

“ASTERIX” C/W “OBELIX” ON 22 NOVEMBER 2013

PRESERVATION OF EVIDENCE— AN ENGLISH LAW PERSPECTIVE

VHT TRAINING CAMP

BREMEN, 22 NOVEMBER 2013

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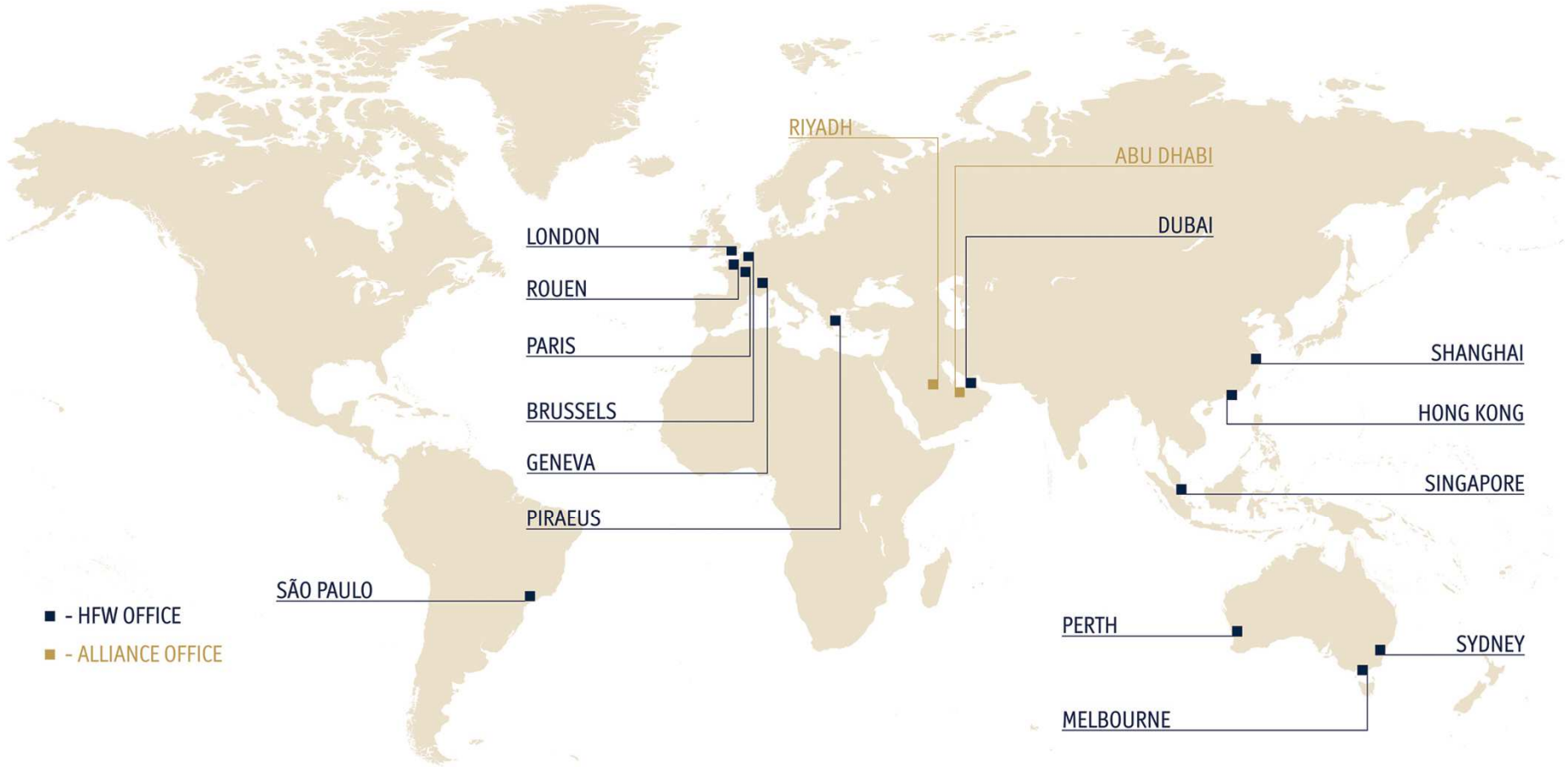
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Holman Fenwick Willan world office map



