The Future of the "Safe Port" Warranty: Smooth Sailing or Murkier Waters?

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In an age when cyber security breaches regularly make headlines, and autonomous vessels are appearing on the not-so-distant horizon, it's important to consider how age-old contracts like maritime charter parties will fare in the face of rapidly-changing technology and the security risks that come with it.

The "safe port" warranty is a tenet of charter party language, and an unsafe port or berth is often asserted in commercial negotiations as justification for damages resulting from delays or damage at port. While there is not a great deal of case law analyzing the warranty in the context of modern technological risks and threats, the cases and arbitration awards that we do have provide an interesting background against which to consider the potential for an expansion of the definition of the safe port warranty in an increasingly tech-based world.

Background

The definition of a "safe port" most commonly used by courts and arbitrators is from a British case from 1958 called *The Eastern City*: "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 . . . ." [1]

The practical application of a safe port (or safe berth[2]) warranty can be found in charter party language, generally in time charters, providing that the charterer shall only nominate ports and berths where the vessel may "safely lie, always afloat" or "NAABSA" (Not Always Afloat But Safely Aground). The safe port warranty has been interpreted to mean that there is *a* safe approach for a vessel to reach the specific port or berth, not necessarily that *all* approaches will be safe. The definition of an "approach" includes adjacent areas a vessel must traverse to either enter or leave the port, which includes the entirety of a river as well as any bridges that a vessel may need to pass. The test as to whether an unsafe condition is "avoidable by good navigation and seamanship" is whether, in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the port or berth. Where such language is used, it is a charterer's non-delegable duty to provide a port or berth that is safe for the specific vessel under charter.

An owner's remedy if charterer's duty is breached is to refuse to accept charterer's orders to proceed to an unsafe port or berth, or if the condition was unknown to owner before entering, to recover damages for costs incurred due to nomination of such an unsafe port or berth.

Traditional Application of the Safe Port Warranty

While the definition of a safe port is not a question that is frequently litigated, often there are assertions of unsafe ports or berths in commercial negotiations, even if ultimately no claim is made. The most common types of unsafe port claims arise when vessels encounter challenges reaching a port due to swells, tides, currents, ice, unforeseeable weather, dangerous berth conditions, or missing or misleading navigational aids.

There also have been assertions that a "political" danger renders a port unsafe. In one case, where the load port had been under threat of guerilla attacks and was placed outside Institute Warranty limits by war risk underwriters, an arbitration panel found that the Libyan load port was in a danger zone and that the owner was justified in withdrawing the vessel on the basis of charterer's safe port warranty.[3] By contrast, in considering whether the port of Ras Tanura, Saudi Arabia was unsafe as a result of a boycott on vessels that had called at Israeli ports, the United States Court of Appeals for the Second Circuit concluded that, in the circumstances, the safe port warranty could not be extended so as to place liability for the loss of the voyage on the charterer. The Court's justification was that the parties had never considered the risk of loading interference from a boycott, and that owner was aware of the vessel's prior call to Israel so therefore had knowledge of and control over the facts surrounding the potential source of "unsafety." The Court noted that the term "safe" was implied in the sense of physical safety, not "political" safety.[4]

English law provides further guidance as to what makes a port "unsafe." In a case from 1861, the House of Lords analyzed a situation where the Chilean government had declared a port closed because of a rebellion, and if the vessel were to proceed on charterers' orders, she would have been liable to confiscation. The court stated, in relevant part:

> 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.[5]

In more modern times, the House of Lords rejected charterers' argument that a port could only be unsafe in a physical sense, finding that the outbreak of war between Iran and Iraq, a "political" unsafety, invoked charterers' warranty to nominate a safe port.[6] On the other hand, the London Court of Appeal overruled a lower court holding that the port of Massawa, Eritrea was prospectively unsafe for a vessel to proceed to because it was a characteristic of that port that vessels proceeding to it or at anchor outside it could be subject to attack by pirates. The court proposed a test to ask, "if a reasonably careful charterer would on the facts known have concluded that the port was prospectively unsafe."[7]

The limited case law and arbitration awards discussing "non-physical" risks in the context of a safe port warranty are few, and they reach different conclusions depending on factual circumstances. But the rule appears to be that if a

reasonable owner or master would refuse to send a vessel to a port for fear it would be seized, damaged, or destroyed, the port could likely be considered unsafe.

