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SAFE BERTH" OR "SAFE PORT" CLAUSE IN VESSEL CHARTER AGREEMENTS



Ensuring safety in ports and berths is one of the most important issues in the maritime law. Many standard forms of time charter parties contain an express warranty of safe ports whether it's a load port or discharge port or berth by the Charterer. The Baltimore 1939 (Revised 2001) Charter Party, it is expressly stated that "The Vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the Vessel can safely lie always afloat within ...". Similarly New York Produce Exchange Form 1946 (NYPE 1946) states that the Vessel is to be engaged into lawful trades "between safe ports and/or places". With regard to Voyage Charter Party

Agreements, the express obligation towards the port's or berth's safety is not always stipulated.

The most classic definition that is being used to identify a safe port (or berth) is the one given by Sellers J. in Leeds Shipping vs. Societe Francaise Bunge (The Eastern City) [1958] 2 Lloyds Rep. 127, where he said "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 definition has become a starting point in examining the problem

of safety in judicial court s and arbitration proceedings. When a claim is filed against the Charterer for nominating an unsafe port or berth, the Court examines the following which is based on the aforementioned definition.

1. Whether that particular ship can proceed to a port, use it and return without being exposed to a danger.
2. If not, whether the good navigation and seamanship could have helped to avoid the danger.
3. If not, whether the danger stemmed from any event other than an abnormal occurrence in the port.

Particular Ship: while nominating a "Particular"



**THOUGHT
for
theMONTH**

TAKE A METHOD AND TRY IT.
IF IT FAILS, ADMIT IT FRANKLY,
AND TRY ANOTHER. BUT BY ALL
MEANS, TRY SOMETHING
FRANKLIN ROOSEVELT



port or a berth, the consideration shall be given to the “particular” ship involved and the particular condition she is in. The particular port or berth must be safe for the particular ship, taking into account her type, class, dimensions, features, laden or ballast etc. If the particular ship is laden, then the port must be safe for the ship in her laden condition. If she is ballast, the port or berth must be safe for the ship in its ballast condition. In addition to this, the particular port or berth must be safe not only for the particular ship but also for its crew as well. During the outbreak of Covid – 19 or Ebola, many ports and berths were considered unsafe since the crews were likely to get exposed to these contagious diseases / health hazards once they arrive at the port or berth. The safety of port or berth may also get affected by the season or time of the year, or even may be due to the civil and political issues.

Relevant Period of Time: Though in a general sense this indicates the time when the ship is using the port or the berth, it actually relates to the entire period of time when the ship is using, staying and returning from the port/berth. However, the prospective

safety of the port is judged at the time of the charterer’s orders. In practice, the charterer is considered liable, if an unsafe circumstance exists, at the time of charterer’s order, despite it being remedied prior to arrival.

Safety: The term ‘safety’ has wide meaning as it include both physical and political safety. Physical risks include the grounding of ship due to rocks, bars, submerged objects, hidden wrecks, berth characteristics etc. whereas the political unsafety includes the risk of war, epidemics, terrorism etc. and also the risk where the ship is being blacklisted or detained at a subsequent port.

Abnormal Occurrence: Though all the aforementioned are the criteria’s to consider a Safe port or berth, the charterer is not in breach if the cause of any danger is due to an abnormal occurrence. This is one of the defences which a charterer can apply, if a claim is filed for breach of warranty of safe port or berth. A port will therefore only be unsafe if the danger flows from its own qualities or attributes.

Good Navigation and Seamanship: Another circumstance where charterer

shall not be liable is where the danger was avoidable by ordinary good navigation and seamanship. If more than ordinary skill is required to avoid the danger, then the port will not be safe.

This being said, each claim of unsafe port dispute requires unique analysis of the evidence that is likely to be relevant. The success of advancing an unsafe port claim, in case of ship owner) or defending, in case of charterer, is dependent on the wording of the charter party (whether it contains an express or implied safe port / safe berth warranty); evidence etc. A ship owner also has its own duties and obligations in response to an order from the charterer. Although the master is entitled to assume that the charterer has complied with any safe port warranty (by nominating a safe port), the master’s obligation is only one of reasonable conduct. Any order given by a charterer directing a ship to an unsafe port is a breach of the charter party and the owner is not obliged to follow it. However, if the master reasonably obeys the order and the owner suffers loss as a consequence, it will be entitled to damages.

