JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 17th May 2007

Introduction

1. This is an appeal under section 69 of the Arbitration Act 1996 ("the Act") which is brought by the claimant in the action, AIC Limited ("the Charterer"), the respondent in the underlying arbitration. The claim challenges certain conclusions of law in an award on preliminary issues made on 16 May 2006 ("the Award") by Messrs Gaisford, Moss and Farrington ("the Tribunal") in favour of the owner, Marine Pilot Limited, defendant in this action and claimant in the arbitration ("the Owner"). On 30 August 2006, permission to appeal was granted by Christopher Clarke J, who held that the issues raised were ones of general public importance and that the decision of the Tribunal on those issues was at least open to serious doubt. The first two issues, decided by the Tribunal in favour of the Charterer, are not the subject of any appeal by the Owner.

The facts

2. Certain facts were assumed to be correct for the purposes of the preliminary issues decided by the Tribunal. They were as follows.

3. By a Charter dated 27 October 2004, in substantially the terms of the Asbatankvoy form with amendments and incorporating the Charterer's standard terms (although not executed in such form) the M/T Archimidis ("the Vessel"), an Aframax oil tanker of 94,999 metric tonnes deadweight, drawing 13.47 metres in fully laden conditions, was fixed for three consecutive voyages to load gasoil or unleaded mogas "1 safe port Ventspils" with "discharge 1/2 s[a]fe ports" in the "UK C[ontinent] B[ordeau]x/Ham[burg] range".

4. The original fixture was extended by three addenda to cover eight voyages and a wider range of possible discharge ports. The dispute relates to a claim by the Owners for deadfreight in relation to the sixth voyage.

5. The relevant terms of the Charter were as follows:

"Part I …

Clause F
Worldscale 200 minimum rate (flat) Amsterdam rate to apply. Overage at 50 percent. …

Clause I
Demurrage per day: United States $30,000 (thirty thousand) per day/pro rata.

Part II …

3. DEADFREIGHT
Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's discretion, and shall upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however, deadfreight shall be paid at the rate specified in Part 1 hereof on the difference between the intake quantity and the quantity the Vessel would have carried if loaded to her minimum permission freeboard for the voyage. …

9. SAFE BERTHING – SHIFTING
The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto and lie at and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. …

19. GENERAL EXCEPTIONS CLAUSE
The Vessel, her Master and Owner shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: - any … peril, danger of accident or the sea or other navigable waters; …..And neither the Vessel, nor Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss of [sic] damage or delay or failure in performing hereunder, arising or resulting from: - … perils of the seas…"

Special provisions …
2. 3 consecutive voyages following basis:

Cargo:
Minimum 90,000 metric tonnes always consistent with 45 feet fresh basis arrival Northwest Europe. No deadfreight to be for Charterer's account provided minimum quantity supplied. ½ grades with Vessel's natural segregation gasoil or unleaded mogas undarker 2.5 NPA

Load one safe port Ventspils. Discharge 1/2 safe ports United Kingdom Continent Bordeaux/Hamburg range.

2nd and 3rd voyages in direct continuation normal steaming plus 24 hours for cancelling (steaming basis Ventspils/Rotterdam or vice versa 3.5 days, additional 24 hours for cancelling to exclude delays due to bad weather force 6 and above, fog and narrow passage closure or restrictions beyond Owner's control).

3. Worldscale Hours Terms and Conditions shall apply to this Charter Party.

Laytime 84 SHINC

AIC TERMS …

11. LIGHTERING CLAUSE …
If Charterers request Vessel to load/discharge via lightering/ship-to-ship transfer (weather permitting and always subject to Master's approval which [is] not unreasonably to be withheld) at anchor of any load/discharge port.

Charterers will provide at their cost and expenses all suitable fenders, hoses and any other equipment to safely perform the load/discharge operation.

All time commencing from Vessel's arrival at the lighterage ship-to-ship location until Vessel's break free, shall run continuously weather permitting or not, without interruption and shall count as full laytime used or demurrage if vessel already on demurrage…."

6. On 11 January 2005, the Vessel arrived at Ventspils to load the cargo. However, because of previous bad weather conditions, the dredged channel had silted up as a result of a lack of water. Because of the draft restrictions, the Master served a notice of readiness ("NOR") stating that he expected to load a cargo of "approximately 67,000mt". The Tribunal found that the Charterer had "formally tendered for loading a quantity of 93,410mt" but went on to hold that,

"since all concerned were aware that it would not be possible for the Vessel at that particular time to load this quantity, this was a gesture without legal significance."

It was not clear from the Award whether the NOR was served before or after the Charterer's tender.

7. The Master in fact loaded 67,058mt, marginally more than stated in the NOR, which, according to the Award (paragraphs 29 and 30), was all that he thought "could [be] lifted in the prevailing physical circumstances known to all".

8. For the purposes of the preliminary issues, the Tribunal was asked to assume that, as a matter of fact, the Vessel could not have safely proceeded to Ventspils, loaded the minimum contracted cargo of 90,000mt at the Vessel's berth and departed safely with that cargo. Similarly, the Tribunal was invited to assume that it would have been possible for a ship-to-ship transfer ("STS") to have taken place in deep water at or off Ventspils in a location which would not have involved the subsequent use of the dredged channel with its draft limitation, so that the Vessel could have loaded 67,000mt at the berth and then proceeded to load the balance of the cargo to bring it up to 90,000mt by STS transfer.

