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ILLEGAL ANCHORING LOCATION WAS MASTER'S ERROR OF NAVIGATION

In the "Afra Oak" the Owners and Charterers of the vessel claimed and counterclaimed losses arising from the Master anchoring in Indonesian territorial waters following an order from Charterers for the Vessel to "proceed to Spore EOPL (Eastern Outer Port Limits) for further orders." It was found to be a matter of ordinary practice for ships to anchor in Indonesian waters without permission having received an order to wait "Singapore EOPL". However, the place where the Vessel anchored was prohibited and the Master and the Vessel were detained for 8 months.

In arbitration Owners primarily argued that the Master had followed Charterers' orders and that Charterers had breached the warranty that they would only order the Vessel to safe ports or places.

Charterers counterclaimed on the grounds of (i) a defective passage plan and the Master's disabling lack of local knowledge which rendered the Vessel unseaworthy and (ii) Owners had breached a term within the Charterparty by which they warranted that the Vessel would comply with the laws of any place to which it was ordered.

The Tribunal found that, properly construed, Charterers' orders included the requirement that it be followed using good navigation and seamanship. The risk of detention by anchoring in Indonesian waters was avoidable by the exercise of good seamanship and navigation and therefore the Vessel anchoring where it did was in breach of Charterers' orders.

Nevertheless, the Tribunal found in favour of Owners on the basis that the identical provision to Article IV(2)(a) of the Hague Rules in the US Carriage of Goods by Sea Act 1936 (which was incorporated into the Charterparty by a Clause Paramount) excepted them from liability. Article IV(2)(a) provides that the ship shall not be responsible for loss or damage arising from an "Act, neglect, or default of the master…in the navigation or in the management of the ship".

Charterers appealed to the High Court where Sir Nigel Teare, summed up the question to be answered as follows:

> "Does Article IV(2)(a) of the Hague Rules provide a defence where, in breach of an order of its charterers, a vessel proceeds into territorial waters and waits at anchor there in breach of local law?".

The Judge rejected Charterers' argument that the decision in the Hill Harmony (2001) determined that any failure to comply with a Charterers' employment order disentitled an Owner from relying on the negligent navigation defence, holding instead that the case was authority for the proposition "that if there is a choice not to comply with employment orders that choice cannot, without more, be described as negligent navigation".

The Judge dismissed Charterers' appeal. He found that Article IV(2)(a) may or may not apply depending upon the facts of a particular case. In the present case the Judge found that, as a matter of fact, the Vessel's detention was caused by the Master anchoring where he did which was a result of his error in navigation and seamanship.

LIABILITY FOR UNDERWATER CLEANING TIME

In the "Globe Danae" Langois Enterprises, as Disponent Owners, chartered the vessel to Smart Gain for a time trip from the east coast of India to Brazil, carrying metallurgical coke in bulk.

At the Brazilian disport, cargo rejection led to the vessel remaining idle in laden condition in tropical water ports for 42 days until cargo discharge.

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Clause 86 of the Charterparty provided:

Owners not to be responsible for any decrease in speed/ increase in consumption of the Vessel whether permanent or temporary cause [sic] by Charterers staying in ports exceeding 25 days' trading in tropical and 30 days if in non-tropical waters. In such a case, underwater cleaning of hull including propeller etc. to be done at first workable opportunity and always at Charterers' time and expense. After hull cleaning vessel's performance warranties to be reinstated."

Charterers redelivered the vessel without underwater cleaning. After redelivery on 4 September at Acu the vessel sailed to Tubarao, where Owners on 9 September arranged the underwater cleaning of the vessel.

Owners commenced arbitration and argued that the phrase 'always at Charterers time and expense' meant that Charterers were liable to pay for the time and cost of cleaning even though the vessel had been redelivered. The Tribunal ruled in favour of Owners, relying on the purpose of the clause to assign responsibility to Charterers for risks associated with marine growth during idle periods.

The High Court dismissed the Charterers' appeal, emphasising that the commercial purpose of clause 86 was for Charterers to compensate Owners for cleaning costs resulting directly from Charterers' orders and that Owners had a claim in debt at the hire rate for the time used.

