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Defence class cover

Unsafe Ports, a claims-handling guide

Introduction

When a ship suffers damage whilst alongside a berth or within a port, shipowners will want to recover any loss or damage that may result. A shipowner typically attempts to make such a recovery by way of an unsafe port claim against the charterer.

An unsafe port claim may arise in many and varied ways. Low-value claims may involve something as minor as cosmetic hull damage as a consequence of a defective fendering arrangement. However, at the other end of the spectrum, there is potential for extensive liability, not only in relation to the expense of repairing a ship, but also in respect of a number of consequential losses. These may include loss of hire or detention, liability for cargo loss or damage, salvage and pollution costs, and any claims by port authorities or berth owners.

Each unsafe port case is specific to its own facts and invariably necessitates a great deal of factual evidence. This guide introduces members to the basic legal concepts involved in an unsafe port dispute and also explores the evidentiary basis for advancing or defending a claim.

How does the obligation arise?

Express warranties

Many standard form charterparties contain an express warranty of safety of the loading or discharge port or berth by the charterer (eg lines 27-35 NYPE 1946 or lines 18-19 Baltime form). This is commonly referred to as a safe port warranty. This clause will take effect regardless of whether the charterparty contains a named port or range of named ports.

Implied warranties

In circumstances where a charterparty does not contain an express warranty, there is still a possibility that one may be implied. There are no absolute rules in this regard and each

case will turn on the true construction of the charterparty in question.

However, generally, the more liberty a charterer has under the charterparty, the greater the likelihood that a safe port warranty will be implied. Unlike with express warranties, where a port is named in a charterparty as part of a range of named ports, it is unlikely that any warranty of safety will be implied.

What is an unsafe port?

The classic definition of an unsafe port was formulated in *The Eastern City*¹ by Sellers L.J. who stated 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.'

Relevant period of time

The relevant period of time is the time when the ship will be using the port (and, where relevant, approaching or departing from it). However, the prospective safety of the port is judged at the time of the charterer's orders.

In practice, this means that a charterer may still be liable if a state of unsafety exists at a port at the time an order is given despite it being remedied prior to arrival.

There is also a potential secondary obligation on charterers dependent upon the circumstances and type of charterparty used. In a time charter, if a port subsequently becomes unsafe while a ship is en route, a new obligation is imposed upon the charterer to cancel the original order and order the ship to another port. This obligation may also apply where the ship has arrived at port, a subsequent state of unsafety has arisen and the ship is still able to leave. It is less clear whether this obligation arises in a voyage charter context. However, it seems likely



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from the prevailing English judgments that, if proceeding to a named or nominated port, this secondary obligation will not arise.

Particular ship

It is well established that the question of safety applies to the particular ship involved and the particular condition she is in. This may include issues such as her dimensions, draughts, and laden or ballast condition.

Physical/geographical limitations

Under a safe port warranty, a port is only deemed safe if the ship may approach safely, use the port safely at the relevant time and depart from it safely. Where a charterer is subject to a safe port obligation, the charterer will also be responsible for the safety of docks, wharves, berths and other places within the port.

The meaning of safety

Safety encapsulates both physical and political safety. Physical risks include, amongst other things:

- grounding due to uncharted shallows, shoals, banks, bars, rocks or submerged objects/ hidden wrecks
- meteorological/natural risks such as storms, swells or ice
- berth characteristics such as defective fendering, water draft or air draft
- port set-up, including defective berthing procedures, inadequate tugs and pilotage arrangements.

Danger also extends to political unsafety and the risk of war, terrorism or epidemics. It may also include the potential risk of a ship being blacklisted or detained at a subsequent port. The key issue in determining this is whether the particular source of danger is a characteristic of the port in question.

Defences

Abnormal occurrence

The charterer will not be in breach of its obligations if the cause of any danger is an abnormal occurrence. A port will therefore only be unsafe if the danger flows from its own qualities or attributes. The inevitable consequence of this is that there is a focus on the systems in place for avoiding known physical dangers at a port (eg training and competency of pilots, hydrographical surveys, etc). If inadequate systems are in place, any unsafety is more likely to be seen as a characteristic of the port as opposed to an abnormal occurrence.

In *The Ocean Victory*,² the Supreme Court upheld the Court of Appeal's ruling reaffirming the legal test for what makes a port unsafe as set out in *The Eastern City* and held that one must look at the frequency of the events happening in combination, not individually, when assessing whether they were an abnormal occurrence.

Good navigation and seamanship

A charterer will not be liable for any dangers that are avoidable by ordinary good navigation and seamanship. If more than ordinary skill is required to avoid these dangers, the port will not be safe. However, a port will not be unsafe simply because, for instance, tug assistance is required.

Negligence/causation

Another common defence (which is often linked to an error of navigation/good seamanship) is that the negligence of the master or crew caused, or at least contributed to, the damage. By way of example, this may include a failure to prepare or follow an adequate passage plan or a straightforward ship-handling mistake. The effect of this is that the chain of causation between the charterer's orders and the damage sustained is broken.

Owner's duties and obligations

A shipowner also has its own duties and obligations in response to an order from the charterer. Although the master is entitled to assume that the charterer has complied with any safe port warranty (by nominating a safe port), the master's obligation is only one of reasonable conduct. Any order given by a charterer directing a ship to an unsafe port is a breach of the charterparty and the owner is not obliged to follow it. However, if the master reasonably obeys the order and the owner suffers loss as a consequence, it will be entitled to damages.