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- Widely recognised by clients and competitors alike as the world's pre-eminent shipping practice.
 - 24 hour emergency capability throughout the worldwide network.
 - Over 40 partners and 70 assistants in London alone specialising in wet and dry litigation and crisis management.
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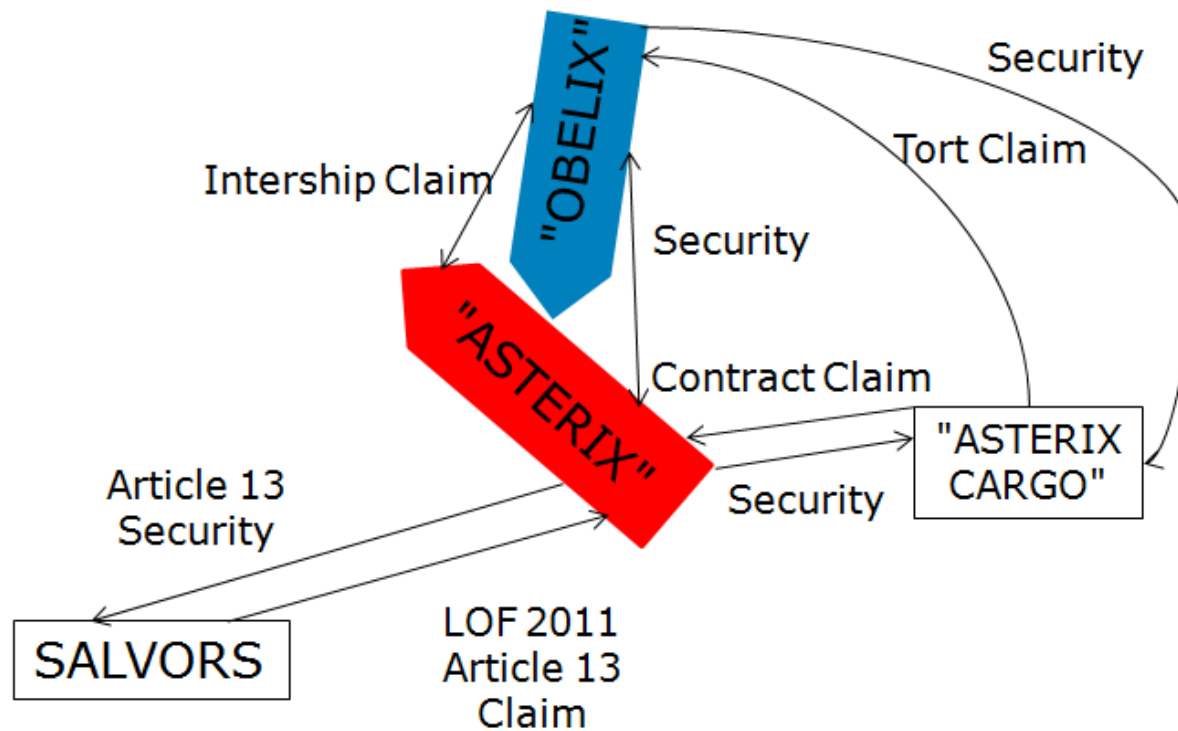
“ASTERIX” c/w “OBELIX” on 22 November 2013



Asterix AND OBELIX
ALL AT SEA



Summary of Claims



- Application of English law – whether by contract or choice
- Importance of evidence
- Practical issues – external marine investigation
- Privilege
- Disclosure requirements
- The problems of managing information – including social media

Will English law apply?

Lloyd's Open Form 2011 – Agreed with “Trust Salvage”

Standard form salvage contract –agreed verbally by the Master acting as agent. Standard clauses:-

I Arbitration and the LSSA Clauses:

The Contractors' remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses (“the LSSA Clauses”) and Lloyd's Procedural Rules in force at the date of this agreement. The provisions of the said LSSA Clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.

J Governing law:

This agreement and any arbitration hereunder shall be governed by English law.



Contracts of Carriage

Charterparty / Bills of Lading – often include law and jurisdiction clause for English law and High Court/Arbitration

“ASTERIX” and “OBELIX” may execute an ASG Collision Undertaking



TRANSPARENCY

English maritime law is constantly evolving through judgments of the High Court, the Court of Appeal and the Supreme Court.

Their legal decisions are widely reported which gives transparency to the English legal system. From 2011, Lloyd's will publish most decisions of the Lloyd's salvage arbitrators, and appeal arbitrator, adding further transparency to the body of Admiralty jurisprudence.

EXPERIENCE

An important element is the experience in shipping matters which has grown up over the centuries as part of the English legal system which is acknowledged for its independence and level of specialist expertise.

