The "Unsafe Port" Dilemma - Who is at Fault?  September 2008

Picture the scene: a vessel makes contact with a berth resulting in damage and pollution. Who is at fault? Was no one at fault? Was it an error of navigation by the pilot or master? Was it a mistake to order the vessel to the port because of dangers that could not have been avoided by the exercise of good navigation and seamanship? The answers to these questions will help determine whether the owners or the chartermers are liable for the significant financial consequences that will arise out of the incident.

The arguments are likely to centre on whether, by ordering the vessel to the port, the chartermers were in breach of any "safe port warranty" in the charterparty. This article examines why litigation frequently arises under this warranty, considers how the actions of owners, chartermers and third parties, both before and after the incident, help determine who is at fault and highlights what practical steps can be taken to help minimise liability.

Whatever the cause of the incident, in common with many modern marine casualties, the financial consequences of making contact with a berth can be significant. A modern vessel, particularly one laden with cargo, represents an enormous concentration of risk. The costs of repair might amount to only a small proportion of the losses. Losses arising from any cargo damage or interruption of the sale of goods claims from the owners of the berth, detention and liabilities for salvage and general average might be far higher. If the incident is unfortunate enough to have caused pollution, say, from the vessel's cargo or ballast water, then even a minor incident has the potential to produce very significant losses and liabilities. In the majority of cases these losses will fall, in the first instance, on owners and their insurers.

Owners and their insurers will be looking for potential avenues of recovery. Where an incident takes place in a port, invariably it will be difficult for owners to make a claim against the port itself, even if the port or its employees (such as pilots) were to blame. Legislation which protects ports and the port authority is commonplace throughout the world. For example, in England, the oddly named Harbours, Docks and Piers Clauses Act 1847 saddles an owner with strict liability for damage done by his ship to harbours, docks, piers, quays or works. This strict liability is often compounded by limitation regimes which protect the port and its employees and servants (notably pilots) which can render any right of action that does exist against a port largely academic.

Usually, the charterparty will provide owners with a right of action against chartermers under the unsafe port warranty. For example, the NYPE 1946 provides that the vessel shall be employed "between safe port and ports…" and the NYPE 1993 provides that the vessel shall be employed "between safe ports and safe places." Invariably, this clause is tailored to the needs of the parties by prescribing a specific port or range of ports (the effect of naming a port has recently received judicial scrutiny but this is beyond the scope of this article).

This form of obligation requires chartermers to order the vessel only to ports that are "safe". The port needs to be safe when the ship will be using it and it must be safe for that particular ship.

What constitutes a "safe" port is famously described by Sellers, L.J. in Leeds Shipping v Société Française Bunge (The Eastern City) [1958] 2 Lloyd's Rep. 127 where he states 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…"

English case law has thrown up a variety of examples of what can affect the safety of the port. Obviously, the geography and topography of the port can make it unsafe, typically, shallows and sandbanks, but in addition, so can man-made hazards, such as an uncharted anchor or a wreck. A port may be unsafe by reason of poor navigational aids (including an inadequate system of pilots), inadequate mooring facilities or by failing to have adequate monitoring or warning systems in place. A port may also be unsafe as a result of 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). Owners have also tried to argue (albeit unsuccessfully on the facts of the actual case) that an inability of a country's judicial system to give adequate relief to a vessel unlawfully detained by the Executive Government rendered the port unsafe.

While there is a steady flow of unsafe port cases through the English courts, the law in this area is generally easy to understand, user-friendly and, to a large degree, well established. The criteria to be applied in assessing whether a port is "safe" is a matter of law, but whether the port was actually safe is a question of fact to be determined by the judge, or more frequently, the Tribunal – normally with the assistance of expert evidence.

In practice, unsafe port claims most frequently arise in ports that are less sophisticated. After an incident, a thorough examination of the suitability of the port will usually be undertaken by owners. In some cases this investigation will uncover significant flaws in the port, particularly when measured against the standards of a sophisticated modern port – all useful ammunition with which owners can attack chartermers.

Once a claim is advanced by owners, chartermers can find that the relevant port authority is unwilling to co-operate with them in defending the litigation, even when it is explained that it is chartermers who are trying to defend the reputation of the port. This can be particularly problematic where owners' allegations include systemic failures, such as a failure to monitor and/or maintain depths, a failure to monitor and/or maintain navigational aids, or a failure to have in place an adequate system of suitably trained and experienced pilots. If chartermers have failed to secure contemporaneous evidence on these issues and are provided with no assistance from the port authority they may be put in some difficulty in resisting owners' claims.

Given this, if chartermers anticipate that a claim may materialise, there is no substitute for a prompt and thorough investigation by their representatives to give chartermers the best chance of defending any claim. A claim from owners may not materialise until months or even years later, at which point the best chance to secure evidence may have been lost.

