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

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6. CONCLUSION

A besetting sin of many charterers in breach of their undertaking is an ignorance of their ports' infirmities.⁶⁷² The price they are paying for their freedom of choice is strict liability when it comes to safety of the port.

Although English and American law have enjoyed a relatively gradual development throughout the decades, with ever increasing threats of terrorism, outbreaks of diseases, and the ability to obtain accurate information of the condition of the port at any time, it is unclear the risk of a threat materializing to render a port unsafe.⁶⁷³ What has been definitely resolved is that a charterer is far from being the insurer of ports risks.⁶⁷⁴ Courts have taken into consideration all of the facts that precede nomination of the port and arrival of a vessel there. Moreover, parties were given liberty to select various charterparty forms that contractually apportioned liability between the parties, subject to any constraints imposed by governing law.

The safe port warranty in most cases concerns trading of the chartered vessel at and between ports of loading and discharge. Potentially the promise of charterers has a wider remit. It may be associated with many other obligations that arise under the charterparty such as bunkering, delivery, and redelivery of the vessel,⁶⁷⁵ calling a refuge port, when its application can extend beyond contractual relationships of the parties and involve various third parties.

The law possesses a significant degree of uniformity that is attributable primarily to the wide adoption of standard form contracts and the manner in which safe port promises are drafted in these contracts.⁶⁷⁶ It is important to determine whether the warranty as to safety of a port in a charterparty is couched in absolute or qualified terms. The NYPE 1994 form, for example, provides "worldwide trading always via good and safe port(s), good and safe berth(s), good and safe anchorage(s), always afloat." If the

⁶⁷² F.J.J. Cadwallader, *An Englishman's safe port*, 8 *San Diego Law Review* 639, 652 (1971).

⁶⁷³ Alexander McKinnon, *Administrative shortcomings and their legal implications in the context of safe ports*, 23 *A&NZ Mar LJ* 186, 204 (2009).

⁶⁷⁴ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 *SAC LJ* 597, 628 (2006).

⁶⁷⁵ *Id.* at 599.

⁶⁷⁶ *Id.* at 628.

charterparty contains this type of clause, the principles established in *The Eastern City*⁶⁷⁷ apply: at the time of nomination the port should be prospectively safe for the chartered ship to get at, stay at and in due course, leave without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

However, if the warranty as to safety is qualified, other factors have to be brought into the equation and the owners' protection will be reduced. For example, The SHELLTIME 3 form contains a qualified safe port warranty in the following terms: "Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks, anchorages and submarine lines where she can also lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage or submarine line and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."⁶⁷⁸ In the context of this clause, the due diligence obligation merely requires the charterers to display reasonable care and that this duty would be discharged if a reasonably careful charterer would, on the facts known, have concluded that the port was prospectively safe."⁶⁷⁹ Ultimately, it must be born in mind that the safe port promise is a contractual, not a legal, concept, and therefore, the nature of the promise may be materially influenced by the manner in which it is drafted.⁶⁸⁰

In rare circumstances, when the charterparty is silent to safe port and/or berth warranty, the court shall construe the policy "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry."⁶⁸¹ Ambiguity will also be resolved by ascertaining how a reasonable party would construe the clause at the time the contract was entered. In interpreting charterparties, nonetheless, a wide range of general interpretation rules guide the courts in their inevitable (and unenviable) task of

⁶⁷⁷ Leeds Shipping Co v Societe Francaise Bunge SA (*The Eastern City*) [1957] 2 Lloyd's Rep. 153.

⁶⁷⁸ Safe Port and Safe Berth Warranties – Time and Voyage Charters, Sea Venture, volume 18, June 1999, available at <http://www.scribd.com/doc/45797363/Safe-Port-and-Safe-Berth-Warranties>

⁶⁷⁹ K/S Penta ShippingA/S v Ethiopian Shipping Lines Corp (*The Saga Cob*) [1992] 2 Lloyd's Rep 545.

⁶⁸⁰ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 628 2006.

⁶⁸¹ Richards on the Law of Insurance § 11:2[f] (6th Ed.1990), at § 11:2[g].

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having to interpret a contract that can, on its face, be ambiguous.⁶⁸² A court will always try to discover the intentions of the contracting parties using the plain, ordinary, and popular meanings of the words used. Reference to a common usage dictionary is perfectly in order. A court will not try to rewrite a contract using interpretation rules but, rather, use these rules to pinpoint the intentions of the parties at the moment of contract.

In some instances, the implication of contract will be necessary to give effect to the reasonable expectations of parties.⁶⁸³ The failure to mention the word “safe” in the charterparty generally will not allow the court to imply it, unless it can be shown that the parties had foreseen the eventuality which in fact occurred⁶⁸⁴ or if it concerns certain areas, where a safe port warranty was previously extended by the courts. The implication of safety will generally concern time charterparties because the obligation to nominate a safe port is continuous and is not limited to nomination of a single loading or discharge port as in voyage charterparties. In voyage charterparties, the tribunal will only consider the extension of a safe port warranty to berth or to approaches to the port, when the safe port warranty was guaranteed.

