JUDGMENT : The Hon. Mr Justice Langley : Commercial Court. 6th June 2007

The Appeal

1. This is an appeal, brought with leave granted by Tomlinson J on 11 December 2006, under section 69(3) of the Arbitration Act 1996. The appeal is brought by the Charterers of the LIVANITA who were Respondents in the Arbitration.

The Charterparty

2. The Charterers entered into a time-charter party with the Owners (Claimants in the Arbitration) dated 24 December 2002. The Vessel is a bulk carrier. The charter was on a modified NYPE form. It was for *"one time charter trip via St Petersburg, Baltic / Conti to the far east with duration 60/70 days without guarantee."*

The Claim

3. The Vessel was delivered to the Charterers passing Skaw on 29 December 2002. She berthed at St. Petersburg on 12 January 2003. Loading of a cargo of 37,058 mt. of steel coils was completed on 20 January. The Vessel left for Dunkirk at 0026 on 23 January. She was assisted by ice breakers to the outbound convoy area on 24 January. The outbound passage in convoy commenced on 27 January and was completed on 2 February. During the outbound convoy the hull of the Vessel was damaged by ice.

4. The Owners claimed for the damage to the hull, relying on the safe port clauses (clauses 67 and 25) in the charter and/or an implied indemnity for compliance with the order of the Charterers. Mr Young QC, for Owners, did not pursue the claim on the basis of indemnity. Charterers contended that there was no relevant express warranty because the risk of the Vessel encountering ice at St. Petersburg was a risk Owners had agreed to bear by agreeing to a charter party with St. Petersburg as a named port in winter. They also contended *("the causation issue")* that the damage was caused by the negligence of the master in deciding to force ice and not by any port unsafety, which was itself denied.

The Award

5. The Award was dated 24 April 2006. The Arbitrators were Graham Clark and Patrick O'Donovan. The Award was made upon written submissions only. The Charterers were found liable for breach of the express safe port warranty in clause 67 of the charter. The cause of the damage to the hull was found to be impact with ice blocks of some size created by the ice breakers and not any negligence on the part of the master. The Claimants were awarded US $73,136.67 plus interest. A small claim but one said, with the sanction of Tomlinson J, to raise important issues of law. That may be so; however, as I think became clear during the hearing of the appeal, the understandable fact that the arbitration was conducted on paper submissions only, makes it a less than ideal case for addressing such issues. The very recent decision of Gloster J in ***AIC Limited v. Marine Pilot Limited*** [2007] EWHC 1182 (Comm) which I was told was to be the subject of an appeal and which is referred to below seems to be a much better candidate for resolution or clarification of the law.

The Provisions of the Charter

6. Lines 14-15 *"… one time charter trip via ST. Petersburg/Baltic/Conti to the far east with duration about 60 70 days without guarantee. Charterers option break IWL against paying Owners additional premium Against vessel's hull and machinery underwriter's invoice and vessel not to force Ice but to follow Ice-breakers, with intended cargo steel / steel products and other lawful harmless general cargo(es) within below mentioned trading limits."*

   Line 29 *"…Trading exclusions (See also Clause 67)…"*

   "8. That the Captain shall prosecute his voyages with the due despatch and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain…"

   "25. The vessel shall not be required to enter any ice-bound port, or any port where lights or light-ships have been or about to be withdrawn by reason of ice or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging. Vessel not to force ICE but to follow ice breakers."

   "26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The Owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters same as when trading for their own account."

   "Clause 67. TRADING EXCLUSIONS

   Country exclusions – trading to be worldwide between safe ports, safe berths and safe anchorages and places, always afloat, always within Institute warranty Limits, excluding war and warlike zones…

   …Vessel not to force Ice but to follow Ice breakers. Vessel to be always left in safe trim / stability and other conditions that would be required for safe navigation within the port(s) as well as sea passage(s)."

The Reasons for the Award

7. The Tribunal addressed what it described as *"the construction issue"* in paragraphs 7-16 of the Award. The issue was expressed to be: *"Was St. Petersburg covered by the express warranty of safety in clause 67?"* The causation issue was addressed in paragraphs 17 to 27 of the Award.