The investigation after an incident is likely to go significantly beyond what chartermers can, in practice, hope to undertake before ordering a vessel to a particular port. By way of example, recent investigations made by the author in such cases have included assessing the type, size and condition of vessels that have called at a particular berth for a 5 year period, analysing all tugs and their capabilities within a certain radius of the port and examining berth construction documents and licences, both historic and current. This form of data will not be readily available to chartermers. Even if it is, the investment required to secure and analyse it may make it impractical for chartermers to undertake this form of assessment prior to ordering a vessel to a port. Moreover, in a charterparty chain, whilst it is head chartermers who will face the claim from owners, it may be that head chartermers had little (if any) involvement in selecting the port of loading/discharge.
Charterers could be forgiven for asking why it is they who face the liability when it transpires that the incident was caused by reasons which, whilst not "abnormal", were not readily apparent, nor easily identifiable. This may even be the case where charterers have in place a good system of checking the safety of the port prior to ordering the vessel there. The answer is that the risk has been allocated to charterers by operation of the governing contract: it is charterers who are under the obligation to order the vessel to a safe port and it is charterers who must face the consequences if they breach this clause.

This danger can be mitigated somewhat by amending the safe port warranty under the charterparty. For example, the pro forma SHELLTIME 4 provides under clause 4(c):

"Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks....")"

If applicable, this type of clause dilutes charterers' obligation to one of exercising due diligence. This means that if charterers can show that they exercised reasonable care and skill in selecting the port they may escape liability even if the port was, at the material time, unsafe. However, this form of clause can be problematic. Firstly, what constitutes "due diligence" will inevitably be in dispute, particularly when assessing the safety of a less sophisticated port. Secondly, care must be taken to ensure that a carefully drafted due diligence qualification is not contradicted by other terms in the charterparty, particularly terms in the fixture recap that may include an unqualified safe port warranty. As the terms in the fixture recap will take precedence over the printed terms, this may render the due diligence clause worthless (see The "Livanta" [2008] Lloyd's Rep. 86 where potential inconsistencies in another context are discussed).

Turning now to owners' position. Owners who assert that an incident occurred because the port was unsafe are likely to find that their vessel and the actions of the crew come under very close scrutiny. Charterers can escape liability if they can show that even though some danger was evident in the port, this could have been overcome by the exercise of good navigation and seamanship.

Where a vessel has, say, made contact with a berthing and the charterers are trying to prove that the incident occurred by a simple mistake on the part of the master or pilot (for which owners will almost always be responsible) and not by some systemic failure on the part of the port, charterers first enquiry will be to examine the actions of the master, crew and pilot. Aside from the navigational aspects - which may be the subject of witness and expert evidence, if it transpires that the crew has paid mere lip service to on board ISM procedures owners may find themselves in difficulty. For example, charterers are likely to look in glee at an ISM pre-arrival checklist duly ticked and signed by the master which confirms that the proposed berthing/approach has been fully discussed between the master and the pilot and the master was happy with the navigational aids, tugs, approach and berthing manoeuvre. Whilst not conclusive, this is a very relevant document of which owners should be aware from an early stage.

So what lessons can owners and charterers take from the above? What steps should they take to minimise risk?

As to charterers, in the author's experience, the extent to which charterers audit the safety of a port before ordering a vessel there can differ dramatically. A good policy put in place, with a full audit trail - subsisting through any sub-charterers may, firstly, help prevent an incident occurring. Secondly, demonstrate that charterers are within any due diligence clause. Thirdly, it should provide a solid base of contemporaneous documents to build a case that the incident occurred either by want of good navigation and seamanship on the part of owners, or by some abnormal occurrence. Crucially, charterers who anticipate that an unsafe port claim may be advanced by owners are well advised to undertake a prompt preemptive and thorough investigation of the port, preferably involving the port authority, in order to ensure that they are in the best possible position to defend such an action. An early investment in the fees and expenses of an investigator may prove to be extremely worthwhile.

As for owners, a rigorous, well executed on board ISM procedure is indicative of well disciplined and trained personnel - all useful building blocks to establishing that the master exercised good navigation and seamanship. Conversely, a poorly maintained and executed safety management system is likely to have the opposite effect. Owners ought to be aware that with the vast majority of cases not reaching trial, settlement negotiations are a key battleground. In addition to coherent witness evidence, the value of owners' representatives being able to draw on comprehensive and methodically organised contemporaneous documentation should not be underestimated. Owners are well advised to ascertain what grounds may exist before launching an unsafe port claim.

There are of course matters that are outside the control of both parties. Following an incident, the port or relevant Government Authority is likely to undertake their own investigations. The conclusions and recommendations often make interesting reading. For example, if after an incident, the port restricts certain tugs from operating, or restricts the licence of certain pilots or alters the berthing restrictions or (as was the case in The "Count" [2006] EWHC 3222 (Comm)) re-buys the narrow approach channel to the port, charterers may find themselves short on defences.

With thanks to Richard Neyton of Holman Fenwick Willan for preparing this article.

Author's note: This article is not exhaustive and is not intended to form a legal opinion. Specific advice should be sought on any matter falling within the scope of the article.