

HILL HARMONY – Which way now?

Every mainstream time charter form will contain a term which places the Master under the orders of the charterers as to the employment of the ship. The Master must follow these orders within the bounds of safety of his ship, crew and cargo. In return, the owners generally receive an indemnity (express or implied) for the consequences of complying with these orders. This should be contrasted with the navigation of the ship. Risks of navigation will generally be owners' risks. For charterparties incorporating a Clause Paramount, owners will normally be exempted from the consequences of any errors of navigation.

The line drawn between employment and navigation is a fine one. Orders to send a ship to a particular port will be orders as to employment. Likewise, orders as to port rotation. But what about the route the ship takes? Is routing also a matter of employment or a matter of navigation?

This issue has come under close scrutiny in the case of the HILL HARMONY.

The HILL HARMONY was time chartered down a chain of NYPE

charters which contained the usual employment clauses but no special routing clauses. The time charterers, on the advice of Ocean Routes, ordered the ship to proceed from Vancouver to Japan by the northerly, great circle route. The Master had experienced heavy weather on a similar voyage some months before. He disregarded the charterers' orders and insisted on taking the longer, southerly rhumb line route. The charterers refused to pay for the extra time taken and the bunkers consumed. The disponent owners claimed these sums in London arbitration.

The dispute focused on the employment provisions of the charter. The charterers argued that the Master's decision was a breach of their orders as to the employment of the ship; or, alternatively, a breach of the obligation to proceed with utmost despatch. The tribunal agreed. The arbitrators held that the routing instructions were "employment" orders which the Master was bound to follow unless he could justify his refusal to do so. They further found that his refusal, based on his experience on the particular voyage some months before, was unjustified.

The owners appealed. Both the High Court and Court of Appeal found in the owners' favour. The High Court ruled that

routing was a decision as to navigation. Once that was established, any route taken by the Master, whether justified or not, would suffice. The Court of Appeal largely agreed and held that, in absence of any special provisions, the Master could take any reasonable route.

The case was finally referred to the House of Lords. The highest English appeal court restored the decision of the arbitration tribunal and found in favour of the charterers.

The House of Lords ruled that an order as to routing is an employment order. Time charterers are therefore entitled to give routing orders to the Master which, unless they compromise the safety of the ship, must be followed. In addition, it was held that the Master must follow the shortest and quickest route unless there are navigational reasons for not doing so.

Navigation is still the Master's responsibility. He is at liberty to change course for safety reasons. He can refuse to enter a port he considers to be unsafe and can, similarly, leave port if it becomes unsafe. The HILL HARMONY decision does not alter these principles. Neither does it give the time charterers carte blanche to order the ship to take any route, however unsafe. The time charterers have

the right to use the ship in a commercially advantageous way and can determine the route the ship takes, as a matter of employment. However they cannot place the ship, her cargo and crew in danger.

The circumstances in which a Master disagrees with the routing of an entire voyage will probably be rare. When a Master does disagree, he must have a sound reason linked to safety which justifies a different route. Owners who cannot justify their Master's decision will bear the risk of that decision. In the words of the leading judgements:

"The choice of ocean route was, in the absence of some overriding factor, a matter of the employment of the vessel, her scheduling, her trading, so as to exploit her earning capacity..."
(Lord Hobhouse)

"So, in the absence of....'navigational or other reasons' for not taking the shortest and quickest route, the master was contractually obliged to take it..."

...But, subject to safety considerations and the specific terms of the charter, charterers may not only order the vessel to sail from A to B, but may also direct the route to be followed between the two."
(Lord Bingham)

A similar result was achieved by charterers in a New York arbitration referred to by the House of Lords (Reefer Express Lines Pty Ltd v Cool Carriers). In that case, on facts less favourable to the charterers, the tribunal also held that the Master also could not take a longer voyage contrary to the charterers' orders.

