CHARTERPARTY — NOMINATION OF A SAFE PORT

The Dagmar. (Tage Berglund v. *Montoro Shipping Corpn.)*[1]

When a ship is let on charterparty, it is common that the ports at which the ship will call are not named in the charter, but that the charterer is empowered to nominate them at a later date, in the light of his current commercial activities. This is true, not only of time charterparties, but also of voyage charterparties. The shipowner who thus surrenders a degree of control over the movement of his ship is naturally anxious that his ship will not be ordered to a port in which it will be endangered, whether by maritime perils or by political disturbance. Accordingly it is not uncommon to find an express undertaking by the charterer that the port nominated be safe.[2] In the absence of an express undertaking, it is thought probable that such an undertaking will be implied.[3]

The question whether a port is safe has more than once been the subject of litigation. Clearly the concept of a safe port is a relative one, relative to the ship in question and to the purposes for which it has entered the port: what is safe for a small vessel of limited draught may not be safe for a tanker of 200,000 g.r.t. Nonetheless general definitions of what will constitute a safe port have been offered by the judges. In *The Eastern City*,[4] Sellers L.J. said that:

> "If it were said that a port will not be safe unless, in the revelant 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, it would probably meet all circumstances as a broad statement of the law."

From such general definitions it might be implied that a port will not be safe unless the ship can remain in the port for the duration of her call without interruption and without the intervention of danger. But this does not seem to be the true state of the law. Concerning the facts of *The Eastern City,* Sellers L.J. noted that:[6]

23. [1962] M.L.J. 334.

24. A more appropriate term would be sub-licence.

25. On analogy with the position in respect of a covenant not to assign in a lease which does not prohibit sub-letting. *Blencowe* v. *Bugby* (1771) 3 Wlls. 234.

26. It may be pertinent to note that in the cases of *Julaika* v. *Mydin* [1961] M.L.J. 310. *Mohamed Said* v. *Fatimah* [1962] M.L.J. 328 the action of trespass was made available to the holder of a Temporary Occupation Licence.

27. *cf.* tenancy at will.

1. [1968] 2 Lloyds Rep. 563.

2. See, for example, the Baltime Time-Charter cl. 2.

3. See Scrutton, "Charterparties and Bills of Lading" (17th ed.) p. 11 and references cited.

4. *Leeds Shipping Co. Ltd.* v. *Ste. Francaise Bunge* [1958] 2 Lloyds Rep. 127, 131.

5. See also *Hall* Bros. S.S. Co. v. *Paul* (1914) 111 L.T. 811, 812 *per* Sankey J.; *The Stork* [1955] 2 Q.B. 68, 105, *per* Morris L.J.

6. [1958] 2 Lloyds Rep. 127, 131.

> It was not questioned that in certain conditions of wind and swell it was customary and necessary for the safety of vessels, particularly those as large as the Eastern City, to leave the port for the open sea and to return to the loading anchorage when conditions improved.

The Court of Appeal held that the port, Mogador (now called Essaouira), on the coast of Morocco, was unsafe, although not because of the intervention of temporary unsafely while the ship was in port *per se*, but because the conditions were such that the ship did not have enough time and notice to escape to the open sea. Sellers L.J. accepted this proposition of the judge at first instance, Pearson J.:[7]

> I think theoretically it is possible for a port to be safe even though ships have to leave it in certain states of the weather provided that all the operations of entering it, going out of it, re-entering it, loading and going out again, can be safely performed, and provided also that there is no appreciable danger of a ship being trapped by the sudden onset of bad weather.

The second proviso is important, and was not satisfied in the instant case: the ship did not have time to escape. The first proviso is perhaps unnecessary: if the approach to a port is unsafe at all times, the port itself is unsafe in any event;[8] the possibility that the approaches be rendered unsafe before the ship can use them is covered by the second proviso.

