

LECTURE 9

SAFE PORTS CLAIMS

1.0 INTRODUCTION

The majority of contracts of carriage, encompassing charterparties, bills of lading, sea waybills, and similar documents, typically incorporate provisions that delineate the permissible trading areas for vessels. The reason is because during the operational lifespan of ships, she routinely navigates diverse ports, docks, anchorages, and offshore locations which can pose danger to the ship.

Even though some of the perils and hazards that the ship can face are unforeseen, it may lead to minor as well as catastrophic losses. These hazards, often latent or unexpected, can emanate from the visited location itself. Alternatively, ships may encounter delays while awaiting the resolution of the encountered dangers. In such circumstances, shipowners may seek compensation, either from the relevant port authority or their contractual counterpart as stipulated in the pertinent charter party or carriage agreement. Pursuing claims against port authorities, however, is notoriously complex and challenging to substantiate. Consequently, shipowners are more inclined to pursue claims in accordance with the governing contract of carriage.

CONTRACTUAL PROVISIONS AND SAFETY OF THE SHIP

In certain scenarios, contractual agreements may contain specific clauses tailored to address particular situations. Some of these clauses may explicitly prohibit voyages to locations known to pose risks, such as those affected by ongoing conflicts, ice, or international embargoes. Nevertheless, danger is not always an enduring characteristic, nor can it always be avoided. Consequently, other clauses are devised to establish the rights and responsibilities of the involved parties in the event a ship encounters danger under such circumstances.

For instance, the majority of time and voyage charterparties, bills of lading, sea waybills, and similar documents are equipped with clauses regulating the actions of the parties when navigating regions susceptible to war or ice-related perils. These clauses, sometimes referred to as Liberty or Caspiana Clauses, are typically comprehensive and outline the specific actions that can be taken in such situations.

They commonly provide for:

- *The vessel's authorization to steer clear of areas affected by these dangers.*
- *The vessel's permission to divert to alternative ports.*
- *The continued applicability of the terms outlined in the contract of carriage during such diversions.*
- *The classification of the vessel's actions as non-deviating, even when altering its course in response to these perils.*

Even in cases where the contract lacks a Caspiana Clause explicitly addressing the particular risk at hand, Article IV Rule 4 of the Hague-Visby Rules, which apply to most contracts either mandatorily or by mutual agreement, grants carriers the prerogative to undertake a "reasonable deviation" without incurring liability, provided that this deviation is prompted by unforeseen circumstances, is not the result of a contractual or duty breach on the carrier's part, and is not solely for the carrier's benefit.

GENERAL PROVISIONS

In contracts, there are often overarching clauses that pertain to the use of secure ports, berths, terminals, or other locations, as parties cannot foresee all potential hazards they may encounter.

In the case of a voyage charter or bill of lading, the parties typically know the vessel's intended trading area before finalizing the contract. This allows the shipowner to assess the port's safety before committing to the arrangement. In some instances, the shipowner won't know the specific port until later, as it will be nominated by the charterers at a later stage. Likewise, a time charter typically grants the charterers the authority to determine the vessel's employment during the charter period, leaving the shipowner uncertain about the vessel's trade destinations.

It is crucial to distinguish between these situations. In contracts specifying a particular port or place, the shipowner generally accepts the risk of proceeding to that location upon entering the contract since they had the opportunity to verify its safety. Consequently, they cannot hold the charterers responsible if the port later proves to be unsafe. However, when the contract allows the charterers to nominate a port or place later on, they are typically obligated to choose a safe one and can be held liable for any loss or damage incurred by the shipowner if the selected port or place turns out to be unsafe. This principle generally applies even if the term "safe" is not explicitly used in the contract's description of the ports or places to be visited. Nevertheless, to underscore this principle, time charters typically explicitly state that the vessel must trade "between safe ports," while contracts allowing for a range of possible ports usually require the charterers to nominate a "safe port" when making their selection, example, "1/2 safe ports South West England range".

The inclusion of the term "safe" typically implies a guarantee by the charterer that the specified port will indeed be safe. Consequently, such an addition may modify the standard rule applicable to voyage charters where the port or place is expressly identified in the contract. For example, a voyage charter specifying "one safe port Ventspils" instead of simply "one port Ventspils" may hold the charterers liable if it is later determined that the port is unsafe.

NATURE OF LIABILITY

If charterers are obligated to nominate a safe port but direct the vessel to an unsafe port, they breach the contract, regardless of whether they were aware of the port's hazardous nature or not. Liability in such cases is usually strict, similar to the handling of dangerous goods.

Therefore, charterparties, particularly in the case of tanker charters, sometimes include clauses expressly stipulating that the charterers are liable only if they fail to exercise due diligence in selecting a safe port or berth. For instance, Clause 4 of the Shelltime 4 charter states:

"Charterers shall exercise 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, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

The purpose of such clauses is to mitigate the strict liability that would otherwise apply. However, it's worth noting that to establish due diligence, charterers often need to demonstrate that not only they but also all their agents and servants exercised due diligence to avoid being held liable if the advice is found to be negligent.

