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The meaning of a good safe port and berth in a modern shipping world

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SAFE PORT AND SAFE BERTH

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rijksuniversiteit
 groningen

THE MEANING OF A GOOD SAFE PORT AND BERTH IN A MODERN SHIPPING WORLD

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus, Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 27 February 2014 at 11:00 hrs.

by

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The idea to write this research has long roots. The idea grew from a spontaneous conversation on a subway train to Midway airport in Chicago. In 2006, I was a seaman. My brother Vasili and his wife Anastasia, urged me that it was about time to start a new career. After spending five years at sea, I decided to pursue a master in Admiralty Law at Tulane University to continue my maritime experience. For that bright idea, I thank you both.

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Leer, December 2013

Andrei Kharchanka

To my Mom...

Моей маме посвящается...

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1. INTRODUCTION

In a modern shipping world, where millions of metric tons of cargo are moved every day, and there is no undiscovered spot on the map, ships still run aground or suffer significant delays for various reasons in a port. The shipping world is built on a scheme where vessel owners do not enter directly into a contract of carriage with cargo interests. They tend to charter their vessels on a time or voyage charter in order to receive constant income.

Under most charterparties, the shipowner assumes the risks while the vessel is at sea and the charterer assumes the risks while the vessel is at its loading or discharging ports. The shipowner's assumption of the risk takes the form of the shipowner's warranty that the vessel is seaworthy. In particular, the shipowner would warrant that the vessel, at delivery, and during its service under the charter, "will be staunch, strong and well equipped for the intended voyage and manned by a competent crew and skillful master of sound judgment and discretion."¹ The charterer's assumption of the risk is usually expressed as its warranties of safe port and safe berth.²

By chartering the vessel, owners on the one hand, solve the problem of vessel employment; on the other hand, they face a risk that their vessel can call ports subjected to adverse weather conditions, political uncertainty, and a false system of port management. Although the Master of the vessel remains as the owners' representative on board, he is still bound by the decisions of charterers as to employment. Failure to obey these decisions can result in the seizure of charter hire payment and withdrawal of the vessel from service. In order to ensure that the owner's most precious treasure is protected, a warranty of safe port was developed.

Traditional understanding of the safe berth and port has changed over the past decade with the development of technology, tightening of government regulations, and globalization of the world. Although it is still true 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

¹ Thomas J. Schoenbaum, *Admiralty and Maritime Law* (5-th ed. 2011) at § 11-8.

² In re: Petition of Frescati Shipping Company Ltd., United States Court of Appeals, Third Circuit, Appellate Brief, 2011 WL 5968584, at 17.

cannot be avoided by good navigation and seamanship,”³ a new approach should be taken in order to evaluate the risks a ship owner can face calling a particular port.

Safety of the port is crucial in determining the liability of the party responsible for its nomination. Courts and arbitration panels confront two distinct problems in interpreting safe port and berth provisions as they typically appear in charter party agreements. First, the decision makers must determine the standard of care that the provision requires. Second, they must determine the meaning of a safe port or berth in the context of litigation or arbitration.⁴

Until now courts in various jurisdictions have not come to a unanimous decision whether safety of the port is a warranty the charterer gives to the shipowner or if it is due diligence which the charterer must exercise while nominating the port. Although English courts continue to use warranty as a standard of safety, there is a continuous trend of taking into account the construction of the charterparties, knowledge of the parties about the port at the time of nomination, their experience, the reasonableness of evaluating the port and the cargo on board prior to calling it, and abnormal occurrences in the port. This shifts charterer’s obligation from strict liability to negligence⁵ or, at a minimum, points that the safe port warranty in charterparties was not an absolute continuing promise of safety.⁶

Because global trade has opened doors for shipments to many previously unknown ports there is a high risk of uncertainty involved on how to deal with issues of suitability of the port when a physically safe and maintained port is located in a country with an unstable and corrupt government; when previously visited on the voyage ports due to sanctions against the country, which flag flies a vessel, make a normally safe port of loading or discharge unsafe; when the cargo on board creates a risk of making an otherwise safe port unsafe because of embargo; and when a popular port becomes unsafe because of a distant incident.

This dissertation focuses primarily on English law because it has enormous experience in reviewing safe port clauses by arbitrators and courts. At the same time, it is important to mention that American law, until recently, took more or less a similar

³ *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No. 2) [1982] 1 Ll Rep 334.

⁴ Steven M. Rubin, *Safe port and berth provisions in time charter agreements: apportioning liability to deter accidents and minimize costs*, 36 U. Miami L. Rev. 465 (1982), 466.

⁵ Alexander McKinnon, *Administrative shortcomings and their legal implications in the context of safe ports*, 23 A&NZ Mar LJ 186 (2009).

⁶ *The Evia*, [1982] 2 Lloyd's Rep. 307 (H.L.).

1. INTRODUCTION

position of the safe port warranty. There is a simple reason for this. The American courts in practice adopted English law and procedure in reviewing admiralty cases. American colonies, after the Revolution, provided through the Judiciary Act of 1789 and the Constitution⁷, exclusive jurisdiction to the federal district courts over admiralty and maritime matters. The U.S. Congress regulates admiralty through the Commerce Clause, and provides national uniform rules which prevail in admiralty claims in national or international shipping and commerce. English legal precedents were cited routinely in American courts.⁸ While uniformity of decisions in the United States and in England in the interpretation and enforcement of charterparties and marine insurance contracts is desirable, American courts are not bound to follow House of Lords' decisions automatically.⁹ Thus, many of the cases used below were decided either by English or American Tribunals and would show factual background of unsafety. They would have been resolved in the same manner regardless of where the Tribunal was located. For that reason, I review some factual circumstances through decisions of the judiciary of only one country. There are certainly differences, for example, "in the appropriate circumstances, the British courts find that a 'safe port' term is implied in the time charter, but in the United States the federal courts have never done so."¹⁰ Unless a different approach is specifically noted, English and American judiciaries apply the same standard of safe port warranty.

A vast majority of maritime contracts provide for the application of either English or American law since in the past decades these judicial systems have developed significant experience and practice. However, it is always up to the parties to decide the applicable law to the charterparty they are negotiating. Considering the fact that there is no global universal approach in interpreting safety of the port and liability of the parties, courts of different countries use their subjective opinion of the surrounding circumstances.

The purpose of this dissertation is to develop a system that integrates reviews, opinions, and decisions on safe port and berth warranty. A unilateral approach is extremely important in light of global integration, port development, the continued sophistication of vessels. Unfortunately, because of the continuous and rapid development of today's world, it is impossible to predict all of the situations that could make a safe port unsafe, but I will attempt to describe all of the possible occurrences that

⁷ Article III § 2 of the U.S. Constitution

⁸ Thomas J. Schoenbaum, *Key Divergences Between English and American Law of Marine Insurance* (1999).

⁹ *Standard Oil Co. of New Jersey v. U.S.* 340 U.S. 54

¹⁰ See *Wong Wing Fai Co., S.A. v. United States*, 840 F.2d 1462 at 1467 (9-th Cir. 1988).

a vessel may face in port. I will focus on an evaluation and systematization of current judicial practice of both English and American courts and arbitration decisions. General principles that set evaluation of safety will be confirmed once again and new categories of safety of the port will be described and illustrated with examples from recent judicial precedents. The dissertation is written as a tool to arbitrators, courts, and the maritime community, in an attempt to minimize the risk in global trade and to bring certainty to contracts.

2. Standard in determining liability of the parties responsible for nomination of the port under English and American Law

2.1. Defining parties involved in maritime adventure

Before proceeding any further I will need to uncover certain landmarks of chartering in order to have a clear picture of ship owner's-charterer's relations. Depending on the volume of cargo to be moved, charterers have an option of either hire the whole vessel and enter into a time charterparty. A time charterer will hire a vessel for a certain period, pay daily hire rates, determine the schedule of the vessel, and pay all bunkers (fuel) and port costs. The time charterer does not hire the crew and the owners will remain responsible for the navigation of the vessel, although the time charterer will determine the ports of call.¹¹ Time charterers will operate the vessel themselves and the vessel's crew will be its servant for the issues related to cargo operations. Alternatively, charterers can contract for part of the ship, leaving shipowners responsible for all operational matters and have their cargo delivered from point "A" to point "B" in return for the payment of freight and (where appropriate) demurrage; the costs of and responsibility for cargo handling are left to the terms of the specific agreement.¹² Such arrangement will create a voyage charter.

The terminology is somewhat arcane for charterparties and other contracts of affreightment. In time and voyage charterparty negotiations, the contracting parties are referred to as the "owner" and the "charterer." The owner may not actually own the vessel, but rather simply have the vessel under a previous time charter. Therefore, the term owner actually refers to the party who has the right to control the movements of the vessel through giving orders to the Master. Very often, the chain of owners-and-charterers can be very long and in order to distinguish between various owners, the owners who actually have beneficial interest in the vessel are referred to as "head owners." All other owners who time chartered the vessel and have only operational interest in her, very often are referred to as "disponent owners."

¹¹ See H. Edwin Anderson III, *Shipbrokers as Intermediaries, Agents and Third Parties*, Ulrik Huber Institute for Private International Law, Groningen (2006) at 8.

¹² J. Cooke, *Voyage Charterers*, Third Edition (2007).

Although the term charterparty is a general term used for contracts of shipments of goods by sea, the vast majority of cargos, especially smaller packages, are moved under a booking note and subsequently issued bills of lading. Primarily bulk cargos and cargo requiring significant space on the vessel will be shipped under a voyage charterparty; containers and project cargos will be shipped under a booking note.

2.2. Defining trading limitations of the vessel

Despite the fact that *mare liberum*¹³ principle applies to maritime trade, very few shipowners choose to allow their vessels to trade worldwide. There are certain meteorological and political reasons for that. The vessel can be affected by adverse weather conditions, the area can be covered with ice, the sea is too shallow for the vessel to sail, there is an uprising or war in a country, which can endanger the vessel, crew and the cargos, a port has no infrastructure to allow her load or discharge cargos, etc. Restrictions in the trading area of a vessel are accomplished in charterparties in two ways. First, charterparties use a safe port and/or safe berth warranty, which is an implied term frequently altered or reinforced by contractual stipulations. Second, charterparties incorporate a trading limits clause.¹⁴

Most charterparties are negotiated with respect to particular printed standardized forms although no particular form for charterparty is required and even an oral contract will be enforced under English or American law.¹⁵ For dry cargos, the most commonly used time charterparty forms include the New York Produce Exchange form 1946 or its revised 1993 version (“NYPE”) or BALTIME 1939 or its revised 2001 version. There are also standardized time charterparties for vessels that carry oil and related products such as SHELLTIME 4 and STB FORM. With respect to voyage charterparties almost every commodity, such as steel, sugar, grain, coal, will have its own industry-standardized form, but for most general dry cargos, the usual form is the BIMCO Uniform General Charter, the so-called GENCON form.¹⁶

¹³ The Free Sea (Latin). A principle formulated by Hugo Grotius that the sea was international territory and all nations were free to use it for seafaring trade. See Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation, Brill Academic Pub (2009).

¹⁴ Gotthard Gauci, Risk Allocation in the Charterparty Relationship: An Analysis of English Law Case Relating to Cargo and Trading Restrictions,, 28 J. Mar. L. & Com. 629 (1997), at 640.

¹⁵ Michael Wilford, Terence Coghlin, John Kimball, *Time Charterparties*, 6th edition (2003).

¹⁶ See H. Edwin Anderson III, *Shipbrokers as Intermediaries, Agents and Third Parties*, Ulrik Huber Institute for Private International Law, Groningen (2006) at 6.

2. STANDARD IN DETERMINING LIABILITY OF THE PARTIES

The standard forms of time charterparties typically provide that a ship “shall be employed between safe ports and safe berth, always afloat or safely aground.”¹⁷ Voyage charterparties will simply describe a port as “one safe port.” The safe port warranty relates to political dangers as well as natural hazards.

In contrast to safe port and berth warranties, trade limits will concern mostly time charterparties. A closely related restriction is contained in the so-called trading limits clause. Owners establish their rights of selecting areas available for vessel’s trade in three ways. The first will name specific areas or countries where the vessel cannot trade at all. Such areas can depend either on constructional characteristics of the vessel, for example, the vessel’s ice class, or countries that are subject to international sanctions, such as Iran and North Korea.

The second restriction concerns Institute Warranty Limits (“IWL”), which are trade limits restrictions for the use of a vessel by the time charterer in relation to geographical areas to which the vessel can navigate. Trading limits are imposed by the hull insurers of the ship and are restricted to areas free from ice hazards and usually in terms of the Warranties Clause of the Institute of London Underwriters. Calling these areas can be conditional on approval of hull underwriters and payment of an additional premium.

Undoubtedly, there is a degree of connection between trading restrictions and the duty to nominate a safe port. One question that needs to be addressed is whether an agreement to breach trading restrictions by the payment of the stipulated additional insurance premium means that there cannot be a breach of the duty to nominate a safe port when the vessel is ordered to proceed to a port in a restricted area. This matter has been dealt with in a number of cases.

In *The Helen Miller*,¹⁸ the issue related to a NYPE form charterparty that allowed charterers to call port outside Institute Warranty Limits upon payment of extra premium on insurance.

At one stage, the charterers paid the extra premium and the vessel was ordered to ports outside the IWL limits. Consequently, the vessel encountered ice and suffered damage to her shell plating for which repairs were later affected. A claim was subsequently made against the charterers for expenditure and delay. The charterers in turn defended on the ground that the effect of the clause was to exclude those liabilities that arose from risks inherent in trading outside those limits. Mr. Justice Mustill rejected

¹⁷ Clause 5, line 72-73 of NYPE 1993 form, available at https://www.bimco.org/Chartering/BIMCO_Documents/Time_Charter_Parties/NYPE93.asp

¹⁸ *The Helen Miller* [1980] 2 Lloyd’s Rep. 95 (Q.B.).

this argument, reasoning that the safe port warranty was still applicable to ports outside the IWL limits, but in respect of which the premium had been paid.¹⁹

Lastly, the owners can restrict trade of the vessel by requiring payment and/or their consent in trading so called war risk areas. Most of the time, such ports or territories are considered war risk areas because sailing to them can expose a vessel to war, strikes, piracy, terrorism, and related perils. They are determined upon necessity by a Joint War Risk Committee. Other ports can be disputed territories between neighboring countries and calling the port can subject the vessel to arrest in one of the countries. Regardless of the fact that owners allowed charterers to call war risk area, safe port warranty remains in place. Charterers cannot shield themselves from liability by claiming owners' consent and payment of additional premium to call a war risk area. In other words, safe warranty clauses cannot be overwritten by owners' permission to call certain areas.

2.3. Introduction to English and American Standards of Safe Port Warranty

English and American law is similar in regards to port safety. It is not necessary for the vessel to be in physical danger for a port to be treated as unsafe. The risk that the trading of a vessel will be seriously disrupted can constitute an unsafe port. An "inordinate" delay caused by, for example, ice or perhaps serious congestion, is capable of making a port unsafe. The delay would have to be so long as to deprive the charter of its commercial purpose, which in the case of a short-trip time charter would clearly be a shorter period than in a period charter.²⁰

Although both systems of admiralty law have a lot in common, there is a major difference in the standard of care when interpreting safety of the port and the berth. Safe port and safe berth clauses in case of the damage to the vessel will bring on the vessel owner a duty to prove not only that the berth was not safe, but also that in ordering a vessel to the berth the charterers failed to exercise due diligence.²¹ Under English law, due diligence will impose on the charterers a strict liability standard for breach of warranty, making them responsible even without fault. On the other hand, under American law, negligence will be the prevailing standard for determining culpability of

¹⁹ Gotthard Gauci, Risk Allocation in the Charterparty Relationship: An Analysis of English Law Case Relating to Cargo and Trading Restrictions, 28 J. Mar. L. & Com. 629 (1997), at 643.

²⁰ Safe port and safe berth, available at http://www.maritimeadvocate.com/security/safe_port_and_safe_berth.htm

²¹ The S. T. Hilda, SMA No. 1196 at 7.

2. STANDARD IN DETERMINING LIABILITY OF THE PARTIES

the party at fault. It allows a responsible party to escape liability if one of four conditions of negligence is not met: duty, breach of duty, causation, and damages.

There are various pro and cons for justifying strict liability standard for safe port clauses. Factors favoring strict liability include the “stimulating effect on the charterer” to ensure that a port is safe before ordering a Master into that port and creation of a more certain standard of liability than that provided by a negligence standard.²² Factors against strict liability include the lack of nautical knowledge typical of most charterers and the fact that the owners have hull insurance. Most insurance policies require the insured owner to notify the insurer of increased risk to the vessel. If the owner fails to do so, the insurer is likely to deny coverage for the damage. Therefore, the owner has a big incentive to know the conditions of the ports and berths that the vessel is to call. At the same time, charterers too should not be idle in monitoring events that can lead to unsafety of the port. In any event, the Master of the vessel has a duty not to take his vessel into an unsafe port, regardless of a safe port clause. Even under a strict liability regime, a Master who enters an unsafe port with knowledge of the unsafe condition will create liability for the owners under the intervening negligence exception.²³

By recent decisions, the concept of a safe port is a question of contract and not law, for it turns on the proper construction of the precise words, express and implied, agreed by owners and charterers in their contracts.²⁴ Nonetheless, a substantial degree of uniformity has been achieved through the adoption of the standard charterparty forms currently available and widely used in practice.²⁵

2.4. English Law Standard

The standard currently governing legal position of owners’ and charterers’ responsibility in nominating a safe port or berth was established in July 1982 in *The Evia* (No.2).²⁶ Since then, this decision became a landmark for all later decisions of English courts in interpreting safe berth. *The Evia* reconfirmed an approach stated in *The Eastern*

²² Jan Ramberg, *Unsafe ports and berths* 662-65 (1967).

²³ Grant Gilmore and Charles L. Black Jr., *The Law of Admiralty* §4-4, at 19, 209 (2nd ed. 1975).

²⁴ *The Mary Lou* [1981] 2 Lloyds Rep. 272, 283.

²⁵ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAcLJ 597 (2006).

²⁶ *The Evia*, [1982] 2 Lloyd's Rep. 307 (H.L.).

*City*²⁷ that safety of the port is a warranty that the charterer gives to the owner of the vessel and breach of the warranty will lead to strict liability of the charterer.

Lord Roskill who delivered the principal speech in *The Evia*, stated that the charterer's obligation is to nominate a port which is, at the time of the nomination, prospectively safe for the chartered ship to get at, stay at (so far as necessary) and in due course, leave without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.²⁸

In analyzing the English law approach, it is important to break the above-mentioned statement into several parts in order to have a clear understanding of charterers' responsibility. First, the port has to be safe at the time of nomination. Second, there should be an absence of abnormal activity or events in the port. Third, the Master should exercise good navigation and seamanship in order to avoid any dangers. I will discuss each of these points in detail in order to show that although English law *ab initio* applies a strict liability standard, recent decisions slowly developed the standard to the pro-charterers approach, based on a negligence standard.

At common law, the implied safe port promise is absolute, and an express promise is construed in the same way, save where the words used suggest the contrary. If, as events turn out, the port is not safe and loss or prejudice results to the ship, the charterer is liable. No excuses will be entertained. The fact that the charterer has acted reasonably, exercised reasonable care and diligence, or had no specific knowledge of, or any way of acquiring knowledge of, the risk associated with the use of the port, represents no defense or mitigation. The charterer is liable by virtue of the fact that the port is unsafe.²⁹

There is no inconsistency between a safe port warranty and naming a loading or discharge port that could be affected by adverse weather conditions such as ice, swell or high winds. The fact that the port may customarily be affected by ice, for example, does not equate to that port is unsafe and particularly so where the charter itself contemplates what may be thought to be the usual safe use of the port.³⁰ The identification of a named

²⁷ Leeds Shipping Co. Ltd. v. Societe Francaise Bunge (The Eastern City) [1958] 2 Lloyd's Rep. 127.

²⁸ Id. at 756 -757.

²⁹ Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd, supra n 19; Unitramp v Garnac Grain Co Inc (The Hermine) [1978] 2 Lloyd's Rep 37 at 47, per Donaldson J (reversed on appeal, but this aspect of the judgment unaffected).

