Powerful dilemmas confront a master when his own nautical experience and judgement stand in conflict with his charterers' instructions. The charterers may seek to prescribe the route that should be adopted for a voyage but what happens if such instructions run contrary to the master's assessment of what is required for the safe prosecution of the voyage? This question has been considered in depth by the Court of Appeal in the Kawasaki Kisen Kaisha Ltd v Whidbey International Ltd (the "Hit-Harmony").

The vessel was chartered by the owners on an amended NYPE 1946 form for a period of several months. On two Trans-Pacific voyages from Vancouver to Japanese ports, the charterers ordered the vessel by voyage routing instructions given by Ocean Routes to cross the Pacific by the Great Circle route. On each occasion the master refused to obey, his reason being that on a previous voyage when traveling this route he had experienced bad weather, including typhoons, which caused substantial damage to the ship. As a result, both voyages took considerably longer than they would have done had the charterers' instructions been followed. It should be noted that the charteparty did not include a clause requiring the owners to follow the routing advice of Ocean Routes.

The charterers claimed damages equal to the hire for the additional days at sea and the cost of additional bunkers consumed on the basis that by reason of the master's decision, owners were in breach of their obligations under clause 8 to follow charterers' orders and directions as to employment. In the alternative, they argued owners were in breach of their obligation to prosecute the two voyages with utmost dispatch. The owners contended that whilst the employment of the vessel was a matter for charterers, the question as to how the charterers' instructions were to be executed in terms of navigation remained the responsibility of the master and his decision to take the chosen route(s) was a navigational decision. The owners also claimed they were protected from liability by the exception in Article IV rule 2(a) of the Hague-Visby Rules regarding an action by the master which is an act, neglect or default in the navigation of the ship.

The arbitrators concluded by a majority that the owners, through the actions of the master, were prima facie in breach of their obligations to follow the charterers' orders regarding the employment of the vessel under clause 8. They were also in breach of their obligation to prosecute the voyage with the utmost dispatch.

The tribunal also concluded that owners were not entitled to rely upon the "error in navigation" defence in Article IV rule 2(a) of the Hague-Visby Rules, because the master had planned his route before the voyage but had not altered his course at sea. On the evidence, the master had decided at the outset not to follow the course recommended by the weather routing service. It was thus not a "navigational" decision.

The owners appealed to the High Court where Clarke J held that the charteparty distinguished between orders as to "employment" and orders as to "navigation". An order as to where the vessel was to go, for example, to port A or B to charge cargo, or to port A or port B via port C to bunker, would be an order as to employment which the master would be bound to follow, subject to his overriding responsibility for the safety of the ship. An order as to how to get from where the ship was to port A, B or C would not, however, be an order as to employment, but an order as to navigation. So a direction to the master proceeding to a port of discharge to pass, say, on one side or another of a lightvessel or an island, or to proceed by way of one channel rather than another, would be a direction as to navigation not employment.

The judge concluded that the arbitrators' decision had been wrong as a matter of law and held that the orders or directions of the charterers to follow the Great Circle route recommended by Ocean Routes were not orders or directions as to employment within the meaning of clause 8. They were orders or directions as to the navigation of the ship from Vancouver to the two Japanese ports. Moreover, voyage planning was a part of the proper navigation of the ship.

The charterers appealed. The questions certified to be decided by the Court of Appeal were:

- Were the voyage route instructions given by charterers to proceed by the Great Circle route "orders as to employment" within the meaning of clause 8 of the NYPE form?
- Was the master's decision not to proceed by this route and to proceed instead by a more southerly route an "act neglect or default of the master...in the navigation of the ship" within the meaning of Article IV rule 2(a) of the Hague-Visby Rules?

The Court of Appeal, in dismissing the Appeal, held:

1. The obligation of the master/owners was to proceed with the "utmost dispatch" from port to port or other nominated destination without deviations, i.e. by the direct route or by a route which, though not direct, was a usual and reasonable route. Prima facie the route to be followed in prosecuting the voyage is the direct geographical route. The owners were also obliged to operate the ship in accordance with the charterers' orders as to its employment. However, neither obligation displaced the right and responsibility of the master in matters of navigation and, in particular, to decide upon the course to be followed when prosecuting the voyage, having regard to weather conditions and other hazards of navigation.

2. If the master took a decision to set and follow a course on the grounds that he would thereby avoid the danger of bad weather and possible damage to the ship as a result, that decision was taken for the safety of the ship and, as such, was a decision as to navigation.

3. A decision as to navigation might be made before or after the vessel had left the port, or even while the vessel was still in port.

4. The master's decision in this case was a decision on navigation because it was a decision on what course or combination of courses to follow in prosecuting the overall voyage and because the reason for the decision, made bona fide, was the master's concern for safety of the vessel.

5. So far as Article IV rule 2(a) of the Hague-Visby Rules was concerned, the Judge was right in construing the term "navigation" to include a decision taken in the course of voyage planning to steer a particular course, having regard to the weather anticipated, rather than limiting the concept of navigation to acts done or measures taken on the voyage itself.

The charterers have been given leave to appeal to the House of Lords. The hearing is due to take place later this year. Members will be kept informed of the outcome.

For the time being, however, the Court of Appeal decision is helpful in establishing that charterers' orders to follow a particular course should not be interpreted or treated as tying the hands of the master in making his decision as to navigation and ensuring the safety of the vessel.
Click here to view report of House of Lords decision in “Sea Venture” Vol.20