The approach to the port law contract essay

Law

Charterers will not be responsible for damage to the ship which is unrelated to the prevailing characteristics of the particular port. Thus a port is not unsafe because a ship within it is damaged by a wholly exceptional storm or by another ship being negligently navigated.[1]In the matter of The Evia, [2]Lord Denning was of the opinion that ‘ 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…’Adding to this, Parker L. J., in the matter of The Sugar Cob[3]remarked that ‘ if a hazard is, for example, properly lighted but for some extraneous reason, e. g., because the power supply was suddenly cut by guerilla action the lights fail, it cannot be said that the port was prospectively unsafe or that the unlighted hazard was a normal characteristic of the port.’Thus to say that the abnormal occurrences will not make a port unsafe may be seen as another way of saying that a port will be unsafe only if the danger flows from its own qualities or attributes. Lord Roskill’s Theory on the concept of safe ports was given in his judgment in the matter of Kodros Shipping Corp. v. Empresa Cubana de Fletes[4]wherein he stated that "...the primary obligation of a time charter under a charter party is to order the ship to go to a port which, at the time when the order is given, is prospectively safe for her, there may be circumstances in which, by reason of a port, which was prospectively safe when the order to go to it was given, subsequently becoming unsafe, on its true construction, imposes a further and secondary obligation on the charterer." He went on to consider the two situations that could arise based on his theory. In the first, which is after the

time charterer has performed his primary obligation by ordering the ship to go to a port which, at the time of such order, was prospectively safe for her, and while she is still proceeding toward such port in compliance with such order, new circumstances arise which render the port unsafe. In the second situation, the nature and consequences of the new danger that has arisen is taken into consideration to arrive at the conclusion of whether the ship can avoid such dangers by leaving the port. If it is not possible for the hip to leave the port then there cannot be the imposition of a further obligation on the charterer.

CHAPTER 2

NOMINATION OF A SAFE PORTIf the vessel suffers damage as a result of the conditions at the port, including grounding, or ranging damage as a result of high winds or wash from passing vessels, or ice damage, or is damaged or seized as a result of belligerent actions at the port, the owner of the vessel can seek damages from the charterer, alleging a breach of charter party. The charterer does not absolutely guarantee the safety of a port or berth nominated. The obligation to nominate a safe port or berth in a time charter is sometimes said to be an absolute warranty, but the master is nonetheless expected to use reasonably skilful navigation and to engage pilots where appropriate. If damage could have been avoided only by very high standards of seamanship, the port will however be unsafe. The charterer is also protected where damage results from an abnormal occurrence. An combatants in a war that suddenly breaks out, or saboteurs in a port that was prospectively safe when nominated, may also qualify as an abnormal occurrence, exempting the charterer from responsibility. It is possible that a

charterer may give an order in good faith requiring the vessel to proceed to a port reasonably believed to be safe. The next day a civil war could break out and the port could be a war zone. The obligation on the charterer to guarantee the safety of the port is not strict. The duty is to nominate a port that is prospectively safe at the time the order is made to proceed to the port. The situation must be considered at the time the charterer gives the order. It is therefore possible for the port to be actually unsafe at the time the order is given but prospectively safe for the vessel's call, and the order given by the charterer will be lawful and the owner will be in breach if the vessel fails to comply. Assume the charterer orders the vessel to a port believing mistakenly that it is prospectively safe but that the master fears that the port will be unsafe. If the port is prospectively unsafe, the order is a breach of contract and the master is not obliged to obey it. The owners may lose their right to an indemnity for loss if they proceed to the port regardless. This situation raises complicated issues. In many cases, a charter party calls for a charterer to nominate a safe berth. This usually has the same effect as an obligation to nominate a safe port. A warranty that a port is safe will include the berths in that port. However, where there is only an obligation to nominate a safe berth and no concomitant safe port warranty, if all the berths in the port are the victims of a common unsafety, then the charterer may not be in breach of charter.

2. 1. The Safe Port Nomination Issue

The uncertainty pertaining to the liability of the charterers pursuant to the nomination of a port and an express warranty that the port will be safe to approach, use and depart was laid out in the matter of the Archimidis.

