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The meaning of a good safe port and berth in a modern shipping world

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5. Damages for nominating an unsafe port

5.1. Type of damages

In relation to a breach of the safe port warranty, owners' right to damages is subject to the ordinary rules relating to causation, remoteness, and quantification. The damages recoverable may relate to physical loss or damage to the ship, intentional sacrifice, detention losses, expenses incurred in extricating the vessel from danger or lightening the cargo, excess port expenses, and any other loss or expense which flows causally and proximately from the breach.

5.1.1. Physical damage to the vessel

The most common type of damages for nominating an unsafe port suffered by the owners is the physical damage to the vessel. It usually consists of repair costs or the costs of the market value of the vessel and loss of income resulting from detention through repairs.

In deciding the amount of money owners can spend in repairing their vessel, the court will look at the scope of work to be done and the value of the ship. As Lord Lloyd in *Ruxley Electronics v. Forsyth* said:

*If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value." In this case they say that whilst the cost of remedial work will exceed the value of the property when remediated, for example for Plot 20 the remediation cost is £291,707 (including VAT) while the value of the property if in good condition is £232,500, the cost is not "out of all proportion to the benefit to be obtained."*⁶²⁷

What is a measure of direct damages? If the damage to the ship for which charterers are responsible can be repaired simultaneously with other necessary repairs or maintenance that must be carried out on the same occasion, the charterers are only liable for the specific costs of repairing the damage caused by their own breach, and are under

⁶²⁷ *Ruxley Electronics v Forsyth* [1996] AC 344.

no liability for loss of income and repair costs incurred solely for the benefit of the owners.⁶²⁸

In any event, owners must mitigate their expenses. The owners may claim the time that the vessel was under repairs in dry dock or in the port. If the vessel lost her next employment because of the damages caused by the breach of safe port warranty owners are entitled to claim hire or freight at prevailing market rates. Obviously, if the damage can be repaired without sending the vessel to the dry dock, owners have to attempt to repair the vessel in most cost efficient way.

5.1.2. Economic damages of shipowners

The second large part of owners' damages is economic damages. They include expenses that the shipowner encountered in order to avoid obvious dangers, detention of the vessel, lost freight and deadfreight.

Is there a bright line test in determining the kind of economic expenses that are recoverable? *The Archimidis*,⁶²⁹ provided clear guidelines that only unusual expenses in avoiding obvious dangers can be claimed against the charterers. If the vessel is able to avoid a danger by the exercise of ordinary good navigation and seamanship, and the means adopted involve expense (such as tugs to keep the vessel alongside in a heavy swell; lighters to allow heavy laden vessel to pass over the sand bar or temporarily removing parts of the vessel superstructure to decrease her air draft) then the owners are entitled to recover those expenses.⁶³⁰ If the expenses are encountered by the owners in any event, for example, ordering pilots or tugs to proceed to the port, the expenses remain owners' responsibility.

A question may arise, whether owners can chose to avoid expenses and wait until an unsafe condition disappears and then claim for the vessel's lost time, i.e. detention. If the means of avoiding an obvious danger involve delay for the vessel, the position of the English law established in *The Hermine*,⁶³¹ rejects recovery of such delay unless the delay is of such extent that it might give rise to a frustration of the contract.⁶³²

⁶²⁸ *Carslogie v. Royal Norwegian Government* [1952] A.C. 292.

⁶²⁹ See *infra* *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, 405.

⁶³⁰ Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, at 7 (2009).

⁶³¹ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep 37.

⁶³² See Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, at 7-9 (2009).

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Usually, voyage charterparties will provide for a specific rate at which detention is calculated, typically based on demurrage rate. In the circumstances when a charterparty is silent as to detention calculations, or when detention of the vessel is unlawful or caused by an order of the charterers, the current market rates of hire will be taken into consideration⁶³³ together with the amount of bunkers a vessel consumed.

Time charterparties do not have detention provisions. Instead they enumerate events, which can bring the vessel off-hire, i.e. when the charterer's responsibility to pay hire is suspended. Such events refer to the working condition of the vessel, her equipment, and crew. Under time charterparty matters referring to navigation and the maintenance of the vessel remain owners' responsibility. In circumstances when the damage to the vessel was caused by fault of the charterers, they are still responsible to pay hire for the vessel. If the vessel is damaged due to a breach of a safe port warranty, the vessel is considered a working vessel and owners will only have to properly mitigate damages and ensure that she can resume her normal operation as soon as possible.

