

## **THE CHARTERERS' SAFE PORT OBLIGATION: TOTAL IMMUNITY**

1. What is the safe port obligation? Traditionally, it has been the duty of a charterer of a vessel to ensure that the port that he sends the vessel to is safe for the vessel to berth and discharge or receive cargo. The safe port obligation whether in voyage charterparties or time charterparties, has proved a highly adaptable and elastic concept and is one of the cornerstones of the shipowners immunity under a charterparty. However, difficulties sometimes arise as will be discussed in this article.
  
2. It would help in the consideration of this issue to examine some sample clauses pertaining to safe port obligations of charterers:-

### **2.1 TANKER VOYAGE CHARTER PARTY**

*“SAFE BERTHING-SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charter, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to berth, additional agency charges and expense, customs overtime and fees, and any other extra port charges or port expenses incurred by reason of using more than one*

*berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in Clause 15.”*

## 2.2 **BALTIC CODE 2000 CHARTERPARTY AND LAYTIME TERMINOLOGY AND ABBREVIATIONS**

*“REACHABLE ON HER ARRIVAL OR ALWAYS ACCESSIBLE – means that the charterer undertakes that an available and accessible loading or discharging berth will be provided to the vessel on her arrival at or off the port which she can reach safely without delay proceeding normally. Where the charterer undertakes the berth will be ALWAYS ACCESSIBLE, he additionally undertakes that the vessel will be able to depart safely from the berth without delay at any time during or on completion of loading or discharging.”*

## 2.3 **“BALTIME 1939” Uniform Time-Charter**

### **Trade**

*“The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or place where she can safely lie always afloat within the limits stated in Box 17.*

*No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calciumcarbide, ferro silicon, naphtha, motor spirit, tar or any of their products) to be shipped.”*

2.4 **NYPE 93**

**TRADING LIMITS**

*The Vessel shall be employed in such lawful trades between safe ports and safe places within excluding as the Charterers shall direct.*

3. The starting point in this discussion is the shipowner's obligation in a charterparty. A shipowner is obliged to proceed the vessel to port nominated by the charterer under the charterparty. However, as seen above, various clauses in the charterparty are drafted in an attempt to render an owner immune from the vagaries of an unsafe port.
4. There is no doubt that the safe port obligation is critical for a shipowner, for he is not obliged to load if it is shown that the charterer has failed to nominate a port that is safe.
5. If the port nominated is or becomes unsafe, the shipowner notifies the charterer to nominate an alternative port, and if the charterer fails to do so, the shipowner may effect delivery at the nearest safe port in accordance with the terms of the charterparty.
6. Case law has determined that a port is not a safe port unless it is a port which the ship can enter as a laden ship *without undue delay or danger*,

- and where she can discharge always afloat, and *from which she can safely return* [*Halsbury's Laws of Singapore (Carriers)*<sup>1</sup>]. It is not, however, sufficient that the port named should be a safe port in the sense that there is no physical danger to the ship. There must be *no danger of capture or seizure from political sources*. The charterer must not, therefore, name a port in which the unloading of the cargo is by law prohibited, or which cannot be reached by the ship without running the risk of hostile capture [*Halsbury's Laws of Singapore*<sup>2</sup>]. These principles are clear enough and seem to offer strong protection to the shipowner in terms of protecting the ship from dangers from an unsuitable port.
7. The obligation imposed on the charterer is not an absolute one in the sense that he is usually absolved from abnormal occurrences, but the duty of the charterer to ensure that the port nominated is safe for all intents and purposes is quite an onerous one.
  8. In the case of *The Carnival*<sup>3</sup> the English Court of Appeal considered the issue of a "*safe port*" within the ambit of a voyage charterparty. It is worth reproducing the extract from page 26<sup>4</sup> of the judgment where the Court of

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<sup>1</sup> Vol 3 pg 463

<sup>2</sup> Vol 3 page 464

<sup>3</sup> [1994] 2 Lloyd's Rep. 14

<sup>4</sup> [1994] 2 Lloyd's Rep. 26

Appeal adopted the classic definition of the safe port warranty from the case of *The Eastern City*<sup>5</sup> at page 131 as well as *The Evia (No.2)*<sup>6</sup>:-

*"If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law. Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimized by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship. In The Evia (No 2), [1982] 1 Lloyd's Rep. 334 at p. 338 Lord Justice Denning stated as follows:-*

*What then are the characteristics of a "safe port"? What attributes must it possess and retain if the charterer is to fulfill his warranty? To my mind it must be reasonably safe for the vessel to enter, to remain, and to depart without suffering damage so long as she is well and carefully handled. Reasonably safe, that is, in its geographical*