CONSEQUENCES OF A PAPER SHORTAGE AND DETENTION BY AGENTS

A Vessel was time chartered on an amended NYPE 1946 form for a trip from Ukraine to an East African port carrying a cargo of wheat in bulk. Charterers instructed the Master to discharge the cargo (which was unsegregated and co-mingled) to three different receivers simultaneously at a single discharge port. Following discharge, the Master issued a protest letter in respect of the simultaneous discharge arrangements and noted the different figures recorded in the Vessel's draft survey (37,210mt) and the receiver's surveyor shore tally (36,861.28mt). One of the receivers brought a shortage claim and requested the agents to prevent the Vessel from leaving the port by withholding clearance until Owners provided a guarantee.

Owners' claim against Charterers in arbitration comprised (i) the cargo shortage claim; (ii) a balance of hire and (iii) crew bonus for sailing in a dangerous area.

The cargo shortage claim was settled for USD 88,924.44 including legal fees, Club correspondents and expert costs.

Owners' position was that Charterers were 100% liable under Clause 8(b) of the ICA or in the alternative under Clause 8(c). They further relied upon Clause 63 of the Charter which provided that "Cargo(es) which have been loaded in vessel's holds without separation and more than 1(one) Bill of Lading have been issued with more than 1 port of delivery, Owners/Master/Vessel will not be responsible to deliver cargo bill of lading by Bill of Lading to different consignees and different port(s)/berth(s) but only for the total quantity on board the vessel". An expert's report was adduced concluding that it was impossible for the Master to assess the cargo discharged for individual receivers in simultaneous arrangements.

Charterers contended that Owners' claim under ICA was dependent on a finding that the concept of "discharge" was synonymous with "delivery" arguing that delivery (which was Owners' responsibility) was not part of "discharge" or "other handling" (which were Charterers' responsibility) within the meaning of Clause 8(b) of ICA. They submitted that Clause 63 did not apply in the present case as there was a single discharge port.

The sole Arbitrator ultimately took into consideration the close relation between the draft survey on completion of loading (37,150.02mt), the Bill of Lading quantity determined by shore scale (37,200mt) and the discharge port draft survey undertaken by the vessel (37,210.70mt) and decided to apportion the claim on a 50/50 basis under Clause 8(c) of ICA on the basis that the claim was a paper shortage and there was no clear and irrefutable evidence that any shortage arose from the act or neglect of either of the parties.

Charterers had placed the Vessel off hire for the period it was detained or wating for port clearance following completion of discharge. They relied upon the following clauses of the Charterparty:

(a) Clause 38 entitled "Arrest" providing that if the vessel was arrested during the charter, time while the vessel was out of operations would be considered as off-hire.
(b) Clause 54 entitled "Off-Hire" providing that the vessel would be off-hire for time actually lost during detention by any authority, including arrest.

Charterers contended that the discharge port agents were an "authority" by reason of being a state body holding a monopoly on agency services.

The Arbitrators held the Vessel was on hire. The delay was simply an exertion of commercial pressure by the agents, acting in a commercial capacity, at the request of the receivers and not an arrest within the meaning of Clause 38.

Owners claimed reimbursement of a crew bonus of USD 3,000 relying upon (i) Clause 50 of the charterparty which provided that any additional war risk insurance, including crew bonus, was to be for Charterers' account and (ii) the BIMCO Piracy Clause for Time Charter Parties 2009.

The claim failed on the basis that the route followed was not a "war-like operation area" or "epidemic hazardous area".

ADDITIONAL FREIGHT FOR CANCELLED PORT NOMINATION

A Norgrain voyage Charterparty provided for supplemental freight to be payable if Taixing was nominated as a discharge port. Bills of Lading were issued for "China Ports". The Charterers declared discharge at Zhousan and Taixing.

Subsequently, Charterers changed the discharge port to Tianjin, and Owners complied under protest and agreement for the additional freight to be held in escrow by the Charterers' lawyers. Charterers challenged the additional freight on the ground that Tianjin did not attract additional freight.

The Tribunal dismissed Charterers' arguments of unjust enrichment and lack of consideration. Freight was deemed earned on shipment discountless and non-returnable.

A further dispute arose over despatch earned at Paranagua during a local public holiday (Corpus Christi day). Despite the absence of the holiday in the BIMCO calendar, the Tribunal, persuaded by evidence from the Brazilian Embassy, recognised Corpus Christi as a public holiday for laytime calculation.