[5]Although the matter still requires considerable analysis on a case-by-case basis, it essentially lays out a framework to be considered. Basically, the judgment lays out the fact that there is no conceptual difficultyxin reading an expressxwarranty of safety in conjunctionxwith the naming of a port /xberth as an assumptionxof responsibilityxfor the safety of thatxport /berth by thexcharterer. The MTxArchimidis was voyage chartered for threexvoyages in succession to " load one safexportxVentspils" and one of the issuesxbefore the Tribunal wasxwhether this constitutedxa warrantyxas to thexsafety of thisxport by thexCharterers or whether it recorded an agreementxbetween bothxOwners and Charterersxthat the portxwasxsafe. The Tribunal of experiencedxLondon MaritimexArbitrators found that thexformer was correct. Onxappeal to the HighxCourt, GlosterxJ agreed, dismissingxthe appeal. Now, the Court ofxAppeal has also agreedxand dismissedxthe appeal. In reachingxits decision, the Court ofxAppeal expresslyxagreed with thexdecision of LangleyxJ in The Livanita[6]that " therexis no inherentxinconsistency between a safexportxwarranty and a namedxloading or dischargingxport". The judgment of SirxAnthonyxClarkexMR, with which LongmorexLJ concurred, was reachedxon two mainxgrounds: 1) the parties did notxdispute that therexwas a warrantyxof safety by thexCharterers in respectxof the dischargexports by virtue of thexterms " Discharge 1/2xsafe ports United KingdomxContinent Bordeaux/Hamburgxrange" and it would bexodd to construe " loadxone safe portxVentspils" in the same clausexdifferently. 2) the Charterers’ argumentxthat the inclusion of " safe" xrecorded the parties’ agreementxthat Ventspilsxwas safe did not seemxto be the naturalxconstruction. Its inclusionxmust have some meaning and a separatexprovision that thexvessel was to " load andxdischarge at any

safexplace orxwharf" lentxfurther supportxto the natural meaningxbeing that Charterersxhad warrantedxthe safetyxof the port. It is notable that Sir AnthonyxClarkexMR made clear in hisxreasons that hexhad not relied upon axpresumption againstxsurplussage in reaching thexdecision: he had " simplyxsought to construexthe languagexof the charterparty". The judgment should put an end to thexuncertainty in this area, as illustratedxby the arbitration[7]in whichxthe arbitratorsxconcluded that " via safexport or portsxand safe berths, includingxCastellammare" meant that Charterersxgave no warrantyxregarding the safetyxof the port/xberth atxCastellammare.

2. 2. Due Diligence perspective of a Safe Port Nomination

In somexstandard charterpartyxforms safe portxwarranty has beenxsubstituted by an obligation to exercisexdue diligence toxensure that thexvessel is only employed betweenxsafe ports. Concept of duexdiligence significantlyxqualifies strictxobligation of thexcharterer to sendxthe vessel to safexport. It wasxsuggested that thisxprotection is particularlyxlikely to arise in casesxwhere a port isxconditionally safe asxresult of partialxand temporaryxfailure of portxsafety system, such as: The Dagmar[8]which was due to the failure of the port in providing the master with the expected weather condition; The Khian Sea,[9]which was a result of inadequatexweather forecastingxsystem and noxsearoom for manoeuvre; The Mary Lou[10]which was a resultxof the failure to providexreliable informationxabout channelxdepth; The Marinicki[11]which was a result of unsatisfactoryxregime in relation to the safety of vessels using thexdredged channel; andThe Count[12]which was a

