

The sea route between countries law contract essay

Law



SYNOPSIS

Introduction

With a little more than three-fourths of the worldwide trade being done via the sea route between countries, it is undeniable that the safety and security of the ports where the ships dock are of utmost importance. With the increasing number of security threats world-over, there is heavy risk of damage to cargo, port personnel and also the possibility of the spread of various communicable threats which might injure a whole nation. Most charter parties contain an implied warranty that the charterer will nominate a safe port at which the vessel will dock. The undertaking of safe port warranty concerns the interests of both parties to the charter party as well as the sound development of shipping practice. The problem is complicated and is different in a voyage charter and a time charter. In view of the simple clause in the charter party, some problems existing in the related laws and lack of established cases in judicial practice in India, the author take it indispensable to have a thorough inquiry into safe port warranty under charter party. Administrative shortcomings and failures of port authorities may render a port unsafe. The law is, however, largely unsettled. It is clear that these issues are of increasing relevance to the law of safe ports. On the other hand, it is not entirely clear as to how closely the charterer's obligation resembles that of strict liability.

Rationale of the study

The concept of 'safe ports' continues to be an area of critical concern for charterers and shipowners. Traditionally viewed in light of the physical

characteristics of the port in question, the modern approach taken by the courts often includes a detailed examination of administrative features of the port authority. In light of increased global security and health risks the recognised principles are under scrutiny. This paper examines the nature of the safe port obligation and analyses the important decisions dealing with administrative shortcomings. It contextualises the emerging issues and highlights the future implications for the law of safe ports.

Aims and objectives

The researcher aims to highlight the prevalent law pertaining to the obligation of the charter to nominate of a safe port and the requirements of a safe port facility as per existing statutes and provisions on the point. Further, recent cases concerning the matter are required to be studied, highlighting the gap between the law and the practicalities. In this manner, the researcher aims to encompass the whole concept of safe ports and bring to light the discrepancies that exist pertaining to the safety and security of ports.

Research Questions

What are the requirements of a safe port/berth as per existing laws? Is there an implied warranty that the port nominated by the charterer is a safe port? What are the consequences of the breach of this warranty and the remedies available for such a breach of warranty? Is there a difference in the safe port nomination in a time charter party and a voyage charter party? Is there an effect on the safe port nomination clause in case of termination of contract or on the occurrence of a force majeure event.

Hypothesis

There exists a strict liability for charterers to exercise due diligence in the nomination of a port. The Charterer is strictly liable while the ship is docked at a certain port and the obligation doesn't merely end with the nomination of a safe port. The administrative control of the Port is also considered as an aspect in nominating a safe port in light of recent developments in maritime law.

Methodology

To get an objective view of the paper the basic research method followed is doctrinal. Essential fraction of the research lies in the study of the books, case studies and current events. This paper will be heavily relying upon the material gathered from the various articles researched and collected from internet and my understanding of those articles. This project is mostly deductive in nature. The author aims to have a deep study on safe port warranty clause under charter party and offer some enlightenment to the legislation and the practice in India.

Limitations of the study

This paper discusses the English Law on the matter and does not propose to delve into the view of the law of any other jurisdiction on the matter. The study focuses on the English case laws on the matter and other jurisdictions which apply the English Law's take on maritime law. Although the author briefly introduces the requirements of the clause in a voyage charter party, this paper mainly intends to focus on the requirements in a time charter party.

CHAPTER 1

INTRODUCTION TO THE CONCEPT OF SAFE PORTS The primary obligation of the charterers with regard to the safety of the port to which they order the ship arises at the time they give that order and it is at that time that their compliance with the obligation is to be judged. At the time the port need only be prospectively safe for the ship, at the appropriate time in future, to reach, use and leave. Thus, the primary obligation will not be broken by a state of unsafety prevailing at the time of the order which will have been cured before the ship's arrival. Nor will the primary obligation be broken if the port is prospectively safe at the time of the order but a state of unsafety subsequently arises from some unexpected and abnormal event occurring after the order has been given; in this sense the obligation is not a continuous obligation. Initially, the view in relation to the concept of safe ports was that it is essentially a matter of common sense- the assurance of safety requirement must be ascertained by considering the requirement of the vessel and the cargo that it carries apart from the general safety requirements of a port. As might be expected, risks to the ship arising from a war or civil conflict are capable of making a port unsafe. The English courts will consider a port unsafe in this situation if a reasonable owner or master would have decided not to proceed there. What is essentially considered to be a " safe" port has been defined by Sellers, L. J. in *Leeds Shipping v Société Française Bunge*[1] in the following words: '...a port cannot be safe unless, in the specific time period, the designated ship can approach it, use it and depart from it without, an occurrence of anything out of the ordinary and without suffering exposure to anything dangerous, unless it can be avoided