³⁰ STX Pan Ocean Co Ltd (Formerly known as "Pan Ocean Shipping Co Ltd") v Ugland Bulk Transport A.S., 2007 WL 1623170, at 6.

port, 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.³¹

2.4.1. Safety at the time of nomination

The safety of the berth or the port includes not only natural conditions of the port but also various circumstances that have to assist the Master to bring his vessel there. There must be buoys to mark the channel, lights to point the way, pilots available to steer, a system to forecast the weather, good places to drop anchor, sufficient room to maneuver, sound berths, and so forth. In so far as any of these precautions are necessary. Once the set-up of the port is found to be deficient — such that it is dangerous for the vessel when handled with reasonable care — then the charterer is in breach of his warranty and he is liable for any damage suffered by the vessel in consequence of it.

Safety of the port includes physical, commercial, and political safety that will amount whether a specific vessel can enter the port, stay there, and depart. It also includes the route of the vessel to the port that must be free of any obstruction. There must, as a bare minimum, be adequate water and air draft and adequate mooring facilities and fenders. A vessel may lie aground and be safe, but in the absence of a term permitting her to lie aground or a custom, a vessel should remain afloat.³²

The promise of safety is not that the port is immediately safe at the time the promise is made and that it will, thereafter, continue to be safe; the promise is that the port is prospectively safe, meaning that the port will be safe at the time the ship has cause to use the port.³³ Therefore, the crucial moment when the test of safety is to be adjudicated is when the chartered ship arrives at, uses, or departs from the port, whichever mode is in issue.³⁴ This is especially true in time charterparties where charterers have liberty to sail the vessel to any port.

The word “safe” in a charterparty means a port safe in regards to incidents of navigation. Therefore, as soon as the charterers have named a port into which it is physically possible for the Master to take the ship they have fulfilled their part of the

³¹ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497.

³² *Voyage Charters*, Third edition, London (2007), at 119-120.

³³ *The Evia*, [1982] 2 Lloyd's Rep. 307 (H.L.).

³⁴ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 607 (2006).

contract.³⁵ In considering a question of safety, not only the port itself but also the safety of the approaches thereto must be taken into account. Obviously, approaches to the port cannot be extended to unreasonable limits. Current court practice will typically extend port warranty to river or canal passage to the port.³⁶

The port has to be safe at the time of nomination. What occurs if the port is not safe at the time of nomination, but becomes safe by the time of vessel's arrival? Once unsafety of the port is cured, the port would be considered safe one. Under the warranty standard although owners assumed unsafety of the port while nomination of the port was made, they rely on charterer's promise that this condition changes before arrival of the vessel.

In that regard, there is a different approach to continuity of safety under voyage charterparties. Nomination of the port under the voyage charter party takes effect immediately upon notification of the owner or the Master. In the absence of express provisions, the charterers are neither obliged nor entitled to change a nomination once it is made.³⁷ This leads to two conclusions.

Firstly, the charterers have no right to nominate a prospectively unsafe port. It was contended in *The Ergo*³⁸ that whether or not the charterer has nominated a safe port must be considered against the state of knowledge which the charterers had or ought to have had at the time of nominating the port. The obligation of the charterers to nominate a safe port will not be broken by a state of unsafety prevailing at the time of the order that will have been cured before the ship's arrival. Nor will this obligation be broken if the port is prospectively safe at the time of the order, but a state of unsafety subsequently arises from some unexpected and abnormal event occurring after the order has been given; in this sense the obligation is not a continuing obligation.³⁹

Secondly, the charterers have no right to nominate a port, which, apart from questions of unsafety, is an "impossible port." An impossible port is one in which there

³⁵ *Ogden v Graham* 121 E.R. 901, 778.

³⁶ In rare circumstances the court will extend the warranty to areas far beyond approaches to the port. See *Nobel's Explosives Co v Jenkins & Co* [1896] 2 Q.B. 326

³⁷ Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 11-10 (4th ed.), WL ADMMARL § 11-10, at 3.

³⁸ *Revising the Safe Port*, David Chong Gek Sian, 1992 *Sing. J. Legal Stud.* 79 at 3.

³⁹ Michael Wilford, *Time Charterers*, Lloyds Of London Press Limited (1982), at 203.

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is a certainty of conditions which will, in all probability, defeat the object of adventure.⁴⁰ Sellers L.J. in *Reardon Smith Line Ltd v. Ministry of Agriculture, Fisheries and Food* provides an example of a port that was destroyed by earthquake or a nuclear explosion. He further held that:

*In these circumstances, assuming in favour of the shipowners that the charterers were under an implied obligation not to nominate an impossible port, I am of the opinion that a port only becomes an impossible port for this purpose when loading [or discharge] there at will subject the ship to such delay as will frustrate the commercial object of the adventure, so that the voyage when performed will be something different from that contracted for.*⁴¹

In determining whether a hazard is temporary the court will look to whether the conditions at the time of nomination created a continuing risk of danger to all vessels calling the port. Only when the conditions cannot be overcome within a reasonable time, for example, with the next tide, will the port be considered unsafe.

Nomination of an unsafe port by a charterer under a charterparty containing a safe port clause constitutes a breach of contract for which the owner is entitled to recover damages for breach of contract in respect of any resulting loss, whether through delay⁴² or damage to the vessel⁴³ or through taking avoidance measures,⁴⁴ subject to ordinary principles of causation. The owner can also require the charterer to nominate another port, or accept the nomination.⁴⁵ If the nomination is accepted, the charterer is liable for damages resulting from compliance with the bad nomination, subject, of course, to the normal rules of *novus actus interveniens* and mitigation.⁴⁶ The right to damages will not be deemed to be waived merely by acceptance of the nomination. There must be something amounting to abandonment by the shipowner of their right to damages, and

⁴⁰ J. Schoenbaum, Admiralty & Mar. Law § 11-10 (4th ed.), WL ADMMARL § 11-10, at 3.

⁴¹ *Reardon Smith Line Ltd v. Ministry of Agriculture, Fisheries and Food* [1961] 1 Lloyd's Rep. 385, 421.

⁴² *Olgen v Graham* [1861] 1B&S 773.

⁴³ *Reardon Smith Line Ltd v. Australian Wheat Board* [1956] AC 266.d

⁴⁴ *Evans v Bullock* [1877] 38 LT34.

⁴⁵ Thomas J. Schoenbaum, Admiralty & Mar. Law § 11-10 (4th ed.), WL ADMMARL § 11-10, 4.

⁴⁶ *Reardon Smith Line Ltd. v. Australian Wheat Board* [1956] A.C. 266, 269.

this could only be shown by either an agreement, or an estoppel operating to that effect.⁴⁷

When a charterer orders a ship to a particular port, it gives orders under the charterparty. If the port is, or proves to be, unsafe, the charterer is in breach of charterparty, and for that breach, the shipowner is entitled to claim damages.⁴⁸

Can charterer's warranty to nominate a safe berth be broken before the obligation to nominate arises? In *The APJ Trity*,⁴⁹ a voyage-chartered vessel was struck by a missile while at sea and was towed to a port where she was discharged. The owners claimed a breach of warranty in that the port nominated was an unsafe port. The arbitrators held that the charterers gave, *inter alia*, no warranty of the safety of the approach voyage, but of the berth. The court ruled that the warranty to nominate a safe port cannot be broken before the obligation to nominate arises; in any event it only covers movement within the port, not the approach journey.

2.4.1.1. Valid renomination under voyage charterparties

The nomination of an unsafe port does not create as many complications when the vessel is not employed to trade cargo. Interests of cargo owners or receivers dictate both owners and charterers whether to call a nominated load or discharge port. The reason is obvious: the charterer has a cargo to load or discharge at the nominated port and presumably doesn't want to go to any alternative place. In addition, there are interests of shippers and consignees involved that require definite nomination. Charterparties very often facilitate contracts for the sale of goods and the delivery of the cargo from or to a certain place is a condition of those contracts. Under the voyage charterparty, which has only one load/discharge port the approach taken by the tribunals is rather strict. It is sometimes described as an election rather than a selection.⁵⁰ This is done to protect cargo interests and bring certainty in international trade.

Nomination of the port under the election approach is considered as irrevocable. It seems unlikely that a voyage charterer may renominate after supervening unsafety. First of all, a voyage charterer, unlike a time charterer, is not in control of a vessel in

⁴⁷ See e.g. *Anglo-Danubian Transport Company Ltd. v. Ministry of Food*, supra, note 7, 139-140; *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391.

⁴⁸ *GW Grace & Co Ltd v. General Steam Navigation Co Ltd*, [1950] 2 K. B. 383, 389.

⁴⁹ *Atkins International HA of Vaduz v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep. 37.

⁵⁰ See J. Cooke, *Voyage Charterers*, Third Addition (2007), at 110.

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terms of her employment. His main duty is to provide the cargo for the vessel to load and to nominate a port that is not impossible. The fulfillment of the duty of naming a port of loading is inseparably connected with the fulfillment of the duty of providing the cargo.⁵¹ Unless delay of the vessel in order to reach the load port is so significant that it will frustrate the charterparty, the only remedy the shipowner can have against nomination of an unsafe load port is detention of the vessel and expenses to reach the port. Some voyage charterparties contain a liberty provision that the vessel must proceed to the place “or as near thereto as she may safely get.” In *Dahl v. Nelson*,⁵² Lord Blackburn held that this term permits an alternative method of performance when attendance at the destination is prevented for an unreasonable time, assessed in terms of the “object of the contract.” The vessel should instead attend the nearest feasible port in the reasonable interests of both parties.⁵³

Another obstacle that a voyage charter can face, and it will be very true for the cases where charterer, shipper, and consignee are different parties, is a breach of terms of carriage under a bill of lading. Both owners and charterers can become responsible for any loss or misdelivery of the cargo caused by such deviation. The Hague-Visby Rules do not define deviation or outline the consequences; however, an unreasonable deviation is set out in article 4(4) as “any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”⁵⁴

Unfortunately, determining the reasonableness of a deviation is a very case specific endeavor and will involve the evaluation of the interests of all parties. Although the vessel can be the most valuable asset in the maritime adventure, interests of shipowners can sometimes be disregarded. Owners may be relieved of liability for cargo damage where they deviate because of restraint of princess, piracy, terrorism, and war.⁵⁵ Where the port is affected by strikes, deviation is considered reasonable,⁵⁶ however,

⁵¹ *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, 379.

⁵² *Dahl v. Nelson, Donkin* (1881) 6 App. Cas. 38, H.L.(E.).

⁵³ Chris Ward, *Unsafe berth and implied terms reborn*, [2010] L.M.C.L.Q. 489, 495, quoting *Renton (GH) & Co Ltd v. Palmyra Trading Corp of Panama (The Caspiana)* [1957] AC 149, 173–174.

⁵⁴ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules), effective 2 June 1931, available <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/portrait>

⁵⁵ William Tetley, *Marine Cargo Claims*, Fourth Edition (2008) at 1822.

⁵⁶ *G.H. Renton & Co. v. Palmyra Trading* [1957] A.C. 149.

where strike is only anticipated, deviation was considered to be for the sole benefit of the owner.⁵⁷

I agree with the conclusions of Robert Gay that a continuous obligation of safety, which is adamant to time charterparties, cannot be transferred to voyage charterparties. In *The Evia*, the House of Lords said that if a time charterer nominates a port that is prospectively safe, but which becomes unsafe before the vessel gets there, the charterer has an obligation to make an alternative nomination. In the voyage charterparties where a single port of loading or discharge is agreed by the parties or when bills of lading are issued charterers completed their primary obligation to nominate a port. Charterers can be under no obligation to cancel an order and send a vessel to a different port – where there is no right, there can be no obligation.⁵⁸ Hence, charterers exhausted their right and thus there can be no secondary obligation to renominate a port.

The House of Lords in *The Kanchenjunga*⁵⁹ reviewed a similar situation, but did not need to make a final decision whether voyage charterers preserved an obligation to renominate prospectively unsafe port. In *The Kachenjunga* the owners let the vessel to the charterers under a consecutive voyage charterparty on the Exxonvoy form concluded before the outbreak of the Gulf War (on 22 September 1980), specifying the loading port range as “1/2 safe ports Arabian Gulf excluding Fao and Abadan.”⁶⁰ The charterers ordered the vessel to load at Kharg Island, which the arbitrators held was unsafe at all material times. The owners telexed to the charterers the confirmation of their instructions to the Master. The vessel proceeded and upon arriving at anchorage off Kharg Island gave notice of readiness. A berth became available only a week after arrival, but fog prevented berthing. The next day Kharg Island was bombed in an Iraqi air raid and the Master sailed away. The owners sought nomination of another port, which the charterers declined, insisting that the vessel load at Kharg Island, where the Master refused to return. Both sides accused the other of repudiation and the dispute was arbitrated. After a lengthy arbitration and several appeals, it was held by Lloyd L.J. that the mere nomination of an unsafe port would not, of itself, amount to a repudiation of the charterparty. Once owner had elected not to reject charterer’s nomination, and so they had waived their right to do so or to call for another nomination. The Master’s later

⁵⁷ William Tetley, *Marine Cargo Claims*, Fourth Edition (2008) at 1822.

⁵⁸ Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, 2009 at 10.

⁵⁹ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391.

⁶⁰ *Id.*

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refusal to endanger his ship and crew did not excuse owner from their breach of contract not to call nominated port.⁶¹

However, where the charterparty is for one port to load and one to discharge and there is no express warranty of safety in the charter party, the owners will be liable to proceed to that port. In *The Houston City* it was established:

*Where 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 desires it delivered, the ship owner 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 the ship there is definite.*⁶²

In the circumstances where there are no special provisions in a charterparty, the effect of the nomination of loading or discharge port by the charterer is that the charterparty must thereafter be treated as if the nominated port had originally been written into the charterparty without any right to change it.⁶³ The next question that stems from this proposition is who will be responsible for the damage to the vessel if the Master, notwithstanding his objection to nomination, nevertheless proceeds to the nominated port? It seems that the right answer is that the charterer is responsible. The safe port warranty remains in place, but the risk of prospective unsafety of the port should be reviewed under *The Houston City*⁶⁴ standard of whether the Master acted reasonably in proceeding to the port.

In the charterparties stating several ports, or a range, charterers are under a secondary obligation to nominate a safe port. This will be subject to condition that the bills of lading contain provisions entitling the vessel to deviate if the circumstances have changed.

2.4.1.2. Valid renomination under time charterparties

Time charterparties take a different approach to the renomination of an unsafe port. Owners can enjoy more flexibility from charterers, as charterers trade the vessel on

⁶¹ Id. at 391.

⁶² *The Houston City* [1954] 2 Lloyd's Rep. 148.

⁶³ *Bulk Shipping v. Ipco Trading (The Jasmine B)* [1992] Lloyd's Rep 39, 42.

⁶⁴ *The Houston City* [1954] 2 Lloyd's Rep. 148.

their own account and can adapt easily when a previously nominated port becomes unsafe. In judging safety of the port, a criterion of reasonable foreseeability of changes in conditions is the criterion to determine the prospective safety of the nominated port.⁶⁵ In determining whether the port was safe, “the court would have to regard to facts, which are (or ought to be) known to a reasonably well-informed charterer.”⁶⁶ Whether or not the charterer has breached his promise to nominate a safe port would depend on whether the source of the delay, damage, or loss (i.e. unsafety) was a characteristic of the port at the date of the nomination. If the source of unsafety was a characteristic of the nominated port, then the charterer would have breached his promise to nominate a safe port.⁶⁷ If after orders have been given under a time charter to sail to a prospectively safe port, that port subsequently becomes unsafe (as a result of abnormal occurrence) at a time when the ship can still avoid the danger by stopping short of or leaving the port, the charterers come under a new obligation to order her to do so.⁶⁸

It seems to me, that the position can become more complex when the owner considers in advance that the port nominated by the charterer is unsafe. Although it is clear, that the owner may reject the order to proceed there, although he, of course, takes the risk that his view of the port unsafety may ultimately be incorrect.⁶⁹

English courts took an uncompromising position that safe port nomination is a responsibility of the charterer that cannot be overwritten by acts of a shipowner at any stage of charterparty performance. Charterers would be responsible for their nomination of an unsafe port in any event because it is a continuing obligation to give a valid order. In a time charter, the safe port warranty should be absolute. Unlike voyage charterparties, charterers are in control of the vessel in terms of her employment.

Is nomination of a safe port primarily the responsibility of the charterer? I suggest that it is not. Although nomination of a safe port is a duty of the charterer, he is free to elect when to exercise this duty. The trade of the vessel is not contingent on delivery of the cargo, by payment of the charter hire. Charterer can always give fresh orders if the previously nominated port turns out to be unsafe.

⁶⁵ *Vardinoyannis v. Egyptian General Petroleum Corporation (The Evaggelos TH)* [1971] 2 Lloyd's Rep 200.

⁶⁶ *Revising the Safe Port*, David Chong Gek Sian, 1992 Sing. J. Legal Stud. 79 at 4

⁶⁷ *Id.* at 6.

⁶⁸ *In The Evia* (No. 2) [1982] 1 LI Rep 334 at par. 10.49.

⁶⁹ *Unsafe ports - The "Kanchenjunga"*, Clifford Chance Maritime Review (1998) available at <http://www.ukpandi.com/knowledge-developments/article/unsafe-ports-the-kanchenjunga-1746/>

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In *The Archimidis*⁷⁰ the court reviewed a situation where a time charterparty named a single load port and there was no provision for the charterers to nominate any other load port. The effect of such nomination is that charterer will come under *The Evia* “primary obligation,” which is not qualified in any way by the fact that the port is not named in the charterparty. In cases where the charterers retain a right to send the vessel elsewhere, then they will also come under the “secondary obligation.”

Certain time charterparties can include a port of loading or discharge written into a charterparty without any alternative. In such circumstances, nomination of the port is made upon conclusion of the charterparty. Often the charterers do not retain any right to send the vessel elsewhere. As such, the rights of time charterer become similar to the rights of voyage charterer: they can be under no obligation to cancel an order and send the vessel to a different port. The only difference is a remedy for the owners. Although owners will not have a right to demand that charterers renominate a prospectively unsafe port, they will be entitled to continuous hire for the vessel. Charterers will not be entitled to put the vessel off-hire because owners did not comply with their orders to sail to the nominated unsafe port. In addition, if the Master accepts to proceed to the port, owners will be entitled to indemnification of their expenses, such as additional tugs, lightering of the vessel, etc.

2.4.1.3. Nomination of an impossible port in voyage charterparties

What happens if the nominated port was safe at the time of nomination, but was affected by an event, which requires significant time to disappear? In the situations where a shipowner cannot rely on valid safe port nomination, he still can resort to charterer’s implied obligation not to nominate an utterly impossible port. In *Tillmans v. Knutsford* an impossible port was defined as one where

*impossibility of access in respect of the duration of time which is so far lasting as to make the delay to the ship until the obstacle shall have ceased to exist a delay which would practically and in mercantile sense frustrate the adventure.*⁷¹

An impossible port should not be nominated by the charterers and its nomination is breach, which requires immediate cure, which means that the charterers are obliged to make a valid nomination. In *The Houston City* Willmer L.J. said:

⁷⁰ AIC Ltd v Marine Pilot Ltd (*The Archimidis*) [2008] 1 C.L.C. 366.

⁷¹ *Tillmans v. Knutsford* [1908] 1 K.B. 18

At the time it seems to me that some limitations on the charterers' freedom of choice must be implied, even in cases where the ports from which the choice can be made are specifically named in the charterparty. It was indeed conceded by counsel for the charterers, both before the judge and this court, that an impossible port must not be nominated.⁷²

However, impossibility will not be implied when other terms of the charterparty show an express desire of the parties to call any port within a specified range. In *The Epaphus*⁷³ there was a sale contract for rice, to be shipped at Kandla for “one main Italian port to be declared on vessel passing through Suez ... per vessel Epaphus”. The buyers nominated Ravenna, but the vessel Epaphus could not enter that port because she had excessive draft. That meant she had to discharge some cargo at Ancona before returning to Ravenna. The sellers claimed against the buyers for the additional demurrage that they had to pay to the shipowners, saying that the buyers should not have nominated Ravenna because it was impossible for Epaphus and her cargo to get there. The buyers riposted that Ravenna was a “main Italian port” so that their nomination was good; therefore, they were not liable to pay the extra demurrage. The Court of Appeal accepted the buyers’ argument. The Court held that the parties had expressly agreed that the buyers could nominate any “main Italian port”, and Ravenna was within that description. Therefore, an implied term to the effect that the buyers must only nominate a port where the named vessel could get into the port to discharge was contrary to the express terms of the contract. Stephen Brown LJ put it:

In the light of the express limitation to a main Italian port, it was not possible to imply any further requirement that the nominated port should be one that the vessel could enter. It was not the buyers' duty to ensure that the vessel could enter the nominated port

In the circumstances when the port becomes impossible while the vessel is on a way to it, obligations of the charterers will depend on whether the port is a load or discharge port. Considering the fact that in regards to voyage charterparties obligation of charterers are not continuing, there is no implied obligation to renominate a port. According to Cooke for Voyage Charters, the charterparty will be frustrated in the

⁷² Reardon Smith Line v. Ministry of Agriculture, Fisheries and Food [1962] 1 Q.B. 42 at 110-112.