result of misalignmentxof buoys and the absence of an adequatexsystem to monitorxchanges in the channel. In K/S Penta Shipping A/S v. Ethiopean ShippingxLines Corp (The SagaxCob)[13]JudgexDiamond, Q. C. Considered the charterers'xliabilities provided inter alia: Charterers shall exercise duexdiligence to ensure that the vessel is only employed between and at safe ports, where she can always lie safelyxafloat but the Charterers shall not be deemed to warrant the safety of any port and shall be under no liability in respect thereof save for loss or damage caused by their failure to exercise due diligenceThe vessel was chartered forxemployment in the RedxSea, the Gulf ofxAden and East Africa. From the beginning of charter in Januaryx1988 and until Septemberxcalled at Massawa about 20xtimes without any negativexconsequences. On the otherxhand there was anxevidence about the vulnerabilityxof the port of Massawa to occasional artilleryxattack by Eritreanxguerillas which was known to thexcharterers – two attacks werexlaunched on Mayx31 and August 26 and vessel wasxordered to proceedxin navy convoy. As a result ofxattack, crewmembers werexwounded and vessel was so damaged that it did not resumexservice under the time charter and majorxrepairs were effected atxLisbon. territory. If there is not a clause mentioning the obligation to nominate a safe port with regard to either the port as a whole or any berth nominated by the charterers within it, the burden lay on the owners to demonstrate that one had to be implied because it was ' necessary' or to give the charter party business efficacy.[14]That meant that the owners had to demonstrate that although they accepted that they had taken the risk of dangers which affected the port as a whole or all the berths within it,

nonetheless it was necessary to imply a term in the charter party that the charterers promised that any.

3. 1. Safe Port Warranties must be Explicit

The Court of Appeal’s decision in Mediterranean Salvage and Towage Ltd v. Seamar Trading and Commerce Inc., makes clear that if shipowners wish charterers to warrant the safety of ports in charter parties, such warranties must be explicit. The case involved a claim by the owners of " Reborn" in respect of damage allegedly sustained by the vessel during loading of a cement cargo at Chekka, Lebanon due to the ship’s hull being penetrated by an underwater projection at the berth nominated by the charterers. The vessel had been chartered on an amended General contract form. Clause 1 was amended to read, " the vessel shall proceed to the loading port(s) or place(s)…or so near thereto as she may safely get and lie always afloat". Under Clause 20 the owners warranted that the vessel, " shall fully comply with all restrictions whatsoever of the said ports…and that they have satisfied themselves to their full satisfaction with and about the ports specifications and restrictions prior to entering into this charterparty". Chekka had been agreed as the load port, and it was for the charterers to nominate the berth at which the vessel was to be loaded. The charterparty contained no express warranty of safety in respect of either the port or the berth. However, the owners argued that the charterparty contained an implied warranty by the charterers that the loading berth they nominated would be safe. The owners’ claim failed. The Court held that a warranty of port safety will logically encompass a warranty of safety as to the port’s berths, but that where a charterparty does not contain a warranty of port

safety, there is unlikely to be any warranty as to safety of berths within the port. It also determined that the mere fact that the charterers were under a duty to nominate a berth did not of itself give rise to a warranty of berth safety. The Court of Appeal took the opportunity to reiterate that the starting point in every charter is that the vessel is operating at the owners' risk, and that the reason for including express warranties of port and/or berth safety was to shift some of that risk to the charterers. The Court identified the deletion of the word " safely" in Clause 1 together with the owners' warranty in Clause 20 as indicating that the owners had taken upon themselves responsibility for ascertaining whether ports and berths to which the vessel was directed were safe. This decision will be welcomed by traders since it resists further expansion of the circumstances in which charterers will be found to have warranted port or berth safety. It follows a number of decisions, including AIC Limited v. Marine Pilot Limited (The " Archimidis"), [15]in which the courts have found that charterers warranted port safety where there was more than an element of ambiguity in the charterparty terms. By rejecting the contention that safe port warranties may be implied into charters as a matter of course, the Court of Appeal has identified the limits of the protection that owners will be afforded in this area under English law.

3. 2. Effect or negligence by master or crew

It is frequently argued by the charterers that although the port is unsafe, the damage suffered by the owners has been caused by or contributed to by the negligence of the master and crew. It may be said that the master should have seen the danger for himself and refused to enter the port. Such

