

THE IMPACT OF CMA CGM LIBRA ON THE ALLOCATION OF RISK IN A MARITIME ADVENTURE*

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In this article, the author analyses the impact that the decision in the CMA CGM Libra case may have on the allocation of risk in a maritime adventure. With the adoption of the Hague Rules a century ago, a compromise was reached between the carrier's interests and the cargo interests in relation to a carrier's obligation to exercise due diligence to make the ship seaworthy and the defences available to the carrier, "error in navigation" being one of them. As the decision in CMA CGM Libra differs from the traditional understanding by the shipping industry of the division of responsibility under the Hague Rules and given that the decision extends the carrier's seaworthiness obligation at the commencement of the voyage, changing the previously understood position, the outcome of the case and the decision of the Supreme Court on this very important issue of allocation of risk between the carrier and the cargo interest were awaited with great interest by the entire shipping industry.

Keywords: *seaworthiness; due diligence; error in navigation; passage plan.*

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1. INTRODUCTION

The topic of allocation of risk in a maritime adventure has always been a controversial subject because of the conflict between the interests of shipowners and cargo owners in a maritime adventure. Carriage of goods by sea is inherently risky as there are factors that cannot be controlled, predicted or avoided, heavy weather being one of the most obvious. For this reason, ever since the beginning of the commercial carriage of goods by sea, there has been tension between the interests of shipowners and cargo owners, with law and practice trying to strike a balance between these two sides.

Under common law, the shipowner had the absolute obligation to make his vessel seaworthy. However, at the same time, there was almost unrestricted freedom and privity of contract under English law. Therefore, for a long time, shipowners utilised the same to the full extent and were able to exclude any liability for cargo damage by incorporating in the contract of carriage and bill of lading numerous clauses stating that the shipowner would not be liable for any damage to the cargo howsoever caused, even if caused by the shipowner's own fault or negligence (*negligence clauses*).¹

By the 19th century this was considered an unsatisfactory solution and countries started introducing legislation to invalidate such clauses that tried to exclude liability for fault and negligence.

¹ James, P. S., *Introduction to English Law*, Tenth Edition, Butterworth, London, 1979; Haris, L. C., *Bills of Lading: A Shipowner's Point of View*, London, 1957, as in Čizmić, J., Klauzule o isključenju i ograničenju odgovornosti u engleskom pravu – granice dispozitivnosti, *Pravni vjesnik*, vol. 8 (1992), no. 1-4, pp. 151-160; Čizmić, J., Klauzule o isključenju i ograničenju odgovornosti u engleskom pravu – granice dispozitivnosti, *Pravni vjesnik*, vol. 8 (1992), no. 1-4, pp. 151-160; Pallua, E., *Pomorsko uporedno pravo*, Viša pomorska škola, Rijeka, 1975; Pallua, E., *Suvremeni razvoj engleskog prava u Zakonodavstvu i sudskim precedentima*, *Uporedno pomorsko pravo i pomorska kupoprodaja*, vol. 25 (1983), no. 100, pp. 193-217.

2. THE HAGUE RULES

At the same time, it was recognised that because maritime transport is by its very nature international, a unified set of rules should be adopted that could apply worldwide. This initiative led to the International Conference which in 1921 started the process that ended with the adoption of the Hague Rules 1924.² One of the main aims of the Conference, aside from the unification of law, was to strike a balance and achieve a compromise between the interests of shipowners and cargo owners as the main parties of the contract of carriage. The result of this compromise is contained in Article 3 and Article 4 of the Hague Rules.³

Article 3 provides for the responsibilities and liabilities of the carrier in relation to the obligation of seaworthiness⁴ and the obligation to properly and carefully care for the goods.⁵

Article 4 provides defences available to the carrier. Article 4, para 1 provides defence⁶ in relation to the seaworthiness obligation under Article 3, para 1,

² International Convention on the Unification of Certain Rules on Law Relating to Bills of Lading, 1924 (the so-called Hague Rules, 1924) adopted on 25 August 1924, entered into force on 2 June 1931 ratified by more than 95 states, with the Protocol to amend the International Convention on the Unification of Certain Rules on Law Relating to Bills of Lading, 1924 adopted on 23 February 1968, entered into force on 23 June 1977, (Visby Rules, 1968 or together Hague-Visby Rules) and the Protocol to amend the International Convention on the Unification of Certain Rules on Law Relating to Bills of Lading, 1924 as modified by Amending Protocol of 23 February 1968 adopted on 21 December 1979, entered into force on 14 February 1984, (SDR Protocol, 1979), Status of Conventions – Comité Maritime International (hereinafter: CMI Status of Conventions), *Yearbook 2020*, pp. 330-331 available at <https://comitemaritime.org/publications-documents/cmi-yearbook/> (3 February 2022).

³ The reference to the Hague Rules in this article applies equally to the Hague Rules 1924 and the Hague-Visby Rules 1968.

⁴ Article 3, para 1: “The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all the other parts of the ship in which goods are carried, fit and safe for their caption, carriage and preservation.”

⁵ Article 3, para 2: “Subject to the provisions of Article 4 the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.”

⁶ Article 4, para 1: “Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of Article 3, para 1. Whenever the loss

whilst Article 4, para 2 provides defences⁷ in relation to the carrier's obligation to properly and carefully care for the goods under Article 3, para 2.

As the Hague Rules were widely adopted, it is no surprise that many states also adopted the same or similar clauses in their domestic legislation relating to the allocation of risk between the carrier and the cargo interests, the carrier's responsibility and liability as well as defences. Among them is also Croatia which, in the Croatian Maritime Code 2004,⁸ adopted a set of rules based on the Hague Rules 1924.⁹

or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article."

⁷ Article 4, para 2: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) 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.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotion.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or the servants of the carrier contributed to the loss or damage."

⁸ Articles 460 and 550-553 of the Croatian Maritime Code, *Official Gazette*, no. 181/2004, 46/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019 (hereinafter: CMC).

⁹ Croatia has been party to the International Convention on the Unification of Certain Rules on Law Relating to Bills of Lading, 1924 (the so-called Hague Rules, 1924) since 8 October 1991 (*Official Gazette – International Treaties*, no. 1/1992) and its Protocols 1968 and 1979 since 28 January 1999 (*Official Gazette – International Treaties* no. 3/1995 and 3/1999).

