Safe port warranty in charterparty contracts

By Igor Sterzhantov©2011-12
www.lawandsea.net

Historical Background - Obligations of a Merchant and a Shipowner

English law of contract regulates performance of obligations which the parties have chosen to impose on themselves in the course of their commercial relations. Most of general principles of the English law of contract were developed in the eighteenth and the nineteenth centuries on the rise of public interest to the philosophy of laissez-faire, accordingly the courts saw their role mainly in holding the parties to their bargain as provided in contract[1]. Contacts of sea carriage were no exception to this rule.

Obligations of a merchant and a shipowner were mutually absolute – the former shall nominate the port[2], provide for the goods and pay freight. The latter shall reach place or places named in contract, there load the goods and deliver them to the receiver. Absolute duties were subject only to few exceptions such as acts of God or King's enemies and perils of the sea. Generally speaking, only total loss of the vessel excused the shipowner from fulfilling his contract. Cresswell J in *Moss and Others v Smith and Another* [1850] EngR 155; (1850) 9 CB 94 described these duties at pp.105-106:

> What is the nature of the contract between the ship-owner and the merchant whose goods he contracts to carry on freight! The ship-owner engages to carry the goods from the port of loading to the port of discharge: his contract would be absolute, but for the exception introduced into the bill of lading, – unless prevented by perils of the sea. Now,

[1] An introduction to the law of contract. P.S. Atiyah, 4th ed., p.7
[2] Per Anderson B in *Rae v Hackett* [1844] EngR 492;

> when is the ship-owner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary: if that were so, any the most considerable damage, such as the loss of her rudder, without which she could not proceed,: would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract, – that, if the damage which results from a peril of the sea, is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract.

Even when excused from performance, as for example in cases of a total loss, the owner was not entitled to any payment for the services done before his vessel become a total loss, same as no money was due for the contractor who performed his contract in part but was not able to finish it without fault of his own, Blackburn J said in *Appleby v Myers* (1867) L. R. 2 C. P. 651:

> The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight pro rata.

Harshness of an absolute obligation imposed on the shipowner to reach the place named by the charterer was recognised by the lawmakers, but this duty was thought to be compensated by a counter obligation of the charterer to handle the particular ship and provide the goods at the place she reaches[3]. Bramwell B expressed this dilemma in *Bastifell v Lloyd* (1862) 1 H & C 388 at p.394:

> At the trial I was struck with the hardship of making the shipowner responsible for the condition of a particular wharf; but the charterer is responsible for the condition of the particular ship, and it was by the conjoint condition of the wharf and ship that the latter was prevented from getting alongside the wharf.

However, from the second half of the nineteenth century, the courts, while insisting on performance of the contract within strict limits of self-imposed obligations, started to abandon a pure literal approach in cases, where, if followed to the letter, performance would lead to results so irrational that it was absurd to suppose that two commercial men entered into a contract to pursue it to this end[4]. One way to deal with this problem was to discharge the parties from further performance[5], and this approach later brought to formation of the doctrine of frustration. And another way was to construe the contract so, that it would satisfy principles of mercantile reasonableness and business necessity.

[3] Schilizzi v Derry (1855) 4 E & B 873 at 887 per Campbell C.J.: But if the merchant is bound, the shipowner is bound.
[4] Dahl v Nelson, Donkin, and Others, (1881) 6 App. Cas. 38, per Lord Balckburn at p.54.
[5] See Taylor v Caldwell (1863) 3 B & S 826; 122 ER 309

To the same period of time belongs rapid development of 'safe port' warranty and 'as near thereto as she might safely get' provision in charterparties. Initially the only way to impose safe port warranty onto the charterer was to imply this term in the contract, whereas 'as near thereto as she might safely get' clause was not, strictly speaking, attributed to the safety of the ship but rather to her physical ability to reach the place named in the contract. Wording 'as near as she might safely get' was used as a legal tool to construe the contract and mitigate rigidity of the bargain by permitting the charterparty to be performed under the concept of a secondary destination[6].

Read the rest of this article here:
http://www.lawandsea.net/COG/COG_Safe_Port_1obligations.html

[6] *The "Athamas"* [1963] Vol. 1 Lloyd's Rep. 287 per Sellers LJ at p294. For absolute duty of the shipowner see Lord Ellengborough in Atkinson v Ritchie (1809) 10 East 530 at 533, also per Lord Cambell CJ in Schilizzi v Derry (1855) 4 E & B 873 at 886 and Spence v Chodwick [1847] EngR 472; (1847) 10 QB 517 at 527 per Lord Denman CJ citing Lord Ellenborough in Atkinson v Ritchie (1809) 10 East 530, 533.