⁷³ Eurico SpA v Philipp Bros (The Epaphus) [1987] 2 Lloyd's Rep. 215.

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absence of a “so near as she may safely get” provision.⁷⁴ In the circumstances when a discharge port becomes impossible such renomination seems to be appropriate within “so near thereto as she may safely get” even in the absence of agreement of the parties.

In *The Anna CH*,⁷⁵ the tribunal found for the owners when charterers rejected to nominate the nearest port after a discharge port became impossible. During a period when hostilities between Iran and Iraq had ceased, owners let their vessel to charterers for a voyage from West Germany to Bandar Khomeini. The charter provided that if it appeared after departure from the loading port that the vessel would be subject to war risks, then the cargo would be discharged at a safe port in the vicinity of the port of discharge. The vessel arrived at Bandar Abbar, at which time hostilities had recommenced. She waited there a month and then charterers ordered her to join a convoy to Bandar Khomeini. The majority of the crew refused, and eventually discharge was ordered at Bandar Abbar. Owners claimed demurrage for the whole of that period. Arbitrators found that the refusal to proceed was legitimate and charterers were obliged to order the vessel to discharge at Bandar Abbas. They had wrongfully delayed in so doing.

If the bill of lading incorporates Hague, Hague-Visby rules deviation of the vessel from the nominated port will be considered as unreasonable and the owner will be responsible for the breach. This can be avoided by incorporation of special clauses in the charterparty or bill of lading, such as war risk, piracy clause, which brings charterers within an obligation to renominate impossible discharge port.

What remedies do owners have in the circumstances when the port becomes unsafe upon the vessel’s arrival? In the instance when the order to call the port is patently bad, that it would be manifestly unreasonable to comply with, the Master is allowed to reject the order. Assessment of danger will lie on the Master. Even if the vessel is an arrived vessel (notice of readiness was tendered and free pratique was granted by local authorities), owners can withdraw notice of readiness. To a great extent owners have no reasons to know of the unsafety until the ship arrives.⁷⁶ Compliance with such an order by the owners can amount to a failure to mitigate damages.⁷⁷ Although charterers do not have an obligation to renominate a port, compliance with an

⁷⁴ See J. Cooke, *Voyage Charterers*, Third Addition (2007), at 111.

⁷⁵ *Islamic Republic of Iran Shipping Lines v Royal Bank of Scotland Plc (The Anna Ch)* [1987] 1 Lloyd's Rep. 266.

⁷⁶ See *Voyage Charters*, Third edition, London (2007) at 134.

⁷⁷ See *Compania Naviera Maropan v Bowaters (The “Stork”)* [1955] 2 QB 77 at 104.

order to enter an unsafe port will usually break the chain of causation between the breach and the damage will frequently be an essential link in the claim. Thus, in *The Stork*,⁷⁸ Devlin J. said:

A Master who entered a berth which he knew to be unsafe (and which perhaps charterer had nominated in ignorance of its condition), rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble.

Unfortunately, there can be confrontation between owners and charterers whether to call immediately unsafe port. There is no definite answer under current case law, whether owners or charterers are obliged to renominate the port. The only solution to it is to seek mutual agreement of the parties as soon as it is inevitable that the port is unsafe.

2.4.2. Abnormal activity or events in the port

Largely, the decision of whether a port or berth is safe is a question of fact; however, the criteria in deciding what amounts to unsafety are matters of law.⁷⁹ As judge Geoffrey Lane L.J. pointed in *The Hermine*:

The kinds of risk that may fall within the category include exceptional storms and seas, such as typhoons and tsunamis; earthquakes and other similar geological occurrences; political events, such as the outbreak of war, terrorism or civil commotions, tumults and risings. But what is abnormal should not always be equated with exceptional acts of God or man. In the present context abnormal would appear to be the antithesis of normal: If a risk is not a normal characteristic of a port then probably it is to be characterized as abnormal, irrespective of any further consideration of scale and impact. There is yet another dimension

⁷⁸ *Compania Naviera Maropan v Bowaters (The "Stork")* [1955] 2 QB 77.

⁷⁹ *Kristiansands Tankrederi A/S v. Standard Tankers (Bahamas) Ltd. (The Polyglory)* [1977] 2 Lloyd's Rep. 353 at 353.

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*to abnormality. Beyond the notion that a risk may be inherently abnormal, it is also possible for the manifestations or consequences of a characteristic risk to be abnormal.*⁸⁰

Applying key principles of abnormality to the actual conditions of the port we can come to certain conclusions. First, if the set-up of the port is good but, nevertheless, the vessel suffers damage owing to some isolated, abnormal, or extraneous occurrence unconnected with the set-up — then the charterer is not in breach of his warranty. Second, when a competent berthing Master makes for once a mistake, or when the vessel is run into by another vessel, or a fire spreads across to her, or when a hurricane strikes unawares - the charterer is not liable for damage so caused. Such causes of damage do not arise from the qualities and attributes of the port itself or from its “inherent unsafety.”⁸¹

In *The Mary Lou*, Mustill, J., pointed out that a particular cause of unsafety is not to be regarded as abnormal in this sense merely because it is out of ordinary when looked at over the whole history of the port. The question is how many occurrences or how long certain conditions should prevail in the port before it is considered unsafe? Unfortunately, there is no clear answer to this question. The court will review surrounding circumstances for each case individually. For example, in *The Houston City* the court assessed a delay that can render a charterparty impossible by four constant factors: the length of a normal voyage, the number of lay days allowed, the geography, and the type of cargo.⁸² Of course, “changed circumstances may make a port unsafe if the new circumstances can be regarded as an attribute of the port.”⁸³ Once the court sees that there is a trend in repetition of a certain event, it will be moved from abnormal to ordinary condition of the port.

To summarize, a port is generally not rendered unsafe only by abnormal occurrences or as they are also called, conditions of the port. They can be divided into several groups: physical conditions, administrative, political, and environmental. I will shortly discuss each of them below and will describe them in detail in the fourth chapter.

⁸⁰ *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd*, supra n 19; *Unitramp v Garnac Grain Co Inc. (The Hermine)* [1978] 2 Lloyd's Rep 37 at 219.

⁸¹ *The Evia*, [1982] 2 Lloyd's Rep. 307 (H.L.).

⁸² *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food (The Houston City)* [1962] 1 Q.B. 42, 59.

⁸³ *The Mary Lou* [1981] 2 Lloyds Rep. 272, 278.

2.4.2.1. Physical conditions

Weather usually has merely temporary effect and such conditions are certainly beyond the control of the charterer. It must be accepted that any port may be made unsafe because of weather.⁸⁴ The most common dangers created by weather are those of winds,⁸⁵ swell,⁸⁶ tide,⁸⁷ unpredictable gales,⁸⁸ and ice.⁸⁹

Other physical conditions can be attributed to topography of a port or roads to it. There can be shallows, sandbanks,⁹⁰ vulnerability to silting,⁹¹ an exposed or rocky seabed,⁹² absence of shelter,⁹³ or insufficient room to maneuver within a port in face of dangerous conditions.⁹⁴

2.4.2.2. Political conditions

A condition of political safety of the port was introduced only in the middle of the nineteenth century. In *Ogden v Graham*,⁹⁵ a port had been closed by the order of the Chilean Government and a ship could not proceed to it without being confiscated. Charterers started a dispute over detention for the time lost. The court ruled against the charterers. It admitted that charterers completed their obligation by nominating a port to which it was physically possible for the vessel to enter. However, the risk for the vessel to be confiscated did not imply to safety of the port, which charterers guaranteed. The decision opened a door for the courts to render the port unsafe when there was a risk of confiscation,⁹⁶ hostilities of war,⁹⁷ terrorism, civil commotions⁹⁸ and strike.⁹⁹ The key principle formulated by Justice Blackburn J. read:

⁸⁴ J Bond Smith Jr., Time and voyage charters: safe port/safe berth, 49 Tul. L. Rev 860, 871 (1974-1975).

⁸⁵ Johnston Bros v Saxon Queen SS Co (1913) 108 LT 564.

⁸⁶ Aktieselskabet Ericksen v. Foy, Morgan & Co., [1926] 25 Lloyd's List L.R. 442 (K.B.).

⁸⁷ Carlton S.S. Co. v. Castle Mail Packets Co., [1898] A.C. 486 (H.L.), Pentonville Shipping Ltd v Transfield Shipping Inc (The Jonny K) 2006 WL 584599.

⁸⁸ The Eastern City [1958] 2 Lloyd's Rep. 127.

⁸⁹ Knutsford (SS) Ltd v Tillmanns & Co (The Sussex Oak) [1908] AC 406.

⁹⁰ Shield v. Wilkins, 155 Eng. Rep. 130 (Ex, 1850).

⁹¹ Unitramp v Garnac Grain Co Inc (The Hermine) [1978] 2 Lloyd's Rep 37

⁹² Mediolanum Shipping Co. v. Japan Lines Ltd "The Mediolanum" [1984] 1 Lloyd's Rep.136 (C.A.), Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn) [2009] 1 C.L.C. 909.

⁹³ The Houston City [1954] 2 Lloyd's Rep. 148.

⁹⁴ Compania Naviera Maropan v Bowaters (The "Stork") [1955] 2 QB 68.

⁹⁵ Ogden v Graham (1861) 1 B&S 773.

⁹⁶ Id.

“on the construction of this charterparty, the charterers are bound to name a port which, at the time they name it, is in such a condition that the Master can safely take his ship into it: but, if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty.”¹⁰⁰

2.4.2.3. Administrative conditions

Administrative conditions refer to conditions that are not covered by political conditions. They establish procedures for the safety of port facilities,¹⁰¹ defective nature of navigational aids and safety equipment,¹⁰² handling dangerous goods, managing a system that can quickly respond to the dangers of navigation,¹⁰³ adequate availability of pilots,¹⁰⁴ appropriate weather reports or warnings of approaching bad weather,¹⁰⁵ public safety of the crew and public health of the port (quarantine).¹⁰⁶

⁹⁷ The Evia, [1982] 2 Lloyd's Rep. 307 (H.L.).

⁹⁸ K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob) [1992] 2 Lloyd's Rep 545.

⁹⁹ Tharsis Sulphur and Copper Co. v. Morel Bros. & Co. [1891] 2 Q.B. 647, C.A.

¹⁰⁰ Ogden v Graham (1861) 1 B&S 773, 781.

¹⁰¹ Emeraldian Ltd Partnership v Wellmix Shipping Ltd, 2010 WL 2397675.

¹⁰² Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou) [1981] 2 Lloyds Rep 272.

¹⁰³ The Marinicki QBD 29 July [2003] 2 Lloyd's Rep 655.

¹⁰⁴ The Khian Sea [1979] 1 Lloyd's Rep 545 (CA).

¹⁰⁵ The Eastern City [1958] 2 Lloyd's Rep. 127.

¹⁰⁶ Although there is no case law on this point, recent incident involving the Dawn Princess in Sydney Harbor suggests that a cruise ship can be quarantined after cases of “swine flu” had been discovered on board.

These conditions often involve distinctions between normal and abnormal risks and may on occasion, involve difficult questions of fact and degree. It is also necessary to appreciate what initially may have been a wholly unprecedented and unexpected occurrence, but which may subsequently recur in circumstances such that the abnormal is transmogrified to the normal, and the risk becomes a characteristic of the port.¹⁰⁷

2.4.2.4. Commercial sense

In considering whether a port is safe, one must consider not only the physical, political and administrative impediments that exist at the time of nomination, but also the duration. To some extent, the commercial sense of the maritime enterprise is interconnected with good navigation and seamanship. When the last pertains mostly to the actions of the Master in operating the vessel, commercial sense will refer both to his and the owners rationale in making a decision for calling a nominated port when a risk of delay exists. Mostly, it is charterers' decision to proceed to a port that is temporary obstructed¹⁰⁸ or congested.¹⁰⁹ Of course, charterers are the ones who will be paying detention for delay of the vessel, if it turns out that the port was not safe. However, very often for commercial reasons, such as fluctuation of prices for some commodities, charterers can still win by delaying berthing of the vessel.

*Lewis v. Louis Dreyfus & Co.*¹¹⁰ stresses the importance of the difference between temporary and permanent delay and suggests that, if the place of loading is more than temporarily obstructed, one may have to load somewhere else within a reasonable time. It is accepted that charterers are not bound to consider the owners' convenience.¹¹¹

2.4.3. Good navigation and seamanship

A port is safe if a vessel could only come to harm through negligence of the Master. The proposition is that the port must be safe if a vessel will only be exposed to danger through negligence. If there is a dangerous obstruction in the port, but with

¹⁰⁷ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 617 (2006).

¹⁰⁸ *Knutsford (SS) Ltd v Tillmanns & Co (The Sussex Oak)* [1908] AC 406

¹⁰⁹ *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)* 2006 WL 3835262.

¹¹⁰ *Lewis v. Louis Dreyfus & Co.* (1926) 31 Com.Cas. 239, C.A.

¹¹¹ *Tharsis Sulphur and Copper Co. v. Morel Bros. & Co.* [1891] 2 Q.B. 647, C.A.

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ordinary care and skill, the vessel will never be at risk of collision with it, the port is safe. Only where, even with ordinary care and skill, the vessel would still be damaged, can we say that the port is unsafe.

To elaborate a little, every port in its natural state has hazards for the ships going there. It may be shallows, shoals, mud banks, or rocks. It may be storms, or ice, or appalling weather. In order to be a safe port, there must be reasonable precautions taken to overcome these hazards, or to give sufficient warning of them to enable them to be avoided.¹¹²

Weather conditions, for example, are often a source of damage to the vessel at the berth. Although in unusual instances weather conditions may render a safe berth unsafe as a matter of law, this is not a general rule.¹¹³ Courts and arbitrators ordinary will not find a breach of the safe berth warranty when a storm damages a vessel at berth, because a storm is simply “one of the perils of the sea” for which a charterer cannot be held responsible.¹¹⁴

If a Master or shipowner unconditionally accepts the nomination of a port with full knowledge of local conditions, the charterer is not liable for the damage incurred. Similarly, where the Master negligently enters an unsafe port, the charterer may not be liable. In the last analysis, it is the responsibility of the Master to make the decision whether to enter a port. If the fault is shared between the charterer and the Master, damages may be divided proportionately.¹¹⁵

A good example of balancing interests of the charterers and ensuring the safety of the vessel by the Master can be seen through comparing two cases with identical circumstances. Both concern an ice bound port and the Master’s evaluation of its safety. In *Limerick S.S. Co. v. Stott*¹¹⁶ the Master directed the vessel to the port of Abo. He endeavored to force his way through the ice in order to gain access to the port, although the charterparty did not require him to do so and there were ice-breakers available at the port. The vessel was strained in the ice and had to wait until an icebreaker came to his assistance. The court held that the ice damage suffered by the vessel was proximately

¹¹² In *The Evia* (No. 2) [1982] 1 LI Rep 334 at p. 338,

¹¹³ Steven M. Rubin, *Safe port and berth provisions in time charter agreements: apportioning liability to deter accidents and minimize costs*, 36 U. Miami L. Rev. 465, 471-472.

¹¹⁴ *Esso Standard Oil, S.A. v. The S.S. Sabrina*, 154 F. Supp 720, 724.

¹¹⁵ Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 11-10 (4th ed.), WL ADMMARL § 11-10.

¹¹⁶ *Limerick SS Co. v. Stott (W.H.) & Co.* [1921], 2 K.B. 613.

caused by the act of the Master and not through the orders of charterers to proceed to the discharge port. Moreover, the surrounding circumstances clearly showed that Abo at all times was a safe port, although its approaches were covered with ice. In the second case, *The Sussex Oak*,¹¹⁷ the Master found at the time he reached the mouth of the River Elbe that there were significant quantities of ice. He assessed the possible delay in waiting for ice clearance, the degree of danger, and the likelihood of harm and decided to enter the river and proceed to Hamburg. The vessel suffered damage. The court found that the Master was acting prudently in assessing the delay in view of the nature and degree of danger. Hamburg was an unsafe port, but the Master did not have an intervening negligence.

The authorities make it clear that if the Master acts reasonably, even though mistakenly, in the situations confronting him, it is unlikely that his actions will be held to have been the effective cause of damage.¹¹⁸ In analyzing under a good seamanship standard, a court will look at all of the circumstances that preceded proceeding to the berth. If the court finds that the manner to enter the berth will require additional skills, “very careful control of the vessel,” and “tools” or if maneuvering will still result in collision or damage to the vessel, the berth will not be safe.¹¹⁹ In other words, the master has to act as a reasonable man, having adequate maritime experience in order to preserve the owners’ rights to claim a safe port warranty. This was recognized in *The Polyglory*¹²⁰ by Parker J:

If there is a dangerous obstruction in the port but with ordinary care and skill the vessel will never be at risk of collision with it, the port is in ordinary parlance safe. On the other hand if the situation in the port is such that even with ordinary care and skill there will still be a risk of collision, the matter is quite different. The vessel will then be exposed to danger despite the use of care and skill. It may not in fact come to harm and if it does it may be because some negligence has occurred but again in

¹¹⁷ *Grace (G.V.) & Co., Ltd. v. General Steam Navigation Co.* [1950]. 2 KB 383.

¹¹⁸ *Compania Naviera Maropan v Bowaters (The Stork)* [1955] 1 Lloyd’s Rep. 349 at 363.

¹¹⁹ *Emeraldian Limited Partnership v. Wellmix Shipping Limited, Guangzhou Iron & Steel Corporation Limited* [2010] EWHC 1411, at 1415.

¹²⁰ *Kristiansands Tankrederi A/S v. Standard Tankers (Bahamas) Ltd. (The Polyglory)* [1977] 2 Lloyd’s Rep. 353 at 365.

ordinary parlance it appears to me that a port is not safe if it is, despite ordinary prudent and skillful navigation and handling, such that a vessel will be at risk.

The Master is only required to exercise ordinary care, skill, and seamanship. If the danger could be avoided only by the exercise of a very high standard of care, skill, and seamanship in the navigation of the ship, the danger may render the port unsafe, provided it otherwise cannot be characterized as an abnormality.¹²¹

2.4.4. Intervening negligence of third parties

In the circumstances when damage to the vessel occurs as a direct result of nomination of an unsafe port, there can be little doubt as to the responsibility of the charterer. However, very often a chain of causation can be interrupted by acts of third parties, known as, *novus actus interveniens*,¹²² which break the chain of probable cause and intervene in the natural chain of events. These parties, although part of the maritime adventure, are not a party of the charterparty between owners and charterers. Nevertheless, they can be responsible for their negligence to either owners or charterers.

In *Corr v IBC Vehicles Ltd.*¹²³, Lord Bingham identified the underlying principle in the following terms:

“The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor’s breach of duty by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible.”

A basic principle of English law is that in every claim in contract or tort the claimant must show that the loss he has suffered is within the scope of the duty he asserts. Put generally, if the particular misfortune that the claimant has suffered is “the

¹²¹ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 618 (2006).

¹²² Latin for “new act intervening,” the courts interpret this to mean that the accused’s conduct was not the cause of the harm or injury.

¹²³ *Corr v IBC Vehicles Ltd.*, [2008] UKHL 13.

very thing” that the defendant had a duty to prevent, it will not be open to the defendant to say that the occurrence of the misfortune broke the chain of causation.¹²⁴ As such, when we look at the supervening negligence of third parties we first have to decide whether owners or charterers are responsible for their actions under the charterparty. Secondly, we will be looking at the general principles of law, in order to determine whether third parties action or omissions can be attributed to either the owners or charterers. Below I will review the various occasions when owners or charterers can be held responsible for acts that they did not commit themselves.

