

MULTI-FACETED SEAWORTHINESS IN THE POST-COVID ERA IN CHINA

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Introduction

To overcome the challenge brought by COVID-19, the Supreme People's Court in China issued three Guiding Opinions on Hearing Civil and Commercial Cases involving COVID-19 in 2020; and the third opinion is particularly relevant to shipping law ('the Guiding Opinion').¹ It provides that, among other things, the carrier has an obligation to exercise due diligence to make sure that COVID control measures, such as disinfection and fumigation, are suitable to the cargo carried on the ship; the number of healthy crew holding health certificates may also affect the seaworthiness of the ship; however, the court will not support the unseaworthiness assertion of a cargo interest if the sole evidence is that some crew members are infected or that the ship calls at immediate ports that are infected with COVID.² Also, in December 2022, the Maritime Safety Administration of Ministry of Transportation and Communications of China published the 12th Edition of Seafarers' Guide to Prevention and Control of COVID ('the COVID Guide').³ This guide introduced several measures aimed at tackling and controlling of spread of COVID. The purpose of this article is to examine the meaning of seaworthiness and evaluate whether the recent COVID measures in China could expand the concept of seaworthiness.

Seaworthiness: an evolving concept

Seaworthiness is an important obligation of carriers, and it requires that a ship is fit for the cargo and the contract voyage.⁴ It is ubiquitous across many related areas of maritime law. For example, the New York Produce Exchange Time Charter 2015 expressly requires the delivered ship to be seaworthy.⁵ Seaworthiness and cargo-worthiness are treated as a warranty in a voyage policy in Marine Insurance Act 1906 and are equally important in Institute Cargo Clauses.⁶

In common law, seaworthiness is an implied, absolute obligation of carriers, though it may be excluded by contract.⁷ In contrast, under the Hague-Visby Rules, the duty of seaworthiness is not absolute, and the carrier must only exercise due diligence to make sure that its ship is seaworthy before and at the beginning of the voyage; however, this obligation cannot be excluded by the carrier.⁸ The standard of due diligence is known as the prudent owner test, and a court will consider if a prudent carrier would have put his ship to the sea with the cargo, had he known of certain defects of his ship.⁹

Seaworthiness is also said to be a relative concept, as the standard of this duty changes depending on many variables, including but not limited to the nature of the voyage or the ship. Traditionally, with regard to the meaning of seaworthiness, emphasis seemed to be placed on the 'fitness for purposes' characteristics of vessels provided by carriers to the public.¹⁰ In other words, arguably, the focus of seaworthiness was on the physical soundness and fitness of vessels. Gradually, the modern case law adds more ingredients to its meaning. Thus far, four components are particularly relevant in determining the seaworthiness of a ship: the condition of the vessel and its equipment,¹¹ the competence and efficiency of the master and crew, the adequacy of documentation, and fitness to stow and carry agreed cargo.¹² It is possible to argue that the meaning of seaworthiness is expanding.

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¹ See The Supreme People's Court of The People's Republic of China, *Guiding Opinions on Hearing Civil and Commercial Cases involving COVID-19, the third* (Web Page, 16 June 2020) <<https://www.court.gov.cn/zixun-xiangqing-236501.html>> ('The Guiding Opinion').

² Ibid Art 11.

³ See Maritime Safety Administration of the People's Republic of China, *12th Edition of Seafarers' Guide to Prevention and Control of COVID* (Web Page, 12 December 2022) <<https://www.msa.gov.cn/public/documents/document/mdmy/njq3/~edisp/20221213032647947.pdf>> ('The COVID Guide').

⁴ Simon Baughen, *Shipping Law* (Informa, 7th ed, 2019) 82.

⁵ Clause 2 of the BIMCO New York Produce Exchange Time Charter 2015.

⁶ *Marine Insurance Act 1906*, 8 Edw. 7 c.41, ss 39(1), 40(2); see also clause 5 of Institute Cargo Clauses (A).

⁷ John F. Wilson, *Carriage of Goods by Sea* (Longman, 7th ed, 2010) 10.

⁸ Hague-Visby Rules, Article III(1); see also Anthony Rogers, Jason Chuah and Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea*, (Taylor & Francis, 2019) 420.

⁹ Timothy Young KC et al, *Voyage Charters* (Informa, 5th ed, 2022) 275.

¹⁰ *Lyon v Mells* (1804) 102 ER 1134.

¹¹ *The Maori King (Owners) v Hughes* [1895] 2 QB 550, CA. One issue affected vessel's seaworthiness is its refrigeration equipment.

¹² *Papera Traders Co. Limited & Others v Hyundai Merchant Marine Co. Limited, The Keihin Co. Limited, Eurasian Dream* [2002] EWHC 118 (Comm), [126]-[128] (Creswell J).

Besides proper physical conditions of the ship and its equipment, the competency of crew and master and the requirements on legal documentations are also included as part of it.¹³

Legal documentations and the law

It is now settled that legal documentation may affect the seaworthiness of a ship;¹⁴ however, it is difficult to determine the exact boundary of its scope. The rules from international organisations may be absorbed into seaworthiness. One example is the recent Supreme Court case in the United Kingdom, the *CMA CGM LIBRA*.¹⁵ In this case, one key issue was whether a defective passage plan would render a ship unseaworthy.