The Tribunal's conclusions

9. The Tribunal held that the Charterer had a liability to pay deadfreight if it failed to supply the minimum cargo and that the burden was accordingly upon it to justify the short supply. The Charterer argued that the Vessel was only able to load 67,058mt because of the lack of water in the dredged channel which inhibited her departure on her full draft, for which it was not liable, and that it had tendered above the minimum cargo of 90,000mt. The Owner argued that the lack of draft was an aspect of port/berth unsafety for which the Charterer assumed liability and/or that the full cargo had not been supplied but was capable of being loaded, as to 67,058mt alongside at Ventspils and as to the balance by STS transfer. In the alternative to its deadfreight claims, it claimed damages for breach of what it contended was the Charterer's breach of warranty that Ventspils was a safe port.

10. The Tribunal concluded in favour of the Owner that the Charterer had failed to supply or furnish the minimum quantity of cargo and was therefore liable to pay deadfreight in respect of the difference between the amount actually loaded and the contractual minimum quantity of 90,000mt. Further, the Tribunal held that the Owner's alternative claim for damages for breach of warranty that Ventspils was a safe port was legally sustainable but required to be determined on a full hearing of the evidence. In particular, the evidential issues that remain to be decided are whether Ventspils had a propensity to silt up (in which case, the Tribunal might have concluded that the safe port warranty had been breached); or whether the silting up of the channel constituted an abnormal occurrence such that the safety was not something for which the Charterer could be liable.

11. In paragraphs 6-7, 25-30 and 32-33 of the Award the Tribunal held as follows:

"6. In addition to the disagreement relating to the freight rate for voyages 1-5 and 6-8, a dispute arose on voyage 6 as a result of a claim by Owners for what was described as "deadfreight". On the sixth voyage, the Vessel had lifted a cargo of only 67,058mt diesel as opposed to the contractual minimum quantity of 90,000mt. As a result of what were said to be altogether exceptional conditions as Ventspils the available water in the dredged channel was reduced to the extent that, when asked for him advice as to the quantity of cargo which the Vessel could load on the available draft, the Master informed the Charterer that she would be able to load no more than 67,000mt. The vessel was duly instructed to load up to the maximum permissible sailing draft and the owners subsequently claimed damages representing the freight which they had been unable to earn on the difference between the quantity of the cargo actually loaded and the minimum contractual quantity.

7. We note here for the purposes of determining the issues of principle arising out of the Owner's deadfreight claim that it was agreed that we had to assume that, as a matter of fact, the Vessel could not have safely proceeded to Ventspils, load the minimum contractual cargo of 90,000mt and departed safely with that cargo on the sixth voyage. Similarly, we were invited to assume that it would have been possible for a ship-to-ship transfer ('STS') in deep water to have taken place at or off Ventspils in a location which would not have involved the subsequent use of the dredged channel with the draft limitation. …

25. We have referred to the importance assumed at the hearing by the arguments relating to possible STS transfer of the balance of the minimum contractual cargo. Indeed, for our part, by the conclusion of the hearing we were satisfied that the possibility of an STS transfer represented an insuperable obstacle so far as the Charterer's attempt to avoid liability for the deadfreight claim was concerned.

26. In a nutshell, we could see no answer to the submission made on behalf of the Owners that there was no obstacle to the Charterers completing loading by STS in accordance with Clause 11 of their own Terms. All that was required to initiate the STS procedure was a 'request' – although it was true that an STS transfer could only take place weather permitting and always subject to the Master's approval (which was not to be unreasonably withheld). Thus, as it was put by Counsel for the Owners

'there was no legal obstacle to their loading a full contract quantity and thus no legal answer to their deadfreight liability.'

27. The only answer offered on behalf of the Charterers to this argument was that although there was a contractual entitlement to call for an STS transfer, there could be no obligation on them to do so. They accepted that, at the time, the Owners had referred to the possibility of the Charterers contemplating 'filling up' the vessel in another port. The Owners had confirmed that if this was in the Charterers' mind, they were willing to assist. However, the Charterers emphasised that non one at the time had even suggested an STS transfer.

28. Given that we had to assume for the purpose of this application that it would have been practicable for the vessel to have 'topped off' on the sixth voyage with an STS transfer, we accepted as correct the submission made on behalf of the Owners that whilst this was indeed no more than an option (so that the Charterers were not obliged to exercise it) if they failed to do so they could not escape liability for any freight lost by the Owners as a result. We were bound to conclude that it was an available means of performing the Charterers' obligations under the charter to load the minimum contractual quantity and that the Charterers could not therefore rely on their own deliberate decision not to exercise this option in order to avoid liability for a prima facie breach.

29. It is implicit from the comments made above that we rejected the Charterers' argument that they had not failed to supply or furnish the minimum contractual cargo. Their argument that they could rely upon the fact that the Master had only called for 67,000mt of cargo was not one that impressed us. It was clear so far as we were concerned that when the Master tendered Notice of Readiness stating that he expected to load a cargo of 'approximately 67,000mt', he was doing no more than providing a technically informed statement from the Vessel of the maximum quantity of cargo which her staff felt could [be] lifted in the prevailing physical circumstances known to all. On no sensible legal or commercial view could the Master's NOR be taken to have varied the term of the charterparty or to have given rise to an estoppel in the Charterers' favour.

