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Rough Seas

By Marilyn Raia

Judges who have spent significant time at sea are few and far between. Nonetheless, they set high standards for seafarers and the carriers who employ them. Because of these high standards, judges do not allow carriers to avoid liability for cargo loss or damage due to expected weather and sea conditions. A carrier can avoid liability for cargo loss or damage only when the loss or damage is caused by unanticipated extreme or extraordinary conditions at sea, also known as a "peril of the sea." This column explains how the courts have analyzed the peril of the sea defense in cargo cases.

Cargo Law Basics

Federal law imposes certain obligations on carriers of goods to or from the United States in foreign trade. They must "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." If a carrier fails to fulfill its obligations, it is liable in the first instance for cargo loss or damage. However, federal law recognizes there are certain circumstances under which a carrier should be excused from failing to fulfill its obligations. Those circumstances involve events and conditions outside the carrier's control and expectations.

One exception to liability arises when cargo is lost or damaged due to a peril of the sea. In order to be excused from liability due to a peril of the sea, the carrier must prove the existence of a peril of the sea and that it exercised due diligence to make the carrying vessel seaworthy at the beginning of the voyage.

Peril of the Sea Defined

The phrase "peril of the sea" is not defined in any statute. Instead, the determination of whether cargo has been lost or damaged due to a peril of the sea is left to the courts. In the process of determining what conditions constitute a peril of the sea, the courts have set high standards for what seafarers are expected to anticipate and withstand.

Courts commonly define a peril of the sea as conditions which are of "an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." Another common definition is "a fortuitous action of the elements at sea of such force as to overcome the strength of a well found ship or the usual precautions of good seamanship." Whether the conditions encountered by a vessel during a voyage meet those definitions is determined on a case-by-case basis. The courts consider various factors including wind strength, the type and extent of damage suffered by the vessel, and the existence of cross-seas. The courts also consider the foreseeability of the conditions at the location and time of year they were encountered, and the actions taken by the master when facing them.

Peril of the Sea Found

Taisho Marine & Fire Ins. Co. Ltd v. ***M/V Sealand Endurance***, 815 F.2d 1270 (9th Cir. 1987) involved a containerized shipment of Sony stereo equipment that was loaded on the deck of the ***M/V Sealand Endurance*** for carriage from Japan to California. The shipment was insured by Taisho. While at sea, the container and contents were destroyed during a storm. Taisho paid Sony for its loss and then sued the carrier, Sealand. Sealand argued it should not be liable for the loss because it was caused by a peril of the sea.

The district court found the ***Sealand Endurance*** encountered at least four waves in excess of sixty feet, which caused the vessel to roll more than forty degrees. Further, it found a substantial number of waves between forty and sixty feet battered the vessel. During the storm, the sustained winds remained between Beaufort forces 10 and 12 (48-71 knots) with gusts in excess of 95 knots. The court noted the master reduced speed from 21.5 to 17 knots to minimize damage. In the storm, the vessel lost the gangway and two fire hoses and nozzles overboard. A lifeboat embarkation ladder and pilot ladder were damaged. Some deck-stowed containers were lost overboard and other containers suffered physical damage.

The district court concluded the Sony shipment was lost because of a peril of the sea. It exonerated SeaLand from liability in light of Taisho's agreement that SeaLand had exercised due diligence to make the vessel seaworthy at the commencement of the voyage. Taisho appealed and lost in the Ninth Circuit.

A frequently cited case in which the court found the cargo damage to have been caused by a peril of the sea is J. Gerber & Company v. ***S.S. Sabine Howaldt***, 437 F.2d 580 (2d. Cir. 1971). In that case, a cargo of steel products suffered extensive saltwater damage during a voyage from Belgium to Delaware and Virginia. At one point, the vessel encountered Beaufort force 11 winds with squalls gusting to force 12. The vessel rolled 25-30 degrees and the hull twisted and strained in turbulent cross seas. It remained hove to for twelve hours. During the storm, the vessel suffered damage. The pedestal holding the master switch that controlled the capstan at the stern broke loose leaving a hole in the deck. A porthole in the galley was smashed; two winch covers were ripped off and disappeared; the catwalk from the amidships housing over the hatches was torn loose and destroyed; and dents appeared in several parts of the vessel's superstructure and fixtures. Further, the vessel was forced off course and the normal daily sailing distance of 200 nautical miles was reduced to 96.

