Neutral Citation Number: [2023] EWHC 2978 (Comm)

Case No: CL-2022-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

AND IN THE MATTER OF AN ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2023

Before :

SIR NIGEL TEARE SITTING
as a Judge of the High Court

- -

Between :

MERCURIA ENERGY TRADING PTE	**Claimant**
- and -	
RAPHAEL COTONER INVESTMENTS LIMITED	**Defendant**

m/t AFRA OAK

- -
- -

John Russell KC and Joseph Gourgey (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
Timothy Hill KC and Socrates Papadopoulos (instructed by **Stann Law Limited**) for the **Defendant**

Hearing dates: 16 November 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 23 November 2023 at 10:00am.

Sir Nigel Teare :

1. This is an appeal from an arbitration award dated 29 March 2022 pursuant to section 69 of the Arbitration Act 1996, permission to appeal having been granted by Jacobs J. on 8 August 2022. The appeal raises a question of law with regard to Section 4(2)(a) of the US Carriage of Goods by Sea Act 1936 (which is to the same effect as Article IV rule 2(a) of the Hague Rules) as incorporated into a voyage charterparty, and in particular its application to employment orders by the charterer.

2. The question of law is: "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?".

3. Permission to appeal was granted on the grounds that the issue raised was of general importance and that the award was open to serious doubt. The award was issued by a tribunal with considerable familiarity with the law of charterparties and the Hague Rules, namely, David Owen KC, Sir Bernard Eder and Dominic Kendrick KC.

4. The Appellant was the Charterer of the vessel AFRA OAK and the Respondent was the Owner of the vessel.

The arbitration

5. The parties' disputes arose out of the detention of the vessel AFRA OAK ("the Vessel") by the Indonesian Navy on 12 February 2019 when the vessel was in Indonesian territorial waters near Singapore. At the time of the detention the Vessel was laden with a cargo of fuel oil owned by the Charterer. The Master and Vessel were arrested on 12 February 2019 by the Indonesian Navy and detained for a period of 8 months until criminal proceedings concluded in October 2019 with the conviction of the Master. The Vessel was then released.

6. The detention of the Vessel gave rise to substantial claims by the Owner and to substantial counterclaims by the Charterer.

7. In the arbitration the Owner claimed that the Vessel had complied with the Charterer's orders by anchoring where she did, that the Vessel had been entitled under United Nations Convention on the Law of the Sea 1982 ("UNCLOS") and Indonesian law to anchor there and that the Charterers had breached a warranty that the Vessel would only be ordered to safe ports/places, as the anchoring place was politically unsafe since the vessel was exposed to a risk of unlawful detention. The Tribunal rejected these claims. The Vessel was not entitled under UNCLOS to anchor in Indonesian waters (see paragraphs 42 to 46 of the Award), such anchoring was prohibited by Indonesian law (see paragraphs 47 and 50) and the Master was guilty of the criminal offence of which he was convicted (see paragraph 51). There had been no breach by the Charterer of the safe port/ place warranty (paragraphs 64-66). The relevant danger was the political danger of detention resulting from anchoring in Indonesian territorial waters contrary to UNCLOS but it was one which the master could and should have avoided (paragraphs 66-67). Accordingly, save only for some minor claims of modest value (which were largely admitted subject to set-off), the Owner's claims failed (see paragraphs 158.a.-158.e). There is no appeal against that decision.

8. The Charterers advanced a counterclaim on the grounds that the Vessel was unseaworthy on two grounds: (a) that the passage plan for the short voyage was defective as it failed to record that the Vessel should not anchor in territorial waters and (b) that the Master had a disabling lack of knowledge in relation to anchoring in territorial waters. These claims were dismissed (see paragraphs 83-84 of the Award). Permission to appeal was sought in relation to the Tribunal's decision on (b) but was refused. A related application pursuant to section 68 of the Arbitration Act was dismissed without a hearing on the grounds that it had no real prospect of success.

9. The Charterer also advanced a counterclaim pursuant to a term in the charterparty (the "Compliance clause", clause 2 in the Exxonvoy Clauses) in which the Owner warranted that the vessel shall comply with the laws of the place to which she may be ordered. However, in counsel's closing submissions before the Tribunal the Charterer accepted that if their order to the vessel was not construed as an order to wait in Indonesian waters then this claim could not succeed (see paragraph 79 of the Award). Counsel for the Charterer told me that in that event the Charterer had an alternative claim based upon the Owner's failure to follow the employment orders of the Charterer. This claim is not expressly mentioned in the Award. However, counsel for the Owner accepted that these two alternative claims were advanced in the arbitration. He added that the claim based upon the compliance clause had been the primary claim.

10. With regard to the question whether the order was to be construed as an order to wait in Indonesian waters the Tribunal said, at paragraph 79 of the Award:

> "79. We have already found and held that properly construed the order was 'wait in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship' and that this precluded waiting in Indonesian waters i) due to UNCLOS and ii) since only vessels which had been cleared into Indonesia prior to proceeding to an Indonesian port could anchor in Indonesian waters. In short there was no way of making the vessel compliant with Indonesian law, because what the vessel was doing – waiting for orders in Indonesian territorial waters – was contrary to Indonesian law."

11. This was a reference back to the Tribunal's findings in paragraph 70 with regard to the Owner's claim pursuant to the implied indemnity which was advanced in parallel with the unsafe port claim. This claim also failed. The Tribunal there said:

> "70. On its true construction the gist of the order was not 'anchor anywhere at all in EOPL', it was 'anchor wherever it is safe to do so in EOPL, using good navigation and seamanship'. To give an extreme example, if the vessel had anchored in a dangerous position in the Ship Traffic Separation lanes, it is obvious that no indemnity would be forthcoming. Equally, if the vessel anchors illegally in Indonesian waters, it cannot claim under the indemnity for the consequences of so doing. The order to proceed to Singapore EOPL and wait for further orders was entirely innocuous, provided only that the Master used good navigation and seamanship in complying with it. In short, the Master's conduct, not the order, caused the loss."