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<sup>5</sup> [1958] 2 Lloyd's Rep. 127

<sup>6</sup> [1982] 1 Lloyd's Rep. 334

*configuration on the coast or waterway and in the equipment and aids available for her movement and stay. In short, it must be safe in its set-up as a port.*

*To elaborate a little, every port in its natural state has hazards for the ships going there. It may be shallows, shoals, mud banks, or rocks. It may be storms or ice or appalling weather, In order to be a "safe port", there must be buoys to mark the channel, lights to point the way, pilots available to steer, a system to forecast the weather, good places to drop anchor, sufficient room to manoeuvre, sound berths, and so forth. In so far as any of these precautions are necessary - and the set-up of the port is deficient in them - then it is not a "safe port". Once the set-up of the port is found to be deficient - such that it is dangerous for the vessel when handled with reasonable care - then the charterer is in breach of his warranty and he is liable for any damage suffered by the vessel in consequence of it. To illustrate this proposition, I will give some of the deficiencies in set-up which have been held to render a port unsafe. On the other hand, if the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated, abnormal or extraneous occurrence - unconnected with the set-up - then the charterer is not in breach of his warranty. Such as when a competent berthing-master makes for once a mistake, or when the vessel is run into by another vessel, or a fire spreads across to her, or when a hurricane strikes*

*unawares. The charterer is not liable for damage so caused.”*

(Writer’s emphasis)

9. Indeed, the circumstances of the port deficiency found in *The Carnival* were quite interesting. It was not just a defective fender at the berth that was the offending article that, in combination with the premature passing of “*The Carnival*” caused the vessel that suffered damage, “*The Danilovgrad*”, to surge and yaw and contact the fender. Counsel for the charterers, in their defence, argued that the fender was in good order save for its metal end-piece, and that if proper pilotage arrangements had been made, the *Danilovgrad* would not have suffered the damage that it did, namely a puncture in its hull resulting in water ingress into the holds and subsequent cargo damage. The Court there disagreed saying that as long as the fender was one of the effective causes of the damage the safe port warranty was broken.
  
10. This case certainly supports the proposition that the safe port obligation is a highly elastic concept adopted by the Courts to protect shipowners and to place on charterers the burden of ensuring that intended ports of

- loading or discharge stringently meet the standard of safety and care required to ensure a ship can enter and depart from the same safely.
11. The point was also emphasized in *The Marinicki*<sup>7</sup> where the vessel in question was damaged by an underwater obstruction when it entered the port of Jakarta. The Court held *the owners were unable to establish when the object came to rest in the channel, and were thus unable to establish that on Feb. 9, 2000, when the order to proceed to Jakarta was given, the port was unsafe because of the presence of the obstruction in the channel. However, the port of Jakarta was unsafe on Feb. 9, 2000 because there was no proper system in place to investigate reports of obstacles in the channel and/or to find and remove such obstacles and in the interim to warn vessels that there was an obstacle in the channel, by means of notices to mariners and by buoying the obstruction; accordingly the owners' claim that the charterers were in breach of the safe port warranty succeeded.*
12. It is arguable based on Lord Justice Denning's dicta in *The Evia* that this was not something the charterers would have accounted for i.e. that there could be obstructions in the approach channel rendering the port unsafe. Hence, charterers bear the rather onerous risk of sending vessels to ports where there is no, or a poor system of assessing the safety of the channel approach into port. A charterer may argue that he cannot be held

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<sup>7</sup> [2003] 2 Lloyd's Rep. 655

- accountable for any and every single danger that a port may pose for the shipowner, such a duty being too onerous. However, the Courts have adopted the policy of making sure charterers take great efforts to ensure the safe passage of vessels they charter into port.
13. However, some reprieve for the charterers does exist in the form of a few decided cases which distinguish between an unsafe characteristic of the port per se, and an abnormal occurrence. In *The Chemical Venture*<sup>8</sup> the Court considered as its primary task in such cases to “ascertain whether a particular source of danger can properly be described as a characteristic of the port and, if so, whether that danger renders the port prospectively unsafe. If the particular risk amounts to an abnormal occurrence then it will usually follow that it does not constitute a characteristic of the port and so does not render the port prospectively unsafe”. In the Chemical Venture owners were unable to assert that a missile attack on the vessel rendered charterers in breach of the safe port obligation as they were held to have waived that right.
14. The analysis in two very recent English decisions on the issue of the safe port obligation must be considered for the purposes of this article. The first

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<sup>8</sup> [1993] 1 Lloyd's Rep. 508

is that of *The Archimidis*<sup>9</sup> and the second being *STX Pan Ocean Co Pte Ltd v Ugland Bulk Transport A.S.*<sup>10</sup>.