2.1. Seaworthiness

Article 3 is often called a “cargo clause” as it provides for the shipowner’s obligation to exercise due diligence to make the vessel seaworthy¹⁰ before and at the beginning of the voyage. This broader concept of seaworthiness can be divided into three items. One is the ship itself, i.e. her structure and stability. The ship has to be able to withstand normal risks of sea carriage, be safe, sound and without defects. What this entails for a particular vessel will depend on the intended trade the vessel is going to be employed in. For example, if the vessel is going to be trading in ice-affected areas, she would need to be certified for such trade and have a reinforced hull, etc., in addition to all other requirements.

Secondly, there is the obligation to properly man, equip and supply the ship. This entails having sufficient fuel and provisions to safely get from A to B, as well as having competent crew on board to safely sail the ship from A to B. The competence of the crew is generally evidenced by their certificates, which have to be in line with the international regulations in force. Shipowners also need to prove that sufficient training has been afforded to the crew, especially for any specific equipment that the ship has or if the vessel is of a specific type. The obligation to equip the ship properly includes providing all equipment that the crew might need in both cargo handling and in navigating and sailing the vessel from A to B, including but not limited to charts, compass, radar, other navigational equipment and publications.

The third item of the broader seaworthiness obligation is so-called “cargo-worthiness”, which imposes the obligation to make the holds and other areas of the ship in which the cargo is carried suitable for the particular carriage. Dirty cargo holds by themselves might not render the vessel unseaworthy because the

¹⁰ The concept of seaworthiness is well established in theory and practice. See Colinvaux, R., *Carver’s Carriage by Sea*, Thirteenth Edition, Stevens & Sons, London, 1982; Gaskell, N., *Bills of Lading: Law and Contract*, LLP, Hong Kong, 2000; Tetley, W., *Marine Cargo Claims*, Third Edition, Yvon Blais Edition, Montréal, 1998; Eder, B.; Barry, S.; Foxton, D., *Scrutton on Charterparties and Bills of Lading*, Twenty-second Edition, Sweet & Maxwell, London, 2011; Wilson, J. F., *Carriage of Goods by Sea*, Seventh Edition, Longman/Pearson, London, 2010; Mandaraka-Sheppard, A., *Modern Admiralty Law*, First Edition, Cavendish Publishing, London, 2001; Baughen, S., *Shipping Law*, Second Edition, Cavendish Publishing, London, 2001; Tetley, W., *International Maritime and Admiralty Law*, Yvon Blais Edition, Cowansville, 2002; Pavić, D., *Pomorsko imovinsko pravo*, Književni krug, Split, 2006; Bolanča, D., Sposobnost broda za plovidbu u pomorskom prijevozu stvari, *Pravo u gospodarstvu*, vol. 34 (1995), no. 3-4, pp. 268-276; Grabovac, I., Pojam dužne pažnje (“due diligence”) u prijevozu stvari morem, *Uporedno pomorsko pravo i pomorska kupoprodaja*, vol. 25 (1983), no. 100, pp. 103-113. See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* (HL) (1961) 1 Lloyd’s Law Reports 57; (1961) AC 807; *The Amstelslot* (1963) 2 Lloyd’s Law Reports 223.

ship will be perfectly safe for navigation with unclean holds. Therefore, whether such a condition of the holds affects the vessel's seaworthiness will depend on the cargo being carried. For example, holds with grain residues will normally be acceptable if the vessel will load a cargo of coal, whilst if there are residues after the carriage of coal and the next cargo is grain, the vessel will be considered unseaworthy for this cargo since it is clear it will become contaminated and will not arrive at the destination in the same condition in which it was loaded.

The concept of seaworthiness therefore can be summarised as making the vessel in all respects safe and ready for a particular voyage and for the carriage of a particular cargo. Under English law, the usual test for seaworthiness¹¹ is whether a prudent owner would have required the relevant defect to be made good if he had known of it before he sent the vessel to sea in such condition.

2.2. Obligation to Properly and Carefully Care for the Cargo

The *CMA CGM Libra* case does not concern the shipowner's obligation to properly and carefully care for the cargo under Article 3, para 2 of the Hague Rules and this topic is therefore only briefly addressed in this article for the sake of completeness.

It is important to note that whilst the seaworthiness obligation has a clear temporal definition and applies before and at the beginning of the voyage, the obligation to properly and carefully care for the cargo has no such definition and applies throughout the voyage.

Virtually all cargo claims that the shipowner may face will allege breach by the carrier of either Article 3, para 1 or Article 3, para 2 of the Hague Rules. Therefore, any decisions and precedents dealing with issues and principles outlined in these rules will be of great importance to the shipping industry.

The importance of the *CMA CGM Libra* case¹² for the seaworthiness obligation is similar to the importance of the relatively recent judgment in *Volcafe*¹³ for the carrier's obligations under Article 3, para 2. Whilst the judgment did not extend the scope of the carrier's obligations, it placed a very heavy burden of proof on the carrier before he can avail himself of the Article 4 defences. Whilst previously it was up to the cargo interests to prove there was a breach by the carrier, now the

¹¹ The test for unseaworthiness is well established in *McFadden v Blue Star Line* (1905) 1 KB 697.

¹² The *CMA CGM Libra Supreme Court Judgement*, (2021) UKSC 51, 10 November 2021 on appeal from (2020) EWCA Civ 293.

¹³ *Volcafe Supreme Court Judgement* (2018) UKSC 61, 5 December 2018 on appeal from (2016) EVCA Civ 1103 (2019) 1 Lloyd's Law Reports 21, <https://www.supremecourt.uk/cases/docs/uksc-2016-0219-judgment.pdf> (4 February 2022).

mere fact that the cargo was damaged on the outturn shifts the burden of proof to the carrier. In order to exonerate himself from liability, the carrier must first prove that there was no breach of Article 3, para 2 and then prove that the damage occurred due to one of the defences in Article 4. This is a very heavy burden of proof and practically means that it will be easier for the cargo interests to advance their claims and more difficult for the carriers to exonerate themselves from liability.

2.3. Shipowner's Defences

On the opposite side of the coin, Article 4, often called the “shipowner’s clause”, provides defences¹⁴ that the shipowner can use once he has complied with Article 3. Therefore, provided he has exercised due diligence to make the vessel seaworthy, the shipowner can exonerate himself from liability if he can prove that the damage occurred for one of the reasons listed under Article 4, para 2. For the purposes of this article, we shall not go into each of the defences, although it should be noted that these are all causes over which the shipowner does not have direct control, for example heavy weather, acts of God, acts of war, strikes and lockouts, and acts of the shipper and other third parties.