8. The submissions of the parties on the construction issue were stated in paragraphs 7 to 10. The authorities referred to were two decisions of Mustill J, ***The Helen Miller*** [1980] 2 Lloyd's Rep 95 and ***The Mary Lou*** [1981] 2 Lloyd's Rep 272. The Charterers also referred to a New York arbitration award (***The Bahama Spirit*** SMA No.

3849) and to an extract from a London award (London Arbitration 18/86 – LMLN 181). Commenting on the passage (at page 280) of the judgment of Mustill J in ***The Mary Lou,*** in paragraph 11 of the Award, the Tribunal recorded that: *"…it was not part of the Owners' case that St. Petersburg was permanently unsafe. Nor did they allege that it was known to be unsafe at the time the charter was concluded. Nor was there any evidence in relation to either point."* Having concluded that there was no relevant binding authority and therefore that the issue was one of construction of the charter party, the Tribunal continued:

"12. Turning now to the construction of this contract, the Charterers argued that it was to be inferred by (i) naming St. Petersburg as a load port (ii) expressly deleting the safe port warranty contained in lines 24-31 of the standard form charter and (iii) including it instead in clause 67 (which dealt primarily with trading exclusions) that the safe port warranty only applied to the unnamed load port(s) and the discharge ports – which were not named. They argued that any other construction would give no effect to the express deletion of lines 26-31 and the insertion of the safe port provision in the Trading Exclusions clause at Rider Clause 67.

*13. The Owners denied that any such inference could be made. As a matter of construction, they submitted, the charterparty provided for a time charter trip via St. Petersburg/Baltic/Continent to the Far East with an intended cargo of steel products **"within below mentioned trading limits"**. Those trading limits were defined in clause 67 as **"worldwide between safe ports/safe berths/safe anchorages and place"** with certain country exclusions. St. Petersburg was not excluded. Furthermore, the safety requirements of clause 67 were to apply without limitation to ports, berths, anchorages and places.*

14. We carefully considered the parties' arguments on construction. We were not persuaded that the deletion of the express safe port warranty from lines 26-31 and its transfer to the Trading Exclusions clause had the effect of either (i) limiting the safe port warranty to the second and/or third load ports and discharge ports – thus expressly excluding St. Petersburg which was named and/or (ii) somehow reducing the safe port warranty to a mere trading exclusion provision. We considered that, if anything, the express warranty in clause 67 was wider than the standard provision. Trading was to be worldwide (with certain named country exceptions) between safe ports, safe berth, safe anchorages and places, always afloat. Moreover we did not accept that, by moving the express safe port provisions, it was somehow downgraded.

15. We considered that the reason for deleting lines 26-31 was more prosaic. The trading exclusions in clause 67 were considerably different from those in the standard form in lines 26-31. Whilst no doubt lines 26-31 could have been amended, we agreed with the Owners that it was probably easier to deal with the trading exclusions and the safe port warranty in a separate clause.

*16. One other point of construction was raised by the Charterers. They argued initially that even if, which they denied, St. Petersburg, was covered by an express warranty of safety, they were not in breach of that warranty because the vessel was prospectively safe at the time of nomination and, on the authority of The "EVIA" (No. 2) 2 Lloyd's Rep. 207, they were not to blame if thereafter conditions changed and deteriorated. We agreed with the Owners that the decision in "The EVIA" (No. 2) had no relevance to the present case. The likelihood of encountering ice in St. Petersburg in the winter months could not be considered an **"unexpected or an abnormal event"**. The vessel went to St. Petersburg and was damaged by ice and prima facie St. Petersburg was therefore – subject to questions of causation – unsafe for the vessel."*

9. Although the causation issue forms no part of this appeal, there are two passages (paragraphs 22 and 25) of the Reasons to which reference was made and I will therefore also set them out:

"22. It was the Owners' case that the nature of the damage as described in the report of Captain Bogachev of Sea Wolf Ltd. was entirely consistent with the Master's explanation in his two statements. The voyage through the ice took 6 days rather than the usual period of 1 day. Throughout that period the "LIVANITA" was having to deal with broken ice of up to 60cm left in the wake of the ice breaker. Although the ice was broken by the ice breaker, it did not disappear and over the period of 6 days the ice blocks created by the breaker were likely to have caused damage to both sides of the "LIVANITA's" hull. The Master candidly admitted that on occasions he did not maintain the convoy speed. He said that, had he done so, the damage to his vessel would have been substantially greater, as the unbroken ice would have hit the "LIVANITA" with greater force.