CONSUMPTION DISPUTE

Owners chartered a vessel to Charterers on an amended NYPE form for a time charter trip from Venezuela to Italy.

The Charterparty provided (inter alia):
ABT 12 KNOTS ON ABT 19 TONS VLSFO + 0.1 MT LSMGO

Bunkers on delivery about 730-770 mt VSLFO and about 25-40 mt LSMGO. Bunkers on redelivery about same as on delivery.

Evidence of weather conditions shall be taken from Vessel's logs. The Vessel to be monitored by Charterers appointed weather routing company strictly in accordance with the performance warranty… this does not preclude Owners from appointing their own independent weather reporting bureau… which evidence along with vessel's evidence shall be taken into consideration by all parties.

As advised to Charterers by the Master, the vessel was delivered with 812.70 mt VLSFO and 26.31 mt LSMGO on board. She performed the trip from Venezuela to Italy calling at Gibraltar for bunkers. Upon completion of discharge the vessel was redelivered with 718.90 mt VLSFO and 20.67 mt LSMGO.

Owners claimed reimbursement of an outstanding balance of hire in the amount of USD 79,103.27. Charterers made the following counterclaims:

- USD 62,025 for misrepresentation of the fuel consumed and/or reported to be on board on delivery
- USD 23,985 for unreported sailing of 250 miles.
- USD 14,130 for underperformance during good weather

The matter was referred to LMAA Small Claims arbitration. Since Charterers' Defence and Counterclaim exceeded USD 100,000 the arbitrator ordered the reference to

proceed under the full LMAA Terms. The arbitrator imposed a recoverable cost cap under s.65 of the Arbitration Act 1996.

Owners' disclosed deck and engine logbooks were incomplete and almost entirely illegible. The Tribunal held the logbooks were not acceptable as evidence of weather conditions. Owners had also failed in other aspects of their disclosure obligations. However the Tribunal accepted the Master's daily weather reports to Charterers' weather routing company were contemporaneous.

Charterers produced the report of a marine expert who relied upon their weather routing company data to assert the vessel had underperformed even though Charterers had not disclosed the WRC reports.

Charterers' expert's report was rejected.

The Tribunal held that Charterers' WRC data showed the Vessel had in fact met its performance target despite evidence that slip was extremely high which had been caused by apparent fouling. The Tribunal concluded that it was probable Owners were aware of fouling and high slip but were content in the knowledge the vessel would still meet her performance warranty.

The Tribunal also rejected Charterers' expert's suggestion the ship's crew had worked backwards to calculate consumption to conceal the true quantities of fuel on board. There was no evidence for this despite the illegible logbooks.

The Tribunal also rejected the Charterers' experts' AIS analysis based on which he asserted the vessel had sailed an additional 250 miles. His analysis was inconsistent with the load port and Gibraltar SOFs which contemporaneous evidence did not support his assertions.

In rejecting Charterers' claim and awarding Owners the outstanding sum due to them, the Tribunal awarded interest at 7.5% compounded.

PRACTICAL APPROACHES TO TYPICAL DISPUTES

A vessel's AIS had been turned off earlier because of an alleged risk of piracy at the time of delivery on passing Singapore. Arbitrators accepted as the delivery time the date and time calculated by the time Charterers as the earliest time at which the vessel could have arrived at the point of delivery in preference to unsatisfactory evidence from Owners in the form of fair log entries said by Owners to have been prepared from memory and without the benefit of scrap logs.

As to the time of redelivery: the tribunal applied a contractual clause which expressly entitled Owners not to accept redelivery and for the vessel to remain on hire until Charterers supplied additional bunkers up to the required quantity and that only then could the vessel be considered redelivered.

As to performance: notwithstanding deficiencies in the Owners' calculations the Tribunal accepted their calculation with adjustments, including a 5 per cent allowance for the word "about", to determine that in port consumption had been excessive. The Tribunal rejected a separate underperformance claim based on a report from a weather routing company which disregarded the effect of swell when determining good weather days and deducted an allowance for favourable current factor. In any event the report had not been presented within a strict 15 day contractual time limit and was therefore deemed waived.

Interest on the sum awarded to Owners was awarded at 7.5 per cent compounded.

The above are only intended to be short summaries.
If you require any further information please feel free to contact us.

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