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The “Afra Oak” – When Breach Of Charterers’ Employment Orders Constitutes Negligent Navigation

Case reading of Mercuria Energy Trading Pte v Raphael Cotoner Investments Limited (The ‘Afra Oak’) [2023] EWHC 2978 (Comm)

❖ Factual Background

- Mercuria Energy Trading Pte (“Charterers”) chartered the vessel “Afra Oak” from defendant Owners and gave orders on 7th February 2019 to “Proceed to Spore EOPL for further orders. Discharging plan still not known yet.” The acronym means that the vessel was required to wait for further orders outside Singapore port limits.
- This area was known to include off the east coast of Malaysia, and off the coast of Bintan, Indonesia (outside of the Straits of Malacca and Singapore, but within the territorial waters of Malaysia and Indonesia).
- On 9th February 2019, the vessel proceeded to the Indonesian water as the ship master considered that it was a slightly easier place to anchor. However, the vessel was not entitled to do under the United Nations Convention of the Law of the Sea 1982, as this was prohibited by Indonesian law.
- On 12th February 2019, the vessel was arrested by Indonesian Navy as the latter was carrying out a new campaign to monitor and enforce that area. The vessel was detained for 8 months till the criminal proceeding were concluded with the conviction of the master.
- Owners advanced a claim for breach of the safe port warranty, and Charterers advanced a counter claim for a breach of Charterers’ employment orders. In response to Charterers’ counterclaim, Owners relied on the exception in Article IV(2)(a) of the Hague Rules incorporated into the charterparty.

The “Afra Oak” – When Breach Of Charterers’ Employment Orders Constitutes Negligent Navigation (Cont’d)

❖ 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.

❖ Arbitration Award

- It was found that Owners’ claim for breach of safe port / place warranty failed, as the Charterers’ order was a standard instruction and the political danger of detention in Indonesian territorial waters could have been avoided by ship master.
- Owners’ claim for an implied indemnity for complying with Charterers’ order also failed, as the chain of causation was broken when master decided to depart from the passage plan and select Indonesian waters rather than Malaysian waters. In other words, it is the master’s conduct instead of Charterers’ order that caused the loss.
- On its true construction, Charterers’ order should be understood as “wait in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship”.

The “Afra Oak” – When Breach Of Charterers’ Employment Orders Constitutes Negligent Navigation (Cont’d)

❖ The Arbitration Award (Cont’d)

- However, the Tribunal determined that Owners were allowed 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.

Charterers appealed to the Commercial Court by relying on the decision in the *Hill Harmony [2001] 1 AC 638* that section IV(2)(a) of Hague Rules did not afford a defence to Owners in the absence of a good reason for departing from their employment order.

❖ The Commercial Court’s Decision

- The Court found there was no error of law in the arbitration award. It was 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. If an owner fails to comply with an employment order, it can still rely on the negligent navigation exception under the Hague Rules.
- It was found that the ship master’s failure to correctly assess the risk of anchoring in territorial waters was an error or negligence in the navigation of the vessel, therefore Owners can rely on the negligent navigation defence.

The “Afra Oak” – When Breach Of Charterers’ Employment Orders Constitutes Negligent Navigation (Cont’d)

❖ The Commercial Court’s Decision (Cont’d)

- The Hill Harmony case was distinguished. In that case, Charterers ordered the vessel to proceed by a route recommended to them by a weather routing service, but the ship master disregarded this order on the ground that the vessel had previously experienced bad weather on this route, instead he decided to take a longer route. Charterers refused to pay for the hire and bunkers of the extra time. The Court found favor of Charterers, and held that “employment” and “navigation” are two different things, the former embraces the economic aspect (i.e. the economic aspect or the exploitation of the earning potential of the vessel) and the latter embraces matters of seamanship. 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. Master’s decision of routing was opposed to Charterers’ employment order, not an error in navigation or exercise of seamanship; therefore the Owners could not rely on Hague Rules Article IV.

❖ Comment

Where a charterers’ employment order is breached, the merit of owners’ right to rely on the negligence navigation defence will be largely fact-specific. Owners should be mindful of the distinction between the employment of the vessel and the navigation of the vessel (which relates to seamanship) when seeking to rely on the “error of navigation” defence.

In A Nutshell: Without Prejudice – Not Always The Case

❖ General Principle

It is well known that the general purpose of “without prejudice” (“WP”) is to settle disputes without fear that the statements made during the negotiations will be admitted as evidence on questions of liability. The WP rule is explained in *Cutts v Head [1984]*:

“Parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of that negotiation (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should ... be encouraged fully and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.”