30. Although the Charterers formally 'tendered' for loading a quantity of 93,410.495mt, since all concerned were aware that it would not be possible for the vessel at that particular time to load this quantity, that was a gesture without legal significance. As Counsel for the Owners argued, in this context the Charterers' obligation to 'tender' or 'furnish' required them to have the cargo alongside the vessel for loading. Since that would have meant that she would not have been able to proceed out of the port for an indefinite period following completion of loading, the fact that the quantity of cargo 'tendered' was available in the port was not, in our view, relevant to the question of whether the Charterers had complied with their obligation with regard to the minimum cargo size. …

32. It was not realistic in our view to argue (as the Charterers sought to do) that this was not a case involving a breach of the obligation to furnish a cargo of minimum size but a case where a ship had deliberately failed to call for the full amount of cargo because her staff were aware that she would be unable to load it. In answer to the arguments put forward on behalf of the Charterers as to the contractual allocation of risk as it appeared from a true construction of the contract, Counsel for the Owners submitted that what the parties had essentially agreed was that Charterers could load whatever quantity they required but that they would pay freight on a minimum cargo size of 90,000mt. We agreed. On the evidence it struck us that what had happened here was that when confronted with this unfortunate situation the Charterers had decided that of the available options open to them (one of which would have been to have awaited the dredging of the channel which was referred to in the contemporaneous documents as a matter of urgency) they had decided that the least unattractive option was to have the vessel sail away with less than the minimum contractual quantity.

33. On a true construction of the provisions of the contract we were therefore satisfied that there was no answer to the Owners' deadfreight claim and that it was unnecessary (as Counsel suggested on their behalf at the hearing) for us to get into the realm of possible unsafety. However, out of deference to the care with which the arguments on this point were presented at the hearing and because Counsel for the Owners submitted that this case reinforced the correct conclusion on the construction of the contract, we shall refer briefly to these arguments."

12. It is unclear from the quoted passage whether the Tribunal was at this stage (before dealing with the issue of unsafety) concluding that there were two bases, or merely one basis, for the Charterer's liability to pay deadfreight. It would seem to follow from the Tribunal's holding that the Charterer's formal tender of 93,410mt was "*a gesture without legal significance*" and its acceptance of the Owner's submission that the Charterer's obligation to "*tender*" or "*furnish*", "*required them to have the cargo alongside the vessel for loading*", that the Tribunal was concluding that there had, in the event, been a failure by the Charterer to supply the requisite contractual minimum, irrespective of the further issue whether the Charterer was bound to exercise its option to

load by STS transfer (which, on the assumed facts, was a feasible one), if it were to avoid liability for deadfreight.

13. In relation to the alleged unsafety issue, the Tribunal concluded as follows:

> *"40. As to the Charterers' argument that a draft limitation restricting cargo quantity could not, on the authorities, constitute 'unsafety', we agreed with the Owners that whilst in the present case there was no question of unsafety in the ordinary usage of that word, there is authority for the view that a port can be unsafe because of a need for lightering to get into or out of it. The same principles apply to questions of unsafety involved in leaving ports as entering them.*
>
> *41. As to the supposed objection in principle to any unsafe port or berth argument in this case based on the fact that there was no evidence of unsafety at the date of the charterparty, our view was that if, as a matter of fact, there is a propensity for sudden silting to occur in the dredged channel at Ventspils, that could form the basis of an unsafe port or berth case. Had it been necessary for us to decide this point, on the very limited evidence before us, we could not have concluded that the silting up of the channel constituted an abnormal occurrence, such that the unsafety was not something for which the Charterers might be liable.*
>
> *42. Had we been required to do so, we therefore would have been inclined to conclude that the Owners' case based on the breach of an alleged safe port/berth warranty, could not be dismissed as a matter of principle but if pursued, would have to be considered on its merits."*

The issues

14. Thus, whilst the factual issues of safety and the practicability of STS remain to be determined in the arbitration, the relevant questions for decision in the arbitration and on this appeal were:

    i) whether the Charterer had failed to supply the minimum quantity of cargo; this in turn required the determination of two sub-issues, namely:
        a) whether, by formally tendering for 93,410.495mt, the Charterer could nonetheless be said to have failed to supply or furnish cargo because that tender was "without legal significance" in the circumstances where all parties know that because of the draft restriction the Master could only load 67,000mt and/or because, in order to comply with its obligation to furnish, the Charterer had physically to bring the cargo alongside the Vessel for loading; and
        b) whether, even if such a formal tender would have *prima facie* satisfied the Charterer's obligation to furnish, the existence of the option to load the balance of the cargo by STS transfer and, on the assumed facts, the availability of that option meant that the Charterer could not escape any liability for its failure to load the contractual minimum cargo if it failed to exercise the STS transfer option;

    ii) whether the wording in the Charterparty, referring to the sole loadport as "1 safe port Ventspils", constituted a warranty by the Charterer of the safety of the port, as opposed to an agreement by both parties that the port was safe; and

    iii) whether features of a loadport which might mean that a vessel "*could not proceed to, load the contractual cargo at and depart from the port"* by reason of a draft restriction could as a matter of law render the port prospectively unsafe.

Issue i)(a): Had the Charterer "fail[ed] to supply a full cargo", notwithstanding its "formal" tender of 93,410.495mt?

15. This issue falls to be decided in the first instance without consideration of the impact of clause 11 of the Charter party and the Charterer's entitlement to load by STS, weather permitting and subject to the Master's approval.

16. Mr. Steven Berry QC and Mr. Edmund King, counsel on behalf of the Charterer, submitted, as their primary argument, that the Charterer did indeed "supply" a full cargo by making a formal tender of more than 97,000mt, and that was an end of the matter; in such circumstances, there could be no *prima facie* breach of the Charterer's obligation, or failure on its part, to supply a full cargo, and therefore the STS issue was irrelevant.