The defence pertinent to the *CMA CGM Libra* case which we shall look at in detail is under Article 4, para 2 (a) “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”, or the so-called “error in navigation” defence.¹⁵

¹⁴ Defences available to the shipowner are those listed in Article 4 of the Hague Rules; Tetley, W., *Error in Navigation or Management*, <http://www.mcgill.ca/files/maritimelaw/ch16.pdf> (11 January 2008). Jansson, M., *The Consequences of a Deletion of the Nautical Fault*, Master Thesis, Gothenburg University, Gothenburg, 2007; Bolanča, D., *Odgovornost brodarara za izuzete slučajeve*, Pravni fakultet u Splitu, Split, 1996; Bolanča, D., *Spašavanje ljudi na moru i devijacija kao “izuzeti slučajevi” u prijevozu stvari morem*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, vol. 33 (1991), no. 131-132 = 3-4, pp. 249-262; Pospišil, M., *Protecting & Indemnity (P&I) osiguranje i obvezno osiguranje prema međunarodnim pomorskim konvencijama*, Vlastita naklada, Crikvenica, 2021.

¹⁵ For the defence of error in navigation, see Article 4, para 2 (a) of the Hague Rules; for the successful error in navigation defence, see New Zealand Supreme Court, *Tasman Pioneer* (2010) NZSC 37, 16 April 2010, available at [https://www.hfw.com/downloads/Shipping%20Bulletin%20\[A4%204pp\]%20June%202010.pdf](https://www.hfw.com/downloads/Shipping%20Bulletin%20[A4%204pp]%20June%202010.pdf) (4 February 2022).

It is important to highlight that the duty to exercise due diligence¹⁶ to make the vessel seaworthy is an overriding obligation, meaning that if the vessel was unseaworthy before and at the beginning of the voyage, then the shipowner can no longer use one of the Article 4 defences. In other words, in order to rely on one of these defences, the shipowner must first demonstrate that he complied with the Article 3 obligation to exercise due diligence to make the vessel seaworthy. However, the seaworthiness obligation is no longer absolute as it was under common law, but is an obligation to exercise due diligence, i.e. to exercise reasonable skill and care to make the vessel seaworthy.

On the other hand, it is a non-delegable obligation and the shipowner will not only be liable for his own negligence in making the vessel seaworthy, but also for the negligence of persons he employed to carry out this function as his agents, for example a ship repairer engaged to repair a defective hatch cover. If the ship repairer is negligent in repairing the hatch cover and it is still defective, then the shipowner cannot use the defence that he himself did nothing wrong and there was no negligence on his part since it is deemed that the ship repairer was acting as the shipowner's agent in carrying out his obligation to make the vessel seaworthy. The same principle applies to the crew. In the same example, if the crew were tasked to carry out the repair of the hatch cover and they were negligent, the shipowner will again be liable and will not be able to be discharged from his obligation to exercise due diligence for making the vessel seaworthy.

However, this should be contrasted with navigational decisions taken by the crew which until now did not fall under this concept. It was considered that when the crew are navigating the vessel, they are not acting as the shipowner's agents for the purpose of making the vessel seaworthy, and the shipowner could rely on the Article 4 defence of error in navigation in the case of any negligent navigational decisions by the crew.

¹⁶ About due diligence, see *Northern Shipping v Deutsche Seereederei GmbH (The Kapitan Sakharov)* (CA) (2000) 2 Lloyd's Law Reports 255; Grabovac, I., Pojam dužne pažnje ("due diligence") u prijevozu stvari morem, *Uporedno pomorsko pravo i pomorska kupoprodaja*, vol. 25 (1983), no. 100, pp. 103-113; Grabovac, I., Je li bilo kakvih promjena glede temelja odgovornosti prijevoznika u međunarodnim konvencijama o prijevozu stvari morem?, *Zbornik radova Pravnog fakulteta u Splitu*, vol. 48 (2011), no. 1=99, pp. 1-10; James, P. S., *Introduction to English Law*, Tenth Edition, Butterworth, London, 1979; Rodiere, R., *Traité Générale de Droit Maritime*, Paris, 1968, as in Grabovac, I., Je li bilo kakvih promjena..., *op. cit.*; Manca, V. P., *Commento alle convenzioni internazionali marittime*, Milano, 1875, as in Grabovac, I., Je li bilo kakvih promjena..., *op. cit.*

It should be noted, however, that there have been attempts to change the balance achieved by the Hague and the Hague-Visby Rules by adopting new international conventions, the Hamburg Rules 1978¹⁷ and the Rotterdam Rules 2008,¹⁸ which sought to tighten the shipowner's responsibility, especially by erasing error in navigation as a possible defence. However, both attempts were unsuccessful as neither of these conventions was widely accepted, with the Rotterdam Rules not yet being in force and garnering only 5 ratifications to date.

3. THE CMA CGM LIBRA

3.1. Background

The *CMA CGM Libra* is a Post-Panamax container ship with a capacity of 11,356 TEU, with a summer draft of about 15.5 metres and a service speed of 16 knots. On this particular voyage she was sailing from Xiamen, China, to Hong Kong in May 2011.

Similar to many other Chinese ports, the approach to Xiamen is considered difficult for several reasons. One factor is heavy traffic, including an abundance of small craft such as fishing vessels, whilst the other main factor is the topography of the seabed which is prone to changes due to the build-up of mud and silt and therefore changes in depth. The shipowner, CMA CGM, in fact issued a circular to all their vessels warning them of this danger and stating that extra care should be taken when navigating to Chinese ports in general but Xiamen in particular.

¹⁷ United Nations Convention on the Carriage of Goods by Sea, 1978, Hamburg, 31 March 1978 (Hamburg Rules, 1978), entered into force 1 November 1992, having 35 state parties, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XI-D-3&chapter=11&clang=_en (4 February 2022). Grabovac, I., *Hamburška pravila: kodifikacija budućnosti ili promašeni međunarodnopravni akt*, *Zbornik radova Pravnog Fakulteta u Splitu*, vol. 27 (1990), 1, pp. 71-82. Grabovac, I., *Supostojanje Haško-Visbyjskih pravila i problematika međunarodnog ujednačavanja prava o prijevozu stvari morem*, *Pomorski zbornik*, vol. 1994, no. 32, pp. 207-221.

¹⁸ United Nations Convention on Contracts of the International Carriage of Goods Wholly or Partly by Sea, (Rotterdam Rules), New York, 11 December 2008, signed in Rotterdam, 23 September 2009, not entered into force, having 5 state parties out of 20 needed to enter into force, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XI-D-8&chapter=11&clang=_en (4 February 2022). Skorupan Wolff, V., *Odgovornost prijevoznika prema Nacrtu konvencije o prijevozu stvari (u cijelosti ili djelomično) morem*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, vol. 46 (2007), no. 161, pp. 146-189; Skorupan Wolff, V., *Poredbena analiza Haških i Rotterdamskih pravila*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, vol. 49 (2010), no. 164, pp. 169-210.

