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Safe port clauses: A comparison of English law and Azerbaijani Law

Abstract

Safe port clauses stated under charterparties have own weight in calling a port weather it is safe or not for a particular ship. In this regard, the parties of business might be interested in how to state the clauses properly for not being burdened with financial troubles. Considering the above, the article will try to take a look at safe port clauses which should be and are a part of charterparties while entering business relations. The article will also analyse the clauses through English and Azerbaijani law and will try to identify comparative points between them.

Annotasiya

Çarter müqavilələri ilə müəyyən edilən təhlükəsiz liman qeyd-şərtlərinin limanın spesifik gəmi üçün təhlükəli hesab edilib-edilməməsi baxımından xüsusi çəkisi var. Bu mənada, biznes münasibətlərinin tərəfləri maliyyə çətinlikləri ilə üzləşməmək üçün bu qeyd-şərtlərin necə düzgün olaraq göstərilməsində maraqlı ola bilərlər. Deyilənləri nəzərə alaraq, məqalə biznes münasibətlərinə girərkən çarter müqavilələrinin bir parçası olan və olmalı olan təhlükəsiz liman qeyd-şərtlərinə bir nəzər salacaq. Məqalə həmçinin bu qeyd-şərtləri İngilis və Azərbaycan hüququ vasitəsilə analiz edərək, onlar arasındakı müqayisəli məqamları ortaya çıxarmağa çalışacaq.

Introduction

There has always been a matter in respect of ensuring safety in ports, since over 90% of the world trade has being carried out by sea¹ and that becomes a larger scale day by day. Considering potential and various technical problems might occurred in ships, unwelcomed warlike activities, bad weather conditions, etc., there will oftentimes be an issue regarding cargo loss or damages to vessels which leads to liability among the parties of vessel. In order to take precautionary measures, it has been a matter to assure safety in ports by parties of a vessel for all along the years. In the light of that, ensuring safety in ports has appeared through legislations and case law. But to what extent it can be reflected by law? Is there always a need to develop clauses that stated under law?

In addition, it paves the way to further disputes amongst the parties of a vessel, if they fail to define safe port clauses under a charterparty. Safe port clauses under charterparties should clearly be stated under not only legislative acts but also should be developed through the case law so as to

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¹ International Maritime Organization, brochure: IMO's contribution to sustainable maritime development, 3. Look at here:

<http://www.imo.org/en/OurWork/TechnicalCooperation/Documents/Brochure/English.pdf>
[last visited on 26.04.2018].

avoid undesired corollaries might happen. Besides, two laws belonging to two different legal systems reflect the safe port clauses slightly differently. Through the article, it will be shown how they treat the matter and which different views that the laws have with respect to safe port clauses.

I. The Parties May Involve

In general, a ship could be entitled to numerous and several owners/holders/hirers. For instance, if the vessel is under mortgage there would probably be a bank that has a right to demand its funding, or if charterer and carrier are not the same person, there would be carrier liable for cargo being lost and charterer liable for the vessel got damaged. Although it is possible to prolong this list, but we will focus on three of them in this article: ship owner, charterer and carrier. That is because they are in the middle of matters concerning a vessel. The brief explanation of parties is as follows:

- Ship owner - a legal/natural person who has an entitlement over the vessel, unless there is mortgagor on the vessel or encumbrance, and generally, ship owner is responsible for the vessel and her crew (depending on type of charterparties);
- Charterer - a natural/legal person acting like a “merchant”, and entering into charterparties with a ship owner (or another charterer who bareboat chartered the vessel) and generally, is responsible for safety in ports and berths while entering or getting out, and decides where the vessel should steer to;
- Carrier - a person who enters into a bailment relationship with charterer in terms of carrying cargo.

Now, we have another question that who should take the risk for damage or (maybe) loss due to various dangers encountered in port/berth where the vessel under charterparty got damaged or lost her cargo. The issue will be tried to elucidate from the perspective of two laws: English and Azerbaijani.

II. Point of the English law

Firstly, the cause of choosing English law in this article is that English law has a broad insight into the maritime law and in our case, into port-related matters. English law regulates almost all clauses and provisions stated under charterparties for ensuring safety in ports. Under English law, safety clauses are most-likely determined between a ship owner and charterer. Generally those clauses are known as warranties which a charterer undertakes under the charterparty.

A. Warranties

For purposes of safety in ports, warranties are the main figure that should be taken into account by not only ship owners, but also charterers. Warranty clauses are in general granted by charterers while chartering the vessel.

Many charterparties, and especially time charters have provisions requiring nomination of safe ports; however, in most charterparties there are only a few words with regard to that, hence courts have developed several rules regarding the obligation imposed upon charterers to nominate a safe port under the charterparty.²

In this regard, the wording of warranties has much weight for the parties and depending on how it is stated liability the liability can be shifted from one side to another on the basis of wording and considering the particular situation.

