SEMAPHORE

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When Breach of Charterers' Employment Orders Constitutes Negligent Navigation

Does the negligent navigation defence under Article IV(2)(a) of the Hague Rules apply where, in breach of charterers' employment orders, a vessel proceeds into territorial waters and waits at anchor there, in breach of local law?

This is one of the issues considered by a recent online digest of cases by Hill Dickinson, which included *Mercuria Energy Trading Pte v Raphael Cotoner Investments Limited (Afra Oak)* [2023] EWHC 2978 (Comm).

In an appeal from an arbitration award, the Court concluded that it may or may not do so, depending on the facts of the particular case. It dismissed the charterers' appeal, finding that the tribunal which heard the case was entitled to conclude that the master had failed to exhibit good seamanship and navigation. In the circumstances, the owners were entitled to rely on s.4(2)(a) of the United States Carriage of Goods by Sea Act 1936 (US COGSA), which has the same effect as Article IV (2)(a) of the Hague Rules.

Article IV(2)(a) of the Hague Rules states:

> 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.

The dispute arose out of the detention of the vessel by the Indonesian Navy in 2019. The vessel's detention was part of a new campaign by the Indonesian Navy to monitor and enforce Indonesian territorial boundaries north and east of Horsburgh lighthouse, a popular location for vessels to await further orders. The Navy's campaign subsequently led to the detention of over 20 vessels, with some being released relatively promptly but others waiting for almost a year and longer.

On 7 February 2019, the charterers emailed the owners' operational department to "Pls ask master proceed to Spore EOPL for further orders. Discharging plan still not known yet" (the charterers' order). On 9 February 2019 and while on passage, the master took a decision to anchor within Indonesian territorial waters to wait for orders, on the basis that it was a slightly easier place to anchor. On 12 February 2019, the Indonesian Navy arrested the master and detained the vessel for a period of eight months. The vessel was only released in October 2019, when the criminal proceedings were concluded with the conviction of the master.

The parties advanced significant claims and counterclaims against each other.

In summary, the tribunal found as follows:

1. the charterers' order was a standard instruction in this area and the political danger of detention as a result of anchoring in Indonesian territorial waters could and should have been avoided by the master. The charterers were, therefore, not in breach of the safe port/place warranty

2. it was the master's conduct, not the charterers' order, that caused the loss. The master made a spur of the moment decision to depart from the passage plan and select Indonesian waters simply because it was an easier place to anchor than in Malaysian waters, as many vessels did. As a result, the master's decision broke the chain of causation and the owners' claim for an implied indemnity for complying with the charterers' order failed
3. on its true construction, the gist of the charterers' order was to "wait in Singapore EOPL [Eastern Outside Port Limits] where you consider it safe to do so, using good navigation and seamanship"
4. the vessel was not entitled under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) to anchor in Indonesian waters, as such anchoring there was prohibited by Indonesian law. The charterers' order, therefore, in effect, precluded waiting in Indonesian waters. By anchoring within six miles from Indonesian land on this basis, the vessel failed to follow the charterers' order
5. however, the owners were entitled to rely on Article IV(2)(a) of the Hague Rules to exempt themselves from liability because the master's actions constituted a failure to exercise good navigation and seamanship

The Commercial Court found that there was no error of law in the tribunal's decision. The authorities established that, where the Hague Rules (or US COGSA) are incorporated into the charterparty, an owner will have the benefit of the immunities in Article IV (or s.4 respectively) in respect of all contractual activities performed under the charter. It could not be said that where an owner fails to comply with an employment order, it could never rely on the negligent navigation exception under the Rules.

Here, the tribunal clearly regarded the master as having acted negligently in the navigation of the vessel. It found that the master's failure to take due account of the risk of anchoring in territorial waters was a mistake, which could not be characterised as good seamanship and navigation.

As noted by the tribunal, the facts in this case could be distinguished from those in *The Hill Harmony* [2001] 1 AC 638. In that case, the master had declined to take the shorter northern circle route recommended to charterers by a weather routeing service for a trans-Pacific voyage (in April) and took the longer more southerly rhumb line route. He did so because on a previous trans-Pacific voyage (in October), the vessel had encountered very bad weather and had suffered damage. The charterers' deductions from hire for extra days at sea and extra bunkers consumed were upheld because the master's decision not to comply with charterers' orders was found not to be an error in the navigation or management of the vessel, nor an exercise of seamanship. It was held that the master had no rational justification for doing what he did. Among other things, the weather was likely to be much better in April than in October.

In the Court's view, the decision in *The Hill Harmony* established no more than that if there is a choice not to comply with employment orders that choice cannot, without more, be described as negligent navigation. In this case, however, the tribunal had found that it was an error in navigation that caused the master to anchor where he should not have done so. Consequently, the negligent navigation defence applied.

Hill Dickinson's comment is that the decision will be welcomed by shipowners, particularly when trading to ports where territorial boundaries in surrounding waters can be unclear or mistaken by crew.

Nonetheless, it should be remembered that where a charterer's employment order has been breached, a shipowner's right to rely on the negligent navigation defence will very much depend on the facts of the particular case. A shipowner will have to demonstrate that the master's actions were in the navigation or management of the vessel and an exercise of seamanship.

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