THE SHIPPING AND INSURANCE ASPECTS OF INTERNATIONAL MARKETING OF COMMODITIES

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This was the topic I was given, but not the topic I have written about. The reason is simple — it would be impossible in a Paper of reasonable length to cover the whole of a topic of such breadth. With that licence which is an implied term of every request to write a Paper for an occasion such as this, I have chosen to narrow the subject to a discussion of shipping and insurance aspects of mineral sales contracts, as being the sphere of interest of this Association and, generally speaking, I have avoided the area of the special class of high value, low volume minerals, such as nickel, and also that of petroleum and its derivatives.

1. SHIPPING

At the threshold of any mineral exploitation venture, there are fundamental questions as to the type of sales arrangements most suited to the product, the parties and the market. Quite a large part of the planning of a mineral development involves consideration of alternative methods of shipping the product to the market. Decisions on these matters are conditioned by many factors; among them are:

(a) the location of the mine and its access to a port (existing or potential);
(b) the nature of the product;
(c) the type of vessel which is most suitable to the product and the availability of vessels of that type;
(d) the location of the market and the port facilities there available;
(e) the previous experience and expectation of the market in relation to the product;
(f) technical considerations including alternative ways of treating and handling the product and the possibility of harnessing new technology;
(g) the competing legal, commercial and taxation interests of the parties — e.g. as between co-venturers in a joint venture situation and as between buyers and sellers;
(h) a balancing of the risks inherent in the respective methods of selling — c.i.f. versus f.o.b.;
(i) the effect on the economic viability and financing of the project; and
(j) the need to ensure the ability both to meet sales commitments to buyers and to service the capital and operating costs of the project, i.e. the need to have vessels available whenever required to move the product without incurring too heavy a debt at times when no product is available for shipment or at times of market downturn.

It is fundamental to such a venture to be able to marshal the capital required to set it up. It is equally fundamental to be able to maintain the cash-flow of the venture to service that capital, to meet operating costs and to provide profits to the entrepreneurs.

Looked at from the shipping point of view, the task is one of ensuring the availability of an adequate fleet of suitable vessels on the most favourable terms; but this can be a two-edged sword, because the more secure is the availability of the vessels, the more inevitable is their financial dependence on the venture: thus arises the need to provide for security at all stages in the movement of the products of the venture from the mine to the customer.

The problem has many aspects:

(a) the production facilities must be able to produce at the required rate notwithstanding the inevitable problems of weather, strikes and industrial disturbances and technical difficulties with mining and processing;

(b) the stockpiling and shiploading facilities must be adequate to overcome the problems listed under (a) above as well as to enable maintenance of shipping schedules;

(c) the number and type of vessels engaged and the terms of their engagement must be such as to ensure the flow of products to the market at the necessary rate, but desirably with enough flexibility to allow for variations in the availability of those products and the capacity of the market to absorb them; and

(d) the market must be an assured one and be capable of receiving and absorbing the products of the venture at the required rate and of maintaining the flow of cash to the venture.

I have stated these propositions as absolutes. My readers will have realised immediately that in the real world none of these exists or is attainable as an absolute: therefore the problem can be restated as one of weighing and balancing the risks inherent in the various stages of the venture, while ensuring that in the overall there is adequate security to satisfy the needs and requirements of lenders, buyers, sellers and shipowners alike.

To elaborate further on the purely shipping aspect, let us consider the various possible alternative arrangements which can be made to provide for the movement of products to the market. This in turn involves consideration of the two basic types of sale, viz. c.i.f. (and its variant c.&f.) and f.o.b. (and its variants).

In an f.o.b. sale strictly so called, the responsibility of the seller is to deliver on board a vessel arranged by the buyer, though on many occasions the terms of sale are varied so that the seller also arranges freight (i.e. a vessel to carry the goods). But let us look at the normal case, where the buyer furnishes the vessel. In this case, the seller has the obligation to load a vessel nominated by the buyer but approved by the seller at an agreed rate or within an agreed time following arrival of the vessel within an agreed span of time. Frequently, the seller also accepts responsibility for providing or arranging a suitable berth for the vessel and for its availability on arrival of the vessel. In such a case, the seller accepts, by agreement with the buyer, financial responsibility for delay in completion of loading of the vessel beyond the due time, usually by agreeing to a rate of demurrage to compensate for time used in excess of the agreed time (which rate may be the charter party rate, where the vessel is on voyage charter).

Thus there is a financial constraint on the seller to provide adequate facilities to meet his commitments, but this is the limit of his exposure.

The disadvantages of this position are, however:

(a) lack of control over the movement of the product, i.e. the seller is to a large extent at the mercy of the buyer as to whether or not vessels are nominated on a regular basis and as to whether or not they arrive within the stipulated laydays;

(b) normally the price is set in the market place and thus the f.o.b. price represents the market price in the buyer's country less the freight: hence, the seller has the opportunity to increase his return by selling c.i.f. rather than f.o.b., if he can make more economical freight arrangements than the buyer could.

For these reasons, among others, many sellers are motivated to sell their products on a c.i.f. (or c.&f.) basis. This course imposes additional obligations, and additional financial risks, on the seller. Having the responsibility for freight, the seller has a choice of methods of obtaining vessels to fulfil this obligation. These are:

(a) spot charters;
(b) time charters;
(c) contracts of affreightment;
(d) bareboat charters;
(e) purchase;
(f) a combination of the foregoing.

Looking at (a) to (e), it will be recognised that they are in ascending order of risk-taking and financial commitment, but of course there are other considerations as well which dictate the choice. For example, although spot voyage chartering involves minimum financial commitment, a seller who relies on this method alone will be at the mercy of the market and may, indeed, at times be quite unable to obtain a suitable vessel to meet a particular shipping obligation. Each of the other methods (b), (c), (d) and (e) offers protection against the fluctuations of the market but at the price of greater financial commitment and management responsibility on the part of the seller. Time chartered vessels have a master and crew provided by, and the operating responsibility remains with, the owner, but the charterer is responsible for the advantageous employment of the vessel, for which he is committed to pay hire throughout the term of the charter, save in limited events. Market forces do affect both time charter rates and the availability of vessels for hire.