17. Mr. Timothy Young QC, counsel on behalf of the Owner, sought to uphold the Tribunal's finding that the Charterer's "formal tender" of a quantity of 93,410.495mt "was a gesture without legal significance". He submitted:

    i) that the Charterer had no desire nor intention to load that full cargo since it would delay the Vessel in her voyage and accordingly "they did not actually try or ask to pump more than 67,058mt on board;"

    ii) that there was no inhibition against the Vessel receiving a full 90,000mt of cargo; the inhibition was in her departing in the channel on her chartered voyage with that full cargo on board; the Charterers adopted the least unattractive option of having the Vessel sail away with less than the minimum cargo;

    iii) the obligation to supply cargo under Clause 3 of the Asbatankvoy form means "pump to the Vessel" since freight is calculated under Clause 2 of the form by "an intake quantity" and Clause 10 says that "The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer";

    iv) there was no finding of a refusal on the part of the Master/Owner to load the cargo, nor was the Tribunal even asked to assume a refusal; (the Owner accepted that if there had been a wrongful refusal on its part, the Charterer would not have been obliged to load by STS);

v) that, in order for there to have been a tender of legal significance, the Charterer would have to have been prevented from pumping the cargo into the Vessel, either physically or by the Owner evincing "an improper intention to refuse to accept it";

vi) all that happened in the present case was that, *"because of the draft in the channel, the Master gave a technically informed statement that the Vessel could not sail along that channel with more than about 67,000mt on board and the Charterer decided to load only that quantity.";* see paragraph 15 of Mr. Young's submissions;

vii) consequently, submitted Mr. Young, *"since everyone appreciated the reality of the situation, and since no more cargo was intended to be loaded than the 67,058mt actually loaded, the Charterer … in truth requested the Vessel proceed with such cargo as they had loaded, or, alternatively, the Charterer … supplied 67,058mt on board and no more and then (no more being supplied) the Master had the liberty to sail, which he did. In either event, clause 3 expressly stipulates that the Charterer.. w[as] to pay deadfreight".*

Conclusion on Issue i)a)

18. What precisely happened factually, and in what order, is unfortunately not clear from the Award. What is clear, however, is that this court is bound by such findings of fact as the Tribunal has reached. The critical feature, in my judgment, is that the Tribunal found as a fact (whatever the Tribunal's purported legal characterisation of the tender as "a gesture without legal significance") that the Charterer had indeed "formally" tendered for loading a quantity of 93,410.495mt. I do not see how, as a matter of law, in the light of that finding, i.e. a finding of actual tender of full contractual performance, the tender can be stripped of legal significance merely because the parties knew: *"that it would not be possible for the Vessel at that particular time to load that quantity"* (see paragraph 30 of the Award).

19. The mere fact that both parties knew that such a quantity could not be loaded does not, in the absence of some express contractual provision, mean that the tender of performance had no legal validity. By finding that the Charterer had tendered for loading the minimum quantity, the Tribunal was concluding that the Charterer had indeed indicated that it was ready and willing to perform its part of the contract. Moreover, the Tribunal also held (see paragraphs 6 and 29 of the Award) that the Master told the Charterer that the Vessel *would be able to load* no more than 67,000mt (emphasis supplied). Whether the NOR was served before or after the Charterer's tender, it was clear that the Tribunal found that the Master had indicated that he was *only prepared to load* 67,000mt. Once there has been a finding that one party had indicated that it was not prepared to load the full amount despite the tender "for loading", I cannot see that it can be said that there was nonetheless a breach of contract, or "failure" on the part of the Charterer in not having the cargo of mogas alongside, or, as Mr. Young submitted, in failing actually to try, or ask, to pump more than 67,058mt on board. Moreover, even on the assumption that the Charterer's obligation was to pump the mogas on board, the finding that there had been a tender of performance by the Charterer obviated the need actually for it to do so, in circumstances where the Master had indicated, or was indicating, that the maximum that he would load was 67,000mt.

20. Nor was I persuaded by Mr. Young's submissions, as set out above, that there was no "finding of refusal" to load the cargo on the part of the Master/Owner. The refusal may not have been contractually "wrongful" in any sense, since the Owner may well have been entitled to rely, not only on clause 19 which excused it from any failure to perform as a result of "a peril, danger or accident of the sea or other navigable waters", but also on the fact that its loading obligation, as set out in clause 9, was limited by, and subject to, the express proviso that "the Vessel can ..lie at [the place of loading], and depart therefrom always safely afloat". But it was the Master's statement that he was not prepared to load more than 67,000mt which was the reason why the Charterer's tender of performance was not accepted. It is true that in paragraph 32 the Tribunal held that the Charterer *"had decided that of the available options open to them (one of which would have been to have awaited the dredging of the channel which was referred to in the contemporaneous documents as a matter of urgency) they had decided that the least unattractive option was to have the vessel sail away with less than the minimum contractual quantity".*

Be that as it may, that commercial decision does not, in my view, undermine or detract from the fact that here there had been an actual tender of full performance by the Charterer. In those circumstances, I do not see how it could be said that there had been a "failure" on the part of the Charterer within the meaning of clause 3.

21. Nor was I persuaded by Mr. Young's submission that there had been a failure by the Charterer because "there was no inhibition against the Vessel receiving a full 90,000mt of cargo; the inhibition was in her departing in the channel on her chartered voyage with that full cargo on board; the Charterers adopted the least unattractive option of having the Vessel sail away with less than the minimum cargo." The findings of the Tribunal as to the statements by the Master, as set out above, and the assumptions that the Tribunal was asked to make, were to the effect that the Vessel was not safely able *to load* a full 90,000mt of cargo because of the lack of draft and that the Master had declined to do so; see e.g. paragraphs 6 and 7 of the Award. There is no evidentiary suggestion in the Award, for example, that, in the face of the Charterer's tender of full performance, the Master had agreed to load a full cargo, but then had been further instructed by the Charterer merely to load the lesser amount so as to enable the Vessel to depart.