The district court held the character of the seas and weather did not constitute a peril of the sea and found the testimony of the captain and chief mate about the conditions encountered to not be credible or consistent with the vessel's log. It further held the carrier was negligent in allowing the vessel to depart Belgium with untarped defective hatch covers and insufficiently protected ventilators. The Second Circuit reversed. It held the district court's findings were clearly erroneous. It noted the district court misinterpreted the vessel's log about the conditions encountered and concluded the captain and chief mate were credible witnesses. It also held there was no dividing line on the Beaufort scale above which a peril of the sea existed. Rather, the determination of whether the loss or damage was caused by a peril of the sea was based on the facts of each case. The Second Circuit also noted the evidence established: 1) the hatch covers were not defective; 2) tarpaulins that had been fastened as covers over the winches and ventilators were blown to shreds during the storm; and 3) water did not enter the holds through the ventilators.

Peril of the Sea Not Found

Some courts expect seafarers to be able to withstand quite severe conditions at sea and do not excuse them from liability for cargo loss or damage if the severe conditions could have been anticipated. Thyssen, Inc. v. ***S/S Eurounity***, 21 F.3d 533 (2d. Cir. 1994) illustrates the point. That case involved a shipment of steel that suffered seawater damage during a voyage from Belgium to the US East Coast. During the voyage, the vessel encountered a storm classified as an "ultra bomb" or extra-tropical cyclone. The central barometric pressure of the storm fell sixty millibars in twenty-four hours. The storm gave rise to Beaufort force 10 to 11 winds, waves

between 32 and 37 feet high, and chaotic cross seas causing the vessel's weather deck to be awash. During the storm, the vessel was hove to. The vessel owner offered evidence that the severe storm put torsional stress on the hull making the entry of seawater into the holds inevitable. The vessel suffered some, but not extraordinary, damage to deck equipment. The cargo owner argued the hatch covers and seals were not properly maintained which resulted in the entry of seawater into the holds.

The district court held the carrier failed to prove the cargo damage was caused by a peril of the sea. Rather, it held the damage was due to the unseaworthy condition of the hatch covers and seals. It also held there was "nothing of an extraordinary nature", and no "irresistible force or overwhelming power in the conditions." The court further noted both sides' experts testified the sea and wind conditions encountered by the vessel were not unusual in the North Atlantic in the winter. Although the vessel may have faced stronger than usual cross seas due to the rapid decrease in barometric pressure caused by the ultra bomb, the court held the conditions were expectable and thus, did not qualify as a "peril of the sea" to excuse the carrier from liability for seawater damage to the steel. The Second Circuit affirmed the district court's decision.

In Re Tecomar S.A., 765 F.Supp. 1150 (S.D.N.Y 1991) involved a vessel that sank with all hands and cargo except for one container in a winter storm in the North Atlantic. During the voyage, the vessel reported Beaufort force 11 winds and 30- to 46-foot wave heights. Masters of ships in the area testified it was the worst storm they had seen in their careers. Nonetheless, the court noted "the North Atlantic in the winter is a most inhospitable place" and concluded it was more expectable to encounter severe weather conditions there during the winter than on other routes. Because the vessel was built to withstand extreme conditions and had previously experienced them, the court held there was no peril of the sea.

Courts expect mariners and their vessels to be able to withstand quite severe conditions at sea. Unless the conditions are unexpected, irresistible, and overwhelming, an ocean carrier will not be able to rely on the peril of the sea defense to avoid liability for cargo loss or damage.