A Notice to Mariners¹⁹ was also issued which stated that “numerous depths less than charted exist within, and in the approaches to Xiamen”, i.e. that charted depths cannot be relied on. Because of the nature of the seabed and frequent changes, there is also a dredged fairway leading from the open sea to the port which is used by deep-draught ocean vessels to ensure that they have a sufficient depth of water for navigation. The Notice to Mariners also stated that the minimum depth in the fairway is 14 metres whilst the depths outside the fairway cannot be guaranteed for the already mentioned reasons.

3.2. Passage Plan

Before a vessel departs on a voyage, the master and the officers need to plan the passage. This means taking into consideration all the information available to them and then making a plan for a safe voyage, choosing the safest and normally the shortest route bearing in mind the conditions prevailing at the time.

In this case, the course was plotted on the chart as part of the passage planning process, keeping within the buoyed channel of the fairway at all times.

However, the actual course of the vessel deviated from this plotted course. At the beginning, the vessel was slightly to the starboard side of the planned course, although she was not completely outside the buoyed channel of the fairway. This nevertheless positioned the vessel in such a way that when she neared the rocks close to the starboard boundary of the channel, the master needed either to make a large adjustment to bring the vessel back onto the plotted course, or leave the fairway and pass the rocks from the starboard side and re-join the fairway further on. The charted depths around the rocks on the starboard side were about 30 metres, which is more than enough for this vessel. However, as stated, such charted depths outside the fairway could not be relied on. Regrettably, the master indeed chose to leave the buoyed channel and the vessel grounded.

There was no doubt that the master’s decision to leave the buoyed channel was negligent. Nevertheless, according to Article 4 of the Hague Rules, owners will not be liable for damage caused by negligent decisions of the crew in navigation of the vessel.

Before going further into the legal arguments raised, it is important to understand the process of passage planning. In order to plan the passage, the officers and the master have to consider all the relevant information and all the relevant

¹⁹ Notice to Mariners 6274(P)/10 (“NM6274”) issued by the UK Hydrographic Office in December 2010.

factors for that particular voyage. This includes, but is not limited to: calculating the under-keel clearance depending on the draught of the ship since the ship's draught changes depending on how much cargo the ship carries at any given time; consulting the tidal charts in the case of a tidal port; checking the chart and the Notice to Mariners to see whether any corrections need to be made to the chart and also if there is any relevant information for their voyage. In this case, such information was the warning that the depths outside the fairway cannot be relied on. There is other information which may be relevant depending on the port, for instance ice information for navigation in north Canadian ports during winter, or tropical cyclone warnings during the respective seasons. Thus, it can be seen that passage planning is a complex process requiring an assessment of the relevant factors and the application of knowledge to such factors by the crew. Besides, the passage planning process will be different for each and every voyage.

3.3. IMO Guidelines

In 1999 the IMO adopted Guidelines²⁰ for voyage planning, summarising the proper approach to passage planning. The Guidelines provide that there are four main elements in passage planning: appraisal, planning, execution and monitoring. This means that the passage planning process does not merely encompass the period before the voyage, i.e. the plotting of the course that the ship intends to take. Since many unpredictable factors might occur after the ship sails from port, such as encountering heavy traffic which needs to be avoided, changes in weather, receiving a storm warning which may require a change of course, the passage plan is not a static document and may need to be adjusted during the course of the voyage. It is therefore clear that passage planning is in fact a process which starts before the beginning of the voyage but then continues during the whole of the voyage until the destination is reached.

Furthermore, the passage plan is not one single document, but is contained in several different forms and documents. Tide tables, charts, draught calculations, and under-keel clearance calculations all form part of the passage plan. There is normally a pro forma "passage plan" document used by the crew to note down the intended course, waypoints for changes in the course, and any comments deemed important enough to be referred to during the voyage. However, the passage plan is by no means limited to just this document and includes

²⁰ The IMO Guidelines for Voyage Planning were adopted by Assembly Resolution A893(21) on 25 November 1999, [https://www.wcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.893\(21\).pdf](https://www.wcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.893(21).pdf) (3 February 2022).

all documents which the master and the crew have to refer to both before and during the voyage.

It is also crucial to highlight that passage planning requires the exercise of judgement and seamanship by the crew and that during the process of passage planning the crew are required to make navigational decisions based on their knowledge and experience. Prior to this case, there was indeed common understanding in the industry that whether such a decision is made before the commencement of the voyage or during the voyage, the nature of the decision is the same, i.e. these are all considered navigational decisions.²¹

4. THE COURT PROCEEDINGS

Going back to the *CMA CGM Libra*, after the vessel grounded the owner engaged salvors and declared General Average. Once the general average adjustment was issued, the shipowner claimed general average contributions from cargo interests in the amount of USD 13 million. About 92% of the cargo interests paid their contributions, but about 8% refused and claimed that they were not liable for general average contributions because the vessel was unseaworthy and there was a breach of a contract of carriage by the shipowner.

4.1. Admiralty Court Decision²²

The shipowner considered that despite the master's negligent decision he was entitled to general average contributions since he was able to rely on the Article 4, para 2 (a) defence of error in navigation and thus commenced legal proceedings against the cargo interests in order to recover outstanding general average contributions in the amount of about USD 800,000. However, the cargo interests claimed that a defective passage plan itself can render the vessel unseaworthy and that the passage plan was defective because it did not contain a warning that the depths outside the fairway could not be relied on. The owner argued that any defect in passage planning is a navigational decision by the crew which is outside the scope of the owner's seaworthiness obligation and for which he has an error in navigation defence according to Article 4, para 2 (a) of the Hague Rules.

²¹ *The Torepo* (QBD Admlty) (2002) EWHC 1481 (Admlty), (2002) 2 Lloyd's Law Reports 535; *Cosco Bulk Carrier Co Ltd v Tianjin General Nice Coke and Chemicals Co Ltd (The Jia Li Hai)* (QBD Comm Ct) (2017) EWHC 2509 (Comm), (2018) 1 Lloyd's Law Reports 396.

²² *The CMA CGM Libra, Queen's Bench Division* (Admiralty Court), (2019) EWHC 481 (Admlty), 8 March 2019, Lloyd's Law Reports, vol. 1 (2019), pp. 595-616.