22. The obligation under clause 3 to pay deadfreight is only triggered in the event that the Charterer *fails* to supply a full cargo. Deadfreight is traditionally described as the name given to liquidated damages claimed for a charterer's breach of contract to furnish a full cargo to a ship in accordance with the charter; see e.g. *Scrutton on Charterparties, 20th edition*, Art. 196 page 400; *Cooke on Voyage Charters, 2nd edition,* paragraphs 21.82 -83

and 54.1. There is no support in the wording of clause 3, or more generally, for the words "Should the Charterer fail to supply a full cargo" to be construed as synonymous with the words "in the event that (for whatever reason) a full cargo is not loaded on the Vessel", nor for the liability to pay deadfreight to attach in circumstances other than where the Charterer is in contractual breach. Accordingly, where, as here, there was a tender of full contractual performance by the Charterer, there can have been no failure to supply and therefore no obligation to pay deadfreight. A tender of performance cannot be deprived of "legal significance" just because both parties know that it is not possible for the other contracting party to accept that tender. I was referred to no authority that supported such a proposition nor did Mr. Young seek to suggest that the doctrine of frustration somehow operated to deprive the tender of significance, whilst nonetheless rendering the Charterer liable for the non-supply of a full cargo. It follows that I hold in favour of the Charterer on issue i)(a).

Issue i) (b) Whether, even if such a tender would have prima facie satisfied the Charterer's obligation to furnish, the existence of the option to load the balance of the cargo by STS transfer and, on the assumed facts, the availability of that option, meant that the Charterer could not escape any liability for its failure to load the contractual minimum cargo if it failed to exercise the STS transfer option?

23. As I said above, it is not clear from the Tribunal's decision whether the basis of the Charterer's liability to pay deadfreight was that it had in the event failed to supply a full cargo, even if loading one was impossible, since its tender had no legal significance, or because, even if it had tendered a full cargo, in the circumstances it should have availed itself of the option to load by STS (which, on the assumed facts, was available). The effect of the Tribunal's finding on this second issue is that the Charterer was effectively bound to exercise its option to load by STS, in order to avoid any liability for deadfreight.

24. As set out above, in paragraph 28 of the Award the Tribunal held: *"Given that we had to assume for the purpose of this application that it would have been practicable for the vessel to have 'topped off' on the sixth voyage with an STS transfer, we accepted as correct the submission made on behalf of the Owners that whilst this was indeed no more than an option (so that the Charterers were not obliged to exercise it) if they failed to do so they could not escape liability for any freight lost by the Owners as a result. We were bound to conclude that it was an available means of performing the Charterers' obligations under the charter to load the minimum contractual quantity and that the Charterers could not therefore rely on their own deliberate decision not to exercise this option in order to avoid liability for a prima facie breach."*

25. Mr. Young's basic submission under this head was that, even on the assumption that there had been a tender of supply of the full cargo, or even irrespective of that tender, once the Charterer had been informed that there was no possibility of the Vessel departing from the berth down the channel with a full cargo, the Charterer, in those circumstances (and on the agreed assumption that STS was feasible), was guilty of a failure to supply a full cargo, if it did not avail itself of its option to top up the cargo by STS. The fact that the Charterer had no obligation to exercise the option of STS was irrelevant; but if it did not choose do so, it could not escape from its liability to pay deadfreight.

26. In my judgment, the Tribunal, whilst correct in characterising the Charterer's right to request loading by STS as optional, was wrong, in the circumstances of this case, to conclude that the fact that the Charterer did not exercise that right, meant that it had failed to supply a full cargo. The position here was that the Charterer *had* tendered supply of the contractually required minimum at the berth. It had elected, in other words, for a contractual mode of performance at the berth and had complied with its obligation to supply a full cargo at that place of loading. There had been no "failure" on its part to supply. It was the Owner which had in effect refused, because of the draft restrictions, and no doubt justifiably, to load more than 67,058 mts at the berth. I agree with Mr. Berry's submission that, in those circumstances, where there had been no failure on its part, but rather a refusal on the part of the Owner to accept the former's tender of performance, it was not incumbent upon the Charterer to exercise a right by which the Vessel could have been loaded to full capacity, by a secondary means of loading the balance of the contractual cargo. There is nothing in clause 3 or clause 11 that suggests that, even where the Charterer has tendered supply a full cargo at the berth, it nonetheless remains under an obligation to require an alternative means of loading in order to top up to the contractual minimum, where the reason for the fact that the Vessel has not loaded the minimum contractual cargo at the berth, has nothing to with any act or omission on the Charterer's part. Of course, the position might be very different if the Charterer had not been able to supply the full cargo at the berth; in those circumstances it might well be liable for deadfreight if it did not exercise a contractually available right to top up to the contractual minimum by STS if that was feasible. But that is not this case. In the absence of any failure to supply at the berth, I do not consider that the fact that the Charterer did not avail itself of the right to top up the load by STS – which would have been at its cost and might, even if feasible, have been risky, depending on weather conditions – meant that it had failed to supply for the purposes of clause 3. (I should add that it was not in the circumstances necessary for me to consider Mr. Berry's further argument that, once have elected to perform by loading at the berth, the Charterer no longer had any entitlement to call for loading by STS, and I express no view on the point.)