2.4.4.1. Pilot

The safety of the port will depend on the pilot as he is a servant of the owners and negligence on the part of the pilot can constitute a break in the chain of causation between the charterers’ order to proceed to the port and the damage suffered.

If the pilot was incompetent because there were endemic problems with the quality of pilots at the port, then there is an argument that the charterers have breached their obligation to pay for competent pilotage. Assuming, however, that the pilots were in general competent, but this pilot was negligent, then the charterers have satisfied their contractual duty to provide a competent pilot. Support for the proposition that, although paid for by the charterers, a pilot is a servant of the owner and therefore the owner is responsible for his negligence, is to be found in lines 170-171 of the NYPE, which provides: “the owners to remain responsible for the navigation of the vessel, acts of pilots ... same as when trading for their own account.”

This proposition found its support in *The Vine*,¹²⁵ where the court noted that the fact that the pilot may have knowledge that a berth lacks fenders and there is special mooring plan in place does not detract from the importance of the Master having such knowledge. For the Master is responsible for the safe berthing of his vessel even though he may be advised by the pilot.¹²⁶

2.4.4.2. Consignee

Very often, the charterers are not the same party as the shippers and receivers of the cargo. The vessel can be chartered for the benefit of third parties. Although a safe port warranty is a non-delegable duty, the charterers very often try to insert

¹²⁴ See *Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] 1 A.C. 1391.

¹²⁵ *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 (Comm).

¹²⁶ *Id.*

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indemnification provisions in the underlying contract with cargo owners in order to escape from liability in the event of vessel damage. This can happen in situations when charterers, shippers, and consignees are three different parties.

Very often, the shippers and consignees of the cargo know more about nominated ports and it is reasonable to expect that they should be responsible for consequences of their nomination. Their manufacturing facilities, for example, can be located close to the port of loading or discharge or they can be actual owners of the berth. In *Paragon Oil Co. v. Republic Tankers, S. A.*,¹²⁷ the charterer had warranted safe berth in a contract with the vessel's owner, and the purchaser of the cargo had made a substantially identical warranty in contract with the charterer, and the ship came aground and was damaged when the promised berth was not clear on the vessel's arrival.

The Court of Appeals, Friendly, Circuit Judge, held that

*under circumstances, purchaser, who had contracted with charterer to provide safe berth for vessel, was liable for damage vessel sustained when grounded after it found berth was occupied, although vessel's agent and captain had known berth was occupied and proceeded toward it nevertheless, where they had been assured that berth was expected to be available when vessel arrived.*¹²⁸

The court determined liability along the contractual chain. First, the charterers were held responsible to the owners because they breached the safe port warranty. Second, the consignees (buyers) were held responsible to the charterers as they breached a contract of affreightment, which incorporated the identical safe berth clauses as the charterparty.

The same principal will apply also to a wharfinger when, absent an express contract creating a higher standard, does not guarantee the safety of vessels coming to his wharves. Although, the wharfinger is bound to exercise reasonable diligence in ascertaining the condition of the berths and to remove any dangerous obstruction or to give due notice of its existence to vessels about to use berths.

¹²⁷ *Paragon Oil Co. v. Republic Tankers, S. A.*, 310 F.2d 169 (1962).

¹²⁸ *Id.*

Regardless of what the charterparty says in regards to the third party who is responsible to nomination of the berth, the charterers safe port/berth obligation is a non-delegable duty. A cesser clause¹²⁹ in the charterparty will not relieve the charterers of liability for nominating an unsafe discharge berth. They can only seek indemnification of their liability from the cargo interests.

In *The Federal Calumet*,¹³⁰ the charterparty provided that “all liability of charterers shall cease on completion of loading except charterers to remain responsible for payment of freight, deadfreight and demurrage if any.” The panel found nothing in the cesser clause relieving the charterer from the consequences of its failure to make certain that the vessel was directed to a berth with safe access. Although the charterparty provided for the berths to be nominated by the consignee, the fact is that, when it did so, the consignee was merely acting as an agent for charterer. The basic responsibility remains with charterer and cesser clause did nothing to alter that responsibility.¹³¹

The decision should be distinguished from *Samuel West Ltd. v Wrights (Colchester) Ltd.*¹³² where the shipowner sought to recover damages for actual physical injury to the ship. The charter was of a motor barge to take a cargo of coal “to Colchester as ordered or as near thereto as she could safely get and there deliver the cargo alongside any wharf vessel or craft as ordered where she could safely deliver.” The berth to which she was sent was one where she took the ground but it proved a foul berth and she was damaged. The shipowners claimed against the consignees under a bill of lading incorporating the charterparty. Branson J. decided against the shipowners on the grounds that they had failed to prove that an order to go to that berth came from the consignees; that by the word “safely” in the provision quoted the ship was simply excused from obeying an order of the consignee if the wharf was not one where she could safely deliver. His Lordship said: “The attempt to put as a matter of contract the safety of a berth upon the consignee as distinguished from the ship is an attempt which has not succeeded yet in any reported case.”

2.4.4.3. Voyage charterer as an Indemnitor

¹²⁹ Cesser clause is a clause that reliefs charterers from liability upon shipment of the cargo. Typically it will read: “Charterers liability shall cease, as soon as cargo is shipped and the freight, deadfreight and demurrage at loading, if any, are paid, the owner having a lien on the cargo for freight, demurrage and average.” See more on Cesser clauses Machale A. Miller, Cesser Clauses, Charter Party Symposium - Part II, 26 TLNMLJ 71 (2001).

¹³⁰ *MV Federal Calumet*, 1982 WL 9172221, SMA No. 1667.

¹³¹ *Id.*

¹³² *Samuel West Ltd. v Wrights (Colchester) Ltd.* (1935) 40 Com. Cas. 186.

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There can be several parties involved in chartering the vessel and her subsequent operation. Very often, the vessel can be sub-chartered several times and there can be multiple intermediaries between a party responsible for nominating an unsafe port and the vessel owners. Ultimately, time charterers of the vessel will be responsible for the decision the voyage charterers make in nominating an unsafe port and will always seek indemnification.

In *Venore Transportation Co. v. Osvego Shipping Corp.*,¹³³ a vessel under a time charter was sub-chartered to carry grain to Brazil. The standard NYPE charterparty form was used, which provided: “the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that charterers or their agents may direct, provided that the vessel can safely lie always afloat at any time of tide, except at such a place where it is customary for similar size vessels to safely lie aground.”¹³⁴ Upon arrival to the discharge port the Master was assured by the charterers’ agent that it was safe to dock the vessel despite the fact that one of the mooring pontoons was missing. It was only after the vessel docked and began discharge operations that anyone noticed damage to the vessel’s hull.

The court held the time charterer was liable to the owner for damage to the ship under its safe berth warranty, and the voyage charterer was required to indemnify the time charterer under its separate safe berth warranty.¹³⁵ The court further found that the voyage charterer had the non-delegable duty of supplying a safe berth. If the owner of the coal wharf was faultless and was able to collect from the vessel for his loss, the ultimate liability for wharf damage would also devolve on the voyage charterer.¹³⁶

I can admit that very often, the safe berth warranty will not be transferred from a time charterparty to a voyage charterparty. In the current market situation when there is high competition and freight rates are low merchants have a prevailing bargaining power. They force disponent owners to agree to their terms of voyage charterparty in order to secure cargo for the vessel. In the circumstances when the safe port warranty cannot pass through to the party actually responsible for nominating the port, it is important for time charterers to do their due diligence and check the actual conditions of the port before accepting such a nomination from voyage charterers (merchants).

¹³³ *Venore Transportation Co. v. Osvego Shipping Corp.*, 498 F.2d 469 (2nd Cir. 1974).

¹³⁴ *Id.*

¹³⁵ See also *Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] C.L.C. 734.

¹³⁶ J Bond Smith Jr., *Time and voyage charters: safe port/safe berth*, 49 *Tul. L. Rev* 860, 1017 (1974-1975).

2.4.4.4. Charterers' and Owners' agents

Under English law, an agent is a person that is authorized to act on behalf of another (“the principal”) to create a legal relationship with a third party.¹³⁷ Although it is the charterers' obligation to nominate a safe port, very often actual order to proceed to the port or the berth will come not from the charterers themselves, but from a third party, the charterers' agents in the load or discharge port. Throughout the duration of the charterparty, owners sometimes also appoint agents in the port to deal with crew changes, and the delivery of supplies and spare parts to the vessel. Often, the same agent can be appointed to represent the interests of both owners and charterers. Nevertheless, when the order to call a port comes from the agents, the court will look at the agency relationship between the parties and determine, whether an agent was acting on behalf of the owners or charterers. Once that is established, the court will hold the principal, whose agent who committed a breach responsible.

Generally, bunkering of time chartered vessel is a responsibility of the charterers.¹³⁸ There can be a fine line in defining whether the agent is one nominated by the charterers or the owners when the vessel is ordered to a bunkering port and there is a bunker supplier pilot on board.

The owners let their vessel, the *MV Mediolanum*, for a time charter under a NYPE form. The charter provided that the vessel was to trade in lawful trades between safe ports. The vessel loaded a cargo of petroleum coke at Los Angeles for carriage to Ghent via the Panama Canal. The charterers had arranged with the owners of a refinery in Las Minas in Panama to supply bunkers to the vessel. After the vessel passed through the canal, charterers' agents in Panama ordered the Master to proceed to the sea buoy off Las Minas for bunkering. A pilot, an employee of the refinery, came on board to assist the Master in the navigation of the vessel to the bunkering area. At that time, the bunkering berth was congested and the pilot was instructed by the refinery to bring the vessel to a different bunkering place. The vessel proceeded towards the new bunkering place, but unfortunately took ground on an unchartered coral bank and suffered damage. The owners claimed the costs of the repairs, hire for the loss of time when the vessel was aground, and subsequently, when she had to be repaired, and the costs of the bunkers.¹³⁹ On appeal by the charterers, the court held that bunkering agents were not charterers'

¹³⁷ Restatement of Agency (Second) § 1 (1958).

¹³⁸ Clause 2 of NYPE form provides: “That the Charterers shall provide and pay for all the MGO and fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions...”

¹³⁹ *Mediolanum Shipping Co. v. Japan Lines Ltd. (The Mediolanum)* [1984] 1 Lloyd's Rep.136 (C.A.).

agents in the true meaning of the word. Bunker agents' safe port obligation should be considered separately, as the refinery "might well be regarded as performing similar functions to those of a Harbor Master or port authority whose acts would not be treated as acts of the charterers."¹⁴⁰

2.4.4.5. Wharf owners

Historically safe port warranty given by charterers was connected to wharf owners' obligation to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay.¹⁴¹

The Charlotte C,¹⁴² serves as a reminder that it is not just the charterer who may face claims for damage to a vessel arising from an unsafe port. It serves as a rare example of how English tort law can sometimes allow direct recovery by the shipowner against the port owner/operator.

The vessel had called at Bird Port, Newport, to load a cargo of steel coils. Steel coils were commonly loaded and discharged at this port. She berthed in a NAABSA berth ("not always afloat but safely aground") where it was expected that vessels might take the ground at low water. The concrete bottom of the berth was usually covered with a layer of silt or mud that came in with the tide. This was dredged, but only when operational requirements permitted.

After leaving the port, the parties became aware that the vessel's bottom was damaged and it was adjudged that the cause was a stray steel coil on which she had rested on in the berth. The depth of mud and silt in the berth at the relevant time was between 1 and 1.5m. The Court found that this level was excessive and that the port system for dredging and inspection was inadequate. A proper system would have required daily inspection and regular dredging, which would have revealed the presence of the steel coil and would thus have prevented the accident. The port operator was therefore negligent through failing in its duty of care to ensure that those using the berth

¹⁴⁰ *Cosmar Compania Naviera S.A. v. Total Transport Corporation (The Isabelle)* [1982] 2 Lloyd's Rep. 81.

¹⁴¹ *The Calliope*, [1891] App. Cas. 11.

¹⁴² *Carisbrooke Shipping CV5 v. Bird Port Ltd (The Charlotte C)* [2005] EWHC 1974.

could do so without suffering damage. This negligence was causative of the ship owner's loss, and the port operator was therefore liable in damages.

It is worth recording that in this case there was no dispute between owners and charterers that the port operator did owe a duty of care to the owners of vessels using its berth. This reflects the English common law of negligence and the statutory duty of care which is imposed under the Occupiers' Liability Act 1957. However, as mentioned below, not all jurisdictions impose such a clear duty. The court did not find charterer responsible for damages. However, this type of uncharted obstruction on the bottom of a berth will therefore normally render berth unsafe and expose the charterer to a claim in damages.¹⁴³

Recently the Third District Court of the United States took a controversial decision in *The Athos I*.¹⁴⁴ Generally, the Corp. of Army Engineers was obligated to maintain a depth at a certain level and it may have been assumed as a duty through course of conduct,¹⁴⁵ as they were maintaining entrance to the port year after a year. A casualty was caused when a lost anchor protruded through a vessel's hull. It was later discovered that the anchor was sitting on the bottom of the navigable channel for a long time. The court declared that the government had no statutory or regulatory duty to scan the anchorage and approaches to the berth for hazards to navigation although they were doing it for years.

Although it is still true that wharf owners can enjoy a due diligence standard of care while maintaining their wharf safe, both under English and American law; however, under English law, the charterers are held to the highest degree of care and have to ensure that the nominated port is safe at any given time and approaches to the berth are free of any dangerous obstacles.

2.4.4.6. Authorities

Under certain circumstances, the sailing of the vessel can be restricted by government authorities, which can detain a vessel to enforce security measures or

¹⁴³ Robert Melvin , An Alternative Unsafe Port Claim, available at <http://www.simsl.com/Publications/Articles/Articles/CharlotteC1205.asp>

¹⁴⁴ In re Frescati Shipping Co Ltd, 2011 AMC 1090 (Ed. Pa, 2011).

¹⁴⁵ See Japan Line, Ltd. v. United States, 1976 AMC 355 (E.D. Pa. 1975), aff'd 1977 AMC 265 (3d Cir. 1976).

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regulate traffic of the vessel in territorial waters. This was the case in *The Doric Pride*.¹⁴⁶ The vessel was time chartered for a single trip from US Gulf to South Korea. Charterers nominated New Orleans as a load port. This was the vessel's first visit to any US port and it was designated a high interest vessel by United States Coast Guard ("USCG"). While the vessel was at anchor awaiting the coastguard boarding team, there was a serious collision in the Mississippi River, which led to the closure of the Southwest Pass and a delay in inspecting the vessel. Owners considered that the vessel was on detention while waiting six days for the USCG inspection. Charterers contended that the vessel was off-hire, covered by clause 85 of the charter party, which read: "should the vessel be captured or seized or detained or arrested by any authority or any legal process during the currency of this Charter Party, the payment of hire shall be suspended until time of her release, and any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners account, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the charterers or their agents or by reason of cargo carried or calling port of trading under this charter."¹⁴⁷

Judge Rix LJ held that the primary cause of the vessel's delay was because it was the first time caller to the United States, and not because New Orleans was unsafe port. Impossibility of the USCG to timely board the vessel and the subsequent closure of Southwest Path did not prevent the vessel from sailing to a different port. Clause 85 could not be superseded by owners' allegation of a breach of the safe port warranty by charterers. By accepting New Orleans, out of the other ports in the US Gulf, owners accepted risks associated in sailing to it. In any event, nothing prevented owners from sailing up river, when Southwest Pass was closed. The decision once again confirmed that in a situation where there is an abnormal occurrence in the port, the risk of vessel delay or damage will stay with the owners.

2.5. American Law Standard

Unfortunately, in comparison to English law, American law is not uniform in interpreting safe port clauses. The extent of the obligation of the charterer to nominate a port is unclear, because of an unresolved split between the Second and the Fifth Circuit of the United States Court of Appeals. Current decisions following the Second Circuit view hold that the charterer is a warrantor of the safety of the vessel, while she is in a

¹⁴⁶ *Hyundai Merchant Marine Co. Ltd. v Furness Withy (Australia) Pty (The Doric Pride)* [2007] 2 C.L.C. 1042.

¹⁴⁷ *Id.* at 1043.

port or berth selected by the charterer, absent special circumstances.¹⁴⁸ This approach is similar to the one adopted by English law. In contrast, the Fifth Circuit's minority view places the burden of proof on the vessel owner to show that the charterer breached its duty of due diligence in choosing a safe port or berth.¹⁴⁹ Recently the Third Circuit joined the position of the Fifth Circuit.

2.5.1. Majority approach established by the Second Circuit

A safe port warranty has not been reviewed recently by American courts. The reason for that is that most of the cases are now resolved by the parties through arbitration or mediation, and established case law dates back to the 1970s.

In *Park S.S. Co. v. Cities Service Oil Co.*,¹⁵⁰ the tanker *Clearwater Park* was chartered for two consecutive voyages with cargoes of crude oil from a safe port in Venezuela to a safe port in the United States. In addition to the safe port clause, the charter party contained a safe berth clause reading as follows: "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 that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer."¹⁵¹ The issue presented for decision was whether the charterer or the owner was obligated to select a safe berth for discharging into lighters in an area containing both safe and unsafe berths.

The court of appeal considered the *ejusdem generis* rule¹⁵² of interpretation when reviewing construction of the safe berth clause. It explained that, "if the charterer had designated a 'wharf' for discharging and the berth at which the vessel was moored proved to be unsafe, no one would say that the charterer had performed its duty in designating a wharf at which one berth was safe and another unsafe."¹⁵³ Thus, once the Master received express assurance that the berth is safe and relied on that assurance, he is not at fault.¹⁵⁴ If however, the Master receives express assurances that the berth is safe

¹⁴⁸ Peter G. Hartman, Safe port/berth clauses: warranty or due diligence? 21 Tul. Mar.L.J. 537, 538.

¹⁴⁹ *Id.*

¹⁵⁰ *Park S.S. Co. v. Cities Service Oil Co.*, 1951 A.M.C. 851, 854.

¹⁵¹ *Id.* at 852.

¹⁵² Latin for "of the same kind," used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

¹⁵³ *Id.* at 853.

¹⁵⁴ *Cities Service Transp. Co. v. Gulf Refining Co.*, 79 F.2d 521, 521.

and does not rely on it, and negligently determines the depth and the vessel is subsequently damaged, damages are divided between the owner and the charterer.¹⁵⁵

The warranty approach was affirmed in *Venore Transportation Co. v. Osvego Shipping Corp.*¹⁵⁶ There *MV Santore*, was chartered for a voyage from Galveston to Salvador with some cargo of wheat. Upon arrival to Salvador, the Master noticed that one of the pontoons on the pier was missing. Before docking the vessel, he received assurances that a new pontoon would be supplied shortly. After the vessel docked the weather suddenly changed and the *MV Santore* was rolling and slamming into the pier with the single pontoon acting as a pivot. Subsequent investigation revealed that the bow of the ship had been sharply dented and that several of its hull plates had been pushed in because of the ship's smashing against the dock and the pontoon. The issue of intervening negligence of the Master was brought to the attention of the court. The court established that the safe berth clauses were warranties on which the Master had the right to rely.¹⁵⁷ On appeal from the charterers the United States Court of Appeals for the Second Circuit stated that when there was no intervening negligence in either the decision to moor with one pontoon or the Master's decision to go ashore in order to check a condition of the berth as he relied on the assurances of the charterers as to the safety of the docking operation. In its decision, the court stated that "[Charterers] had an express obligation to provide a completely safe berth, an obligation which was non-delegable."¹⁵⁸ Therefore, the safe port warranty established by *The Evia* in England found its reflection in the opinion delivered by the Second Circuit of the United States.

2.5.2. Minority approach established by the Fifth Circuit

Although the Second Circuit applies a strict liability standard in determining the liability of the charterers for nominating an unsafe berth, the Fifth Circuit moved forward, and in its decision in *Orduna S.A. v. Zen-Noh Grain Corp.*, imposed upon the charterer a duty of due diligence to select a safe berth.¹⁵⁹

In this case, Orduna, S.A. (Orduna) voyage chartered a vessel, the *MV Trebizond*, to Euro-Frachtkontor (Euro). While the vessel was at her berth, a steel loading arm fell from a grain elevator, owned and operated by Zen-Noh Grain Corporation (Zen-Noh), and damaged the vessel. The owner filed a claim against Zen-

¹⁵⁵ Id.

¹⁵⁶ *Venore Transportation Co. v. Osvego Shipping Corp.*, 498 F.2d 469 (2nd Cir. 1974).