First of all to apply the WP rule, there must be a real dispute in existence that is “capable of settlement in the sense of compromise (rather than in the sense of simply payment or satisfaction)”. In other words, if the parties seek for agreement or compromise on an undisputed liability or debit, there would be no basis of WP issue.

Also, it is not necessarily decisive to render the communications without prejudice by simply inserting this phrase, the rule will ordinarily operate when it is clear that the parties are genuinely trying to compromise a dispute without resort to litigation. With this pre-condition, the WP rule usually applies to the settlement offers and admission against interest; it also applies to the exclusion of all oral and written negotiations genuinely aimed at settlement and prevents them from being given as evidence.

In A Nutshell: Without Prejudice – Not Always The Case (Cont'd)

❖ A Case Study

The above principle is depicted in a recent arbitration case which dealt with whether negotiations in meetings and correspondence were admissible as evidence on determining if charterer was in repudiatory breach of a charterparty. The brief background is as below:

- The respondent time charterer chartered a ship for a period of 118 to 122 months from the disponent owner. However, after the time charterer took delivery of the ship, the freight market collapsed and they were unable to pay hire to disponent owner.
- In turn, the disponent owner defaulted on their payment to the head owner who exercised a lien on the outstanding hire. All parties proceeded to discuss a possible novation for the purpose of removing the disponent owner from the contractual chain so that the time charterer would become liable to head owner directly, however such negotiations were not successful.
- The disponent owner terminated the charterparty for repudiatory breach and commenced arbitration against the charterer to recover the outstanding sums. In arbitration, time charterer asserted that the negotiations about a possible novation were privileged and thus subject to WP privilege.

The tribunal considered that whether the WP rule applies to the negotiations was dependent on whether such were aimed to resolve a dispute, instead of whether either party specifically stated that discussions were privileged.

❖ A Case Study (Cont'd)

Having regard to all the material circumstances, the tribunal decided that the discussions of a novation did not imply that there was a legal dispute; instead, they were intended to find a commercial solution to avoid parties defaulting on their payment obligations, given the commercial problems occurred due to the drastic collapse of freight rates. A novation relates to future commercial relations, not to the past. Therefore, the tribunal concluded that at the time of the relevant negotiations of novation, the parties were not in dispute, and accordingly, the negotiations were not WP privileged.

❖ Exceptions To WP Rule

However, the WP rule is a general rule, not an absolute one. There are recognized exceptions in practice where the WP communications can be relied upon as evidence. Below is a brief summary of the exceptions which derived from English case law.

- **Rectification:** for example, X may rely upon WP communications with Y to show a term of their settlement agreement requires correction as it has been misstated.
- **Existence of settlement agreement:** for example, X may rely upon WP communications with Y to show a binding settlement was concluded if Y claims the opposite.
- **Perjury, blackmail or other unambiguous impropriety:** for example, Y makes a false statement when testifying. X may rely upon WP communications with Y as evidence of Y's perjury.

In A Nutshell: Without Prejudice – Not Always The Case (Cont'd)

❖ Exceptions To WP Rule (Cont'd)

- **Misrepresentation, fraud or undue influence:** for example, Y tells X USD100,000 will be accepted as a final settlement of a USD250,000 claim. In reliance upon Y's representation, X pays Y USD100,000. Y brings a claim against X for the USD150,000. X may rely upon WP communications with Y.
- **Reasonableness:** for example, Y seeks to set aside his settlement agreement with X. X may rely upon WP communications with Y as evidence of the reasonableness of the settlement.
- **Estoppel:** for example, even where there is no concluded settlement agreement, Y makes a clear statement in WP communications upon which X reasonably relies. This may be admissible as evidence of estoppel.
- **Delay:** for example, Y files an application to dismiss X's claim for want of prosecution. X may rely upon the fact that WP communications occurred and the relevant dates as evidence to explain the delay.
- **Costs:** for example, X prevails in his claim against Y. Y may rely upon WP communications save as to costs as evidence for the Court or tribunal to consider when assessing costs.

Loss Prevention: Operating In Icy Conditions

Operating ships in icy conditions requires a unique set of skills and precautions, and ship operators are strongly recommended to liaise with classification societies, flag and coast states, equipment manufacturers, H&M insurers and other relevant stakeholders. This article will provide generic guidance which is not exhaustive.

❖ Risk Assessment

A comprehensive risk assessment should be completed before trading in the harsh environments. It includes procedural amendments, structural modifications and additional trainings.

The crew need to receive the up-to-date weather information including details on the extent of ice development in the area, and they should also be capable of analyzing the information to estimate how the ice will further develop and how current weather may impact it.

