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

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SUMMARY

Sailing from one port to another in order to deliver goods is one of the main purposes of any commercial maritime adventure. Although most of the ports in the world have some kind of navigational history and are described in detail on maps, groundings, delays, and other accidents still occur to vessels. With the growing complexity of vessels and the increasing cost of their operation, the amount of damages that the shipowner can suffer by delaying a vessel due to congestion or repairs can be significant. Although the vessel belongs to the owners, this does not mean that they look for the cargos to employ her. Modern shipping is a very specialized sphere where matters of crew, maintenance, and navigation of a vessel are handled by the owners and the charterers handle the vessels commercial employment. Both owners and charterers aim to earn a profit from the vessel; however, the means that each party uses are different. The owners are primarily concerned about the preservation of the vessel to receive constant hire; the charterers are primarily concerned about the rotation of the vessel among different ports to fully exploit her.

The issue of safe ports and berths naturally stems from the vessel's operation. This dissertation starts with delineating a meaning of safe ports and berth under English and American law, discusses a standard of culpability of the parties, and sets benchmarks on physical, political, administrative and ecological safety.

Chapter two of the dissertation establishes a standard of liability of the parties responsible for nomination of the port. It explains in detail the differences in application to voyage and time charterparties, sets the responsibilities of the parties on various stages of the voyage, including the time when the vessel was chartered, the time when the port was nominated, and when the port became unsafe after it was nominated. A standard of safety is explained as it is applied under English and American law.

Under English law, it is a warranty of the charterers that encompasses strict liability for nomination of an unsafe port. American law provides two approaches and depends on a court circuit where the case involving the breach of safe port obligation is reviewed. A majority of the circuits follow the Second Circuit position that considers nomination of the port as a warranty given by the charterers. The Fifth Circuit (States of Louisiana and Texas) and the Third Circuit (States of Virginia and Pennsylvania) employ a different standard that imposes a duty of due diligence on the charterers in selecting a port. Various conditions such as good navigation and seamanship,

intervening negligence of third parties, and the previous accident history of the port are reviewed in connection with the obligation of the charterers.

Chapter three discusses the historical development of the safe port warranty and the current trends with regard to its future interpretation. Further, it is impossible to understand the safe port warranty without defining each of the terms that comprise the warranty, e.g., “one good safe port, one good safe berth.” The exclusion or changing of the order of the terms has a legal significance and can lead to a different results in defining the responsibility of owners and charterers. In certain circumstances, tribunals will imply a safe port warranty; however, this is only done when certain conditions are met.

In chapter four, the physical, political, administrative and environmental safety of the port are discussed in detail. Typically, most incidents occur due to the physical conditions of the port, such as ice, draft, wind, current, and silting; however, depending on the port, the breach of physical conditions can extend more broadly, including the passage of the vessel.

Political safety describes social activities that can render the nominated port unsafe. Special attention is given to such categories as sanctions and embargos in light of the recent cooperation of the world community in fighting oppressive regimes. Piracy is also described in light of the recent escalation of attacks in the Gulf of Aden. The enforcement of safe port warranties has become increasingly important for shipowners and has led to the development of new clauses for voyage and time charterparties, such as a piracy clause, sanctions clause, and radiation clause. Occasionally, these clauses give owners significant priority over charterers in deciding whether to call a nominated port.

Administrative safety pertains to the infrastructure of the port. The global shipping community would like to see worldwide standards in port maintenance due to the growing size and complexity of vessels. Unjustifiably these standards sometimes transfer responsibility for ensuring this on the charterers.

Lastly, a new emerging category of environmental safety is becoming increasingly important, especially in light of tightening antipollution legislation worldwide. As the limit of liability for violation of this legislation can exceed the value of the vessel, owners are looking for indemnification from charterers when there is subsequent oil pollution as a result of vessel damage.

SUMMARY

The measure of damages that owners can recover from charterers for breaching safe port warranty and damages charterers can recover from owners for not calling safe port are discussed in chapter five. Special attention is drawn to the liability of the owners to cargo interests for misdelivery of the cargo because of unlawful deviation. Remedy of cargo interest against the owners is extra-contractual and is regulated by the Hague and Hague-Visby Conventions. Economical and non-economical (punitive) damages are discussed in light of different approach to their imposition by English and American courts.

The final chapter draws a line that in interpreting safe port and berth clauses tribunals will try to discover intentions of the contracting parties. Application of the warranty has much greater use. Besides ports of loading and discharge, it applies to bunkering ports, ports of refuge, and the route of the vessel. Although most of the standard charterparty forms provide for safe port/berth warranty, parties can chose to incorporate clauses that change culpability of charterers from strict liability to negligence standard for nominating unsafe port. In addition, pre-contractual investigation of the ports and port conditions can save owners and charterers from an argument for breach of safe port warranty, unless there was an unexpected abnormal occurrence. The dissertation concludes with a proposal that the due diligence approach will best reflect the modern realities of the shipping world.

