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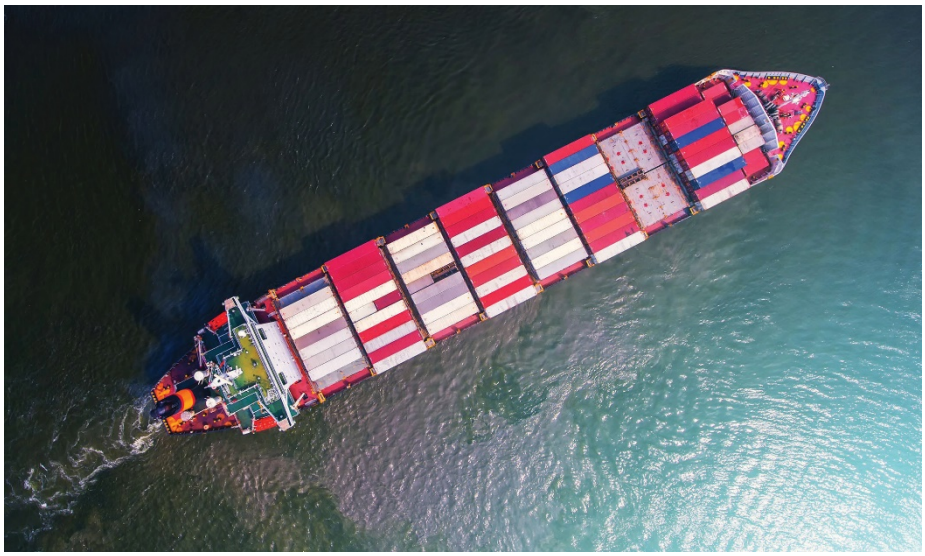
BRIEFING

SHIP PASSAGE PLANS – NO ROOM FOR ERROR!

APRIL 2019

- DEFECTIVE PASSAGE PLAN RENDERED VESSEL UNSEAWORTHY
- SERVANTS OR AGENTS RELIED UPON BY SHIPOWNERS TO MAKE THE SHIP SEAWORTHY "BEFORE AND AT THE BEGINNING OF THE VOYAGE" MUST BE SHOWN TO HAVE EXERCISED DUE DILIGENCE



"IT IS NOW CLEAR THAT JUST AS THE STANDARD OF SEAWORTHINESS MUST RISE WITH IMPROVED KNOWLEDGE OF SHIPBUILDING, SO MUST THE STANDARD OF SEAWORTHINESS RISE WITH IMPROVED KNOWLEDGE OF THE DOCUMENTS REQUIRED TO BE PREPARED TO ENSURE SAFE NAVIGATION."

The English High Court's judgment in *Alize 1954 v Allianz Elementar Versicherungs AG* (*The CMA CGM Libra*) [1] is an important decision involving the application of longstanding principles as to a shipowner's liability for actionable fault following a casualty. In finding that a defective passage plan rendered a vessel unseaworthy, the English High Court has demonstrated how traditional tests will be applied to update the law into the modern day world.

Prior to this decision, there had been no case whereby a defective passage plan rendered a vessel unseaworthy. However, it is now clear that just as the standard of seaworthiness must rise with improved knowledge of shipbuilding, so must the standard of seaworthiness rise with improved knowledge of the documents required to be prepared to ensure safe navigation. Following the IMO's recognition in 1999 of the need for passage planning to be adopted by "all ships engaged on international voyages", *The CMA CGM Libra* shows that by 2011 the English courts expected an adequate passage plan to have been prepared. If it was defective, the consequences could be severe.

The Case

The case concerned a laden container vessel which grounded by virtue of the master negligently navigating outside of the buoyed fairway when leaving the port of Xiamen in China. The owner had known this to be a difficult port to navigate, especially as various Notices to Mariners had been issued advising that areas existed

[1] [2019] EWHC 481 (Admlty)

in the Xiamen Gang (though not in the fairway) that had depths less than those charted.

Cargo interests refused to pay the owner their proportion of the total claim in general average and denied liability under Article III r.1 of the Hague Rules on the basis that the casualty was caused by the owner's actionable fault. In particular, they alleged that the vessel was unseaworthy because she had an inadequate passage plan, that inadequacy was a cause of the casualty and due diligence was not exercised by the owner to make the vessel seaworthy.

