriage by sea and marine insurance, it is not that which Flaux J envisaged. Further, Lord Sumption's judgment in *Volcafe*, and the earlier marine insurance case, *The Cendor MOPU*, now reveals precisely how the inherent vice exceptions differ in scope as between those two species of contracts. In a contract of carriage, inherent vice will not exist where a breach of the carrier's obligation to take care of the cargo is a proximate cause of the loss. As Lord Reid put it, there will be inherent vice only where "the goods could not stand the treatment which the contract authorised or required".<sup>29</sup> In a contract of marine insurance, on the other hand, the standard of care to be observed by the carrier is irrelevant. Instead, where the loss is not inevitable,<sup>30</sup> the intervention of any insured peril as a proximate cause of the loss excludes inherent vice from consideration: the lack of fitness of the subject matter for the insured voyage is irrelevant.<sup>31</sup>

The notion that inherent vice must have a different meaning or scope in these two contexts is not new. Much the same distinction is to be found in the London marine insurance codes of the late-sixteenth century,<sup>32</sup> and in seventeenth- and eighteenth-century French commentaries cited by English lawyers and judges of their day as authorities on the law of merchants and maritime matters.<sup>33</sup> More recently, Professor Bennett made a series of cogent arguments in favour of this distinction,<sup>34</sup> and was critical of the Court of

26. Cited *Volcafe* CA, [15].

27. *The Cendor MOPU*, [88] (Lord Mance).

28. *Ibid*, [143] (Lord Clarke), citing H Bennett, "Fortuity in the law of marine insurance" [2007] LMCLQ 315.

29. *Albacora SRL v Westcott & Laurence Line Ltd* [1966] 2 Lloyd's Rep 53, 59; 1966 SC(HL) 19, 23.

30. In insurance, "inevitability" is said to be a separate defence, which partially overlaps with inherent vice: see eg *The Cendor MOPU*, [51] (Lord Mance).

31. *Ibid*, [80–81] (Lord Mance), [103–112] (Lord Clarke).

32. Guido Rossi, *Insurance in Elizabethan England: The London Code* (CUP, 2016), 339–344, 590–591.

33. eg Cleirac, *Us et Coustumes de la Mer* (Bordeaux, 1647), ch.5, arts 8–9, 261–262, and ch.7, art.10, 296–297; and in J-M Pardessus, *Collection de lois maritimes antérieures au XVIII<sup>e</sup> siècle*, vol 2 (Paris, 1831), 390 n 2, and 404 n 1. Insurers' liability in such cases was subsidiary to the master's, where the latter's fault had contributed to the loss: Cleirac, ch.5, arts 4–6, 258–260; Pardessus, 388 n 5, 389 nn 3–4. See also R-J Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du mois d'Août 1681* (La Rochelle, 1760), vol 1, 599 (book 3, title 2 ("des Connoissemens"), art.2); vol 2, 74–76 (book 3, title 6 ("des Assurances"), arts 28 and 29); vol.2, 149–150, 152 (book 3, title 7 ("des Avaries"), arts 4 and 5). On citation of these in England see: CP Rogers, "Continental literature and the development of the common law by the King's Bench: c 1750–1800", in V Piergiiovanni (ed), *The courts and the development of commercial law* (Duncker & Humblot, 1987), 166–168; J Story, "Literature of the Maritime Law", in WW Story (ed), *The Miscellaneous Writings of Joseph Story* (Boston, 1852), 112–115. An example of English counsel citing Cleirac in the seventeenth century: *Mors v Slew* (1673) 3 Keble 112, 114; 84 ER 624, 625.

34. Bennett [2007] LMCLQ 315, 342–349.

Appeal in *Soya v White*,<sup>35</sup> and of Moore-Bick J in *Mayban General Insurance v Alstom Power Plants*,<sup>36</sup> for importing the carriage-contract notion of inherent vice into the marine insurance context.<sup>37</sup> In *The Cendor MOPU* the UK Supreme Court adopted Professor Bennett's position.<sup>38</sup>

Despite this, the Court of Appeal in *Volcafe* reasserted that inherent vice exceptions should be of similar scope in the carriage-contract and marine insurance contexts. Leaving aside the burden-of-proof issues which influenced Flaux J in the present matter, it is interesting to speculate as to what factors might have prompted the courts from time to time to make this error. One factor might be a tendency, evoked by Lord Sumption, to refer "by way of background" to the position of common carriers, who typically are compared to insurers because, with limited exceptions, they are strictly liable for loss of or damage to the cargo.<sup>39</sup> Lord Sumption condemned this, noting that common carriage was "no longer a useful paradigm", being "an almost extinct category"<sup>40</sup> and a "somewhat theoretical case".<sup>41</sup> The more appropriate starting point was the position of bailees of goods for reward,<sup>42</sup> who are not liable as insurers.<sup>43</sup>

Another (obvious) factor is that the same term—"inherent vice" or something similar—is used in both contexts. This terminological similarity reflects a shared conceptual root, as in both contexts, "inherent vice" refers to a cause of damage involving some internal vulnerability of the subject matter. And in both contexts an inherent vice exception delineates a range of risks pertaining to the subject matter of the contract which the counterparty—carrier or insurer—is unwilling to assume. Indeed, as Professor Bennett highlighted, there are terms employed in both the carriage and the marine insurance contexts that share a common meaning, like "perils of the sea".<sup>44</sup> Yet other concepts, like "seaworthiness" bear different meanings in these two contexts.<sup>45</sup> "Inherent vice", as we have seen, is of the latter sort.