The crew must be adequately informed of the local requirements such as the need for ice breaker assistance in certain winter periods, restrictions on docking/undocking during darkness and any additional equipment that may be required during ice passages, such as search lights.

❖ Maneuvring

Astern manoeuvre in ice exposes the most vulnerable parts of the ship and therefore deserves extra consideration. Shipowners' operational procedures should contain guidance of entering an ice edge, the safe speed for various grades of ice conditions, the use of rudder and its influence on turning circle of the ship.

While navigating in or near ice, it is advisable to have an additional lookout to assist duty officer. As detecting ice can be challenging especially in dark, it is necessary to have search lights and adjust radar settings to better identify ice.

The ship's passage planning should adhere to IMO Resolution A. 893(21) *Guidelines For Voyage Planning*. The presence of sea ice along the planned route emphasizes the importance of traditional passage planning, requiring continuous review throughout the voyage.

The publication *Ice Navigation in Canadian Waters* section 4.10 offers guidance on planning passages in areas with ice, which can also be applied in non-Canadian waters, especially in the absence of local guidance.

❖ Maneuvring (Cont'd)

Particular attention should be given to the risk of superstructure icing, which could affect the ship stability. Superstructure icing is influenced by various factors such as meteorological conditions, condition of loading, and behavior of the ship in stormy weather. The Ice Navigation in Canadian Waters section 4.3.1 provides further advice on icing and precautions to minimize the development of superstructure icing.

❖ Cargo Care

Shipowners should pay attention to correct ventilation of the cargo during the voyage by applying the commonly used practices of the Dew Point or Three Degree Rule.

It is necessary to consult the classification society and equipment maker to ensure that the hatch covers can be operated in low temperatures. For example, all hatch cover securing components should be maintained to prevent jamming; the hatch cover gaskets should keep proper sealing ability. As a reminder, hose testing of hatch covers cannot be conducted in sub-zero temperatures.

❖ Deck / Machinery Equipment

The operational procedures should cover:

- Prepare navigation/communication equipment receivers, antennas and scanners.
- Ensure the readiness of mooring and anchoring systems.
- Check and prepare accommodation and pilot ladders.
- Inspect deck cranes and verify the functionality of deck levers and valves.
- Maintain heat in store rooms.
- Apply special polar resistant greasing to wires, davits and other moving parts that may require it.
- Keep air vents clear of ice accumulation, and drain fresh water systems if necessary.
- Check and prepare hydraulic and electrical systems.
- Ensuring ballast systems are functioning.

Loss Prevention: Operating In Icy Conditions (Cont'd)

❖ Deck / Machinery Equipment (Cont'd)

Machinery instructions should include:

- Prevent ice development at the sea chest that could disrupt seawater intake to engine machinery.
- Protect batteries and other stored energy sources.
- Ensure proper functioning of combustion engines by addressing low-temperature air intake issues.
- Maintain the operational status of emergency generators and implement precautions to prevent freezing of fuel and cooling water systems.
- Drain domestic freshwater systems if necessary.

❖ Firefighting And Life Saving Equipment

Shipowners must take measures to ensure that all firefighting equipment remains operational. For example, to implement heating in areas where essential firefighting equipment is stored to prevent frost damage; to drain the exposed part of the fire lines when not in use; to regularly test the fire dampers.

Lifesaving appliances must also be protected for full operational capability and accessibility. For lifeboats and rescue boats, a fuel capable of withstanding extreme low temperatures should be utilized, and engines must be able to start in extreme cold conditions.

❖ Training

Both the crew and applicable shoreside personnel should be adequately trained to support the ship in aspects of:

- Navigation and maneuvering training provided by an accredited training facility and may include simulator based training.
- Meteorological training to analyze ice development.
- Appropriate training for engineers to understand the impact extreme cold weather can have on machinery and how to mitigate associated risks.
- First aid training for frost bite, hyperthermia or other cold weather related injuries.
- Familiarisation training in systems or equipment specifically related to the safe operation of the ship in cold climates.
- Understanding and practicing appropriate behaviour while working on deck, considering the impact of wind chill etc.



