



► **LEGAL COSTS COVER (LCC) -  
A GUIDE TO SAFE PORTS**



## SAFE PORTS

**Both time and voyage charterparties will normally place charterers under an obligation to order the ship to proceed to ports which are safe.**

**Safe port disputes are normally complex and fact sensitive. We set out some of the principles a court or arbitration tribunal will usually apply when considering such claims.**

### How does the 'safe port' obligation arise?

The obligation usually arises by way of an express term in the charterparty. Examples of such terms include:

NYPE 2015 (Clause 1):

... (b) The Vessel shall be employed in such lawful trades between safe ports and safe places within the following trading limits... as the Charterers shall direct.

(c) Berths – The Vessel shall be loaded and discharged in any safe anchorage or at any safe berth or safe place that the Charterers or their agents may direct, provided the Vessel can safely enter, lie and depart always afloat.

Where there is no express term, the court may in certain circumstances imply a term as to safety.

### 1. What is a "safe" port?

The often cited definition of a "safe port" was given by Sellers LJ in the case of *The Eastern City*<sup>1</sup>:

"...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."

Physical risks which can render a port unsafe include:

- Grounding due to uncharted shallows, shoals, banks, bars, rocks or submerged objects / hidden wrecks;
- Meteorological risk such as storms, swells or ice;
- Berth characteristics such as defective fendering, water draft or air draft;
- Port set-up, including defective berthing procedures, inadequate tugs and pilotage arrangements.

Political risks, including the risk of war and terrorism may also result in a port being rendered unsafe. In *The Evia* (No 2)<sup>2</sup> the House of Lords rejected an argument by charterers that the safe port clause of the BALTIME form applied only to physical unsafety only. In that case, the ship was ordered by charterers to proceed to Basra, Iraq. After reaching Basra, war broke out between Iran and Iraq, resulting in the ship being trapped for a number of months, ultimately frustrating the charter.

<sup>1</sup>[1958] 2 Lloyd's Rep 127 at p131

<sup>2</sup>[1982] 2 Lloyd's Rep 307

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### Relevant period (What if the port becomes unsafe after charterers' orders?)

The prospective safety of the port is judged at the time of the charterers' orders. The "relevant period of time" is the time when the ship will be using the port, and where relevant, approaching or departing from it.

Case law suggests that if the port subsequently becomes unsafe whilst the ship is en-route, the charterers come under a new obligation to cancel the original order and issue fresh orders for the ship to proceed to another port which is prospectively safe<sup>3</sup>. If charterers fail to issue new orders and owners are aware of the changed circumstances, then the owners may be entitled to cease to obey the earlier order.

### Does a ship's characteristics matter?

The question of safety of a port will be applied to the particular ship involved and the particular condition she is in. Factors such as the ship's dimensions, draughts and laden or ballast condition need to be taken into account by charterers when nominating a safe port.

By way of example, if charterers were to order a non ice-classed ship to go to a port whose approach is known to freeze over during winter, and the ship ended up stuck in ice resulting in damage to the hull, then on the face of it charterers have breached their safe port obligation. However, this would not mean that the port was an unsafe port for other, ice-classed ship.

### Defences available to charterers

There are a number of defences available to charterers in a safe port dispute, including:

#### Abnormal occurrence

A charterer will not be in breach of its obligations if the cause of danger to the vessel is an "abnormal occurrence", which can be defined as an isolated, abnormal or extraneous occurrence, unconnected with the set up of the port and well removed from the normal and ordinary course of events. One-off incidents, such as when a competent pilot makes a mistake, or when the ship is involved in a collision, are likely to be considered as "abnormal occurrences" and therefore unlikely to render a port unsafe.

Unprecedented weather conditions may also be considered to be an "abnormal occurrence". In the case of the *Ocean Victory* the ship was ordered by charterers to discharge cargo in Kashima, Japan. During unloading, weather conditions deteriorated rapidly, with the berth affected by considerable swell gale force 9 winds on the Beaufort scale. The Supreme Court found that the simultaneous coincidence of the gale force winds and long waves experienced amounted to an "abnormal occurrence"<sup>4</sup>.

#### Good navigation and seamanship

A charterer may also argue that dangers encountered by the ship which are avoidable by good navigation and seamanship do not render a port unsafe.

<sup>3</sup>See *The Lucille* [1983] 1 Lloyd's Rep 387

<sup>4</sup>[2017] 1 Lloyd's Rep 521

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### Negligence by ship

Connected with good navigation and seamanship, a charterer may argue that the negligence of the master or crew caused (or at least contributed to) the damage. Such negligence could include a failure to prepare or follow an adequate passage plan or a ship-handling mistake.

### Litigating safe port cases

Safe port disputes are typically complex and fact sensitive cases and it is important to obtain and preserve as much evidence as possible from an early stage, including:

#### Objective Assessment

- Correspondence exchanged between Owners, Charterers (including their respective brokers), before, during and after the fixture;
- The relevant chart(s) used;
- Ship's ECDIS data;
- Ship's VDR;
- AIS data;
- Details of the port's characteristics, including:
  - Buoyage;
  - Pilot training, competency and experience;
  - Accuracy and frequency of port's hydrographic surveys and dredging operations;
  - Publication of information to port users, including notices to mariners;
  - Availability of tugs and other service vessels (e.g. icebreakers).

### Employment clause

In some charterparties an "employment" clause may be present, specifying that the Master (although appointed by the owners) shall be under the orders and directions of the charterers.

In the event of an incident that resulted in the ship being damaged, a court or arbitration panel may conclude that due to the "employment" clause there is an expressed or implied indemnity, requiring charterers to indemnify owners in respect of damage to the ship that results from compliance with charterers' orders.

Therefore, seeking an indemnity from charterers under the "employment" clause can be a useful tool for an owner to advance if an unsafe port claim is certain. In the *Evaggelos Th*<sup>5</sup> it was held that although charterers had not broken the implied obligation as to port safety, charterers could nevertheless have been held liable under the charterparty if the arbitration tribunal had concluded that compliance with the orders of the charterers was the cause of the damage to the ship.

<sup>5</sup>[1971] 2 Lloyd's Rep 200

### Conclusion

Whether a port claim can be successfully pursued or defended, is a matter of law as well as a matter of fact. Safe port claims can be particularly complex, so we recommend to our Members to approach the Club's LCC team for advice at an early stage.

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A recent publication raising awareness of time pressure in the maritime industry included an assessment of safe port warranty. The guidance provides further information about some ways in which a port may demonstrate that it is 'safe', beyond the criteria already highlighted within this article. You can learn more by visiting [The Nautical Institute website](#).

For further information please visit [www.shipownersclub.com/lcc](http://www.shipownersclub.com/lcc)

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