In voyage charterparties owners' revenue is measured by received freight. On one hand, owners have a right to receive and load a full and complete cargo up to the draft of the vessel or an amount agreed in the charterparty. It is the charterers' obligation to select a safe port and ensure that the vessel, being fully and duly described as to her dimension in the charterparty, may safely enter, load, and depart from the port that charterers themselves elected out of the allowed range of ports. It is charterers' responsibility to monitor any natural artificial events such as tides or strikes, when they nominate a port.

Owners are in principle entitled to claim deadfreight in respect of the difference between minimum contractual quantities under the charterparty. The claim for deadfreight is an alternative defense of owner's rights and can be pursued in conjunction with damages for breaking a safe port warranty.

*The Archimidis*⁶³⁴ provides a recent example of when the court confirmed this principle. By a charter dated 27th October 2004, based substantially on the Asbatankvoy form with amendments and incorporating charterers' standard terms, *The Archimidis*, an Aframax oil tanker of 94,999 metric tons deadweight, drawing 13.47 meters in fully laden conditions, was fixed for three consecutive voyages to load gas oil from "1 safe port Ventspils" with "discharge 1/2 safe ports" in the "UK Continent

⁶³³ *Zim Israel v. Tradex (The Timna)* [1971] 2 Lloyd's Rep. 91.

⁶³⁴ *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, 405.

Bordeaux/Hamburg range.”⁶³⁵ This original fixture was extended to cover eight voyages. The dispute related to a claim by Owners for deadfreight in relation to the sixth voyage.

On 11th January 2005, the vessel arrived at Ventspils to load its cargo. The dredged channel had silted up and draft restrictions were in place. Because of this, the Master served a notice of readiness stating that he expected to load a cargo of “approximately 67,000 mt.” For the purposes of the preliminary issues, the arbitral tribunal was asked to assume that the vessel could not have safely proceeded to Ventspils, loaded the minimum contracted cargo of 90,000 mt at the vessel’s berth, and departed safely with that cargo. The tribunal was also asked to assume that it would have been possible for a ship-to-ship (“STS”) transfer to have taken place in a deep water location off Ventspils, which would not have involved the subsequent use of the dredged channel with its draft limitation. The vessel, therefore, could have loaded 67,000 mt at the berth and the balance of the cargo by STS transfer.⁶³⁶

The tribunal concluded in owners’ favor. It held that the charterers had failed to supply the minimum quantity of cargo and were therefore liable to pay deadfreight in respect of the difference between the amount actually loaded and the contractual minimum quantity of 90,000 mt. It was held that, although charterers had formally tendered for loading a quantity of 93,410 mt, since all the parties concerned were aware it would not be possible to load this quantity (because of the draft restrictions), charterers’ tender was a gesture without legal significance. It was further held that owners’ alternative claim for damages for breach of warranty that Ventspils was a safe port was legally sustainable, but would require determination on full hearing of the evidence. Such evidence included whether the silting up of the channel at Ventspils constituted an abnormal occurrence such that the safety of the vessel was not something for which the charterer could be liable.

The position of the court to treat deadfreight and breach of safe port warranty as one event that stems from another leaves charterers with only few options on how to persuade the court that the owners were fully aware of the risks related to the maritime adventure when they accepted the port nomination. One argument charterers can bring is that seasonal changes in weather conditions are well known and well publicized facts in the trade and therefore must be considered an inherent vice of the loading area. With the increasing growth of electronic resources that allow ports to accurately monitor port conditions, charterers have a good chance at success. Once owners accepted a port

⁶³⁵ Id. at 599.

⁶³⁶ English Maritime Law Update: 2008, *Journal of Maritime Law and Commerce*, July, 2009 at 407.

nomination, they have evaluated the risks of the port and any changes of conditions that can be inherent to it. Thus, owners could bear the burden of short loading cargo and return unearned freight or wait in the port on their own expenses until the changed condition improves in order to comply with the charterparty.

5.1.3. Unrecoverable damages

What expenses can the owner not recover from the charterer? The ordinary expenses and losses of trading are not recoverable, despite the fact that, in a broad sense, they are incurred as a result of their obedience to the orders of the charterers. This was expressed by Lloyd J. in *The Aquacharm*,⁶³⁷ in the following words:

It is of course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote.