12. Counsel for the Charterer submitted that the Charterer's claim (in the alternative to the claim based on the Compliance clause) in respect of the Owner's failure to comply with the Charterer's order was dismissed by the Tribunal in paragraph 85 of the Award in these terms:

> "85. Finally, Charterers also argued that even if they did not establish a failure of due diligence by the Owners to make seaworthy, the Owners were still not entitled to rely upon the exception of "Act, neglect, default of the master… in the navigation or in the management of the ship" because on a true analysis, the Master was making a legal error, not an error in navigation or management. They relied upon cases such as Knutsford v Tillmans [1908] AC 406 where a Master misconstrued the terms of a bill of lading and therefore refused to enter a port on account of ice and the Hill Harmony [2001] 1 AC 638 where the Master chose wrongly in law not to perform his required obligations. It seems to us that these cases are in a different category from the present case, where the Master attempted to comply with the orders given but by simple oversight in the course of navigation anchored the vessel where he should not have done."

13. It is this decision, that the Owners were entitled to rely upon the exception of "Act, neglect, default of the master… in the navigation or in the management of the ship" as a defence to the claim for breach of the Charterer's employment orders, that has given rise to the appeal.

The charterparty

14. The key terms of the Charterparty were as follows:

> "**Recap**
>
> Charterer's option to discharge/reload part/full cargo within agreed ranges but maximum 2 operations.
> …
> Charterer has the option to discharge part/full cargo at one safe port within the agreed load/discharge range and reload same or different cargo in the same discharge range for final discharge within agreed discharge ranges. Maximum 4 ports total including the part discharge-reload port and always in geographical rotation. Charterer to be allowed only one part-discharge/reload operation and the port of discharge/reload to be considered as interim port.
>
> **Exxonvoy Clauses …**
>
> 2. (c) **COMPLIANCE.**
> Owner warrants that Vessel shall, during the period described in paragraph (a) of this Clause, be in full compliance with … all applicable law, regulations and/or other requirements of … the countries of the … place(s) to which Vessel may be ordered hereunder … The … laws, regulations and requirements referred to in this Paragraph (c) mean conventions, laws, regulations and requirements concerning … navigation… and other like matters.
>
> 4. **VOYAGE(S).**

(a) Vessel shall proceed with utmost dispatch to any port(s) or place(s) as ordered by Charterer in accordance with Part I (C) and there load a cargo as specified in Part I (E) and (F). On completion of loading, Vessel shall then forthwith proceed to any port(s) or place(s) as ordered by Charterer in accordance with Part I (D) and there deliver said cargo …

…

9. **LOADING AND DISCHARGING PORT(S)/PLACE(S)**

…

(b) **CHANGE OF DESTINATION**. After nominating loading and/or discharging port(s) or place(s) pursuant to Paragraph (a) of this Clause, Charterers may nominate new port(s) or place(s), whether or not they are within the range of the previously nominated port(s) or place(s)…

…

27. **BILLS OF LADING**

…

(b) Notwithstanding anything else in this Charter to the contrary, the carriage of cargo under this Charter and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in sub-paragraphs (i) through (vi) of this Clause and all such terms shall be incorporated verbatim or deemed incorporated by reference in any such Bill of Lading. In such sub-paragraphs and in any Act referred to therein, the word "Carrier" includes Owner and Chartered Owner of Vessel.

(i) Clause Paramount. This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936

…

Scanports Clauses …

2. ADHERENCE TO VOYAGE INSTRUCTIONS

A. Owner shall be responsible (and indemnify Charterer, its affiliates and associates) for any time, costs, delays or loss suffered by Charterer, its affiliates or associates due to underlift, overlift or other failure to comply fully with charterer's voyage instructions …"

…

12. WAITING/STORAGE

Charterers shall have the option to order the Vessel to wait at safe location(s) at or off loading and/or discharging port(s) and/or en route inside or outside territorial waters and/or port limits as directed by Charterer. However, specific place closest to the nominated location shall be always at Master's discretion at the sole discretion of the Master in respect of vessel safety. The waiting/storage period shall be at the option of the Charterer but shall not exceed 5 days in total. Charterer shall pay for such waiting/storage time at the demurrage rate plus bunkers consumed together with the freight against Owner telex invoice, documentation to follow."

15. It is common ground that the Carriage of Goods by Sea Act 1936 of the United States is, so far as material, to the same effect of the Hague Rules. The Act provides:

> "Section 3 …
>
> 2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
>
> Section 4…
>
> 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."

The Charterer's Order

16. The Tribunal made the following finding in paragraph 9 of the Award:

> "9. On the afternoon of 7th February, during loading, the Charterers sent the vessel a fateful order: Charterers ordered the Master after completion to "proceed to Spore EOPL for further orders. Discharging plan still not known yet". The Owners' expert mariner stated that 'Spore EOPL' is an acronym for Singapore Eastern Outer Port Limits, but also acknowledged, (as the Charterers' expert mariner stated) that it is commonly understood as Singapore Eastern Off Port Limits, or Outside Port Limits. There is no significant difference between these views of the acronym, since their meaning, and the clear intent of the order, was that the vessel should wait a short time for further orders outside Singapore port limits, a location where port dues and taxes were not payable and vessels cannot be ordered to berth or move out by the Singapore Port Authority. It is very common indeed for vessels to wait in the large area known as Singapore EOPL."

17. There is an issue between the parties as to whether or not the Tribunal held that the Charterer's Order was to wait in Singapore EOPL excluding Indonesian waters. On behalf of the Charterer it was submitted that the Tribunal found that the Charterer's Order was to wait in Singapore EOPL excluding Indonesian waters and that the Tribunal made an implicit finding that the Owner had failed to comply with the Charterer's Order. On behalf of the Owner it was submitted that neither finding had been made by the Tribunal. In the light of that dispute which the court must resolve it is necessary to refer to other passages in the Award which concerned the Charterer's Order. They may throw light on the meaning of the Charterer's Order or at least provide the context in which the Charterer's Order is to be understood.

18. When recounting the history of ships anchoring off Singapore following the financial crash of 2008 the Tribunal referred to a shipping notice issued by Malaysia in 2019 and said this at paragraph 22(b):

> "22 (b) Accordingly, two main areas for anchoring were off the east coast of Malaysia, and off the coast of Bintan, Indonesia, both areas being clear of marine traffic. They were outside the Straits of Malacca and Singapore, but within the

> territorial waters of Malaysia and Indonesia. Captain White referred to these two areas as "the new EOPL". However, as Captain Todorov, the expert master for the Charterers pointed out, there was also a third EOPL area where large vessels would also anchor, which was simply further away in a more northerly direction in international waters."

