

KISH P & I LOSS PREVENTION CIRCULAR KPI-LP-155-2014
(Understanding Implications concerning Safe Ports & Berths)

► **The Importance:**

Everyone in the shipping trade is somehow involved in the various possible problems once intending to navigate to different ports & berths as well as the adjacent areas. Those entering a charter-party must be aware of the risk of significant unsafe port claims being levied against them.

It is also important to be attentive of the legal obligations a Charterer may take on when warranting in the Charter-party that the vessel will be trading between safe Ports, Berths and anchorages. Equally important is to know the extent and limit of these obligations and what defenses a Charterer may raise when confronted with such a Claim.

► **Overview of the key points Charterers need to keep in mind can be quoted as following:**

1. The existent risks:

There is often a risk that a vessel is damaged when entering, remaining and leaving a port. The loss may consist of hull repair costs, but also delay and loss of time in addition to liabilities for third party property damage. Owners will 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 Charter-party terms).

2. Expressed or Implied Safety warranty:

When Charterers consider their liability under the charter party for such an

incident, they should keep in mind that they have probably given an express warranty for the safety of the port or berth. For instance, NYPE 93, clause 5. reads that: **the vessel shall be employed between "safe ports and safe places"**. If this is not expressly mentioned, courts will in most cases not imply such a warranty. However, if the contract provides for a geographical range of unnamed ports, the matter is different and a warranty may be implied.

3. Instances that the Obligation arise:

After charterers have established that there is a safety warranty (express or implied), the second decisive point is when this obligation arises. The answer is that the port or the berth must be in compliance with the warranty at the time when charterers give the order to proceed to a port or berth. At that time the port needs to be prospectively safe for the ship to reach, use and leave it. It may be advantageous for Charterer to consider -already- before giving the order whether a port or a berth is safe to reach and use for the intended vessel. Their agents and also receivers often have useful knowledge of particular berths, and also respective P & I club's local correspondents will be able to assist beforehand. In some ports this may only be inside information with regard to draught information given by port authorities, and their reliability & the information like those in the Guide to Ports, etc can not be referred to with a reasonable amount of confidence.

4. Subsequent reported unsafe cases and charterers duties:

Nevertheless, should this initially safe port become subsequently unsafe, e.g. a war breaks out, the Port becomes Ice bound, etc. , then Charterers' initial obligation will arise again, i.e. they need to order the vessel to another, prospectively safe port if they wish to continue with the trade.

Repeatedly insisting on ordering the vessel to an unsafe Port could be construed as a serious Charter-party breach. The position under a voyage charter party would be different. The charter may be frustrated due to the unsafe port as this subsequent event will affect the contract "at the core", as most voyage charters are just for one voyage.

It should be remembered, however, that English Law has no concept of "Force Majeure" and the doctrine of Frustration is interpreted strictly.

5. Defining safety in the concept of ports & berths:

The classic definition of safety is found

A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it, and, without, in the absence of abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

in the case law:

But not only physical safety is warranted. A port can also be politically or legally unsafe. This is the case if the local political and legal system cannot provide effective legal remedies for wrongful confiscation.

Subsequent to an incident which caused loss to the vessel, Owners may hold Charterers responsible under the charter party. Owners will claim that the loss, either physical damage and/ or loss of time, was caused by an allegedly unsafe port or berth to which charterers ordered the vessel to proceed. In such a case, Charterers should immediately contact the Club in order to assist and render advice. However, it may be advantageous to have some arguments ready, or at least to be aware of what evidence should be collected.

6. Possible defenses by the charterers:

A) Abnormal occurrence:

As a starting point, and (obviously) given the facts of the case, Charterers may argue that the incident was caused by an "abnormal occurrence", as Charterers will not be responsible for Owners loss if caused by a fact which is not a prevailing characteristics of the particular port. A port will not be considered unsafe because a ship within it is damaged by a wholly exceptional storm or by another ship being negligently navigated. Such causes of damage do not arise from the qualities or attributes of the port itself. With other words the port is not "inherently unsafe".

To state another example, if a hazard is properly lit (marked by light) but for some extraneous reason, e.g., because the power supply was suddenly cut by guerrilla action the lights fail, it cannot be said that the port was prospectively unsafe or that the unlighted hazard was a normal characteristic of the port. Therefore abnormal occurrences will not make a port unsafe; a port will be

unsafe only if the danger derives from its own qualities or attributes.

Finally, if the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated, abnormal or extraneous occurrence—unconnected with the setup—then the Charterer is not in breach of his warranty. Such as when a competent berthing-master makes for once a mistake, or when the vessel is run into by another vessel.

B. Avoidable dangers and master's negligence:

Furthermore, Charterers may argue that all ports have some element of danger. However, this will not render a port unsafe if these dangers can be overcome by ordinary skill of the master, i.e. dangers which are avoidable by *ordinary good navigation and seamanship* do not render a port unsafe. Charterers want to look for an element of negligence in master's (or pilot's) behavior which caused a break in the chain of causation. This can be the case when the master should have seen the danger himself, for instance a missing fender on a jetty, and should have refused to enter the berth.

This applies also when the master fails to exercise reasonable skill in leaving an unsafe port, and thus breaks the chain of causation. The legal test is whether the master acted reasonably while being on the **“horns of dilemma”**, i.e. having to take a quick decision when confronted with a hazard.

7. Concluding Advice:

Ship Incidents in Ports can be extremely costly, having generated

some of the largest loss claims in recent years. Yet it could be as simple as a claim for broken mooring lines.

Charterers need to be keenly alive to the risk that Ship-owners will seek to hold them responsible under charter terms warranting the safety of Ports, Berths and Anchorages.

Charterers can best protect their position by contacting the P & I Club experts whenever they learn of an incident at Port – even if there is no immediate indication of serious damage to the vessel or an issue that could lead to liability for Charterers; it is best to prepare against a claim that may only be made some significant time after the event.

The claims of a port or berth being unsafe may be raised quite oftentimes but the burden of proof shall be on the shoulders of the claimant.

It is equally noteworthy to bear in mind that the commercial complications & the world's economic crisis will inadvertently affect the shipping business & the ships will be bound for the ports that have never seen such sizes and activities. In the shipping market; it was very rare to see a brand new Panamax or a clean fairly new vessel to go for dirty cargoes; but with the economical recession expanding all over the world, you may see lots of such instances. There are numerous leniencies exercised with respect to approaching awkward places & remotely located ports & berths; that is why understanding the possible claims & advances are considered to be a requirement of the trade much more than before.