argument often face the practical difficulty when it comes to arbitration or litigation, that it is awkward simultaneously to contend that the port was safe and yet also that it was so obviously unsafe that the master should have disobeyed charterer’s order to go there. It may also be said that the damage was caused not by the unsafety of the port but by the negligent handling of the ship by her master or crew at the relevant time, or partly by one and partly by the other. If the negligent act the master or crew rather than the charterer’s breach of the term as to safety is the effective cause of the damage, there is no liability on the charterers. It is said that the chain of causation from the breach by the charterers has been broken by the intervening act or default by the master or the crew.[16]But the dilemma in which a master is frequently placed and the fact that it is the initial breach of contract by the charterers that has placed him in it, has to be taken into account in determining the effective cause. If the master acts reasonably, even though mistakenly, in the situation confronting him it is unlikely that his actions will be held to have been the effective cause of the damage. [17]Where the master has fears about the safety of the port but eventually decides to enter it or remain in it, damage which then caused the ship may yet be regarded as the natural and the probable result of the charterer’s order and thus caused by it. This is particularly likely to be so when the master’s fears have been allayed by the charterers or their agents. Even though paid for by the charterers a pilot is usually to be regarded as the servant of the owners and negligence on the part of the pilot may therefore be such as to constitute a break in the chain of causation between the charterers’ order and the damage suffered. In some cases, however, the pilotage arrangements at a port may be regarded as a characteristic of the

port and in such circumstances the incompetence or negligence of a pilot may be held to be one of the elements constituting the unsafety of that port. [18]It may be that the charterers' breach is held usually held to be the effective cause of some clearly defined part of the loss or damage and the negligence of the master or crew the effective cause of another distinct and separable part. Examining that possibility may entail difficult or complex evidence, and fine judgments, but if ultimately that is the finding, there is no difficulty about the result: the charterers must pay damages for the consequences of their breach; but not for the separate consequences of the crew negligence. In case the master discovers the unsafety of the port only at some stage of the voyage, after having obeyed the charterer's order, he should refuse to enter that port or, if already within it, leave that port. If the master proves to be negligent in his decisions, then the charterer is not liable for damages. The master is frequently placed in a dilemma and the question is whether he acted reasonably. If this be true, even though acting mistakenly, in the situation confronting him, it is unlikely that his actions will be held to have been the effective cause of the damage. But, if the sole and only cause of damage is the failure of the master and crew to exhibit the standard of navigation and seamanship expected of them, then the port is safe. If the master has fears or doubts about the safety of the port but eventually decides to enter it or remain in it, damage which is then caused to the vessel may yet be regarded as the natural and probable result of charterer's order, particularly when master's fears have been allayed by the charterer or his agent. Claims for breach of contract in respect of the safe port warranty, will be limited by the rules of causation and remoteness of damage but might take possible forms:• Against physical damages to the

vessel.• The shipowner may seek to recover the costs of avoiding the dangers, i. e. extra costs incurred for tugs or lightering the vessel etc.• Damages for detention of the vessel when she is trapped in the port for an unusual period. The delay must be such as to frustrate the adventure. One last issue that needs clarity is the continuing guarantee of the safety of the port during the period it is to be used. In past cases it has been ruled that there is an equitable allocation of risk, the shipowner undertakes for a specified period of time to comply with charterer's orders in return for a guarantee from the charterer to use the vessel only between safe ports. The opposite view suggested that the obligation which was limited to a warranty that the nominated port of discharge is safe at the time of nomination and may be expected to remain safe from the moment of a vessel's arrival until her departure. This links the obligation to the characteristics of the port at the time of nomination, irrespective of the knowledge of the charterer. This position under law was ultimately concluded in the case of Evia No. 2. It was settled that the charterer would be liable for the existing situation or condition at the port even if he was unaware of the circumstances, although it is the accepted norm that he is not liable for the occurrence of situations that is out of the ordinary and unusual. The existence of a secondary obligation would come to light if such a clause is placed in a time charter. If in case of the existence of such a secondary obligation, then the charterer is bound to navigate or provide the ship to a port where it is not at danger.

3. 3. Frustration/Force Majeure

The parties to the charterparty should check whether their contract contains a provision that allocates risk as between the parties in the case of