¹⁵⁷ See id. at 470.

¹⁵⁸ Id.

¹⁵⁹ *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990).

Noh, designer of elevator, charterers, and others. The United States District Court for the Eastern District of Louisiana found Zen-Noh, the designer of the collapsed structure, and Euro liable for Orduna's damages. On appeal, Euro claimed that the district court erred in holding that Euro guaranteed the safety of the berth. The safe berth clause in the charter party provided that the charterer would designate "'safe discharging berths [the] vessel being always afloat."¹⁶⁰ Euro argued that this clause obligated Euro to employ only due diligence in selecting a berth, and that it did so in this instance. The district court cited the three United States Court of Appeals for the Second Circuit cases mentioned above and held that Euro breached the safe berth clause in the charter party. The United States Court of Appeals for the Fifth Circuit reversed, holding that "a charter party's safe berth clause does not make a charterer the warrantor of the safety of a berth."¹⁶¹ The court considered the case in light of public policy and reasoned

*[N]o legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.*¹⁶²

Under the due diligence standard, it is insufficient solely to establish that a particular port is unsafe; it has to be further established that the charterer has failed to exercise due diligence with regard to the unsafety of the port. The burden of proof is probably distributed between owner and charterer. It is for the owner to adduce evidence that the port is unsafe, and, thereafter, for the charterer to rebut liability by adducing evidence that, notwithstanding the unsafety of the port, due diligence had been exercised to ascertain that the port was safe. The charterer is put to his proof only if it is first established that the port is unsafe.¹⁶³

There is no argument that the decision was a shock to the maritime community. Nevertheless, I can admit, it created a positive trend to be followed in the future.

¹⁶⁰ Id. at 1155.

¹⁶¹ Peter G. Hartman, Safe port/berth clauses: warranty or due diligence? 21 Tul. Mar.L.J. 537, 552.

¹⁶² Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149 at 1157.

¹⁶³ D. Rhidian Thomas, The Safe Port Promise of Charterers from the Perspective of the English Common Law, 18 SAclJ 603 (2006).

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Although the due diligence standard does not fully exculpate charterers from responsibility, it gives enough room for the owners to question the charterers about a nominated port and allows the charterers to check the actual conditions of the port.

The approach is also indirectly supported by the Hague¹⁶⁴ and Hague-Visby Rules.¹⁶⁵ Article 4(3) of the Rules offers an acceptable solution to the safe port warranty problem by adopting the due diligence approach. The article stipulates that the shipper (charterer) shall not be responsible for loss or damage sustained by the carrier (shipowner) or the ship, arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or servants. Considering the fact that many bills of lading incorporate the terms of the charterparty and a number of standard voyage charterparties incorporate the Rules, they can be directly applicable to voyage charterparties.¹⁶⁶

2.5.3. A modern clash between due diligence and strict liability standard of care in interpretation of safe port and berth clause

In 2011, the balance and distribution of risks between owners and charterers were seriously disturbed by the *The Athos I*¹⁶⁷ decision of the Third Circuit Court of the United States. The decision attracted a lot of attention at the places like BIMCO¹⁶⁸,

¹⁶⁴ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules), effective 2 June 1931, available

<http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/portrait>

¹⁶⁵ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules), effective 23 June 1977, available at <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/landscape>

¹⁶⁶ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, 1991, at 242.

¹⁶⁷ *In re Frescati Shipping Co Ltd*, 2011 AMC 1090 (Ed. Pa, 2011).

¹⁶⁸ Baltic and International Maritime Council founded in 1905, is the largest of the international shipping associations representing shipowners controlling around 65% of the world's tonnage and with members in more than 120 countries drawn from a broad range of stakeholders having a vested interest in the shipping industry, including managers, brokers and agents. The Association's main objective is to safeguard its members' interests through the provision of quality information and advice, while promoting fair business practices, facilitating harmonization and standardization of commercial shipping practices and contracts and acting as a catalyst for the promotion of quality, safety, security and environmental protection. In support of its commitment to promote the development and application of global regulatory instruments, BIMCO is accredited as a Non-Governmental Organization with all relevant United Nations organs. In an effort to promote its agenda and objectives, the Association maintains a close dialogue with governments and diplomatic representations around the world including maritime administrations, regulatory institutions and other stakeholders within the areas of the European Union, the United States and Asia. More information is available at BIMCO's website at <http://www.bimco.org>.

Intertanko¹⁶⁹ and Protective and Indemnity Clubs as it reassessed liability of the parties in the safe port warranty and reconsidered the role of the government in maintaining navigable waters. It created a debate over two issues that have a fundamental impact on the maritime community. The first one is what can be considered about the approach to the berth and the second one whether safe port and berth warranties are absolute.

The case stemmed from the November 26, 2004 oil spill from the single hull tanker M/T ATHOS I into the Delaware River south of Philadelphia, which was the third largest oil spill in US history. At stake in the case were more than \$177 million in damages from the collision and subsequent cleanup and remediation.¹⁷⁰ The accident occurred while the ATHOS I was traveling up the Delaware River, on a voyage from Puerto Miranda, Venezuela to Paulsboro, New Jersey. The vessel was time chartered by Frescati Shipping to Star Tankers, Inc., as part of a pooling agreement. In return, Star Tankers voyage chartered the vessel to CINGO on an ASBATANKVOY form, which did not specify the port other than as a “safe port” in the United States or the Caribbean. Approximately 300 meters from the dock of the CITGO refinery where she was to discharge her cargo, the tanker struck a submerged nine-ton lost anchor that ripped two holes in the hull. Some 200,000 barrels of heavy crude oil spilled into the river, with devastating ecological results. The issue decided by the Court was whether voyage charterers represented by the companies associated with the CITGO refinery may be held responsible for the cleanup costs and the losses associated with damages to the ship.¹⁷¹

The shipowner brought a claim arguing that the terminal had an absolute duty to provide not only a safe berth, but also the approaches to it. The court determined that the definition of “approach” that owners urged the Court to adopt was unreasonably expansive. Although the docking pilot was aboard the ATHOS I, the ship was in an area

¹⁶⁹ The International Association of Independent Tanker Owners has been the voice of the independent tanker owners since 1970. INTERTANKO’s 250 members own, operate and manage about 3,350 tankers, or 75% of the independent global tanker fleet, in all major maritime trades. INTERTANKO also works closely with other tanker related interests, e.g. shipbrokers and oil companies, which constitute 320 associate members. The Association leads the tanker industry in serving the world with safe, environmentally sound and efficient seaborne transportation of oil, gas and chemical products. More information is available at INTERTANKO’s website at <http://www.intertanko.com>.

¹⁷⁰ Federal Court in PAs Eastern District Issues Decision in \$177 Million Maritime Case, *The Maritime Executive*, 18 April 2011, available at <http://www.maritime-executive.com/article/federal-court-in-pa-s-eastern-district-issues-decision-in-177-million-maritime-case>

¹⁷¹ See Pat Martin, *Athos I: Oil Spill Resulting from Striking “Unknown” Object*, *ASBA News*, May 2012.

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of the anchorage open for the passage of all ships, not an area used exclusively, or even primarily, by vessels docking at the CITGO refinery.

In *The Athos I*, the court adopted a different position and interpreted “approach” as “areas immediately adjacent” to the berth or within “immediate access” to the berth.¹⁷² The court confirmed the position established by the Court of Appeals for the Fifth Circuit that “a charter party’s safe berth clause does not make a charterer the warrantor of the safety of a berth. In determining that the port was safe, the court considered that hundreds of vessels passed over the anchor’s location without any accident and owners were sufficiently familiar with the port as they called it 14 times on previous occasions.

The court also found that the government had no statutory or regulatory duty to scan the anchorage for hazards to navigation (although it may have assumed a duty through course of conduct).¹⁷³

The difference between the circuits would not bring confusion in the maritime community if not for the fact that New York arbitrators generally follow the Second Circuit’s position.¹⁷⁴ The decision undermined the uniformity of maritime contract interpretation and created even a bigger legal gap between the American and English standards. Did the decision contribute to the development of safe berth interpretation? I can say that it certainly did. The decision, by itself, is controversial because it misinterpreted some important prepositions of a safe port clause in order to reach a progressive decision.

I cannot agree with the Third Circuit interpretation of approach to the port. Under the English law, approach to the port extends to rivers and canals, which lead from open seas to the port.¹⁷⁵ Under recent American law, an “approach” is more limited

¹⁷² See *In re: Frescati Shipping Co Ltd*, 2011 AMC 1090 (Ed. Pa, 2011).

¹⁷³ See *Japan Line, Ltd. v. United States*, 1976 AMC 355 (E.D. Pa. 1975), *aff’d* 1977 AMC 265 (3d Cir. 1976).

¹⁷⁴ See, eg, *In the Matter of the Arbitration between T Klaveness Shipping A/S and Dufenco International Steel Trading*, SMA Award No 3686, April 18, 2001.

¹⁷⁵ See *The Sussex Oak*, [1950] 2 KB 383 defined approach as part of River Elbe from North Sea to Hamburg; *The Archimidis* [2008] 1 C.L.C. 366 a dredged channel leading from the sea to the port was considered as approach; *Limerick Steamship Co Ltd v WH Stott & Co Ltd* [1921] 1 K.B. 568 a canal to Manchester was considered as approach; *The Doric Pride* [2006] EWCA Civ 599 Southwest Pass was considered as approach, *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q.B. 326 the route from Hong Kong to Yokohama was considered as approach etc.

to an area between the dock and upriver channel¹⁷⁶ or area through which vessels travel in order to move from the main channel of the river to the berth.¹⁷⁷ The court in *The Athos I* mistakenly squeezed “approach” to actual doorstep of the berth justifying its decision by the volume of traffic through the anchorage area, where the casualty took place.¹⁷⁸ It seems that such an interpretation might jeopardize the safety of many ports; forcing shipowners to obtain additional guaranties from charterers for calling ports that are not located directly on the sea.¹⁷⁹ The decision created a dangerous gap by breaking seamless transfer of risks between owners and charterers by nominating inland port. The gap begins where the vessel leaves open seas and continues her voyage through canal or river until the vessel arrives at the place immediately adjacent to the berth.

I fully support the decision of the court that due diligence should be the prevailing standard of care, as it is “consistent with their purpose of giving a charterer and the master the option not to proceed to a port they deem unsafe.”¹⁸⁰ The provisions of a safe port clause require charterers to use due diligence in selecting the berth and do not relieve the master of his duty to navigate the vessel safely. *MV Athos I* sailed to Paulsboro before. The master was familiar with the port and the berth and did not protest their safety. Moreover, as an experienced mariner, he knew of the risk of unknown, uncharted, and unmarked hazards. By agreeing to proceed, he was deemed to have constructive knowledge of all the hazards there.¹⁸¹ Lastly, a good history of the port can only affirm findings of the court. Since hundreds of other vessels had previously used the oil refinery berth safely, the district court correctly found that charterers did not breach any contractual warranties,” that “[charterer] fulfilled its duty of due diligence, and that the port and berth were generally safe.”¹⁸²

With increased unification of the modern shipping industry, most of the contracts are based on standard charterparty forms. Each clause has its own meaning established by English court or scholars. Unfortunately, courts in the United States rarely

¹⁷⁶ *Osprey Ship Mgmt. Inc. v. Jackson County Port Authority*, 2007 WL 4287701 (S.D. Miss. Dec. 4, 2007).

¹⁷⁷ *Tabea Schiffahrtsgesellschaft MBH & Co. v. Board of Commissioners*, 636 F.3d 161 (5th Cir. 2011).

¹⁷⁸ *In re Frescati Shipping Company, Ltd. (The Athos I)* 2011 AMC 1090 (Ed. Pa, 2011) at 9.

¹⁷⁹ See also Chapter 3.4.3.

¹⁸⁰ *In re Frescati Shipping Company, Ltd. (The Athos I)*, Brief for Appellees, 2012 WL 566113, at 28.

¹⁸¹ *Id.* at 29.

¹⁸² *Id.* at 80.

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interpreted safe port and berth clauses.¹⁸³ The extreme narrowness of the American judicial review for errors of law has meant there has never been a steady flow of cases coming up from arbitration and allowing the courts to hone the principles of charterparty law in the way that their counterparts in the UK have done over the years.¹⁸⁴ Nevertheless, in the recent decade US jurisprudence has been making it up.

A warranty standard established by *The Evia I* in 1982 is a governing one under English law. Despite its controversy, recent interpretation of safe port and berth clauses by American courts can be considered a step forward. The courts in the United States considered decisions and interpretation of safe port clause given by English courts and applied them to the new realities of maritime industry. *The Orduna* followed by *The Athos I* introduced the due diligence approach in interpreting safe port clauses, equally dividing risks for nomination between owners and charters. Although the recent *The Athos I* decision was not a popular one, bringing substantial criticisms from those familiar with safe port warranty, it gave a new spin on determining a standard of care while nominating the port.

¹⁸³In 1991 was the last time that a federal court reviewed an arbitral award about whether notice of readiness had validly been given under a voyage charter.

¹⁸⁴Martin Davies, MORE LAWYERS BUT LESS LAW: MARITIME ARBITRATION IN THE 21ST CENTURY, 24 *Austl. & N.Z. Mar. L.J.* 17 2010.

3. Construction of “good safe port, safe berth” clause and legal significance of each term

To accurately interpret safe port and berth clauses, one must understand the roots that led to their development. The clauses were not created in one day. It took a long route before they transformed into the form that we are using now. Two words “safe” and “port” will bring a little value to an ordinary observer asked to review a charterparty. The aim of this chapter is to identify the meaning of each term that is or was used in safe port/berth clauses and to explain their significance when they stand-alone or are used together with other words. In order to do so, I will explore the development of safe port clauses throughout their history and explain the construction and interpretation of the clause by courts and arbitrators. Finally, I will devote some time to elaborate on the implication of safety, as it can be a silent guardian for the owners’ interests incorporated in the charterparty warranty.

3.1. Historical development of safe port warranty

Most of the general principles of the English law of contract were developed in the eighteenth and nineteenth centuries on the rise of the public interest to the philosophy of *laissez-faire*, accordingly the courts primarily held parties to their bargain as provided in the contract.¹⁸⁵

At that time, the obligations of the shipowner and the charterer were mutually equal and provided for the shipowner to reach an agreed port and load the goods and for the charterer to provide the goods and pay the freight. The only time the shipowner could be excused for non-performance was a situation when the ship was a total loss.¹⁸⁶ According to Wightman J. in *Ogden v. Graham*:

It may be that the charterers were perfectly innocent on this occasion as regards any knowledge of the danger that might be incurred by the vessel, but at

¹⁸⁵ Historical Background - Obligations of a Merchant and a Shipowner, available at http://www.lawandsea.net/COG/COG_Safe_Port_3_1WarrantyImplied1.html

¹⁸⁶ Moss v. Smith [1850] Eng R 155 at 105-106.

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*the same time here is a contract that she is to go into a safe port...which charterers shall name.*¹⁸⁷

A ship was not rendered incapable of performing a voyage when she was merely damaged to an extent which renders some repairs necessary: if that were so, any of the most considerable damage, such as loss of her rudder without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading.¹⁸⁸

That approach implied on the shipowner to call any port agreed in the charterparty regardless of the perils it may face in reaching it. The harshness of such absolute obligation was compensated by a counter obligation of the charterer to handle the particular ship and provide goods at the place she reaches.¹⁸⁹

As the obligation was absolute, the charterparties did not even refer to safety of the port. The only term that was used at that time was “good port.” It referred to a place that was recognizable as such by local authorities. It was presumed that a good port ought to have some facilities to assist in handling the goods.¹⁹⁰ In *Sea Assurance Company of Scotland v Gavin and Others* the vessel *MV Sarah* was ordered to proceed to Saloe (which is just round a head of land, about 10 miles distant from Tarragona) on a coast of Spain to load some cargo of nuts when she was caught by the storm and was severely damaged. The insurance company denied coverage and alleged that Saloe was not a good port. The judge ruled that a good port is one that:

The inquiry in this case is, not whether Saloe be a large or a petty port, - a good port or a bad one... [It] is proved that the town of Saloe is frequented as a port, and is universally designated as a port; - that the Spanish nation recognize it to be a port, and have conferred upon it the dignity and privileges of a port; that it is also recognized as a port by the government of this country, who have extended to it, as such, a branch of their consular establishment. It is proved, that, in point of natural situation, it has many great advantages for the security of vessels, so as almost to supersede the necessity of any artificial means of protection. There exists at Saloe, on a very

¹⁸⁷ *Ogden v Graham* 121 E.R. 901, 778.

¹⁸⁸ *Id.*

¹⁸⁹ See *Bastifell v Lloyd* [1862] 1 H&C 388, p. 394.

¹⁹⁰ *Sea Assurance Company of Scotland v Gavin and Others* [1830] 6 E.R. 676.

*respectable scale, all the machinery and appendages that are pretended to be essential to a port. There are a custom-house and custom-house officers, who permit the cargo to be shipped, and receive the customs upon such shipping. There were, at the time of the wreck, conveniences erected on the shore for the purpose of loading goods, and of protecting smaller vessels from wind and weather. There was a port-captain, or Harbour Master, who regulated the mooring of vessels, and by whom port-charges were levied; and it is established by the evidence that Saloe is a port where, from time immemorial, considerable foreign trade has been carried on, particularly with Great Britain.*¹⁹¹

Such draconian approach imposed in the charterparties to responsibilities of the shipowner to call a named port started to transform into a more mild approach with introduction of “as near as she might safely get” term. The term did not shift the responsibility on the charterers in regards to the safety of the ship; rather, it allowed shipowners not to call places which the vessel had no physical ability to reach. In *Dahl v. Nelson, Donkin and Others* Lord Watson said:

*When, by the terms of a charterparty, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primarily obligation; and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense ‘impossible’ to do so.*¹⁹²

The wording “as near as she might safely get,” was used as a legal tool to construe the contract and mitigate rigidity of the bargain, by permitting the party to be performed under the concept of a secondary destination.¹⁹³ Successful invocation of the clause allowed the shipowner to call an alternative port in case of impossibility to call the named one due to bad weather or tides and made the vessel an arrived one.¹⁹⁴

¹⁹¹ Id. at 134.

¹⁹² *Dahl v. Nelson, Donkin* (1881) 6 App. Cas. 38, H.L.(E.).

¹⁹³ Historical Background - Obligations of a Merchant and a Shipowner, available at http://www.lawandsea.net/COG/COG_Safe_Port_1obligations.html

¹⁹⁴ Id.

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In the beginning of the twentieth century, there was a tendency that the shipowner and charterer would share the responsibilities of nominating a safe berth. Although the courts rejected that it was the responsibility of the charterer to investigate the conditions of the port, they acknowledged that the charterers should take reasonable care in order to avoid damage to the vessel. In other words, the charterers could be responsible for the damage to the vessel when they knew of the condition of the port or berth and did not inform the owners. In *The Empress*,¹⁹⁵ the vessel was damaged in Gosport Beach when she arrived to discharge a cargo of stones. The vessel berthed at the wharf, which was not even. The court found that there was no breach of duty by charterers. Neither the master nor the charterers were aware of the inequalities of the ground at the berth.¹⁹⁶

The breaking point in the interpretation of the safe port warranty came in 1935 with the ruling of *Lersen Shipping v. Anglo-Soviet Shipping*.¹⁹⁷ Prior to it, the courts did not interpret the “safe afloat clause” as an express warranty, nor did they think there were sufficient grounds to imply a charterer’s warranty for the safety of ports and berth.¹⁹⁸ In *Lersen Shipping v. Anglo-Soviet Shipping*, the vessel was chartered for the shipment of timber. During loading of cargo in Leningrad the vessel started to list as a result of touching the ground. She was subsequently towed to deep water; however, despite of Master’s effort the list could not be cured. With the increasing wind the vessel lurched from one side to another damaging herself and losing some deck cargo overboard. The court found that, although the vessel was not seaworthy for the cargo, the berth nominated by the charterers was not one at which the vessel could load the cargo destined for her had lie safely always afloat. The court explained its reasoning:

*A time charterer who has used the chartered ship outside the agreed limits is disentitled to rely upon the clauses in the charterparty which are inserted to protect him, until the Master has with knowledge of the breach resumed the ship’s duties under the charterparty.*¹⁹⁹

¹⁹⁵ Henry W. Richard & Sons v. Gosport & Alverstone U.D.C. (The Empress) [1923] 14 Lloyd’s Rep. 96.