## **The Archimidis**

### **FACTS**

15. The *Archimidis* was chartered for three consecutive voyages for the carriage of gasoil from "*1 safe port Ventspils*". The charterparty contained clauses requiring the charterer to pay deadfreight in the event it failed to supply the full cargo minimum of 90 000 MT, as well as a lighterage clause allowing the charterers the option to discharge via lighterage or ship to ship (STS) transfer subject to owner's approval. The vessel arrived at Ventspils to load cargo. However, because of previous bad weather conditions, the dredged channel had silted up as a result of a lack of water. Because of the draft restrictions, the master served a notice of readiness stating that he expected to load a cargo of "approximately 67,000 mt".
16. The charterers tendered for loading a quantity of 93,410 mt although they knew that it was not possible for the vessel to load that quantity at that particular time. In the event, the master loaded 67,058 mt. The owners

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<sup>9</sup> [2007] 2 Lloyd's Rep. 101

<sup>10</sup> [2007] EWHC 1317

brought arbitration proceedings against the charterers claiming deadfreight on the difference between the minimum quantity of 90,000 mt and the 67,058 mt actually loaded. At the hearing of preliminary issues, the charterers submitted that they had tendered above the minimum cargo of 90,000 mt. The owners contended that the lack of draft was an aspect of port/berth unsafety for which the charterers assumed liability and/or that the full cargo had not been supplied but was capable of being loaded, as to 67,058 mt alongside at Ventspils and as to the balance by transfer in accordance with clause 11 of the AIC terms. Alternatively, they argued that the charterers were liable in damages for breach of warranty that Ventspils was a safe port.

17. The tribunal held that the charterers were liable to pay deadfreight. They found that the charterers had "*formally tendered for loading a quantity of 93,410 mt*", but held that "*since all concerned were aware that it would not be possible for the Vessel at that particular time to load this quantity, this was a gesture without legal significance*". They held that the charterers' decision not to request an STS transfer for the balance of the cargo in accordance with clause 11 of the AIC terms meant that they could not avoid liability for a *prima facie* breach of charter.

18. Leave to appeal the tribunal's decision was granted and the Commercial Court held that:-

*“(1) The tribunal had found as a fact that the charterers had “formally” tendered for loading a quantity of 93,410.495 mt. In the light of that finding of actual tender of full contractual performance, the tender could not be stripped of legal significance merely because the parties knew “that it would not be possible for the Vessel at that particular time to load [that] quantity”. The obligation under clause 3 to pay deadfreight was only triggered in the event that the charterers failed to supply a full cargo. The words “Should the Charterer fail to supply a full cargo” were not synonymous with the words “in the event that (for whatever reason) a full cargo is not loaded on the Vessel”, nor did the liability to pay deadfreight attach in circumstances other than where the charterers were in contractual breach. Accordingly, the tribunal erred on the question whether the charterers had failed to supply a full cargo.*

*(2) The fact that the charterers did not avail themselves of the option to load the balance of the cargo by STS transfer did not mean that they had failed to supply a full cargo. The charterers had tendered supply of the contractually required minimum at the berth. They had elected for a contractual mode of performance at the berth and had complied with their obligation to supply a full cargo at that place of*

*loading. In circumstances where there had been no failure on the charterers' part, but rather a refusal on the part of the owners to accept the former's tender of performance, it was not incumbent upon the charterers to exercise a right by which the vessel could have loaded to full capacity, by a secondary means of loading the balance of the contractual cargo. Accordingly, the award would be varied to declare that the owners were not entitled to claim deadfreight.*

- (3) The phrase "1 safe port Ventspils" constituted a warranty by the charterers that the port was in fact safe.*
- (4) In principle, a port could be unsafe because of a need for lightering to get into or out of it. "Safely" meant "safely as a laden ship". The vessel had to be able to reach, use and return from the warranted port. Necessary routes to and from the port were within the warranty, so that unsafety in such routes amounted to a breach. There was no realistic distinction between loading and discharging. If the chartered vessel, laden with the chartered cargo, could not undertake those operations in safety, then prima facie, there might be a breach. There was a plain danger since the vessel would otherwise go aground. The matter would be remitted to the arbitrators to determine whether the weather and the consequential*

*silting up of the channel, which led to the draft restrictions, was an "abnormal occurrence", and whether the charterers were entitled to rely on the exclusion relating to "Perils of the seas"*

19. Owners had argued in this case that: -
  - 19.1 the charterer had no intention to load full cargo since it would delay the vessel in her voyage;
  - 19.2 the charterers adopted the least unattractive option of having the vessel sail away with less than the minimum cargo; and
  - 19.3 the obligation to supply cargo under clause 3 of the Asbatankvoy form meant actual delivery of the cargo to the vessel.
  