I use the term "contract of affreightment" in the sense of a contract with a shipowner by means of which a shipper can ensure a supply of vessels on voyage or time charter to lift a specified tonnage over a specified period of time at a cost which is either fixed or subject to escalation on a predetermined basis. Such a contract has considerable advantages in the servicing of long-term contracts for sale (as opposed to spot sales).

Bareboat chartering and the purchase of vessels involve the seller in the manning and operation of the vessels with all the attendant expenses and risks; purchase additionally involves the outlay of capital. These two methods do, however, give a shipper of minerals the advantages of certainty of availability and relative stability of costs, by avoidance of fluctuations in the chartering market.

The best arrangement for a large-scale mineral venture may well be a judicious mixture of all five methods.

I will now take each of these types of contract in turn and deal with some of their provisions and then with some of the usual problems they give rise to:

A. F.O.B. Sales Contracts

In this case, as I mentioned earlier, the shipping obligations of the seller are generally:

(a) to have the contract goods ready for the nominated vessel within a specified period, frequently (but possibly erroneously) called "laydays", during which the vessel is obliged to be ready to receive the cargo; and

(b) to load the cargo into the vessel within the period allowed called "laytime" (which may be fixed in the contract as a number of days or may be determinable by calculation from an agreed loading rate per day).

Frequently, however, a seller may have additional obligations; e.g. the responsibility to nominate the loading port (which must be a "safe port"), and the obligation to provide or procure a berth for the vessel within the port (which berth must also be "safe").

I should interpolate that in general commerce, a seller who is unable to furnish goods conforming with the contract from the intended source is under an obligation to

procure goods of that description from elsewhere to satisfy the sales contract. In the cases we are dealing with here, however, the sales contract will generally speaking relate to a specific product from a specific mine and will not be capable of being satisfied by the procurement of substitute goods.

The obligation to provide the goods, as with all of the express terms of such a contract, is a condition the breach of which amounts to a complete failure of performance on the part of the seller. The measure of damages in such a case is that provided for in the Sale of Goods Act. (As to this, see Sassoon, *C.I.F. and F.O.B. Contracts* 2nd ed., para. 218 et seq. and para. 512 et seq.)

A seller may try to minimise his exposure to such a failure of performance by the inclusion in the sales contract of an "exceptions" or "force majeure" clause, the purpose of which will be to relieve him of liability either for certain defined causes of inability to perform or delay in performance and for delay or inability caused by events beyond his control generally. It will be appreciated that a prudent buyer (in an f.o.b. sale) will seek to have provisions of this sort reflected in his charterparty and that there is obviously a price tag on any provision which decreases the responsibility of the seller and materially increases the responsibility of the buyer as charterer or which increases the freight payable by him. Thus the seller is faced, on this issue as with all others, with a balancing of risk against cost.

Appendix A to this Paper is a set of clauses which have been drafted for inclusion in f.o.b. mineral sales contracts to cover the shipping aspect, i.e. the buyer's obligation to provide suitable vessels according to a schedule and the seller's obligation to load each vessel at an agreed rate. The clauses also specify the time which is to count and the exceptions from the counting of time and go on to provide for the calculation of dispatch and demurrage.

Clauses of this type require particular attention in drafting and great care in interpretation. For these reasons, it is often desirable to make use as precedents of clauses which are in a well-known standard form. It is imperative, however, that the reach and effect of such clauses be fully investigated: it is not always possible to negotiate changes in wording in clauses of this sort, but at least one should know what consequences will flow from the use of a particular form of words. I can do no better than to adopt the words of one of the great maritime lawyers of our age, Lord Diplock, in his speech in the House of Lords in *The "Maratha Envoy"* (1977) 2 Lloyds Rep. 301 at p. 304:

> My Lords, the freight market for chartered vessels still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please.
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> In practice the contracts negotiated in this market by the parties or their brokers are based upon one or other of a number of printed forms of charterparties appropriate to the various kinds of use to which vessels are put. These forms incorporate numerous standard clauses to which additions, often in the form of other well-known standard clauses, and deletions are agreed in the course of the bargaining process in which agreement is also reached upon such basic terms as rates of freight, demurrage and dispatch money.
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> So far as the profitability of the transaction to each party is concerned, there is an inter-relationship between rates of freight, demurrage and dispatch money and clauses of the charterparty which deal with the allocation between the charterer and shipowner of those risks of delay in the prosecution of the adventure contemplated by the charterparty which, being beyond the control of either party, have been conveniently called "misfortune risks" as distinguished from "fault risks". Among the most prevalent of misfortune risks is congestion at a loading or discharging port causing the

vessel to wait idly until a berth falls vacant at which her cargo can be loaded or discharged. If it is to wait at the shipowner's expense he will endeavour to secure that this risk is covered in the freight rate that he charges. If it is to wait at the expense of the charterer and paid for as demurrage or by reduction in dispatch money he will expect this to be reflected in a lower freight rate charged.

No market such as freight, insurance or commodity market, in which dealings involve the parties entering into legal relations of some complexity with one another, can operate efficiently without the use of standard forms of contract and standard clauses to be used in them. Apart from enabling negotiations to be conducted quickly, standard clauses serve two purposes. First, they enable those making use of the market to compare one offer with another to see which is the better; and this, as I have pointed out, involves considering not only the figures for freight, demurrage and dispatch money, but those clauses of the charterparty between charterer and shipowner, particularly those risks which may result in delay. The second purpose served by standard clauses is that they become the subject of exegesis by the Courts so that the way in which they will apply to the adventure contemplated by the charterparty will be understood in the same way by both the parties when they are negotiating its terms and carrying them out.

It is no part of the function of a Court of justice to dictate to charterers and shipowners the terms of the contracts into which they ought to enter on the freight market; but it is an important function of a Court, and particularly of your Lordship's House, to provide them with legal certainty at the negotiation stage as to what it is that they are agreeing to. And if there is that certainty, then when occasion arises for a Court to enforce the contract or to award damages for its breach, the fact that the members of the Court themselves may think that one of the parties was unwise in agreeing to assume a particular misfortune risk or unlucky in its proving more expensive to him than he expected, has nothing to do with the merits of the case or with enabling justice to be done. The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreements. Justice is done by seeing that they do so or compensating the party who has kept his promise for any loss he has sustained by the failure of the other party to keep his.

