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Unsafe Port Claims

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Contents

Introduction

Few decisions have stood the test of time more than that of the Court of Appeal in Leeds Shipping v Société Française Bunge (The Eastern City) [1958] 2 Lloyd’s Rep. 127, in which Sellers J gave his classic definition of a ‘safe port’, as follows:

“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…”

This classic statement (applicable as it is both to time and voyage charters and to ports and berths) has been approved by the courts on countless occasions, most notably by the House of Lords in The Evia (No. 2) [1982] 2 Lloyd’s Rep. 307 and more recently by the Court of Appeal in The Ocean Victory [2015] 1 Lloyd’s Rep. 381. But as the latter case demonstrates, neither the clarity nor longevity of the established legal definition mean that unsafe port disputes are either reducing in their number or complexity. On the contrary, there are numerous examples of disputes in relation to the practical application of Sellers J’s ‘classic definition’. For example, what counts as “danger” for these purposes? What amounts to an “abnormal occurrence” and what (in practice) is required for the purposes of “good navigation and seamanship”?

The aim of this publication is to highlight some of the key aspects of the law on unsafe ports, with particular reference to the types of issues and problems that may arise in the current commercial and political environment.

The Existence of a Warranty

Express warranty

Logically, the first question to consider in any potential unsafe port claim is that of whether or not the charterparty contains any warranty of safety at all. This question can often be answered very shortly, for many standard charter forms (e.g. the NYPE and the Asbatankvoy forms) contain an express warranty of safety by the charterer as regards the safety of the loading or discharging port or berth. Whilst it is a matter of construction in every case, where there exists such an express warranty of safety, that will not be negated by the fact that a loading or discharging port or berth is expressly named in the charter, either on its own or as a range of named ports from which the charterer may select.

Implied warranty

But what if there is no such express warranty as, for example, in the Gencon form? In what circumstances will a warranty of safety be implied? The short answer is that there exist no absolute rules and it is in every case a question of the true construction of the charterparty be it a voyage or time charter. As the Court of Appeal explained in The Reborn [2009] 2 Lloyd's Rep. 639, whether or not there is any implied warranty of safety will depend upon the normal contractual rules for the implication of terms, that is, the test is one of necessity.

Logically, the first question to consider in any potential unsafe port claim is that of whether or not the charterparty contains any warranty of safety at all

However, the practical application of that test will be heavily influenced by the degree of liberty which the charterer enjoys under the terms of the charter to choose the port or place where the ship is to load or discharge. The greater that liberty, the greater the necessity to imply a warranty of safety. Where, on the other hand, the information given in the charter to the owner about the intended port or place is more specific, it is more natural to conclude that the owner has satisfied itself as to its safety, or is prepared to take the risk of its unsafety. It is ultimately a question of risk allocation.

Whilst generalisations must be employed cautiously, the authorities indicate that the courts' overall approach to this question of risk allocation is as follows:

- Where a port is expressly named in a charter, be it on its own or as part of a range of named ports or places, then it is unlikely that any warranty of safety will be implied: see, for example, The Houston City [1954] 2 Lloyd's Rep. 148.
- The position is not so straightforward, and there may be differences as between time and voyage charters, where a charter provides for the charterer to nominate a port within a geographical range of ports, but not itself specified by name. In the time charter context, in The Evaggelos Th [1971] 2 Lloyd's Rep. 200 the court considered that in this situation a warranty of safety should be implied, on the grounds that "common sense and business efficacy require it in cases in which the shipowner surrenders to the charterer the right to choose where his ship shall go". It remains the case, however, that no decision has yet gone so far as fully to equate voyage and time charters in this regard. On the contrary, in The Reborn, Lord Clarke MR expressly stated that he "would not apply the reasoning directly from a time charterparty to a voyage charterparty". Lord Clarke was, moreover, not persuaded that the correct distinction was between a charterparty with named ports or places and one with unnamed ports. Rather, he suggested that what was important was whether or not the ports in question could be "readily identified". If they could, then it was difficult to see why that was not equivalent to naming them.

It is therefore necessary for those drawing up charterparties to give very careful thought to the precise manner in which the loading or discharging ports or places are described in the charterparty. In cases where there exists no express warranty of safety, whether or not any warranty will be implied will most likely be heavily influenced by the degree of specificity with which the relevant ports and places are described.

Absolute and Qualified Warranties

Absolute warranties

A charterer's primary obligation pursuant to a warranty of safety such as that given in the NYPE form (that is to employ the ship only "between safe port and/or ports") is 'absolute'. It is therefore of no relevance to consider whether or not the charterer was negligent or unaware of the unsafe feature(s). Nor is there any room, it would appear, for the concept of 'reasonable safety': see the The Ocean Victory [2014] 1 Lloyd's Rep. 59. Whilst safety itself is not an absolute concept, the enquiry in any given case is focused not on the reasonableness of either the charterer's actions or the port set-up, but on the prospective exposure of the ship to dangers which cannot be avoided by good navigation and seamanship.