The Decision

Before considering the substantive matters of unseaworthiness, causation and due diligence, Mr Justice Teare addressed the issue of which party bears the burden of proof in relation to Article III r.1. He affirmed the conventional view that the burden lies on the cargo interests to establish that the vessel was unseaworthy and such unseaworthiness caused the grounding. If those matters are established, the burden then lies on the owners to prove that due diligence was exercised to make the vessel seaworthy.

Unseaworthiness

Mr Justice Teare held that neither the formal passage plan, nor the working chart, contained the necessary warning of the potential danger arising outside the buoyed fairway from the existence of areas with lower depths than charted. The necessary warning should have been such that, when the navigator was faced with a decision whether to remain in the buoyed fairway or to navigate outside, he had in mind the warning that charted depths outside the buoyed fairway may be unreliable.

"THE JUDGE AFFIRMED THAT THE LONG-ESTABLISHED AND AUTHORITATIVE TEST OF UNSEAWORTHINESS IS WHETHER A PRUDENT OWNER WOULD HAVE REQUIRED THE RELEVANT DEFECT, HAD HE KNOWN OF IT, TO BE MADE GOOD BEFORE SENDING HIS SHIP TO SEA."

The judge affirmed that the long-established and authoritative test of unseaworthiness is whether a prudent owner would have required the relevant defect, had he known of it, to be made good before sending his ship to sea. He found it inconceivable that a prudent owner would allow the vessel to depart from Xiamen with a passage plan that lacked the necessary warning, especially given that IMO Resolution of 1999 states that a "well planned voyage" is of "essential importance for safety of life at sea, safety of navigation and protection of the marine environment".

The owner argued that passage planning is simply the preparation for safe navigation and is not itself an aspect of seaworthiness. In making these arguments, the owner sought to benefit from the negligent navigation exception under Article IV r.2(a) of the Hague Rules, which provides that (assuming there is no failure by the owners to make the vessel seaworthy) a shipowner will not be responsible for loss caused by neglect in the "navigation or in the management of the ship".

However, Mr Justice Teare rejected this, stating that seaworthiness extends to having the appropriate documentation on board, including the appropriate charts. Firstly, he noted that Article III r.1 places a seaworthiness obligation upon the shipowner "before and at the beginning of the voyage" and that passage planning before the beginning of the voyage is necessary for safe navigation during voyage. Secondly, he pointed out that it is well recognised that if a vessel's charts are not up to date that is an "attribute" of the vessel which can render her unseaworthy - and that a proper passage plan is now like an up to date and properly corrected chart.

Mr Justice Teare also suggested that a "one-off" failure to correct a chart in a material manner before the beginning of the voyage is capable of rendering a vessel unseaworthy, even if the shipowner has put in place proper systems to ensure that the prerequisite materials were on board to prepare an adequate chart. He explained that concentrating upon the shipowner's own actions to the exclusion of those of his servants or agents, confuses the issue of seaworthiness with the issue of due diligence, which in any event is a non-delegable duty.

Finally, Mr Justice Teare observed that the negligent navigation exception applied only to Article III r.2 and not Article III r.1. Therefore, a shipowner will not be protected from liability for failing to exercise due diligence to make the vessel seaworthy by the fact that a cause of the casualty was negligent navigation.

Conclusion

In conclusion, this case found that an appropriate passage plan is a matter of seaworthiness under Article III r.1 of the Hague Rules. This is not the type of chart that might traditionally have been expected to affect the seaworthiness of a vessel, especially as a passage plan relates principally to navigation of the ship. Nevertheless, following this judgment, shipowners will have to ensure that, through its agents and servants, due diligence is exercised to produce a non-defective passage plan that clearly contains the necessary warnings. Failure to do so, if causative of a casualty, will not be saved by the negligent navigation exception under Article IV r 2(a) of the Hague Rules, which cannot be applied where a shipowner has failed to exercise due diligence to make the vessel seaworthy.

"FOLLOWING THIS JUDGMENT, SHIPOWNERS WILL HAVE TO ENSURE THAT, THROUGH ITS AGENTS AND SERVANTS, DUE DILIGENCE IS EXERCISED TO PRODUCE A NON-DEFECTIVE PASSAGE PLAN THAT CLEARLY CONTAINS THE NECESSARY WARNINGS."

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with one of the authors below or your regular contact at Watson Farley & Williams.

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