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Mercuria Energy Trading PTE V Raphael Cotoner Investments LTD (The "Afra Oak") 2023

Trudy Pisani Cerulli
Claims Manager

The *"error in navigation"* defence in Article 4 Rule 2 (a) of the Hague Rules has recently been applied by the English Commercial Court, exonerating owners from liability in a charterparty regime.

Pursuant to an Exxonvoy charter of the M/T "AFRA OAK" ("Vessel"), MERCURIA ENERGY TRADING PTE ("Charterers") provided instructions to the Vessel's Master to *"proceed to Spore EOPL for further orders. Discharging plan still not known yet"* and *"... wait in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship". "Spore EOPL",* short for Singapore Eastern Outer Port Limits refers to the Singapore Straits bordered by Indonesia, Malaysia and Singapore (UNCLOS signatories). The Convention requires vessels' innocent passage through territorial waters to be continuous and expeditious, without anchoring, save for vessels or lives in distress.

The Vessel proceeded to Singapore EOPL, but anchored six nautical miles away from Indonesia, within its territorial waters. The vessel was arrested on 12 February 2019 and detained for 8 months, raising serious economic claims and counter claims between Owners and Charterers. The case was heard by a London Arbitral Tribunal where Owners' claim for unsafe port was rejected, on the basis that the orders were industry standard and anchoring in Indonesian territorial waters was avoidable by the exercise of good seamanship.

Charterers claimed indemnity for Owners' failure to comply with their orders to proceed to Singapore EOPL, which precluded violating the law and anchoring in Indonesian territorial waters. Owners relied upon the Hague Rules exception in Article 4 Rule 2 (a) incorporated pursuant to a clause paramount. This exception provides:

"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."

Charterers' appeal revolved around the question of application of Article 4 (2) (a) to Owners' breach of Charterers' employment orders under the charterparty.

The Commercial Court extensively discussed the relevance of the "Hill Harmony" [2001] where it was held that in the absence of a rational justification for departing from charterers' orders to proceed via a certain route, owners had breached their duty of reasonable despatch. The defence of "error in navigation" was inapplicable where the underlying reasons for the breach concerned the vessel's routing and therefore her employment as opposed to her navigation.

In the "Afra Oak", the Court relied on the Tribunal's conclusion that the Master's action to anchor within territorial waters in breach of UNCLOS, amounted to negligent navigation, thus distinguishable from the "Hill Harmony". This triggered the defence in Article 4 (2) (a).

Takeaway Principles

1. Owners' failure to comply with charterers' employment orders, in the absence of overriding reasons such as the vessel's safety, gives rise to an indemnity claim.

2. Paramount clauses in a charter also carry with them, the Hague / Hague Visby defences for the carrier's benefit, which can apply beyond cargo damage scenarios (see clause paramount guide).

3. There is an important distinction between the "employment" and the "navigation" of the vessel. For the Hague / Hague Visby "error of navigation" defence to be triggered, the master's actions and decisions need to revolve around issues of seamanship and not employment of the vessel.

4. The choice of the vessel's ocean route, scheduling and trading, are, in the absence of overriding factors, matters of employment and not navigation, which serve to exploit the vessel's earning capacity. "Hill Harmony" [2001] 1 Lloyd's Rep. 147.

5. Anchoring a vessel within a state's territorial waters without the necessary permits, is a breach of good navigation and seamanship, thus bringing the above defence into play.