Thus, the Admiralty Court judge had the task of resolving this conflict. The Court held that the warning that the charted depths outside the fairway could not be relied on, and that there were numerous depths less than those charted in the approaches to Xiamen, was so important that it needed to be noted not only on the passage plan but also remarked upon on the chart to be used for navigation. The Court therefore concluded that the lack of this warning rendered the passage plan defective and that this was causative of the grounding. When the master gave evidence, he himself stated that he would not have deviated from the plotted course had the warning been on the passage plan and the chart in use.²³ The judge further found that a defective passage plan can render a vessel unseaworthy and therefore the owner would not be able to rely on the error in navigation defence in Article 4.

4.2. Court of Appeal Decision²⁴

Turning to the Court of Appeal decision, the judge went even further and stated that the chart itself was defective. Whilst the Admiralty Court judge also mentioned that the warning should have been marked on the navigational chart, he did not go as far as to say that the chart was defective because this warning was missing. It has long been established that a defective navigational chart renders the vessel unseaworthy,²⁵ since a correct chart is an essential element of equipment needed on board for the vessel to be considered seaworthy. The lack of an up-to-date chart and any defect in the chart would therefore immediately render the vessel unseaworthy and it would be unnecessary to go any further and decide whether a defective passage plan can also render the vessel unseaworthy. For the chart to be correct it needs to be up-to-date, i.e. it has to be the latest version of the chart, but because some factors can change rapidly it is not feasible to print new charts every time there is a change.

A Notice to Mariners is issued for every such relevant change and the crew needs to manually make corrections on the navigational chart in use. For instance, such a correction could be a wreck. If a vessel sank at a position where it poses danger for navigation, a Notice to Mariners will immediately be issued so that the charts can be corrected and the wreck marked. The same would

²³ The chart in use was British Admiralty Chart no. 3449 (BA 3449), the most up-to-date printed version.

²⁴ *The CMA CGM Libra*, Court of Appeal, (2020) EWCA Civ 293, 4 March 2020, Lloyd's Law Reports (2020), vol. 2, pp. 565-581.

²⁵ *Alfred C Topfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* (1985) 2 Lloyd's Law Reports 325.

apply if a new underwater cable was laid close to an anchorage area and therefore presented a danger; a Notice to Mariners would state that charts have to be corrected by marking the underwater cable at this position. Chart corrections are a mechanical exercise performed by the crew who will go through every Notice to Mariners and put the appropriate remark on the chart. These remarks are permanent and form part of the chart from that point forward and remain on the chart for all future voyages.

In this case, the Admiralty judge correctly stated that the warning with regard to depths in the approaches to Xiamen should have been “pencilled in” on the chart, as should the plotted course for this particular voyage, which makes it part of the passage planning process rather than a correction to the chart. Such remarks which are intended just for a particular voyage will be erased before the chart is used for the next voyage and therefore they do not form part of the chart and the chart is not defective per se without such non-permanent remarks.

Whilst a defective chart could certainly make the vessel unseaworthy, it was necessary to decide in this case whether the defective passage plan could also have had the same effect. Before this case, navigational decisions, whether made before or during the voyage, were considered to be outside the scope of the seaworthiness obligation, but part of an error in navigation defence. The demarcation line was based on the nature of the act, the nature of the decision. If it was a navigational decision which was considered the exercise of seamanship, then it would not fall within the scope of the shipowner’s obligations of making the vessel seaworthy. It would in fact afford him the defence of error in navigation if such a navigational decision was wrong or negligent.²⁶

By rejecting the reasoning that a navigational decision in itself cannot render the vessel unseaworthy, the judge’s decision in this case changes the understanding of this demarcation between the seaworthiness obligation and navigation of the vessel and makes the shipowner responsible for a larger scope of issues and actions. Before this judgement, it was deemed that the demarcation line was based on the nature or the character of the decision or the act, rather than when such a decision was made. However, the judges in this case decided that whether something falls under the shipowner’s seaworthiness obligation or whether it can be used as an error in navigation defence should be determined by a temporal line meaning that anything that is done before the commencement of the voyage is able to render the vessel unseaworthy, whilst the

²⁶ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* (HL) (2001) 1 Lloyd’s Law Reports 147; (2001) 1 AC 638.

shipowner could still have an error in navigation defence for navigational decisions made during the voyage.

The owner argued against this on the basis that it changes the division of responsibility under the Hague Rules and is against the intention of the Hague Rules. It was argued that if the Hague Rules intended to make such a demarcation on a temporal basis so that everything before the commencement of the voyage would affect seaworthiness and only navigational decisions after the commencement of the voyage could be used as a defence, then the Hague Rules would surely have specified this clearly. There were also previous court decisions where it was held that a navigational decision can in fact be made before the commencement of the voyage and that the shipowner can use the error in navigation defence for such a decision. Therefore, the owner argued that the judgment in this case changes the previously understood position about the allocation of risk and the shipowner's scope of responsibility and did not follow existing precedents.

The last issue discussed was whether the shipowner exercised due diligence. As stated, the shipowner has an overriding obligation to make the vessel seaworthy, although this is not an absolute obligation, but an obligation to exercise due diligence. Therefore, if the vessel is deemed unseaworthy, the only defence that the shipowner can use is that he exercised due diligence. However, his obligation to exercise due diligence is non-delegable which means that the shipowner will also be responsible for the actions of others who act as his agents in making the vessel seaworthy. The shipowner in this case argued that he should not be responsible for the actions of the crew who were not acting as his agents in his capacity as the carrier, but were acting as navigators.²⁷ They were exercising their seamanship and applying their own judgement, knowledge and experience in the process of passage planning. Nevertheless, the Court decided against this interpretation and stated that as soon as the carrier assumes responsibility for the cargo, all actions by the master and the crew are the responsibility of the shipowner and within the scope of the shipowner's obligations. Therefore, the Court found that the shipowner did not prove that he exercised due diligence to make the vessel seaworthy.

²⁷ *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* (1982) 1 Lloyd's Law Reports 7; (1982) WLR 119; *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The Apostolis)* (CA) (1997) 2 Lloyd's Law Reports 241.

4.3. Appeal to the Supreme Court

Because of the importance of this issue and because it changes the traditional understanding of the division of responsibility under the Hague Rules and under which circumstances the carrier can use the error in navigation defence and other Article 4 defences, the shipowner applied for leave to appeal to the Supreme Court. Permission to appeal was granted on the basis that it was of public interest for this very important issue to be decided by the highest instance court. The grounds of appeal to the Supreme Court and the issues on which the Supreme Court had to decide can be broadly summarised under two items.