B. C. & F. Sales Contracts

This form of contract is distinguished from f.o.b. principally by the fact of the undertaking by the seller of the obligation to arrange and pay for the carriage of goods to an agreed port of destination. The point of interface with the buyer or consignee is at the discharge port and the sales contract necessarily contains provisions regulating the discharge. There are two usual types of arrangement: one (rare in dealings with the types of commodity we are considering) provides for discharge on "berth" or "liner" terms; the other is on a "free out" basis. Under "berth" (or "liner") terms, the cost of discharge is included in the freight and hence in the sales price. Where a sale is "free out", the meaning is that the consignee or receiver of the cargo has the obligation to arrange all aspects of the discharge at no cost to the vessel (other than for harbour and berth dues and the like, which are normal expenses of vessels rather than of cargo interests).

The buyer/consignee/receiver must nominate a berth and discharge the vessel at an agreed rate or within an agreed laytime.

The sales contract will, for these reasons, contain the terms and conditions under which the discharge is to be carried out: normally the contract will provide either for a berth to be available to the vessel on arrival or for time for discharging to commence on or at a specified time after the arrival of the vessel at the port of discharge "whether in berth or not" and may as well provide for waiting time to count before the vessel reaches the port. Usually a charterparty will provide that the nominated berth must be reachable at all times of tide and must be one at which the vessel "can safely lie always afloat". For this purpose, it is necessary for the sales contract to specify a minimum draught to be available to the vessel. In some cases, a

vessel will need to "lighten" (i.e. discharge part of its cargo into lighters) so as to be able to enter the port and berth, in view of the restricted draught available. Such matters must be dealt with in the sales contract so as to ensure that responsibility for the cost and time involved is allocated to the proper party: otherwise the seller is likely to find himself bound to pay the shipowner for them with no recourse.

Again, where the sale is on a "free out" basis, there will be a need for provisions covering laytime and demurrage; it is important to a c. & f. seller that the party responsible for discharging the vessel is legally bound to pay demurrage, if incurred; and also to pay for any grab damage caused during the discharge operation: such a provision should take the form of an agreement to indemnify the seller against all claims and costs arising out of damage to the vessel occurring during discharge. Anything short of this is unlikely to be effective or enforceable.

Appendix B is a set of clauses such as I have been describing: similar in purpose to Appendix A but taken from a c.i.f. sales contract and therefore dealing with the seller's obligations as to the type of vessel to be employed and with the terms and conditions to apply at the discharge port — they are in effect a mirror image of the f.o.b. loading conditions.

2. LEGAL PROBLEMS COMMONLY ARISING IN RELATION TO THE CARRIAGE OF GOODS BY SEA

In what follows, I will be discussing some of the problems which can arise under one or more of the types of arrangement previously mentioned and will attempt to illustrate them by some of the more recently decided cases, which also, perhaps, explain to some extent the purpose of some of the clauses in Appendices A and B.

Although the cases are concerned with charterparties, this is not to suggest that the principles they enunciate should not equally apply to the shipping terms of sales contracts — if only because of the practice, which this Paper may be taken to recommend but which is as yet imperfectly followed, of adapting for use in sales contracts, the sorts of standard clauses advocated by Lord Diplock.

A. EXCEPTIONS CLAUSES

In the discussion of f.o.b. contracts I adverted to the practice of including an "exceptions" or "force majeure" clause (it was in that context I quoted Lord Diplock).

"Laytime", as I mentioned earlier, is the period allowed for loading or discharging a vessel. It may be fixed or ascertainable in a number of ways. According to the learned authors of *Scrutton on Charterparties*, 18th ed. at pp. 314, 315:

> If by the terms of the charter the charterer has agreed to load within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it, unless such impediments are covered by exceptions in the charter . . . or arise from the fault of the shipowner or those for whom he is responsible.

See *Alexander* v. *Atieselskabet Hansa* (H.L.) (1920) A.C.88, at p. 94, where Lord Finlay quoted the above text with approval.

> . . . If no fixed time for loading or unloading is stipulated in the charter, the law implies an agreement on the part of the charterer to load or discharge within a reasonable time . . . "A reasonable time" means reasonable under the circumstances then existing . . . and should be estimated with reference to the means and facilities available at the port, the course of business at the port, the customary methods employed at the port, and the character of the port with regard to tides and otherwise. (*Scrutton*, pp. 318-320).

In his work, *The Law of Demurrage,* Hugo Tiberg gives this definition of "demurrage":

> Quite generally, demurrage can be described as a payment provided by contract or law for the use by the charterer of time beyond that which is conceived to be normally necessary for loading or discharging of a ship . . . (3rd ed., p. 2).

In English law, the term is restricted to apply only where there is agreement as to the amount payable, i.e. it refers to a sum payable by way of liquidated damages. If no such liquidated amount has been agreed upon, unliquidated damages for detention may be payable in like circumstances.

It is the absolute nature of the obligations to provide a cargo and to load (or discharge) within the laytime allowed and the requirement to pay for delay caused to the vessel by way of demurrage or damages for detention which give rise to the need for an "exceptions" clause in charterparties and equally so in sales contracts.

The types of occurrence generally sought to be covered by an exceptions clause of this nature are those categorised by Lord Diplock in the passage quoted above from his speech in *The "Maratha Envoy"*, as "'misfortune risks' as distinguished from 'fault risks'".

Frequently, however, one finds that the shipping terms of an f.o.b. contract contain no provision for time not to count but rather that there is included in the contract, following what has become in international commerce a commonly accepted practice, a "force majeure" clause in wide, general terms not specifically referring to the suspension of the counting of laytime.

My purpose in what follows is to discuss and illustrate the operation of such clauses and to consider the advisability of employing a form of clause directed specifically to relieving breaches of these two absolute obligations (i.e. inability to provide a cargo and delay in loading), rather than relying upon a more general "force majeure" type of clause.