Warranty appears when the charterparty names a port and at the same time, uses the word “safe” or alike to describe the port. In the “*Archimidis*” the charterparty stated “one safe port Ventspils”³ and this was considered a warranty by the charterer as to the safety of the named port. It means that even if the charterparty does not specify separately that the charterer warrants a safe port or berth to load or discharge, but the charterer indicates “one of the safe ports”, it might consider the charterer as a liable person for damage. In a similar case, The “*Livanita*”,⁴ the wording “one time charter trip via St Petersburg...” combined with “trading to be worldwide between safe ports, safe berths and anchorages and places...” contained an express warranty about the safety of St Petersburg.

The safety warranty in this context might also cover safe port when the charterparty shows “a safe port or a safe berth, even if the port is not listed”.⁵ It means that if the charterparty does not state any named port/berth should be safe, the charterer should proceed the vessel to any named or nominated port afterwards by him/her which should be safe.

For example, in the court case, The “*Ternauzen*”⁶ the vessel was damaged due to grounding during loading operations. The charterparty specified that the vessel should be steered to a port “where she can lie safely afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety”. The provision is considered as a warranty, and despite the fact it said that the vessel could lie aground, the judge stated that the berth in

² Choi Wai Bridget Yim, *Safe Port Promise by Charterers: Rethinking Outstanding Complications*, (2016) 30 ANZ Mar LJ 1, 5 (2016).

³ AIC Ltd v. Marine Pilot Ltd (The “*Archimidis*”), 1 Lloyds Rep 597 (2008).

⁴ STX Pan Ocean Co Limited v. Uglund Bulk Transport AS (The “*Livanita*”).

⁵ G.W. Grace & Co. Ltd. v. General Steam Navigation Company. Ltd. (The “*Sussex Oak*”), 83 Lloyds Rep 297 (1950).

⁶ Lensen Shipping Ltd. v. Anglo-Soviet Shipping Co. Ltd (The “*Terneuzen*”), 52 Lloyds Rep 141 (1935).

question was not one which the vessel could lie safely while loading the designated cargo.

B. Charterparties

Charterparty is a contract between a ship owner and charterer or hirer through which the rights over the ship depending on type of charterparty fully or partly, are entitled to the charterer. In English law, there are three main types of charterparty: time, voyage and bareboat charterparties. In general, safe port clauses become one of the main parts of charterparties that it is worth mentioning some of examples through charterparties which have been accepted in the international law. Although the safe port clauses enumerated from different type of charterparties are not formally passed as a law, they are frequently confronted in practice.

1. Time charter:

Time charter is one type of charterparties that allows charterer to voyage under the time period stated in the charterparty. The charterer has, hence, quite extensive options in regards to where he or she may send the vessel and what to transport, even though sometimes the charterparty can stipulate restriction of the area.

For instance, under *Gentime*⁷ in clause 2 of the charterparty the trading limits indicate an express warranty, namely “The vessel shall be employed in lawful trades...between safe ports or safe places where she can safely enter, lie always afloat, and depart”. The charterer in this regard cannot name safe port by virtue of nature of time charter. Consequently, expressing a general wording might be considered the right thing to do.

Another example is quite similar to *Gentime* clause which implied through *Baltime*⁸ such as - “The vessel to be employed in lawful trades...only between good and safe ports or places where she can safely lie afloat”. However, it is possible for the parties to agree with changes in the standard clauses.

For example, in the court case of “*Dagmar*”⁹, the charterparty was based on a *Baltime* wording with the following amendments:

The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat or safe aground where vessels of similar size and draft are accustomed to lie in safety.

⁷ The Bimco General Time Charterparty, Issued 1999 (*Gentime*).

⁸ The Bimco Uniform Time Charterparty Box Layout 1974 (*Baltime*).

⁹ *Tage Bergland v. Montoro Shipping Corporation Ltd (The “Dagmar”)*, 1968, 2 *Lloyds Rep* 563.

The wording still indicates an express warranty; however, it has been extended to also include “lying safely aground”, hence, the vessel must not always be afloat.

2. Voyage Charter

Under a voyage charter, ship owner and charterer agree upon that the vessel shall carry a specified cargo to the designated point beforehand and the ship owner should grant the charterer with the seaworthy and properly equipped vessel in exchange of stated freight under the voyage charter of which the charterer should pay to the ship owner. Through the following type of voyage charter we will have a look at safe port warranty.