The first was whether a defective passage plan can render the vessel unseaworthy. The question posed was whether the defect must go to an attribute of the vessel in order to render the vessel unseaworthy or whether it can encompass a navigational decision as long as such a decision is made before the commencement of the voyage. Previously, it was deemed that a navigational decision whenever it is made cannot render the vessel unseaworthy, but in this case the judges drew a temporal line stating that a navigational decision on its own can render the vessel unseaworthy if it is made before the commencement of the voyage.

The second item is the last issue discussed in the Court of Appeal judgment which is whether the crew act as the shipowner's agents when they act as navigators in passage planning and whether the shipowner can claim that he exercised due diligence even if the crew made a negligent or incorrect navigational decision during the passage planning.

4.4. Supreme Court Decision²⁸

The Supreme Court hearing took place in July 2021 and the judgment was issued in November 2021. The Supreme Court dismissed the appeal, finding that the Admiralty judge directed himself properly in law and the findings he made amply support the conclusion reached that a defective passage plan can render a vessel unseaworthy and that the owner did not prove that he exercised due diligence to make the vessel seaworthy.

Numerous issues and previous precedents are discussed in the Supreme Court ruling clarifying the application of the Hague Rules, the test of seaworthiness and the due diligence obligation. Regardless of what the respective parties may feel about the ruling, there is no doubt that the Supreme Court's opinions on

²⁸ *The CMA CGM Libra Supreme Court Judgement*, (2021) UKSC 51, 10 November 2021.

these issues will be a useful reference and guide in future cases, although, as is often the case, the shift in the established understanding of these principles may well lead to an increase in litigation of seaworthiness cases. It is therefore worth going through the Supreme Court's findings and comments in more detail.

In summary, the Court's conclusion was that the carrier's obligation under the Hague Rules is not subject to a category-based distinction between a vessel's quality of seaworthiness and the crew's navigational decisions. The crew's failure to navigate the ship safely is capable of constituting a lack of due diligence by the carrier and it makes no difference that the delegated task of making the vessel seaworthy involves navigation. The conclusion can be broken down into the following elements:

– On the proper interpretation of the Hague Rules, the Article 4, para 2 exception of act, neglect or default in the navigation or management of the vessel cannot be relied upon in relation to a causative breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy.

This confirms the established principle that the seaworthiness obligation under Article 3, para 1 is an overriding obligation. If the vessel is unseaworthy, the carrier's only defence is that he exercised due diligence and he is not entitled to rely on Article 4, para 2 defences.

This principle was established in the case of *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 and has applied ever since.

– 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. 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.

As previously mentioned, one of the owner's main arguments was that a navigational decision itself cannot render the vessel unseaworthy and that unseaworthiness must relate to an attribute of the vessel.

The Court stated that there are a number of cases in which it has been held that a vessel may be rendered unseaworthy by negligent management of the vessel, despite the nautical fault exception in Article 4, para 2 (a).²⁹ Whilst it is more often that an act of management has rendered a vessel unseaworthy prior to the voyage rather than an act of navigation, the Court stated that the same approach should apply to both elements of the nautical fault exception. As the

²⁹ *Steel v State Line Steamship Co* (1877) 3 App Cas 72; *Gilroy Sons & Co v WR Price & Co* [1893] AC; *G E Dobell & Co v Steamship Rossmore Co Ltd* [1895] 2 QB 408; *The Friso* [1980] 1 Lloyd's Law Reports 469.

Court of Appeal held, there are two notable cases which illustrate how an act of navigation may render a vessel unseaworthy. In the first case,³⁰ the vessel was unseaworthy because a compass adjuster had negligently adjusted the vessel's compass, and in the second³¹ the vessel was unseaworthy because the master had miscalculated the amount of fuel required for the voyage.

The owner submitted that these cases can be distinguished because they involved an act of management or navigation which caused a defect in an attribute of the vessel which in turn led to unseaworthiness, whilst in the present case it was purported that the act of navigation itself led to unseaworthiness. The owner argued that the defective compass rather than the negligent adjustment is what rendered the vessel unseaworthy in the first case and the lack of fuel rather than the incorrect calculation of it rendered the vessel unseaworthy in the second case. Whilst a navigational decision can cause a defect in an attribute of the vessel which will in turn render the vessel unseaworthy, the navigational decision itself should not do so. The owner therefore argued that there is an "attribute threshold".

The Supreme Court held that this is not a principled distinction. If the vessel is unseaworthy, then it makes no difference whether negligent navigation or management is the cause of the unseaworthiness or is itself the unseaworthiness. What matters is the fact of unseaworthiness. Causation is relevant to the issue of due diligence, but not to whether the relevant defect or state of affairs amounts to unseaworthiness. This will depend on its effect on the fitness of the vessel to carry the goods safely on the contractual voyage.

The Court's rejection of the "attribute threshold" argument was twofold. Firstly, the Court found that the passage plan is in fact an attribute of the vessel, just as navigational charts or other equipment are. Secondly, the Court stated that the concept of seaworthiness is not subject to an attribute threshold, and if there is one, the same must be widely and diversely drawn. There are ample authorities where seaworthiness was not limited to physical defects in the vessel and her equipment. It extends to documentary matters such as adequate and up-to-date charts,³² adequate piping plans,³³ as well as to the mental abilities and requisite knowledge of the crew,³⁴ the adequacy of the vessel's systems such as

³⁰ *Paterson Steamships Ltd v Robin Hood Mills Ltd (The Thordoc)* (1937) 58 Lloyd's Law Reports 33.

³¹ *E B Aaby's Rederi A/S v Union of India (No 2) (The Evje)* [1978] 1 Lloyd's Law Reports 351.

³² *Grand Champion Tankers Ltd v Norpipe A/S (The Marion)* [1984] AC 563.

³³ *Owners of Cargo Lately Laden on Board the Makedonia v The Makedonia* [1962] P 190 and *Robin Hood Flour Mills Ltd v N M Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Law Reports 276.

³⁴ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd's Law Reports 719.

in relation to engine maintenance³⁵ or hot works and fire safety.³⁶ It may also extend to the cargo on the vessel, such as, for example, where it is stowed so as to endanger the vessel³⁷ or where a dangerous cargo does so.³⁸ It also extends to residues of a previous cargo which render the vessel's holds unfit for carriage³⁹ and even to the trading history of the vessel.⁴⁰

The suggestion that there is an attribute threshold has already been criticised by some authorities⁴¹ on the basis that such a requirement can be difficult to apply in practice and can lead to anomalies. It has been suggested that any such requirement should be confined to cargo worthiness and should in any event "be regarded as illustrative rather than prescriptive".