Market Snapshot

Clarksons Hails 2023 'Hugely Significant' Year For Shipping Decarbonization

- According to Clarksons Research, around 539 newbuilding orders placed in 2023 were for vessels that will be able to burn alternative fuels, equating to around 45% of all orders placed in gross tonnage terms.
- The largest share of alternative fuelled orders in 2023 were LNG dual-fuel ships, being 220 in total. There were also 125 orders of methanol dual-fuel vessels, 55 new orders involving LPG and 4 with ammonia.
- In term of vessel types, 83% of container ship newbuilding capacity and 79% of car carriers orders were contracted with alternative fuel capability. The share of alternative fuelled orders was much lower in bulk carrier and tanker sectors.
- Overall, 6% of global fleet is alternative fuel capable, which had increased from 2.3% in 2017. It is expected that the share will further rise to nearly a quarter of all fleet capacity by the end of this decade. Tracking of vessel performance under the Carbon Intensity Indicator (CII) in 2023 suggested that more than 30% of tonnage were D or E-rated, so continued investment in the existing fleet will be critical.

Unipeac Still Dominates Dirty Spot Charter Market Despite fewer VLCC Fixtures in 2023

- Unipeac, as the trading arm of oil major Sinopec, concluded 51 fewer fixtures in 2023 compared to 2022; nevertheless, it continued to rank top 1 in the dirty spot charter market as it completed more VLCC fixtures than the rest of the top 10 combined.
- In Suezmax segment, French oil major Total maintained the number one spot, followed by ExxonMobil. Shell increased its activity in chartering this type of tanker and moved up from 10th to 3rd. Unipeac was another big gainer by moving from 9th to 6th.
- The Aframax segment experienced an overall downward activity in 2023, with Shell and Exxonbil were markedly less active than in 2022. Vitol was ranked as the top charterer in this segment, though its reported fixtures were 10 fewer than 2022 when they were in 2nd place.
- On a global basis, in 2023, the total reported spot cargo volumes increased by 3.6%, but the number of fixtures were down by 3.8% (or 300).

Fertilizer, Grain And Clean Product Trades Most Exposed To Red Sea

- An analysis of Suez Canal transit data showed that, of the worldwide ocean trade in fertilizers, around 20% moves via the Suez Canal, followed by around 13% of the world grain and steel trades, and around 10% of clean petroleum products.
- In term of the vessel types, the analysis showed that 21.6% of the tankers transiting Suez Canal were Suezmax and 37.6% were Aframax; while for bulkers, 37% were Supramax, 23.8% were Panamax and 22% were Handysize.
- Freight markets in Suezmax and Aframax segments had already been trending up, especially for rates of the West Africa to UK / Continent routes and the Mediterranean trades. In the VLCC segment, a sharp rise has also been observed for the West Africa to China voyage.
- It is observed that for the Suezmax market, rerouting 40% of the voyages by the Cape of Good Hope as opposed to Suez Canal would lead to 10% increase in tonne-miles, with a significant impact on freight costs. For the Black Sea to India route, if rerouting, the distance travelled would be three times as long, which means that the freight would need to be almost double in order to achieve the same earnings.

Somali Pirates Set For New Attacks After Breaking Six-year Hijack Drought

- The International Maritime Bureau (“IMB”) warned that the Somali pirates may be preparing for more attacks on shipping after their first successful hijack of the 41,600-dwt Bulgarian handymax bulker “Ruen” in last December.
- A second ship “Lila Norfolk” was boarded by a group of armed men on 4th January when she was some 460 nautical miles off the coast of Somalia. At least 15 crew members were on board the vessel and stayed in the citadel after spotting the boarding party. A naval aircraft overflew the vessel on 5th January and established contact with vessel to ascertain the safety of crew. Afterwards, an Indian Navy warship headed to aid the vessel, and the invaders appeared fled away.
- The IMB figures showed a small increase in maritime piracy incidents in 2023 – a total of 120 as compared to 115 in 2022. However, the impact on seafarers was much higher, as 73 were kidnapped or held hostage compared to 41 in 2022.
- IMB warned that Somali pirates still retain the capability to carry out attacks far from coast. Meanwhile, ships with armed guards on board also need to be cautious not to mistake fishermen for pirates in some heavy fishing areas.

Qatar Delays LNG Cargoes to South Europe Amid Red Sea Crisis

- Qatar, one of the world's biggest LNG exporters, has delayed some shipments to Europe as the crisis in the Red Sea forces longer travel time.
- According to the market ship tracking data, since 15th January, Qatar had diverted at least 6 shipments destined for Europe around the Cape of Good Hope in southern Africa, instead of shorter route through the Suez Canal.
- On average, the detours would add about 2 weeks to the journey to Europe. The rerouting tied up vessels for longer periods than planned, curbing the carrying capacity for subsequent cargoes. LNG traders already noted that many deliveries of cargoes were rescheduled from the original dates.
- Qatar has not reduced exports, even though some cargoes were taking longer to reach destination. LNG shipments from the nation during the mid-January are about 7% higher than the same period last year. European gas futures were near a six-month low amid high inventories, strong renewables output, subdued industrial demand and plenty of alternative LNG supply.