EXPERTISE

The Admiralty Court, another specialist court of the Queen's Bench Division, hears collision, salvage and other related maritime disputes. The Admiralty Judge has many years experience of cases involving navigation, seamanship and other practical nautical matters and his judgments are influential in the courts of many countries in the maritime world. The Admiralty Registrar and Admiralty Marshall provide expert support, for instance adjudicating on the quantum or value of claims and administering the arrest of vessels within the English jurisdiction.

For these reasons not only is English law and jurisdiction commonly the default choice in many international shipping contracts but is also frequently chosen for the resolution of disputes either before the High Court or in arbitration. The result is that the English judges and arbitrators are highly experienced and well practiced in such cases.



ASG COLLISION UNDERTAKING

ASG COLLISION JURISDICTION AGREEMENT

["AAA"] Collision with ["BBB"] [Date]

IT IS HEREBY AGREED between the owners of the above vessels as follows:-

A. The claim of each party, including the question of limitation of liability, shall be determined exclusively by the English Courts in accordance with English law and practice.

B. The undersigned will accept service of the other party's proceedings (including any limitation proceedings) on behalf of their respective clients/principals.

C. Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other. **[Each party agrees to waive its right to apply to arrest or re-arrest to obtain further security under the Civil Procedure Rules 1998 Part 61.6]**

D. The owners of the ["AAA"] hereby warrant that the registered owners of the ["AAA"] at the time of the collision were [insert owners name] of [insert owners registered address] and that the ["AAA"] was not demise chartered out at such time.

E. The owners of the ["BBB"] hereby warrant that the registered owners of the ["BBB"] at the time of the collision were [insert owners name] of [insert owners registered address] and that the ["BBB"] was not demise chartered out at such time.

F. This agreement shall be governed by English law and any dispute arising hereunder shall be submitted to the exclusive jurisdiction of the English Courts.

Signed Signed

Solicitors Solicitors

For and on behalf of the owners of ["AAA"] For and on behalf of the owners of ["BBB"]

Dated this [] day of [] 20[].

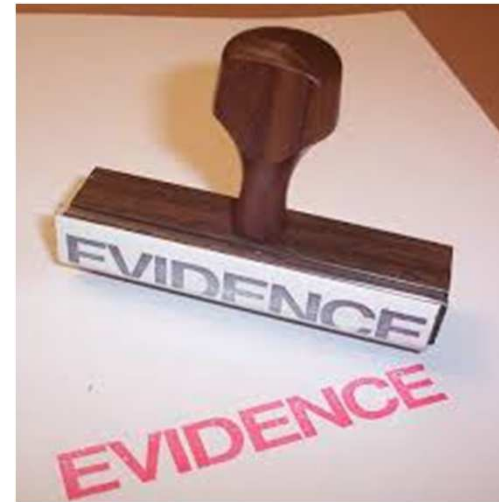
The importance of evidence

Procedural requirements

- Pleadings
- Disclosure requirements
- Witness statements

Fundamental requirements

- Forum shopping – is it relevant?
- Obtaining before Port/Police/Flag/other interested parties
- Knowing your case
- Identifying your strengths and weaknesses
- When to settle and when to fight



Is Limitation in issue?

- England applies the highest limits under the 1996 Protocol to the LLMC 1976
 - Attractive if you are likely to be the receiving party
- Containerville is located in Territorial European Union waters ("TEU")
 - TEU has not signed up to the 1996 Protocol
 - Forum shopping options

CARGO Claims

- Physical damage/loss
- Cargo's proportion of Salvage
- Cargo's claim against the colliding vessel

COLLISION Claims

- Intership collision claims

SALVAGE Claims

- Article 13 Award for Trust Salvage
- Contractual arrangements with the local tugs?

Because of the potential overlap, participating underwriters may be willing to share costs

- IMO require member states to investigate marine casualties on board vessels under their flag.
- Resolution A.849/20 in 1997 introduced Casualty Investigation Code and guide to investigations.
- In June 2008 IMO issued Casualty Investigation Code.
- In the UK MAIB and other states formed independent investigation units – independent from National Maritime Administration.
- Port State Control and other maritime authorities have rights of enforcement and criminal prosecution.
- Main problem to owners and insurers – difficult to control flow of information and evidence that may be useful to opposing interests. This may delay and hamper civil litigation arising from the incident and it may cause increased costs to shipowners and insurers.