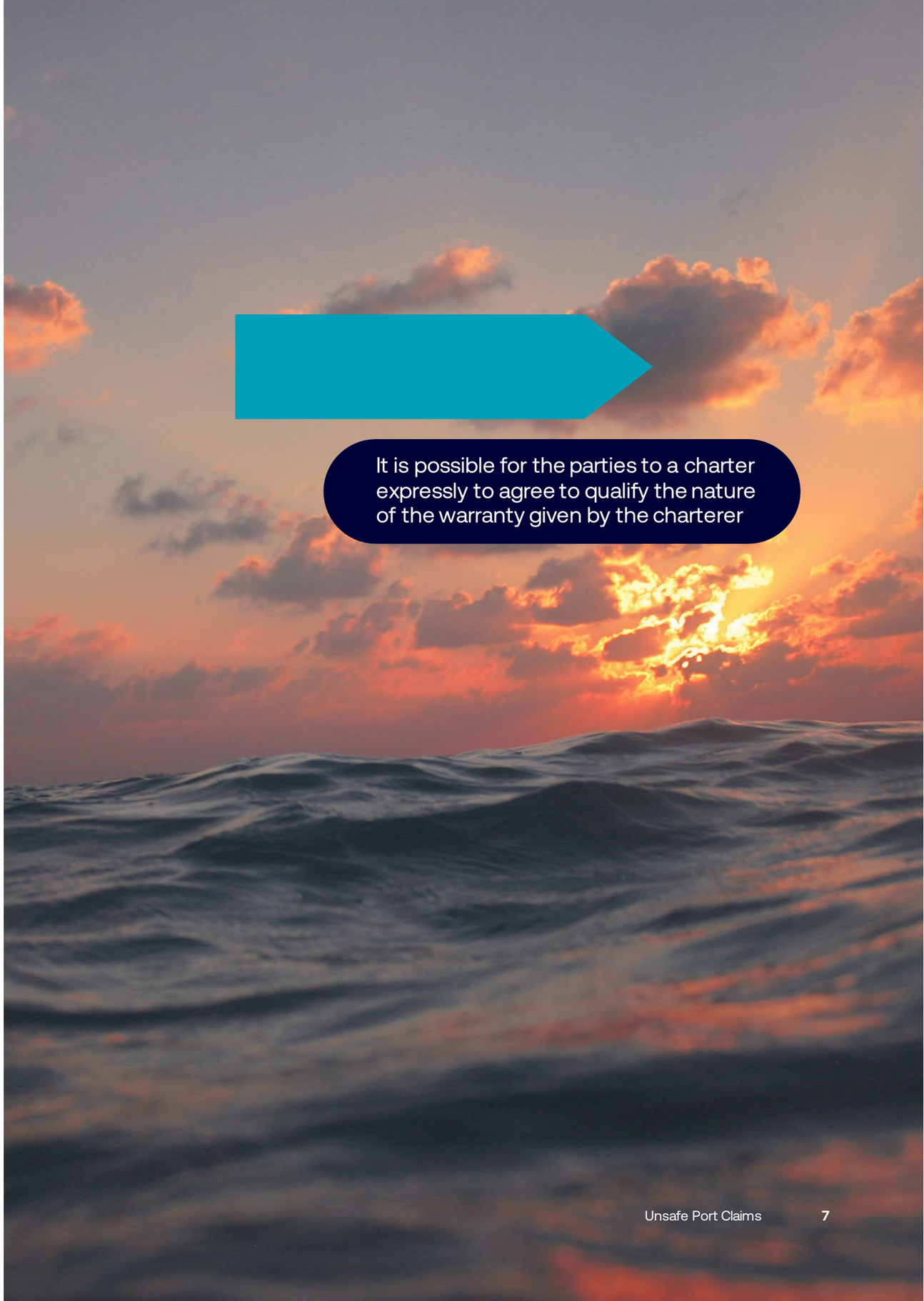
Qualified warranties

It is possible for the parties to a charter expressly to agree to qualify the nature of the warranty given by the charterer, for example, to one of due diligence only, as in the case of the Shelltime 4 form. Where the obligation is diluted to one of due diligence, the charterer's obligation is merely to take reasonable care to ensure that the port or berth is safe. The Saga Cob [1992] 2 Lloyd's Rep. 545 suggests that this duty is likely to be satisfied if a reasonably careful charterer would, on the facts as known, have concluded that the port was prospectively safe.

Two issues which often arise in practice in relation to due diligence obligations are the presence of inconsistent clauses within a charter, that is one imposing an obligation of due diligence and one phrased in terms of an absolute undertaking, and the effect of a delegation by the charterer of its right of nomination of a port of berth.

In relation to the first issue, it is a question of construction which of the clauses should prevail (or whether they can be read together): see, for example, The Greek Fighter [2006] 2 C.L.C. 497. In practice, however, and as demonstrated by the facts of The Greek Fighter, an unqualified safe port warranty in a recap is likely to prevail over an obligation of due diligence in a standard form.

As regards delegation of the charterer's obligations, the courts' approach to this mirrors their approach to due diligence in the context of seaworthiness (as per The Muncaster Castle [1961] A.C. 807). In other words, due diligence must be exercised by the charterer or by the individual or body to whom it delegates the right of nomination, even if an independent contractor of the charterer, and it is no answer for it to say that it delegated that function: see, e.g., Dow Europe v Novoklav Inc [1998] 1 Lloyd's Rep. 306.



The Meaning of Unsafety

The application of the test in The Eastern City, that is the legal criteria to be applied when deciding whether or not a port is safe, is a matter of law, although the eventual finding as to whether or not a port is safe is a question of fact, which is usually determined by the court or tribunal with the assistance of expert evidence: see The Polyglory [1977] 2 Lloyd's Rep. 353.