The carrier's duty to have an updated passage plan for their planned voyages is regulated by the Guidelines for Voyage Planning of the International Maritime Organisation.¹⁶ That is to say that rules or guides of influential international organisations may have a role to play in shaping the contents of seaworthiness. Arguably, a passage plan affects the safe navigation of a ship, so there is no difficulty in accepting that it can be an important legal document which prudent carriers should have at the commencement of a voyage.¹⁷ Therefore, though even the passage plan in this case was up to date, the fact that the crew did not 'include express reference to the uncharted depths warning' in the area outside of the fairway was a defect in the passage plan and the carrier was liable to the grounding of the ship caused by unseaworthiness.¹⁸

Similarly, in *Golden Fleece Maritime*, the shipowner was liable for a breach of new regulations for double-hulled vessels under the Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and this breach might affect the seaworthiness under the time charter party.¹⁹

However, not every regulation or requirement of an international organisation will be incorporated into the concept of seaworthiness. In the *Derby* case,²⁰ given a warranty of seaworthiness in the charter party 'Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service',²¹ the issue that the English Court of Appeal faced was whether the requirements of rates of pay and conditions issued by the International Transport Workers Federation (ITF) were factors which might render the ship unseaworthy. The court opined that the 'Blue Cards', which showed compliance with ITF's requirements, unlike navigational charts, had no bearing on the seaworthiness of the ship; though a ship might be required by the state of flag or the ports of call to have legal documents ready for the purpose of physical inspection or for remedial measures, the documents affecting the seaworthiness of a ship were, among other things, generally the ones relating to the physical condition of the ship.²²

Recent COVID control measures in China and seaworthiness

The concept of seaworthiness in China is similar to the definition in the Hague-Visby Rules. Section 47 of the Maritime Code in China provides that 'the carrier shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy; properly man, equip and supply the ship; 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'.²³ Although China is not a signatory of the Hague-Visby Rules, the Maritime Code in China drew lessons from the Hague-Visby Rules. Since the same definition is adopted in China, the contents of seaworthiness are likely to converge with the ones in English law in the future. For instance, lacking certain legal documents or equipment may render a ship unseaworthy. A ship will not be seaworthy if it does not have the most up-to-date navigational chart before sailing.²⁴

As mentioned above, the Guiding Opinion²⁵ of the Supreme People's Court in China imposes an obligation on carriers so they shall exercise due diligence to make sure that any COVID control measures, such as disinfection

¹³ See Anthony Rogers, Jason Chuah, and Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (n 8) 73, where the authors said that the concept of seaworthiness evolved to be more and more complex over the last 200 years.

¹⁴ David Foxton, Howard Bennett, Steven Berry, Christopher F. Smith, and David Walsh, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 24th ed. 2021) 7-028.

¹⁵ *Alize 1954 v Allianz Elementar Versicherungs AG* [2021] UKSC 51.

¹⁶ IMO Resolution A.893(21) – Guidelines for Voyage Planning – (Adopted on 25 November 1999).

¹⁷ *Alize 1954, CMA CGM SA* [2019] EWHC 481 (Admlty) [78] (Teare J).

¹⁸ *Alize 1954 v Allianz Elementar Versicherungs AG* [2021] UKSC 51, [13].

¹⁹ *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli)* [2008] EWCA Civ 584.

²⁰ *Tossa Marine Company Limited v Alfred C. Toepfer Schiffahrtsgesellschaft G.m.b.H. (The Derby)* [1985] 2 Lloyd's Rep 325, CA.

²¹ *Ibid* 2.

²² *Ibid* 5 (Lord Justice Kerr).

²³ Maritime Code of the People's Republic of China 1992 (People's Republic of China) National People's Congress Standing Committee, Order No 64 7 November 1992 Art 47. This article is identical to article III(1) of the Hague-Visby Rules.

²⁴ *Qinhuangdao Heshun Shipping Co.Ltd v PICC Property & Casualty Co Ltd Qinhuangdao Branch – Marine insurance dispute*, Appeal case, High People's Court of Tianjin (2015) Jingaomin4zhongzi No. 93.

²⁵ The Guiding Opinion (n 1).

and fumigation, are suitable for the cargo carried on the ship.²⁶ This requirement in fact adds another layer of meaning to cargo-worthiness. It seems that COVID control measures and equipment may be treated in a way similar to other equipment used to stow and preserve the carried goods. The crew members shall apply different disinfection measures to different cargoes. For example, with regard to cold chain transportation, the crew members should have a loading plan for refrigerated containers and the containers should be stowed in airy spaces; the crew members should also have a scheduled disinfection plan for refrigerated containers.²⁷

Also, the number of healthy crew members holding health certificates may affect the seaworthiness of the ship.²⁸ The Guiding Opinion emphasized that unseaworthiness is not determined by the fact that some crew members are infected or that the ship calls at immediate ports that are infected by COVID.²⁹ The Guiding Opinion also envisions a situation where the COVID control measures may frustrate carriage of goods by sea contracts. In section 12, it provides that, at the commencement of a voyage, due to COVID control measures, among others, if the carrier cannot find necessary crew or supplies, or the ship cannot leave the port of loading, the carrier and the shipper may propose that the contract is frustrated.³⁰ Logically, if the above reasons are due to the fault of the carrier and not the measures of the port of authority, the carrier may be liable to a claim of unseaworthiness.