2.0 DEFINING SAFE PORT

The concept of a "safe" port has been eloquently articulated by the English High Court in *The Eastern City*, offering guidance on what constitutes a safe haven for maritime activities which stated as follows: ***"A port will not be safe unless, in the relevant 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."*** This definition revolves around the pivotal idea that a port qualifies as "safe" if, during the pertinent timeframe, a specific vessel can approach, utilize, and depart from it without encountering undue peril, provided that no extraordinary events disrupt the principles of sound navigation and seamanship.

Key Considerations:

i. "The particular ship"

The port's safety assessment is intimately linked to the unique characteristics of the vessel in question. A port may be secure for certain ships but perilous for others due to differences in size, draft, beam, and other attributes. The fact that many ships have safely used the port does not conclusively establish its safety, as these vessels might possess distinct characteristics.

ii. "Safe"

Unless the charter explicitly guarantees perpetual safety, temporary hazards that can be mitigated by a reasonable waiting period do not render a port hazardous. However, if the port routinely faces temporary yet ferocious and unpredictable perils that could trap ships without adequate safeguards, it may be considered unsafe.

For instance, if bad weather affects a port upon a ship's arrival, the vessel is

expected to wait for improved conditions before docking, thus rendering the port temporarily safe. In contrast, if a port consistently faces severe and unpredictable weather conditions, even though temporary in nature, that could leave ships unprotected, it might be deemed unsafe.

UNSAFE INFRASTRUCTURE

A port's danger may stem from inadequate infrastructure or warning systems that hinder vessels' safe usage. For instance, if a ship is directed to a port with a poorly maintained dredged channel, resulting in significant damage, the port may be deemed unsafe if there is no system to address obstacles or to notify mariners about navigational hazards.

POLITICAL OR LEGAL UNSAFETY

Port safety may also be compromised for political or legal reasons, such as the risk of extended delays, detention, confiscation, or other legal repercussions. For instance, if a port necessitates a government permit for entry, but due to political unrest, all permits are denied, the port is likely unsafe because the ship may face confiscation for proceeding without a permit.

iii. "Can reach it, use it and return from it":

Port safety extends beyond its physical limits to encompass the safety of the approaches to and from the port. This is particularly critical for river ports, where access depends solely on navigating the river. Nonetheless, this principle applies universally to all ports, and its determination hinges on the specifics of each case—whether the approaches are safe for navigation.

iv. "In the relevant time"

The relevant timeframe is the duration during which the vessel will be utilizing the port. Charterers pledge that the port remains safe for the entire duration of the vessel's stay. Therefore, factors like hostilities at the charter date, vessel delivery date, or port nomination date are irrelevant if they cease by the time the vessel eventually arrives at the port.

v. "In the absence of some abnormal occurrence"

Charterers assure that the port's normal characteristics render it safe. Thus, if a danger arises due to an abnormal event at the port—something that a reasonable person would not expect—charterers are not in breach of contract, even if the port becomes unsafe in practice. However, what constitutes an abnormal occurrence can shift over time. For instance, hostilities may initially be abnormal but become normal if they persist, potentially leading to a breach of contract for subsequent voyages.

vi. "Without...being exposed to danger which cannot be avoided by good navigation and seamanship"

Irrespective of the nature of the danger, a port is not hazardous if prudent navigation and seamanship can circumvent the danger. Nevertheless, if the level of skill required exceeds what is reasonably expected of a competent mariner, the port may be considered unsafe.

3.0 SAFE BERTHS

Sometimes, a contract may stipulate that the ship must head to a berth rather than just a port. In such cases, the general principles outlined earlier concerning safe ports typically apply to the berth as well.

Hence, if the contract specifies that the vessel should load at a berth nominated by the charterers within a named port without explicitly stating that either the port or the berth must be 'safe', then, unless the nominated berth has distinct characteristics distinguishing it from other berths at that port, the charterers generally do not guarantee the safety of the berth they nominate. However, if the charter explicitly includes a safety provision for the berth, then, the charterers commit to ensuring the nominated berth(s) are safe.

However, situations can be more intricate. For instance, if the charterers are to nominate a berth (without specifying its safety) at 'a safe port', the safety of the port encompasses the entire port area, including the berth, and the charterers are typically expected to guarantee the safety of both the port and the berth they nominate.

On the other hand, if the charterers are to nominate 'a safe berth' at a named port (without specifying the port's safety), the charterers generally do not commit to ensuring that the berth and its approaches will be free from dangers that affect the port as a whole. Instead, they promise to keep the berth free of other specific types of dangers.