The facts which can give rise to unsafe port claims, in particular the types of unsafety, are many and varied.

Safety in Arrival, Use and Departure

The classic definition of safety requires that the ship is able to reach the port in safety, safely use the port at the relevant time, and also depart from it in safety. A failure to satisfy any one of these requirements will result in the port being unsafe. This much is straightforward, but just what is meant by 'safety' (or 'danger' under the test in The Eastern City) in this context?

Physical and Political Safety

'Danger' includes physical dangers. Such physical dangers may arise as a matter of geography and topography, such as reefs, sandbanks and exposure to certain weather conditions such as high winds, long waves and swell. They may equally, however, be caused by such man-made hazards as an unchartered wreck or defective fendering arrangement at a berth.

It is also clear that 'danger' may extend to political unsafety and the risk of war or risk of confiscation of the ship. Thus, as long ago as Ogden v Graham (1861) 1 B. & S. 773, the court held that "if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty". In The Evia (No. 2), the House of Lords relied on the decision in Ogden v Graham when rejecting the charterer's argument that clause 2 of the Baltime form applied only to physical unsafety, holding that the obligation applied to political unsafety as well.

The much more difficult question, however, is just how far one should extend what is encompassed within 'political unsafety' for these purposes. It is easy to see why dangers affecting the physical integrity of the ship, or the owner's proprietary rights therein, should be treated as equivalent to physical dangers, for they ultimately pose a physical threat to the ship itself, or at least to the owner's interest in that physical ship. That is why a state of war existing at the relevant port or place, or risk of detention, may serve to render a port unsafe (see, for example, The Saga Cob [1992] 2 Lloyd's Rep. 545).

But as the recent Covid-19 pandemic demonstrates, situations may present themselves which are far less clear cut. The Club received numerous enquiries regarding whether the presence of Covid-19 in a country or area was sufficient to render a port unsafe. Whilst Covid-19 is not a political risk, similar considerations arise as in some of the 'political unsafety' cases, in that Covid-19 does not itself present any risk to the physical ship.

It may, however, present a risk to the ship's crew (with the consequence that, in the most extreme of situations, all of the crew could fall ill, leaving the ship effectively unmanned) and the fact of the ship calling at a Covid-19 infected port could lead to her being blacklisted, or detained, at a subsequent port of call. Whether or not this amounts to 'danger' for the purposes of The Eastern City definition of safety will likely be a question of degree, given the need for the danger to properly be described as a characteristic of the port.

That will in each case depend on the particular facts, most notably the risk status of the individual port and the precautions that may be taken to avoid the spread of the disease. While a contagious disease can, in principle, render a port unsafe, in reality it may be difficult to prove such a claim, the burden being on the owner to prove that there was a sufficient level of unsafety that could not be overcome by the exercise of reasonable precautions on the part of the ship.

The Meaning of Unsafety (cont.)

Temporary Dangers and Delay
Temporary dangers and delay throw up a different set of problems. On the one hand, it is not necessary for a port to be unsafe that it is unsafe at all times. Unsafety only at particular times will suffice, as for example in The Eastern City itself, where the Court of Appeal held that the port was unsafe because, during winter, it was exposed to unpredictable sudden southerly gales which were liable to cause the ship to drag her anchors in the unreliable holding ground of the anchorage area. Nor will a port be unsafe merely because the ship is required to wait for a time before entering the port, for example for tidal or other meteorological reasons, nor even if in certain conditions she will be required to put to sea for safety. Thus, in Smith v Dart (1884) 14 QBD 105, it was held that Burriana in Spain was a safe port, notwithstanding that it was necessary for ships to keep up stream so as to be able to put to sea in certain bad weather conditions.

On the other hand, it would be wrong to suggest that a merely temporary danger will render a port unsafe. Rather, the most that can be said is, as per in the judgement in The Count [2008] 1 Lloyd's Rep. 72 that "some temporary evident obstruction or hazard" will not render the port or place unsafe but "that is different from the situation where the characteristics of the port at the time of the nomination are such as to create an obvious risk of danger". -

Given that good seamanship cannot necessarily be expected to protect against hidden hazards, the important question in all these cases is whether or not the master ought to have been aware of the temporary danger. In other words, was the information available to the master and the systems in place at the port such that, with the exercise of good navigation and seamanship, he ought to have able to avoid the temporary danger and keep the ship safe?

This is well demonstrated by the facts of The Marnicki [2003] 2 Lloyd's Rep. 655, where a ship sustained serious bottom damage due to an obstruction in the dredged channel constituting the designated route to Jakarta. The owner was unable to establish that the obstruction had been in place when the order to proceed to Jakarta was given. The court nonetheless held that the port of Jakarta was prospectively unsafe at that time because the port lacked a proper system for monitoring the system in the channel and investigating reports of obstacles, or for finding and removing them. Nor was there any system for warning ships in the meantime that there was an obstacle in the channel.