### **Inherent vice exceptions and "the nature of the service contracted for"**

Lord Sumption's judgment in *Volcafe*, it is submitted, describes a coherent approach to determining the scope of exceptions for inherent vice in commercial contracts, generally: "the standard of care by reference to which the exception for inherent vice is to be assessed may depend on the nature of the service contracted for".<sup>46</sup>

35. *Soya* CA, 149 col.2.

36. [2004] EWHC 1038 (Comm); [2004] 2 Lloyd's Rep 609, [22].

37. Bennett [2007] LMCLQ 315, 346–348.

38. *The Cendor MOPU*, [123–133], [138] (Lord Clarke). Writing extrajudicially, Flaux LJ later acknowledged that Professor Bennett's criticisms had been vindicated in *The Cendor MOPU*: *supra*, fn.14, [26–27].

39. *Volcafe*, [8].

40. *Ibid*, [8].

41. *Ibid*, [17].

42. *Ibid*, [19].

43. *Ibid*, [8]. The distinction between the strictly liable "professional (or common)" carriers, and other "specially retained" ("non-professional") carriers, was introduced into English law by Holt CJ in *Coggs v Barnard* (1703) 2 Ld Raym 909; 92 ER 107; D Ibbetson, "*Coggs v Barnard*", in C Mitchell and P Mitchell, *Landmark Cases in the Law of Contract* (Hart, Oxford, 2008), 1, 17–18.

44. Bennett [2007] LMCLQ 315, 342. See also *Pickering v Barkley* (1648) 2 Rolle Abr 248, n 10.

45. Bennett [2007] LMCLQ 315, 342.

46. *Volcafe*, [35], citing *Albacora* (*supra*, fn.29).

Professor Bennett can be seen to have made an earlier attempt at providing such an approach, in suggesting that inherent vice exceptions should differ in scope depending on the differing “commercial contexts” of contracts. Thus, he argued that it would be commercially reasonable for carriers to expect cargos to be capable of withstanding “the reasonably foreseeable perils of the voyage”, whereas underwriters might only reasonably expect their insured cargos to be able to withstand “peril[s] ... such that it would be unusual for [them] not to be encountered”.<sup>47</sup>

In *Volcafe* and *The Cendor MOPU*, it would seem that the principal consideration determining the scope of an inherent vice exception will normally be the nature of the obligations undertaken by the party providing the service. This should be identified by construing the contract: the commercial context as such will be indirectly relevant, as background to the construction exercise. The differences in the services undertaken—to carry carefully and properly, on the one hand; to guarantee the subject matter from injury proximately caused by insured perils, on the other—explain the differences in the scope of the inherent vice exceptions in the carriage and marine insurance contexts.

Another aspect of this general approach relates to proximate cause. Whether a particular occurrence or condition is retained as a proximate cause has been variously described as a matter of common sense, fairness, or justice.<sup>48</sup> In the context of commercial contracts, “[t]he justice of the matter is to be found in the bargain struck by the parties”.<sup>49</sup> Accordingly, as has been decided in relation to contracts of carriage and of marine insurance, it seems likely that, where a breach of the service provider’s obligations under a commercial contract has intervened in a loss, it will generally be retained as the proximate cause and any inherent predisposition of the subject matter to deteriorate will be treated as a mere background condition.

Can this approach be generalised further? It is submitted that it already has been, in relation to other contracts and exceptions. Consider, for example, that the seller of goods, like the cargo owner under a contract of carriage, assumes an obligation to provide goods which are fit for the purpose of their contract. The buyer, like the carrier, assumes the risks of loss or damage to the goods which arise from misuse. And, where there is misuse of a kind which a prudent supplier would not have contemplated, even if this has combined with a defect in the goods to cause a loss, it seems that the defect will not be retained as a proximate cause.<sup>50</sup>

Jeffrey Thomson\*

47. Bennett [2007] LMCLQ 315, 342–343; also at 328, defining “habitual risks” of the insured adventure. His suggested scope for the inherent vice exception in the insurance context was rejected in *The Cendor MOPU*: [79–81] (Lord Mance), [104] (Lord Clarke).

48. *Noten BV v Harding* [1990] 2 Lloyd’s Rep 283, 286–287; *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404; [2010] PIQR P8, [14–15]; *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599, [20–21].

49. *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm); [2011] 1 Lloyd’s Rep 187, [8] (Gross J).

50. *Decca Radar Ltd v Caserite Ltd* [1961] 2 Lloyd’s Rep 301.

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