For instance, under the *Gasvoy*¹⁰:

Vessel shall proceed...to a safe berth, dock, anchorage, submarine line, alongside a vessel or vessels or lighter or lighters or any other place whatsoever as ordered by Charterers within the limits [specified in Box 19] or so near thereto as she may safely get, lie and depart from, always afloat...

In contrast to the time charter, voyage charter allows the parties to point exact port or place where the vessel should be steered to. With that, ship owner may assure himself by naming the port beforehand that the vessel can stand out of the danger.

3. Bareboat charter

It is worth mentioning that the bareboat charterer is, in comparison with the voyage and time charterer, taking more control of the vessel as he or she equips, crews and trades the vessel for his own account. Just as the common border between ship owner and charterer is set aside, almost all functions over the vessel have been taken over by the charterer. In terms of safe port, some of bareboat charters cover safety in ports whilst “hand-over” of the vessel is being conducted.

For example, under in clause of 3 of *Barecon 2001*¹¹, it is stated that:

The vessel shall be delivered by the Owners and taken over by the Charterers at the port or place indicated [in Box 13] in such ready safe berth as the Charterers may direct.

III. Point of the Azerbaijani law

In contrast to English law, Azerbaijani law approaches the safe port clauses in a slight different way. First and foremost, Azerbaijani law belongs to the civil law system in which the maritime legislation regulates almost all maritime-related matters, even though the international conventions become a part of national legislation after having ratified by relevant state authorities.

¹⁰ The Bimco Gas Voyage Charterparty, Issued 1972 (Gasvoy).

¹¹ The Bimco Standard Bareboat Charter (Barecon 2001), revised 2001.

Notwithstanding almost all rules are regulated under the law, the Azerbaijani Merchant Shipping Code ("MSC") – the main legislative code in Azerbaijani maritime law allows parties to regulate their own business (for instance, carriage of goods) by themselves, of course if that is not against rules of the MSC.

Under Azerbaijani law, the title of the article can be found mainly through the legislation. Other provisions or rules might be defined by the parties of current business relations. Those rules can differ depending on nature of interactions.

Under the MSC, there are two types of charterparties:

1. Time charter;
2. Bareboat charter.

The definition of *time charter* is more or less similar to the general definition of time charter. As known, the crew of vessel is peculiar to ship owner and hired by himself/herself. In this regard, the MSC defines that the crew shall obey to ship owner in the sense of operating vessel and with respect to internal rules of the vessel.¹² On top of that, charterer's orders are also mandatory which are given with regard to commercial purposes.¹³ For example, oftentimes laytime and demurrage serve to business goals of ship holders regardless of it is charterer or ship owner, and if charterer is a holder of ship at the moment when orders should be given in respect of staying or getting out of the port/berth, the crew should obey to those orders, as failure in time arrangement might damage the charterer's business.

As regards the *bareboat charter*, the MSC implicitly defines that the charterer should ensure seaworthy of the vessel during the term of charterparty¹⁴. That means, the charterer should prevent possible damages to the vessel including ones might be occurred by virtue of unsafe ports/berths.

As it can be seen, there are no other provisions related to the safe port under the charter-related paragraphs of the MSC.

From practical standpoint, there is a workable charterparty - *Asbatankvoy*¹⁵ wherein the safe port warranty is clearly stated:

The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighter age being at the expense, risk and peril of the Charterer.

¹² MSC, Article 159.1.

¹³ *Id.* at art. 159.2.

¹⁴ *Id.* at art. 167.2.

¹⁵ *Asbatankvoy*. Association of Ship Brokers & Agents (U.S.A.), Inc. October 1977.

According to other provisions of *Asbatankvoy*, the master is in charge of defining the port whether it is safe or unsafe in the conditions of warlike activities or perils to vessel, if the charterer could not name or nominate a safe one. Considering that the master is a part of crew under voyage charterparty whom the ship owner hires, we may think of that the ship owner in this context defines a safe port.

III. When Safety Comes?

According to the MSC, the charter¹⁶ should cover the matters such as: the place where the vessel is about to steer or the place nominated¹⁷. As a general rule, a charter should cover a nominated port or the place where a vessel steers to and also the name of loading and discharging place¹⁸.

Under the MSC, the carrier should proceed the vessel to the port which is stated under the charterparty. In this regard, the charterer has an obligation to name or nominate a safe port.¹⁹ That is the main clause under the MSC in relation to the safe port clause. Through this provision, the law impose on the charterer to name or nominate port which is safe at the moment of entering/staying/getting out of the port/berth and in this sense the carrier is obliged to proceed the ship to the safe port.

According to the MSC, should the charterer does not name or nominate a safe port, or fail to name or nominate properly, the carrier may terminate the charter (i.e. contract of carriage) and may demand for loss, if any.²⁰ Through this provision, it is obvious that the carrier has privilege to decide, in case the charterer does not introduce safe port/berth.