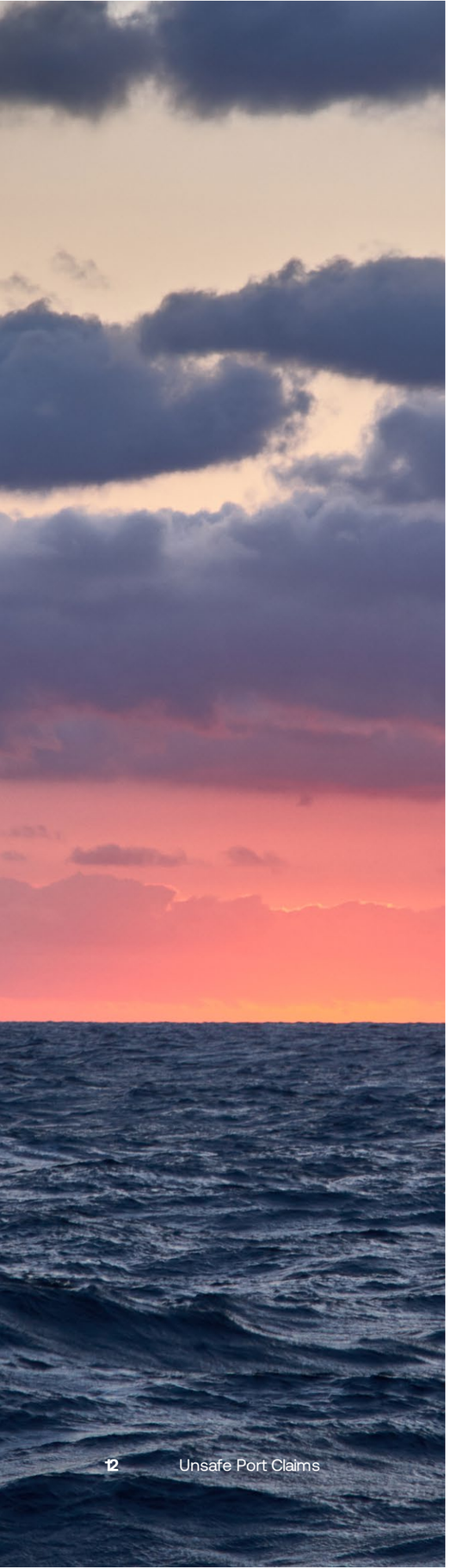
> The classic definition of safety requires that the ship is able to reach the port in safety, safely use the port at the relevant time, and also depart from it in safety

Safe for the Particular
Ship It is well established that the question of safety must be considered with reference to the particular ship in question bearing in mind, for example, her dimensions, draughts and laden or ballast condition. It will therefore be no defence for a charterer to point to the fact that the relevant port or place was safe for ships of different sizes and characteristics, if it was not safe for the particular ship in question: see The Sagoland (1932) Com. Cas. 79.

This point is becoming increasingly important as ship sizes increase and older ports built at a time when ships were much smaller struggle to cope with them. There is also room for debate as to just how far the specifics of the particular ship in question should be taken into account. Taking the Post-Panamax example, there can be no doubt that a port which was incapable of safely accommodating such a large ship would be unsafe for that ship, notwithstanding that it was safe for smaller ships.

But what if the port in question could safely be used by the average PostPanamax ship, but could not be so safely used by the particular ship in question, because of, for example, a quirk in her steering system which made the steering unusually sluggish? In other words, if the particular ship has a particular, and wholly unexpected, feature which renders the port unsafe for that particular ship, but no other, does that suffice to render the port unsafe?

In circumstances where a charterer could have no knowledge of the particular, unusual feature, it might be felt that the charterer should not be held liable for breach of the safe port warranty in such a situation. On the other hand, there is much force in the view that the absolute nature of the charterer's warranty (see above) dictates that a finding of liability should, in this situation, nevertheless follow. This particular question has not been considered in case law however, one possible way to analyse matters is through the law of causation. As with any breach of contract, in order for the losses claimed to be recoverable, the breach must have been the dominant or proximate cause of the losses. If, in the situation set out above, the dominant cause of the damage to the ship was in fact found to be her sluggish steering system, then it is suggested that no claim for breach of the safe port warranty should lie. If, however, there were a factual finding to the effect that the quirk of her steering system was not wholly out of the ordinary, then it may be much easier to say that that particular characteristic should be treated no differently to, say, her length, with the consequence that the port was unsafe for her. There is, however, much scope for debate on this point.



The Meaning of Unsafety (cont.)

The fact that the port must be safe for the particular ship does not mean that damage must actually be caused to that particular ship in order to give rise to a claim for breach of the safe port warranty. It may well be the case that the relevant characteristic of the port posing a danger to the ship in question also poses a danger to other ships and property. If that danger results in damage to another ship, which in turn causes an owner's loss, then the owner may be entitled to damages so long as its loss is directly caused by the relevant danger. This is illustrated by the decision in the Count, where there was (as the court found) no adequate system for monitoring the channel and where a ship grounded as a result of the buoys in the channel being out of position. The owner claimed damages for detention in respect of the delay to the ship as a result of the blockage of the channel by the ship which had grounded. The court held that it was entitled to recover, on the basis that the grounding of the other ship was caused by the characteristics which made the port an unsafe port to nominate for the ship in question.

'Characteristics' and 'systems'

In The Saga Cob, the court held that the primary task when determining the question of safety is to ascertain whether a particular source of danger could properly be described as a characteristic of the port and, if so, whether that danger rendered the port prospectively unsafe.