4.0 THE SHIPOWNERS' REMEDIES

When a ship is directed by charterers to an unsafe port or berth, two distinct issues arise:

1. Can the shipowner be compelled to proceed to that port or berth?
 2. Can the shipowner seek damages for losses or damages incurred due to entering such a port or berth or reasonably refusing to do so?
- **Can the Shipowners be compelled to proceed to that Port or Berth?**

If a specific Liberty or Caspiana clause applies, it typically specifies the carrier's rights to avoid the danger. However, the ship may encounter other dangers not covered by such clauses, so it's essential to consider the shipowner's rights in such circumstances generally. Charterers usually promise that the port will be safe for the vessel when it arrives. Therefore, if a reasonable mariner, at the time of receiving the charterers' order, believes that the port will be unsafe when the vessel arrives, the vessel is not obliged to comply with the order. This is because the master has an overriding duty, for reasons of public policy, to protect the ship and crew. However, if a reasonably prudent mariner, at the time of receiving the charterers' order, believes that the port will be safe when the vessel arrives, the vessel must follow the order and proceed to the nominated port. Nonetheless, if the port becomes unsafe subsequently, the master has the right to refuse further entry.

In some cases, it may not be entirely clear whether the port is currently or will become safe or unsafe. This poses a challenge for the master and crew because if the ship were to enter an obviously unsafe port, resulting in damage or loss, the owner would typically not be entitled to damages, as the cause of loss or liability would be the fault or negligence of the owner's own servant or agent in performing navigation duties correctly. However, courts and tribunals understand the predicament faced by the master and crew in such situations, and they usually support decisions made by reasonably prudent mariners in such circumstances.

If a port is safe when the ship is initially ordered to proceed there but becomes unsafe later, the question arises as to whether the charterers or cargo interests are entitled or obliged to order the vessel to an alternative port. In the case of time charters, it can be opined that the charterers are obliged to issue new orders to proceed to a safe alternative port. The situation is less clear in the case of voyage charters or bills of lading. The reasoning is that most of these contracts usually include provisions that allow the vessel to proceed to the named or nominated port "or so near thereto as the vessel can safely get." Therefore, if the named or nominated port becomes unsafe, the parties can usually use these terms to make the contract workable in changed circumstances.

- **Shipowner's Remedy For losses or Damages incurred**

The question as to whether a shipowners can seek compensation for losses or damages incurred when they enter a specific port or berth can only be answered in the affirmative. The rationale behind such affirmative response is premised on the fact that the ship must have already entered these locations before any potential hazards become evident, leaving them with no opportunity to prevent such issues. Under such circumstances, shipowners typically have the right to claim damages for any losses they experience. These damages may encompass physical damage to the ship, expenses related to salvaging or removing the wreck, costs associated with safety measures, and potential delays in ship operations. Additionally, shipowners may face liability claims from third parties and may be entitled to seek reimbursement from charterers or other contractual partners based on the terms of the carriage agreement. These claims can be substantial, as demonstrated in the case of the *Aegean Sea*, which ran aground while proceeding to berth at La Coruna, resulting in significant pollution and various claims from third parties, including:

- *Damage to third-party property*
- *Cleanup and preventive measures costs incurred by third parties*
- *Loss of use and loss of profits claims from fishing boat owners, yacht owners, fish and shellfish farm owners, shellfish harvesters, fishing net and fishing pot owners, shop owners, local municipalities, the government of Galicia, and the state of Spain*

Shipowners can also recover damages when the shipmaster reasonably refuses to enter an unsafe port, contrary to the charterers' safety promises.

5.0 LIMITATION AND STRICT LIABILITY

The liability of charterers for sending a vessel to an unsafe port is often strict, potentially leading to significant damages, including damage or loss of the ship and cargo, pollution liabilities reimbursement, and more. To mitigate this liability, charterers may seek to limit their liability claims. To qualify for such a limitation, one must prove they are a "person entitled to limit" for the specific claim in question.

P&I INSURANCE

Regarding insurance, Hull and Machinery insurance typically covers physical damage to the ship resulting from entering an unsafe port, but it does not cover losses due to delays in avoiding or entering such places. These insurers may also have the right to take over the shipowner's indemnity claims against other liable parties. P&I insurance clubs may be directly liable for pollution claims when sending a vessel to an unsafe port, and they also have subrogation rights to the shipowner's indemnity claims.

For cargo insurance, standard terms, such as the ICC A terms, provide coverage for various claims. Still, they usually exclude damages caused by specific war-related factors and losses due to delays resulting from entering or avoiding unsafe ports. Charterers can obtain liability insurance to cover their responsibilities to shipowners for damage to the ship -Charterers' Liability for Hull (CLH) or Damage to Hull (DTH) and liability to other parties, such as cargo owners (P&I cover).

Regardless of contractual responsibilities for ensuring safe ports or berths, shipowners may suffer the most if these duties are not fulfilled. Therefore, it is crucial for shipowners and charterers to diligently assess the suitability of nominated ports or berths with the assistance of local agencies and reference materials. Failure to do so can jeopardize their rights to indemnities from other parties and their insurance coverage. In cases where a ship enters an unsafe port, sustains damage, or faces potential danger, maintaining detailed records of the circumstances and actions taken is of utmost importance.