supervening events. If so, such a provision would specify where responsibility lies in the case of such an event. However, where there is such a provision, but it does not expressly cover the earthquake / tsunami scenario, then one or other of the parties might seek to rely on frustration of the contract. Under English law, it is rare for a party successfully to demonstrate that its contract has been frustrated. This will require the party alleging frustration to establish that circumstances have changed to such a radical extent since the contract was concluded that the contractual obligation in question can no longer be performed or, if performed, would be very different to the obligation which was originally undertaken. Mere inconvenience, hardship, additional expense or delay will not generally amount to sufficiently frustrating factors. However, where the vessel itself is damaged as a result of the tsunami, there may be an argument for frustration. Furthermore, in certain circumstances, a delay may be such as to amount to frustration and this will depend in part on the length of delay as against the length of the charterparty, although this is not a conclusive factor. By way of example, in The Sea Angel[19], the Court of Appeal held that a delay of three or so months towards the end of a short (20 day) time charter caused by the unlawful detention of the vessel by the port authorities did not frustrate the charter. Whilst there is no general concept of force majeure in English law, there may be a force majeure clause in the charterparty and it is arguable that an exception such as " Act of God" would cover the Japanese disaster. Again, however, the relevant provision and the prevailing circumstances would have to be considered closely by the party seeking to rely on force majeure before concluding whether or not there was a force majeure event

CHAPTER FOUR

APPLICATION OF SAFE PORT WARRANTIES IN VOYAGE CHARTERPARTIESThe concept of safe port exists equally in voyage charters. Where a charterer nominates a port that was originally safe but is subsequently considered unsafe after the spill incident, the charterer is not obliged to re-nominate unless expressly provided otherwise in the charter. Again, the owner can rely on his liberty to take the vessel only " so near thereunto as she may safely get/reach" if there is such a provision in the charter.

4. 1. Delay or damage at the port

Owners who have complied with charterers' orders to proceed to an unsafe port may also have a claim in damages if there is any physical damage or delay.[20]In a voyage charterparty, the charterer pays freight to the owner. This is payment, not only for the voyage itself, but also for the agreed time in which to load and discharge his cargo. If a charterer takes longer to load and discharge than the laytime provided for in the charterparty, then he is usually liable to pay damages by way of demurrage. The rate of demurrage is normally fixed on a daily basis and will be payable per day or pro rata for any part of a day. Some charterparties also provide that if the cargo is loaded and discharged in less than the laytime allowed, then the shipowner will pay a sum of money to the charterer. This is despatch and is often set at half the demurrage rate.

4. 2. Port Nominations - a Voyage Charter perspective

The key difference under a voyage charter is that the vessel, if detained, will not be earning hire. Unless demurrage is running or it can be shown that there is an actionable breach by the charterer, the risk falls upon the owner

and in particular does so where the safety of the nominated port or berth has been agreed by the owner. 4. 2. 1. Impossibility at time of nominationWhere a charterer nominates a port which is simply impossible to reach because of the oil spill - for example if the nominated port is shut at the time of nomination, or if the slick prevents port access - the charterer is obliged to make another nomination.[21]4. 2. 2. Supervening impossibilityIf at the time the charterer makes the nomination the port is open but it is subsequently closed, an issue arises whether a voyage charterer has to nominate another port for loading or discharge. If a charterer has validly nominated a load or discharge port under a voyage charter, that nomination can be changed but only with the agreement of the owner. Absent agreement, the vessel may proceed to the port " or so near thereunto as she may safely get/ reach" and there give notice of readiness and sit there earning demurrage until the port clears. A charterer will be advised to negotiate revised terms well in advance if there are real concerns that the port will not promptly re-open.[22]

CHAPTER FIVE

THE CONTRIBUTION OF THE ISM AND THE ISPS CODESThe most common defense a charterer could use in order to be rendered not liable in case of the occurrence of any untoward incident, is that the incident was due to the disregard or negligence of the master or the crew. It is a prime duty of the master or captain of the ship to steer the ship to safety and hence have assessed the safety of the port prior to navigating the ship to that port. However, when the order is issued to the Master to steer the ship toward that port, then there is a conflict of duty because there is either the breach of contract in case the master refuses to abide by the order or the breach of