"25. The central difficulty with the Charterers' case was that they had to demonstrate that the Master's decision marginally to reduce the speed ordered by the convoy leader caused the damage and that none would have occurred had the Master complied strictly with the convoy's instructions. As the Owners argued, the Master was "on the spot" (in any event, he was "on the horns of a dilemma"). His prime concern was the safety of the vessel and the crew and to minimise damage to the vessel. The primary concern of the convoy was to get as many ships safely through the ice as possible – even at the expense of minor damage to individual ships. Furthermore, we agreed with the Owners that the distinction that the Charterers sought to draw between the Master "forcing ice" as opposed to "following ice breakers" was somewhat artificial. We did not accept that marginally dropping speed from 0.3nm/h to 0.6nm/h as described by the Master to lessen the impact of the ice on the vessel constituted "forcing ice". The prohibition against "forcing ice" in clause 25 was directed to preventing the Master forcing ice on his own without the assistance of an ice breaker. That did not happen here."

The Application for Leave to appeal

10. In seeking leave to appeal, Charterers identified two "points of law", (to which I will refer as Ground 1 and Ground 2) expressed to be:

"Where a charterparty expressly names a loading port and also contains, in a different section of the charterparty, a safe port warranty, does that safe port warranty apply to the named loading port?

If the answer to the above question is "yes", is the owner still entitled to rely upon the safe port warranty in circumstances where the owner knew or should reasonably have known that the named port was unsafe at the time the charterparty was entered into?"

Grant of Leave

11. In granting leave to appeal, Tomlinson J wrote:

"1. *I grant leave to appeal pursuant to section 69(3) of the Arbitration Act 1996 because there arises out of the award a question of law which is of general public importance, in the sense of being of general importance to the relevant commercial community, as to which the decision of the tribunal is in my judgment at least open to serious doubt.*

2. *I am not sure that the charterers' formulation necessarily states precisely the question of law which in fact arises in this case. To my mind the critical question in this case arises out of the fact that the named port was, by the time the vessel came to use it, "unsafe" in an entirely predictable and indeed entirely to be expected respect, i.e., the approaches were affected by ice. The charterparty expressly stipulates that the vessel may be required to follow icebreakers. This feature alone renders it arguable that the decisions in "**The Helen Miller**" … and "**The Mary Lou**" … are not of direct application.*

3. *Furthermore in "**The Mary Lou**" Mustill J said, at page 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 to 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."

*Here, the contract was for one time charter trip which was specifically to take in St. Petersburg. It is true that St. Petersburg was not permanently unsafe in that it is not affected by ice all year round. It is also true that there is no finding by the tribunal that the port was affected by ice as at the date of the charterparty, although there is a finding that the vessel first encountered ice only 7 days later on 31 December. However, it is a permanent feature of St. Petersburg that ice is to be reasonably expected to be encountered on a voyage to and from that port which is expected to begin from Skaw between 28 December and 2 January. In my judgment it is arguable that in such circumstances the charterers were not in breach of a charter expressed as this was by reason alone of the fact that the conditions reasonably to be expected in fact obtained. In my judgment the passage cited above from the judgment of Mustill J in "**The Mary Lou**" arguably supports such an approach.*

4. *The owners are correct to point out that the tribunal made no finding of fact that as at the date of the charterparty the owners knew that there would be ice in the Baltic during January / February. The arbitrators did find that the vessel in fact encountered ice on 31 December. However the relevant question may be not whether the owners knew that there would be ice but whether they knew that it was likely that there would be ice. As to this the charterers had plainly submitted that the owners would have known that, to a greater or lesser extent depending on the severity of the weather conditions at the time and year in question, the port would be affected by ice. As I understand it the (Norwegian) owners did not controvert that proposition. Moreover at paragraph 16 of their Reasons the tribunal did find "the likelihood of encountering ice in St. Petersburg in the winter months could not be considered an "unexpected or an abnormal event." "*

