Passage Planning & Unseaworthiness - Where the line is drawn?
The 'CMA CGM Libra'

By

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In the CMA CGM Libra the Admiralty Court ruled that a defective or inadequately prepared Passage Plan, if causative of a loss during the relevant voyage, would not only render the vessel unseaworthy but, at the same time and without more, will also constitute a failure by the owner/ carrier to exercise 'due diligence' before and at the commencement of the voyage to make the vessel seaworthy under the Hague/ Hague-Visby Rules. This would be owner's/carrier's actionable fault barring recovery in General Average ("GA") from cargo. By the same token, a cargo owner claiming under a Bill of Lading would be able to recover its loss. The CMA CGM Libra shows that where a line is (literally) drawn on the navigational chart may turn out to be crucial as a shift of a cable's difference on the chart may shift a liability between cargo and owner/carrier of many millions of dollars.

Introduction

On 8 March 2019, the Admiralty Court handed down its decision[1] on a claim by the owners of the *CMA CGM Libra* ("Owners") for recovery in GA of GA contributions due by certain cargo interests who denied any GA liability on grounds of causative unseaworthiness and lack of '*due diligence*' by the Owners to make the vessel seaworthy before the commencement of the voyage.

Facts

Just after midnight of 17/18 May 2011, the *CMA CGM Libra* ("the Vessel"), a 131,235 mt DWT 2009-built container laden with 5,983 containers, departed from Xiamen, China destined for Hong Kong. After she dropped pilot, she sailed outbound the dredged channel marked by buoys and shown on the relevant BA Chart by a magenta pecked line. Buoy 14-1, which was the next in order after Buoy 15 outbound and before Buoy 14, was marking a shoal in the middle of, and extending along more than a half of the width of the lane marked by the magenta line on the chart.

After passing Buoy 15, the Master decided not to follow the route marked on the chart as set out in his approved Passage Plan and which would bring the Vessel to the starboard of Buoy 14-1 but to alter course to starboard, leaving Buoy 14-1 a cable or so to port and sailing through an area showing adequate water depths with the intention to return to his original

[1] *Alize 1954 & another -V- Allianz Elementar Versicherung AG & Others (The CMA CGM LIBRA)* [2019] EWHC 481 (Admlty)

route immediately afterwards. That was a split-second decision by the Master and it was accepted that, despite the falling tide and Master's safety concerns, there was enough water for the Vessel to sail within the dredged channel as provided for by the Passage Plan. Following the starboard manoeuvre, the Master, during his attempt to alter to port, realised that the Vessel would not be able to return back to his original route in time between Buoys 14-1 and 14 and changed his manoeuvre. In the event, the Vessel run aground a few cables away from her intended route within an area identified as a "Former Mined Area". The charted depth though at the grounding location was 35 metres and, as it transpired by a block chart correction issued by British Admiralty a couple of months later, there was an extensive shoal which was not shown on the Chart at the material time. The equivalent Chinese Chart, issued a few months before the grounding, was showing the shoal but there had been an apparent delay by a few months in the promulgation of this update.

Also, although the Vessel was equipped with a fully integrated Electronic Chart ("ECS") in preparation to switch to paperless mode and its officers were using it, it was not an approved ECDIS as this was not mandatory at the time and the Owners' SMS was to the effect that the SOLAS "carriage of charts" requirement was complied with by paper charts. The Vessel was to be navigated by reference to paper charts only, and ECS was to be used only to improve situational awareness. What turned out to be key feature of the case (although held not to be causative) was the fact the whilst the official British Admiralty paper chart did not show the relevant shoal (as the Vessel's ECS provider's updates did not) the relevant ENC cell for use in ECDIS did.

Salvage under LOF terms followed which was financed by the CMA CGM ("Owners") who then sought to recover in GA. About 92% of the cargo interests settled their contribution but about 8% refused alleging Owners' fault, namely causative unseaworthiness before the commencement of the voyage and lack of due diligence by Owners in this respect.

Issues & Allegations

The Owners said that the Vessel ran aground on an uncharted shoal and/or alternatively the grounding resulted from Master's error in navigation.

The Cargo denied liability on grounds of unseaworthiness raising the following points:

- The Master was incompetent in that no competent master would have attempted to navigate the way the Master of the Vessel navigated.