The need for the relevant danger to be a 'characteristic' of the port was reinforced by the Court of Appeal's decision in The Ocean Victory. This focus on 'characteristics' in turn leads to an inevitable focus on the 'systems' in place at a port, for example, the systems for monitoring the condition of the port and alerting the master to any potential dangers. The port systems may also serve to turn what appears to be an isolated act of negligence on the part of, for example, a pilot (who is usually the owner's responsibility under the terms of the charter) into part of a wider systemic failing by the port, for example, in relation to the training of pilots, such that liability for breach of the safe port warranty may attach. These cases are very fact sensitive and, in the recent London Arbitration 2/23 the arbitration tribunal considered whether the ship grounding as a result of the pilot's failure to manoeuvre the ship correctly rendered the port unsafe. The tribunal found that while the pilot's failure to manoeuvre the ship correctly was causative of the ship's grounding, it was a one-off mistake of an otherwise competent pilot which did not render the port unsafe.

This emphasis on 'systems' is only likely to increase in the modern age, where the wealth of information about the physical and meteorological characteristics of ports means that the focus of unsafe port claims is very often on the systems in place for avoiding known physical dangers, as opposed to the physical dangers themselves. What this tends to result in, in practice, is a microscopic analysis, after an incident, of the port and its systems as compared against the standards of a modern sophisticated port. Two particular points need emphasising:

- Whilst the focus of The Eastern City test is on prospective unsafety (see further below), the Court of Appeal in The Saga Cob recognised that events subsequent to a charterer's order could be relevant to prospective unsafety. This may be correct, but only insofar as the subsequent events may serve to cast a light on the prevailing factual situation as at the time of the order.
- It does not follow from the mere fact that the systems were changed after an incident that the port or place was necessarily unsafe in advance of that change.

It may well be the case that the relevant characteristic of the port posing a danger to the ship in question also poses a danger to other ships and property.

A Charterer's Duties and Obligations

Prospective Safety – A Charterer's Primary Obligation

Pursuant to The Eastern City, a charterer's duty is to order the ship to a prospectively safe port, in the sense that the ship can safely reach, use and depart from the port at the relevant time in the future.

Therefore, the prospective safety of the port is to be assessed as at the time that the charterer makes its nomination. Two consequences follow from this; first, this obligation will not be broken by reason of any unsafety present at the time of the order which will have been remedied by the time of the ship's call at the port; second, the obligation will also not be broken in the event that a port which is prospectively safe for the ship as at the time of its nomination subsequently becomes unsafe after the nomination is given.

In The Evia (No. 2), the outbreak of war between Iraq and Iran on 22nd September, 1980 did not render unsafe the port of Basrah, which was a safe port when the order to proceed there was given in March, 1980.

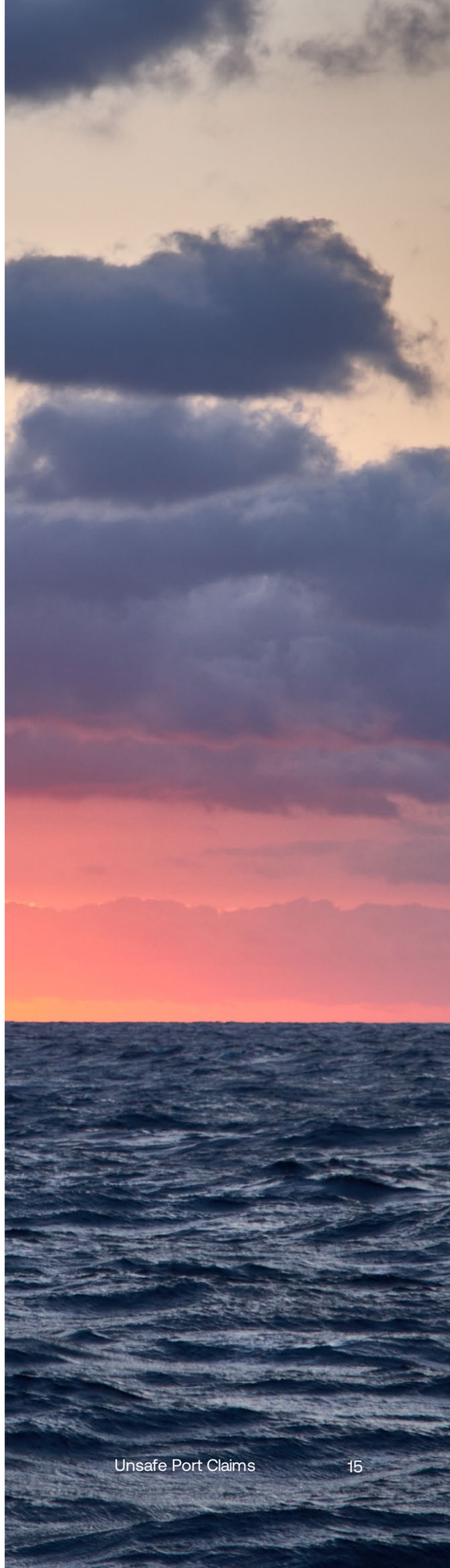
Supervening Unsafety – A Charterer's Secondary Obligation

However, the House of Lords also held in The Evia (No. 2) that, if a charterer has complied with its primary obligation but the port subsequently becomes unsafe whilst the ship is en route to the port, then the charterer comes under a new, 'secondary', obligation to cancel the original order and nominate a new prospectively safe port, so long as it is an order with which the ship can effectively comply. The same obligation applies where a situation of unsafety arises once the ship is at the port, but at a time when the ship can still avoid the danger by leaving.

