End of sea passage for "CMA CGM LIBRA": UK Supreme Court upholds lower courts' decisions

The long-awaited judgment from the UK Supreme Court in the "*CMA CGM LIBRA*" case was handed down on 10 November 2021, in which the 5-member panel of distinguished judges upheld the lower courts' decisions that the vessel's defective passage plan rendered the vessel unseaworthy. We expect that the decision will impact evidence collection and retention in general average and cargo claim litigation.

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Background

On 17 May 2011, M/V "CMA CGM LIBRA", a 6,000 TEU container ship, grounded while leaving the port of Xiamen, China. The ship's charts had failed to record a warning derived from a Notice to Mariners that depths shown on the chart outside the fairway were unreliable and waters were shallower than recorded on the chart. The grounding occurred when the master sailed the vessel outside of the fairway, expecting the waters to be deeper than they actually were.

Salvage costs in the sum of about USD 9.5 million were incurred, and owners claimed general average contributions totalling USD 13 million from the cargo interests. About 8% of those cargo interests refused to pay on the basis that the grounding arose out of actionable fault by the owners. This led the owners to initiate English Court proceedings to claim for about USD 800,000 in general average contributions.

The first instance judge found, as a matter of fact, that the vessel's passage plan and working charts were defective due to the crew's failure to record the warning required by the Notice to Mariners. He also found that the defective passage plan was causative of the grounding. For a summary of the High Court and Court of Appeal judgments, please refer to Gard's earlier Insight article .

Issues on appeal

Notwithstanding the factual findings at first instance, the vessel owners maintained that they were not at fault pursuant to what is commonly referred to as the "navigation exception" at Article IV Rule 2(a) of the Hague Rules, which exempts a carrier from liability arising from the " *act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship* ". It is well-established under English law that the navigation exception does not excuse a carrier from liability if the carrier has failed to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. Therefore, the issues at the core of the vessel owners' appeal to the Supreme Court were:

1. Did the defective passage plan render the vessel unseaworthy for the purposes of Article III Rule 1 of the Hague Rules?
2. Did the failure of the master and second officer to exercise reasonable skill and care when preparing the passage plan constitute want of due diligence on the part of the carrier for the purposes of Article III Rule 2 of the Hague Rules?

The Supreme Court had no trouble in reaching the conclusion that the lower courts were right to find that in this particular case, the defective passage plan did make the vessel unseaworthy.

The Court found no force in the owners' submissions that they had discharged their duty to exercise due diligence to make the vessel seaworthy by equipping the vessel with all that was necessary for her to be safely navigated. Owners had argued that they had provided all the equipment and instructions to allow the crew to create a proper passage plan, and thus the crew's failure to annotate it was not caused by the carrier's lack of due diligence. The Court rejected this argument and held that the obligation on the carrier to exercise due diligence to make the vessel seaworthy requires that due diligence be exercised in the work of making the vessel seaworthy, regardless of who is engaged to carry out that task. The carrier cannot escape from its seaworthiness responsibilities by delegating them to its servants or agents, such as navigators, managers, engineers or ship repairers. This is because the carrier's responsibility to make the ship seaworthy at the commencement of the voyage is non-delegable, so it does not matter which agent or servant actually performs the work.

Supreme Court's decision was based on the particular facts of the case

Notably, the Court pointed out at paragraph 82 of their judgment that a defective passage plan does not inevitably lead to the conclusion that the vessel is unseaworthy. It is still necessary to prove that: 1) the defect in the passage plan was sufficiently serious to render the vessel unseaworthy, and 2) the defect was causative of the loss or damage. In many cases, it will be the failure to properly and carefully navigate the vessel during the voyage that is the cause of the loss, rather than any prior defect in passage planning.

In the present case, the vessel was found to be unseaworthy because: 1) the defect in the passage plan was found to have a decisive influence on the master's critical decision to leave the fairway, and 2) the danger was one which was not sufficiently visible or otherwise detectable to be avoided by the exercise of due navigational care.