by the exercise of prudent navigation and seamanship...’There have been a number of English case laws on the point which has laid out the norm of what typically constitutes a safe port. The following factors have been considered as important factors in adjudging the safety of a port: the geography and topography of the port can make it unsafe; shallows and sandbanks; man-made hazards, such as an uncharted anchor or a wreck; poor navigational aids (including an inadequate system of pilots); inadequate mooring facilities; failing to have adequate monitoring or warning systems in place; political hazards, such as war or insurrection (although it should be noted that the safety of a port in conditions of war is usually addressed in a bespoke war clause); inability of a country’s judicial system to give adequate relief to a vessel unlawfully detained by the Executive Government rendered the port unsafe; Safety must be decided by reference to the particular vessel in question.

Elements of Safety

The concept of a safe port or a berth is that a vessel must be able to safely approach it, dock there and then depart without encountering any danger. If any sort of such danger could be avoided by the use of any navigation skills that is normally expected to be employed by the master of the ship, then it is not considered to be an unsafe port.

Port must be safe to approach and leave

The primary obligation of the charterer is to nominate a port, where a vessel must be able to approach safely, taking into account the size of the vessel and the goods onboard the vessel. It is his obligation to ensure that the

structure of the vessel is not damaged and that that vessel is not forced to unload some of the goods onboard the vessel onto lighters if the draft is too great to let her enter the port safely. The charterer is not bound to ensure that the route is safe or that the shortest route must be nominated.

Port must be safe to use

The position of the port, the facilities available and the layout of the port should be such that it is able to accommodate the ship and its requirements in terms of cargo discharge. The port must be equipped with tugs, tubes and other machinery for the efficient discharge of cargo and any other necessary action that the ship may require at the port. The port must also have employees that are skilled and possess sufficient standard to deal with goods on board the ship and also the safety in the manner in which they approach the ship. The port must also have access to data that the master of the ship may require for the safe voyage of the ship. The charterer is obligated to ensure that there is no political strife in that country or that the ship and the master will not be treated prejudicially on account of political difference. The risk that a vessel may be seized by the authorities at the port is a danger which can lead to the port being treated as unsafe. The charterer must nominate a port that is not merely safe to enter but safe for normal cargo operations as well. Further, if there exists uncertain weather conditions and the charterers have given adequate warning, then they do not have to accept liability for the same. There must always be adequate sea room to manoeuvre the ship and the port must be equipped to ascertain that there is always sea room. .

Good Navigation and Seamanship

It is primarily the duty of the master to ensure the safety of the ship and perform his duty of sailing using good navigation skills and seamanship. This is always adjudged by the test of ordinary prudence of a Master. If in case, even with the exercise of such prudence the Master is unable to navigate the ship to safety, then the port is considered to be unsafe.

Recent Developments in the Concept

Of late, the weather conditions at a port which could render it unsafe, is considered to be a factor which deems that port to be unsafe. However, it has been held that if the port has adequate facilities to predict the weather and communicate it to the approaching/departing ships, then it may still be considered to be a safe port. Safety in maritime law is a term that varies according to the developments in the field, relating to the improvement in technology. It has been considered to incorporate the technical facilities that are present at the port within the ambit of what decides the safety of that port. The navigational aids at the port is, of late, considered to be an essentiality that determines port safety. Further, if the vessel requires any equipments such as a tug for example, its absence will render the port unsafe. The ability of the port to deal with the occurrence of anything out-of-the-ordinary is also a factor that is being considered recently by the courts in their decision. This is considered by the courts in case of the occurrence of any untoward incident where the examination of the expert evidence is done to identify whether the port could have salvaged the damage that had occurred. The interpretation of the concept of 'safe ports' is majorly done by arbitrators. Therefore, most of the decisions on this point are based on

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subjective interpretation of the occurrence as the arbitrators are given the freedom to decide without reference to established case laws. A port that has been decided to be unsafe for a certain ship, may be deemed to be safe for another. English and US law concerning port safety are broadly similar. It is not necessary for the vessel to be in physical danger for a port to be treated as unsafe. The risk that the trading of the vessel will be seriously disrupted can constitute unsafety. An 'inordinate' delay caused by, for example, ice or perhaps serious congestion, is capable of making a port unsafe. The delay would have to be so long as to deprive the charter of its commercial purpose, which in the case of a short-trip time charter would clearly be a shorter period than in a period charter. The safety of a port can extend beyond the port limits and includes the approach. Where the approach to a port is lengthy, e. g., along a major river such as the Mississippi, it is arguable that the obligation to nominate a safe port includes a warranty that extends for the length of the river - even where the ship is detained or damaged more than a hundred miles from the port.