20. The writer submits that owners in this case seemed to think that they were protected by the terms of the charterparty in the event of the vessel being unable to load the full quantity due to unforeseen circumstances. They seemed to think that charterers had an obligation to effect an STS delivery to transfer of the cargo to fulfill its loading obligations. The owners argument failed in this respect, and in this sense they were not immune from the deadfreight losses suffered as a result of the channel being unsuitable for full loading due to silting. It also became obvious that in the

- absence of an express clause stating that charterers were to be considered as having “*supplied*” the cargo only when the full complement of cargo was loaded onto the vessel whether by normal loading or STS, charterers had fulfilled their obligations by simply tendering the correct cargo of load port.
21. The mere fact that both parties knew that such a quantity could not be loaded did not, in the absence of express contractual provision, mean that the tender of performance had no legal validity. By finding that the charterer had tendered for loading the minimum quantity, the tribunal was concluding that the charterer had indeed indicated that it was ready and willing to perform its part of the contract. Hence, from the owners point of view, they erred in thinking that notice to the charterers of the vessel’s inability to load the full complement of cargo due to the insufficiency of the berth was enough to render them in breach. The owners had thought that the charterers would be under an obligation to try and load the full cargo in some way or the other to avoid breaching its safe port warranty. This issue has now been remitted to the arbitrators to decide if the silting was an abnormal occurrence thus absolving the charterers or whether it was a characteristic of the port that the charterers would be liable for.

22. The case is also significant as there was a novel argument raised by counsel for charterers that the safe port obligation was merely a *mutual agreement* between the parties that the port was safe. In the context of charterparties, the authorities clearly demonstrate that the words "*safe port*" or "*safe berth*" usually connote a warranty of safety, and therefore the Court held against the charterer on this point. In this respect, the Owners' immunity from the losses arising from an unsafe port is preserved.
23. It was also argued on behalf of the charterers the port was safe if the vessel loaded less than the chartered minimum cargo, or that in those circumstances the charterer could have no liability for the owner's loss. The Court agreed with owners that there can be no realistic distinction between loading and discharging. If the chartered vessel, laden with the chartered cargo, cannot undertake those operations in safety, then *prima facie*, there may be a breach. There is a plain danger since the vessel would otherwise run aground.
24. The tribunal will determine whether the weather and the consequential silting up of the channel, which led to the draft restrictions, was indeed an "*abnormal occurrence*" since, if it was, it is accepted by the owner that the charterer would not be in breach of the warranty. Likewise, it will be for the

tribunal to decide whether, in the circumstances, the charterer was entitled to rely, in the events which happened, upon the exclusion clause in clause 19 of the Asbatankvoy form relating to "Perils of the seas". It will also be seen from the *STX Pan Ocean* case that *The Archimides* has gone on appeal.

### **STX PAN OCEAN**

25. The next case for consideration in this article is that of *STX Pan Ocean*. Here, the vessel was damaged by ice in St Petersburg, and owners claimed for damage to the hull relying on the safe port clauses. The Court mentioned in passing that *The Archimdis* case pending for appeal would be a good case on clarification of the law on safe port clauses, and in the *STX Pan Ocean* situation, specifically the following issue:-

*“Where a charterparty expressly names a loading port and also contains, in a different section of the charterparty, a safe port warranty, does that safe port warranty apply to the loading port?” If the answer to the above question is “yes”, is the owner still entitled to rely upon the safe port warranty in circumstances where the owner knew or should reasonably have known that the named port was unsafe at the time the charterparty was entered into?”*

26. This issue was already put to rest in *The Archimides* case, that the safe port warranty would extend to the load port as well. Also, in the *STX Pan Ocean* case, no evidence was adduced to show that the owners knew or should reasonably have known about the unsafety of St Petersburg. Presumably, and in the opinion of the writer, cases such as *The Doric Pride* where owners were held to have assumed the risk of traveling to US ports which detained “*high interest vessels*”, will be drawn upon in support of charterers arguments that owners are taken to assume the risks of the port to which they agree to travel to. These are probably issues which owners will have to bear in mind in future, especially if the appeal on *The Archimides* on this issue is in favour of the charterers.

## **CONCLUSION**

27. Owners have to ensure that the clauses in the charterparty are watertight to protect their interests, for example loading obligations of the charterers as in *The Archimidis*. Owners cannot always expect to be immune especially in situations where charterers can show clearly that the unsafety of the port arose from an abnormal occurrence, or that owners knew of the peculiar characteristics of the port and proceeded there anyway. It remains to be seen how the appeal on *The Archimidis* is



disposed of, and future factual situations where charterers can truly argue abnormal occurrences that would absolve them.