

16th March 2011 – Special report

soundings

The Club offers its condolences and sympathies to all its Members and colleagues who remain, together with the people of Japan, firmly in our thoughts during this difficult time.

Japan Earthquake/Tsunami

Following the tragic events in Japan the Managers have received a number of charterparty enquiries, in particular in relation to the prospective safety of Japanese ports and the obligation to comply with a charterer's orders to proceed to a port in Japan.

The situation on the ground in Japan continues to develop on a day by day basis and any specific enquiries that Members may have will depend on the terms of any charterparty as well as the current situation. Set out here is some general guidance on some of the key issues.

Should Members wish to discuss these or any other issues in more detail then they should speak with their usual contact within the Managers.

Is the port unsafe and do I have to proceed?

Both time and voyage charters typically impose a duty on the charterer to nominate only safe ports and/or berths through an express clause in the charterparty.

The classic test is that a port (or berth) is safe if 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 unavoidable danger. If there is a risk to the crew but not the ship the port may still be unsafe.

The warranty on the part of the charterer is prospective, i.e. that, when nominated, the port will be safe to approach, use and depart from. However, if an order was given before

the earthquake to a Japanese port which is now unsafe, time charterers are under a duty to now nominate an alternative, safe port. There is authority that under a voyage charter the position is different and there is no general duty or right of re-nomination in the case of the port becoming unsafe between nomination and expected arrival.

Is a port at which there is a risk of radiation poisoning unsafe?

A port could be unsafe because of a risk of radiation poisoning to the crew. It may also be that the port would be unsafe because of the risk of radiation affecting the vessel itself. It is important however, that any decision to refuse to visit a Japanese port on grounds of unsafety due to risk of contamination is made reasonably and objectively.

Continued overleaf



Japan Earthquake/Tsunami (continued)

An argument that Tokyo is currently unsafe because of a perceived risk of radiation would not be sustainable, for example. Clearly the position is fast moving and it is important that up to date information is obtained from, for example, the IAEA website at www.iaea.org

Where there is a difference of opinion between the owner and the master or crew members as to the safety of visiting a Japanese port, both parties should consult the relevant employment contracts to ascertain the employee's rights.

In the event that a crew member does suffer from radiation poisoning having called at a Japanese port, liability will be dependent upon whether the owner is in breach of the employment contract or whether the charterer was in breach because the port was unsafe.

Are ports which are closed unsafe?
There is also the question of whether ports currently closed are unsafe.

The fact that a ship may have to wait for a time before entering a port before entering the port does not make it unsafe. However, if the delay is "inordinate" then the port will be unsafe. The period of delay must be such a period as would frustrate the charter (see further).

If the port is closed is the charterparty frustrated?

All these ports will reopen at some point, and the question therefore is whether their temporary closure

means that the contract is frustrated. A charterparty is frustrated, and therefore brought to an immediate end, if during its performance a fundamentally different situation arises, through no fault of either party, and for which the parties have made no provision in the charter, so that it would be unfair in the new circumstances to require them to perform the rest of their obligations.

The charterparty may of course make provision for supervening events causing delay, in which case the legal consequences of the event must be determined by the provisions of the contract. Further, as stated above, it may be that the delay means the nominated port is unsafe and that there is thus a right to ask for alternative orders.

There is no definitive rule as to how long that delay must be – it will depend on the circumstances of each individual case, with particular emphasis on how long the delay is expected to be as against the unexpired duration of the charterparty. Time charters for a trip and voyage charters are more likely to be frustrated therefore, than period time charters. The judgment is to be assessed at the time and therefore without the benefit of hindsight. Although there were a number of peculiarities in the particular case, a ship being detained with only a 3 day redelivery voyage to complete for 108 days when the charter length was only 20 days, has been held to not frustrate that charterparty. The charterparty may also be

frustrated where the ship itself has been damaged in the earthquake or tsunami.

Is the ship at liberty to deviate due to the risk of radiation?

Recourse should of course be had to the express terms of the charterparty. However, the master has the right to divert in order to avoid danger, whether navigational or otherwise affecting his ship or property or life on her. What will be critical is the extent to which there is a reasonably held belief that the deviation is required due to the risk to life.

An exclusion zone has now been established around the damaged Fukushima nuclear plant. The latest information suggests that the low levels of radiation that have escaped from the plant are likely to be blown north west out in to the Pacific Ocean. An alteration in the wind direction or a further explosion at the plant could of course alter the situation and Members with ships trading in the area should closely monitor the situation.

The Managers will continue to provide up to date information as and when it is received and further information can also be found on the UK P&I Club's website - www.ukpandi.com/knowledge-developments/industry-developments/japan-earthquake/#c22247

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