The Hague / Hague-Visby Rules exception of "fire" contained in Art.IV r2. (b) of the Rules states that:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier."

The recent English Law Court of Appeal decision in the case of A. Meredith Jones & Co. Ltd. v Vangemar Shipping Co. Ltd. ("The Apostolos") has highlighted some important issues relating to the application of the "fire" exception.

Before considering the application of the exception it is perhaps worthwhile considering a carriers overriding obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage (Art. III r1.). It is common ground that if owners, having failed to exercise due diligence, are in breach of Art. III r1. because the ship was unseaworthy before and at the beginning of the voyage and that breach caused the loss or damage, they cannot rely upon any of the exceptions contained in Art. IV r2., including the "fire" exception.

In "The Apostolos" a cargo of cotton in bales caught fire in the ship's holds during loading operations at Salonika. The plaintiff cargo interested argued that hot work which they said was being carried out on the hatch covers at Salonika caused the fire and that the resulting exposure of the cargo to the risk of fire from a spark entering the holds rendered the vessel unseaworthy. The Court of Appeal rejected the plaintiffs argument and held that to show breach of Art. III r1. the plaintiffs had to show that owners had failed to make the ship seaworthy and that the loss or damage was caused by the breach i.e. that the fire was caused by the unseaworthiness. The fact that hot work was being carried out on the hatch covers did not, by itself, render the ship unseaworthy. For a ship to be unseaworthy there must be some attribute of the ship itself which threatens the safety of the cargo. The owners were therefore not in breach of Art. III r1 merely because welding exposed the cargo to a risk of ignition. The holds themselves were not intrinsically unsafe and it could not be said that the welding was taking place to render the ship seaworthy.

It is also worth noting that whilst the burden of proving the exercise of due diligence to make the ship seaworthy falls on the carrier, the carrier need prove nothing until the claimant has proven that the ship was unseaworthy and that the unseaworthiness caused the loss or damage. As owners are often the only party in possession of all the facts and evidence this burden is not an easy one for claimants to discharge. This is perhaps more true in fire cases than in any other, since vital evidence may be destroyed by the fire itself.

Assuming that a claimant cannot show both (1) that the ship was unseaworthy and (2) that same unseaworthiness caused the loss or damage, where the loss or damage results from fire, the carrier will be entitled to rely upon the fire exception contained in Art. IV r2. (c) unless the claimant can show that the fire was caused by the "actual fault or privity of the carrier".

In "The Apostolos" it was accepted that the plaintiffs had to establish knowledge on the part of the general manager of the vessel's managers in order to prove actual fault or privity of the carrier. The Judges found that there was no reliable evidence that welding had taken place on the board the ship at Salonika before the fire or that the general manager knew what had happened then and so the allegation by the plaintiff of privity against the owners failed. The question of whose acts can be considered to be those of the carrier itself is not, however, always an easy decision. It is a question of fact to be determined having regard to all the circumstances of the case. A carrier is not liable for damage caused by fire arising from the acts of its servants, unless he is personally at fault. As most ships are owned by companies rather than by individuals it is necessary to consider whether the action giving rise to the fire is an act of the company itself, for which the carrier would be liable, or simply an act of its servants. Whose acts amount to the acts of the company itself? Such a person is the "alter ego" of the company and this will vary from company to company. It may be the shipowners board of directors who are empowered to make decisions on behalf of the company. Alternatively it may be the managing director alone or, as in "The Apostolos", the vessel's manager. It should be remembered, however, that if the shipowner has properly delegated performance of a certain obligation to a subordinate, such as the Master, and the negligent performance of that obligation by the subordinate causes the fire, such negligence will not normally amount to the actual fault or privity of the carrier itself and should still entitle the carrier to rely upon the fire exception.

It is often also argued by cargo interests that the onus is upon the carrier to prove that the fire was not caused by their actual fault or privity, since the relevant facts are only known to them. In the first instance decision, the Judge refused to accept such an argument. He concluded that it was for the party alleging "fault and privity" to establish it. This is a difficult hurdle for cargo interests to overcome in many cases.

This article is intended to outline the position under English Law and it is therefore important to bear in mind that other jurisdictions may take a different approach. If Members are in any doubt they should consult the Club for further advice.

Perils of the Sea

In its judgment of 22 October 1986 in the "Bunga Seroja", the High Court of Australia considered in detail the history and meaning of the perils of the sea defence in the Hague and Hague-Visby Rules, and restated the Australian approach that foreseeable, or even foreseen, dangers may be perils of the sea and support a defence under the Rules. The High Court considered in detail UK and North American cases which had adopted a narrower meaning, and rejected them.

In October 1989 the plaintiff's cargo was loaded in Sydney for carriage to Kielung. The vessel proceeded from Sydney to Melbourne and then to Burnie in Tasmania. While crossing Bass Strait the vessel encountered heavy weather and some of its containers were lost on deck. Before leaving Burnie, the vessel received forecasts of heavy weather that it would encounter crossing the Great Australian Bight to Fremantle. The heavy weather encountered by the vessel was foreseeable in an area that is notorious for bad weather and was actually foreseen before departure. The cargo was damaged by pounding during the heavy weather.

The consignee sued the carrier in the Supreme Court of NSW. The trial judge made three important findings of fact:

a. the vessel was fit in all respects for the voyage when leaving port;
b. the carrier had discharged its obligations under Article III Rule 2 of the Rules;
Those findings of fact were challenged on appeal to the NSW Court of Appeal, but upheld unanimously.\(^5\) They were not disturbed on further appeal to the High Court of Australia.

