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SEAWORTHINESS AND (UN)SAFE PORTS IN LONDON ARBITRATION 2/23: ONE-OFF PILOT ERROR DID NOT AMOUNT TO INCOMPETENCE.

In London Arbitration 2/23 (2023) 1129 LMLN 2, an arbitral tribunal determined that a pilot's one-off error which caused the grounding of the Vessel (negligent navigation) did not render a port unsafe. The tribunal also found the Vessel to be unseaworthy due to a defective passage plan that could not have considered the most detailed and appropriate paper chart for the disport, although this was not found to be causative of the grounding.

Background

By way of a NYPE 1981 form, the Owners chartered a Panamax bulk carrier (the **Vessel**) to Charterers for a time charter trip from Indonesia to Charter "...trading always via safe port(s), safe berth(s), safe anchorage(s)...". Charterers nominated Maura Satui as the loadport, and Chaozhou Harbour as the disport.

Under the Charterparty the Owners were to remain responsible for, *inter alia*, the navigation of the Vessel and the acts of pilots.

Entry to Chaozhou Harbour is subject to compulsory pilotage and required the Vessel to proceed along the Chaozhou channel before turning into the harbour basin.

The Vessel departed Maura Satui with paper navigational charts (in accordance with SOLAS Chapter V Regulation 19) and an Electronic Chart System capable of displaying Electronic Navigational Charts. Neither the electronic or the paper charts onboard indicated the presence or limits of the approach channel to Chaozhou Harbour. The Master had not obtained the paper chart (the Chinese MSA Chart 81102) which showed the limits of the 14.5m channel and the positioning of the buoys.

The Vessel entered the channel under pilotage and with tug assistance. Evidence showed that the Master relied almost entirely on the pilot and was not actively involved. The Vessel subsequently failed to successfully turn into the harbour basin (and further failed to perform a corrective manoeuvre) and grounded in chartered shoal water (i.e., in a location where the Vessel should not have been).

It was common ground between Owners and Charterers that the pilot made an error in performing the turn and that the pilot either knew, or should have known, the location of the chartered shoal water.

Owners alleged that the port nominated by Charterers (i.e. Chaozhou Harbour) was unsafe and claimed US\$1,158,559.59 for the cost of repairing the Vessel and associated repairs. Charterers sought to defend the claim on the basis that the loss and damage arose from either (or a combination of) negligent navigation, unseaworthiness, want of due diligence, dangers and accidents of the seas and or errors of navigation.

The Tribunal's Decision

The tribunal was asked to decide whether (i) the disport was unsafe due to the incompetence of the pilot and or tug masters; and or (ii) the Vessel was unseaworthy at the beginning of her voyage to Chaozhou (and, if so, whether Owners failed to exercise due diligence to make the Vessel seaworthy at the beginning of the voyage).

Was the port nominated by Charterers unsafe?

The tribunal concluded that the port nominated by Charterers was a safe port.

The traditional test for unsafety is concisely provided by Sellers LJ in *The Eastern City*:¹ “a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it **without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.**” (emphasis added).

The parties and the tribunal agreed that the grounding was caused by the pilot's negligent navigation of the Vessel. The pilot was negligent as he knew the limits of the deep water channel and the charted shoal and failed to ensure that the Vessel turned at the required rate to remain in the deep channel. The tribunal considered whether the pilot was so incompetent so as to render the port unsafe. Whilst the tribunal found the pilot to have been negligent in misjudging the turn and failing to take appropriate action to correct the error, the pilot's actions did not amount to incompetence in light of the test in *The Eurasian Dream* (i.e., was the pilot affected by a disabling lack of skill or knowledge).² There was no evidence to show that the pilot was ever involved in an incident prior to the grounding and that he was not otherwise competent (nor should the pilot have been expected to know of any specialist manoeuvres not commonly used in the Chaozhou Harbour).

Therefore, the pilot's one-off error in navigation did not amount to incompetence so as to render the port unsafe. The parties did not adduce evidence as to the qualifications and experience of the tug masters and so, in absence of any evidence to the contrary, the tribunal found the tug masters to also be competent.

As a result, the tribunal readily concluded that the nomination by Charterers was a safe port nomination and in accordance with the charter.

Was the Vessel unseaworthy at the beginning of her voyage?

The tribunal found the Vessel to be unseaworthy at the beginning of her voyage as she lacked the appropriate charts to prepare a berth-to-berth passage plan compliant with IMO Resolution A893(21). The defect in the passage plan was capable of being rectified had the Master obtained the Chinese MSA Chart 81102 before commencing the inbound passage to Chaozhou Harbour. However, the Master failed to do so.

The tribunal further found that there was no evidence that Owners exercised due diligence to ensure the Vessel had a compliant passage plan before departing for Chaozhou Harbour.

The tribunal also found the Master to have been negligent:

1. in failing to obtain a copy of the Chinese MSA Chart 81102 before transiting the Chaozhou Harbour as the Master should have been aware that the charts onboard the Vessel were not sufficiently detailed to transit the channel; without knowledge of the limits of the deep water channel, the significance of the Vessel deviating from following her planned track on the ECS was not apparent; and
2. for failing to effectively monitor the pilot's conduct of the Vessel. The pilot's plan was not discussed in any detail or plotted on the Vessel's charts or radars; which meant that the Master was not in a position to query the pilot's actions or attempt direct action to prevent the grounding.

Nevertheless, the tribunal held that the unseaworthiness of the Vessel was not causative of the grounding, rather; it was the Vessel's negligent navigation that caused the grounding. Under the Charter, Owners were responsible for the consequences of errors of navigation and so Charterers were not liable for the damage to the Vessel.

Commentary

This decision follows a line of previous authorities that a one-off mistake of a pilot is not necessarily sufficient to render a pilot incompetent (and a port unsafe) (see Leggatt LJ in *The Star Sea*³ “...must be possible, in certain circumstances, to draw the inference from one incident that someone had a “disabling lack of knowledge”...[however]... one mistake or even more than one mistake does not necessarily render a crew member incompetent”).

Further, the tribunal's determination that the Vessel was unseaworthy shows the importance of Masters taking all necessary steps to secure the appropriate charts/information to ensure an appropriate passage plan is created. To fail to do so may render a vessel unseaworthy.

¹ *Leeds Shipping Co Ltd v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127

² *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719

³ *Manifest Shipping & Co., Ltd v Uni-Polaris Insurance Co., Ltd and Others (The Star Sea)* [1997] 1 Lloyd's Law Reports 360, 374.

Similarly, the importance of communications between the Master and the pilot is emphasised. Without knowledge of the pilot's plan, the Master was not in a position to know if the Vessel had deviated from the pilot's track and thus be in a position to query the pilot's actions or attempt direct action to prevent the grounding.

It is also noted that of the three-member tribunal, two were master mariners. This is reflected in the approach of the tribunal in assessing the facts (for example, the tribunal were critical of the expert evidence presented to them and appeared to take a pragmatic approach when judging what a competent master or pilot would (or should) have done).

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