Practical Issues – Containerville Police

- Upon arrival in Containerville on 28 November, the Federal Police declare the “ASTERIX” a ‘no-go’ area pending the completion of their own investigation into the circumstances of the collision.
- Despite not being maritime experts, the Federal Police insist upon attending on board prior to even Owner’s representatives.
- Interviews are conducted with members of the crew.
- Contemporaneous evidence is studied and copied.
- The investigation lasts for approximately four hours.
- By the time the investigation is completed, the Containerville Accident and Investigation Branch (“CAIB”) have arrived on scene.



- Investigates all types of marine accidents (ship & crew) to or on board ships in territorial waters.
- Aim of improving safety at sea and avoidance of future incidents.
- Powers set out in the relevant local regulations these include:
 - provision for the ordering, notification and conduct of investigations, but allow inspectors a good deal of discretion
 - investigate accidents involving or occurring on board any ships in the Containerville territorial sea.
 - do not have the power to prosecute or otherwise bring disciplinary proceedings for unsafe working practices.

CAIB – Requirements and Powers



- CAIB will not release evidence, names of witnesses etc. unless ordered by court.
- CAIB sought to extend powers of investigation and control of evidence, the impression is that they do not want lawyers or shipowner representatives present during witness interviews want to greater control over the evidence
- VDR recording
- Reporting stage
- Draft report sent to interested parties – relatively short consultation period usually about 30 days
- Owner's and other parties only chance to comment on draft report
- The Master or Owner has an obligation to report any accident to the CAIB
- The Master and Owners must preserve charts, log books, VDR and all other docs
- CAIB inspector may prohibit persons from gaining access to the vessel/equipment pending investigation
- CAIB inspector may require the vessel to remain in Containerville waters pending investigation.

- They may require a person to attend an interview at the expense of the CAIB.
- The witness may request another person to be present during the interview but they may not prevent the witness answering questions.
- There may be a conflict for this person between their interests in the crew/insurers/owners etc.
- A third party may only be permitted to stay if they are a professional legal advisor, advising the person required to attend the interview only.
- Refusal to submit to interview is an offence.
- The recording of interviews pursuant to local regulations may not be permitted, and statutory protection (against self-incrimination) should not be overridden.
- If the statement falls outside of this protection, it may be the witness is faced with prosecution, and a recording that may be used against them.



Worldwide equivalents - examples



- Owners of the “OBELIX” appoint a Court Surveyor in Containerville.
- Owners of “ASTERIX” receive summons and a draft assignment of the Court Surveyor including the following:-
 - i. To interview all crew members from both vessels;
 - ii. To attend on board both vessels;
 - iii. To obtain copies of all documents on board both vessels including the deck and engine logbooks and any VDR evidence;
 - iv. To obtain from the local VTS, copies of all radio exchanges for the period commencing 1 hour before the collision up to the commencement of the tow by the “Black Pearl”.
 - v. To carry out all investigations which the Court Surveyor considers necessary for the purpose of determining the origins, causes and circumstances of the collision.
 - vi. To describe and determine the origins, causes and circumstances of the collision.
 - vii. To record, quantify and determine the cause of the loss and damage suffered by all.
 - viii. To provide the Court seized of the merits with information to rule on the liabilities incurred and losses suffered.

- Because Containerville is a port of refuge for “ASTERIX” and “OBELIX”, it is probable that the “OBELIX”s application for the appointment of a Court Surveyor will be granted.
- “ASTERIX” Interests should attend the Court to try to limit the geographical scope (currently worldwide) of the Court Surveyor’s assignment.
- “OBELIX” Interests might have an interest in the intership claim progressing in Containerville.
- If “ASTERIX” Interests are obstructive to the Court Survey, they risk a prejudicial report based on failure to assist which could damage their position if the merits are ultimately heard in Containerville.

Oxford English Dictionary Definition

noun

a special right, advantage, or immunity granted or available only to a particular person or group

**TOP
SECRET**

In a Legal Context

Privilege has long been recognised as a fundamental principle of English law. For several hundred years, the law of privilege has protected the right of clients to communicate with their lawyers in confidence, without fear that those communications will later be disclosed to third parties during the course of litigation. However, the modern commercial context has generated numerous challenges to the law of privilege, most notably for areas in which it is common practice for non-lawyers to advise on legal matters.