19. The Tribunal referred to a further shipping notice issued by Malaysia in 2014 and this is at paragraph 22(c):

> "22(c) The effect of this notice was that vessels anchored yet further away off the coast of Malaysia. They also anchored east of the Middle Channel off Bintan Island, Indonesia, often up to 15 nautical miles away, but in many cases 10 miles or less. They also anchored further away still in international waters. All three areas, (off Malaysia, off Bintan and further afield) fell within the phrase Singapore EOPL."

20. At paragraph 27 the Tribunal made the following finding:

> "27. However, making allowance for this missing information, on any common sense view, we find that in the year up to 9th February 2019, as a matter of ordinary practice, many ships must have responded to an order to wait at Singapore EOPL by anchoring in Indonesian waters, without having obtained permission from Indonesian authorities to do so."

21. At paragraph 31 the Tribunal returned to the Charterer's Order and said:

> "31. On 7th February Charterers emailed Owners' operations department "*Pls ask master proceed to Spore EOPL for further orders. Discharging orders not known yet*". This is a standard instruction for this area. At around this time, on any one day, perhaps 60-100 ocean-going vessels would be waiting in the EOPL areas having received similar instructions for one reason or another (eg. waiting for employment, waiting for loading/discharging orders, or waiting to receive supplies). It will be noted that the instruction did not specify waiting only in international waters EOPL."

22. When rejecting the Owner's case that there had been a breach of the safe port warranty the Tribunal held that the Owner had not established a breach of the due diligence duty to nominate a safe port. At paragraph 64 the Tribunal said:

> "On the face of matters, Charterers exercised due diligence by giving a conventional order, which had been given many hundreds if not many thousands of times before, to wait at Singapore EOPL, one of the major shipping areas in the world. Accordingly, on analysis the Owners' case has to be that the Charterers should have warned the Master not to anchor in Indonesian waters. Prima facie, taking full account of the fact that Charterers are a large organisation which is based primarily in Singapore, we cannot see how due diligence compels such a result. The evidence of Mr Z (who was called by the Owners) and other witnesses confirmed that at the date of the order (7th February) and even at the date of detention (12th February) it was unknown to the shipping community at Singapore that Indonesia had embarked upon a campaign of detention. It was also of course unknown to Charterers that the

> vessel would anchor in Indonesian waters, since the place of anchorage was left to the Master's discretion."

23. Further, at paragraph 67(b) the Tribunal said:

> "67(b) [The master] decided while on passage to anchor instead in Indonesian waters and he selected a location to anchor which was within the range of ordinary practice for Singapore EOPL."

24. When rejecting the Owner's case on the implied indemnity, which was advanced in parallel with the unsafe port claim, the Tribunal said at paragraph 70:

> "70. On its true construction the gist of the order was not 'anchor anywhere at all in EOPL', it was 'anchor wherever it is safe to do so in EOPL, using good navigation and seamanship'. To give an extreme example, if the vessel had anchored in a dangerous position in the Ship Traffic Separation lanes, it is obvious that no indemnity would be forthcoming. Equally, if the vessel anchors illegally in Indonesian waters, it cannot claim under the indemnity for the consequences of so doing. The order to proceed to Singapore EOPL and wait for further orders was entirely innocuous, provided only that the Master used good navigation and seamanship in complying with it. In short, the Master's conduct, not the order, caused the loss."

25. When rejecting the Charterer's case on the Compliance clause the Tribunal said at paragraph 79:

> "79. Charterers argued that if their order to proceed to Singapore EOPL and wait was to be construed as an order to wait in Indonesian territorial waters then Owners were in breach of this clause, because the vessel was not in compliance with relevant laws. However, in paragraph 6 of their Closing Submissions Charterers rightly accepted that if the order was not so to be construed then Indonesia was not a place "*to which Vessel may be ordered hereunder"* and so they could found no claim for breach upon it. We have already found and held that properly construed the order was 'wait in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship' and that this precluded waiting in Indonesian waters i) due to UNCLOS and ii) since only vessels which had been cleared into Indonesia prior to proceeding to an Indonesian port could anchor in Indonesian waters. In short, there was no way of making the vessel compliant with Indonesian law, because what the vessel was doing – waiting for orders in Indonesian territorial waters – was contrary to Indonesian law. If it is of any slight relevance, consideration of this clause simply confirms once more that the Master in the exercise of good navigation should not have chosen to anchor in Indonesian territorial waters."

26. Having rejected the Charterer's case on unseaworthiness the Tribunal made the ruling at paragraph 85 of the Award which forms the basis of this appeal:

> "85. Finally, Charterers also argued that even if they did not establish a failure of due diligence by the Owners to make seaworthy, the Owners were still not entitled to rely upon the exception of "*Act, neglect, default of the master… in the navigation*

> *or in the management of the ship*" because on a true analysis, the Master was making a legal error, not an error in navigation or management. They relied upon cases such as Knutsford v Tillmans [1908] AC 406 where a Master misconstrued the terms of a bill of lading and therefore refused to enter a port on account of ice and the Hill Harmony [2001] 1 AC 638 where the Master chose wrongly in law not to perform his required obligations. It seems to us that these cases are in a different category from the present case, where the Master attempted to comply with the orders given but by simple oversight in the course of navigation anchored the vessel where he should not have done."

27. Counsel on behalf of the Charterer submitted that, on a proper understanding of the Award, the Tribunal clearly found that the Charterer's order to wait at Singapore EOPL did not include Indonesian waters. Reliance was placed on paragraphs 70 and, in particular, paragraph 79 of the Award where it was said in terms that the Charterer's Order "precluded waiting in Indonesian waters". It was further submitted that to suggest that the Charterer's Order included anchoring within Indonesian waters is fundamentally inconsistent with the Tribunal's finding that Owner was not in breach of Exxonvoy Clause 2(c). The Charterer's claim under that clause failed because Indonesian territorial waters was "*not a place to which the Vessel may be ordered*". The Owner cannot, on the one hand, argue that the Charterer's Order included Indonesian waters and, on the other, maintain that it excluded Indonesian waters for the purposes of Exxonvoy Clause 2(c).