Another recent COVID-related development is the COVID Guide issued by the Maritime Safety Administration of Ministry of Transportation and Communications of China in December 2022.³¹ The COVID Guide requires shipping companies to establish COVID control and prevention plans, including quarantine plans, formation of covid prevention and control committees, and crew health monitoring mechanisms.³² The captain must be responsible for the implementation and management of COVID control and prevention measures and shipping companies should also provide training to crew members at the commencement of the voyage.³³ The equipment that a ship must have includes COVID control and prevention tools; when loading the goods, the crew members are required to take relevant COVID control measures according to the nature of the goods.³⁴

The significance of the recent COVID control development may have a bearing on the concept of seaworthiness. Some scholars have argued that COVID control regimes should be part of seaworthiness, though the current requirements of seaworthiness on ships, equipment and crew may not easily include the regimes.³⁵ It also has been argued that Art III(1) of Hague-Visby Rules is general requirement of seaworthiness which can be expanded to include other requirements, including infection free ships, measures to prevent crew members and virus free cargoes.³⁶ To achieve the status of seaworthiness, it is suggested that the crew are actually healthy at the beginning of and during the voyage; also the carrier should not overly rely on any health certificates which may be valid for a few years.³⁷ However, the Guiding Opinion seems to indicate that a ship will not be unseaworthy simply because some crew members are infected with COVID.³⁸

It has been discussed that the scope and contents of seaworthiness may be broadened by international law and the rules or standards of international organisations.³⁹ The Guiding Opinion and COVID Guide are not international law or rules published by international organisations. However, as in the *Derby* case⁴⁰, the law of ports of call or the law of the state of flag may still be relevant when determining what measures the carrier should take, or what certificates the carrier must obtain. However, most certificates should have some connection to the physical condition of the ship or equipment which may affect the vessel's safe navigation. The scope of seaworthiness can be extended obviously by international, public law, and local regulations. Examples include duties of the flag State to make sure that ships flying its flag meet the requirements of seaworthiness under the United Nations Convention on the Law of the Sea.⁴¹

²⁶ Ibid Art 11; See also The COVID Guide (n 3).

²⁷ The COVID Guide (n 3) s 2(8).

²⁸ The Guiding Opinion (n 1).

²⁹ The Guiding Opinion (n 1) Art 11.

³⁰ Ibid Art 12.

³¹ See The COVID Guide (n 3).

³² Ibid s 1.

³³ Ibid.

³⁴ Ibid s 2(8).

³⁵ Lixin He and Haoze Chen, 'Expansion and Unification of Seaworthiness Standards in Maritime Law under the Major Public Health Events' (2022) 40(3) *Journal of Hainan University Humanities & Social Sciences* 156.

³⁶ Ibid 155.

³⁷ Ibid 157.

³⁸ The Guiding Opinion (n 1) Art 11.

³⁹ One example is the International Safety Management (ISM) Code published by International Maritime Organisation. Shuming Yang and Dong Guo, 'From "Justice between Carrier and Shipper" to "Public Justice": Seeing the Evolution of Maritime Law from the Perspective of the History of Seaworthiness' (2009) 31(2) *Modern Law Science* 119.

⁴⁰ *The Derby* (n 20).

⁴¹ *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994) Art 94. Other examples include *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 3

A country also has the power to decide the meaning of seaworthiness by itself. The Guiding Opinion and COVID Guide seem to suggest that a COVID prevention and control system may be included in the original definition of seaworthiness. Considering that the concept of seaworthiness in Maritime Code of the People's Republic of China⁴² has almost the same meaning as that in the Hague Visby Rules, the interpretation of seaworthiness at common law will have a significant impact on Chinese maritime law. The discussion on the role of legal documentations and local laws in *The Derby*⁴³ may contribute to the development of seaworthiness in China. Consequently, the equipment of the ship should include COVID prevention equipment; cargo-worthiness may be affected by COVID disinfection measures; crew competency requires crew and master to receive COVID control training; and legal documents may include certain health certificates and relevant inspection certificates.

The Guiding Opinion and the COVID Guide are not law, as the National People's Congress of China is the highest legislative power. Therefore, it remains open to what extent Chinese courts will define seaworthiness in accordance with these policy documents. When the world finally overcomes COVID, the COVID element in seaworthiness will inevitably fade away. What is certain is that seaworthiness will keep evolving to meet new demands and challenges in China.

(entered into force 25 May 1980) and *International Convention for the Prevention of Pollution from Ships*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983).

⁴² Maritime Code of the People's Republic of China Maritime Code 1992 (n 23).

⁴³ *The Derby* (n 20).