What is less clear is whether or not such a secondary obligation also arises in the voyage charter context. In The Evia (No. 2), the House of Lords considered that the key distinction between the two types of charter is that a time charterer has a continuing right and obligation to give orders for a ship's employment, whereas a valid nomination pursuant to a voyage charter is usually the limit both of the charterer's right and obligation to nominate. The House of Lords however, was not called upon to decide the point and therefore left the matter open.

As and when the point arises for decision, it is fair to say that neither of the potential solutions is particularly attractive. If there does exist no secondary duty to re-nominate on the part of a charterer in the case of a voyage charter, then that would mean that an owner would be obliged to proceed to the port (notwithstanding the danger), or be held in breach, unless it could be said that it was relieved of its obligation to do so on the grounds that the charter was frustrated. The first of these outcomes is obviously unattractive for an owner and the second could work unfairly against a charterer, especially if the cargo could in fact easily be loaded / discharged (as the case may be) at an alternative port within the original range.

On the other hand, it must be borne in mind that the very nature of a time charter results in a hire regime which clearly dictates who, as between an owner and a charterer, should bear the risks of the delay and expense involved in a re-nomination. A voyage charter, on the other hand, does not contain any such financial regime. Further, if and to the extent that the problem may be dealt with by other clauses, for example a war or strike clause, imposing a secondary duty of re-nomination on a charterer may serve to disrupt the allocation of risk effected pursuant to such specific clauses.



An Owner's Duties and Obligations in Response to an Order

The Right to Consider the Order

It is not the case that, upon receipt of a charterer's order to proceed to a particular port or place, an owner is obliged instantly to obey it (even if the order is lawful). Rather, the law affords the master a reasonable period of time within which to consider and evaluate matters and make up their mind (see by way of analogy The Houda [1994] 2 Lloyd's Rep 541). That is not to say, however, that the master is under any duty to check the safety of the nominated port or place before proceeding to it. On the contrary, Morris LJ in The Stork [1955] 1 Lloyd's Rep 349 considered that the master was entitled to assume that the charterer had complied with its contractual duty to nominate only a prospectively safe port or place.

Effect of an Order and an Owner's Right of Refusal

The House of Lords in The Evia (No. 2) confirmed where a safe port warranty exists, an order by a charterer to proceed to a prospectively unsafe port amounts to a breach of the charterparty. An owner will be entitled to damages in respect of that breach if the master reasonably obeys the charterer's order and the owner suffers loss in consequence thereof: see The Houston City. It is also possible that an invalid order which is persisted in may amount to a repudiatory breach of the charter.

Where a charterer orders a ship to an unsafe port or place, its order is accordingly uncontractual. As Lord Goff explained in The Kanchenjunga [1990] 1 Lloyd's Rep. 391, such an order does not "conform to the terms of the contract" and there is therefore no question of an owner being obliged to follow it (notwithstanding, in the case of a time charter, the fact that an owner is generally under a charterer's orders as regards employment). An owner is accordingly entitled to reject an unlawful nomination or order.

Indeed, in some circumstances, an owner may not only be entitled to reject a nomination or order, but may be legally obliged to do so. Such a situation may arise where an owner knows the relevant port or place to be unsafe.

If, in that situation, an owner was nonetheless to proceed to the relevant port or place, it may be found either to have caused its own loss, or to have failed in its duty to mitigate that loss. As the court explained in the first instance decision in The Kanchenjunga [1987] Lloyd's Rep. 509, it is not the case that "the master can enter ports that are obviously unsafe and then charge the charterers with damage done. It is also the rule that an aggrieved party must act reasonably and try to minimize his damage".

The House of Lords decision in The Kanchenjunga is also authority for the proposition that, if an owner with full knowledge of the unsafety, complies with an invalid nomination or order in such a way as to indicate unequivocally that it is treating the nomination or order as valid, then it may be found to have waived its right to reject it. It does not follow, however, that the owner will also be found to have waived its right to claim damages in respect of the charterer's breach.

Mere compliance with an order to proceed to an unsafe port is unlikely to break the chain of causation between the breach and the damage. On the contrary, compliance with the order will usually be an essential link in the chain of causation and, save in cases where it ought to have been obvious to the reasonable master that they should not proceed, an owner is entitled to assume that a charterer has complied with its obligations (see above and The Stork).

Possible Defence to Unsafe Port Claims

Abnormal Occurrences

As per The Eastern City, there will be no breach of the safe port warranty by a charterer if the relevant danger was caused by an 'abnormal occurrence'. The rationale for this exclusion lies in the fact that damage caused by an 'abnormal occurrence' does not result from the qualities or attributes of the port or place itself. This is well demonstrated by the facts of The Evia (No. 2) and the Court of Appeal's finding that the outbreak of war (see above) was an isolated occurrence which was in no way connected with the characteristics or attributes of the port of Basrah. It was therefore an abnormal occurrence within the meaning of The Eastern City definition, with the consequence that the charterer was not in breach of its safe port warranty.

Whilst the facts in *The Evia* (No. 2) were relatively straightforward, there will be many other cases in which the dividing line between a 'characteristic of the port' on the one hand and an 'abnormal occurrence' on the other is much more difficult to draw. The problems that may arise in this regard are thrown into sharp focus by the case of The Ocean Victory, which concerned the grounding and loss of a bulk carrier at the port of Kashima in Japan following her departure from her berth during a severe gale. The loss of the ship was all the more remarkable given that Kashima is a modern port which, prior to the incident, had an untarnished safety record.