¹⁹⁶ Id. at 101.

¹⁹⁷ *Lersen Shipping v. Anglo-Soviet Shipping* [1935] 52 Ll.L. Rep 141.

¹⁹⁸ J Bond Smith Jr., Time and voyage charters: safe port/safe berth, 49 Tul. L. Rev 860, 866 (1974-1975).

¹⁹⁹ *Lersen Shipping v. Anglo-Soviet Shipping* [1935] 52 Ll.L. Rep 141 at 143.

The court clearly pointed that safe port warranty given by the charterers is equal, if not superior, to the warranty of seaworthiness of the vessel given by the owners. One of the court findings was that the main reason for the unsafety was an unexpected drop of the water level at the berth. Why then the court did not consider it as an abnormal occurrence, which could shift responsibility for unsafe berth nomination back to the owners? The answer is simple, a concept of abnormal occurrence was introduced only twenty years later in *The Eastern City*.²⁰⁰ Only in late 1950-s a tendency, which commenced in the mid-1930s and culminated for British and American judges, to explain safe port clauses in favor of the shipowners²⁰¹ was disturbed.

The concept of the charterer's obligation, amounting to a continuing and absolute guaranty of the safety of the port during the time it would be used, whether expressed in the charterparty or not, was abolished in English law by the House of Lords in *The Evia*.²⁰² The pendulum of English maritime law swung from benefiting the shipowners, towards serving the charterers by adopting a new concept of prospective safety.²⁰³ The principles established earlier in *The Eastern City* were confirmed and applied to new circumstances.

The evolution of *stare decisis*²⁰⁴ in evaluating safe port warranty progressed in stages. First, the warranty was found in time charterers. In *Lersen Shipping v. Anglo-Soviet Shipping*,²⁰⁵ the court found that the presence of a "safely afloat and safely aground" clause could encompass to responsibility of charterers for its breach. Second, in *The Sussex Oak*,²⁰⁶ while reviewing a breach of the safe port warranty under the time charterparty the court suggested that the same principle could apply to voyage charterparties. Finally, in *The Eastern City*,²⁰⁷ the court applied a safe port warranty while reviewing a voyage charterparty.²⁰⁸

²⁰⁰ Leeds Shipping Co v Societe Francaise Bunge SA (*The Eastern City*) [1958] 2 Lloyd's Rep. 127.

²⁰¹ See L. Herman, S.E. Goldman, *The Master's Negligence and Charterers Warranty of Safe Port/Berth*, LMCLQ 615 at 617, (1983).

²⁰² *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* [1983] 1 A.C. 736.

²⁰³ See Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, 1991, at 225-227.

²⁰⁴ Latin: Let the decision stand. The policy of courts to abide by or adhere to principles established by decisions in earlier cases.

²⁰⁵ *Lersen Shipping v. Anglo-Soviet Shipping* [1935] 52 Ll.L. Rep 141.

²⁰⁶ *Grace (G. W.) & Co. Ltd. v. General Steam Navigation Co. Ltd. (The Sussex Oak)* [1950] 2 K.B. 383.

²⁰⁷ *Leeds Shipping Co Ltd v Société Française Bunge (The Eastern City)* [1958] 2 Ll Rep 127.

²⁰⁸ See Jan Ramberg, *Unsafe ports and berths* at 596 (1967).

3.1.1. Risk allocation between owners and charterers

English courts impose on charterers a warranty of port and berth leaving them with a very high degree of care. This approach came through a long transformation from due diligence, which was prevailing standard until 1930s.²⁰⁹ There was no wonder to application of due diligence approach in those days. Very often, the Master and the owner were the same person who entered into a charterparty with the charterer. Gilmore & Black, *The Law of Admiralty* described Masters' duties:

*It is the Master who has the best means of judging the safety of a port or berth, first because he is an expert in navigation, furnished with aids thereto, secondly because he knows his vessel (including its draft and its present trim), and thirdly because he is on the spot.*²¹⁰

At the same time, charterers were thousands of miles away from the port and could not assess situation.

The industrialization of society created a need to reevaluate the distribution of risks between the parties. The NYPE 1946 form expressly stated that "the Master ... shall be under the orders and directions of the charterers in regards to employment and agency." It showed that charterer "wishes to control the manner and the place of discharging its cargo; he bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for charterer's acceptance of the risk of its choice."²¹¹

The specifics of the modern shipping world gives even a better explanation to safe port warranty by charterers. Time charterers became operators of the vessels and, to a big extent, at least informally, override the Master's decisions as to the navigation of the vessel. Being away from the vessel they direct her relying on reports from weather routing services, recommendations of international vessel security organizations, and their commercial needs. Very often, charterers are sophisticated traders with a well-developed network of agents or sister companies that can monitor and determine port conditions in a much better way than the Master or owners. Thus, the Master, having no

²⁰⁹ *Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.* [1935] 52 Ll. L. Rep. 141 marked a trend towards warranty. In the dissenting opinion Lord Maugham implied into a safe port clause safety of the berth.

²¹⁰ Gilmore & Black, *The Law of Admiralty* at 204-205 (2nd Ed. 1975).

²¹¹ *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804, 854 (C.A.2 1951).

up to date knowledge of port occurrences or dangers, is entitled to rely on safe port assurances.

Despite technological advances, the physical assessment of conditions done by the Master on board can still be a determining factor in assessing the safety of the vessel. Most of the time, though, the commercial reasons for sailing to a high-risk port overrides any concern for safety. In such circumstances, the only defense the shipowner has is a reliance on the safe port warranty, which sets strict liability as the standard on charterers. There is also an opposing view, which resorts to the Master's assessment of danger and characteristics of the vessel he navigates.

Although by default English courts would still apply the charterers' warranty of the safety of the port, parties are given freedom to decide how they actually want to allocate the risks²¹² by either enumerating them in the charterparty or using standard forms of the charterparties. If the charterparty contains a safe port and berth clause, it is clear, that the charterers assume a definite and very substantial obligation. Nevertheless, I consider, the obligation should not be one of a warranty, but of a due diligence, because both parties had sufficient means to check either distantly or on a spot actual condition of the port.

In contrast to the present, and similar to prior English law, the concept of warranty is still applied by the American courts sitting in the Second Circuit. The charterer who nominates a port is held to warrant that the particular vessel can proceed to that port or berth without being subject to risk of physical damage.²¹³ The Fifth Circuit, on the other hand, moved even further than English courts and imposed on the charterers only a duty of care in nominating a port, shifting all responsibility for occurrences beyond charterers control to the shipowners.²¹⁴

3.2. Definition of terms

Before I proceed with describing the relevance of each term and their interplay, it is important to give a definition of each term separately. Then one can easily see the difference between "port" and "berth," "safe" and "unsafe." The word "port" has several meanings, depending upon the context. The natural category constitutes a port in its

²¹² J. Bond Smith, Jr., *Time and voyage charterers: safe port/safe berth*, 49 Tul. L. Rev. 860 (1974-1975).

²¹³ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal at 228 (1991).

²¹⁴ See *Orduna, S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990).

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geographical sense. It is an access of the sea and a shelter in the coast, whereby vessels may conveniently sail, find protection, lie safely afloat (or sometimes aground), be loaded and unloaded. This category also corresponds to the old category of a harbor.²¹⁵ A “safe port” is a place where a chartered vessel may enter, load or discharge and leave without legal restraints and at which the vessel will encounter no peril greater than those of the sea.²¹⁶ Rowlatt J identified a port in *The Saxon Queen* as

*It [port] is not a mere quay on a beach. Public money has been spent on the works there, and there are regulations under Acts of Parliament and Orders of the Board of Trade with regards to it. There is a pilot, and a Harbor Master, and what I hope is a thriving little trade in stone and some fishing carried on there.*²¹⁷

This area is not fixed according to legal, fiscal, or geographical criteria, but rather is determined on commercial considerations.²¹⁸ The courts never came to unanimous decision what can constitute a port. The presence of facilities to accept vessels will not be treated as a determinative factor; thus, even a village having just a wooden jetty, where the lighters used to come, was a port.²¹⁹

A “berth” is a location where the loading and discharging operations occur. It may include a dock, anchorage, offshore mooring, or may be alongside another vessel. Additionally approaches to the berth may be included in its definition.²²⁰

Depending on the construction of the clause and insertion and deletion of terms, courts will apply different responsibility on the parties. Below I will review all possible alterations of the standard wording “one good safe port, one good safe berth” and the results of eliminating one of the terms in it.

3.3. No express warranty of the safety of either port or berth

Although generally English courts favor the interests of shipowners, a construction of a safe berth and port clause having no reference to safety will be interpreted in favor of charterers. Because charterers have a right to choose and nominate

²¹⁵ See Black’s Law Dictionary (9th ed. 2009).

²¹⁶ *Atkins v. The Fibre Disintergrating Co.*, 85 US 272 (1873).

²¹⁷ *Johnston Bros v Saxon Queen SS Co* (1913) 108 LT 564.

²¹⁸ Dr. S Mankabady, *The concept of safe port*, 5 J. Mar. L. & Com 633, 634 (1973-1974).

²¹⁹ See *Harrower v. Hutchinson* (1869) L.R.4Q.B. 523.

²²⁰ *P. Dougherty Co. v. Bader Coal Co.*, 244 F.267 (D. Mass. 1917).

a particular berth within a port, they assumed responsibility for the risk of any “unique dangers” that affected the berth, but not the port as a whole or every berth within it.²²¹

In *The Reborn*,²²² owners chartered the vessel to charterers for carriage of a cargo of cement from Chekka, Lebanon to Algiers. Whilst at the loading berth at Chekka, the vessel’s hull was damaged because of contact with an underwater projection. The charterparty was based on amended GENCON terms and provided in relevant part “1 berth Chekka – 27 ft sw permissible draft” and “Owners guarantee and warrant that upon arrival of the vessel to and/or prior its depart from, loading or discharging ports...the vessel including, inter alia the vessel’s draft, shall fully comply with all restrictions whatsoever of the said ports.... including their anchorages, berths and approaches and that they have satisfied themselves to their full satisfaction with and about the ports specifications and restrictions prior to entering into this Charter Party.” The word “safely” in the printed Gencon terms was struck out by agreement.²²³ In the judgment Justice Anthony Clark MR stated:

*It did not follow from the mere fact that [charterer] was under a duty to nominate the berth that it warranted that the berth was safe and the fact there was no express warranty that the port was safe meant that, if there was an implied safe berth warranty, it was not a safe berth warranty of any width.*²²⁴

The reasoning in respect of time charterparties, into which a warranty of safety is often implied, should not be directly applied to voyage charterparties, particularly where, as in this case, “the danger at the berth was (it appears) unascertainable by either the owners or the charterers and the question is simply which party has to bear the risk.”²²⁵

²²¹ Michael Volikas, No implied safe berth warranty in named port voyage charter: The Reborn, Shipping E-brief, July 2009, <http://www.incelaw.com/whatwedo/shipping/article/Shipping-e-Brief-July-2009/No-implicit-safe-berth-warranty-in-named-port-voyage-charter-The-Reborn>

²²² Mediterranean Salvage and Towage Limited v. Seamar Trading and Commerce Limited (The Reborn), [2009] 1 C.L.C. 909

²²³ Gencon 1994 clause 1 reads: “...The said vessel, as soon as her prior commitment have been completed proceed to the loading port(s) or place(s) stated in Box 10 or so near to as she may safely get and lie always afloat.”

²²⁴ The Reborn [2009] 1 C.L.C. 909.

²²⁵ Id.

The express wording of the charterparty was crucial to this decision. The implied term was not necessary to make the contract work, nor could the charterparty reasonably be understood to mean, when read against the relevant background, that charterers warranted the safety of the berth from risks not affecting the port as a whole or all the berths in it or arising from the specifications and restrictions of the berth. In a construction like that, the judges came to a mutual agreement that “the owners agreed that they would either investigate Chekka and the berths at Chekka or take the risk of any dangers getting to whatever berth was nominated, loading, and departing from it.”²²⁶ As such, the decision was in favor of charterers because the clause did not encompass any warranty of the berth, but only due diligence on their side.

3.4. Implication of the safe port and berth obligation

Sometimes while drafting safe port and/or berth clauses, parties forget to include a certain term. Would English law imply safety and allow the court to reconstruct the contract based on parties’ intention? The courts will be eager to imply the term if it comes “from the language [the instrument] read in its commercial setting.”²²⁷ In *Hamlyn v. Wood* Lord Esher said:

*I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessary arises that the parties must have intended that the suggested stipulation exists.*²²⁸

On later stage the principle of implication was brushed up to ensure that judges could not replace real intention of the parties relying on fairness. General implication test, stated by Lord Hoffmann in *Attorney General of Belize and others v Belize Telecom Ltd and another*,²²⁹ read:

The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it

²²⁶ Id at 910.

²²⁷ *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 459.

²²⁸ *Hamlyn v Wood* [1891] 2 Q.B. 488 at 491.

²²⁹ *Attorney General of Belize and others v Belize Telecom Ltd and another*, [2009] 1 W.L.R. 1988.

fairer or more reasonable. It is only concerned to discover what the instrument means. However, that meaning is not necessary always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.

...

It follows that in every case in which it is said that some provision out to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

3.4.1. Implication of safe ports

The core principle implied by the safe port warranty was laid down in *The Houston City*:

We respectfully agree that it was implicit in the charter-party under consideration in Grace's Case that orders should not be given by the charterer to the Master to proceed to an unsafe port. The basis of such an implication is to be found in the limits within which it was agreed that the charterer should be authorized to employ the ship and in the stipulation that the Master should be under the orders of the charterers as regards employment agency or other arrangements. The implication, it may be said, was necessary to carry out the clear intention of the parties with respect to the employment of the ship and, in relation thereto, the giving of orders to the Master.²³⁰

While discussing the implication of safety in a port, Marko Pavliha stated: “It appears that whenever courts imply charterer’s duty to nominate a safe port, they actually

²³⁰ Reardon Smith Line Ltd v Australian Wheat Board (The Houston City) [1954] 2 Ll Rep 148, 265.

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imply it ‘in fact’ rather than ‘in law.’²³¹ Although, until now, neither the courts nor the arbitrators implied safety of the port when other clauses of the charterparty clearly showed the intention of the parties, safety of the berth was implied on several occasions.

The issue of implication is rather complex, as the position of courts is different in regards to voyage and time charterparties. As a matter of construction, voyage charterparties will usually name one or several ports where the owners should direct a vessel for loading or discharge of the cargo. Where a single port is named in a charterparty and there is no express warranty of safety, then no warranty of safety will be implied. There is no reason why the clause should not be understood as meaning what it says.²³² When charterers nominate the port at the time when the fixture is made, then owners are considered to have a sufficient opportunity of checking for themselves whether the port will be safe for their vessel, and no warranty of safety will be implied.

When charterers are given an option to chose a load or discharge port from a range of ports or when charterers exercise an option to nominate a port under a time charterers’ right, but there is no express safe port warranty, the law will imply a safe port warranty. How far does this warranty reach? The implied warranty from the charterers will be reviewed under express terms of the charterparty, primarily trading area and range of ports. Owners undertaking to trade within a certain range encounters for assumption of risks that are normal for that area.²³³ Therefore, the charterers’ implied warranty will only be a warranty as regards to those risks which are not normal within the range or trading area agreed.²³⁴ Unfortunately, no case definitively distinguishes between named and unnamed places. In *The APJ Priti*, Bingham LJ suggested a rationale for different treatment by observing that the owner “could, before finally agreeing the charter, address his mind to the limited range of loading and discharging ports to consider their acceptability.”²³⁵

²³¹ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, 1991, at 217.

²³² See Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, 2009 at 9.

²³³ See *infra* Atkins International HA of Vaduz v Islamic Republic of Iran Shipping Lines (*The APJ Priti*) [1987] 2 Lloyd’s Rep 37.

²³⁴ See Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, at 20 (2009).

²³⁵ Atkins International HA of Vaduz v Islamic Republic of Iran Shipping Lines (*The APJ Priti*) [1987] 2 Lloyd’s Rep 37, 41.

3.4.2. Implication of safe berth

As I have discussed above, courts will not be that reluctant to imply safety of the port. Will the courts be in a better position to imply safety of the berth? Safety of the berth will be implied through the safety of the port. In *Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.*,²³⁶ Lord Justice Slesser was convinced that it was the intention of the parties, although not expressed in the words, that the vessel should be employed not only between safe ports where it could lie safely afloat or aground, but also between safe berths with similar qualifications.²³⁷ While construing the true meaning of the clause the court determined that “although the only mention of the ‘berth’ in the clause was in that part that provided for delivery of the vessel, the critical part of the clause was a statement that “steamer to be employed in lawful trades, between good and safe ports and places within the following limits...” The court was convinced that

*It was intention of the parties as derived from a charterparty, though not so expressed in words, that the vessel should be employed not only between good and safe ports or places, where she could lie safely always afloat or safe aground, but also between good and safe berths with similar qualifications – the word ‘port’ or ‘place’ to be deemed to include that part of the port or the place which is berth. I prefer to found my judgment on the basis of a term to that effect to be implied in order to give business efficacy to the contract, rather than upon the actual language of the clause itself.*²³⁸

It is my opinion that the court is justifying its opinion by the fact that once safety of a larger area is given, it will spread and cover smaller areas located within it.

3.4.3. Implication of safe approaches or route

The question arises, whether the court will imply safety to the areas which are not actually in the port itself but that the vessel has to pass in order to get there. Of course, it is hard to imagine that arbitrators and the court will shift on the charterers all risks that the vessel can face in high seas. Once the vessel completes sea passage and is on approach voyage to the port, the court will imply safety. If any part of the approach a vessel has to undertake, as a result of the order of the charterer, is not safe then the port itself is considered not safe. The contractual obligation to nominate a safe port would

²³⁶ *Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.* [1935] 52 Ll. L. Rep. 141.

²³⁷ *Id.* at 149.

²³⁸ *Id.*

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thereby be broken.²³⁹ Although the obligation extends to the area outside the port, in *The Sussex Oak*,²⁴⁰ the court looked at the route the Master chose to approach the port. It was held that “[t]he charterer [is not to] guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinary prudent and skillful Master can find a way of making in safety.”²⁴¹

The vessel can face a danger of unsafety up to a hundred miles away from the port. Under the common law, the direct geographical route between two ports is the proper one in respect of this obligation to proceed directly to the port.²⁴² In regards to a voyage charter, it was held that “[i]t is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports.”²⁴³ It was held that exceptions can be made for navigational reasons. In each case, the court will look carefully at whether a vessel completed her ocean leg of transit and entered restricted waters such as a channel, canal, or river.

Another question which can arise while the vessel is on the approaches to the port is whether safety was given in regards to the empty or laden vessel. In *The Archimidis*,²⁴⁴ the court determined safety of approaches for a fully loaded vessel. The vessel was chartered for three consecutive voyages for carriage of gasoil from “1 safe port Ventspils.” The vessel was not able to load the full amount of cargo tendered by the charterers because of previous bad weather conditions the dredged channel was silted up as a result of lack of water. The court ruled that the port was unsafe because of a need for lightening to get into or out of it. Safety meant “safety as a laden ship,” namely:

Necessary routes to and from the port were within the warranty, so that unsafety in such routes amounted to a breach. There was no realistic distinction between loading and discharging. If the chartered vessel, laden with the chartered cargo,

²³⁹ Peter Hallin, At the Threat of Piracy Hire Issues in Time Charterparties, available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1693923&fileId=1712527>

²⁴⁰ *Grace (G. W.) & Co. Ltd. v. General Steam Navigation Co. Ltd. (the Sussex Oak)* [1950] 2 K.B. 383, at 391.

²⁴¹ *Id.*

²⁴² See *Balian & Sons v Joly, Victoria & Co Ltd* (1890) 6TLR345; *Davis v Garratt* (1830) 6 Bing 716, 725.

²⁴³ *Reardon Smith Line v. Black Sea Insurance* [1939] A.C. 562, 575.

²⁴⁴ *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366.