Murkier Waters

While even the cases conducting an analysis of "political" unsafety still focus largely on the risk of physical danger to a vessel, it does not seem out of the question to consider less traditional instances of unsafety as falling within the realm of an unsafe port assertion. For example:

1. What if a port develops a reputation for corruption, and a shipowner knows it likely will face spurious detention claims unless certain "fines" are paid? Could an owner refuse to accept charterer's orders in such a situation, or at least open a commercial dialogue to request a different port order under the purview of the safe port warranty, arguing that such a situation would render the port unsafe?
2. Consider the practice at some Chinese ports of requiring crew members to surrender mobile phones or other electronic devices for inspection upon arrival. Such inspections have been said to be conducted at random or if a ship was specifically identified as posing a security threat.[8] If a port authority or foreign government was targeting specific ships and requiring surveillance of crew members' work and personal devices, could an argument be made that such a port was unsafe for that particular ship?
3. What if a cyber-criminal threatens a vessel with remote hijacking if it enters a certain port without paying some sort of ransom? It is conceivable that a cyber-criminal could hack a port's IT system such that its infrastructure is compromised, posing a physical danger to vessels entering the port. Alternatively, even if such a criminal did not have the actual capability to do so, it still could make that threat. Could owners assert that such a threat warrants a port unsafe?

All of these scenarios seem increasingly more plausible given the developments in technology and the risks of security breaches. And of course, there are countless conceivable variations to these hypotheticals. Under the "traditional" definition of a safe port, the answer to the first two hypotheticals is "probably not," whereas the third probably could support a finding of unsafe port. This is because the first two hypotheticals identify only financial damage and privacy concerns, respectively. In the third, however, regardless of the cyber-criminal's actual capabilities, there appears to be a real risk of physical harm to the vessel.

The reference in the above definition to a "safe port" for the "particular ship" and to "avoidance by good navigation and seamanship" implies that the safe port warranty is not applicable to a port defect that is of an operational rather than a physical nature. The limited case law available indicates that a finding that a port is unsafe will generally require some risk of physical danger, as, even in the "political unsafety" cases, the ultimate risks involved damage to or seizure of the particular ship. That said, all of the case law on this topic hails from a time before any of those hypotheticals were plausible.

In any case, the analysis of whether or not a port or berth is safe will be a fact-based analysis, which is why there are a number of ways the definition of a safe port could feasibly evolve to adapt to today's increasingly technology-reliant age. Even under the 1958 definition in *The Eastern City*, the exposure to fraudulent "fines," the requirement that crew members surrender their cellphones upon arrival, or a threat of cyber warfare to a ship, arguably could be dangers which cannot be avoided by good navigation and seamanship.

Conclusion

There does not appear to be any immediate risk of upheaval to a sixty-year-old definition of a safe port. But, it is important to think critically about how such long-standing charterparty terms and principles could (or should) be altered in the context of new technologies and risks that could not have been foreseen at the time these maritime customs developed and charterparty definitions were forged.

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Endnotes

[1]*Leeds Shipping v. Societe Francaise Bunge (The Eastern City)*[1958] 2 Lloyd's Rep. 127, 131.

[2]"Port" also encompasses "berth" for the purposes of this article.

[3]*In the Matter of the Arbitration Between Arietta Compania Naviera S.A. and World Wide Transport, Inc., "The Arietta Venizelos,"* 1973 AMC 1012, 1022 (1972).

[4]*Pan Cargo Shipping Corp. v. United States,* 234 F.Supp. 623, 638 (2d Cir. 1967), cert. denied 389 U.S. 836 (1967).

[5]*Ogden v. Graham* (1861) 1 B. & S. 773.

[6]*The Evia* (No.2) [1981] 2 Lloyd's Rep. 613, [1982] 1 Lloyd's Rep. 334 (C.A.) and [1982] 2 Lloyd's Rep. 307 (H.L.)

[7]*K/S Penta Shipping A/S v. Ethiopian Shipping Lines Corporation, "The Saga Cob"* [1992] 2 Lloyd's Rep. 545.

[8]*Margaret Zhou and Helen Huang, Alert: Anti-terrorism Measures for Ships Calling at Ports in China*, UK P&I CLUB PUBLICATIONS, https://www.ukpandi.com/knowledge-publications/article/alert-anti-terrorism-measures-for-ships-calling-at-ports-in-china-141306/ (last visited February 13, 2018).