At first instance, the court held that the cause of the incident was a combination of two factors: (1) the phenomenon of swell from 'long waves', which forced the ship to leave the berth; and (2) a very severe northerly gale, which meant that the ship could not safely exit the port via the Kashima Fairway. The court found that, taken on their own, neither of these events was particularly abnormal. He further acknowledged that the concurrent occurrence of those two conditions at the port was rare. Nonetheless, the court went on to find that the fact that the situation experienced by The Ocean Victory flowed from events that could be termed as characteristics or features of the port meant that it must be "at least foreseeable".

The Court of Appeal was critical of this reasoning on appeal and considered it was not sufficient that the event should be "at least foreseeable".

Rather, it is necessary to examine whether the event was a characteristic of the port, having regard to the evidence relating to the past history of the port, the frequency of such an event occurring and the likelihood of it happening again. Bearing in mind the expert evidence showing that the storm was exceptional (both in terms of its rapid development, duration and severity) and that no ship in the port's 35 year history had experienced a situation quite like it, the Court of Appeal considered that the damage to the ship was caused by an abnormal occurrence and that the port was, therefore, safe.

Dangers Avoidable by Good Navigation and Seamanship

In addition to abnormal occurrences, The Eastern City definition expressly excludes dangers which are avoidable by 'good navigation and seamanship'. As the court explained in The Ocean Victory this phrase "describes the standard of navigation expected of the ordinarily prudent and skilful master". If a higher standard is required in order safely to navigate the port, then the port will be unsafe: see The Polyglory [1977] 2 Lloyd's Rep. 353.

It should not be thought, however, that a port will necessarily be unsafe if a ship suffers damage notwithstanding the exercise of good navigation and seamanship by its owner. For as the court observed in The Mary Lou [1981] 2 Lloyd's Rep. 272 "care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely that the casualty was the result of simple 'bad luck'". Whether or not 'bad luck' for these purposes adds anything to the requirement that the danger not be due to an abnormal occurrence is yet to be resolved.

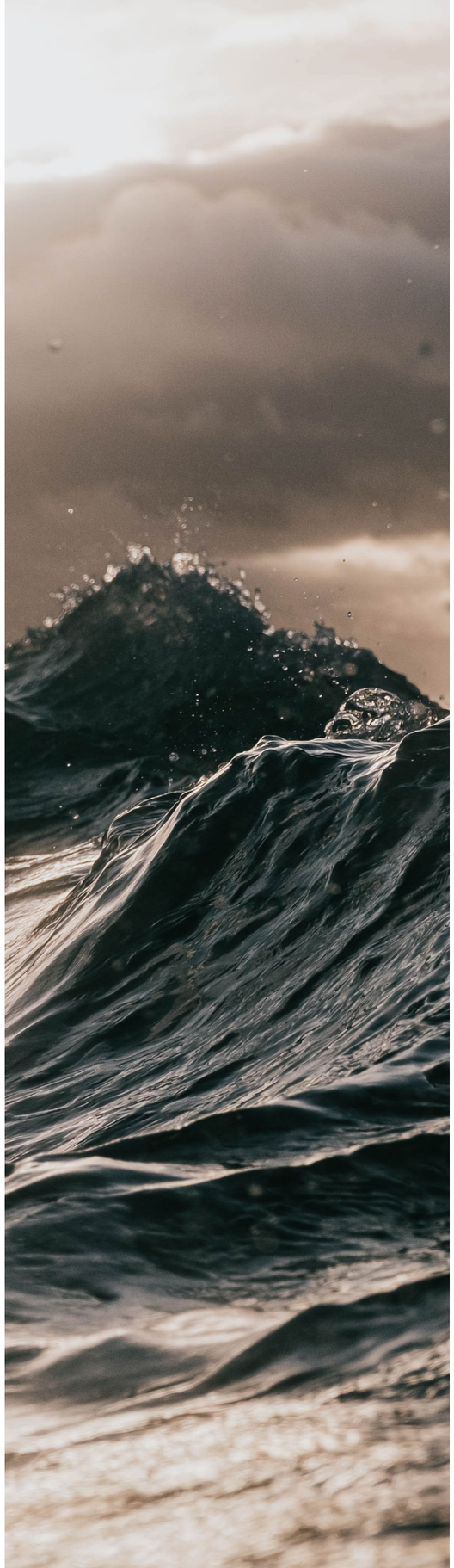
Negligence on the part of the Master / Crew

Perhaps the most common defence sought to be employed in unsafe port cases is that the loss and damage was in fact caused, or at least contributed to, by negligence on the part of the master or the ship's crew. The reason for this is that, if it can in fact be shown that such negligence was the effective cause of the damage, then the charterer will not be held liable for it. That is because, in such a case, the chain of causation between the charterer's breach in ordering the ship to an unsafe port and the loss and damage sustained by the owner is broken by the intervening act of negligence on the part of the owner.

When considering, however, whether or not the chain of causation has been broken in this manner, the courts will take account of the fact both that the master has been placed in a difficult position and that it is the charterer's breach of contract which placed the master in that difficult position. Thus, if the master acts reasonably, even if mistakenly, when placed on the horns of a dilemma, then their actions will not be found to be the effective cause of the loss and damage: see The Stork.

Possible Defence to Unsafe Port Claims (cont.)