Interpretations by the Court

The English courts have tended to be more willing to recognise the application of a duty to nominate a safe port to the approach to the port than to the situation once the ship has departed the port, even where the vessel has no option but to retrace its route along the approach. There is, however, no logical reason for this, and there are cases in which a charterer has been found liable where the vessel could not safely return to the open sea after departure from the port. Safety is a question of fact. The test is objective and does not depend on the state of knowledge of the charterer concerning

conditions at the port, unless the obligation in the charter party to nominate a safe port is modified, e. g., by an express provision requiring the exercise of 'due diligence' on the part of the charterer in nominating the port.

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.[2]In the matter of *The Evia*, [3]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*[4]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. In the case of *Shipping Corporation of India Ltd. v. Mare Shipping Inc.*,[5]J. Alamas Kabir held that it was the Charterers who having the choice of a safe port, had selected an unsafe port as the discharge point and as such the suggestion made on behalf of the Charterers that it was the responsibility of the Owners of the vessel to check whether the ship could be safely moored

at the named port, is untenable. The responsibility of the Owners of the vessel ended with the declaration of the equipment available on board for mooring and berthing for the purpose of discharge of its cargo. No prior checking had been done by the Charterers to ascertain as to whether with the mooring equipment on board the vessel she would be able to moor safely at the named port for discharge of her cargo.

Lord Roskill's Theory

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*[6] 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. The second situation that he considered was where the charterer had performed his primary obligation by ordering the ship to go to a port which was, at the time of such order, prospectively safe for her and she had proceeded to and entered such port on compliance with such order, new circumstances arise which render the port unsafe. It was his

opinion that the first situation imposes a secondary obligation on the charterer to cancel his original order and for safety reasons, direct the ship to prospective safety at another port. Since it was his order to go to that port in the first place, he must ensure protection for the ship from any prospective danger. 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 ship to leave the port then there cannot be the imposition of a further obligation on the charterer.

CHAPTER 2

NOMINATION OF A SAFE PORT There is obviously a difference between the nomination by the charterer of a port and the identification of a port in the charter party. If a port is named in the charter it is doubtful whether charterers can meaningfully be said to be providing any warranty as to the safety of such a port. The position is less clear if a range of ports is identified from which a charterer must make a nomination. If 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 abnormal occurrence is an exceptional event that is not a characteristic of the port. It can include a collision caused by the negligent navigation of another vessel, and truly exceptional weather conditions. If it is a feature of the port that allows negligent navigation to cause damage, a successful claim by owners may still be possible. Unanticipated violent acts by 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. If the prospectively safe port becomes unsafe after the charterer gives the order, the charterer should rescind the order and nominate another port. This applies even once the vessel has arrived at the port, provided it is in a position to leave. 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. The claims made normally concern damage to the ship. The owner will seek to recover the costs of repair. In addition, as the claim is one for breach of contract, economic loss is recoverable, provided it is foreseeable, and will include claims for loss of use. In addition, the owner may face liability to third parties where, for example, the vessel damages port facilities, pipelines or cables. In such a case the owner can look to the charterer for an indemnity for any liability incurred. 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.

THE SAFE PORT NOMINATION ISSUE

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 is that of *The Archimidis*^[7] and the second being *STX Pan Ocean Co Pte Ltd v. Ugland Bulk Transport A. S.*^[8]

FACTS

The *Archimidis* was chartered for the transport of gasoil from a 'safe port' Ventspils. The charter party for the voyage contained clauses requiring the charterer to pay deadfreight in the event it failed to supply the full cargo of 90, 000 metric tons. The vessel arrived at Ventspils to load cargo. However, because of the 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 metric tons. The charterers tendered for loading a quantity of 93, 410 metric tons 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 metric tons. The owners brought arbitration proceedings against the charterers claiming deadfreight on the difference between the minimum quantity of 90, 000 metric tons and the 67, 058 metric tons actually loaded. At the hearing of preliminary issues, the charterers submitted that they had tendered above the minimum cargo of 90, 000 metric tons. 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. 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. 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'

CHAPTER THREE

THE IMPLIED WARRANTY OF SAFETY In the absence of an express warranty, it is general practice that the Judiciary may be ready to imply a warranty of safety into the contract. This is not done in cases where there the charterer has no obligation to nominate a safe port. This also does not apply in cases where the contract dictates that the vessel trades in a warzone or any other specified dangerous 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.[9] 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 berth which they nominated would be 'prospectively safe' with regard to dangers which were unique to that berth.

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 voyage 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")*,^[10] 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. 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.[11] 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.

[12] 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.