*could not undertake those operations in safety, then prima facie, there might be breach.*²⁴⁵

The dangers that render a port unsafe need not necessarily be in close proximity to the working area of the port. If the only means by which the vessel can reach or leave the port are subject to hazards, the port will be unsafe even if the hazards are at a considerable distance away.²⁴⁶

3.4.4. Constructional implication of safe port warranty

Charterparties can be drafted in various ways. Sometimes parties either intentionally or by omission delete safe port clause from their ordinary location in the main terms of standard forms of the charterparties and insert it under additional clauses. Will that constructional deficiency somehow prejudice the safe port warranty? *The Livantia*,²⁴⁷ is a good example where the court decided in favor of the owners regardless of the fact that the safe port clause was expressly deleted from its ordinary position. The parties entered into a trip time charter on an amended NYPE form. The charter was expressed to be for one trip “via St Petersburg, Baltic/Conti to the far east.” The safe port warranty in lines 24-31 of the standard form charter was deleted, but additional clause 67, the Trading Exclusions clause, provided “trading to be worldwide between safe ports, safe berths and safe anchorages and places”²⁴⁸

The vessel loaded steel coils at St Petersburg on 12 January. Due to ice at the port, the vessel joined an outbound convoy in order to sail out. The hull of the vessel was damaged by ice during the outbound convoy.

At arbitration, the Tribunal held that the charterers were liable for breach of the express safe port warranty. The cause of damage to the hull was held to be ice blocks and not negligent navigation.²⁴⁹ In its reasoning the High Court stated:

We were not persuaded that the deletion of the express safe port warranty from lines 26 - 31 and its

²⁴⁵ Id.

²⁴⁶ In re: Petition of Frescati Shipping Company Ltd. , United States Court of Appeals, Third Circuit, Appellate Brief, 2011 WL 5968584, at 18.

²⁴⁷ STX Pan Ocean Co Ltd v Uglund Bulk Transport A.S. (The Livantia) [2007] EWHC 1317 (Comm).

²⁴⁸ Id.

²⁴⁹ Jessica Pollock, Naming Of Ports and Safe Port Warranty - Recent Decisions, Newsletter (September 2007), available at <http://www.simsl.com/Publications/Articles/NamedSafePort0807.html>

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.²⁵⁰

The decision made it clear that the court will enforce the safe port warranty regardless of its location in the charterparty.

3.4.5. Conclusions

According to Thomas Rhidian, “an implied promise, at least potentially, has a wide role to play in connection with time charterparties, and also in connection with voyage charterparties where, as is often the case, the port(s) of loading and/or discharge are to be nominated by the charterer from a geographical range of ports.”²⁵¹ But, it would appear, that no implication is made where the nomination is made in regards to a specified (named) port. When charterers name the ports at the time when the fixture is made, then the owners are considered to have sufficient opportunity of checking for themselves whether the ports will be safe for their vessel, and no warranty of safety will be implied. Nevertheless, where a port is named, but there is also an express warranty of safety, there is no reason why it should be understood as meaning what it says. In effect, instead of making inquiries for themselves, the owners can rely on the charterers’ undertaking.²⁵²

Whether a time or voyage charterparty provides for the nomination of a safe port, a warranty that the berth is safe will probably be implied, but this is not invariable

²⁵⁰ STX Pan Ocean Co Ltd v Ugland Bulk Transport A.S. (The Livantia) [2007] EWHC 1317 (Comm).

²⁵¹ D. Rhidian Thomas, The Safe Port Promise of Charterers from the Perspective of the English Common Law, 18 SAclJ 600 (2006).

²⁵² Robert Gay, Safe port undertakings: named ports, agreed areas and avoiding obvious dangers, Lloyd's maritime and commercial law quarterly, N1 at 121 (2010).

and may depend upon the specific terms of the charterparty. Each time the court will evaluate surrounding circumstances before returning its decision. *The Reborn*,²⁵³ is a good example when the court, despite the fact that the word “safe” was struck from the charterparty, still applied the whole implication test, before deciding that save port warranty cannot be implied when there was express agreement of the parties to exclude it. There, Lord Hoffmann made the important point that the question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.²⁵⁴

3.5. Legal significance of the phrase “always lie safely afloat”

Voyage charterparties frequently contain a clause providing for a vessel to be always afloat. The wording of the charterparty or a recap may contain an abbreviation “aaaa,” i.e. always available always afloat. I will not discuss the availability of the berth issue in this dissertation. Nevertheless, the safety of the vessel will depend greatly on whether she can remain afloat. The term is concerned exclusively with the marine characteristics of the place of loading or discharge. It requires that the vessel shall be water-borne and able to remain there without risk of loss or damage from wind, weather, or other properly navigable vessels. The water-born ability of the vessel will include not only her ability to lie afloat, and be free from dangers below her hull, but also from dangers above her. The vessel shall not be considered to be afloat if she is not able to pass under a bridge.²⁵⁵ In the *Goodbody v. Balfour*,²⁵⁶ it was considered that Manchester was not a safe port for the vessel in question, because it would have been necessary to dismast the ship to enable her to get under the bridge in order to pass the canal on the way to the port.

Will an always-afloat clause apply when an accident occurs while the vessel is at sea and outside limits of the port? In *The Evangelos Th*,²⁵⁷ a tanker was time chartered in November 1968 for trading in the Red Sea and elsewhere, which was at all material times a war zone. The charterers agreed to contribute to war risk insurance. The

²⁵³ See supra Chapter 3.3.

²⁵⁴ *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] 1 C.L.C. 909.

²⁵⁵ See *Goodbody v. Balfour* [1899] 5 Com. Cas. 59 C.A.

²⁵⁶ *Id.*

²⁵⁷ *The Evangelos Th* [1971] 2 Lloyd’s Rep. 200.

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charterparty contained no express warranty as to the safety of the ports to which the ship might be ordered, but provided that the cargos should be loaded or discharged at any place where the ship could “always lie safely afloat.” The ship was ordered by the charterers to proceed to Suez at a time when there was a cease-fire. But, following the ship’s arrival, hostilities broke out again and the ship became a constructive total loss as a result of shell fire.²⁵⁸ The court held that “the words ‘always lie safely afloat’” were concerned exclusively with the marine characteristics of the place of discharge, and required that the vessel should at all times be water-borne and able to remain so without risk of loss or damage from wind, weather, or other properly navigated crafts.²⁵⁹ Damage that was caused by shooting could not be considered as one covered by an “always lie safely afloat” clause, as the vessel was not in port.

The court in *The Alhambra*²⁶⁰ stated three rules, which assist in determining whether the vessel is always afloat. They concern not only the vessel characteristics, but also characteristics of the place where she was ordered by the charterers. Justice Brett L.J. explained them as:

*They [charterers] should order her to go to a port, to something which is known in a seafaring language as a port. ... A port in which from the moment she went into it, she should be able to lay afloat, and she should be able to lay afloat until the time when she was fairly discharged. ... But there is something more than that. It must not only be that, but it must be safe. Therefore, if she was ordered to a port in which she could lay afloat from the beginning to the end, but in which she could not be safe laying afloat (there may be such ports), she was not bound to go to that port.*²⁶¹

Will a result be different if there is no safe port warranty in the charterparty? An answer can be derived from ruling of the Court in *Hillstrom v. Gibson*.²⁶² The court ruled:

It cannot be laid down as an inflexible rule that when a ship has got as near the port as she can get,

²⁵⁸ Time Charters, Six edition, at pg. 217.

²⁵⁹ *The Evangelos Th* [1971] 2 Lloyd’s Rep. 200.

²⁶⁰ *The Alhambra* (1881) L.R. 6 P.D. 68.

²⁶¹ *Id.* at 72-73.

²⁶² *Hillstrom v. Gibson*, Ct. Sess. Cas. 3d Series, 463.

and the only impediment to proceeding further is overdraft, the master is, under all circumstances, to consider the voyage at the end.

It seems that in the absence of safe berth clause, charterers will be responsible to lighten the vessel and owners to complete the voyage to the discharge port because they assumed the risk of the port being unsafe, but obtained a guarantee that she is afloat. As I can see the difference between the presence of a safe port clause will be the time when laycan begins. With a safe port clause, the laycan will start upon arrival to a spot where lightering is possible.

What will happen if the vessel is over draft in the load port and the loading is not complete? In *The Curfew*,²⁶³ the vessel was ordered to leave her loading berth after she loaded to the draft that allowed her to safely leave port. The court took the owners' position and ruled:

*The true construction to be put upon the words in the charterparty, "and there load always afloat," must be that the vessel is to be loaded "always afloat" and get out of the dock so loaded by the next tide. If she cannot get over the sill of the dock with a complete cargo, she must be entitled to go out as soon as she has loaded down to the limit of safety over the sill, and finish the loading elsewhere.*²⁶⁴

This approach to an always-afloat provision of the charterparty was opposed by the arbitrators' decision in *The Garganey*.²⁶⁵ The *MV Garganey* was chartered for a voyage charter from Toledo to Aratu. The charterparty provided that charterers warranted safe berth. Nothing in the charterparty stated that the vessel should load at the berth always available, always afloat, but for the clause where "owners guarantee the vessel's capacity 21,400 mt basis seaway draft as full cargo."²⁶⁶ Upon arrival to Toledo the vessel berthed and started loading, which was interrupted ten days later when she had to vacate the berth and shift to the anchorage in anticipation of low water levels alongside the berth, caused by strong prevailing winds. She berthed again seven days later and completed loading operations. Owners claimed demurrage as the charterers were in breach of the "always afloat" warranty. The Tribunal agreed with the owners'

²⁶³ *The Curfew* [1891] P. 131.

²⁶⁴ *Id.* at 135.

²⁶⁵ *The Garganey*, SMA No. 4095, 2010 WL 4643331.

²⁶⁶ *Id.*

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contention that the berth was not a safe berth for a vessel the size of the *MV Garganey per se*, but to knowingly warrant it as “always afloat” when such weather conditions were not considered usual or “entirely unexpected,” was imprudent and detrimental.²⁶⁷ Regardless of the owners’ familiarity with the weather conditions and behavior of the Great Lakes, the “always afloat” condition is a warranty in the charterparty.

The question arises whether the vessel is afloat if she has to sail through ice. On the one hand the vessel might have sufficient depth under her keel and thus will be water-borne at all times. On the other hand, the ice can prevent her from sailing and the vessel may even rest on the ice during extreme temperatures and ice movements. In the situations when the vessel is allowed to trade by her classification society and the charterparty in ice bound areas an “always lie safely afloat” clause can be crucial in determining who bears a risk when the vessel has to winter and cannot proceed on her voyage. In my opinion, in the absence of safe port warranty, the risk of delay of the vessel due to wintering will fall on the owners.

In combination with other clauses of the charterparty an “always lie safely afloat” clause can be considered in determining whether safety of the port will be implied. This is not absolute and the extent of the obligation may turn on the specific terms of the charter.²⁶⁸ In time charterparties it could imply that the nominated port of loading/discharge was safe at the time of nomination and might be expected to remain so from the moment of the ship’s arrival until her departure.²⁶⁹ As I discussed above, this implication will exist only when the word “safe” or “safely” was not struck out in the charterparty.²⁷⁰ Further, the court will have to construe a contract as a whole and read it in its commercial setting.²⁷¹

Having an “always lie safely afloat” clause in the charterparty will have similar consequences for the charterers as having a “safe port” clause. The clause will allow the Master to load the vessel to his satisfaction (with less cargo than agreed in the charterparty) or lighter the vessel in order to proceed to the port.²⁷²

²⁶⁷ Id.

²⁶⁸ Scrutton on Charterparties 21-st edition, at 921 (2008).

²⁶⁹ See *Vardinoyannis v Egyptian General Petroleum Corp (The Evaggelos Th)* [1971] 2 Lloyd’s Rep. 200.

²⁷⁰ See *Mediterranean Salvage and Towage Limited v. Seamar Trading and Commerce Limited (The Reborn)* [2009] 1 C.L.C. 909 at 913.

²⁷¹ *Belize v Belize Telecom Ltd* [2009] UKPC 10.

²⁷² See *The Ross Isle*, SMA No. 1340, 1979 WL 406546.

3.6. Legal significance of the phrase “as near as she may safely get”

The clause “or so near there to as she may safely get” goes back some 150 [200] years, to the days of sailing ships and has been in use in relation to the carriage of goods by sea throughout the era of steamships and their modern successors.²⁷³ Normally, the clause is added after the name of the port of discharge. In a time charterparty, the Master usually lacks these discretionary powers, and if the port of discharge is unsafe, he can only refuse to proceed to that port but not to discharge the cargo in other ports.²⁷⁴

Lord Watson said:

I adopt the view of L. J. Brett that the shipowner must bring his ship to the primary destination named in the charterparty, “unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable.”²⁷⁵

The meaning of a “or so near thereto as she might safely get” clause is drawn from *Schilizzi v Derry*,²⁷⁶ where a sailing brig chartered for a voyage from London to Galatz was not able to cross the bar in the mouth of the Danube river for more than one month, from the fifth of November until eleventh of December due to lack of water. Having lost in stormy weather both of her anchors, the vessel was forced, for the sake of safety, to sail back to Odessa. In Odessa the Master, being in disagreement with the charterers’ representative about alternative employment, found another, more profitable service and sailed under another contract back to England. Charterers claimed damages for loss of profit.²⁷⁷ Lord Cambell CJ said:

[t]he meaning of the charter party must be that the vessel is to get within the ambit [emphasis added by the author] of the port, though she may not reach the

²⁷³ *The Athamas (Owners) v. Dig Vijay Cement Company Ltd.* [1963] 1 Lloyd's Rep. 287.

²⁷⁴ Dr. S Mankabady, *The concept of safe port*, 5 J. Mar. L. & Com 633, 637 (1973-1974).

²⁷⁵ *Dahl (t/a Dahl & Co) v Nelson, Donkin & Co* (1881) 6 App. Cas. 38, 60.

²⁷⁶ *Schilizzi v Derry* (1855) 4 E & B 873, at 886.

²⁷⁷ Igor, Serzhantov, *As near thereto as she can safely get*, available at http://www.lawandsea.net/COG/COG_Safe_Port_2as_near.html

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*actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles [340 miles from Galatz], had completed her voyage to Galatz.*²⁷⁸

The question that ordinarily arises is, what is the ambit of the port? Mere mileage in itself cannot be the test. The parties, through their regular course of dealing could have agreed and limited the range of the ports that the vessel could call if the nominated port was not available.²⁷⁹ A bulletproof reasoning came from Justice Sellers in *The Athamas*.²⁸⁰ Under the Gencon charterparty, the Owners of the *MV Athamas* entered into a voyage charter for the carriage of cement in bags from Sika to Saigon and Pnom-Pen. The charterparty in its relevant terms read: "... and being so loaded the vessel shall proceed to one safe berth or place Saigon, always afloat where the vessel is to discharge part cargo, such quantity to be at the sole discretion of the Master, and to be sufficient to enable the vessel thereafter to proceed safely to and to enter and discharge the balance of the cargo at one safe place, always afloat, Pnom Penh, or so near thereto as she may safely get and lie always afloat and there deliver the cargo on being paid freight."

The argument between the parties arose when the vessel was not able to proceed to Pnom Penh after she discharged part of the cargo in Saigon. The vessel was denied pilotage as she was not able to maintain necessary speed in order to sail up the river during a low-water season. The vessel would have to wait for almost five months for the water level to raise in order to proceed to the second discharge port. In lieu of such circumstances, owners discharged all cargo in Saigon. Charterers alleged that the vessel was unseaworthy and the Owners had no right to discharge the cargo in Saigon and had to wait for five months in order to proceed to the second port. Owners claimed demurrage for the time spent in Saigon.

It is important to note that Pnom Penh is a port located 250 miles away from Saigon. Saigon is in South Vietnam, Pnom Pehn is in Cambodia. Saigon lies 40 miles up the Saigon River; and Pnom Pehn about 180 miles up the river Mekong. Both rivers discharge into the South China Sea.

²⁷⁸ *Schilizzi v Derry* (1855) 4 E & B 873.

²⁷⁹ See *The Athamas* (Owners) v. Dig Vijay Cement Company Ltd. [1963] 1 Lloyd's Rep. 287.

²⁸⁰ *Id.*

On appeal, Lord Justice Sellers found that a substitute discharging place or port was within the phrase “so near thereto as she may safely get,”²⁸¹ if, inter alia, it was within a distance from the primary port which was reasonable in the light of the circumstances and of the particular adventure. It was further found that although it was a berth charterparty reaching the ambit²⁸² of Pnom Penh was immaterial and Saigon was indeed in the ambit of Pnom Penh. Distance was considered as an immaterial factor as the distance between the ports in the different parts of the world can be different and what is “near” for one region can be “remote” for another. The requirement is not a near port and not the nearest port, but the nearest safe port or place.²⁸³

Very often instead of nominating a safe port, parties may agree to a range of ports that can be accompanied by a promise to get a vessel to the discharge place as near as she may safely get. This happens when a discharge place is unknown at the time the vessel was chartered because the cargo can be sold while it is in transit. Most often, this situation occurs when the vessel is chartered to carry bulk or liquid cargos. Will owners be required to actually call the discharge port or can they discharge on the roads considering it a place where the vessel can as near as she may safely get?

The law and practice in such cases was very clearly in *Capper v. Wallace*, where L.J. Lush stated:

It cannot, we think, be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, the Master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words ‘as near thereto as she can safely get’ must receive a reasonable and not a literal application. The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are

²⁸¹ *The Athamas (Owners) v. Dig Vijay Cement Company Ltd.* [1963] 1 Lloyd's Rep. 287.

²⁸² The ambit was interpreted by Lord Campbell as a defined area of jurisdiction of a certain port authority. Such an area might well include more than “an actual harbor.”

²⁸³ *The Athamas (Owners) v. Dig Vijay Cement Company Ltd.* [1963] 1 Lloyd's Rep. 287 at 295.

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*of opinion that it would be the duty of the Master to lighten the ship and proceed to the port.*²⁸⁴

Despite the fact that the court came to this conclusion that the Master has to lighten the vessel when there is a custom of the port to do so, there were some developments to this rule. First, the owner has to determine “was it a part discharge in the ordinary acceptance of those words, or was it a discharge made solely with the view of lightening the ship.”²⁸⁵ If it was a discharge in order to enable the vessel to reach her final destination the ship will not be considered an arrived vessel and all time lost in order to perform lightening will be on the owners. Second, only if the charterparty does not expressly provide for a safe port warranty can charterers insist that the vessel lighten and proceed to the discharge port.²⁸⁶ Justice B. Pollock stated in *Nielsen & Co. v. Wait, James & Co.*:

*On behalf of the shipowner it is clear that, custom or no custom, his interests are protected by the charterparty to this extent, that his vessel is never to be placed in any position to which she may not safely get at all times of tide and always afloat; ... the word “safely” means safely as a loaded vessel; and, therefore, under any circumstances the plaintiffs would have been entitled to insist that their vessel should not be ordered to discharge at any place which would be inconsistent with their rights in this respect...*²⁸⁷

Will owners be exculpated to proceed to a port that is temporarily inaccessible? In *The Maria L.*,²⁸⁸ the vessel was chartered for a voyage from Guantas to Lisbon Hamburg range a charterparty provided in a relevant part “safe berth each port ¼ safe accessible Lisbon, Portugal to Hamburg, Germany.”²⁸⁹ The vessel was ordered to proceed for discharge to Bordeaux, but was unable to proceed because her draft exceeded a river draft. She arrived at the mouth of the river some 54 miles away from Bordeaux during one of the lowest tides of the year and had to wait a week before she could proceed upstream. The Tribunal found that for the vessel, the word “accessible” means that the vessel has to be able to enter the port in question safely and leave it

²⁸⁴ *Capper v. Wallace*, 5 Q.B.D. 166

²⁸⁵ *Nielsen & Co. v. Wait, James & Co.* [1884-1885] L.R. 14 Q.B.D. 516.

²⁸⁶ See *Hillstrom v. Gibson*, 8 Ct. Sess. Cas. 3d Series, 463.

²⁸⁷ *Nielsen & Co. v. Wait, James & Co.* [1884-1885] L.R. 14 Q.B.D. 516.

²⁸⁸ *The Maria L.*, SMA No.611, 1971 WL 224618.