In *Bunge Y. Born* v. *Brightman*, (1925) A.C. 799 at p. 807, Lord Dunedin stated:

> The general rule is absolutely authoritative to the effect that if you wish to make an exception apply to the providing of cargo as distinguished from the loading proper, you must do so in words so clear as to admit of no ambiguity.

This passage, of course, refers to the inapplicability to failure or delay in providing a cargo of a clause designed to except time lost in the loading operation from counting as laytime; nevertheless, it sounds a warning to the draftsman to employ clauses which are explicit in their reach, rather than seek to rely upon generally worded provisions.

Various authorities also cast doubt on the scope of general exceptions clauses. Tiberg states that there is a line of strong decisions by United States courts holding that:

> a general exceptions clause . . . does not *in principle* apply to the demurrage situation, the theory being that while the loading or discharge may be prevented by the excepted hindrance, the obligation to pay demurrage remains unaffected. A corresponding exception should therefore always be inserted in the clause dealing with demurrage if the charterer wants to enjoy the protection of the exception for that purpose. (Tiberg, *op. cit.*, pp. 465, 466, and see the cases there cited.)

The other area which exceptions clauses are used to cover in charterparties (but with no counterpart in sales contracts) is in regard to the owner's liability to cargo. Historically, it was common for a shipowner to seek to restrict his liability to the greatest extent possible. This led to the passage of legislation in various countries to limit the extent to which a shipowner might avoid liability (e.g. the United States

Charter Act and the Australian Sea-Carriage of Goods Act 1904) and ultimately to the adoption of the Hague Rules, which I now turn to consider.

B. HAGUE RULES

"The International Convention for the Unification of certain Rules of Law relating to Bills of Lading" was signed at Brussels on 25 August 1924. These Rules were given effect in relation to the carriage of goods by sea from Australian ports by the Australian Sea-Carriage of Goods Act 1924. Section 9(1) of this Act provides:

> All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

In passing, I make two observations as to the Hague Rules. The first is that notwithstanding the adoption at a diplomatic conference in 1978 of the Hamburg Rules, the Hague Rules still apply and will continue for the foreseeable future to apply to the carriage of goods by sea from Australia. The second point I want to make is that although the Rules in terms do not apply to either sales contracts or charterparties as such, they nevertheless, by force of s.9(1) of the Sea-Carriage of Goods Act, apply to bills of lading issued in respect of all goods carried under charter from Australia. Hence, the Rules bear upon the rights and obligations of the parties to sales contracts — both c. & f. and f.o.b. Furthermore, it is almost invariable for charterparties to contain what is called the "Clause Paramount", by which the Hague Rules are incorporated into the charterparty.

In particular, the Rules specify in Article IV the rights and immunities of the carrier, including a series of seventeen exceptions from liability (Article IV, Rule 2). I do not propose to discuss these in detail; suffice it to say that the purpose and effect of the exceptions is to throw onto cargo interests the risk of and therefore the obligations to insure against the excepted perils.

C. TIME LOST WAITING FOR BERTH

What Lord Diplock said in *The "Maratha Envoy"* takes on added point and piquancy when the decision in that case is contrasted with one given in a New York arbitration in the matter of *The "Polyfreedom"* (April 7, 1975) noted (1975) 4/LMCLQ/443 which, like *The "Maratha Envoy"*, was concerned with the Baltimore Form C grain charterparty, which although in form a berth charter was in these cases drawn up as a "port" charter without any express provision governing the counting of time waiting for berth in the case where the vessel was unable to enter the port. Under such a charterparty, the counting of laytime begins when the vessel is an "arrived ship": *The "Johanna Oldendorff"*, (1973) 2 Lloyds Rep. 285. This last mentioned case is currently the definitive decision so far as British law is concerned on the concept of when a vessel becomes an "arrived ship" and also involved a Baltimore Form C grain charterparty.

In *The "Johanna Oldendorff"*, Lord Reid laid down what has come to be called the "Reid test" for determining when a vessel is an "arrived" ship, in the following terms:

> Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the Charterer (at p. 291).

In *The "Polyfreedom"* the vessel, bound for the port of Rotterdam, anchored to await a discharge berth off the Hook of Holland, a "recommended anchorage" for vessels awaiting entry to the port but which was not within the legal, fiscal or geographic limits of the port of Rotterdam. The arbitrators, by a majority, held that this was immaterial and did not affect the commencement of laytime. Ironically, the majority based their decision on *The "Johanna Oldendorff"*, while the dissenting arbitrator sought to distinguish the House of Lords' decision on the ground in effect that whereas the waiting place in that case was sheltered allowing a vessel to remain there in any weather until ordered to a berth, the anchorage off the Hook of Holland was in the open sea and it was questionable whether or not the vessel could remain at anchor or proceed to a berth, in case of bad weather. The majority decision was quoted in aid by two of the Lords of Appeal in their judgments in the Court of Appeal in *The "Maratha Envoy"* but found no favour with the House of Lords in that case.

The effect of the decision in *The "Maratha Envoy"* is to establish clearly and unquestionably, so far as English law is concerned, that a vessel becomes an "arrived ship" under a "port" charter only when it reaches a berth or other customary waiting place within the named port, until which time the vessel is still on its voyage. Lord Diplock makes a strong point, however, that parties are at liberty to make other provisions, saying (at p. 305):

> There are also standard clauses dealing specifically with the commencement of laytime at individual ports at which the usual anchorage for vessels waiting turn lies outside the limits of the port. A typical clause of this kind relating to the ports of Avonmouth, Glasgow and Hull is cited in the judgment of Lord Justice Roskill in The "Johanna Oldendorff" (1972) 2 Lloyd's Rep. 292 (at p. 306). A similar clause is used in the case of the four ports on the River Weser, for all of which the usual waiting place for vessels of considerable draught is an anchorage at the Weser Lightship which lies outside the limits of any of the ports. The Weser Lightship clause runs as follows:
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> > "If vessel is ordered to anchor at Weser Lightship by Port Authorities, since a vacant berth is not available, she may tender notice of readiness upon arriving at anchorage near Weser Lightship, as if she would have arrived at her final loading/discharging port. Steaming time for shifting from Weser Lightship to final discharging port, however, not to count."
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> The use of the time lost clause or of standard clauses relating to particular ports whose waiting place is outside the limits of the port may well seem to be particularly appropriate to cases where the charterparty reserves to the charterer an option to choose a loading or discharging place out of a range of ports at some of which the risk of congestion may be greater than at others or at some of which the usual waiting place lies inside and at others outside the limits of the port; for, in the absence of any such express provision, the existence of the option means that the charterer by the way he requires the contract to be carried out may influence the incidence or extent of the risk to be borne by the shipowner.