28. Counsel on behalf of the Owner submitted that the Tribunal's paragraphs 64 (due diligence) and 70 (implied indemnity) assumed that there was no breach of the Charterer's Order and that the Order had been followed. Counsel explained that, when the Tribunal spoke of the "gist" of the order, it referred to the general obligation under the charter to carry out orders properly and carefully, not that this was actually part of the order. The order itself did not say "*EOPL excluding Indonesian territorial waters*" just like it did not say "*EOPL excluding the TSS [the Traffic Separation Scheme]*". The whole of paragraph 70, and especially the last sentence, makes clear that Charterers' order did not include a prohibition from waiting in Indonesian waters; instead this was precluded by the general obligation of good navigation and seamanship. The Charterer's Order was followed but the loss arose by negligent navigation which broke the chain of causation which caused the implied indemnity claim to fail. With regard to the Charterer's reliance on paragraph 79 the Owner says that that paragraph is not dealing with the duty to follow the Charterer's Order but with the Compliance clause and that the reasoning in that paragraph cannot be transposed to the question of the Charterer's Order.

29. What is in issue on this part of the appeal is not a question of law but a question of how to read the Award.

30. There was no dispute that when reviewing an Award the court should read the award "as a whole in a fair and reasonable way … [and] should not engage in minute textual analysis": *Kershaw Mechanical Services Ltd v Kendrick Construction* [2006] 4 All ER 79 at paragraph 57. The Courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration": *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.

31. If one focuses on the geographical extent of Singapore EOPL there is much to be said for the submission that the Tribunal found that the Charterer's Order to wait at Singapore EOPL included Indonesian waters.

    (i) In paragraph 31 of the Award the Tribunal found that the Charterer's Order was a standard instruction in this area.

    (ii) In paragraph 22 (b) and (c) of the Award the Tribunal found that the three anchorage areas mentioned in that part of the Award, one of which was in the territorial waters of Indonesia, were within Singapore EOPL.

    (iii) In paragraph 31 of the Award the Tribunal noted that the Charterer's Order did not specify waiting only in international waters EOPL.

    (iv) In paragraph 67(b) of the Award the Tribunal found that the master decided while on passage to anchor instead in Indonesian waters and he selected a location to anchor "which was within the range of ordinary practice for Singapore EOPL".

    (iv) That is consistent with the finding of the Tribunal in paragraph 27 of the Award that in the year up to 9th February 2019, as a matter of ordinary practice, many ships must have responded to an order to wait at Singapore EOPL by anchoring in Indonesian waters, without having obtained permission from Indonesian authorities to do so.

32. However, counsel for the Charterer did not rely upon the geographical extent of Singapore EOPL. Rather, his argument was that the Tribunal's construction of the Charterer's Order was that the Vessel was "to wait in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship". Thus the requirement to use good navigation and seamanship was part of the Order. Since the master could not, using good navigation and seamanship, wait in Indonesian waters, the Order "precluded waiting in Indonesian waters".

33. This way of explaining the Tribunal's finding in paragraph 79 avoids the apparent difficulties created by the geographical extent of Singapore EOPL as described in the earlier parts of the Award.

34. I have noted above how counsel for the Owner submitted paragraph 79 of the Award should be understood; see above at paragraph 28. Counsel also submitted that had there been a finding that the Owner failed to comply with the Charterer's Order one would have expected the Tribunal to have made an express finding to that effect. There was no such finding.

35. I accept that there is some force in the points made by counsel for the Owner with reference to paragraphs 64 and 70 of the Award. But I must not apply a "meticulous legal eye" when reading the Award. This is particularly so in this case where the Tribunal had a great many issues to resolve. It is not unusual, whether in court or arbitration, for issues to be dealt with because they have been argued notwithstanding that having regard to later findings or holdings they may not actually arise. I also accept that there is some force in the point that there was no express finding of breach. However, the explanation for the Tribunal not having expressly referred to such breach may have been that such breach

necessarily followed from the dismissal of the claim based on the Compliance claim and so was not stated.

36. The Tribunal stated in terms that the Order "precluded waiting in Indonesian waters". Having considered the Charterer's explanation (see paragraph 32 above) and the Owner's explanation for this finding (see paragraph 28 above) I prefer the Charterer's explanation which seems to me to be the "fair and reasonable way" of reading the Award. The Owner's explanation involves reading paragraph 79 as containing a finding that the Charterer's Order permitted waiting in Indonesian waters. If that had been the Tribunal's view it is most unlikely that the Tribunal, in the context of discussing the proper construction of the Charterer's Order, would have stated that it "precluded waiting in Indonesian waters". Further, the Owner's explanation sits unhappily with the Tribunal's rejection of the Compliance claim.

37. Counsel for the Owner referred, as did the Tribunal, to the master choosing, negligently, to wait in the TSS which was within Singapore EOPL and said that it could not be said that the master had failed to follow the Charterer's Order. But on the Tribunal's construction of the Order, namely, that it was to "wait in in Singapore EOPL where you consider it safe to do so, using good navigation and seamanship" the master would have failed to follow the Charterer's Order if he waited in the Traffic Separation Scheme.

38. I therefore accept that the Tribunal found that on the true construction of the Charterer's Order it precluded waiting in Indonesian waters. That is what the Tribunal found in paragraph 79 of the Award. That finding follows from the Tribunal's construction of the Order which is not challenged on this appeal.

39. That being so it must follow, in circumstances where the Vessel waited in Indonesian waters, that there was a failure by the Vessel to follow the Charterer's Order. Paragraph 85 of the Award in effect recognises that there was such a breach. In circumstances where the Charterer's case on the Compliance clause and on unseaworthiness had been dismissed, there was no need (if there was no further breach) to refer to the exception of "Act, neglect or default of the master in the navigation or management of the ship". Yet the exception was referred to and the Tribunal concluded that it did apply to exempt the Owner from liability. That liability can only have been the liability arising from the failure to follow the Charterer's Order. There was no other liability to which it could refer.

40. I can now deal with the issue of law which arises on this appeal.

Section 4 2(a)

41. The Charterer's case is that the Charterer's Order was an order as to the employment of the Vessel which the Charterer was entitled to give pursuant to clauses 2 and 12 of the Scanports terms. That was not in dispute.

42. The Charterer further says that on the authorities, where an employment order has been given and breached, Section 4(2)(a) will not afford a defence in the absence of a good reason for departing from the order. This contention is very much in dispute. The Owner says that, where an employment order is breached, Owners have a defence if they can show either a good reason (under the Master's general discretion as regards matters of

seamanship), or an act, neglect or default of the master in the navigation or management of the ship.

43. Counsel for the Charterer anchored his case on the decision of the House of Lords in *The Hill Harmony, Whistler International v Kawasaki Kisen Kaisha* [2001] 1 AC 638. However, he also submitted that the proposition which he advanced was consistent with some earlier cases. I should therefore start with them.

