Charterparties which do not contain an express warranty as to safety

Where a charterparty specifically names the loading port or berth and contains no warranty as to safety, no warranty as to the safety of the port or berth can be implied into the charterparty. In such circumstances, the owners are treated as having assumed responsibility for ascertaining whether the vessel can safely approach, use and leave the berth or port by expressly agreeing to proceed there (Reardon Smith Line Ltd v Australian Wheat Board*).

One would assume that the position should be the same where a charterparty, which contains no warranty as to safety, specifies a range of named loading or discharging ports out of which the charterers must nominate the actual loading or discharging ports. This was the view of the House of Lords in the “APJ Prit” [1987]*. However, the Privy Council appears to have suggested in Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* that the charterers are obliged to nominate only those ports which it is possible for the vessel to reach. It is submitted that the views expressed in the APJ Prit more accurately reflect the current state of the law. Where the charterers must nominate the load or discharge ports from a geographical range, it is probable that some warranty as to safety will be implied in the absence of any express provision in order to prevent the charterers undermining the very purpose of the charterparty by nominating impossible port(s). There is authority for this proposition in the context of time charterparties, but not yet in the context of voyage charterparties (the “Evangelos Th**”).

Definition of a safe port or berth

The classic definition of a safe port was given in the “Eastern City”**.

“A port will not be safe unless, in the relevant period of time, a 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”

These principles apply equally in the context of safe berth warranties, the doctrine being the same in each case (the “Stork”***). The charterers’ obligation is to nominate a port or berth which, when the order is given, is prospectively safe. In other words the port or berth must be likely, subject to the occurrence of abnormal and unexpected circumstances, to be safe at the time of the vessel’s arrival.

Safe Port Warranties

i) Absolute and qualified warranties

It is important to determine whether the warranty as to safety of a port in a charterparty is couched in absolute or qualified terms. The NYPE 46.1 form simply states that the vessel shall be employed “between safe port and/or ports” (line 27). If the charterparty contains this type of clause, the principles established in the Eastern City (supra) apply. However, if the warranty as to safety is qualified, other factors have to be brought into the equation and the owners’ protection will be reduced. The Shelltime 3.1 form contains a qualified safe port warranty in the following terms:

“Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks, anchorages and submarine lines where she can also lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage or submarine line and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid ....”

In the context of this clause, the “due diligence” obligation merely requires the charterers to display “reasonable care” and that such duty would be discharged if “a reasonably careful charterer would, on the facts known, have concluded that the port was prospectively safe” (the “Saga Cob”***)

ii) The charterers’ primary obligation to order the vessel to a port which is prospectively safe under time and voyage charterparties

The relevant time at which the port must be prospectively safe is the time when the vessel will be approaching, using and departing from it. In determining this, the particular characteristics (including length, beam and draft) of the vessel in question must be taken into account.

a) The approach voyage

A port will be unsafe if the vessel is unable to enter the port due to the port’s physical and/or climatic characteristics when considered in conjunction with the vessel’s characteristics. However, it is important to appreciate that a temporary obstacle, which renders the approach to a port dangerous whilst it subsists, will not mean that the port is unsafe unless the hazard a) cannot be avoided by good navigation and seamanship or b) causes delay for a period which is sufficient to frustrate the commercial purpose of the charter. In the Stork (supra), Mr Justice Devlin states that, “The law does not require the port to be safe at the very time of the vessel’s arrival. Just as she may encounter wind and weather conditions which delay her on her voyage to the loading port, so she may encounter similar conditions which delay her entry into the port, and the charterer is no more responsible for the one than for the other.”

The safe port warranty also extends to the means of access to a port which the vessel is obliged to use by virtue of the port’s geographical characteristics and/or the vessel’s characteristics. For example, where the port is an up-river port, the river and access to the river must also be capable of being navigated by the vessel in safety (the “Mary Lou”**). The risk of hostile attack en route to a port may also render it unsafe for political reasons (“Saga Cob”, supra).

b) Use of the port

A port must be physically safe in terms of its location, size, layout and its natural and artificial characteristics. It is not necessary for the port to be safe for uninterrupted use provided that the vessel may safely leave it as/when it becomes temporarily unsafe. In the Eastern City (supra), Mr Justice Pearson said, “Be it supposed that a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that the imminence of such weather conditions will be recognised in time and that the ship will be able to leave the port safely.”
c) The departure voyage

The same principles apply as in the case of the approach voyage.

d) Good navigation and seamanship

The charterers will not be in breach of their safe port warranty if the immediate and proximate cause of the loss is the negligence of the master, owners or their servants or agents.

e) Loss due to an abnormal occurrence

The charterers will not be in breach of their safe port warranty if loss is caused by some abnormal occurrence. Thus, a port is not unsafe if, for example, the ship is damaged by a wholly exceptional storm or by another vessel which is navigated negligently in the “Evita” (No. 2). Lord Denning explained the position as follows, “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 berming master makes for once a mistake, or where the vessel is run into by another vessel....”

ii) Breach of the charterers’ primary obligation to nominate a port which is prospectively safe under time and voyage charters

The owners are allowed a reasonable time in which to consider whether the charterers have nominated a safe port. If the owners, expressly or impliedly, accept an order to proceed to an unsafe port, they will be treated as having waived their right to refuse to comply with the order. However, the owners will not be treated as having waived their right to claim damages from the charterers if they suffer loss due to the unsafety of the port unless they have also expressly waived their right to claim such damages (the “Kanchenjunga”).

a) Time charters

If between nomination and arrival, the nominated port ceases to be prospectively safe, the time charterer then becomes under a secondary obligation to re-nominate another port which is prospectively safe at that time (the “Evita” (No. 2), as above). This secondary obligation also arises if the port becomes unsafe when the vessel is actually using it and is able to avoid the danger by sailing.

