

UNSAFE PORTS AND BERTHS

There have been several reported incidents in Durban where vessels have either grounded alongside a berth or just near a berth. These incidents immediately raised concern amongst port operators and users as to whether Durban could be declared an unsafe port in terms of contracts between Owners and Charterers. The *MV Ocean Victory* casualty at Kashima, Japan, in 2006 resulted in a claim against a charterer and reminded charterers of the legal obligations that they may take on when warranting in the charter party that the vessel will be trading between safe ports, berths and anchorages.

An investigation into each grounding will obviously need to take place in order to determine the facts in question. One such investigation revealed that the master had declared the wrong draught, which resulted in the vessel grounding.

In light of the groundings in Durban, the port prudently looked at the draughts in the port and immediately reduced the under keel clearance (UKC) in the port by 30cm. This decision had an immediate impact on the industry for at the time, there were a number of vessels on the water sailing to Durban that were within the draught restrictions for Durban and there were a number of consortium agreements in place in order to bring larger vessels to Durban. These contracts were agreed based on the draught restrictions

in place at the time.

All ports have some element of danger. This will, however, not render a port unsafe if these dangers can be overcome by the ordinary skill of the master. Dangers that are avoidable by ordinary good navigation and seamanship do not render a port unsafe.

There is often a risk that a vessel can be damaged when entering, at berth or leaving a port. This may result in hull repair costs, but also result in delays in addition to liabilities for third party property damage. Shipowners will often try to recover these losses from charterers on the basis of an alleged failure by the charterer to order the vessel to a safe port, berth or anchorage depending on the contractual terms contained in the charter party.

Increase in stevedore damage claims in Mozambique

According to a brief issued by the legal team at Bowman Gilfillan, there has been an increase in the number of reports of stevedore damage to ships in the Port of Beira, which is managed and operated by the Port Authority, Cornelder de Mozambique (CdM) with stevedores under their employ.

The firm warns that the common law liability of the vessel owner for stevedore damage can shift to the vessel's charterers, depending on the clauses contained in charter parties and, in particular, stevedore damage clauses.

CdM's Operational and Commercial Regulations for the Container and General Cargo Terminals establish the terms and conditions to which users of the port are subject and in relation to any services provided by the Port Authority.

The relevant sections pertaining to Responsibility of a Ship are provided for in Article 48, which states that: "The respective captain who supervises and commands cargo-handling operations shall be exclusively responsible for everything which occurs inside or from the inside of the ship, whether the operation is executed by a member of the crew, or by a person extraneous to it, contracted, or not, by the ship or its agent.

"The owners of a ship, or the person representing them, shall be liable on the terms on which principals are liable for the acts of their agents, for all damage or losses caused to the ship itself, or to cargo, by stevedores, operators of equipment, gate clerks or any other persons who execute the operation in which damage or loss arises, provided that such damage or losses occur within or from inside the ship.

"The liability of the ship, or of its representative, shall cease when the damage or loss, or when the operation from which the damage or loss arose, is ascertained to have taken place outside of, or from outside of the ship.

Bowman Gilfillan emphasise that CdM can rely on its regulations to avoid claims for any stevedore damage that may occur in its port. "This will prove difficult for parties to recover any claims from stevedores and the damage may have to lie where it falls contractually. Owners and charterers should be aware of this and are advised to bring this matter to the attention of their P&I Clubs and Hull Underwriters," they say.

Contractual liabilities

In contract law, some contractual terms can be expressed or implied. It is expected that the vessel will trade between safe ports and safe berths.

Often charterers give an express warranty for the safety of the port and berth. For example, clause 5 of the New York Produce Exchange (NYPE) charter 93 provides that the vessel shall be employed between "safe ports and safe places". So, when charterers consider their liability under the charter party in respect of a grounding incident, they should keep in mind that they have probably given an express warranty for the safety of the port or berth.

If this is not expressly mentioned in the charter party terms, then in most cases, the courts will not imply such a warranty. However, if the charter party terms simply provide for a geographical range of unnamed ports, then the matter may be different and the warranty may be implied.

If there is a safety warranty (whether expressed or implied) then one must ask when does the obligation arise? The general view is that it arises when the charterers order the vessel to proceed to a port or berth. This means that a berth that was safe can now be unsafe as a result of an incident or the berth could be unsafe and made safe prior to the vessels arrival.

Changing circumstances

Circumstances change very quickly in shipping and an initially safe berth can be rendered unsafe simply, for example, by change in weather conditions. It is therefore imperative that a charterer makes prudent enquiries regarding circumstances in a port prior to a vessel's arrival just in case the circumstances have changed and the vessel needs to proceed to another port in order to deliver the cargo.

In this regard, port agents and P&I correspondents are best placed to provide up-to-date information on a port or berth or any problems associated with a particular port. This information is also freely publicised by port managers.

The general view is that at the time the port needs to be safe for the ship to reach, use and leave it.

Charterers who repeatedly insist on ordering a vessel to an unsafe port could be in serious breach of the charter party.

Defining a safe port

So what does the word "safe" actually mean? The accepted view is that a port will not be safe unless at the relevant time the ship can reach it and use it, without in the absence of abnormal occurrence,

being exposed to danger that cannot be avoided by good navigation and seamanship.

The above relates to physical safety, but a charterer can also warrant that a port is also politically or legally safe. This issue can arise where the local political and legal system does not provide effective legal remedies to resolve disputes.

If a vessel is damaged and/or delayed as a result of an incident then the owner of the vessel could hold the charterer responsible for the damage and/or losses under the charter party. Owners will seek to claim that the loss was caused by an allegedly unsafe port or berth to which charterers ordered the vessel to proceed.

In such a case it is important to be aware of what evidence should be collected in relation to any incident. In a case where, for example, an abnormal occurrence causes damage to a vessel (such as an exceptional storm), the port will not be considered unsafe. A port will only be unsafe if the danger derives from its own attributes.

Investigating incidents

The on board investigation into any grounding or damage to a vessel should determine the chain of events that resulted in the incident. A charterer would not be held liable if there is an element of negligence in the master's or pilot's actions. This may also be the case where the master sees the danger, but fails to take action to avoid the danger. For example, the master sees that a fender is missing on the berth yet continues to berth the vessel.

Shipping accidents can be extremely expensive and costly for all those involved. Some expensive claims have arisen simply from a vessel breaking her mooring lines. Two such cases arose in Durban recently when a strong storm caused the vessels to snap their mooring lines and as a result, one ship then struck another. The question that arose was whether the vessels were aware of the impending storm and whether before the storm struck they took preventative action by checking mooring lines or doubling up on mooring lines.

The general view is that should a port not be properly dredged or should it fail to give adequate warnings to vessels about dredging works then this could result in an unsafe port claim under a charter party safety warranty clause. Durban is Africa's busiest port and it would be a serious issue should it be physically unsafe or system failure in the port.

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