The proposition of Pearson J. was accepted and applied recently by Mocatta J. in *The Dagmar*.[9] The Swedish m.v. "Dagmar", under charterparty in the Baltime form, was ordered to a place in Quebec called Cape Chat. It was scarcely a port, being no more than a pier on the south shore of the St. Lawrence, a pier serving the small township of Cape Chat and the sawmill which was the town's only industry. The vessel (6491 g.r.t) was the largest that had come to Cape Chat for many years. The place was exposed to winds from the north, such winds came up unexpectedly, the vessel's after moorings parted and she was driven aground with resultant damage. The learned judge held that the port was unsafe and that the charterers were liable. But he applied the proposition of Pearson J., holding that:

> the mere fact.... that in certain conditions of wind and sea the Dagmar and, indeed, vessels substantially smaller than her, could not remain in safety in Cape Chat, does not by itself and without more establish that Cape Chat was unsafe for the vessel.[10]

The instant case appeared to differ from *The Eastern City*[11] in that in the former, the approach of bad weather from the north could have been anticipated by attention to weather forecasts on the radio. There being time to escape to open water, the place was potentially safe for the vessel. But the vessel's radio mast had been dismantled in order to facilitate loding and it was found that the master had been reasonable in thinking that he would receive warning of adverse weather forecasts from the shore. In finding the port unsafe, Mocatta J. held, firstly that where a port was such that ships had to leave it in certain states of weather, the onus was on the charter to bring this to the attention of the master. Given that the charterer warrants the safety of a port at all, this conclusion is not surprising; the premise is that the charterer is in a better position to be informed about the nature of the port that he has chosen than the master.[12] The charterer's obligation to provide cargo is bound up with his duty to provide a place where the cargo

7. [1957] 2 Lloyd's Rep. 153, 172.

8. It is clearly the law, that for a port to be safe, not only must the commercial area of the port itself be safe, but also the approaches to the port, see *e.g. Grace (G.W.) & Co, v. General S.N. Co.* [1950] 2 K.B. 383; this is also explicit in the general definition of safe port, *supra*.

9. *Tage Berglund* v. *Montoro Shipping Corp.* [1968] 2 Lloyds Rep. 563.

10. [1968] 2 Lloyds Rep. 563, 572.

11. [1957] 2 Lloyds Rep. 153, 172.

12. *Reardon Smith Line* v. *Australian Wheat Board* [1954] 2 Lloyds Rep. 148, 153-4 (High Court of Australia).

can be loaded. Just as he must provide the master with information relating to the safe carriage of the cargo provided, so he must provide him with the information which will enable him to use the port in safety.

Normally a master can expect advice on weather conditions from harbour authorities. In a harbour or port that provides complete shelter, such advice may only be necessary when the ship wishes to leave. But the vessel may have to leave for safety's sake during loading, the availability and rapid communication of such advice becomes more important. Mocatta J. also held, secondly, that if, in such a port, the vessel will receive no weather information from the shore and must rely upon her own resources for obtaining weather forecasts, the charterer must bring this to the notice of the master. Ports which lack shelter in certain states of the weather are also likely to be the ones that lack other facilities. The learned judge further held[13] that in such a situation the charterers must "at least pass on to the vessel or cause to be passed on all relevant adverse weather forecast." This might seem a heavy burden to place on the charterer who is essentially a businessman rather than a navigator or a meteorologist. Yet it is submitted that, in the particular circumstances, it is not unreasonable. There is no clear gulf between ports that are safe for a particular ship and those that are not. For a particular ship, the ports of the world might be listed in order of safety, beginning with the safest and ranging down until the mythical line is reached below which all ports are unsafe. It is clear that, for vessels such as the "Eastern City" and the "Dagmar", places like Mogador and Cape Chat are very near this line. The greater the danger (without actually rendering the port unsafe) the greater the degree of involvement and activity that can reasonably be expected of the charterer; indeed, it is clear from the *Dagmar*, that a port may sometimes be deemed unsafe unless he does act positively and effectively outside the normal role of the businessman. If he does not like playing harbour-master, then he should name a place that has one, and all the other facilities that make for safety.

Finally, *The Dagmar* is interesting for its reiteration that a port which must be left in certain states of weather, is not without more unsafe. It is respectfully submitted that this proposition, adumbrated by Pearson J. in *The Eastern City,* is correct. It is in the character of a court that favours business efficacy, one that prefers "ut res magis valeat quam pereat," that it will prop up the shaky legal edifice of the parties, provided that it does not have to actually re-design the structure and provided that the edifice is not likely to collapse disastrously on the head of one or both of the parties. Accordingly, the court should not condemn the port to which the charterer has brought his cargo unless the choice of port really is unreasonable from the point of view of the shipowner. Choice of a dangerous port is unreasonable. A port that is inconvenient because loading or unloading may be interrupted while the ship escapes to the open sea is not necessarily dangerous. A choice that is troublesome is not necessarily unreasonable. It is true that the loading or unloading and thus the adventure may be prolonged, but shipowners anticipate this contingency in their contracts. In the case of a time charter, the sands of time run against the charterer — the shipowner receives his monthly remuneration in any event, whether the month is spent scuttling in and out of port or more profitably, (subject, of course, to the off-hire clause). The expenses of leaving and re-entering port — fuel, port charges, and pilotage, usually fall on the charterer.[14] The economy of the voyage charter is different, the freight earned by the shipowner is not directly tied to the time spent; but if the vessel is detained in port over and above the lay days, the shipowner is compensated by the demurrage clause,[15] or in the absence of such a clause, by a right to damages for detention.[16] It is true, on the other hand, that under a voyage charter the expenses of leaving and re-entering port will usually fall on the shipowner; but it is argued *infra* that the situation and thus the expenses are analogous to the voyage and the operating expenses incidental to it. Even if this argument is not accepted, the court is not likely to feel so sorry for the shipowner that it will upset the adventure by declaring the choice of port unreasonable in this respect and thus unsafe. In