No distinction appears to have been drawn between period time charters and time trip charters under which the charterers are obliged to make a one-off election to discharge at nominated discharge port(s) and then cannot revoke their election. It is easy to see why charterers under a ongoing period charterparty should owe such a secondary obligation as they have a continuing right or obligation to give orders for the vessel’s employment. It is more difficult to see why time trip charterers who have exhausted their right of election as regards the discharge port(s) should also be treated as owing a secondary obligation to order the vessel to another safe port as they have no continuing right to order the vessel to discharge elsewhere. However, the position appears to be that this secondary obligation is owed by all time charterers.

b) Voyage charters

It is presently unclear if voyage charterers come under such a secondary obligation to nominate an alternative safe port. It has been argued that this secondary obligation can only owed by time charterers who have a continuing right and/or obligation to give orders as to the employment of the vessel. However, this ignores the fact that a voyage charterparty is more akin to a time trip charterparty in that the voyage charterers are also frequently obliged to exercise a right of election as regards loading and discharging port(s). The matter is clearly one upon which the Courts will have to issue definitive guidance.

If voyage charterers do not owe such a secondary obligation, the position under voyage charterers would be governed by the doctrine of frustration unless there is some other relevant provision in the charterparty (which might be the case if the charterparty provided that the vessel was to proceed to the nominated port “or so near thereto as she may safely get!”).

Safe berth warranties

As indicated above, the principles outlined in the Eastern City (supra) apply to safe berth warranties save that the characteristics of the berth determine whether it is safe. The main differences between a safe port and a safe berth warranty are demonstrated by the judgment in the APJ Pitti (supra).

a) Approach to and departure from the berth

In the APJ Pitti (supra), the vessel was fixed to carry cargo to “one or two safe berths Bandar Abbas, one or two safe berths Bandar Bushire, one or two safe berths Bandar Khomeini in charterers’ option”. While proceeding to Bandar Bushire, the vessel was damaged by an Israeli missile. The owners argued that this amounted to a breach of the safe berth warranty. The Court of Appeal held that the only express promise under the terms of the charter was that, when the order was given to proceed to a particular berth, that berth would be prospectively safe. This promise did not extend to cover the approach voyage to the port. In Lord Justice Bingham’s words,

“The charterers next relevant obligation was to nominate a berth or berths for the vessel within the declared port. I think it plain that on the express language of this charter the charterers promised that the berth or berths nominated would be prospectively safe for the vessel. .... Since, on the construction I prefer, the charterers had not promised that the port they declared would be safe, I do not accept that the vessel’s passage to and from a nominated berth should be treated as including any part of the voyage to or from the port. It would only include movement within the port to and from a nominated berth.”

b) Risks affecting the port as a whole or all the berths within it

The Court of Appeal in the APJ Pitti (supra) also indicated that a safe berth warranty is limited to an undertaking that the nominated berth will be prospectively safe from risks which do not affect the port as a whole or all the berths in it. There would thus be no breach of a safe berth warranty by the charterers if every berth or the port as a whole was prospectively unsafe in the same way and to the same extent. The Court of Appeal explained the rationale behind this finding as follows,

“The charterers’ promise should, in my view be understood as limited to a promise that the berth or berths nominated would be prospectively safe from risks not affecting the port as a whole or all the berths in it. To hold otherwise is to erode what I think is intended to be a meaningful distinction between berths and ports. I cannot help feeling that the promise is primarily directed to ensuring that the berth or berths nominated (including the passages there and back within the port) should be free from marine hazards foreseeably dangerous to the vessel. .... I am, therefore, satisfied that the charterers’ promise must be understood as applying to physical and political unsafety, but I accept the charterers’ contention that the unsafety referred to must be particular to the berth or berths nominated and not general to the port as a whole or all berths in it. There will be no breach by the charterers even if a berth nominated is prospectively unsafe, if every berth or the port as a whole is prospectively unsafe in the same way and to the same extent. Where all the berths or the port as a whole are prospectively unsafe, the owners should not have agreed the discharging port in the first place....”
The position under bills of lading issued for the cargo

Where the owners are the carriers of the cargo under bills of lading which have been issued for the cargo on board their vessel, they must ascertain what rights they enjoy under the bill of lading contract. The reason for this is that, unless the charterers are also the owners of the cargo, the owners may place themselves in breach of the bill of lading contract if they invoke the charterparty safe port or berth warranty. It may be that the bill of lading contract contains a compatible warranty as to safety either because there is an express term to this effect or because the terms of the charterparty have been incorporated successfully into it. If the bill of lading contract contains no warranty as to safety, the owners will have to fall back on a) any other clause which may assist them in the prevailing circumstances (such as a war clause) or b) the general rights given to them by the law which governs the bill of lading contract (such as the doctrine of frustration under English law).

1 [1956] A.C. 1
2 [1987] 2 Lloyd's Rep 37
3 [1962] 1 Q.B. 42
4 [1971] 2 Lloyd's Rep 200
5 [1998] 2 Lloyd's Rep 127
6 [1959] 2 Q.B. 68
7 [1991] 2 Lloyd's Rep 645
8 [1981] 2 Lloyd's Rep 272
9 [1962] 1 Lloyd's Rep 334
10 [1990] 1 Lloyd's Rep 391