44. In *SS Knutsford v Tillmans & Co.* [1908] AC 406 a vessel had been sent from Middlesbrough to Japan to deliver most of her cargo and then sailed for Vladivostok. When she arrived within 40 miles of Vladivostok she found that she could not get into port by reason of ice. It was said that there was some danger to the propeller from ice, a rather vague fear of submarine mines and some danger from a lee shore. After three days the vessel returned to Nagasaki and discharged her cargo. Reliance was placed by the Owner on a term in the bill of lading which provided that if a port was inaccessible on account of ice the master may discharge the cargo at some other safe place. However, this did not avail the Owner because Vladivostok was not inaccessible in the required sense of the vessel being unable to enter without inordinate delay. There was also an exceptions clause in the event of an "error of judgment". Lord Loreburn LC said (at p.408) that there had been no exercise of judgment within the meaning of the clause. The master "thought (no doubt acting in good faith) that he could go back, and he went back. He simply broke his contract, interpreting it erroneously."

45. Although the vessel was under charter the claim was brought, not by the charterers, but by the holders and indorsees of the bills of lading (see the report of the decision of the Court of Appeal at [1908] 2 KB 385 at pp.386-7). The claim was therefore brought under the terms of the bills of lading, not under the terms of the charter. The case is not therefore authority as to how a navigational fault exception applies to breach of an order as to employment given by a charterer. For the same reason I am unable to accept that the decision in the case, which concerned a contract contained or evidenced by a bill of lading, can be said to be consistent with the proposition advanced by counsel on this appeal. It does however illustrate the limits of a navigational fault exception.

46. In *The Renee Hyaffil* (1915) TLR 83 and (1916) TLR 660 there was another claim by the indorsees of bills of lading. In that case a cargo of fruit was being carried from Gandia to London. The bills contained an exception in respect of the master's neglect, default or error in the navigation or management of the vessel. The master put into Corunna and remained there for 23 days as he feared his bunker coals would not be sufficient and he was not willing to brave the weather at that season or to face the dangers which he anticipated on the voyage between the north west of Spain and London. The fruit was damaged by the delay. Sir Samuel Evans, P., held that the default of the master in putting into and remaining at Corunna was not a neglect, act, default or error of judgment in the navigation or management of the vessel for reasons which are not reported in the judgment. The Court of Appeal dismissed an appeal, saying (per Swinfen Eady LJ) that "the delay had nothing to do with the navigation or management of the ship as such. The captain apparently was not desirous of proceeding on his voyage." Again, since the claim was brought under the terms of the bills of lading, the case is not authority as to how a navigational fault exception applies to breach of an order as to employment given by a charterer. For the same reason the decision in the case, which concerned a contract contained or evidenced by a bill of lading, cannot be said to be consistent with the

proposition advanced by counsel on this appeal. What it does do, as did *SS Knutsford v Tillmans & Co.*, is throw some light (though perhaps not a very clear light) on how an exception in respect of negligent navigation or management is to be understood.

47. *SS Lord v Newsum Sons and Co. Ltd* [1920] 1 KB 846 was a case arising under a time charterparty pursuant to which the master was obliged to prosecute the voyage with utmost despatch. *SS Lord* sailed from Liverpool on September 26, 1916. At that time, as was known by all the parties, there was considerable danger from the presence of German submarines off the British Isles and also off the coast of Norway, and more particularly between Vardoe and Archangel. The *Lord* proceeded by way of the Norwegian coast and Norwegian territorial waters, and on October 6, 1916, arrived at Honningsvaag, which is situated in the north of Norway, and was the point at which it was necessary for the master to determine the best route for the remainder of the voyage. At the material time the route prescribed by the British Admiralty and the Norwegian War Insurance Association was for vessels to proceed by making a considerable detour of 150 to 200 miles from the Norwegian coast. At Honningsvaag the master, being informed that German submarines were outside and east of Vardoe, decided to wait, and after some time, notwithstanding the advice of the Norwegian War Insurance Association to continue the voyage by making a wide detour out at sea, he determined to follow the coast route to Vardoe, considering this to be less dangerous. He accordingly followed the coast route to Vardoe where *SS Lord* arrived on October 11. On October 23 the crew refused to proceed to Archangel under the prevailing conditions. The charterers protested, but on October 31, owing to the lateness of the season and the continued danger, the voyage to Archangel was treated as abandoned by all parties, and eventually the cargo was discharged at Drontheim, The disputes between the Owner and Charterer were referred to arbitration. The umpire found that in disregarding the advice of the Norwegian War Insurance Association on arrival at Honningsvaag to proceed from there to Archangel at a considerable distance from the Norwegian coast, the master of *SS Lord* was guilty of a grave error of judgment, that his failure to sail was a breach of cl. 9 of the charterparty, which required him to " prosecute his voyages with the utmost despatch," and that if *SS Lord* had sailed in accordance with the advice given by the Norwegian War Insurance Association there was a strong probability that she would have reached Archangel safely. The umpire accordingly awarded damages to the charterers in respect of this breach, but found that on balance a sum was due to the owners for hire.

48. On the hearing of a Special Case the owners contended that they were entitled to rely upon an exception in respect of negligence, default or error of judgment in the navigation or management of the vessel. Bailhache J rejected this contention. He said:

> "…..the deliberate choice, while in harbour, of one of two routes to be pursued cannot, I think, be an error in the " management " or in the " navigation " of the ship. There is no doubt sometimes great difficulty in drawing the line between what is and what is not "navigation," but I think the line ought to be drawn in the way I have indicated and as excluding the deliberation by the master in port regarding the route by which he will proceed to his port of destination. I think the umpire was entitled to hold that there was a breach of contract and that the error of judgment by the master is not excepted by cl. 14."

49. The decision in this case must now be understood in the light of the explanation of the decision given by Lord Hobhouse in *The Hill Harmony* at p. 657:

> "The decision was no doubt correct but the reasoning is certainly confusing. The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former comes within the exception; the latter does not. Where the decision is made does not alter either conclusion."

50. Thus what *SS Lord v Newsum*, as explained by Lord Hobhouse, established is that when the vessel was at Honningsvaag and it was necessary for the master to determine the best route for the remainder of the voyage his decision to follow the coast route to Vardoe was properly to be regarded as a failure to execute the voyage with the utmost despatch and was not negligent navigation of the vessel. The decision illustrates that when reliance is placed on the defence of negligent navigation it is necessary to ensure that the character of the master's decision is properly to be regarded as an act in navigation.