5. *In the light of the findings at paragraphs 2 and 16, I do not accept that the very narrow findings in paragraph 11 relating to permanent unsafety and unsafety as at the date of the charterparty preclude the charterers from arguing this appeal. It is possible that the court hearing the appeal may have to consider exercising its power under section 70(4) to direct the tribunal to set out its reasons in further detail, although the court may consider that unnecessary and/or the parties may render it unnecessary by agreeing matters of which the court might arguably in any event take judicial notice. As I understand it it was not argued by the owners in the arbitration that charterers' liability resulted from the conditions being more severe than reasonably was to be expected to a degree which rendered the conditions different in kind from those reasonably to be expected."*

6. *Although a relatively small sum is in issue and the dispute has been ongoing for some time there can be no doubt but that, in the relevant sense, the determination of the question of law will substantially affect the rights of the parties and it is a question which the tribunal was asked to determine. The question is one of great interest to the market in respect of which there is uncertainty as to the proper approach. Since I have unhesitatingly concluded that the decision of the arbitrators is at least open to serious doubt it is in my judgment plainly just and proper for the court to determine the question."*

Amendment of the Grounds of Appeal

12. Following receipt of the grant of leave to appeal and the accompanying reasons of Tomlinson J, on 30 April 2007 Charterers applied for permission to amend the Grounds of Appeal to add a third ground whilst maintaining that it was in fact *"encapsulated within the original Grounds of Appeal"*. The proposed third ground is: *"Further and alternatively, does the charterer act in breach [of] the safe port warranty in circumstances where the nominated port is, at the time the vessel uses it, "unsafe" in a reasonably predictable and expected way."*

13. The application to amend was addressed at the hearing. It was opposed by Owners on the grounds that the issue of breach of the safe port warranty (if such there was in respect of St. Petersburg) was not one which was before the Tribunal. Section 69(3) of the 1996 Act provides that:

"Leave to appeal shall be given only if the court is satisfied –

(a) … ,

(b) That the question is one which the tribunal was asked to determine.

…"

14. For that reason, Mr Young QC, for Owners, submitted that permission to amend should be refused and if, inferentially, Tomlinson J had purported to grant it on the third ground, he had no jurisdiction to do so.

15. The primary submission of Mr Davies, for Charterers, in response, was that the existing Grounds of Appeal were wide enough to encompass the point. He also submitted that it was "*plain*" that Tomlinson J gave permission to appeal on the third ground and the only way in which that could be challenged was by way of an appeal under section 69(6) of the 1996 Act which itself required leave.

16. Whilst these interesting questions do not in the event affect the outcome of this appeal, because, with the agreement of counsel, I heard argument upon and will address what may be termed the merits of ground three, I will express my views upon them. Essentially, I agree with Mr Young. I do not think Tomlinson J had jurisdiction to give leave on a ground which was not before the Tribunal and I do not think he intended to do so. Unfortunate as it may be, the parties have not been able to agree on any matters of fact beyond those admitted or found by the Tribunal, nor on the issues.

Ground 1 (see paragraph 10)

17. At the time Counsel prepared their skeleton submissions, the decision of Gloster J in AIC was awaited. It was Mr Davies' submission that there was no English authority on the question posed by Ground 1. It was his further submission that the terms of the charterparty allocated to the Owners the risk of damage to the Vessel "suffered as a result of what was obvious." He relied upon the words of Mustill J in The Mary Lou quoted by both the Tribunal (paragraph 8) and Tomlinson J in paragraph 3 of his reasons for granting leave (paragraph 11). The fact, however, remains as Mr Young and the Tribunal emphasised, that it was not alleged nor was there any evidence that St Petersburg was "known to be unsafe" at the time of the charter. At the forefront of Mr Young's submissions was the submission that the fact that a port may customarily be affected by ice does not equate to that port being unsafe and particularly so where the charter itself contemplates what may be thought to be the usual safe use of the port in winter involving ice breakers. Plainly the presence of ice was contemplated ; it was also provided for.

18. In my judgment there is no principle of construction which permits a negative answer to the general question raised by this ground. There is no inherent inconsistency between a safe port warranty and a named loading or discharging port.