- Legal advice privilege
- Litigation privilege
- Common interest privilege
- Joint privilege
- Without prejudice privilege
- Privilege against self-incrimination

Common interest privilege

- The advisee and third party must have the SAME interest in the SAME matter to which the document relates
- BUT! The case law is very inconsistent
- WARNING: common interest privilege is capable of being waived by one party unilaterally



- Litigation must be "reasonably in prospect" at the time the advice is given
- "Litigation" = e.g. court claim or arbitration, NOT a government or regulatory investigation
- Applies to advice obtained from non-lawyers and third parties
- But precludes generic advice



Litigation privilege - example



Litigation privilege would attach	Litigation privilege would NOT attach
<p>“ASTERIX” suffers main engine damage, VHT appoints surveyor, there is fault on behalf of owner and possibly also charterer.</p>	<p>VHT advises owners of what their liabilities would be to charterers in hypothetical circumstances where damage caused to any vessel engine in owners' fleet is owners' fault due to owners' poor maintenance.</p>



- Advice must be given by a lawyer
- Advice must be legal in nature
- Obtained in the "ordinary course of the client's business"
- Does NOT cover third parties
- Very easy to lose!

- The documents (reports, emails, letters, advices, opinions, notes of meetings etc.) must be confidential in the first place
- In the case of *legal advice privilege*, they must remain confidential
- The substance of the advice must be *legal*
- Be wary of emails and other forms of electronic communication/data storage



CLIENT

- Must be part of the "client team" whose role it is to request and receive legal advice in relation to the matter

LAWYER

- Must be qualified to practice under SRA/Bar Council Rules, or under equivalent foreign regulatory body
- External lawyers
- In-house counsel (c.f. Europe)
- Requirement for a valid practicing certificate?



- Concerned *legal advice privilege*
- Legal advice given by non-lawyers DOES NOT attract privilege
- Confirmed essential ingredients for *legal advice privilege* as



LEGAL ADVICE

GIVEN BY A LAWYER

TO MEMBERS OF THE CLIENT TEAM

Waiving privilege goodbye

- Emails
- Data storage
- Disclosure to third parties (including opponents in litigation)
- Otherwise undermining a communication's confidentiality
- Disclosure of parts of documents
- Addition of comments to privileged documents or creation of new documents summarising privileged advice



Safeguarding privilege



- When instructing non-lawyer third party advisers (surveyors etc), write "**IN CONTEMPLATION OF LITIGATION**" clearly on the front page of any documents which flow between you (including initial instructions, emails, reports etc) and ensure they and assureds do the same
- Mark communications as "**PRIVILEGED AND CONFIDENTIAL**" and advise assureds to do the same
- Do not circulate confidential documents too widely (beware of forwarding emails!) and restrict access to internal documents (using passwords, for example). Advise assureds to do the same
- Ask third party advisers to address all reports to the owner's lawyers, care of the VHT, or care of correspondents
- If there is no dispute in prospect and if you may want to assert *legal advice privilege*, consider giving assureds advice via either a **legally qualified claims handler** or an **external lawyer**
- Avoid annotation on privileged documents or creating summaries of privileged documents. Advise third party advisers and assureds to do the same
- Consider retaining practising certificates for legally qualified claims handlers



Disclosure requirements under the CPR



The Civil Procedure Rules apply to all proceedings in the English High Court (CPR).

Reference:- Part 31 and its corresponding practice direction, together with section E of the Admiralty & Commercial Court Guide.

Rule 31.6

Standard disclosure requires a party to disclose (i.e. state that a document exists/did exist) the following:-

- a) the documents on which he relies;
- b) the documents which –
 - i. adversely affects his own case
 - ii. adversely affect another party's case; or
 - iii. support another party's case; and
- c) the documents which he is required to disclose by a relevant practice direction.

Rule 31.7

When giving standard disclosure, a party is required to make a reasonable search for documents falling within Rule 31.6(b) or (c)

Rule 31.10

The disclosure list must explain what has happened to any 'missing' documents and include a disclosure statement identifying the following:-

- The extent of the search made to locate the documents;
- Certifying that he understands the duty to disclose and has carried this out;
- Who is making the statement and why they are appropriate.

Rule 31.12

The Court may make an order (following successful application by the parties or otherwise) for specific disclosure or specific inspection.