Similarly, the owners cannot recover the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense, the cost of ballasting is incurred as a consequence of complying with the charterers' orders.⁶³⁸

Both English and American tribunals will rarely impose punitive damages for a breach of a charterparty. Under English law, punitive damages are intended to punish and deter a defendant or to vindicate the strength of law. They may not be imposed for breach of contract,⁶³⁹ but in may be imposed in very particular tort cases. In other words, only in circumstances when there is damage to a vessel or cargo and "the defendants conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to plaintiff,"⁶⁴⁰ may a party recover punitive damages.

⁶³⁷ *Actis Co v Sanko Steamship Co (The Aquacharm)* [1980] 2 Lloyd's Rep. 237.

⁶³⁸ See *Weir v Union Steamship Co Ltd* [1900] AC 525.

⁶³⁹ *Addis v. Gramophone Co.* [1909] A.C. 488 (H.L.).

⁶⁴⁰ See *Rookes v. Barnard* [1964] A.C. 1129 at 1226.

American law is more lenient and punitive damages can be awarded for a breach of contract where the breach itself is so extraordinary as to be an independent tort.⁶⁴¹ Although in terms of maritime law, punitive damage is a rare occurrence. In *The Octonia Sun*,⁶⁴² punitive damages were awarded to the charterers in addition to damages for cargo loss when the owners of a tanker made an ongoing practice of diverting oil cargos into its vessel's bunkers.

5.2. Claims of cargo interests

The situation that most shipowners fear the most is the damage to cargo that is connected to an unjustified rejection to call a nominated port. In such circumstances, the owner breaches not only its obligation with time and voyage charterers, but also becomes responsible for misdelivery of the cargo. In terms of Hague⁶⁴³ and Hague-Visby⁶⁴⁴ Rules⁶⁴⁵ such a breach will be treated as a deviation, i.e. an intentional and unreasonable change in the geographic route of the voyage as contracted for.⁶⁴⁶ How does one distinguish a reasonable deviation from an unreasonable one? Determining whether a deviation was reasonable would be a question of fact in light of the interests of all the parties to the common venture as contracted for.⁶⁴⁷ As opposed to a reasonable deviation, an unreasonable one will, in the words of Greer L.J., “mean a deviation whether in the interests of the ship or the cargo owner or both, which no reasonable minded cargo-owner would raise any objection to.”⁶⁴⁸

When the shipowner deviates without authority from the agreed route, cargo loses its insurance protection, and the shipowner consequentially becomes the “insurer” of the cargo and is precluded from raising the defense that the loss or damage might

⁶⁴¹ Williston on Contracts, 4 Edition, vol 24, at 241-248 (2002).

⁶⁴² *Octonia Trading Ltd. v. Stinnes Interoil GmbH*, 1988 A.M.C. 832.

⁶⁴³ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules), effective 2 June 1931, available <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/portrait>

⁶⁴⁴ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules), effective 23 June 1977, available at <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/landscape>

⁶⁴⁵ Although the Rules do not expressly define deviation and its consequences article 4(4) reads: “Any deviation on saving and attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

⁶⁴⁶ See *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 All E.R. 403.

⁶⁴⁷ William Tetley, *Marine Cargo Claims*, Fourth Edition, at 1815 (2008).

⁶⁴⁸ *Stag Line v. Foscolo, Mango & Co.* [1931] 2 K.B. 48 at 69.

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occur independently from the deviation, except for circumstances that do not directly relate to a deviation. In order to exculpate himself, the owner has to prove that the loss or damage was caused by either an act of God, the Queen's enemies, or the inherent vice of the goods, and also that this loss or damage must have occurred irrespective of the deviation.⁶⁴⁹ As a result of deviation, owners can lose one of the following rights: the package limitation, one year statute of limitations to file a claim for damage to the cargo, the defense of due diligence,⁶⁵⁰ the exculpatory defenses,⁶⁵¹ the limitations and exclusions of the contract, which would otherwise be upheld despite article 3(8)'s ban on exculpatory provisions, including all defenses and benefits otherwise available to the carrier (e.g. jurisdiction and arbitrations clauses, etc.).