19. There might be in the contextual circumstances envisaged by Mustill J, but not in the circumstances of this case. Indeed that, I think, is consistent with the words of Mustill J in ***The Helen Miller*** at page 101, on which Owners also relied. As Colman J said in ***The "Greek Fighter"*** [2006] EWHC 1729 (Comm) at paragraph 313 effect should be given "to all the terms of the charter which are not inconsistent. The identification of a named port of anchorage, thereby limiting the charterer's choice as to the location of performance is not inconsistent with a warranty that it is safe, any more than the sale of goods by description would be inconsistent with an express term as to quality." The same point can be found in ***The Doric Pride*** [2006] 2 Lloyd's Rep 175, [2006] EWCA Civ 599, per Rix LJ at paragraphs 30-31. I was also told that Counsel were not aware of any case in which the exception alluded to by Mustill J had been adopted.

20. As I have said, the decision of Gloster J in ***AIC*** is now available. One of the issues addressed in the judgment [(paragraph 14G)(iii)] was: *" whether the wording in the Charterparty referring to the sole loadport as 'I 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."*

21. This issue is considered in paragraphs 28 to 39 of the judgment.

22. Whilst the submissions on behalf of charterers recorded in paragraph 30 of the judgment were not identical to those of Mr Davies before me, in substance they were the same and the same "*authorities*" were relied upon. The charterers lost. They did so for reasons with which I respectfully agree. Ground 1 therefore fails.

Grounds 2 and 3 (paragraphs 10 and 12)

23. Mr Davies addressed these Grounds together and so will I. It is important to record that no case was made by Charterers of variation, estoppel or waiver. Mr Davies described Ground 2 as a question of construction based on factual matrix. But there was no evidence that either party knew or ought reasonably to have anticipated anything about the likely conditions at St Petersburg more than the other, nor that either knew or should reasonably have known that St. Petersburg was unsafe at the time the charter was entered into, nor that it was unsafe as sought to be alleged in Ground 3. Mr Young submitted, and Mr Davies did not demur, that the issue of what Owners knew or should reasonably have known about the unsafety of St Petersburg was not raised before the Tribunal.

24. That is sufficient to dispose of these Grounds of appeal.

25. I would add, however, that it is not, in my judgment, right to submit, as Mr Davies did, that it can be inferred from the findings of the Tribunal that "the only basis upon which St Petersburg was alleged or found to be unsafe was that ice was present in the Baltic approaches to the port."

26. Whilst I do not find it easy to discern the reasoning for the conclusions of the Tribunal from the terms of the Award, and, in particular from paragraph 16, what I think is clear is that the port was found to be unsafe because of the ice blocks created by the ice breaker (paragraph 22 of the Award) and Mr Davies' submission suffers from the same difficulty that it elides the presence of ice with unsafety.

27. I should perhaps add that, although Tomlinson J is right (sub-paragraph 6 of paragraph 11) that it was not contended by Owners that conditions were different in kind from those reasonably to be expected there was evidence (and Charterers contended) that they worsened sufficiently to create the situation referred to in paragraph 25 of the Award. Moreover, it is an irony that Charterers' case before the Tribunal was that the presence of ice at St Petersburg and in the Baltic did not make the port unsafe. To quote from paragraph 7 of the defence submissions dated 2 November 2004: *"Charterers further submit that although the ice may have become thicker, the port was being kept open by ice breakers and, although ingress and egress from it may have become more difficult, the safety of the port was not affected."*

28. Similar submissions appear in the following paragraph and in response submissions dated 4 April 2005: *"Charterers' case is that the port of St Petersburg was safe at all material times. The provision of ice breakers kept the port open and safe despite ice conditions."*

Conclusion

29. In substance, if the Tribunal were to find, as it did, that St Petersburg was not safe, and the Master was not negligent, Charterers took their stand on the "*construction point*" identified by the Tribunal (paragraph 4) and re-stated in Grounds 1 and 2. They lost. In my judgment, the Tribunal was right and the appeal on those grounds fails. Having taken that stand, I also think Charterers should not be permitted to depart from it. Again understandably, neither counsel encouraged me to refer matters back to the Tribunal.

30. The Appeal will therefore be dismissed and I will hear the parties on any ancillary matters which cannot be agreed when the judgment is handed down. It was supplied to the parties in draft on 25 May.

Mr David Davies (instructed by Clyde & Co) for the Claimant
Mr Timothy Young QC and Mr Sudhanshu Swaroop (instructed by Stephenson Harwood) for the Defendant