- As there was a breach of the crew "rest periods" requirement of the then applicable ILO 184 (now MLC) in that the Master allegedly had 7 hours less than the minimum

7-day rest period for the week before the grounding, the Master was fatigued and that impaired his decision making.

- The relevant British Admiralty paper chart was not properly updated to show the latest correction as promulgated by the relevant Weekly Notice to Mariners before the grounding which showed a 4.8 metre and 1.2 metre soundings close to the area of the grounding.

- Reliance by the navigating officers on the ECS which was not approved ECDIS in that the Vessel was not supplied with an official electronic chart showing the shoal on which the Vessel grounded.

- The Vessel was not supplied by the relevant Chinese chart showing the shoal on which the Vessel grounded. This allegation was dropped by the Cargo before the trial.

- The Passage Plan was defective in that, among others, it did not :

    - provide a record of a Preliminary Notice to Mariners (which was permanently marked on the chart) that warned mariners that "*numerous depths less than the charted exist within and in the approaches to Xiamen Gang*", listing the "*most significant*", none of which however was in the fairway. The same Preliminary Notice informed mariners that the dredged channels had been deepened; and

    - properly mark on the chart "*no go areas*".

- Lack of a proper system by Owners in place to ensure proper Bridge Management was maintained on board and that the Master had sufficient rest periods. Such 'systemic failure' was the cause of the grounding.

In addition, the Cargo alleged that the Master's decision to leave the fairway channel constituted a "*deviation*" in the legal sense which would deprive the Owners, in any event, of the right to rely on the exemptions in the Hague Rules.

Further, the Cargo, relying on the Supreme Court's recent decision in *Volcafe*,[2] tried to shift the burden on to the Owners to prove that the Vessel was seaworthy (rather than the Cargo to prove she was unseaworthy) by extending further the bailment principle decided in *Volcafe* under Article III, Rule 2 of the Hague Rules to the Owners' due diligence and seaworthiness obligation under Article III, Rule 1.

[2] *Volcafe Ltd. -V- Cia Sud American de Vaporesi SA* [2018] 3 WLR 2087

Decision

The Admiralty Judge, Mr. Justice Teare, held in favour of the Cargo on only one of the above issues, namely that of Passage Planning and the causative effect of the specific defects, but that was enough for the Cargo to win the case.

He decided that there was no deviation. He also held that the obligation under Article III, Rule 1 of the Hague Rules does not relate to Article III, Rule 2 and that the burden of proving causative unseaworthiness must lie on Cargo as this is implicit in Article III, Rule 1, whereas the Owner has the burden of proving the exercise of due diligence.

The Judge also held in favour of Owners that the Master was competent overall and was not fatigued. Whilst the finding on human fatigue is *obiter*, it is significant for Owners in that a mere breach of the statutory requirement for rest hours periods cannot by itself raise a presumption of fatigue and impairment in the decision making of the seafarer. He also found that the paper chart was corrected, there was a proper Bridge Management and that the Vessel was not unseaworthy because she was not supplied official ECDIS charts on board.

Thus, the only finding of unseaworthiness related to Passage Planning. The Judge found the Passage Plan was defective as it did not refer expressly to the Preliminary Notice (re: N.M. 6274(P)/10) which in turn referred to the prospect of less water outside of the channel [*para 73*]. He found that a defective Passage Plan, even if a one-off, amounts to unseaworthiness. The Judge also found that had the Master written a warning on the chart and 'no go' areas were properly marked on the Vessel's working chart he would not have done what he did. Hence, that defect in the Passage Plan was found to be causative of the grounding, i.e. there was a causative unseaworthiness.

As the Master accepted in cross-examination that it was never his intention to sail in the "Former Mined Area" and/or in an area which would have been hatched out as a 'no go' area, the crucial issue turned out to depend on where the 'no go' line should have been drawn (in the event, an expert issue). If the 'no go' line should have been drawn, as Cargo asserted, along the fairway's magenta pecked lines or, as the Judge accepted, along the notional line connecting the channel buoys, the Vessel would be causatively unseaworthy. If, however, the proper marking of the 'no go' line was, even by a cable, to the east of Buoy 14-1 the non-marking would, most probably, not have been held to be causative and the Vessel would have been seaworthy.