It will be observed that Appendix B contains a clause dealing with waiting time at or off the discharge port such as was lacking in the cases just discussed.

D. SAFE PORT

Let me start by offering some definitions: a "port" has been described as follows:

> it should have somewhere for vessels to lie safely and a shore where goods may be safely landed; also that there should be some conveniences for trade, such as wharves and warehouses; and that it should be a place to which vessels are allowed to come by the government of the country — Carver, *Carriage by Sea*, 12th ed., para. 976 (referring to Lord Hale's definition, cited in Bacon's Abridgement, *"Prerogative"*, B(5)).

As to what is a "safe port", the following definition was given by Sellers L.J. in *Leeds Shipping Co.* v. *Bunge* (1958) 2 Lloyd's Rep. 127 at p. 131:

> 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.

It is the duty of a party having the right to nominate a port (whether as seller in an f.o.b. sales contract, buyer in a c. & f. sales contract, or charterer under a time or voyage charterparty) to ensure that the nominated port is safe for the particular vessel: ordering a vessel to an unsafe port is a breach of contract: *The "Stork"* (1954) 2 Lloyd's Rep. 397 (Devlin, J.), affirmed by Court of Appeal: (1955) 1 Lloyd's Rep. 349.

The owners or the master of the vessel may refuse to proceed to such a port: *Lensen Shipping* v. *Anglo-Soviet Shipping* (1935) 52 Ll.L. Rep. 141 and per Devlin, J. in *Grace* v. *General Steam Navigation (The "Sussex Oak")* (1950) 83 Ll.L. Rep. 297.

Where the contract is specific, the obligation to choose a safe port is absolute and renders the party liable if the port becomes unsafe at any time prior to the vessel's departure from it, even where the cause was not foreseeable at the time of nomination: see per Donaldson, J. in *The "Evagglos Th"* (1971) 2 Lloyd's Rep. 200 at p. 204.

Where there is no express term as to the safety of ports, the court will generally imply a term as to safety, but the implied term may not be as stringent as the express one: see per Donaldson, J. in the last mentioned case, in which it was held that the term to be implied should be limited to a warranty that the nominated port (Suez) was safe at the time of nomination and might be expected to remain so until after the vessel's departure from it.

The particular circumstances of the case were that the vessel was time chartered for trading in the Red Sea and elsewhere at a time (1968) when the Red Sea was a war zone. The ship was ordered to proceed to Suez during a time of cease-fire, but became a total loss as a result of shell fire when hostilities suddenly resumed.

This is an illustration of the fact that a port may be unsafe for reasons other than its geographical or meteorological characteristics. Other possible causes of unsafety are lack of effective navigational aids; lack of competent pilots in a port where they are essential to safe berthing; obstruction; inadequacy of berthing or mooring facilities.

To take two examples of the different causes of unsafety: *Reardon Smith Line* v. *Australian Wheat Board* (The "Houston City") 91 C.L.R. 233 (High Court of Australia); (1956) 1 Lloyd's Rep. 1 (Privy Council), was a case where some of the aids normally available to assist vessels in combating northerly gales in the port of Geraldton (W.A.) were temporarily out of repair, causing the port to be unsafe for the vessel. By way of contrast, in *Smith* v. *Dart* (1884) 14 Q.B.D. 105, it was held that a Spanish port was safe although it was necessary for ships to keep up steam so as to be ready to put to sea in certain weather conditions.

But, as Pearson, J. stated in *The "Eastern City"* (1957) 2 Lloyd's Rep. 153 at p. 172:

> Be it supposed that a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that the imminence of such weather conditions will be recognised in time and that the ship will be able to leave the port safely.

In such a case, there may be a duty on the party who nominated the port to ensure that the vessel is given adequate warning of the onset of adverse weather: See

The "Dagmar" (1968) 2 Lloyd's Rep. 563 (Mocatta, J.). Furthermore, there must be nothing to prevent the vessel from leaving the port in time: *The "Khian Sea"* (1977) 2 Lloyd's Rep. 439 (Donaldson, J.).

There are several glosses on these propositions which I should mention. The law is not so clear where there is prior agreement between the parties, i.e. where the sales contract or charterparty actually names the port either on its own or as one of a list of named ports. In such a case both parties must, by their agreement, be regarded as being equally involved in the choice of the port. As was said by Dixon, C.J. in *The "Houston City"* (91 C.L.R. 233 at p. 243):

> When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so.

This statement was adopted by Devlin, J. in *The "Stork"* (supra).

Dixon, C.J. goes on to make the point that where the charterer has the right to nominate the port, the shipowner has no such obligation: he further expresses the view that the charterer must bear the consequences of his choice and cannot throw the burden on the master of the vessel of having to choose between refusing to lift the cargo or taking the risk of a doubtful port or berth. According to Dixon, C.J., if the master decides to take the risk he does not by his decision relieve the charterer of all responsibility.

This view also was adopted by both Devlin J. and the Court of Appeal in *The "Stork"* (1954) 2 Lloyd's Rep. 397; (1955) 1 Lloyd's Rep. 349, but contrasts with that expressed in a number of American cases, in which it was held that, notwithstanding the "safe port" warranty, if the owner or master accepts the nomination of a loading or discharge port with full knowledge of local conditions which make it unsafe for the particular vessel, a charterer may be excused from liability for damages. (See Wilford, Coghlin & Healy, *Time Charters* p. 89 and cases there cited.)