Any damage or delay of the vessel to proceed to the port can be accompanied by the claim of the cargo interests for the damage to the cargo and consequential damages caused by delay. A deviation can result in damages being awarded for delay even when these damages do not arise naturally from the breach of the contract or do not result from circumstances communicated to the owner at the time of contracting.⁶⁵² Thus in *The Heron II*,⁶⁵³ where the vessel deviated to several other ports on her way to Basrah, the discharge port, and the price of sugar fell during nine days of deviation, the court awarded damages arising from lost markets and the drop of price. The main reason for such an award was the owners' knowledge of the price fluctuation and delay in delivery due to the deviation.

If the court finds that damage to the vessel or loss was caused by the breach of a safe port warranty, the indemnity from the claim brought by shippers or consignees will go down the line from voyage charterers to time charterers and owners. In *The Island Archon*⁶⁵⁴ the shipowners had to provide security before the ship was allowed to leave Basrah in order to secure a claim of cargo receivers, which gave rise to some delay.⁶⁵⁵

The shipowners suffered a loss in the form of the payments that they were required to make, first as security for cargo claims, and then in order to satisfy the order of the Iraqi courts, even though no shortage or damage to cargo had occurred. These damages were a direct consequence of the charterers' order for the vessel to proceed to

⁶⁴⁹ See William Tetley, *Marine Cargo Claims*, Fourth Edition (2008) at 1827.

⁶⁵⁰ Article 3(1) of the Hague-Visby Rules.

⁶⁵¹ Article 4(2) (a) to (q) of the Hague-Visby Rules.

⁶⁵² William Tetley, *Marine Cargo Claims*, Fourth Edition, at 810 (2008).

⁶⁵³ *Czarnikow Ltd. v. Koufos (The Heron II)* [1969] 2 Lloyd's Rep 457.

⁶⁵⁴ *Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] C.L.C. 734.

⁶⁵⁵ See § 4.3.7.

Basrah and deliver the cargo there. The court found that the port of Basrah was unsafe due to a default of the Iraqi court system. The court reviewed a standard whether complying with an order as to the employment of the ship can be implied when the order was lawfully given.⁶⁵⁶ Where the losses claimed were the direct consequence of complying with charterers' order the shipowners were entitled to indemnity, notwithstanding that it was an order that the time charterers were entitled to give and the shipowners were bound to obey.⁶⁵⁷

Besides physical damages to the vessel and or the cargo, the court can sometimes award economic ones, which include loss of future business and loss of reputation. Consequential losses are not precluded from recovery by Hague-Visby Rules.⁶⁵⁸ However, it has been held that owners would not be responsible for delay in delivery of the cargo caused by deviation unless there is a physical damage to it, unless the charterparty provides otherwise.

5.3. Quantum of damages

How can the tribunal measure the quantum of the owners' damages? For time charterparties the amount of owner's recovery due to non-employment of the vessel during the repairs is measured by the hire rate of the charterparty when the damage to the vessel occurred. The court can go even further and adjudicate to the owners' damages that amount of loss the owners suffered as a result of non-performance of a subsequent charter. These damages can be higher than ones prevailing on the market. There is a simple reason behind this, charterers ought to contemplate that the vessel is likely to be engaged for her next voyage when performance of the charter is proceeding.⁶⁵⁹ In *The Argentino*,⁶⁶⁰ while awarding the damages, Lord Herschell said:

I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings

⁶⁵⁶ Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The Island Archon) [1994] C.L.C. 734, 738.

⁶⁵⁷ Id. at 742.

⁶⁵⁸ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules), effective 23 June 1977, available at <http://www.jus.uio.no/sisu/sea/carriage.hague.visby.rules.1968/landscape>

⁶⁵⁹ Voyage Charters, at 609 (Third edition, 2007).

⁶⁶⁰ Owners of the Steamship Gracie v Owners of the Steamship Argentino (The Argentino) (1889) L.R. 14 App. Cas. 519.

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*which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision.*⁶⁶¹

For the lost voyage charterparties it seems that the amount of freight lost because of non-employment of the vessel is an appropriate measure of damages. If freight is not lost and the vessel is repaired during the voyage, owners can claim damages at the detention rate for the time lost for the repairs. As long as lost hire or the freight rate are reasonable and are not too remote will owners be able to recover. Only if any subsequent engagement is proved by the owners will the court assess damages based on anticipated profit from the daily employment of the vessel, which can be higher than prevailing market rate.⁶⁶²

In the circumstances when owners operate a fleet of vessels and have an opportunity to find a substitute ship to complete a voyage of one damaged and under repairs, the court will not take increased profits from the other vessel into account.⁶⁶³ However, if a gain results from a step taken in mitigation, it is never to be treated as being merely collateral.⁶⁶⁴

The legal implication of a safe port warranty for voyage charterparties besides liability for the actual damage to the vessel can be seen in the responsibility of the charterer to reimburse owners for a deadfreight claim when the port is deemed unsafe and the cargo is not loaded or short loaded on the vessel; or when the charterers' claim

⁶⁶¹ Id. at 523.