Clarifications of legal principles

In the judgment, the Court restated a number of well-established legal principles which are widely accepted and should be familiar to most within the maritime industry.

Helpfully, the Court also offered numerous clarifications which will undoubtedly serve as useful guidance in disputes to come. We set out below several which are of particular interest:

1. If the vessel is unseaworthy, it makes no difference whether negligent navigation or management is the cause of the unseaworthiness or is itself the unseaworthiness.
2. The concept of unseaworthiness is not subject to an attribute threshold requiring there to be an attribute of the vessel which threatens the safety of the vessel or her cargo. It is not just physical defects in the vessel and her equipment that can potentially render a vessel unseaworthy. Seaworthiness extends to a wide variety of matters such as adequate and up-to-date charts, adequate piping plans, the mental abilities of the crew, the adequacy of the vessel's systems in relation to engine maintenance, cargo stowage, residues of previous cargoes in the holds and the trading history of the vessel.
3. The "prudent owner" test (i.e., would a prudent owner have required the relevant defect to be made good before sending he vessel to sea had he known of it?) is not a universal test of unseaworthiness. That said, the "prudent owner" test has withstood the test of time and is well suited to adapt to differing and changing standards. It is an appropriate test of seaworthiness save in exceptional cases at the boundaries of seaworthiness.
4. The fact that a defect is remediable may mean, in some instances, that the vessel is not unseaworthy. This is likely to depend on whether it would reasonably be expected to be put right before any danger to the vessel or cargo arose.
5. Given the essential importance of passage planning for the safety of navigation, applying the prudent owner test, a vessel is likely to be unseaworthy if she begins her voyage without a passage plan or if she does so with a defective passage plan which endangers the safety of the vessel.
6. The fact that the defective passage plan involves neglect or default in "the navigation of the ship" within the meaning of the navigation exception at Article IV Rule 2(a) of the Hague Rules is no defence to a claim for loss or damage caused by unseaworthiness. In other words, the Article III obligation to exercise due diligence to make the ship seaworthy at the commencement of the voyage is an overriding obligation. Unless the carrier has met this obligation, the carrier cannot rely on the error in navigation defence.

* * **Implications for the vessel owners – evidence collection and claims**

Although the case relates to general average contributions, it is equally relevant for cargo claims where the vessel's seaworthiness is called into question. Establishing a cargo claim is necessarily an exercise in 20-20 hindsight and one relatively certain effect of the " *CMA CGM Libra* " judgment is that after a casualty involving loss or damage to cargo, documentary requests and disclosure requests will be expanded to involve all relevant documentation from the load port concerning the preparation of the vessel for the voyage.

To properly defend against potential cargo claims, owners will have to be even more meticulous when it comes to documenting their passage planning procedures and compliance with them including with all relevant guidelines (such as IMO Resolution A.893(21)). Owners will also have to ensure that this evidence trail is properly stored and preserved in hardcopy and/or electronic format. This is likely to increase the internal workload for Members and Clients and could also be a cost driver for P&I clubs when handling cargo claims.

At first glance, the Supreme Court's decision in the " *CMA CGM Libra* " may appear unfavourable to vessel owners and cargo carriers. However, there are crucial nuances within the judgment which are based on factual findings specific to this case. In particular, the master accepted that the working charts had not been correctly annotated prior to sailing, and that this was causative of the grounding. He admitted that he was unaware of the shallow ground outside the fairway, and that he would not have chosen that route if he had known of it.

The vessel owners had submitted that the Hague Rules are aimed at spreading risk and allocating the cost of insurance between carriers and cargo interests. The Court did not disagree, but pointed out that most negligent navigation would occur during the voyage rather than before, so the main burden of resulting cargo damage or general average claims will likely continue to fall on cargo insurers anyway, not shipowners or their P&I clubs. It appears that for this reason, the Court saw no fundamental shift in the balance of risk between carriers and cargo interests by accepting the proposition that negligent passage planning can cause the vessel to be unseaworthy, which remains a risk against which carriers must insure themselves.

The full UK Supreme Court judgment is available here .

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