Many of the cases on the subject raise as an issue an allegation of negligence on the part of the master and crew. In such cases, even though a port may be unsafe, the question may arise where a casualty occurs as to what was the effective cause of the damage. As Mocatta, J. said in *The "Dagmar"* (at p. 571):

> If (the port) were unsafe for this vessel and if her master and crew were negligent, the difficult question arises whether in law the proper conclusion should be that the casualty was caused by such negligence in the sense that it constituted a break in the chain of causation between the unsafety of (the port) and the casualty, or whether the unsafety was, notwithstanding what may have been done by those on board or omitted to be done, nevertheless still the direct and effective cause of the casualty.

See also *The "Polyglory"* (1977) 2 Lloyd's Rep. 353 per Parker, J. (at p. 363):

> . . . if the only dangers to which a properly manned and equipped vessel of the size and type in question will be exposed are dangers which can be avoided by the exercise of ordinary reasonable care and skill, that port is not, as a matter of law, unsafe . . .

According to the authors of *Time Charters* (pp. 81-82), the sole question under English law is one of causation; the doctrine of contributory negligence does not apply so as to lead to an apportionment of damages related to each party's share of responsibility. The obligation on the charterer is both contractual (rather than tortious) and absolute in nature. Hence, the enquiry is as to the "effective cause", i.e. whether or not the chain of causation starting with the nomination of an unsafe port is broken by supervening negligence. (See *The "Polyglory"*, supra.)

By way of contrast, the same authors state (*op. cit.* p. 91) that, under American

law, damages may be divided proportionally if both the master and the charterer are at fault. They instance a case, *The "Oceanic First"* (decided at arbitration in New York in 1976 and reported as Society of Maritime Arbitrators No. 1054), in which the vessel was on her ninth call at a Japanese port nominated by the charterer under a "safe port" "safe berth" charterparty. The arbitrators held that both parties were guilty of taking a calculated risk which failed, on the basis that the owner ignored the probability of "obvious unsafe and dangerous conditions", while the warranty given by the charterer was an assurance that these obvious unsafe and dangerous conditions did not and would not exist. They held that the damages sustained were brought about by a mutual lack of appreciation of the dangers.

I have given this precis of the short extract of the reasons of the arbitrators quoted by the authors because it illustrates a rather different approach to deciding issues of this nature from that to which we are accustomed in British jurisprudence (under which again the enquiry would presumably have been as to the "effective cause" of the casualty).

It also contrasts with another decision in a New York arbitration, *The "Eva Borden"* (S.M.A. No. 219) which held that a claim that an anchorage was unsafe was unfounded "if only for the reason of the master's complete acceptance of charterers' berthing designation" (a sort of application of the *volenti non fit injuria* principle).

Before passing from this topic and by way of entertainment rather than edification, let me invite your attention to three cases involving essentially the same facts, but which produced somewhat divergent reasoning.

The cases all concern Mississippi River ports. In order to reach the ports and also on the return voyage to the sea the vessel in each case had to pass through the Southwest Pass, which was a scoured and dredged channel. The depth of the channel varied from time to time according to the time of year, the speed of the river and the extent of the dredging carried out. There was published daily a "recommended maximum deep loading draught fresh water at all times regardless of tides".

In the case of *The "Naiad"*, the draught fell during the period the vessel was loading, preventing her from loading a full and complete cargo. The owners claimed dead freight for the cargo not loaded. It was held in a New York arbitration that, although both parties were aware that the river was subject to changes in its draught, the charterers could have selected a port not subject to draught fluctuations and must bear the responsibility for having chosen one which the arbitrators thereby categorised as an unsafe port and were therefore liable to pay dead freight.

In *The "Challenger"*, the charterers nominated a Mississippi River port inside Southwest Pass knowing that silting of the river would prevent the vessel loading a full cargo. In a New York arbitration the river conditions were held to be common knowledge and thus, having granted the charterers a range of loading port options, the owners could not complain that the exercise of the option deprived the vessel of part of her carrying capacity. If changing channel depth conditions prevented a vessel loading a full and complete cargo so as to avoid grounding on her outward passage over a river bar many miles distant to seaward, this did not *per se* cause the port to be unsafe.

The third case concerned *The "Hermine"*, a vessel which loaded at Destrehan on the Mississippi River to a draught of 35 feet 10½ inches. When the vessel reached the Southwest Pass it was delayed, first, for four days by congestion caused by fog, secondly for twenty days due to lack of water and then for a further nine days by the grounding of a vessel at the entrance to the Pass.

At arbitration in London, the arbitrators decided that they were bound as a matter of law to hold that Destrehan was a safe port, but stated a case for the opinion

of the Court. The Court of Appeal, (1979) 1 Lloyd's Rep. 212, upheld the arbitrators' conclusion on the basis that an obstruction which merely caused delay did not render a port unsafe unless the delay was sufficient to frustrate the adventure.

3. INSURANCE

It is not my intention to discuss this aspect of the subject in depth, for the obvious reasons that to do so would more than tax my capacities and again would occupy more time than is available. What I propose is rather to look at the risks to the seller involved in the various stages of the several types of sale.

It will be recalled that ss.21 and 23 of the Sale of Goods Act fix the point of time at which the property passes in the case of a contract for the sale of unascertained or future goods by description: if no other intention appears from the contract, the property in the goods passes to the buyer when goods of the contract description are unconditionally appropriated to the contract (s.23, rule 5(1)). Such unconditional appropriation is deemed to have taken place when in pursuance of the contract the seller delivers the goods to a carrier for the purpose of transmission to the buyer and does not reserve the right of disposal (s.23, rule 5(2)). Furthermore, s.25 of the Act provides that the goods remain at the seller's risk until the property therein is transferred to the buyer.

A. F.O.B. Sales

Clearly, then, in the case of an f.o.b. sale, the goods are at the seller's risk until completion of loading. It will, of course, depend upon the nature of the product being sold whether or not there is such a risk of either loss or damage to the goods or of possible damage being caused *by* the goods that the seller should prudently insure against the risk. (It will be observed that there are two entirely different forms of insurance adverted to in that simple sentence — cargo insurance, to cover loss of or damage *to* goods, and liability insurance to cover possible damage *by* goods.)