⁶⁶² See *Owners of the Dirphys v Owners of the Soya (The Soya)* [1956] 1 W.L.R. 714.

⁶⁶³ *Jebsen v East and West India Dock Co* (1874-75) L.R. 10 C.P. 300.

⁶⁶⁴ See *British Westinghouse v. Underground Electric Railways* [1912] A.C. 673, 691.

for freight differential for cargo left behind if the port is safe. Where owners refuse to obey the order to proceed to an unsafe port, the damage may consist of detention alone, while waiting for a new order, and, if a new order is given, extra costs in reaching the loading port.⁶⁶⁵

The most severe liability for violating a safe port/berth warranty can be seen when there is oil pollution. Despite the fact that time and voyage charterers will not be directly liable for oil pollution, owners can recover their expenses and costs through a suit for indemnification. Such a situation arose after *The Aegean Sea* accident.⁶⁶⁶ By a charterparty on an ASBATANKVOY form, owners chartered their vessel *The Aegean Sea* to the Spanish oil company Repsol to carry a cargo of crude oil from Sullom Voe to “one or two safe ports European Mediterranean.”⁶⁶⁷ The vessel was ordered to discharge at La Coruna where she arrived and waited two days for a berth. While proceeding to berth in darkness and bad weather, she ran aground, broke in two, and exploded. The vessel and most of her cargo were lost, and the casualty resulted in a major oil pollution incident.⁶⁶⁸

The owners brought arbitration proceedings in London against the charterers, claiming that La Coruna was an unsafe port, and seeking to recover the sums they had to pay in respect of pollution, together with the value of the vessel, her bunkers and freight. These claims amounted in aggregate to approximately US \$65 million. The charterers denied liability, and contended that if they were found liable they were entitled to limit their liability to approximately \$12 million pursuant to the 1976 London Convention on Limitation of Liability for Maritime Claims.⁶⁶⁹ The question whether the charterers were entitled to limit liability under the Convention was referred to the High Court by way of preliminary issue.

In rejecting the charterers’ claim to limitation Mr. Justice Thomas concluded:

(1) having regard to the background to the Convention, its structure and language, the benefit of limitation available to a charterer was the same

⁶⁶⁵Id at 606.

⁶⁶⁶ *Aegean Sea Traders Corp. (Aegean Sea) v. Repsol Petroleo S.A.*, [1998] 2 Lloyd's Rep. 39, 54 (Q.B.) at 39.

⁶⁶⁷ Id.

⁶⁶⁸ Id.

⁶⁶⁹ Convention on Limitation of Liability for Maritime Claims (LLMC) Adoption: 19 November 1976; Entry into force: 1 December 1986; Protocol of 1996: Adoption: 3 May 1996; Entry into force: 13 May 2004.

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as that available to the shipowner; it did not entitle the charterers in this case to limit liability for claims such as those brought against them by the owners;

(2) the Convention required all claims arising from a distinct occasion where the owners and the charterers are responsible to be subject to one limit and, if a fund is constituted, to one fund; it could not have been intended that the fund be reduced as a result of claims such as those brought in this case by the owners against the charterers.⁶⁷⁰

The High Court held that the 1976 Convention gave no right to the charterers to limit liability in respect of an unsafe port claim brought against them by the owners under the charter party thus potentially exposing charterers to unlimited claims based on a recourse action.⁶⁷¹ To some extent such a position of law puts charterers in a very difficult situation as the issues of vessel navigation is purely an owner's matter, which requires owners to have significant insurance to cover the risks associated with liability for pollution. By rejecting application of the convention to the charterers, the court created a precedent that requires charterers to face a risk of increased exposure to liability when the vessel causes an environmental disaster.

⁶⁷⁰ Id. at 50.

⁶⁷¹ See Charles B. Anderson, Liability of Charterers and Cargo Owners from Pollution from the ships, 26 Tul. Mar. L.J. 1. at 45 (2001).