51. Reference was also made to *Larrinaga SS Co. v The King* [1945] AC 246 and to *New Line v Erichtheon Shipping* [1987] 2 LR 180. However, whilst those cases considered the scope of "employment" orders given by a charterer and the scope of the implied indemnity for complying with such orders, they did not concern the application of a negligent navigation exception where a claim was advanced by the charterer.

52. It is now necessary to consider *The Hill Harmony* itself. The facts are summarised in the headnote which reads as follows:

> "By a charterparty in an amended New York Produce Exchange form the disponent owners chartered their vessel to the charterers for a period between seven and nine months. On two trans-Pacific voyages from Vancouver, one to Yokkaichi and the other to Shiogama, the master, having experienced very bad weather which caused some damage to the ship on a previous voyage, refused to take the shorter northern great circle route recommended to the charterers by a weather routeing service, taking instead the longer more southerly rhumb line route. In consequence the voyages covered an additional 1,311 and 866.1 miles and took an extra 6.556 and 3.341 days respectively. The charterers deducted hire in respect of the additional days at sea and the cost of the extra bunkers consumed."

53. The owners claimed those sums in arbitration. The charterers maintained that the owners had been in breach of their obligation to prosecute the voyage with the utmost despatch and to comply with the charterer's orders to proceed by the shortest route. The owner's response was that the orders and choice of route were matters of navigation and if the master was at fault owners' liability was excluded pursuant to article IV rule 2(a) of the Hague Rules. Lord Hobhouse said, at p.649:

> "The dispute therefore raised a question of the scope of the contrasting terms "employment" and "navigation" as used in this type of charterparty."

54. Lord Hobhouse referred to the Award of the arbitrators and noted at p.649 what appeared to have been the background to the master's attitude:

> "In October 1993, under a previous charterparty, the vessel had encountered heavy weather on a voyage from near San Francisco to a port in southern Japan and had suffered heavy weather damage. It was apparently this experience which had led the master in the following January and April to choose to follow a more southerly route from Vancouver to the east coast of Japan. Indeed, in January 1994, he gave this as his reason for refusing to obey the charterers' order to proceed by the shortest route, that is to say the "great circle" or more northerly route, and preferring to go further south along the "rhumb line" where he might expect easier weather conditions. Having considered the evidence, the (majority) arbitrators stated: "We did not consider that this amounted to a satisfactory reason in itself for disregarding the charterers' instructions. As regards the April voyage, the only reason which the master gave was that the vessel's auxiliary boiler was inoperative as it had broken down and not been repaired. This excuse if factually correct would have raised obvious difficulties for the owners as it involved saying that the vessel was not seaworthy. But the arbitrators rejected the master's excuse as spurious since the problem with the auxiliary boiler had been dealt with at Vancouver before the vessel sailed and no question of unseaworthiness could arise. The arbitrators suspected that his true reason was the same as before. They said:. "In the case of the second disputed voyage, if the master's decision had indeed been based upon the experience of [the 1993 vovage] it was even more difficult to justify than his decision in relation to the first voyage given the fact that the voyage commenced in late April when the weather could be expected to have been significantly better on the recommended [shorter] route." They concluded that "the evidence . . . had failed to demonstrate that the master had acted reasonably having regard to all the relevant circumstances in rejecting the charterers' orders on both these voyages."

55. Lord Hobhouse summarised the conclusions of the arbitrators at p. 650:

> "The (majority) arbitrators found that the owners were in breach of their obligation under the charterparty to ensure that the master prosecuted the voyages with the utmost dispatch and followed the charterers' orders regarding the employment of the vessel. They then considered the defence "error" in navigation *(sic)*. Following what they understood was the effect of the decision in *SS Lord (Owners) v Newsum Sons and Co Ltd* [1920] 1 KB 846, they concluded that the planning of the voyage was not a matter of navigation; it was not a case where the master had decided to alter course at sea."

56. There was an appeal to the Commercial Court pursuant to the Arbitration Act 1996 which was determined in the Owner's favour by Clarke J. whose decision was upheld by the Court of Appeal. Clarke J. and the Court of Appeal considered that the dispute related to matters of navigation, not to matters of employment. It followed that the orders were not ones which the charterers were entitled to give and the decision what route to follow was one for the master alone. If any liability had arisen it would have been covered by the exception.

57. Lord Hobhouse (and Lord Bingham and the other members of the court) disagreed with Clarke J. and the Court of Appeal and held that there had been no error of law by the

arbitrators. Having explained the different interests of owner and charterer under a time charter (pp.652-653) and having noted the arbitrators' finding that the northerly route was the shortest route and that the master had had no rational justification for what he did (pp.654-655), Lord Hobhouse said that the order given by the charterers had been one which they were entitled to give and was an order as to the employment of the vessel. He said:

> "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.":

58. A little later he said, at p.657-658:

> "The meaning of any language is affected by its context. This is true of the words "employment" in a time charter and of the exception for negligence in the "navigation" of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. "Employment" embraces the economic aspect—the exploitation of the earning potential of the vessel. "Navigation" embraces matters of seamanship. Mr. Donald Davies in the article I have referred to suggests that the words "strategy" and "tactics" give a useful indication. What is clear is that to use the word "navigation" in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Sumner pointed out, where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation.
>
> The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order. The charterers' submissions in the present case and the arbitrators' reasons and decision did not controvert this."

59. Lord Hobhouse's approach gives full effect to the right of the charterer under a time charter to exploit the earning capacity of the vessel and to decide how the vessel will be employed under the charter. His approach shows that when considering whether an order of the charterer relates to employment or navigation full regard must be had to the charterer's rights. In the present case there is no dispute that the Charterer's Order to the vessel to "proceed to Spore EOPL for further orders" was an order as to the employment of the vessel. By contrast the question in the present case is whether, as submitted by counsel for the Charterer, "where owners fail to comply with the employment orders of their charterers and thus breach the charterparty, the Hague Rules' negligent navigation defence is not available to the owners."

