Peril of the Sea Defence - Alive and Well in the United States Fifth Circuit

As information technology has made meteorological data increasingly accurate, timely and accessible, the conventional wisdom has been that it is correspondingly more difficult for a carrier to establish that heavy weather was both unforeseeable and unavoidable so as to enable the carrier to prevail on a "peril of the sea" defence under the Carriage of Goods by Sea Act ("COGSA"). The recent decision of the United States Court of Appeals for the Fifth Circuit in Corus U.K. Ltd. v Waterman Steamship Co. demonstrates, however, that in the proper case the peril of the sea defence is indeed alive, well and readily available to a COGSA carrier, at least one who is free of negligence.

The case is important for claims handlers and legal advisors in that it provides a roadmap for a carrier who would successfully assert the peril of the sea defence under United States law. In point of fact, though, the per curiam affirmance of the lower court by the Fifth Circuit is not particularly instructive. Rather, the detailed decision of the trial judge, the Honorable Kurt Engelhardt of the United States District Court for the Eastern District of Louisiana, is where the details and the value are to be found.

The case was brought by the owner of various steel products damaged aboard the LASH vessel "Atlantic Forest" during a voyage from Rotterdam to New Orleans in late November 2003. During the voyage, the vessel encountered weather conditions ranging from Force 9-12 on the Beaufort Scale for the better part of three days. The core of the dispute was whether the conditions the vessel encountered were sufficiently severe to constitute a "peril of the sea" within the meaning of the COGSA defence codified at 46 U.S.C. § 1304(2)(c).

The general rule is that for a storm to constitute a peril of the sea it must be "of an extraordinary nature or arising from irresistible force or overwhelming power which could not be guarded against by the ordinary exertions of human skill and prudence." Judge Engelhardt described the issue this way:

"Whether a particular storm constitutes a peril of the sea presents a question of fact, which depends upon the intensity of the storm and the weather conditions which would normally be expected in that geographic area at that time of year. For a storm to constitute a peril of the sea for purposes of the COGSA exemption, the weather encountered must be so severe as to be too much for a well-found or seaworthy vessel to withstand. Every peril of the sea case turns on the evidence presented and the facts established for that case."

Judge Engelhardt began his analysis by reciting the well-established shifting burdens of proof applicable in a COGSA case. Cargo interests have the initial burden of proving a prima facie case against the carrier by showing that the cargo was delivered to the carrier's custody in good condition and was discharged in a damaged condition. Here, the good order of the cargo was established by the clean bill of lading issued on behalf of the carrier. Surveys at the ports of destination established that the cargo had been damaged while in the custody of the carrier.

Upon this showing, the burden of proof shifted to the carrier to show that the damage was caused by one of the exceptions to liability found in COGSA. In this instance, the exception on which the carrier relied was that the heavy weather encountered during the voyage was sufficient to constitute a peril of the sea as a matter of law. To sustain the defence, Judge Engelhardt noted that the unreasonableness required the carrier to show: (1) the severity of the storm was sufficient to constitute a peril of the sea; (2) a causal connection between the cargo loss and the peril of the sea; and (3) the carrier's freedom from fault and that the ship was not unseaworthy.

After setting out the applicable law, Judge Engelhardt proceeded to provide a very practical and helpful summary of the factors considered in determining whether in a particular case the weather is sufficiently severe to entitle a carrier to an exemption from liability due to heavy weather. These factors include: structural damage to the ship; the force of wind and the height and violence of the seas; the duration of time the ship encountered heavy weather; the foreseeability of the heavy weather for the given location and time of year; and the size and type of vessel.

The court found that there was no credible evidence of carrier negligence or vessel unseaworthiness. The court took special note of the fact that statutory and class requirements for the vessel had been met and that there was no evidence the cargo had not been stowed in conformity with the stowage plan that had been developed over many years by the carrier and by the very same shipper who was claiming damage. Furthermore, the court was impressed with the testimony of the vessel's master, who closely monitored the weather throughout the voyage and who implemented numerous course and speed changes in an attempt to avoid the worst of the deteriorating weather and to minimize its impact on his ship.

Perhaps most important of all, however, was the significant amount of physical damage sustained by the vessel. The total cost of physical repairs and replacement of ship's equipment was approximately $250,000. Surveyors documented extensive damage to the vessel's forecastle, including damage to the propeller hub, anchor windlass, railings and vent pipes. The heavy seas had pushed in the bulkhead to the forward house, bending the steel plating and steel beams. Various port, hand rails and water tight doors were damaged. Various areas inside the ship's accommodation had been flooded and the stores crane and boom were dented and distorted.

In the absence of this substantial damage to the ship, the peril of the sea defence would not have been sustained. Also of importance was the decision was the court's finding that the storm system which caused the damage was unforeseeable. Even the cargo plaintiff's meteorologist expert admitted that the storm made variances erratic and inexplicable moves and that its forecasted location moved over 1,000 miles during a 36 hour period. Moreover, the storm conditions turned out to be much worse than those originally forecasted. In sum, the court accepted the carrier's evidence that the storm could not have been reasonably foreseen or avoided.

An interesting side bar for maritime practitioners concerned how the court dealt with a conflict between the testimony of the vessel's master and the meteorologist retained by cargo interests to provide expert testimony about the weather conditions encountered during the voyage. It was acknowledged that the vessel's anemometer was destroyed at a fairly early stage so that subsequent notations regarding the severity of the winds were based entirely on visual observations of the master and other deck officers. The plaintiff's expert in meteorology testified that the weather conditions experienced by the vessel could not have been as severe as reported by the ship's crew.

The court rejected the testimony of the expert and credited that of the master who the court noted was not only experienced but also educated in meteorology as a requirement for his licensing.

In sum, the reported case provides an excellent road map for those investigating or evaluating the validity of the heavy weather defence under COGSA.

With thanks to Gary A. Hemphill of Phelps Dunbar, New Orleans, for preparing this article.

1. Corus UK Ltd. v Waterman Steamship Co., No 06-38205 (5th Cir. 2007).
2. See Stew Cole, Inc. v MV LAKE MARROW, 331 F.3rd 422, 426 (5th Cir. 2003).