his duty in the event that he fails to ensure the safety of the ship. If the master acts reasonably, even though mistakenly, in the situation confronting him it is unlikely that his actions will be held to have caused the damage. [23]However, the advent of the International Safety Management Code[24]has altered considerably the Master’s position. As per Article 5, the master shall continue to have authority and responsibility to make decisions and Article 6. 1. 3 dictates that he must be offered the necessary support to do so. He is also required to be familiar with the safety management system of the company that has recruited him as well as per Article 6. 1. 2 of the ISM Code. The company is also duty-bound to assure the familiarity of the employees with the company’s safety management system as per Article 6. 3 of the ISM Code. The creation of the ISM code is to level out an international standard for the safe management and operation of ships, suffice to say that its interest extends to the safety of the ports and the potential hazards that threaten the vessel.[25]Most ship owners mandate adherence to the In the open market, early compliance with the ISM Code is required for competition reasons, while the charterers, particularly in the oil trade, will possibly extend their enquiries to the integrity of the shipowner’s SMS measuring them against the provisions of the code itself.[26]Now, a related clause is inserted in charterparties, this way responding to the commercial consequences of the code: " During the currency of this charterparty, the owners shall procure that both the vessel and the company shall comply with the requirements of the ISM code. Upon request the owners shall provide a copy of the relevant SMS to the charterer". The ISPS code lays down procedures to be adopted by port and flag states to safeguard the future of the shipping industry by protecting people, ships and

ports mainly from terrorist attacks. The code applies to all commercial vessels, mobile offshore units and port facilities. Also, the code built its scope on a strong partnership between ship and port to deter and detect acts threatening security before they develop into a problem. The ISM code, although the SMS deals with different issues, through the emergency response procedures can show a common disciplineThe ISPS code introduces three main characteristics. The first one deals with all stages of the voyage, i. e. prior to entering the port, whilst in a port, so it is the vessel's responsibility to comply with the requirements for the security levels set. Secondly, it refers to the professional judgment of the master in taking decisions to maintain the security levels of the vessel.[27]Thirdly, it refers to the responsibility of the port in terms of security levels that may affect the vessel. The above characteristics could be named as Critical Success Factors that contribute to the safety of the adventure and the performance of the contract. They are examined throughout the whole period, from the time the contract is made, and at the duration of the contract in respect of the safe reach, use and depart of the nominated port, in case claims arise.

Seaworthiness and port facilities

The ISPS Code, as opposed to any other work of the IMO, does not deal only with vessels; it is, as was said earlier, the first instrument of the IMO to extend its coverage to shore based facilities, i. e. port facilities, local administrations and contracting states. This means that the contracting government has to nominate ports to which the Code will apply and the organizations and local authorities responsible for ensuring compliance with the code. Once the ports are nominated then the contracting government

and local authorities have to arrange for these ports to obtain the relevant documents and certificates[28]and appoint a Port Security Officer.[29]The effect of the Ports Facilities on Seaworthiness appears in four situations: The first scenario is when a vessel, which is in compliance with the code, has interface with a complying port and it responds positively to any changes to the security level, if any, required by the flag state or the port facility itself. In this case there will be no problems as long as both sides comply with their security plans and procedures. The seaworthiness of the vessel would not be affected and there should be no delay or any problems with the vessel entering the port facility.[30]The second scenario, is when a vessel complying with the Code, comes into interface with a complying port but it does not change its security level to the one required by its flag state or any other contracting government port at which the vessel is visiting. where the vessel sails to enter the next complying port and the port facility requires to see the security records of the last ten ports the ship visited, and sees that there was a breach of security, either because the vessel did not change its security level or because she visited a non-complying port, then the authorised officer can take prescribed[31]steps. The third situation is when a complying vessel visits a non-complying port; either because the government within which the port is based is not a contracting government to SOLAS convention, or because it was not nominated as one of the ports to which the Code would be applicable, and she does not change its security level. The last situation is when a non-complying vessel visits a complying port. It should be borne in mind that a complying vessel has to keep records of the security levels it operated at for the last ten ports she visited. The authorised officer might detain the vessel if she was in port, or prevent the

vessel from entering the port due to the lack of required certificates. In the last three scenarios, due to the delay or prevention of the vessel from entering the port or leaving it, the cargo owners or charterers might claim that the vessel is not seaworthy due to the lack of documents or because the shipowner allowed his vessel to visit a non-complying port. Although in the latter case it is not the fault of the shipowner that the port is not ISPS certified, it is still his fault that he allowed his vessel to visit such a port. It is not yet known what the opinion of the courts or arbitration tribunal would be with regard to this situation, but problems would rise especially when the delay caused damage to the cargo or the loss of another charter or shipmen, etc.[32]