60. In *The Hill Harmony* Lord Hobhouse addressed the exceptions clause at p.658:

> "In the present case, the exception did not provide a defence. First, the breach of contract was the breach of both aspects of the owners' obligations under clause 8 of the time charter—to prosecute the voyage with the utmost dispatch and to comply with the orders and directions of the charterers as regards the employment of the vessel. As a matter of construction, the exception does not apply to the choice not to perform these obligations: *Knutsford Steamship Co v Tillmanns & Co* [1908] AC 406; *Suzuki and Co Ltd v J Beynon and Co Ltd* 42 TLR 269. In the words of Lord Loreburn LC [1908] AC 406, 408: the master "simply broke his contract, interpreting it erroneously". In the same case, at p 410, Lord Dunedin said, referring to the exception of error of judgment in navigating the ship or otherwise: "It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it." (See to the same effect Kennedy LJ in the Court of Appeal (1908] 2 KB 385,406-407.) Secondly, any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship. Thirdly, the owners failed to discharge the burden of proof which lay upon them to bring themselves within the exception. This was clearest with regard to the second of the two relevant voyages where the arbitrators could only guess at, "suspect", why it was that the master acted as he did."

61. The first matter to be noted about this passage is that Lord Hobhouse did not say that where there has been a failure to follow an employment order the exception in respect of a fault in the navigation of the vessel is not available. If that were the law a single sentence to that effect would have sufficed. Instead, Lord Hobhouse said that "in the present case" the exception did not provide a defence and proceeded to give three reasons.

62. Moreover, it is well established that where the Hague Rules or US COGSA are incorporated into a charterparty the owner has the benefit of the immunities in article IV or section 4 in respect of all the contractual activities performed by him under the charter; see *Adamastos Shipping v Anglo-Saxon Petroleum* [1959] AC 133 and *The Satya Kailash* [1984] 1 LR 588. Thus, there would appear to be little room in the established legal landscape for the suggested proposition that where an owner fails to comply with an order as to the employment of the vessel the owner can never avail himself of the negligent navigation exception in article IV or section 4; see also *Time Charters* 7th ed. at paragraphs 18.6-18.11 and 27.27. Counsel for the Charterer did not question the approach of the court in *Adamastos Shipping* or *Satya Kailash* but said that it did not apply to employment orders. However, in *The Hill Harmony* at p.649 Lord Hobhouse referred to the fact that three clauses paramount were incorporated into the charterparty, said that no point arose about their application and referred in parenthesis to *Adamastos Shipping*. He said: "It was accepted that their effect was to incorporate an exception for loss or damage arising from the act, neglect, or default of the master in the navigation or management of the ship in article IV rule 2(a) of the amended Hague Rules."

63. The second matter to be noted (and this is relied upon by counsel for the Charterer) is that the very first reason given by Lord Hobhouse for the exception not providing a defence in *The Hill Harmony* was that: "As a matter of construction, the exception does not apply to the choice not to perform these obligations" (namely, to prosecute the voyage with the utmost dispatch and to comply with the orders and directions of the charterers as regards the employment of the vessel). The reference to "a matter of construction" reflects the

need, when considering the ambit of the exception, to have full regard to charterer's right to direct the employment of the vessel and to the owner's duty to comply with such directions.

64. The third matter to be noted, when considering the scope or reach of Lord Hobhouse's analysis of the issues in *The Hill Harmony,* is that the master's decision or choice in that case not to comply with the charterer's employment orders did not concern the exercise of seamanship by the master. Lord Hobhouse had made it clear that "navigation" embraces matters of seamanship and he stated, as his second reason for concluding that the exceptions clause provided no defence, that "any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship".

65. The submission of counsel for the Charterer is that in the present case the cause of the Charterer's loss was the decision or choice by the master of AFRA OAK not to comply with the Charterer's Order which precluded waiting in Indonesian waters. It was submitted that: "Where owners fail to comply with the employment orders of their charterers and thus breach the charterparty, the Hague Rules' negligent navigation defence is not available to the owners."

66. I do not consider that *The Hill Harmony* establishes that proposition, save in the sense that if there is a choice not to comply with employment orders that choice cannot, without more, be described as negligent navigation. In *The Hill Harmony* there was nothing more. There was no negligent navigation and so the owner was unable to rely upon the defence of negligent navigation. The proposition in the sense contended for by counsel in this case, that the defence of negligent navigation is not available when there is a breach of employment orders, is not compatible with the manner in which Lord Hobhouse approached the defence at p.658.

67. It is therefore necessary to consider what was found in the present case. In paragraph 67 the Tribunal said:

> a. "The selection of the place to anchor within OPL was a navigational decision for the master. Had he anchored in the vicinity of the site shown on the Passage Plan no problem would have occurred.
>
> b. He decided while on passage to anchor instead in Indonesian waters and he selected a location to anchor which was within the range of ordinary practice for Singapore EOPL. Many ships before February 9th had anchored in this vicinity, although many others, and probably the majority chose either international or Malaysian waters where there was a system which allowed waiting ships to notify a local agent of their presence. In contrast, there was no such system in Indonesian waters, if the vessel was not being cleared into an Indonesian port. Here, it was not possible to anchor legally unless the vessel was waiting to enter an Indonesian port and had been cleared for entry.
>
> c. Absent knowledge of the Indonesian Navy's campaign, the risk of illegal anchoring in Indonesian waters leading to adverse consequences for the vessel could fairly be assessed as small in early February 2019, which is no doubt why it was within the range of ordinary practice to anchor in this locality. But it does not

follow that it was "good navigation and seamanship" to court a small danger of suffering consequences of illegal anchoring for no good reason, even if it was ordinary practice. In another field, many cars as a matter of ordinary practice drive down the motorway at 71-75 miles an hour, because the drivers consider that there is little or no chance of being penalised for exceeding the speed limit slightly, even though they appreciate that they are breaking the law. If an objective, prudent observer, was asked if this was an exercise of "good" driving, the obviously correct answer would be 'no'.

d. We have accepted the evidence of Captain Todorov that a prudent master should appreciate that once a vessel is within 12 miles of land it is probably in the territorial waters of a country under UNCLOS regime and would be anchoring there illegally, or at least risking acting illegally, if simply waiting for orders. The Master chose to anchor within 6 miles of Indonesian land to wait for orders. Territorial waters are expressly a matter which a master was told to consider when preparing his Passage Plan by the Witherbys manual which was required to be on board. In an area with a geography like the Singapore Straits, territorial waters should be an issue for the Master to consider.