B. C. & F. and C.I.F. Sales

The simple rules relating to the passing of property and the transfer of risk stated above do not apply in quite the same way to a c. & f. (or c.i.f.) sale. The subject is exhaustively treated in *Benjamin on Sale* 8th ed., pp. 358-385; suffice it for present purposes to say that the transfer to the buyer of the bill of lading (and where applicable the policy of insurance) giving him the right of action in respect of loss or damage to the goods has the effect of placing the goods at the buyer's risk. (See Sassoon, *C.I.F. and F.O.B. Contracts*, 2nd ed., para. 202.)

Where the sale is c.i.f., it is an explicit term of the contract that the goods be insured during the transit against maritime perils under a policy of marine insurance. (As to the nature of such a policy, see Marine Insurance Act 1909 (C'wealth) and Arnould *The Law of Marine Insurance*, 15th ed.)

Unless the contract makes slecial provision for the earlier passing of the risk, a seller carries, in addition to the risks referred to under f.o.b. contracts, the risk of the loss of the whole cargo through perils excepted by the charterparty up until he negotiates the bills of lading. In the case of a sale c.i.f., of course, the policy of marine insurance on the goods will protect the seller against this loss, but a seller on c. & f. terms has no such protection: for this reason, many c. & f. sales contracts contain a clause passing the risk of loss or damage to the goods to the buyer from the moment of loading on board the vessel.

There is one further area of potential risk to a seller on c. & f. (and even c.i.f.) terms which arises where a time chartered vessel is used to fulfil the carriage of the goods. Under U.K. law, it is fairly well accepted:

> that the shipowner under a time charter is, subject to any specific provisions in the charter, under a liability to the charterer in respect of the loading, stowage, care and discharge of goods carried similar to that under an ordinary voyage charter, and no distinction has generally been drawn between the two types of charterparty in that respect. (Carver, *Carriage by Sea,* 12th ed., para. 371.)

This is not, however, entirely accepted in many other jurisdictions (I instance the United States, Japan and many Continental countries): e.g. under United States law, the view is taken that the master "wears two hats" or performs a dual agency on behalf of both owner and charterer. Thus, in these jurisdictions it is commonly accepted that the charterer has liability to cargo interests for loss or damage to cargo. This to some extent equates the position of a seller who time charters a vessel to perform the carriage under the contract of sale with that of a time charterer who carries the goods of others on board the vessel.

In Continental law, the obligations of the carrier under the Hague Rules are said to apply to a time charterer.

Thus, it becomes incumbent upon a c. & f. (or c.i.f.) seller who employs a time chartered vessel to consider the necessity of taking out charterer's liability cover to protect himself against cargo claims: liability for which can be onerous indeed.

Another matter I should cover is the liability which may arise from the potentially dangerous nature of the product itself: the most obvious example is uranium, but there are many others. It is possible, and indeed has become the practice, to extend the cover available under the standard form of marine insurance policy to include legal liability to the master and crew, stevedores, consignee and others arising from the nature of the product.

APPENDIX A

F.O.B. Shipping Terms — Revised 31/10/78

(A) General

1. Loading and stowing to be arranged by Seller on own account.
2. Ocean freight (including port charges at loading and discharging ports) and discharge of cargo to be effected by and at the risk and expense of Buyer.
3. Any taxes or levies on cargo after loading or on freight and/or vessel to be for the account of Buyer/Owner.
4. The vessel is scheduled to load at wharves owned or controlled by the Seller and the use of such facilities is subject to the Seller's terms and conditions.
5. Demurrage will be to Seller's account provided the vessel presents within layday cancelling agreed by Seller and that all ETA's to load port as required under Clause 12 had been given.

(B) Vessel

6. The vessel nominated is to be modern single deck craned bulk or ore carrier, machinery aft, with hatch openings not less than ..... x ..... feet and dimensions not exceeding:
L.O.A. feet
Beam feet
Draught feet (when loaded with cargo under this order)
A minimum of ..... hatches are to be allocated for loading with reasonably even cargo distribution.
7. Also vessel to:
(a) be National flag/National crew with minimum I.T.F. rates and conditions applicable;
OR
(b) have a valid I.T.F. certificate.
Any time lost as a result of not conforming to either (a) or (b) above not to count as laytime and stevedoring standby expenses, if any, to be for Buyer's account.
8. Vessel's gear to be capable of lifting ..... tonnes all simultaneously in union purchase to Australian Navigation Department regulations. All lifting gear must have the letters "SWL(U)" and tonnage capacity printed conspicuously on the side of each appliance. All blocks must have the safe working load clearly stamped on them.
9. Vessel's hold and crane ladders and gangways to conform with W.W.F. requirements and Australian Department of Shipping and Transport regulations.
Vessels with hatch coamings in excess of four feet in height to have suitable hatch platforms to enable hatchmen to facilitate loading operations. Cost for any conversions as necessary to Buyer's account and time for such conversion not to count. Any stevedoring standby expenses to be for Buyer's/Owner's account.
10. Vessel to be capable of lifting the ordered tonnage in one bottom unless specifically agreed.
11. Any delays which eventuate as a result of vessel's fault are not to count as laytime and any expenses whatsoever attributable thereto to be for Buyer's/Owner's account.

(C) Notions

12. Buyer to supply the vessel's name together with a full description of dimensions and also nominate the quantity to be loaded at least 30 days prior to the E.T.A. at loading port. Thereafter, 14 and 7 days, 72, 48 and 24 hours notices of nominated vessel's E.T.A. at ..... to be sent to "....."

Buyer always to advise Seller of any changes in the vessel's E.T.A. under this clause.

13. If Buyer does not nominate a vessel to complete loading within the shipping period or if a nominated vessel does not present within 15 days of first indicated E.T.A., Buyer to be responsible for any additional handling or storage charges incurred and for any damage to and/or deterioration of the cargo. Also Buyer to be responsible for any delays to vessel in consequence of vessel not presenting within 15 days of first indicated E.T.A.

14. Any stevedoring standby expenses which result from the vessel's itinerary not corresponding with 72, 48 and 24 hours notices to be for Buyer's/Owner's account.

If the vessel fails to comply with above notice requirements and should vessel not keep to itinerary after 14 days definite notice, 48 hours to be added to laytime.

15. Seller reserves the right to amend time counting procedures should the minimum 30 days notice as required under Clause 12 not be given.

