

## THE DEEPWATER HORIZON SPILL – THE IMPLICATIONS FOR VOYAGE ORDERS IN THE U.S. GULF

The tragic explosion and subsequent fire and loss of Deepwater Horizon in April 2010 has had more far reaching consequences than were ever imagined in the immediate aftermath of the casualty. As we go to press the slick is close to ports in Mississippi, Alabama and Louisiana. These states handle 20% of US refining. The Mississippi river is the single busiest waterway in the US with 5-6000 ship calls a year and is close to the large LOOP offshore oil handling facility.

The incident is clearly having a wider effect on shipping. Shipowners have already sought advice from Wikborg Rein's global English law team as the threat impacts on day to day operations, voyage orders and new fixtures. Concerns have come first from the tanker sector; but it has the potential to affect many ports and therefore many forms of shipping. Similarly those who charter tonnage will soon be concerned by the flip side of the owner's questions.

The obvious concern is that a port becomes unreachable either physically due to the deployment of booms or legally due to restrictions imposed upon vessel movements.

The questions posed by the industry so far have included:

- Can we/should we still accept fixtures or voyage orders for ports in the Gulf of Mexico, when there is a risk the ports could be closed by the spreading slick.
- What can owners do if they are under orders on passage to a Gulf Port or terminal and the port/terminal becomes unreachable.
- What happens if the vessel is discharging alongside and it becomes clear we cannot finish discharge before the slick will hit the port and close it, thus trapping the vessel.
- Are we still on hire/ can we claim demurrage or detention if a vessel is unable to leave due to port closures or slick related restrictions.
- How does this impact on a final voyage if the laycan dates for the next fixture are missed because of unexpected delays.

This bulletin seeks to briefly outline some of the key aspects of English law that are likely to apply in this situation. We take time and voyage charters in turn.

### Voyage Orders – a Time Charter perspective

Broadly speaking, owners should not be unduly concerned about receiving orders to proceed to the US Gulf either laden or in ballast.

#### *Lawful orders*

The starting point is that under a time charter there is an ongoing obligation upon the charterer to give lawful orders and owners must comply with those orders. However, should it become unlawful or impossible to reach a port due to restrictions, the owner can legitimately call for new orders and his time charterer is obliged to give them. Meanwhile the vessel remains on hire.

#### *Safe ports*

It is also a clear principle of English law that charterers are obliged to order vessels to ports which are "prospectively" safe (ie safe when the ship is to call) at the time the order is given.

For an existing voyage, a legitimate order may have already been given, but:

1. the port may then become unsafe due to the oil slick if the vessel cannot reach or leave without risk of pollution damage (aside from bottom fouling there is the risk of tracking oil upstream into clean waters on a dirty hull), or
2. once a port is reached the vessel runs the risk of being trapped in port by a movement ban or the deployment of booms etc.

This becomes altogether more difficult for a charterer where new orders are given today involving a port currently at risk or potentially at risk.

#### *A question of fact: when is an oil slick affected port unsafe?*

The question whether a port is situated in a region affected by an oil spill is an easy one to ask. Answering whether a port is "unsafe" is not so straightforward. If a charterer orders a vessel to such a port, it will be in breach of its obligations under the charterparty with potentially serious exposure for the charterer, therefore this is a key question.

There do not appear to be any authorities on whether a port affected by an oil spill can be an "unsafe port". The vast majority of the authorities on this question relate to the safety of a port being determined by either its physical or political characteristics. Whether a port can be considered unsafe because it is in a region affected by the oil spill is a question of fact -essentially centred around the magnitude of the risk to the vessel approaching, lying at or leaving that port. It is therefore an issue owners must consider carefully. What is clear is that the approach route to a port is part of the port

itself. Of course if the danger can be avoided by an alternative safe route, the port is not unsafe.

Blocking in a port without any physical risk to the ship is unlikely in itself to render the port unsafe if this is short term. But the risk of prolonged detention can make a port unsafe. However an owner entitled to hire may suffer no loss.

It is also well established that a vessel will need to be trapped for a very long time before considerations of frustration/repudiation come into play. Where an owner legitimately fears that his ship will not be damaged but will certainly be detained (ie trapped) for an extended period of time a Court might indeed be sympathetic to an owner's objections to an order: ships are intended for trade not to be trapped. Each case will have to be considered on its own facts and by reference to the charter clauses.

#### ***Why might it matter that a slick affected port is potentially unsafe?***

Firstly, if it becomes apparent at any point that a port is prospectively unsafe (ie unsafe at the time the ship is to call) after the voyage order has been given, then under a time charter the position is that the charterer comes under an obligation to cancel the order and issue fresh orders to the owners. Indeed, absent an express clause in the charter to the contrary, it is probably the case that the owner may refuse to go to a prospectively unsafe port once he becomes aware mid voyage of that unsafety.

It may become clear whilst a vessel is loading/discharging/ working cargo in port that is about to become unsafe. If the Master can avoid the approaching danger by leaving the port, the charterers are equally obliged to order the vessel to leave and to issue fresh orders.

It is noteworthy that some charters (eg Shelltime 4) seek to substantially reduce the charterers' liability for the unsafety of any port. Shelltime in its unamended form restricts charterers' obligations to just exercising due diligence to ensure the vessel is employed to safe ports. It also seeks to deny liability for losses caused by any port being unsafe except where the loss is due to failure to exercise due diligence. This type of clause substantially reduces the ability of the owner to claim an indemnity from the charterer where the vessel suffers damage after being ordered to a port which is unsafe.

#### ***Abnormal Occurrence***

Charterers may be tempted by a feeling of comfort that an Act of God or similar is letting them off the hook. However that is a potential trap for the unwary.