e. A prudent Master in the position of Captain Kumar would have realised that if he anchored in Indonesian territorial waters he was taking a small but unnecessary risk, in exposing the vessel and the cargo to the sovereign authority of Indonesia. This did not call for any detailed knowledge of the law of the sea, nor of local laws. There was no compelling countervailing reason to take that risk, and it would have been simple to anchor in international waters, or legally in Malaysian waters, as many ships did. While it would have appeared a small risk, a prudent Master would have realised that it exposed the vessel/cargo to unpredictable consequences in relation to local laws, and possible investigation/detention, and as a result, a prudent Master would not have taken it. In particular, whether or not anchoring in Indonesian territorial waters to await orders was technically illegal as a matter of Indonesian law, a prudent Master would have appreciated that such anchoring would expose the vessel and cargo to a risk, which could not be dismissed as inconsequential, that the authorities would contend that the anchoring was illegal, giving rise to a risk of detention for an indeterminate period and possible fines or other consequences.

f. Conversely, it is a flawed argument to contend that Indonesia had not yet asserted its rights and so it must be assumed that it never would do so and it was therefore good navigation to trespass into their territorial waters to await orders.

g. We find that it did not cross the Master's mind to consider whether he was entitled to anchor within Indonesian territorial waters during the passage on 9th February. He made a spur of the moment decision to depart from the Passage Plan and select Indonesian waters simply because it was a slightly easier place to anchor. The failure to take due account of the risk of anchoring in territorial waters was a mistake and cannot be characterised as good navigation and seamanship. Furthermore, the Master was specifically told in the VTIS exchange with the Singapore Port Authorities that Singapore did not control the anchorage of vessels 12 miles beyond the Horsburgh lighthouse and this should have made him all the more alert to the implications of anchoring in the territorial waters of some other

> state. Indeed the Master's so-called "spinning a line" to the Indonesian authorities after detention may have been a belated recognition that he should not have been anchoring where he did."

68. It is clear from these reasons that the Tribunal regarded the master as having acted negligently in the navigation of the Vessel. "The failure to take due account of the risk of anchoring in territorial waters was a mistake and cannot be characterised as good navigation and seamanship." This finding was supported by expert evidence and by the Vessel's passage plan.

69. The Tribunal also found that the gist of the Charterer's Order was to "anchor wherever it is safe to do so in EPOL, using good navigation and seamanship" (paragraph 70). Thus the Charterer's order required the master to exercise good navigation and seamanship when deciding where to anchor in EPOL. When considering the issue of the safe port warranty the Tribunal had considered whether the relevant danger was one which could be avoided by good navigation and seamanship. The Tribunal held that it could be so avoided and also that the master had failed to exercise good navigation and seamanship. The issue was considered with care by the Tribunal and a clear conclusion was reached.

70. When considering the application of the exception of "Act, neglect or default of the master …… in the navigation or management of the ship" in paragraph 85 of the Award the Tribunal said of *Knutsford v Tillmans* and *The Hill Harmony:*

> "It seems to us that these cases are in a different category from the present case, where the master attempted to comply with the orders given but by simple oversight in the course of navigation anchored the vessel where he should not have done."

71. Counsel for the Charterer criticised the Tribunal's reasoning. Counsel said that whether a decision not to comply with an order as to employment was the result of, or influenced by, oversight is neither here nor there. That may well be so in many cases. But I do not think that counsel's submission does justice to the Tribunal's reasoning in the context of the findings made by the Tribunal with regard to the master's navigation and seamanship.

72. In *The Hill Harmony* there was no error in the navigation of the vessel by the master and any error did not concern any matter of seamanship. In *Knutsford v Tillmans* there was no error of navigation. The master had a mistaken understanding of the clause which permitted the vessel to discharge elsewhere if the port was "inaccessible" on account of ice. By contrast, in the present case the master failed to exhibit good navigation and seamanship when he failed to take due account of the risk of anchoring in territorial waters. It was that failure to exhibit good navigation and seamanship which caused him to fail to comply with the Charterer's Order. There is no appeal against those findings.

73. In the light of the facts of this case, which are materially different from those of *The Hill Harmony* and *Knutsford v Tillmans,* I am unable to detect any error of law in the Tribunal's comment that cases such as *The Hill Harmony* and *Knutsford v Tillmans* are in a different category. When the Tribunal explained that "the master attempted to comply with the orders given but by simple oversight in the course of navigation anchored the vessel where he should not have done" the Tribunal was referring back to its detailed findings in paragraph 67(g) as to the master's failure to exercise good navigation and seamanship. Those findings meant that the present case was materially different from *The*

Hill Harmony and *Knutsford v Tillmans*. Those cases did indeed fall into a different category.

74. The three reasons why the defence of negligent navigation did not avail the owner in *The Hill Harmony* do not apply in the present case. First, the present case does not concern a decision not to follow employment orders without any error of judgment in navigating the Vessel. Second, the error in the present case, as found by the Tribunal, was an error in the navigation of the Vessel. Third, in the light of the Tribunal's clear findings it cannot be said that the Owners failed to discharge the necessary burden of proof.

75. In circumstances where, as found by the Tribunal, an error in navigation caused the master to anchor where he should not have done so, the Tribunal did not err in law in the manner suggested by the Charterer when holding that the Owner was entitled to rely upon section 4(2)(a) of the US COGSA as a defence to the claim that the Owner had failed to comply with the Charterer's Order.

76. At the close of his Skeleton Argument counsel for the Charterer referred to the defence of negligent navigation being "expanded so as to apply to failures to follow employment orders" and urged the Court not to do so in circumstances where the defence is an anachronism not to be found in the Rotterdam Rules or the Hamburg Rules and where the original justification for the defence (that once the vessel had sailed, the vessel was out of the control of the Owner) no longer holds true (cf *Carver on Bills of Lading* 5th.ed at 9-219 and *Weitz, The Nautical Fault Debate* (1997-8) 22 Tulane MLJ 581 at p.594). Whether or not the defence is an anachronism, it was agreed by the Owner and Charterer in the present case and has to be applied. The suggestion that the Tribunal's decision in this case or a decision of the Court dismissing the appeal from that decision expands the defence is mistaken. The defence did not apply in *The Hill Harmony* because the master's choice of route was not caused by any error in navigation or seamanship. The defence does apply in the present case because the master's decision to anchor where he should not have done was caused by his error in navigation and seamanship. That does not expand the defence. It merely applies the defence.

77. For these reasons the appeal must be dismissed.

78. The answer to the question "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?" is: It may or may not do so depending upon the facts of the particular case.