In practice, an owner risks breaching the charterparty if it fails to comply with a reasonable order (in the event the port is, in fact, safe). This would allow the charterer to terminate the charterparty and claim damages at the charter rate for the balance of the charter period. In such circumstances, it may be necessary to sail under a notice of protest.



Evidentiary Basis

The quality of contemporaneous evidence is crucial in determining any unsafe port claim. In a world of increasingly available data, the emphasis is on obtaining and preserving such evidence as soon as possible.

Each potential unsafe port dispute will require a unique analysis of the evidence that is likely to be relevant. However, in very broad terms, the following documentation/information for the relevant periods should be considered at the outset:

- The original or a photocopy/photograph of the chart used
- The ship's ECDIS data
- The ship's VDR
- AIS data available from the port or local ship traffic services
- Echo sounder trace (if a grounding)
- Damage/survey report(s)
- The master's/pilot's experience
- Characteristics of the ship
- The master's/pilot's berthing or plan, and the role and input of the tugs and pilot
- Evidence relating to the port's 'systems', ie buoyage, pilot training/competency/experience; accuracy/frequency of hydrographic surveys and/or dredging operations; the way in which information is disseminated (eg notices to mariners, etc).

Conclusion

The success or otherwise of advancing an unsafe port claim (for an owner) or defending one (for a charterer) is dependent on:

- the wording of the charterparty and the existence of any express or implied safe port warranties
- the evidence available
- where the fault lies.

Subject to the terms of the charterparty, if the cause of the incident was an error of navigation by the master, the shipowner will invariably have difficulty obtaining any recovery at all for the losses. If, on the other hand, the owner suffered loss or damage because of an unsafe port and the incident could not have been avoided by the exercise of good seamanship, the charterer will struggle to deny liability.

US position

Safe berth/port cases decided in the US/New York are typically resolved by arbitration in New York before commercial persons who are members of the Society of Maritime Arbitrators (SMA). Arbitrators in New York are guided by precedent established decades ago by US courts, which adopted the definition provided by *The Eastern City*³.

Occasionally, however, a safe port/berth case reaches the courts. In 1990, the United States Court of Appeals for the Fifth Circuit (Texas, Louisiana, Mississippi) held, contrary to precedent established in cases handed down by the United States Court of Appeals in the Second Circuit (New York, Connecticut, Vermont), that a safe port/berth warranty requires only that the charterer exercise due diligence to provide a safe port/berth⁴.

The holding in *Orduna* remains an outlier. In the recent case of *In re Frescati Shipping Co. (The Athos I)*⁵, the United States Court of Appeals for the Third Circuit (New Jersey, Pennsylvania, Delaware) declined to follow *Orduna* and followed the earlier Second Circuit precedent (which follows the English law precedent).

So, as a practical matter, parties to a safe port/berth dispute subject to New York arbitration will be dealing with the same issues as arise under English law, with one exception. Where appropriate, US courts and arbitrators will apportion damages between the owner and charterer. While some arbitrators and commentators struggle to justify such an apportionment in a contractual case, apportioning damages is a practical commercial option, again, in appropriate cases.

A good example is the award in *The Westwood Anette*⁶. While departing a berth at an isolated port in British Columbia, Canada, in high winds, the ship touched lightly against the metal plates on a mooring dolphin fender. A small hole in the hull resulted. Unfortunately, the hole was at a bunker tank and bunker fuel spilled into the water. The cost of the clean-up was C\$5m even though the mooring dolphin

suffered only cosmetic damage. A majority of the panel allocated damages 50-50. As to navigation, the majority recognised that the pilot and master failed to properly execute the unberthing manoeuvre, which caused the contact, however slight it was. On the other hand, the tugs provided were inadequate and, most importantly, it was foreseeable that ships departing this berth, which was often subject to high winds, would on occasion lightly touch the dolphin. The majority found that the design of the mooring dolphin was unsafe and constituted a danger that was not known or reasonably apparent to those navigating the ship. The dissenting arbitrator took the orthodox view that the cause had to be unsafety or poor seamanship, one or the other, and concluded that the berth was safe, but the pilot and master failed to exercise good seamanship and that was the cause of the damage.

As in England, such cases are fact intensive and, ultimately, turn on the specific facts.

Members should consider the above at the outset of any potential unsafe port claim and contact the club in the event a dispute arises.

Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question and the likelihood of achieving a successful outcome, if it is to lend support.

The club has a good level of experience in advising on and managing unsafe berth/port claims (both for owners and charterers). Members requiring further information on this topic should direct their enquiries to either their usual contact at the club, or to elisabeth.birch@ctcplc.com, or with respect to such claims to be resolved in the US, to leroy.lambert@ctplc.com.

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- 1 [1958] 2 Lloyds Rep 127
- 2 [2017] UKSC 35
- 3 E.g., *Cities Service Transp. Co. v. Gulf Refining Co.*, 188 F.2d 804 (2d Cir.), cert. denied, 343 U.S. 802 (1951); *Time Charters at 10A.1 to 10A.13* (7th ed. 2014); *Voyage Charters at 5A.1 to 5A.10* (4th ed. 2014).
- 4 *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990).
- 5 718 F.3d 184 (3d Cir. 2013)
- 6 SMA 4189 (2012)

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