27. Accordingly, under this head, and subject to any submissions from counsel as to the precise form of the order, I propose to vary paragraphs A(iii) of the Award and to set aside paragraphs 19 – 33 of the Reasons, substituting for A(iii) the following declaration:

> *"(iii) that the Owner is not entitled to claim deadfreight in respect of the difference between the minimum contractual quantity under the Charterparty and the addenda thereto and the quantity of cargo loaded on the sixth voyage."*

Issue ii): whether the wording in the Charterparty referring to the sole loadport as "1 safe port Ventspils" constituted a warranty by the Charterer of the safety of the port, as opposed to an agreement by both parties that the port was safe?

28. The Tribunal held that there was no objection in principle to the owner bringing a claim for damages for breach of a safe port / berth warranty in the alternative to the claim for deadfreight. In the light of my conclusion on the deadfreight claim, the Owner may wish to pursue this alternative claim for damages (for, in effect, the same amount as the deadfreight claim) if it were open in principle for it to do so.

29. The first issue that arises under this head is whether the wording in the Charterparty referring to the sole loadport "1 safe port Ventspils" constituted a warranty by the Charterer of the safety of the port as opposed to an agreement by both parties that the port was safe. The Tribunal held that it was the former. In contrast, it was common ground that the term appearing in the Charterparty referring to the Vessel's discharge ports "1/2 safe ports in the UK Continent Bordeaux/Hamburg range" entailed a warranty by the Charterer of the safety of the discharge ports.

30. Mr. Berry submitted as follows.

i) There was no warranty of safety at Ventspils in this case, because Ventspils was a known port and the Owner took the risks of that port. In a case where the contract provides "1 safe port, Port X", the parties are in fact agreeing between themselves, but neither is warranting, that the port is safe, so that the owner's obligation to go there is definite. Thus the words "safe port Ventspils" are not apt to constitute a warranty by one party to the other that Ventspils is indeed safe.

ii) The primary purpose of a safe port warranty is to permit an owner to refuse to go to that port if he realises the unsafety; the secondary purpose is to give him the right to damages if he goes there without realising the unsafety and his ship is damaged. However, if the port is named, an owner cannot thereafter refuse to go there. He has agreed to it, and thus taken the risk; there is thus no room for a charterer's safe port warranty. In support of this submission Mr. Berry relied upon the dissenting judgment of Dixon CJ in ***Reardon Smith Line, Limited v Australian Wheat Board ("The Houston City")*** [1954] 2 Lloyds Rep 148 at 153, and in particular the following passage:

"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 desired 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. If he agrees upon the place, then, subject to excepted perils, his liability to have his ship there is definite. But where the charterer cannot specify the place of loading or discharge at the time of the charter, the shipowner must agree to submit his ship to the charterer's orders. The orders are normally given directly to the master. When the charter limits the choice of safe ports or safe berths, the purpose is to impose upon the charterer the necessity of doing in the interest of the ship what the shipowner would have done if the charterer had been prepared to nominate to him a port of loading or discharge at the time of proposing the charter, namely, avoiding an unsafe port. The fulfilment of the duty of naming the port of loading is inseparably connected with the fulfilment of the duty of providing the cargo. The charterer must provide the cargo at the named port and he must accordingly name a port where he can provide the cargo. If the safety of the port is in doubt, it seems better to suppose that the charterer must bear the responsibility of his choice, if it is a wrong one, and if the master is not prepared to take the extreme step of declining to lift the cargo because of the dubious security of the port. To place the master in the position of having to decide at his peril whether to take the risk of a doubtful port or berth as an alternative to refusing to come in and lift the cargo operates to the undue advantage of a charterer who in fact has named an unsafe port. For if the master of the ship decides not to frustrate the entire adventure but to take the risk, then on that construction of the clause the master would, by his decision, relieve the charterer of all responsibility; whereas, had the decision of the master been the contrary, the charterer would, because the port was unsafe in fact, be liable for all the damage flowing from failure to provide a cargo according to the conditions of the charter. The point may be stated concisely be saying that the charterer promises that he will provide a cargo and that it will be at a port which is safe or by saying that he promises that he will name a port which is safe."

The passage in that dissenting judgment was subsequently approved by the Privy Council in the same case at [1956] AC 266 at 282 and also, prior to *The Houston City* reaching the Privy Council, by the English Court of Appeal in ***Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Limited*** [1955] 2 QB 68.

iii) Accordingly, Mr. Berry submitted, the present case was a case where the Charterer, with the agreement of the Owner, was prepared at the time of taking the charter to specify the place where the cargo was available to load, and therefore the obligation was on the Owner to satisfy itself as to the safety of the port or berth. In the words of Dixon CJ, "his liability to have his ship there is definite".

iv) Further, he submitted, it is clear that warranties of safety are primarily related to the time that the order is given to go to the port, and the effect of such a warranty is that the port is at that time prospectively safe; see *Scrutton op. cit.*, Article 69, page 128. Such a warranty, submitted Mr. Berry, is inconsistent with, and cannot be aptly included in, a charterparty where a single port is named. In such circumstances, there is no room or need for any order to go to the port, and the obligation to go there is definite from the time of contracting.

v) Mr. Berry accepted that Dixon CJ's comments in relation to the present issue were *obiter*, since in *The Houston City*, the voyage charterparty contained the words "safe port", but did not name the port; the relevant term in that case was "one or two safe ports in Western Australia". However, Mr. Berry submitted that the fact that the charterparty in that case contained those words meant that the judge's *obiter* comments applied to a case where the words "safe port" appear;

vi) As further *obiter* support for his proposition, Mr. Berry sought to rely upon the following statement of Mustill J in ***Transoceanic Petroleum Carriers v Cook Industries Inc (The "Mary Lou")*** [1981] 2 Lloyds Rep 272 at 280:

"The charterers also drew attention to the specific reference to New Orleans as a permissible loading port. This does show, I agree, that the making of a passage up the Mississippi River was regarded as a possible element of the voyage. If the river had attributes which made it permanently unsafe, or if it was known to be unsafe at the time of the charter, then the naming of the port might have been enough to nullify the requirement, added to the printed form, that the loading port would be safe. But this was not the case, and it is entirely consistent with the wording of the clause to say that the owners agreed that the ship would visit the named ports if, but only if, they proved to be safe at the material time."