[13]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. Obligations and Remedies for Safe PortsWhen a

situation arises that need for an alternative nomination, and during the fresh nomination the port must be prospectively safe, it is reasonable that this becomes easier in time charters where the vessel has been chartered for a specified period of time. In voyage charters the position is quite different. The agreement is for chartering a ship for a voyage between specified ports. So no substitutions may be permitted and the shipowner could rescind further performance of the contract in the event of the breach of the safe port undertaking.[14] 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.

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*[15], 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 FIVE

APPLICATION OF SAFE PORT WARRANTIES IN VOYAGE CHARTERPARTIES

The 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. Delay or damage at the port If the vessel has called at a port which is affected by the spill, she is likely to be on demurrage as a result of delay- or half demurrage under BPVOY4 if the delay was not within the reasonable control of owners or charterers. 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. 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.

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.

Impossibility at time of nomination

Where 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. Supervening impossibility If 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.

CHAPTER FOUR

THE CONTRIBUTION OF THE ISM AND THE ISPS CODEThe 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. [16]However, the advent of the International Safety Management Code[17]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.[18]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.[19]Now, a related clause is inserted in charterparties, this way responding to the commercial consequences of the code: "[D]uring 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 DOC and SMC to the charterers...". 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. Thirdly, it refers to the responsibility of the port in terms of security levels that may affect the vessel. Both the ISM and the ISPS codes are usually mentioned during the negotiations, before the deal is closed. In the pre-chartering period, the charterer demands for the insertion of related clauses. Before signing the contract: The charterer is not obliged to consider the ship owner's convenience when selecting the port, provided it is within the indicated range. The charterer warrants that the port is safe. The ship owner can refuse a nominated port if he is aware that the port is inherently unsafe. When the contract is made: The right to nominate a safe port is a clause (express term) included in the contract. In the absence of such a clause the common law implies an obligation (implied term) to the same effect. The charterer's obligations regarding the safety of the port are primarily related to the moment when the order is given. At that moment the port must be prospectively safe, and in the absence of unexpected events, it will be safe for the ship at the time when she actually arrives there. This requirement does not entail that the port must be safe at that particular moment but merely that it will be safe on arrival. Approaching the port: The ship must be able to reach the port in safety.[20]As per Devlin J.[21]" it is essential that the danger must be linked with the use of the nominated port, because it is obvious in point of fact that the more remote it is from the port, the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage which he orders must be one which an ordinary prudent and skillful master can find a way of making in safety". In most situations the

master is unaware of potential dangers and he presumes that the charterer has, in fact, nominated a safe port. As a result, on arrival at the port, if he discovers any hazards that render the port unsafe, he is still entitled to refuse to enter.[22]Using the port: Most cases examine the issue of the safety of the vessel while in the port itself. In point of fact the obligation refers to the safety of the port at the time it is to be used rather than to its safety at the time of nomination. The port must be physically safe in its location, size and layout for the particular ship to use at the relevant time, having regard to both its natural and artificial aspects. In situations where the vessel, being inside the port and facing dangers, i. e. outbreak of hostilities, the charterer must give a new order and send the vessel outside the port limits only if she can escape danger or further damage. Departing from the port: The port will not be safe if the ship is endangered when leaving from it. However, it has not yet been clear how far the warranty of safety extends after the vessel has left the port. During the last three phases, the master (and/or the owner) and the charterer may refer to the charterparty clauses, particularly those addressing issues such as the application of an SMS that extends to the safety of the vessel, the ship security plan and the port security plan that affect their security levels. Additionally, the model includes specific factors that affect the safety of the port.

- The relevant period of time. It is clear that it covers the whole period during which the vessel is using the port from the moment of entry to the time of departure (Wilson, 1998). Under certain conditions it may cover risks encountered in the approaches to the port.
- The abnormal occurrences. The requirements that the event shall be unexpected and abnormal are

cumulative. An event may be highly abnormal, and yet, if in the special circumstances it is to be expected, the charterer will be in breach if he does not give a fresh order for another port 20 (Scrutton, 1984). • Political risks. A port will be unsafe if, apart from natural and physical causes, there is danger to ship and cargo in proceeding to and entering and using the port from political causes, i. e. the presence of a blockade or the outbreak of hostilities. • Dangers that the master may avoid. The safety of the port should be viewed with relation to a vessel properly manned and equipped, and navigated and handled without negligence and in accordance with good seamanship. A port is not safe if more than ordinary prudence and skill is needed to avoid exposure to danger there. 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[23]and appoint a Port Security Officer.[24]The effect of the Ports Facilities on Seaworthiness appears in four situationsThe 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. 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 of the contracting government can take one of the measures stipulated in Regulation 9. 1 of Chapter XI-2 of SOLAS Convention. 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 shipment... etc.

CHAPTER SIX

CONCLUSIONThe international and "borderless" nature of shipping means that bilateral, regional and even global co-operation is often required to ensure an effective regime for ship safety, maritime security and protection of the marine environment.