NAABSA¹ clauses and safe ports

The Standard Club’s damage to hull (DTH) policy is offered as an extension to the charterers’ liability cover. This article reviews ways in which the charterer’s damage to hull cover can respond.

Safe ports
It is the charterer’s obligation to nominate a safe port. A charterer may be legally liable to indemnify an owner for hull damage if the ship was ordered by the charterer to proceed to a port that was unsafe.

What is a safe port?
In The Eastern City¹ a safe port was held to be one that the ship could reach, use and return from without, in the absence of some abnormal occurrence, being exposed to danger which could not be avoided by good navigation and seamanship.

It is important that the nominated port is safe at the time of nomination and not merely likely to be safe when the ship arrives. If, however, the port was safe at the time of nomination but becomes unsafe prior to the ship’s arrival at the port, the charterer is under a secondary obligation to cancel the original order or nominate an alternative safe port.

In order to succeed with a claim for an unsafe port, it is important that clear factual evidence of the unsafety is established.

Express or implied warranty of safety
The majority of time charterparties contain an express warranty clause which gives the charterer the right to order the vessel to a safe port or safe berth. For instance, clause 1(b) of the New York Produce Exchange form 2015 (NYPE 2015) provides that the ship is to be employed between ‘safe ports and safe places’.

If there is an express term in the charterparty that the port must be safe, the charterer has an absolute obligation to nominate a safe port. This means the charterer is liable for any damage resulting from the unsafe port even if the charterer lacked knowledge of the unsafety.

Some charterparties, for instance Shelltime 4, reduce the absolute obligation of safety to one of due diligence, whereby the charterer is to use due diligence to ensure that the ship is only nominated to a safe port.

If the charterparty does not contain an express warranty in respect of the safety of the port, the English courts have been willing to imply a term of safety in certain circumstances.³ However, if the charterparty expressly names the port but does not contain an express warranty as to safety, it is unlikely that the court will imply a term that the port must be safe.⁴ In the absence of a warranty of safe port from the charterers either express or implied, the owner now bears a greater proportion of the risks in the event the port turns out to be unsafe and loss is suffered.

NAABSA ports
Certain ports are suitable for the hull of the ship to rest on the seabed. These ports are often referred to as NAABSA ports, an abbreviation for ‘not always afloat but safely aground’. A NAABSA port may have characteristics such as a soft seabed which allows the ship to rest on the seabed without causing damage to the hull. Estuaries and rivers such as the Thames and the Humber in England, and the River Plate in South America are some examples of the locations for NAABSA ports.

¹ Not always afloat but safely aground.
2 [1958] 2 Lloyd’s Rep 127
3 The Evaggelos Th [1971] 2 Lloyd’s Rep. 200
BIMCO NAABSA clause

BIMCO has developed a NAABSA clause which gives the charterer the right to seek an owner’s approval to order the ship to a safe berth or place where it is customary for ships to lie. This is on condition that the ship lies on a soft bed without suffering damage.

In the event that damage is caused to the ship’s hull, the clause provides for the charterer to indemnify the owner for any loss, damage, costs, expenses or loss of time caused by the ship lying aground.

A charterparty may specifically incorporate the BIMCO NAABSA clause, or a recap fixture or charterparty can simply allow for the charterer to order the ship to a NAABSA port without reference to specific NAABSA charterparty wording.

Damage to the ship after being ordered to an unsafe NAABSA port

If the ship’s hull is damaged as a result of resting on the seabed at a NAABSA port and the ship is under a time charterparty, it is important to consider the specific charterparty terms. If the charterparty contains an absolute warranty that a NAABSA port is safe and the ship suffers damage to the hull when resting on the seabed after being ordered to the port by the charterer, the charterer may be held liable for any resulting loss. Should this be the case, The Standard Club’s DTH cover may respond to cover the member for any losses incurred.

Conclusion

The charterer is obliged to nominate a port that is safe for the ship to enter, carry out normal cargo operations and leave. The price of nominating an unsafe port can result in damage to the vessel and loss of time, to say the least.

Safety is an evolving concept and there are many factors which can render a port unsafe such as:

- physical characteristics of the port and its approaches in relation to the size of the ship
- temporary dangers to navigation, including exceptional weather and ice
- political or civil unrest
- lack of navigational aid

Accordingly, whether a port is safe or not is as much a matter of law as of common sense and may vary from ship to ship or over time. Whilst clauses such as the NAABSA clause allocate risks between owners and charterers in the nomination of a safe port, the master is nonetheless expected to exercise reasonable navigational skills and seamanship to ensure the safety of the ship.

Damage to hull cover

The DTH cover responds to claims for damage to the hull of the ship caused by the charterer’s employment of the ship. Liabilities include physical damage to the chartered ships, off-hire arising from damage claims, and loss of or damage to charterers’ bunkers.

Other scenarios where DTH cover responds to a charterer’s liability to the shipowner:

- Where the charterer’s appointed stevedores cause damage to the ship’s crane or deck during loading or discharging operations and the charterparty states that the stevedores are the responsibility of the charterer.
- Where the charterer supplies off-specification bunkers or cargo to the ship so that there is damage to the engines or cargo tank coatings.
- Where the charterer fails to properly load and stow the cargo, resulting in stowage or cargo collapse and damage to the ship’s hull.
- Inappropriate tugs, incompetent pilots
- Wash damage from passing ships
- Unusually high congestion at a port.

Note: This wording is to be added to the existing berthing provisions in charterparties.

5 ‘…Always subject to Owners’ approval, which is not to be unreasonably withheld, the Vessel during loading and/or discharging may lie safely aground at any safe berth or safe place where it is customary for vessels of similar size, construction and type to lie, if so requested by the Charterers, provided always that the Charterers have confirmed in writing that vessels using the berth or place will lie on a soft bed and can do so without suffering damage. The Charterers shall indemnify the Owners for any loss, damage, costs, expenses or loss of time, including any underwater inspection required by class, caused as a consequence of the Vessel lying aground at the Charterers’ request…’ (originally published in BIMCO Special Circular No.6, 22 December 2011 – BIMCO recommended wording for NAABSA).