Heavy Weather - The Ingredients for a Successful Defence

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A significant proportion of cargo claims dealt with by the Club arise during conditions of heavy weather. Cargoes may shift from their stowed positions, and particularly containerised cargo, (in respect of which the carrier may have no control over its stowage and securing of cargo within individual containers) and heavy cargoes such as steel. As to the latter, the nature of the cargo itself may make it difficult to achieve a tight and secure stow, and also results in the dead-weight capacity of the vessel being reached whilst the vessel's centre of gravity remains comparatively low. This leads to a high metacentric height (GM) and a stiff ship. The short rolling period which thus results can give rise to dynamic forces in heavy weather which can overcome even the most careful efforts to secure the cargo.

Even if the integrity of the stowage is not compromised by heavy weather, damage frequently results from seawater gaining access to the vessel's holds, typically via hatch covers, ventilators, access hatches, sounding and air pipes.

In many cases it is difficult to avoid liability for the resulting damage to cargo, notwithstanding the exception to liability contained in Article IV, Rule 2 of the Rules Scheduled to the Carriage of Goods by Sea Act 1971 (or similar governing legislation). This provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from, inter-alia:

"Perils, dangers and accidents of the sea or other navigable waters".

A recent decision of the Supreme Court of New South Wales Court of Appeal (Great China Metal Industries Co. Ltd., v. Malaysian International Shipping Corporation Berhad (the "Bunga Serina").) has provided a useful reminder about the circumstances in which a "peril of the sea" defence will be available.

The judgment in this case draws a distinction between the Anglo-Australian view on what constitutes a loss by perils of the sea, and the U.S.-Canadian view. In the U.S. and Canada, a peril of the sea involves an event of extreme nature, or a consequence of some irresistible force or overwhelming power which cannot be guarded against by the ordinary exertions of human skill and patience. Thus a "perils of the sea" defence may well fall in the U.S. or Canadian Courts simply because the weather conditions, even though extremely severe, were foreseeable or expected features of the voyage.

In contrast, the Anglo-Australian Courts focus upon the cause of the damage to the cargo. Does the cargo damage arise directly from the action of the sea, or is it instead due to wear and tear, or any other cause ordinarily incidental to the voyage, and thus to be anticipated? A "peril of the sea" defence is not applicable to damage or wear and tear which results from the natural and inevitable action of the wind and waves. However, loss by peril of the seas is not limited, under the Anglo-Australian viewpoint, to that resulting from extreme and unexpectedly violent weather. Nor does the reasonable expectation of violent weather necessarily preclude the defence. In order to succeed there must be some element of the fortuitous or unexpected to be found in the facts and circumstances causing the loss. But the defence will not be available if unseaworthiness or the carriers' negligence in the care of the cargo is a contributing cause of the loss or damage.

In many cases, although severe weather conditions have been encountered, the defence fails because the proximate or contributing cause of the damage has been the unseaworthy condition of the vessel; such as (for example) hatch cover defects, defective cross joint wedges and side cleats, corroded lids, cockings and drainage channels, or corroded ventilators, leaking hatch access covers and damaged sounding or air pipes. If there are competing causes of the loss, one of which is excepted under the Hague Rule or equivalent, and the other not, the defence will not be available.

In cases where it is hoped to make use of the defence, detailed evidence will be required. The carrier will need to demonstrate that due diligence was exercised to make the vessel seaworthy at the commencement of the voyage. This may involve maintenance records for hatch covers and other potential sources of water ingress to the holds. The qualifications and experience of the master and officer may come under review, together with the steps taken to stow and secure the cargo for the passage, and to ensure that the GM of the vessel was such as to avoid the vessel being excessively stiff.

The navigation of the vessel prior to and during the heavy weather will also come under close scrutiny. Could the severe weather conditions, or at least the worst of them, have been avoided by appropriate navigational measures? Whilst encountering the heavy weather, were adequate steps taken by the master to alter course and reduce speed in order to minimise ship motions, and therefore the stresses on both hull and cargo?

To establish a successful defence, detailed and reliable evidence will be required from the ship's witnesses upon all of these aspects, together with an accurate record of the conditions actually encountered. And as to the latter, a video tape or at least still camera pictures of the conditions during heavy weather can be of considerable benefit. In one recent case, a vessel lost two large heavy items of deck cargo overboard in the Bay of Biscay in storm conditions; the owners' defence had been much strengthened by the fact that the master had the foresight to video the worst of the weather conditions and the loss of the cargo.