Seafarer Salaries Jump 10-15% But Could Level Off In 2024

- Danica Crewing carried out a survey which involved 6,000 seafarers, and showed that across all senior officer ranks, there was a salary increase of 10-15% regardless of the nationality.
- The top four ranks for dry bulk carriers saw particularly significant rises despite the sector's comparatively weaker performance in terms of freight and charter in recent months. Likely it is because the shipowners are seeking senior officers capable of dealing new environment related requirements and executing business models.
- Market observers commented that the root cause for these wage increases is the combination of a general shortage of very competent seafarers and an improved financial situation for most vessel owners in past years.
- Looking forward, the huge fall off container shipping rates and continued weak dry bulk shipping market could put a damper on seafarer wage rises in 2024. However, the switch to alternative fuels and the increased complexity of ship technologies will also play an immediate driver of demand for seafarers with such required skills.

Record Wave Of New Containerships Expected To Push Global Fleet Above 30 Million TEU

- 478 containerships with a total capacity of 3.1 million TEU are scheduled for delivery in 2024, beating the 2023's record by 41%. As a result, the container fleet capacity is expected to grow by 10% in 2024.
- While recycling of ships is anticipated to increase in 2024, the fleet could still grow by nearly 2.8 million TEU, surpassing the 30-million TEU milestone by end of 2024 for the first time in history.
- Most newbuildings to be delivered this year are larger than 15,000 TEU. According to market data, Chinese yards have officially solidified their positions as the premiere builders of containerships, accounting for almost 55% of the capacity delivered in 2023 and 2024. South Korea came the second for its 38% share of the new capacity.
- It is estimated that the supply and demand imbalance would become even wider in 2024; however, the prolonged disruption in the Red Sea could potentially tighten the balance and mask the overcapacity.

The Red Sea Crisis – An Opportunity For Shipping Stock Investors?

- The attacks on shipping in the Red Sea have driven up rates as vessels were diverted by the Cape of Good Hope, this attracted the interest of stock investors in listed container lines, although the situation remains extremely fluid.
- Shanghai Containerized Freight Index (SCFI), a weekly barometer for prices of shipments out of Shanghai, has seen a rise from levels around 1,000 in November 2023 up to a level of 1,900 points in early January 2024.
- Similarly, the Freightos Baltic Exchange Global Freight Rate Index (FBX) saw a doubling from late December 2023 when it stood around USD1,300, a small uptick from its levels throughout 2023, to up above USD2,500 in early January 2024.
- Investors in shipping equities are said to be presented with an opportunity to invest in companies that will benefit from the sudden tautness on the vessel supply side, particularly the container trades between Asia and Europe which would have transited through Suez.

European Ports Alliance: EU Launches Effort to Combat Drug Trafficking

- The European Commission, along with various EU Member States and agencies, have launched the European Ports Alliance Public Private Partnership to combat drug trafficking and criminal infiltration in ports.
- Ports account for 75% of EU external trade volumes and 31% of EU internal trade volumes. Recent years have seen a significant increase in cocaine seizures in the EU. For instance, the Port of Antwerp-Bruges in Belgium had confiscated a record 121 metric tonnes of cocaine in 2023, marking 10% increase from the previous year. Rotterdam and some ports in Spain are also vulnerable to drug smuggling.
- The partnership will strengthen risk management, implement effective controls, and bolster law enforcement operations in ports. It also aims to raise awareness and support port authorities and private shipping companies in their fight against drug trafficking.

New P&I Club Mooted As India Seeks To Soothe Sanctions Sting

- India is developing its own protection and indemnity mutual for domestic shipowners. Tentatively named as the India Club, the project will initially target Indian-flagged inland and coastal shipping, and rely on the international fixed premium market for its P&I cover.
- The project also plans to expand to global shipping markets, and would most likely have to access the international reinsurance markets to acquire the levels of cover required.
- India is one of the biggest importer of Russian crude oil. Under G7 countries sanctions, the 12 IG P&I clubs, which provide cover for more than 90% of the ocean-going fleet, are not allowed to provide P&I cover for tankers carrying Russian oil beyond the price cap. To develop its own P&I club, India may aim to ease the pressure of the sanctions on its Russian oil imports.
- Indian Register of Shipping, an international classification society, said its fleet grew by 5 million gross tonnage last year, with new owners from the Middle East, Asia-Pacific and Europe.

Happy Chinese New Year, Happy Reading!

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