– The well-established prudent owner test, namely whether a prudent owner would have required the relevant defect to be made good before sending the vessel to sea had he known of it, is an appropriate test of seaworthiness, well suited to adapt to differing and changing standards.

Given the essential importance of passage planning for the safety of navigation, and 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.

Whilst prior to publication of the IMO Guidelines, the standards for passage planning may have been different, it is now inconceivable for a vessel to embark on a voyage without a passage plan. Therefore, the judge was correct in applying the prudent owner test of seaworthiness and the conclusion that a prudent owner would not allow the vessel to set sail without a passage plan. Since the vessel would be unseaworthy if she began her voyage without one, it must follow that the same must be true if she did so with a defective passage plan which endangered the safety of the vessel.

³⁵ *CHS Inc Iberia SL v Far East Marine SA (The Devon)* [2012] EWHC 3747 (Comm).

³⁶ *Various Claimants v Maersk Line A/S (The Maersk Karachi)* [2020] 2 Lloyd's Law Reports 98.

³⁷ *Kopitoff v Wilson* (1876) 1 QBD 733.

³⁸ *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Law Reports 255.

³⁹ *Empresa Cubana Importada de Alimentos "Alimport" v Iasmos Shipping Co SA ("The Good Friend")* [1984] 2 Lloyd's Law Reports 586.

⁴⁰ *Ciampa v British India Steam Navigation Co* [1915] 2 KB 774.

⁴¹ Aikens, R.; Lord, R.; Bools, M.; Bolding, M.; Sing Toh, K., *Bills of Lading*, Third Edition, Routledge, 2020; Bennett, H.; Dias, J.; Girvin, S.; Hofmeyr, S.; Kerr, S.; MacDonald, A.; MacDonald Eggers, P.; Sarli, R., *Carver on Charterparties*, Second Edition, Sweet & Maxwell, London, 2020; Girvin, S. D., *Seaworthiness and the Hague-Visby Rules*, *International Journal of Shipping Law*, 1997, pp. 201-209.

The standards required are not absolute but are relative to the vessel, the cargo and the contemplated voyage. They are also relative, among other things, to the state of knowledge and the standards prevailing at the material time.⁴² Thus, it is not relevant that this is the first case where a defective passage plan constituted unseaworthiness, since the standards required can change and rise to reflect improvements in technology, with an impact, for example, on shipbuilding,⁴³ equipment,⁴⁴ or navigation, as the judge observed in the present case. The Court acknowledged that there may be cases at the boundaries of seaworthiness⁴⁵ where it may be necessary to address a prior question of whether the defect sufficiently affects the safety and fitness of the vessel so as to engage the doctrine of seaworthiness, although this was not the case here.

– The carrier’s obligation to exercise due diligence to make the vessel seaworthy requires due diligence to be exercised in the work of making the vessel seaworthy, regardless of who is engaged to carry out that task.

The owner argued throughout that the decisions the master and crew make *qua navigators* do not fall within the carrier’s orbit or the shipowner’s due diligence obligation *qua carrier*.

The Court agreed with the Court of Appeal judge that “all the acts of the master and crew in preparing the vessel for the voyage are performed *qua carrier*”. The fact that navigation is the responsibility of the master and involves the exercise by the master and the crew of their specialist skill and judgement makes no difference. The same is true of much of the work necessary to make a vessel seaworthy which generally the carrier entrusts to those with particular skills and experience. The carrier nevertheless remains responsible for any negligence in the performance of making the vessel seaworthy.

It has been well established that seaworthiness is a non-delegable obligation. The leading authority on the nature and scope of the due diligence obligation under Article 3, para 1 of the Hague Rules is the decision of the House of Lords in *The Muncaster Castle*.⁴⁶

The owner also argued that he discharged his due diligence obligation to make the vessel seaworthy because he provided the crew with all materials and equipment

⁴² *F C Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1927) 27 Ll.L 395 at 396 (Viscount Sumner).

⁴³ *Burgess v Wickham* [1863] 3 B & S 669, 693–694.

⁴⁴ *Mountpark Steamship Co v Grey & Co*, Shipping Gazette and Lloyd’s List, p 12, 12 March 1910.

⁴⁵ *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* (CA) (1982) 1 Lloyd’s Law Reports 7; (1982) WLR 119.

⁴⁶ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* (HL) (1961) 1 Lloyd’s Law Reports 57; (1961) AC 807.

necessary to navigate the vessel safely, and moreover he had proper systems in place for passage planning and crew competence. An additional argument is that if a defect is remediable, it may mean that the vessel is not unseaworthy if the crew has all the required material to put it right and it can reasonably be expected that the defect will be put right before any danger to the vessel or cargo arises.

The owner's arguments failed on all points. Providing materials, equipment and competent crew, as well as having proper systems in place, are all aspects of the owner's seaworthiness obligation. However, this does not mean that this is the limit of the carrier's obligation. The carrier's obligation is not merely to "man, equip and supply the ship" (Article 3, para 1 (b)). It is also to "make the ship seaworthy" (Article 3, para 1 (a)) and to make "parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation" (Article 3, para 1 (c)).

The owner could also not use the argument that the defect was remediable since the requisite noting and marking ought to have been done as part of the planning stage of the passage planning process and was unlikely to be revisited as part of the execution and monitoring stage. This is all the more so in circumstances where it related to the initial part of the voyage, and therefore it could not reasonably be expected that the defect would be put right before the danger to the vessel or cargo arose.

It was acknowledged that there are limits to the responsibility of the carrier, for example where the failure to exercise due diligence occurs before he has responsibility for the vessel, such as the negligence of a shipbuilder, or for the lack of due diligence which occurs before the cargo "comes into his orbit", caused, for example, by shippers' actions.⁴⁷

However, the Court found that in the present case the vessel was at all material times within the owner's "orbit". The work of preparing a proper passage plan so as to make the vessel seaworthy for the voyage was entrusted to the master and deck officers, who are the owner's servants.

5. CONCLUSION

The last few years have seen two major cases dealing with the carrier's obligations under the Hague Rules, both for relatively low monetary value, although with high importance for the parties to the contracts of carriage, their insurers and the wider shipping industry.

⁴⁷ *Northern Shipping v Deutsche Seereederei GmbH (The Kapitan Sakharov)* (CA) [2000] 2 Lloyd's Law Reports 255.

The first case was *Volcafe* which changed the understanding of the burden of proof under Article 3, para 2 and made it more difficult for the carrier to exonerate himself from liability and to use one of the Article 4 defences.