SEAFLOWER - Vetting questions

Following the loss of the ERIKA, oil majors have justifiably taken a hard line on the approval and vetting of ships. There is, however, no magic formula in applying for and obtaining these approvals - each oil major has its own procedures.

Tanker charterers will have specific expectations for the vetting approvals a ship should have, or should obtain, as this impacts directly on their ability to sub-charter the ship. Owners, however, are often at the mercy of a process over which they have no control as oil majors may be unwilling or unable to inspect ships for which they have no immediate need. This may mean that owners provide in their charters for results which, even with best intentions, they cannot achieve. These considerations make it all the more important for both

owner and charterer Members to ensure that any major approval charterparty clause expresses precisely their commercial intent if all or any major approvals are missing. This may involve a careful balancing exercise by fixing a discount in the charter rate when owners hold less than the full set of approvals contemplated by the charterparty, together with a back-stop provision entitling the charterers to terminate in certain prescribed circumstances.

Vetting issues have been considered recently on both sides of the Atlantic, in the English High Court, and Court of Appeal, (SEAFLOWER), and in New York arbitration, (DIAMOND PARK and EMERALD PARK). The cases demonstrate the need for major approval clauses to be clearly drafted so that both owners and charterers know exactly where they stand following a failure to obtain, or the loss of, a major approval.

The SEAFLOWER was fixed on a one year time charter. The charterparty included a clause dealing with "major approvals" which stated that she was "Mobil, Conoco, BP and Shell acceptable" and that "Owners guarantee to obtain within 60 days Exxon approval". Two months into the charter, the charterers fixed to Exxon. Exxon approval was not obtained.

Exxon cancelled the fixture and the charterers terminated the time charter.

The High Court held that, while the owners' failure to obtain the Exxon approval was a breach of charter, it was a breach of an intermediate term of that charter. That only entitled the charterers to claim damages. The owners' breach made the ship a "less flexible instrument for voyage chartering" in that she could not lift Exxon cargoes, but was not sufficiently serious to give the charterers the right to terminate. The charterers should therefore have kept the ship on charter and claimed damages from the owners for their lost trading opportunities. The charterers appealed.

The critical question for the Court of Appeal was whether they had the right to terminate. The Court of Appeal held that the oil major approval clause was a condition of the contract, breach of which entitled the charterers to terminate the charterparty. In doing so they placed great store by the owner's "guarantee" in the major approvals clause. In the US cases of DIAMOND and EMERALD PARK, the relevant clause provided that the owner "warrants that the vessel will meet the screening requirements and pass the inspections of all major oil and

chemical companies". During the charter period, the ships were sold. The old owners had at various stages lost some vetting approvals. When this happened, they negotiated reductions in the hire rate. Upon buying the ship, the new owners had to re-apply for vetting approval. In the absence of these approvals, the charterers tried to bind them to the reductions in rates agreed with the former owners, or, alternatively, to terminate the charter.

The arbitrators held that the new owners would be expected to take a pro-active approach to re-establishing the vetting approvals but failure to obtain any approvals would entitle the charterers to damages only. They held that the clause was neither a promise nor a guarantee of 100% vetting coverage. It simply required the ship to pass vetting inspection when tested. If it did not pass, the charterers were entitled to damages. The new owners were not bound by the reductions agreed between the charterers and the former owners.

These two decisions, albeit one English the other US, suggest a difference of approach to owners who "guarantee" they will obtain and maintain approvals and owners who simply "warrant" they will do so. If owners guarantee, they

may find their charterers can terminate in the absence of one or more approvals. If owners intend damages to be the charterers' remedy, clear provisions in the charter will be needed. Ideally, to reduce the scope for disputes, Members should, when fixing, consider specifying:

- The approvals in existence at the date of the charter
- The approvals to be obtained during the charter
- Any financial remedy for the loss of any approvals
- Any financial remedy for any failure to obtain further approvals
- If and when the charterers will have the right to terminate the charterparty if approvals are missing.