Arbitration tribunals in particular are loathe to criticise the actions of a master who was placed in a difficult situation courtesy of having been ordered to proceed to an unsafe port. Whilst a causally relevant act of negligence may serve to break the chain of causation, the evidential burden on a charterer advancing the negligent navigation defence is a high one. Further, even an act of clear negligence may not serve to break the chain of causation if the port is otherwise unsafe and if that unsafety influenced the succeeding negligence. In The Polyglory, for example, the court refused to disturb the arbitrator's finding that, whilst the pilot (the owner's agent for these purposes) was negligent in his use of the engines, that negligence remained causally connected with the unsafety of the port, given that the need for the ship to make a sudden and difficult departure from the port greatly increased the likelihood of error and exacerbated its consequences.



Conclusion

In the Club's experience the pursuit and defence of unsafe port disputes are notoriously difficult. As a case develops documentary and oral evidence will form the matrix on which the actions of the owner and charterer will be judged. It is often crucial that the ship's master is available to give oral evidence, particularly in cases where the charterer alleges that the danger could have been avoided by good seamanship.

Contemporaneous evidence is the best evidence and can be of critical importance in protecting a Member's interests. A checklist of some of the key areas of enquiry and practical considerations in the collection of evidence is set out on the following pages.

Unsafe port cases are invariably expensive to run and often involve different insurers and interests. Coordination and cooperation between the various interests is essential in ensuring a successful outcome.

In the event an unsafe port claim arises, the early involvement of the Club is crucial. The Club's extensive experience and expertise means it is well placed to assist with the preservation of evidence, protect the Member's interests and manage any ensuing litigation.

The original version of this publication was produced with the assistance of Caroline Pounds, Barrister, of Quadrant Chambers.

Unsafe Ports Evidence Checklist

some key points to consider

General

- Complete record of communications dealing with the voyage
- Charts, plans of port, berth or anchorage
- General port set-up including management systems in place for control and maintenance of navigational aids and dredging of approach channels
- General arrangement plans Capacity and cargo plan
- (Scrap and Fair) deck, engine, radio logs, bell book
- VDR /VTS and AIS data
- Miscellaneous published information concerning port
- Ship draughts
- Note of protest
- Detailed records of all services supplied by third parties
- Printed record information, course recorder, engine movement, data logger, echo sounder, etc
- A record of when bridge and engine clocks were synchronised
- All charts in use at the time of the incident (no alteration should be made) together with all rough notes and calculations from the chart table, including passage planning
- All communications with third parties together with any hand-written notes of oral/VHF communications

Moorings

On board:

- Sketch of mooring arrangements identifying station, material, size and security system
- Anti-chafe measures
- Number of lines on board
- Mooring rope/wire details—invoices, test certificates, repairs, when first used
- Retain failed/damaged equipment as evidence
- Storage details
- Winch details
- Photographs, samples
- Mooring watch details
- Damaged/parted rope/wire, where parted and how secured
- Brake test record for mooring winch
- Mooring advice from Pilot, berthing Master, port authority, etc
- Mooring wire / rope running hours record

Ashore:

- Mooring arrangements approval by port authority/terminal operator
- Bollards — type, distance apart, etc
- Mooring line lead
- Mooring gangs

Tugs

- Tugs owners/authority/tugs names
- Number of units available
- Horsepower/bollard pull/propulsion
- Where stationed
- Call-out procedure
- Communication facilities/radio watch
- Duty roster/crew lists
- Operational limits
- Position where tugs are to be waiting for making fast
- Tug or ship's line

Unsafe Ports Evidence Checklist

some key points to consider

Photographic Evidence

- Sea conditions at anchorage
- Strong currents in rivers, ice and other hazards
- The berths fenders and condition of concrete apron
- Approaches to locks, condition of fendering for entry and within, if appropriate
- Condition of locks and evidence of any previous damage
- Mooring arrangements
- Areas of berth particularly exposed to swell
- Other ships affected by adverse conditions
- Any lack of room to manoeuvre in port
- Fender arrangements at adjacent berths (for comparative purposes)
- Any damage to the ship or port illustrations

The Berth

- Design/construction details
- Fender type — sketch or photograph
- Sketch or photograph of fender positions along ship's length
- Condition of fenders at time of berthing
- Advice from agent, pilot, port authority
- Details of seabed composition
- Fender compression information
- Communication with agent, etc, about missing or defective fenders
- Fender arrangements at adjacent berths — condition, disposition, etc
- Ship's fenders
- Constraints at berth — water depth, position of other ships, turning area, etc
- Tidal data (predicted and local measurements), including height and rise, or fall, of tide on passage and at the berth

Weather Services

In Port:

- Port information booklet
- Port weather service
- Local radio
- Warnings provided by port authority to ships and/or agents
- Any specific advice on arrival about local weather characteristics
- Storm signal – where sited?
- Record of all weather forecasts and weather fax charts

On board:

- Weather Reporting and Forecast Areas (or similar publication), stations used?
- Radio officer's watch keeping schedule and log
- Log book or other record of weather, swell, barometric pressure, etc
- Communications with port authority, agents, pilotage authority, other ships, etc
- Weather charts and messages received
- Anemometer — where sited?

Pilotage

- Names of pilots on duty
- Berthing procedures
- Call-out procedures
- Date of last hydrographic survey
- Names of other ships in port and where berthed, together with traffic movements
- Name of person advising pilot of ship's details and record of details given
- Master/pilot exchange
- Pilot's shipping plan (if different from master's)