The relevant wording of the charter was "proceed to one or two safe berths one safe port US Gulf … New Orleans/Ama/Reserve/Myrtle Grove/Destrehan counting as one port". He submitted that the acceptance of Mustill J that, if the Mississippi River had attributes which made it permanently unsafe, then the naming of New Orleans "might have been enough to nullify the requirement, added to the printed form, that the loading port would be safe" supported his argument.

vii) Mr. Berry also relied on two London arbitration decisions where he submitted that the point had been decided in charterer's favour on materially similar words: see (1986) 181 L.M.L.N. 18/86 (a time charter for trading at and between safe berths/ports, including a named port), and (1997) 463 L.M.L.N. 11/97 (a voyage charter to one named safe port). He prayed in aid the well-established principle that in commercial cases it is of the utmost importance that points such as these are settled one way and not subject to conflicting decisions.

viii) Finally, even without reference to authority, Mr. Berry submitted that the word "safe", taken by itself, is at best neutral as to whether either party or neither is warranting safety. In a case where the charterer has no right to choose the port as it has been contractually stipulated before the charter begins, it is the owner who has the greatest means of information as to the safety of the port, and the ability of the ship safely to go there, and accordingly there is no need to read the words as a charterer's warranty. In any event, the clause should be read *contra preferentem* the owner.

31. In my judgment, Mr. Berry is wrong in his submission that the phrase *"1 safe port Ventspils"* is no more than a mutual agreement between the Owner and the Charterer that the port is in fact safe. It was common ground that the term appearing in the Charterparty in relation to the Vessel's discharge "1/2 safe ports in the UK Continent Bordeaux/Hamburg range" involved a safe port warranty by the Charterer of the discharge ports. Mr. Berry's construction therefore requires the words "safe port" to mean something different depending upon whether the words are being read in the context of the loading port or the context of the discharge ports. The argument is also unattractive linguistically because, as Mr. Young pointed out, it gives no effect to the words "1 safe port", since exactly the same result as that contended for by the Charterer would have been reached if Ventspils had simply been designated as the loading port without any reference to the adjective "safe". This is because if a single port is named in a charter, without the word "safe", or if one or more, as ordered, out of a number of named ports, are specified, without the qualifying attribute "safe", there is (in the absence of contrary indications or express provision in other terms of the charter) no implied warranty of safety as to the named port; thus the shipowner takes the risk of the named port as he finds it: see *Scrutton op. cit.*, Article 69; *Voyage Charters*, *op. cit.* paragraph 5.35; and the passage cited above from the judgment of Dixon CJ in ***The Houston City***.

32. But here the words "1 safe port" were not part of the standard printed Asbatankvoy form; they were expressly agreed, and typed into, the contract agreed between the parties. It is well established that parties who expressly insert chosen words into standard printed terms are presumed to have agreed that those expressly chosen words are to have some effect, not no effect; see *Lewinson on the Interpretation of Contacts, 3rd edition,* paragraph 7.3; *Voyage Charters*, *op. cit.* paragraphs 11.109 and 1.115. As Bingham LJ said in ***Atkins International H.A. v Islamic Republic of Iran Shipping Lines (The "A.P.J. Priti")*** [1987] 2 Lloyd's Law Reports 37 at 41, *"No clause is an island. Each has to be construed in the context of the whole charter of which it forms part."* I also refer to the decision of Thomas J in ***Aegean Sea Traders Corporation v Repsol Petroleo SA (The "Aegean Sea")*** [1998] 2 Lloyd's Law Reports 39 at 67-68 as to the need to construe the particular terms of each charterparty. Here the term, construed in its context, strongly suggests, in my judgment, that, as with the discharge ports, the Charterer is indeed giving a safe port warranty.

33. Nor do I consider that the cases referred to by Mr. Berry assist his argument. The issue in ***The Houston City*** was what were the legal consequences of an *express* provision that the vessel should proceed to "one or two safe ports in Western Australia". The passage in the dissenting judgment of Dixon CJ relied upon, was directed first, as to whether, if the charter specifies or names a load or discharge port, without any use of the attribute "safe", the shipowner or the charterer takes the risk of the safety of the port so named; as to which Dixon CJ's view was that the owner took the risk. But the critical factor to note in this context is that Dixon CJ was not addressing that point on the basis, or assumption, that the named port had the express description, or qualification, attached to it of

"safe". His view, effectively, although not expressed in such terms, was that in such circumstances no such warranty on the part of the charterer was to be implied. Second, he was addressing the issue, in the situation where the charter does not specifically name a load or discharge port, but the charterer has to nominate one, as to what were the legal consequences of that obligation to nominate. He was, in fact, considering that question on the basis that the charter restricted that choice by expressly providing that the port so nominated had to be a safe port (which was, of course, the actual position in *The Houston City*). He concluded that in such circumstances the charterer was indeed obliged to nominate a port that was safe and was liable for damage suffered by the vessel when it had been directed to an unsafe port. However, neither Dixon CJ, nor the Privy Council, was considering the precise issue in this case, namely what was the effect of a term where one port was named in the charter as the loadport with the express description "safe". But, in my view, the logic of the reasoning of Dixon CJ and the Judicial Committee, and the approach taken in many of the cases cited in *The Houston City* and cases such as ***Leeds Shipping Company Ltd v Society Francaise Bunge***, where the charterer has to nominate a safe port or berth, strongly support the conclusion that, if the word "safe" is used in a charterparty to describe a port, whether named or unnamed, it does indeed result in the charterer warranting the safety of the port named, or subsequently nominated by him.