(D) Loading Terms

16. Cargo to be loaded at ..... at one or two safe berths as required by Seller. Cost for shifting to second load berth, if required, to be for Buyer's account and time for this shift not to count as laytime.

17. Cargo to be loaded at the average rate of ..... tonnes per weather working day on the basis of ..... workable clean hatches being available for loading. Load rate to be reduced pro rata if a lesser number of hatches is available, however not to be increased if more than ..... hatches available.

18. Time to count from 8 a.m. the following working day after notice has been given to Seller and accepted in ordinary office hours (0900 - 1700 Mondays to Fridays and 0900 - Noon Saturdays) that the vessel is in every respect ready and in free pratique, whether in berth or not, excluding holidays and time between Noon Saturday and 0800 Monday.

19. In case Seller can arrange to load between Noon Saturday and 0800 Monday, holidays or before time commences to count, Master to allow work to be done, crew overtime cost to Buyer's/Owner's account and half such time actually used in loading to count, unless vessel on demurrage in which case all time to count.

20. Time not to count opening and closing hatches at commencement and completion of loading.

21. Time lost by reason of all or any of the following causes shall not be computed in the loading time, viz. war, rebellion, tumults, civil commotions, insurrections, political disturbances, epidemic, quarantine, riots, strikes, lockouts, stoppages of workmen or tugboatmen or any other hands essential to the working, carriage, delivery and shipment of the said cargo whether partial or general or accidents at the Seller's works or wharf, landslips, floods, frost or snow, bad weather, intervention of sanitary customs and/or other constituted authorities, partial or total stoppages on rivers, channels, or on railways, or any other cause beyond the Seller's control whatsoever and wheresoever occurring, unless vessel on demurrage.

22. The Seller shall not be liable in damages or otherwise responsible for failure or delay in loading if prevented or obstructed by war, strike, lockouts, refusal to load, accidents to plant or machinery, or other causes beyond the Seller's control whatsoever and wheresoever occurring.
23. Laytime to cease upon completion of loading.
24. Securing of vessel will be carried out in Seller's customary manner. Time for securing not to count. Time shifting berth, if necessary to secure vessel, not to count and such shifting to be carried out at Buyer's/Owner's expense.
25. Vessel to sail from Seller's wharf as soon as loading is completed, weather and tide permitting.
26. Despatch/demurrage to be at the rate of US$...../..... per day or pro rata. Buyer to present claim for demurrage or remit amount incurred for despatch direct to Seller supported by a valid Laytime Statement, Statement of Facts and Notice of Readiness duly signed by the Master of the carrying vessel, or his representative and the port officer not later than 15 days after completion of loading.
27. This contract to be binding on Buyer regardless of Buyer's own shipping contract.

APPENDIX B

C.I.F. Shipping Terms (1980)

(a) All vessels chartered by Seller (which shall have a valid ITF Certificate or equivalent acceptable to ITF) shall have a minimum lifting capacity of 25 000 wet tonnes shall have hatch openings 3.05 metres by 5.49 metres minimum and holds suitable for grab discharge. No cargo is to be loaded in deep tanks or places inaccessible for grabs. In the event the foregoing conditions are not fulfilled all extra costs including time lost originating therefrom to be for Seller's account.

The Buyer shall indemnify the Seller from and against all costs claims and demands arising out of stevedoring damage to the vessel during discharge.

Discharge port to be declared to Seller if possible before loading completed otherwise forty-eight hours before anticipated arrival or on passing Ushant (north-west coast of France) and to be either Ore Quay Rotterdam (including Botlek and Viaardingen) Amsterdam or Antwerp at Buyer's option. Seller shall cable Buyer immediately on departure of each vessel indicating quantity loaded and E.T.A.

(b) Discharge of cargo shall be effected by and at the risk and expense of Buyer at one safe berth Ore Quay with a guaranteed 10.7 metres minimum draft LWOST at one of the ports mentioned in sub clause (a) above. Laytime for discharging shall commence twelve hours after notice of readiness is given or when discharging commences whichever is sooner. Notice of readiness shall be tendered at any time in or out of office hours after vessel has arrived at the Ore Quay, if such is immediately available on arrival, otherwise when the vessel has arrived at the place where she is ordered to ride at anchor at or off or in the port of discharge and when the vessel is in free pratique and in all respects ready to discharge. Shifting time from anchorage to discharging berth not to count as laytime. Time not to count as laytime in respect of opening and closing hatches at commencement and completion of discharge.

The cargo is to be discharged at the average rate of 10 000 tonnes per weather working day of twenty-four consecutive hours Sundays and local and legal holidays included.

Time lost in the discharge port by reason of Force Majeure, strikes or lockouts on shore irrespective of whatsoever kind, and nautical hindrances of whatsoever kind, not to count as laytime provided Buyer or its local representative has applied all care and means including reasonable additional costs to avoid the vessel being delayed more than is unavoidable under the circumstances and the vessel is not already on demurrage.

(c) **Despatch and Demurrage**

If Buyer fails to meet the discharging requirements specified in sub-clause (b) above, demurrage shall be paid by Buyer to Seller for all time lost after expiration of allowable laytime at the rates provided for hereunder. Despatch shall be paid by Seller to Buyer for laytime saved at the rates provided for hereunder when the vessel is discharged sooner than required under this clause.

Demurrage per 24 hour day (pro rata for part)	In accordance with the actual amount as set out in each Charter Party and like wise for time chartered vessels and the said amount shall be advised by Seller to Buyer by either letter or telex after each vessel is chartered.
Despatch per 24 hour day (pro rata for part)	Demurrage/despatch rates to be in accordance with market rates.

Seller shall endeavour to charter vessels with reversible laydays. In this case Seller and Buyer agree to allow each other, at cost, the benefit of time saved at the loading and discharging port respectively in order to minimise any demurrage payments to the vessel.

The procedure for settling despatch or demurrage shall be that the receivers shall present claim for despatch or remit demurrage in either case supported by valid statement of facts and notice of readiness duly signed by the Master or his representative direct to Seller in no later than fifteen days after completion of discharge.

At port of discharge vessel shall employ Rotterdam, as vessel's agent.