The test of what is a safe port is:

*Whether it can be reached, used and left safely by a particular ship at the particular time which absent some abnormal occurrence*

*without danger save for the type which can be avoided by good navigation and seamanship.*

Generally the decided cases have concerned events which happen very quickly such as sudden and unpredictable violent storms, or unforeseen one-off accidents. An earthquake, tsunami or a coup d'état may similarly be abnormal occurrences. To qualify, there is a 'wholly exceptional test' to overcome. In the current circumstances one would have to be living on a different planet to be unaware of the situation in the Gulf. There is no suggestion either that this has suddenly caught vessels unaware or that it will do so. Rather, knowledge of the slick is very public as is news of its progress. Accordingly, it seems likely that a Court may find that even though the change in characteristics of any port in the Gulf is sudden and temporary, it is not so sudden or temporary that a charterer would be relieved from liability for unsafety if a vessel suffers damage.

#### ***Implied Indemnity***

Aside from any safe port warranty, many charters (eg NYPE clause 8) do, of course, give rise to an implied indemnity for following the charterers' orders. Therefore an owner who is ordered to a port which is subsequently shut due to the slick, may have a further avenue of redress through this indemnity even if there is an express exclusion of any port safety warranty. This indemnity is likely to be wide enough to cover damage to the ship for complying with an order which the owner has the right to reject but chooses for good commercial reasons to follow but then leads to some damage to the vessel.

#### ***Owners duty to act reasonably***

Owners are not obliged to conduct their own enquiries to check the safety of a nominated port before accepting an order. Commonsense suggests that this be monitored and a dialogue with charterers take place if there is concern, however owners should tread carefully. It is likely that charterers will find owners reserving their position and notifying charterers that a claim will follow in the event of any damage. Meanwhile, of course, owners cannot sail into trouble and expect charterers simply to pick up the bill: owners are always expected to act reasonably to mitigate any loss or threatened loss.

#### ***Waiver or acknowledgment***

Owners need to take some care not to unequivocally accept a potentially unlawful nomination. Otherwise although charterers remain liable for the safety of the port, owners may be found by their actions to have abandoned their right to refuse the nomination – though a claim for damages against the charterer remains.

#### ***Off-hire***

With regard to off-hire this will almost certainly turn entirely on the wording of the particular off-hire clause. The Shelltime 4 form suggests the vessel would remain on hire unless one of the excepted perils comes into play over and above the existence of the slick.

### *Last voyage*

There are clear implications arising from an unexpected delay in port which may lead to a laycan date being lost on a new fixture. Owners and charterers will wish to give early consideration to this risk and whether there is likely to be an actionable breach by charterers giving rise to a claim by owners for damages.

### **Port Nominations - a Voyage Charter perspective**

The key difference under a voyage charter is that the vessel, if detained, will not be earning hire. Unless demurrage is running or it can be shown that there is an actionable breach by the charterer, the risk falls upon the owner and in particular does so where the safety of the nominated port or berth has been agreed by the owner.

### *Impossibility at time of nomination*

Where a charterer nominates a port which is simply impossible to reach because of the oil spill - for example if the nominated port is shut at the time of nomination, or if the slick prevents port access - the charterer is obliged to make another nomination.

### *Supervening impossibility*

If at the time the charterer makes the nomination the port is open but it is subsequently closed, an issue arises whether a voyage charterer has to nominate another port for loading or discharge.

If a charterer has validly nominated a load or discharge port under a voyage charter, that nomination can be changed but only with the agreement of the owner. Absent agreement, the vessel may proceed to the port "*or so near thereunto as she may safely get/reach*" (as found for example in ASBATANKVOY or BPVOY4) and there give notice of readiness and sit there earning demurrage until the port clears. A charterer will be advised to negotiate revised terms well in advance if there are real concerns that the port will not promptly re-open.

### *Safe ports*

The concept of safe port exists equally in voyage charters. Where a charterer nominates a port that was originally safe but is subsequently considered unsafe after the spill incident, the charterer is not obliged to re-nominate unless expressly provided otherwise in the charter. Again, the owner can rely on his liberty to take the vessel only "*so near thereunto as she may safely get/reach*" if there is such a provision in the charter.

### *Delay or damage at the port*

If the vessel has called at a port which is affected by the spill, she is likely to be on demurrage as a result of delay – or half demurrage under BPVOY4 if the delay was not within the reasonable control of owners or charterers. Owners who have complied with charterers' orders to proceed to an unsafe port may also have a claim in damages if there is any physical damage or delay.

### *Named ports*

Clients should be aware that in recent decisions charterers were found to have warranted the safety of a port notwithstanding that the port was an agreed port in the voyage charter. Likewise whether there is an implied warranty of safety will turn on the precise wording of each charter.

### Fixing tips:

- Where a fixture refers to, say, Shelltime 4, clear language in the recap indicating the parties intend to reintroduce a warranty of safety would protect owners.
- Owners may find charterers stipulating voyage charter clauses along these lines - "*Owners guarantee that ... they have satisfied themselves to their full satisfaction with and about the port specifications and restrictions prior to entering into this Charter Party*". This clause was found to be binding on owners after the vessel hit an underwater obstruction.
- A "*so near thereunto as she may safely get/ reach*" provision may prove very useful in voyage charters – see comments above.
- Parties may be tempted to turn to the extensive clausing that is found nowadays in ice bound fixtures, although these will require considerable amendments to work for oil.

### Conclusion

Owners not wishing to suffer delays or other uncertain consequences of calling at a port likely to be affected by the oil spill are advised to be on alert when taking vessel nominations. Alternatively they may consider working in a bespoke clause in the charterparty allocating any damage that may be caused due to calling at an affected port to the charterer. No doubt the safest way to proceed will be to seek consensus with the charterer.

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