34. I turn to the other authorities relied upon by Mr. Berry. First, I do not derive any assistance from the *obiter* statement of Mustill J in *The "Mary Lou*. He was dealing with a contract where the standard printed form contained a safe port warranty and was raising, merely as a possibility, a construction argument based upon factual matrix matters.

35. In the first of the two London arbitration decisions relied upon, (1986) 181 L.M.L.N. 18/86, the time-charter provided for "*one time charter-trip via safe port or ports and safe berths, including Castellammare di Stabia"*. The tribunal held as follows: "*On a true construction of the charterparty, the effect of naming Castellammare in the preamble was that the safe port warranty remained applicable to other ports to which the vessel might be ordered to by the charterers. By agreeing to the named port in the charterparty the owners took upon themselves any risks attaching to the port in respect of safety. When the port was put up by the charterers, the owners were in a position to check it out in respect of safety and/or other hazards either through publications such as the appropriate Pilot or through local correspondents. The effect of accepting the named port put the owners in the same position regarding that port, as in the case of a named port in a voyage charterparty. Therefore, the charterers gave no warranty regarding the safety of the port/silo berth at Castellammare."*

The report of the case is extremely brief and it is not possible to discern what arguments were presented or whether there were any other provisions of the charter, or features of the factual matrix, that supported the conclusion reached.

36. In the second of the two cases relied upon, (1997) 463 L.M.L.N. 11/97, the voyage charter provided that the vessel was "*to proceed to one [named] safe port"*. The tribunal held that: *"the naming of the port deprived the owners of the protection afforded by the prefix "one safe port". Those words were invariably inserted when a range of ports was involved, but they lost their purpose entirely in the case of a named port."*

Again, **t**he report of the case is extremely brief.

37. In my judgment, the reasoning of both these decisions, as reported, is unpersuasive. There appears to be no justification as a matter of law, or construction, for excluding the operation of an express term that provides that a port is safe, simply because it is named, whether as one of a range of ports, or as a single port.

38. It follows that I also reject Mr. Berry's argument that the word "safe", taken by itself, is at best neutral as to whether either party or neither is warranting safety. I do not consider that there is any basis, in the circumstances of this case, for reading the clause *contra preferentem* the Owner. In the context of charterparties, the authorities clearly demonstrate that (absent express provision to the contrary) the words "safe port" or "safe berth" usually connote a warranty of safety.

39. Accordingly, I hold against the Charterer on this point.

Issue iii): whether features of a loadport which might mean that a vessel "could not proceed to, load the contractual cargo at and depart from the port" by reason of a draft restriction render the port prospectively unsafe?

40. The issue that arises under this head is whether the warranty is broken if the Vessel cannot depart with a full cargo because of draft restrictions. The Charterer argued before the Tribunal and this Court that there could in law be no breach of the warranty of safety since the Vessel could avoid any unsafety due to draft restriction by not loading the full minimum cargo. In relation to this point the Tribunal held: *"we agreed with the Owners that whilst in the present case there was no question of unsafety in the ordinary usage of that word, there is authority for the view that a port can be unsafe because of a need for lightering to get into or out of it. "*

41. I agree with this conclusion, although whether or not, as a matter of fact, and in accordance with those authorities, Ventspils was in fact unsafe, remains to be determined by the Tribunal. As Mr. Young submitted, "safely" means "safely as a laden ship": see *Scrutton on Charterparties op. cit.*, Article 72 and *Voyage Charters*, *op. cit.*, paragraph *5.73 et seq*. It is likewise well-established that the vessel must be able to reach, use *and return from* the warranted port and that necessary routes to and from the port are within the warranty, so that unsafety in such routes amounts to a breach; see *Scrutton* Article 69 and *Voyage Charters*, paragraphs *5.75 et seq*. The classic definition is that: *"… 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; …" see *Scrutton* Article 69 page 130, and the authorities there cited.

42. I agree with Mr. Young that there can be no realistic distinction between loading and discharging. If the chartered vessel, laden with the chartered cargo, cannot undertake those operations in safety, then *prima facie*, there may be a breach. There is a plain danger since the Vessel would otherwise go aground. I cannot accept Mr. Berry's argument that the Charterer was not liable for damages for breach of the warranty because the port was safe if the Vessel loaded less than the chartered minimum cargo, or that in those circumstances the Charterer could have no liability for the Owner's loss.

43. It remains to be determined by the Tribunal whether the weather and the consequential silting up of the channel, which led to the draft restrictions, was indeed an "abnormal occurrence" since, if it was, it is accepted by the Owner that the Charterer would not be in breach of the warranty. Likewise, it will be for the Tribunal to decide whether, in the circumstances, the Charterer was entitled to rely, in the events which happened, upon the exclusion clause in Clause 19 of the Asbatankvoy form relating to "Perils of the seas".

Conclusion

44. It follows that, in the absence of compromise of the claim, the matter will require further determination by the Tribunal.

45. I am grateful to counsel and solicitors on both sides for their helpful written and oral submissions. I will hear counsel further as to the terms of the order and any consequential matters.

Steven Berry Esq, QC and Edmund King (instructed by Holman Fenwick) for the Claimant
Timothy Young Esq, QC (instructed by Eversheds) for the Defendant