One-off pilot error did not render port unsafe

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In this charterparty dispute, the arbitral tribunal rejected the Owners' claim for damages for breach of the safe port warranty in a time charterparty, after a laden bulk carrier grounded at the entrance to the port of Chaozhou, China, while under compulsory pilotage. It also held that the vessel was unseaworthy, in breach of Article III.1 of the Hague Rules, due to lack of proper charts, but found on the facts that this was not causative of the grounding.

The background facts

The Owners chartered their Panamax bulk carrier to the Charterers for a time charter trip via safe ports from Indonesia to China with bulk coal. They ordered her to load at Muara Satui and discharge at Chaozhou.

Ships entering the port of Chaozhou are required to proceed along a buoyed approach channel and then make a turn to starboard into the harbour basin. The port entry is not difficult and does not require tug assistance.

Because of her laden draft, the Vessel had to remain within the dredged deepwater channel which runs along the centre of the buoyed channel. The channel buoys mark the fairway, which is wider than the dredged channel.

The Vessel was required by SOLAS Chapter V Regulation 19 to navigate with paper charts. She also had an electronic chart system for situational awareness. During loading at Muara Satui, the Master arranged for a copy of the latest UKHO chart covering Chaozhou to be brought onboard. This chart was too small scale for navigation, lacked important details and was evidently out of date.

A large scale, up to date, Chinese chart was also available. This showed the limits of the dredged deepwater channel. It also made it clear that the channel buoys lay outside the edges of the deepwater channel and marked the fairway, not the deepwater channel itself.

The Master did not obtain the Chinese paper chart. Instead, during the voyage to Chaozhou, he downloaded a mid-scale electronic chart. That electronic chart was up to date but lacked important detail. In particular, it did not show the limits of the dredged deepwater channel or make it clear that the buoys marked the fairway rather than the deepwater channel.

On arrival at the discharge port, the Vessel anchored, and the deck team prepared a rudimentary in-port-passage-plan from the pilot station to the berth using the materials available on board.

The Vessel entered the port the following day with a compulsory pilot on board, and three tugs made fast in order to manoeuvre her onto the berth once inside the basin. Weather and visibility were good. The pilot was effectively conning the Vessel himself: the Master and deck team took no active part in the navigation.

The Vessel proceeded along the approach channel without difficulty, but failed to make the starboard turn successfully. She left the port edge of the buoyed channel and grounded on a charted rocky shoal patch. The pilot was aware that the Vessel was not turning quickly enough and attempted to retrieve the manoeuvre using engine, rudder and tug orders, but without success. The Master and deck team said nothing: they did not know the limits of the navigable water for the Vessel and appeared to be unaware that she was standing into danger.

The arbitral award

The Owners' allegations

It was common ground that the grounding was caused by the pilot's negligent navigation of the Vessel.

The Owners contended that the port was unsafe, principally on the basis that the pilot was incompetent. They pointed to his failure to deploy the stern tug in "indirect" mode to bring the stern of the Vessel around to port and her head around to starboard. They alleged that this failure demonstrated a disabling lack of skill or knowledge amounting to incompetence, according to the test in ***Papera Traders Co Ltd v. Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*** [2002] 1 Lloyd's Rep 719.

The tribunal rejected that contention for two reasons:

» "Indirect" towage is a specialist technique which requires regular practice by the pilot and the tugs involved. It was not a technique that was needed at Chaozhou. There was no evidence that the pilot and tugs knew how to employ it, and no reason why they should be expected to know. If they did not know, that did not amount to a disabling lack of skill or knowledge on their part, as they had other techniques at their disposal to ensure that ships entered the port of Chaozhou in safety.

» There was no other evidence that the pilot was incompetent. He had command experience with a well-known Chinese shipping company, had worked as a pilot at Chaozhou for 5 years before this incident, continued working as a pilot there for some five years afterwards, and had not been involved in any other incidents. He had demonstrated the ability to control the Vessel and the tugs in other respects during this incident. He had simply failed to execute the manoeuvre correctly.