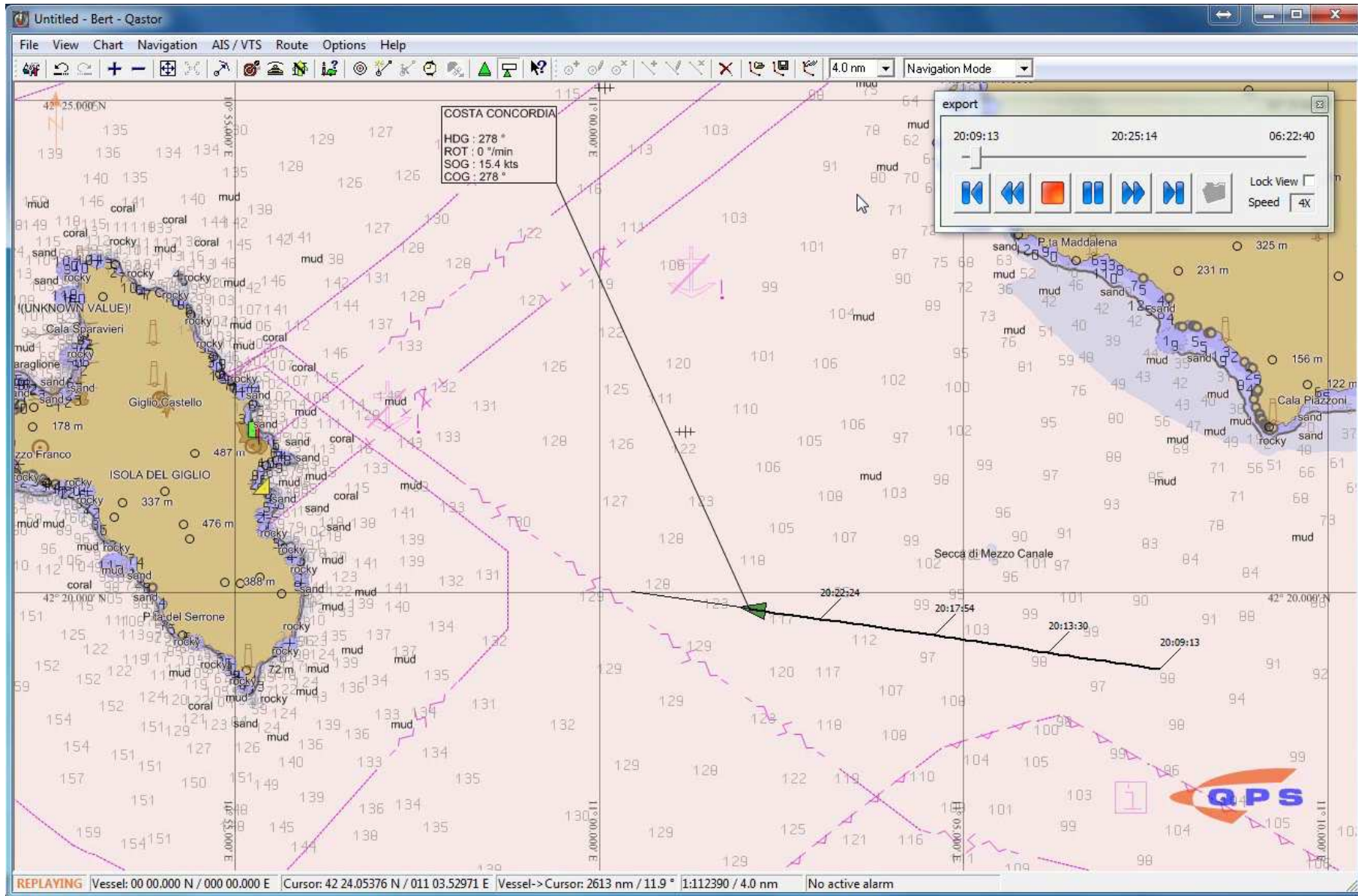
Managing Information – "MOL COMFORT" Press Coverage



Managing Information - "COSTA CONCORDIA"



"COSTA CONCORDIA" – AIS playback on the Internet



1. Early and proper investigation is necessary to ensure that an appropriate legal strategy is adopted;
2. It is dangerous to make assumptions based on limited evidence;
3. Early appreciation of the evidence facilitates accurate assessment of the merits / legal options which can save money in the long run e.g. forum shopping;
4. Social media needs to be managed where possible – encourage email discipline. If a subject is particularly sensitive, pick up the telephone;
5. Early attendance can assist with the management of other interested parties including Port/Flag authorities and opponent's representatives; and
6. Legal support can equal moral support for the Master, Ship's crew and superintendants at the scene of the casualty.

Any questions?



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