BOUNCED CHEQUES AND THE LATEST AMENDMENTS IN THE UAE

The new amendment to Federal Law No. 18 of UAE’s Commercial Transactions Law, 1993, regarding the decriminalization of bounced cheques and the partial payment of cheques took effect from January 2, 2022, as per the directive of the UAE Central Bank. These changes are in line with the embraced practice in countries such as France and the USA. Being a criminal offense before the amendment, the modifications have been enacted so as to make it a civil offense where people can discuss and settle the case amicably.



Cheques returned due to insufficient funds has been decriminalized to a large extent and criminal liability will only accrue in cases where the cheque has been issued for an illegal purpose, bounced as a result of being delivered in bad faith, or as a result of fraud or forgery, or has been deliberately written or signed in a way that makes them untenable. It may also accrue, criminal liability, if proven that:

1. The drawer had ordered the bank to not cash the cheque before the due date;
2. The drawer had closed the account or withdrawn the available balance prior to the due date.

Moreover, the previous beneficiaries of bounced cheques must notify a police station regarding the situation, providing details of the drawer, drawee, the cheque, and the bank where it was to be cashed. Before visiting a police station, the complainant should first ascertain in which area of the city the cheque was first submitted for clearing, as it is the police station in the corresponding area where the cheque was first submitted, that shall have jurisdiction over the complaint.

Once the complaint is accepted, after review of the original cheque along with the return memo and other relevant documents, the cheque issuer, or the counterparty, in this case, will be notified by the police to come to the station for questioning. Once the police record the statements of all parties involved, they will prepare their report and the complaint will be transferred to the Public Prosecution. The Public Prosecution has exclusive jurisdiction to initiate and prosecute criminal proceedings under AED 200,000/- by issuing a fine only. For cheque amounts over AED 200,000/-, the Public Prosecution will have to transfer the case to the criminal court for their review. If the amount is less than AED 200,000/-, then the case would be transferred to a civil court that could enforce him to pay the amount mentioned in the cheque along with a fine. It is at this point that the courts would determine whether or not there existed an element of bad faith.

On the contrary, the new amendment enables the beneficiary to directly approach the court's execution judge, after obtaining a certificate from the bank, to order payment of the full, or

partial payment of cheque's value, or even enforce the right to seize the drawer's assets, in an accelerated and easy procedure that preserves the rights of all parties involved. To that extent, partial payment of cheques has also been made mandatory, with the bank required to pay the drawee the partial amount if the amount in the account is less than the value mentioned in the cheque unless the Drawee rejects such payment. In such cases, the bank shall follow the protocols for partial payment of Cheque value, as stipulated in the new amendment law.

Also as part of the changes, administrative penalties for issuing cheques without funds will also be toughened, including withdrawal of chequebooks from the transgressor, denying them the right to receive new chequebooks for a maximum of five years, and suspending their professional or commercial activity.

This move to amend the Commercial Transactions Law that decriminalizes bounced cheque cases are expected to come as a huge relief to hundreds of businesses, that earlier had to pay hefty fines under risk of imprisonment without trial in the UAE.



HOT NEWS

KERALA HIGH COURT CREATES HISTORY

For the first time in the history of judiciary, the Hon'ble High Court of Kerala held a late night hearing of an Admiralty Suit on Monday, 24th January 2022, to arrest a Vessel, MV Ocean Rose, from leaving Cochin Port Trust, which was scheduled to leave at 05.00 am the next morning.

The late night sitting at 11.30 pm was conducted virtually and the Court directed the Registrar to issue an order

to seize the Vessel, MV Ocean Rose, along with her hull, engines, machinery, boats, bunkers, and equipment after the payment default.

The suit was filed by Grace International Company, who claimed that the owner of the vessel owed over Rs. 2 Crores (approx.) towards the supply of water to the Vessel, which was currently called at the Port of Cochin carrying sulphur for FACT in Kochi.



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