The tribunal concluded that this was a one-off mistake by an otherwise competent pilot, and not a defect in the set-up of the port: ***Kodros Shipping Corporation v. Empresa Cubana de Fletes*** (The Evia)(No 2) [1982] 1 Lloyd's Rep 334. Therefore, the Owners' claim for breach of the safe port warranty failed (as did their supplementary claim under the implied indemnity).

The Charterers' allegations

The Charterers contended that the Vessel was unseaworthy before and at the beginning of the voyage to Chaozhou, because she lacked the proper charts and therefore could not prepare an effective berth-to-berth passage plan: ***McFadden v. Blue Star Line*** [1905] 1 KB 697; ***The CMA CGM Libra*** [2021] 2 Lloyd's Rep 613. They argued that the Owners were, therefore, in breach of Article III.1 of the Hague Rules (incorporated into the charterparty by a Paramount Clause).

The Charterers argued that this breach was an effective cause of the grounding, as it meant that the Master and deck team did not know where the deepwater channel was, and hence where it was safe and unsafe for the Vessel to navigate; and they could not effectively monitor the Vessel's progress and intervene if necessary if she was standing into danger.

It was common ground that, if the Vessel was unseaworthy, and if that unseaworthiness was an effective cause of the grounding, then the Charterers would be able to rely on the Owners' breach of Article III.1 as a defence of circuity of action to the Owners' claim for breach of the unsafe port warranty, according to the principle in ***Post Office v. Hampshire*** [1980] QB 124.

The tribunal held that the Vessel was indeed unseaworthy, in breach of Article III.1, because she did not have the up-to-date Chinese paper chart on board showing the limits of the dredged deepwater channel. It also found that, as a consequence, the Master and deck team failed to alert the pilot to his errors and failed to attempt any action to avoid the grounding. Nevertheless, it held that the unseaworthiness was not an effective cause of the grounding.

Comment

This decision, produced by a specialist LMAA tribunal including two experienced master mariners, provides some useful guidance in unsafe port cases involving pilot error.

It is common in such cases for owners to allege that the pilot was incompetent and that the port was unsafe as a result. Owners will often seek to rely on the first part of Leggatt LJ's*dictum* in ***The Star Sea*** [1997] 1 Lloyd's Rep 360, that it may be possible to infer incompetence from a single incident.

The present decision, however, demonstrates the importance of the second part of Leggatt LJ's*dictum*, that anyone can make a mistake, and a single mistake or even more than one mistake does not necessarily render an individual incompetent. It may be appropriate to infer incompetence from a single incident where this is the first occasion on which the relevant aspect of the pilot's competence is tested. But where the pilot makes a mistake in a task which he habitually performs efficiently, the tribunal is likely to conclude that this is a one-off error.

The decision also demonstrates that tribunals rightly regard a charge of professional incompetence as a grave allegation, which requires convincing evidence before it will be upheld. Additionally, it highlights that, in an unsafe port case, the competence of a pilot is to be judged by reference to the specific port which is alleged to be unsafe: if a particular skill is not required at that port, the pilot will not be condemned as incompetent if he does not possess that skill, even if other pilots at other ports employ it routinely.

Perhaps, however, the most interesting part of this case concerns the Charterers' allegation that the grounding was caused by the Vessel's unseaworthiness. It was common ground that, if the port was unsafe and the Vessel unseaworthy, and if these were both effective causes of the grounding, then the Charterers would have a defence of circuity of action to the Owners' claim for breach of the safe port warranty, on the basis that the Owners' breach of Article III.1 caused the Charterers to incur liability to the Owners for the grounding.

This means that the Charterers would not need to demonstrate that the Vessel's unseaworthiness was a novus actus interveniens which severed the chain of causation between the unsafety of the port and the grounding, in order to avoid liability. It would be sufficient if the unseaworthiness was an effective cause of the grounding.

Ultimately, this issue was moot, as the tribunal held that the port was safe. However, the tribunal's conclusion that the unseaworthiness was not an effective cause of the grounding is somewhat puzzling, in light of its other findings.

The authors of this article, Tom Macey-Dare KC, Martin Dalby, and Joshua Thomson, acted for the Charterers. The article was co-authored by Quadrant Chambers and Ince.

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"His undoubted strength lies in his ability to process heavy and highly technical issues, and his advocacy style is calm, considered and forensic." (Legal 500, 2023)

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