Teare J. accepted that there was no previous case in which it had been held that a defective passage plan rendered the vessel unseaworthy. However, "… *just as the standard of*

seaworthiness may rise with improved knowledge of shipbuilding …", he held, "*.... so may the standard of seaworthiness rise with improved knowledge of the documents required to be prepared prior to a voyage to ensure, so far as reasonably possible, that the vessel is safely navigated*". Therefore, he assimilated the situation to that of an uncorrected chart and, in applying the *McFadden*[3] test of unseaworthiness, he found that the Vessel was unseaworthy. In doing so, the Judge rejected the Owners' submission that Passage Planning is part of navigation and not in itself an aspect of seaworthiness (a point on which the case has been appealed).

The Judge also held that, although the Owners themselves had exercised due diligence in the sense that their systems were adequate, the (negligent) failure of the Master/ Second Officer to prepare a proper Passage Plan amounts to lack of exercise of "*due diligence*" by the Owners because seaworthiness under the Hague Rules is a non-delegable duty of the carrier.

Comment

As the Passage Plan should be prepared before departure, i.e. before the commencement of the voyage, the decision means that a defect on the paper plan or a plotting mistake on the chart before departure of not only where the course line is or should be drawn but also where the "no go" line is drawn, may have an impact on Owners' liabilities under the Hague and Hague-Visby Rules. Whilst prudent seamanship would determine where a line on the chart should be drawn, the question of whether in each case a vessel is or is not seaworthy may be, applying Teare J's approach, dictated by differences of opinion as to where such a line should be drawn. For example, the Master's discretion in deciding to plot a course on the chart through a specific route and navigate his vessel accordingly may be open to an attack by Cargo's expert arguing that that route was mistakenly selected and the vessel accordingly was unseaworthy. The decision blurs the boundaries between *seaworthiness* and *error in navigation*.

This is a novel point and there are no cases directly relevant. The Judge treated the Passage Plan in the same way as a 'nautical publication' or 'instrument' on board the Vessel. By application of the classic *McFadden* seaworthiness test *any* defect would render the Vessel unseaworthy. This did not, however, take into account Owners' argument that Passage Planning *per se* is an act of navigation and does not relate to the Vessel's (physical) seaworthiness. It does not, for example, distinguish between supplying the ship with Tide Tables and the misreading of the Tide Tables by the navigating officer before the departure.

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[3] *McFadden* -V- Blue Star Line (1905) 1 KB 697; "*A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it ... If the defect existed, the question to be put is: Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.*" per Channel J. at 706.

Whilst of course the opposite position is arguable (indeed, the Judge adopted this position), the Judge's finding on "*due diligence*" would seem to overturn the commercial understanding of the allocation of responsibilities on the carrier under the Hague Rules. A carrier would never be able to discharge its "*due diligence*" obligation for any navigational mistake attributed to a defective passage plan. The Owner/Carrier effectively would warrant that there will never be a defective Passage Plan and will always be deemed to be in breach even with a perfect system in place.

Arguably, the impact of this decision is an increase in the standard of seaworthiness which creates a perverse outcome: the Owner/Carrier appears to be better off where the defective preparation of Passage Plan was prepared by an incompetent officer than where there is a one-off lapse in judgment by a competent officer. In both instances the vessel would be unseaworthy but it seems it would be easier for the carrier to escape liability by showing that he exercised due diligence in properly selecting, recruiting, training, instructing and appointing the incompetent officer.

The issue is crucial for the industry. There has been no case relating to a Passage Plan rendering a vessel unseaworthy before now. If indeed it is the case that an inadequate Passage Plan renders a vessel unseaworthy then every grounding or cargo loss at sea will result in an allegation of an inadequate Passage Plan being causative. If found, then Owners' defences of due diligence will be, automatically, lost, thereby shifting liability from the cargo insurer to the Owners' P&I Club.

Looking ahead and, particularly, with ECDIS and today's paperless navigation, careful attention should be given when a Passage Plan is prepared to each and every detail as everything may be investigated by cargo interests unwilling to pay GA or claiming recovery of their losses.

Leave to appeal has been granted to Owners and the case is to be heard by the Court of Appeal in February 2020.

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