Then there is the *CMA CGM Libra* case which makes it more difficult for the carrier to demonstrate the exercise of due diligence to make the vessel seaworthy and therefore compliance with Article 3, para 1 by clearly placing the navigational decisions made by the crew before the beginning of the voyage in the carrier's orbit of responsibility.

This indicates a trend in the increasing burden of the carrier, an extension of his responsibilities and a decrease in the number and nature of circumstances in which he can avail himself of the Hague Rule defences. Perhaps such a trend is not surprising when we look at the developments in the shipping industry over the last few decades. There is certainly a trend in the increasing number and more onerous regulations that owners need to comply with in all areas of operation, most notably safety and environmental protection as well as an increase in the limits of liability, sometimes almost unreasonably so, which apply under civil liability regimes in international conventions and domestic legislations.

The error in navigation defence has for decades been a source of much contention and a target of criticism. There have been moves to abolish this defence, starting with the adoption of the Hamburg Rules and following on in the Rotterdam Rules. However, neither of these conventions has been widely adopted by the industry. This shows the reluctance to move from traditional principles and the well-established allocation of risk between the parties, and the question arises whether a move from the same is indeed justified or needed. After all, the Hague Rules were the result of a well-thought-out balance between various interests and have served the industry well. All parties understand their scope of responsibility which also enables them to insure their interest in the maritime adventure. Therefore, any changes will not only affect the parties, but also their insurers and, by extension, the wider industry.

It is nevertheless expected that the trend of increasing shipowners' responsibilities will continue. Whilst it may take considerable time and effort to reach a consensus for a regime change at the international level, as has been seen with the slow adoption of the Hamburg and Rotterdam Rules, the same effect can to some extent be achieved by Courts interpreting the Hague Rules defences restrictively and placing the burden of proof on the carrier, as is apparent in *Volcafe* and *CMA CGM Libra*.

But whilst the decision in *CMA CGM Libra* certainly makes the shipowners' position more onerous, it is difficult to be overly critical of the view held

by several well-regarded and experienced judges that shipping must keep up with the times, technology advancements and improvements of systems and processes which are proven to reduce incidents. Perhaps a better question is whether imposing more and more regulatory burdens on shipowners actually reduces incidents or purely increases administration for both onshore and on-board personnel. In the author's view, more focus should instead be placed on ending the increasing criminalisation of seafarers and improving their working conditions, especially during the pandemic, to stop the loss of qualified personnel to onshore jobs and to entice good quality candidates into the profession. Human error remains the single largest cause of incidents, and the industry as a whole should focus more on the root causes in order to prevent casualties rather than on the division of responsibility in their aftermath. Claims statistics have already shown that a further increase in the limits of shipowners' liabilities is unnecessary and in fact is making some limits pointless if they are so high as to never actually be used in practice. Perhaps it is time to shift the focus of the industry from the division of responsibility to human resources that shipping still fully relies on.

The impact of the considered judgments has already been felt by the owners and their insurers. Claims are being pursued more aggressively and it is anticipated that more cargo interests will challenge the General Average contribution requests if it is indicated that there was any issue with the passage planning or any negligence of the crew occurring before the beginning of the voyage. Whilst *CMA CGM Libra* focuses on the passage plan, the principle it establishes that all navigational decisions made before the beginning of the voyage are capable of rendering the vessel unseaworthy has much wider implications than the passage plan itself.

With the number of regulations, guidelines and prescribed procedures that the crew must nowadays follow, it is not inconceivable that not all will be complied with perfectly. This may make it increasingly easy for cargo interests to allege unseaworthiness. However, it has to be emphasised that any such defect still has to be causative. In the *CMA CGM Libra* case, the owner's downfall was the master's testimony that he would not have sailed outside the fairway if the warning that the charted depths were unreliable was marked on the chart and the passage plan. It was therefore easy to find in this case that the lack of warning was clearly causative of the grounding.

Another interesting issue may arise, mainly in relation to liner trade. Whilst the Court drew a temporal line between navigational decisions before the beginning of the voyage (which can render the vessel unseaworthy) and during the voyage (which can be used in the error in navigation defence), the question

arises about when the voyage begins. Whilst it is clear that for cargo loaded at Xiamen, the passage plan from Xiamen to Hong Kong had to be in place before the beginning of the voyage, what is the position regarding cargo that was loaded at previous ports and already on board? IMO Guidelines require a berth-to-berth passage plan, and so there is no requirement to plot the entire course of the voyage before sailing from the first loading port. Since the judgment did not limit the scope of the error in navigation defence for negligent navigational decisions during the voyage, it is arguable that such a defence could still be used in relation to the cargo which was loaded at the previous ports.

The question of when the seaworthiness obligation or warranty attaches has also arisen in insurance law and was addressed by the doctrine of stages. The Marine Insurance Act 1906 provides that the warranty of seaworthiness would apply at the commencement of each stage of the voyage.

Whilst the Hague Rules do not have the same qualification, it is somewhat difficult to reconcile that a vastly different result could be reached in respect of different cargoes on the same vessel depending on at which stage of the liner voyage they were loaded. However, it is indeed an interesting argument which may give cargo interests some pause for thought.

It would therefore not be surprising to see an increase in litigation in the short term whilst the parties probe the limits of the findings in the present case and in the increased scope of the seaworthiness obligation placed on the carrier and until the ripples caused in the industry by this case fully subside.

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Sažetak:

**UTJECAJ SUDSKOG PREDMETA CMA CGM LIBRA NA
RASPODJELU RIZIKA U POMORSKOM POTHVATU**

U ovom članku autorica analizira važnost koju odluka može imati na raspodjelu rizika u pomorskom poduhvatu u slučaju CMA CGM Libra. Usvajanjem Haških pravila prije jednog stoljeća, postignuta je nagodba između interesa prijevoznika i interesa vlasnika tereta, kad je riječ o prijevoznikovo obvezi ulaganja dužne pažnje u osposobljavanju broda za plovidbu i dostupne prigovore, pri čemu je nautička greška jedna od njih. Odluka u slučaju CMA CGM Libra odstupa od tradicionalnog shvaćanja pomorske industrije o podjeli odgovornosti prema Haškim pravilima i proširuje obveze prijevoznika u osposobljavanju broda za plovidbu na početku putovanja, mijenjajući prethodno shvaćanje. Ishod slučaja i odluka Vrhovnog suda o ovom vrlo važnom pitanju podjele rizika između prijevoznika i interesa vlasnika tereta bila je iščekivana s velikim zanimanjem od cjelokupne pomorske industrije.

Ključne riječi: *sposobnost broda za plovidbu; dužna pažnja; nautička greška; plan putovanja.*