13. [1968] 2 Lloyds Rep. 563, 586.

14. See, for example, Baltime cl. 4.

15. See, for instance, Gencon cl. 5.

16. Generally, see Scrutton, *op.cit.* chapter IX.

short, the charterer stands to lose more if the port is declared unsafe than does the shipowner if it is regarded as safe. The court should lean in favour of the nomination.

The proposition of Pearson J. may be further supported by argument by analogy with other aspects of this branch of shipping law. Firstly, in the case of ports safer than Magador or Cape Chat, a vessel may have to make navigational manoeuvres, adjustments to her position, in order to load or unload in safety, all within the ambit of the port. It has never been suggested that the need for such manoeuvres renders a port unsafe. It may be argued that to leave the port altogether in certain states of weather is no more than an extreme example of such a manoeuvre, differing in degree but not in kind. In *The Eastern City* there was evidence that other vessels had left Mogador every evening during loading and had returned the following morning to continue the operation, this apparently without protest from the shipowners.[17] Secondly, it is clearly the law, that a port is not unsafe and thus a bad nomination if, on arrival, the master finds that it is temporarily unsafe and that he must wait a few days before entering it.[18] Nor, in such circumstances, can the master refuse to go further on the ground that he has got as near to the nominated port as he can safely get.[19] This being the law, it is difficult to see why a port should be unsafe in law if a temporary physical unsafety intervenes, not prior to the arrival of the ship, but while it is in port[20] The ship that is delayed outside the port on arrival is like the ship that is held up en route by adverse weather, the time and expense are part of the voyage, part of the navigation and matters for the shipowner; it is difficult to view the ship that escapes port in the face of intervening unsafety as performing part of the contract voyage; but it is more difficult to see why the charterer should shoulder the loss when that loss can be avoided by reasonable navigational manoeuvres by the ship. It is submitted that such ports should not be unsafe in law.

The proposition is admittedly subject to qualifications. Firstly, intervening danger will render the port unsafe in law if the vessel is likely to be trapped in the port by the sudden onset of the danger.[21] This was the situation in Mogador and, in the particular circumstances, in Cape Chat. Secondly, if the dangerous conditions in question occur with such frequency that the vessel spends more time escaping from the port and lying outside it than it does using it, then the periods in which the vessel is unable to use the port should be aggregated and if the total period of interruption is inordinate in the light of the adventure, then it is unreasonable to require the shipowner to use the port, the port is impossible and thus, in effect, unsafe.[22]

> For in matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost.[23]

A third and final qualification is this:

> But it would be right to take into account the object of the voyage and the object of going into the port *(e.g.* to load or unload cargo) and the provisions of the charterparty concerned, and it might be necessary, on the true construction of a particular charterparty, that the port should be safe for uninterrupted loading.[24]

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17. [1957] 2 Lloyds Rep. 153, 160.
18. Parker v. Winlo (1857) 27 L.J.Q.B. 49, 53 per Crompton J.
19. Dahl v. Nelson (1881) 6 App. Cas. 38.
20. It has been held that a port is not unsafe because a vessel must leave it in certain states of the tide: Carlton S.S. Co, v. Castle Mail Co. [1898] A.C. 486.
21. [1967] 2 Lloyds Rep. 153, 172 per Pearson J. quoted supra.
22. This seems to be a reasonable adaptation of the principle in Dahl v. Nelson (1881) 6 App. Cas. 38.
23. Moss v. Smith 5 Q.B.D. 163, cited with approval by Blackburn L.J. in Dahl v. Nelton (1881) 6 App. Cas. 38, 52.
24. [1967] 2 Lloyds Rep. 153, 172 per Pearson J.