Under the MSC, if the carrier cannot enter the port nominated or named by the charterer on account of natural occurrences, bans or prohibitions applied by the relevant state or other causes that the carrier is not liable for, the carrier should inform the cargo owner, charterer or other persons who have an entitlement over the cargo pieces²¹. This provision allows carrier (in case bareboat chartered) or ship owner to decide by his own.

According to the MSC, there would be two conditions about the vessel by which cargo is carried:

a) If the vessel is wholly entitled to carry the cargo, the carrier, in a reasonable time after informing charterer and cargo owner, should discharge the cargo at the nearest safe port or may send back the cargo to where it is departed, unless the charterer or cargo owner does not require or request upon what

¹⁶ Known as a charterparty.

¹⁷ *Supra* note art. 95.

¹⁸ *Id.* at art. 90.

¹⁹ *Id.* at art. 95.1.

²⁰ *Id.* at art .95.2.

²¹ *Id.* at art.118.1.

measures should be taken.²² With this provision, the legislation, as likely as not, states dissent wording from English law and binds the safe port matters to the cargo carried by the vessel, not to the vessel itself.

b) There would also be partially entitlement of vessel through which the carrier may carry cargos belonging to shippers more than one. In that case, the carrier may discharge the cargo in one of the safe port by his choice, if shipper or charterer have not made a decision regarding where the cargo should be discharged to. In this sense, the carrier has 72 hours awaiting time after informing shipper and charterer accordingly²³. Under this provision, the legislation gives a carrier more privileges rather than grants to the charterer.

Conclusion

Through the above-mentioned, we may conclude the following comparative points between English and Azerbaijani law:

1. As a general view, English law may be deemed more specific and in detail rather than Azerbaijani law. Although the main cause for that has been the case law through which English law has been enhanced, Azerbaijani law seems to lack of the case law which caused the law to be within a “frame” and could not cross the line;

2. English law opted to regulate safe port clauses under charterparty conception and it is enlarged by the case law. In other words, if a ship is chartered (most-likely by time- and voyage-chartering) the clauses for safe port should be indicated under that charterparty no matter this ship is about to carry passenger or cargo. For instance, each “activity” of a ship associated with entering/staying/getting out of the port is stated under charterparties. But Azerbaijani law seems to suffice by stating only general rules for safe port concept and it is more likely linked to carriage of cargo;

3. Azerbaijani law considers the parties of safe port clauses as a carrier and charterer/shipper, while English law draws attention to a charterer and ship owner. It means that English law regulates safe port matters “one click” before than Azerbaijani law, namely whether the ship is or is not a subject to carriage of cargo, safe port clauses should be undertaken by the charterer under English law. However, Azerbaijani law seems to allow parties of a vessel to “prolong” the time for defining legal statements with respect to safe port clauses until the vessel is intended for carrying a cargo;

4. English law in most cases imposes liability on charterer because of that he should name or nominate the port where the ship will be in safety. Plus, as mentioned previously, there are various warranties which charterer make ship owner assured that the ship will be steered to only safe ports. From perspective of Azerbaijani law, the matter appears differently. We may feel

²² *Id.* at art. 118.2.

²³ *Id.* at art. 118.3.

by analysing Azerbaijani law that the law imposes liability for unsafe port on a carrier. Although it is not explicitly defined, liability for unsafe port falls into scope of carrier's work which is conducted at the end of "process". It means that Azerbaijani law firstly states: "*the carrier should proceed the ship to safe port*", then expresses that "*charterer should name or nominate a safe port*".

5. It seems that two laws defines the accidents arisen out of being in unsafe port differently. English law ascribes unsafe port matters to the damages a ship got. The very point here is also bound with the parties of safe port clauses. As such, English law describes the parties as a charterer and ship owner whose main interests have concentrated on the ship. Whereas Azerbaijani law states carrier and charterer/shipper as the parties who should specify safe port clauses or abide by the rules defined under the MSC. Here it seems that Azerbaijani law sees the safe port clauses in the context of carriage of goods, namely the interaction between carrier and charterer whose main interests are a cargo.²⁴ In this context, under Azerbaijani law, ship as an interest between carrier and charterer is not an exception.

To sum up, the safe port clauses might be regulated differently under different laws. In this sense, English law demonstrates more detailed position, while Azerbaijani law treats the safe port clauses more conservatively. It will be beneficial for ship owners, legal/natural persons who intend to be a charterer and other related persons to look through safe port clauses carefully while entering into charterparty. Here, choosing of law is worth mentioning.

²⁴ Views has been retrieved by an implicit standpoint of Azerbaijani law.