In one sense, that was sufficient to dispose of the appeal.\(^3\) As there had been no breach of the carrier’s obligations under Article III of the Rules, the claim had to be dismissed. However, the courts considered in some detail the meaning of the perils of the sea defence, its history and place in the context of the Hague Rules as a whole, and the divergence of interpretation between the Anglo-Australian view on the one hand and a number of decisions, mainly from North America but also some from the UK, on the other.\(^4\) The Australian position was also supported by decisions in Germany and France.\(^7\)

The perils of the sea defence had been discussed by the High Court in "Shipping Corp of India v Gamlen Chemical Co.\(^8\) The principal judgment was that of Mason and Wilson JJ in which they stated at that "sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea”.

The Court stressed that the Rules had to be interpreted in a way that acknowledged their international status, and that uniformity (so far as possible) was to be sought in interpreting and applying them.\(^8\) A court should prefer the interpretation which has most general international support.\(^9\) However, an abandonment of Gamlen in favour of the US and Canadian approach would not have achieved uniformity as English, French and German law would have been different. Otherwise, the desire for a uniform interpretation may well have led to a different outcome. at least for McHugh J.\(^11\) Having considered the alternative interpretation in detail, the High Court rejected it in favour of its own earlier interpretation in Gamlen, which was more in line with the history and text of the Rules.\(^12\)

Justice McHugh observed that the US view of perils of the sea restricts the carrier’s reliance on that defence by reference to the peril’s foreseeability, the Australian approach is to restrict it by reference to the carrier’s negligence.\(^15\)

The High Court rejected a reading of "perils of the sea" that confined them to matters that were wholly unforeseen. To do so would transform the obligation to use due diligence to make the vessel seaworthy into an absolute obligation of seaworthiness. This was to deny the history and development of the Rules in this regard. A seaworthy vessel is fit to encounter conditions that can reasonably be foreseen and guarded against. If cargo is damaged when forecast conditions are met by a seaworthy ship despite proper stowage and cargo handling, it would be inconsistent with this history to hold the carrier liable.\(^14\)

The answer in any case is a factual enquiry that considers the seaworthiness of the vessel, whether the cause of damage was the result of inadequate stowage by the carrier (in breach of Article III Rule 2), whether it arose by an act, neglect or default of the Master in the navigation or management of the ship (providing a defence under Article IV Rule 2(a)), or whether it resulted from some other cause peculiar to the sea, providing the basis of a peril of the sea defence.

The High Court endorsed the observation of Mason and Wilson JJ in Gamlen that perils of the sea could be foreseeable or, indeed, foreseen. However, the fact that the peril was foreseeable or foreseen, and the steps taken by the carrier in response, will be important in determining whether the carrier has discharged its obligations under Article III of the Rules or has been negligent. If negligence is established, the carrier will not be entitled to rely on the peril of the sea defence (or any other defence in Article IV Rule 2) even if it is otherwise made out.\(^15\)

With thanks to Ian Davis of Ebsworth & Ebsworth, Sydney, for preparing this article on the "Banga Seroya".

\(^{10}\) [1993] 3 F.L.R. 201
\(^{11}\) Great China Meat Industries Co Limited v Malaysia International Shipping Corporation Bhd
\(^{13}\) [1995] 1 Lloyds Rep. 405 (C.A.)
\(^{15}\) [1997] 3 Lloyds Rep. 152 (Q.B.)
\(^{16}\) [1998] 1 Lloyds Rep. 107 (C.A.)
\(^{17}\) [1999] 3 Lloyds Rep. 391 (Q.B.)
\(^{18}\) [2000] 3 Lloyds Rep. 312 (Q.B.)
\(^{19}\) [2001] 3 Lloyds Rep. 355 (Q.B.)
\(^{20}\) [2002] 3 Lloyds Rep. 393 (Q.B.)
\(^{21}\) [2003] 3 Lloyds Rep. 277 (Q.B.)
\(^{22}\) [2004] 3 Lloyds Rep. 397 (Q.B.)
\(^{23}\) [2005] 3 Lloyds Rep. 399 (Q.B.)
\(^{24}\) [2006] 3 Lloyds Rep. 401 (Q.B.)
\(^{25}\) [2007] 3 Lloyds Rep. 403 (Q.B.)
\(^{26}\) [2008] 3 Lloyds Rep. 405 (Q.B.)
\(^{28}\) [2010] 3 Lloyds Rep. 409 (Q.B.)
\(^{29}\) [2011] 3 Lloyds Rep. 411 (Q.B.)
\(^{30}\) [2012] 3 Lloyds Rep. 413 (Q.B.)
\(^{31}\) [2013] 3 Lloyds Rep. 415 (Q.B.)
\(^{32}\) [2014] 3 Lloyds Rep. 417 (Q.B.)
\(^{33}\) [2015] 3 Lloyds Rep. 419 (Q.B.)
\(^{34}\) [2016] 3 Lloyds Rep. 421 (Q.B.)
\(^{35}\) [2017] 3 Lloyds Rep. 423 (Q.B.)
\(^{36}\) [2018] 3 Lloyds Rep. 425 (Q.B.)
\(^{38}\) [2020] 3 Lloyds Rep. 429 (Q.B.)