Sometimes the printed clauses in standard charterparty forms provide for the express safe port and safe berth warranties and sometimes typed clauses do so. Whether to do so is a matter of choice of the parties during contract negotiations.⁶⁸⁵ Freedom of contract should not be disturbed in order to assist one of the parties to rectify its breach. Justice Cohen L.J in *The Cydonia* said:

*It seems to me that one should do as little violence as possible to the wording of a commercial document, in order to arrive at a sensible construction of its provisions.*⁶⁸⁶

In general, the same criteria as to safety apply to both time and voyage charterparties. However, it is submitted that the time charterer should have a greater responsibility than the voyage charterer for ensuring that it orders the vessel to safe port

⁶⁸² Interpretation of Contracts available at <http://www.duhaime.org/LegalResources/Contracts/LawArticle-92/Part-7-Interpretation-of-Contracts.aspx>

⁶⁸³ *Equitable Life Assurance Society v Hyman*, at pg 459.

⁶⁸⁴ *Trollope & Colls Ltd v North West Metropolitan Hospital Board* [1973] 1 WLR 601 at 609-610.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Stag Line LD v. Board of Trade* [1950] 2 K.B. 194, 197.

and berth.⁶⁸⁷ It is presently unclear if voyage charterers come under such a secondary obligation to nominate an alternative safe port once the first nominated port becomes unsafe. It has been argued that only time charterers who have a continuing right and/or obligation to give orders as to the employment of the vessel can owe this secondary obligation. However, this ignores the fact that owners guaranteed and warranted the vessel's compliance with the restrictions of the loading and discharging ports at the time of nomination. The matter is clearly one upon which the courts will have to issue definitive guidance. If voyage charterers do not owe such a secondary obligation, the position under voyage charterers would be governed by the doctrine of frustration unless there is some other relevant provision in the charterparty (which might be the case if the charterparty provided that the vessel was to proceed to the nominated port "or so near thereto as she may safely get).

Good chartering practices can prevent owners and charterers from entering into a long argument over the unsafety of the port or berth by simply avoiding an accident to the vessel. The extent to which charterers audit the safety of a port before ordering a vessel there can make a difference. Full audit of the port done by charterers through whole contractual chain, firstly, may help to step away from entering into a contract, which can lead to drastic for the charterers consequences. Secondly, demonstrate that charterers exercised due diligence in selecting the port. Thirdly, provide a solid base of defense to build a case against the owners that the incident occurred either by want of good navigation and seamanship on the part of owners, or by some abnormal occurrence. Crucially, charterers who anticipate that owners may advance an unsafe port claim are well advised to undertake a prompt pre-emptive and thorough investigation of the port, preferably involving the port authority, in order to ensure that they are in the best possible position to defend such an action. An early investment in the fees and expenses of an investigator may prove to be worthwhile.⁶⁸⁸

In reflecting on the definition of a safe port, the relevant safety of the port "is inseparably connected with the fulfillment of the duty of providing the cargo. The charterer must provide the cargo at the named port and he must accordingly name a port where he can provide the cargo."⁶⁸⁹ Failure of the vessel to enter or to leave the port as a

⁶⁸⁷ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 193-194 (1991).

⁶⁸⁸ Eleferios D. Katarellos, Aristotelis B. Alexopoulos, *What is a Safe Port? The "Unsafe Port" Dilemma - Who is at Fault?* available at <http://www.stowMasters.com/Mastersrole.pdf>

⁶⁸⁹ *Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* [1954] 2 Ll Rep 148 at 153.

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fully loaded vessel will expose charterers not only to the breach of a safe port warranty, but also for deadfreight,⁶⁹⁰ and extraordinary expenses of owners claim.

Unfortunately, charterers cannot control or prevent various natural and political occurrences. These types of events occur without any involvement or fault of charterers. In the recent years, new categories of unsafety have emerged, namely, administrative and environmental categories of unsafety. They require more due diligence for charterers to inspect the port prior to nominating it.

The issue concerning the unsafety of the port will always exist. It cannot be eliminated no matter how many precautions have been undertaken by the charterers. At the same time, owners are becoming less concerned of the dangers since most of the ports have a well-developed system to inform of forthcoming dangers. With the recent decrease of charter hire and freight rates, the ability to call any ports and adhere to charterers' orders became a necessity of the owners to survive in a hard financial market. As such, the responsibility for calling an unsafe port "unconsciously" shifts from the charterers to the owners. It is only for the courts now to acknowledge new realities and adopt due diligence approach in interpreting safe port and berth clauses.

⁶⁹⁰ See *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, [2008] EWCA Civ 175 and *Hall Brothers Steamship Co Ltd. v. R & W Paul Ltd.* (1914) 19 Com. Cas, 384.