²⁸⁹ *Id.*

safely, but that temporary obstructions do not make a port either unsafe or inaccessible. The Owner's case for breach of safe port warranty would have been a valid one if the vessel had not been prevented from proceeding to the respective discharging ports by tides or other predictable obstacles. The court explained further:

*As the clause reads now, it appears to be equivalent to the term "so near thereto as she may safely get". Even such a wording does not refer to temporary obstacles such as tide, which would prevent the vessel from reaching her destination for a reasonable period of time. Neap tides are considered as temporary obstacles causing a reasonable delay.*²⁹⁰

The court will not consider temporary obstructions as circumstances allowing owners to not complete their obligations under the charterparty. Courts and arbitrators will go deep into the construction of the charterparty and distinguish that the word "accessible," in conjunction with a safe port warranty, has a different meaning than a phrase "always accessible" standing alone.

3.7. Legal significance of the phrase "safely aground" in a Not Always Afloat But Safely Aground ("NAABSA") clause²⁹¹

Quiet often, the vessel will not be able to proceed safely to the port and load the cargo unless she can touch the bottom during loading and at low tides. Sailing to such ports can be a bargain, which owners can use in order to receive premium freight. The question can arise whether knowledge of the condition that a draft of the berth can be lower than the draft of the vessel can prejudice the owners' rights to claim breach of the safe port warranty as they accepted a risk of a lower draft.

²⁹⁰ Id.

²⁹¹ BIMCO NAABSA clause: "Always subject to the 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, available at https://www.bimco.org/en/Chartering/Clauses/NAABSA_Charter_Party_Wording.aspx

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The answer will depend on whether the phrase safely aground was accompanied by a safe port warranty. If the vessel was damaged and the charterparty provided for warranty of safe port and/or safe berth, owners interests will be protected if the owners are able to demonstrate that the proximate cause of damage is because the charterers ordered the vessel to a place where it was not “safely aground.”²⁹² If “safely aground” was a standalone clause, it could bring owners outside the assumption of risk and allow them to recover from the charterers if the berth turns out to be unsafe. However, in my opinion, a standard of care applied to the safely aground promise should be a due diligence standard. It stems from the BIMCO NAABSA Charterparty Clause, which obliges charterers to (always) confirm in writing to owners that they have carried out a proper investigation as to the safety of the position where the vessel will be lying aground.²⁹³ If the clause has a warranty, such confirmation would not be necessary.

A good example of is provided in *The Pass of Leny*,²⁹⁴ where the vessel was chartered for a voyage charter. A charterparty in its relevant part provided that “the ship should proceed to Boston or as near thereto as she could get (safely aground) and there load her cargo.”²⁹⁵ The vessel suffered damage in the consequence of slipping off the berth alongside the wharf in the port of Boston. The owners brought a claim against the charterers and the wharf owner. The court found that the vessel was moored at a slight angle out from the jetty. The accident was caused by the inability of the berth to hold the ship in that position. The owners of the wharf had taken all reasonable steps to make the berth safe, and that they did not know, nor should they have known, that the berth was unfit for the vessel to load her cargo while aground. In regards to the charterers, who warranted that the vessel would safely lie aground and load the cargo, the court said that they had not expressly or impliedly given any warranty as to the fitness of the berth and that the shipowners knew more about the berth than the charterers because they sent several ships to this berth and had ample opportunity of seeing and noting its character.

3.8. Legal significance of “reachable on arrival” clause

The use of a “reachable on arrival” clause most often pertains to the financial interests of the owners in insuring that a vessel is operated continuously at the time and

²⁹² Worth Knowing: NAABSA – are you covered? BIMCO newsletter, (April, 2010) available at https://www.bimco.org/en/News/2010/04/12_NAABSA.aspx

²⁹³ Bimco’s New NAABSA Charterparty Clause, Standard P&I Club, Circular to Assureds (February, 2012), available at <http://www.exclusivelyforcharterers.com/docs/2012%20002%20%20BIMCO%20new%20NAABSA%20wording.pdf>

²⁹⁴ Bulk Oil SS Co v. Boston Oil Wharves Ltd (1936) 54 Ll. L. Rep. 288.

²⁹⁵ Id at 291.

expense of charterers. It is linked with the provisions of a safe port/berth clause of charterparties. It is a well-known phrase, that essentially means that if a berth cannot be reached on arrival of the vessel, it follows that the warranty in the charterparty must be considered broken. In other words, when such a provision is included, the berth has to have two characteristics; namely it has to be safe and reachable on arrival.²⁹⁶ Can the clause bring port charterparties into quasi-berth leaving behind only the issue of safety? The main distinction between berth and port charterparties is when the Master can render notice of readiness and the vessel becomes an arrived one. In port charterparties, the vessel becomes arrived before berthing as long as she is within ports limits. Laytime commences and owners have a right to charge detention for all time waiting for the berth.²⁹⁷

The question posed above can be answered in the negative in light of recent case law. In *The Dellian Spirit*,²⁹⁸ the vessel was chartered to sail to one or two safe ports in the Black Sea, at charterers' option, and there load oil. By clause 6, the vessel was to load "... at a place or at a dock or alongside lighters reachable on her arrival, which shall be indicated by charterers ..." ²⁹⁹ On vessel's arrival to Tuapse, no berth was available, there being four other tankers already lying at the jetty. The vessel was able to berth only four days later. The shipowners contended that charterers were in breach by failing to provide a berth reachable on arrival of the vessel. The Court of Appeal ruled in favor of the owners and explained:

Clause 6 was to put the risk of waiting for a berth on to the charterers until such time as the vessel became an arrived ship, but that thereafter the risk was assumed by them...

*The clause is put in so as to protect the owner when the ship arrives off the port - when she is ready to come in to discharge - and save him from having to wait outside to his loss.*³⁰⁰

In other words, a ship does not need to be an arrived ship in the technical sense of being within the commercial area of the port, for the commencement of laytime. A

²⁹⁶ W.E. Astle, *The Safe Port or Berth Reachable on Arrival* at 61 (1986).

²⁹⁷ See *infra* §3.14.

²⁹⁸ *Shipping Developments Corp v V/O Sojuzneftexport (The Delian Spirit)* [1972] 1 Q.B. 103.

²⁹⁹ *Id* at 103.

³⁰⁰ *Id.* at 122.

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reachable on arrival clause and berth congestion will not prejudice owners' right to consider the vessel arrived when she reaches the port.

On the other hand, a reachable on arrival clause can make a berth charterparty a quasi-port charterparty. A good example is provided in *The Laura Prima*.³⁰¹ There, the House of Lords considered the meaning of the words "reachable on arrival" in the context of a charterparty on the Exxonvoy 1969 form. The vessel was chartered for a voyage from one safe berth in Libya to two safe ports in Italy. The charterparty provided, inter alia, as follows:

6. Notice of readiness. Upon arrival at customary anchorage at each port of loading the Master shall give the charterer notice that the vessel is ready to load cargo, berth or no berth, and laytime shall commence upon the expiration of 6 hours after receipt of such notice or upon the vessel's arrival in berth whichever first occurs. However, where delay is caused to vessel getting into berth and after giving notice of readiness for any reason over which charterers has no control, such delay shall not count as used laytime.

and

*"9. Safe berthing – shifting. The vessel shall load any safe place or wharf, or alongside vessels reachable on her arrival, which shall be designated and procured by the Charterer"*³⁰²

The vessel arrived at her loading place in Libya and tendered notice of readiness but was unable to proceed to a loading berth because all possible berths were occupied by other vessels. This remained the situation for nine days. Charterers and owners were in dispute over the lost time. In delivering his judgment, Lord Brandon said:

"Reachable on arrival" is a well-known phrase and means precisely what it says. If a berth cannot be reached on arrival, the warranty is broken unless there is some relevant protecting exception ... The berth is required to have two characteristics: it has

³⁰¹ *Nereide SpA di Navigazione v Bulk Oil International Ltd (The Laura Prima)* [1982] 1 Ll Rep 1.

³⁰² *Id.*

*to be safe and it has also to be reachable on arrival.*³⁰³

Clause 6 acted as an exception to clause 9 providing that, where delay was caused to the vessel getting into berth after giving notice of readiness, for any reason outside control of the charterers, such delay shall not count as being used for laytime.

The principle established in *The Laura Prima*, was later applied and affirmed in *The Sea Queen*,³⁰⁴ where the berth was not reachable due to unavailability of tugs and in *The Fjordaas*,³⁰⁵ where the berth was unavailable due to bad weather. The principle applies when a berth is not reachable on arrival for any reason and not just congestion.³⁰⁶

3.9. Express warranty of the safety of both port and berth

As easy as it might sound initially, an express warranty of both berth and port can create confusion. Arguments can arise about whether there is any legal significance in positioning a name of the port before or after naming a safe berth.

Although there is a rare argument between the parties about the real meaning of the clause, as it is an express promise of the charterers to warranty safety of both a port and a berth, there can be an argument whether a charterparty should be treated as a berth or a port charterparty. In *The Finix*,³⁰⁷ in the course of judgment, Donaldson J put the matter as follows:

There is a real of uncertainty where the charterparty provides that discharge shall take place at, for example, (a) one safe berth London' or (b) 'London, one safe berth.' The test is undoubtedly whether on the true construction of the charterparty, the destination is London or the berth. My own view is that in case (a) it is the berth and in case (b) it is London.

³⁰³ Id.

³⁰⁴ Palm Shipping Inc. v. Kuwait Petroleum Corporation (*The Sea Queen*) [1988] 1 Lloyd's Rep. 500.

³⁰⁵ K/S Arnt J Moerland v Kuwait Petroleum Corporation (*The Fjordaas*) [1988] 1 Lloyd's Rep 336.

³⁰⁶ See Notice of Readiness - Voyage Charter, Steamship Mutual P&I Newsletter (June 1999) available at http://www.simsl.com/Publications/Articles/Articles/Notice_Readiness_1.asp

³⁰⁷ Nea Tyhi Maritime Co of Piraeus v Compagnie Graniere SA of Zurich (*The Finix*) 1978 WL 58469.

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The Finix set a principle that where the destination is a named berth or there is an express right to nominate a berth, the charter is a berth charterparty,³⁰⁸ unless any other provisions of the charterparty do not override the opening term. Arrival at the specified destination is the point both geographically and in time when the voyage stage ends and the loading/discharge operations begin. Identification of the “specified destination” – whether “berth” or “port” - impacts the incidence of loss occasioned by delay in loading or discharging, when the delay is due to the place at which the vessel is obliged by the terms of the charterparty to load or discharge her cargo.³⁰⁹

This principle was laid as a foundation for a recent decision in *The Merida*,³¹⁰ where the vessel was chartered for a voyage and a recap stated in its relevant part “one good and safe chrts’ berth terminal 4 ... Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao.”³¹¹ The vessel arrived at Xingang and tendered a notice of readiness. The vessel then anchored and spent some 20 days awaiting a berth. Owners argued that the charterparty was a port charterparty, that they were entitled to tender notice of readiness on arrival at Xingang and that the delay thereafter was for charterers account.³¹² The court took the opposite view and ruled that “the opening term expressed the contractual destination, germane to the allocation of the risk of delay”³¹³ and the charterparty was a berth charterparty, thus the owners claim for demurrage due to waiting for berth failed.

Although the case did not concern a safe berth warranty, the determination of whether a charterparty is a port or a berth charterparty can influence the determination of what the parties actually intended when they concluded the contract. If the intention of the parties was to enter into a charterparty having only a safe berth warranty, any damage that occurred on approaches or in the port before the vessel actually berths would be on owners’ account.

3.10. Inconsistency of terms in the charterparties

Occasionally parties will draft a charterparty that has inconsistencies in its terms. For example, various clauses of the charterparty may have a safe port or safe

³⁰⁸ Id.

³⁰⁹ Schoefield, Laytime and demurrage, at para 3.3. (5th ed., 2005).

³¹⁰ *Novologistics Sarl v Five Ocean Corp (The Merida)* [2009] 2 C.L.C. 896.

³¹¹ Id.

³¹² Id.

³¹³ Id. at para 24.

berth warranty, but not both. The question is, whether such an inconsistency can lead to a creation of a port charterparty?

Identification of the specified destination, whether berth or port, impacts the incidence of loss occasioned by delay in loading or discharging, when the delay is due to the place at which the vessel is obliged by the terms of the charterparty to load or discharge her cargo being occupied by other shipping.³¹⁴ In the worst case, the vessel can be damaged and depending on the construction of the charterparty either the owners or the charterers will bear the expenses. A good example of how court was dealing with inconsistency of the charterparty could be found in *The Merida*. The *MV Merida* was chartered for a voyage and the charterparty included the following terms: “one good and safe chrts’ berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao,” clause 2.1 read differently “The vessel to load at one good and safe port/one good and safe charterers’ berths Xingang and to discharge at one good and safe port/one good and safe charterers’ berth Cadiz and at one good and safe port/one good and safe charterers’ berth Bilbao.” The court explained its position:

If ... cl. 2[1] is viewed as introducing a safe port/s warranty and reiterating the safe berth/s warranty, then there is no inconsistency between the opening term and cl. 2[1]. The opening term expresses the contractual destination, germane to the allocation of the risk of delay; cl. 2[1] focuses on a different matter (the safety of the ports and berths) and imposes additional obligations on Charterers. It is true that the opening term would have sufficed to impose a safe berth/s obligation on Charterers, so that the repetition of this obligation in cl. 2[1] was, strictly, unnecessary. But reiteration of that warranty at least avoids argument and gives rise, at worst, to surplusage. For my part, this is the construction of cl. 2[1] which I prefer in this somewhat individual charterparty. It is a construction which is not free from difficulties; but any such difficulties are outweighed by those which are, with respect, attendant upon the construction contended for by Owners and accepted by the arbitrators. If right so far, then, as suggested by the

³¹⁴ *Novologistics Sarl v. Five Ocean Corporation the “Merida”* [2009] EWHC 3046 (Comm).

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*opening term, the charterparty remains a berth charterparty.*³¹⁵

The court made it clear that if there is an inconsistency in the terms of the charterparty, that it will be interpreted broadly. Mentioning of a safe port warranty in any part of the charterparty would automatically trigger a warranty, regardless of the fact that the opening terms did not have it. In terms of determining whether it is a berth or a port charterparty, the courts will review the charterparty as a whole in order to see whether all of the clauses are consistent with one another.

3.11. Express warranty of safety of berth only

An express warranty of the port is mostly relevant for time charterparties. Although its meaning for the purpose of interpreting charterparties was given in *The Evia*³¹⁶, only five years later the court in *The APJ Priti*³¹⁷ clearly distinguished it from safety of the berth. The question becomes, can a safe berth warranty be applicable to the port? In relation to specified ports, the safe port promise exists only when it is expressly made; in other words, when there is an express promise in the charterparty to that effect.³¹⁸

The *MV APJ Priti* was chartered for a voyage to carry a cargo of urea from Damman to ½ safe berths at each of Bandar Abbas, Bandar Bunshire, and Bandar Khomeini in the charterer's option. There was no express safe port warranty. The vessel was hit by a missile while in route to Bandar Khomeini, the port indicated by charterers, but before charterers had directed it to any berth. The issue was whether there was a breach of the express safe berth warranty if the approach voyage was prospectively unsafe. It was held that there was no such breach. There was no basis for implying a safe port warranty and, until the vessel arrived at the indicated port of discharge and a berth was nominated, the express safe berth warranty was not engaged.³¹⁹

³¹⁵ *Id.*

³¹⁶ *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* [1983] 1 A.C. 736.

³¹⁷ *Atkins International HA of Vaduz v Islamic Republic of Iran Shipping Lines (The APJ Priti)* 1987 WL 493320.

³¹⁸ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 600, 2006.

³¹⁹ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497 at paragraph 321.

That warranty related to the characteristics of the nominated berth and not to the characteristics of the approach route to the port where the berth was located. Justice Bingham L.J. qualified the effect of the safe berth warranty in the following passage:

The charterers' promise should, in my view, be understood as limited to a promise that the berth or berths nominated would be prospectively safe from risks not affecting the port as a whole or all the berths in it. To hold otherwise is to erode what I think is intended to be a meaningful distinction between berths and ports. I cannot help feeling that the promise is primarily directed to ensuring that the berth or berths nominated (including the passages there and back within the port) should be free of marine hazards foreseeably dangerous to the vessel. But the Courts have always refused to distinguish between physical and political unsafety, and certain forms of political unsafety may have obvious physical consequences. It is, moreover, possible to envisage cases in which some berths in a port might be politically unsafe and others not. Counsel suggested the helpful example of Beirut. I am, therefore, satisfied that the charterers' promise must be understood as applying to physical and political unsafety, but I accept the charterers' contention that the unsafety referred to must be particular to the berth or berths nominated is prospectively unsafe, if every berth or the port as a whole is same extent. Where all the berths or the port as a whole are prospectively unsafe, the owners should not have agreed the discharge port in the first place or the Master should have taken advantage of the clauses entitling him to discontinue the voyage.³²⁰

A detailed application of this case can be seen in *Canadian Forest Navigation Co Ltd v Minerals Transportation Ltd*,³²¹ where disputes arose over a voyage charter of the *MV Phoenix Anne*, which contained a safe berth warranty, namely “one safe berth Toledo,” but had no express warranty as to the safety of the discharge port. The berth nominated by the charterers had insufficient water depth and the vessel was not able to

³²⁰ *Atkins International HA of Vaduz v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep. 37, at 42.

³²¹ *Canadian Forest Navigation Co Ltd v Minerals Transportation Ltd* 2001 WL 1135100.

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proceed to it. As a result, the vessel had to be lightened and consequently lost time. Charterers argued that there was no breach of the safe berth warranty because the whole port was unsafe as a result of unusual weather conditions, i.e. there was insufficient water. The court agreed with the charterers' submissions.

This decision defined the safe berth warranty more clearly: the safety of the port will, under no circumstances, be implied if the charterparty had only warranted the safety of the berth.

3.12. Express warranty of safety of the port only

It is unusual to see an express safe port warranty without an accompanying safe berth warranty. The primary reason for this mutual relationship is that the courts will often imply a safe berth warranty if a safe port warranty exists. In the absence of an express promise, the safe berth warranty can be implied on considerations of business efficacy.³²² In voyage charterparties, an implied promise does not normally exist in connection with the ports specified in the charterparty. In those circumstances, it is for the owner, before entering into a charterparty, to determine that the specified port is safe for the vessel to use.³²³ Absent express limiting language in the charterparty, an express promise to the safety of the port would imply an absolute obligation on the charterer to ensure that the port is safe for the vessel.

The principal of safe port was restated in *The Greek Fighter*.³²⁴ The tanker *Green Fighter* was time chartered in December 2001. The charterparty was in the form of a recap that provided "3 months time charter for trading always afloat within IWL via safe ports/anchorages AG/Gulf of Oman area excl. Iran/Iraq with lawful cargos of oil/crude oil."³²⁵ Later on, it was agreed that the vessel would be used as floating storage in the Khorfakkan area. The Owners brought a claim against the charterers for breach of safe port warranty, or alternatively, for an indemnity in respect to their losses after the vessel and its cargo were detained by the Coastguard of the United Arab Emirates at Khorfakkan and, having been under detention, the vessel was then confiscated by the UAE authorities and sold at public auction on 12 March 2003. The vessel was arrested

³²² D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 600, 2006.

³²³ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL) at 397.

³²⁴ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497.

³²⁵ *Id.*

because she was loaded with oil from Iraq, in direct contravention of the United Nations sanctions then applicable to Iraq.

Although the court disagreed with charterers proposition that the safe berth obligation is not breached where there are general features of a port that are not confined to any particular berth, and by analogy that a safe port obligation is not broken where all the ports in the country are affected by the same characteristics, the court explained that when a matter concerns nomination of a safe port or anchorage, the construction of the warranty is unique to that particular port.

In a case where both charterers and owners are aware of the particular characteristics of unsafety of the berths at the agreed port at the time when the charter is entered into, the warranty may well have to be construed so as not to cover those characteristics, there can be no reason why, if the characteristic is known only to the charterers or it eventuates only the charter has been entered into and is extant when a berth is nominated, a safe berth warranty of this kind should not protect the Owners.³²⁶

Because the arrest of the vessel occurred outside the berth at her anchorage, the safe berth warranty could not be implied to the safe port warranty. The court considered that the place of the incident that led to the damage or arrest of the vessel has to be considered in determining the applicable warranty. When the vessel was arrested in the port, which was safe in all regards, the safe berth warranty was not breached.

3.13. Does the term “good” imply any warranty?

Many charterparties would still be construed in a way where safety of the port or berth would be accompanied with a promise to call a good port. As I discussed earlier, the use of the term “good” had historical roots when the charterers and insurance companies tried to distinguish ports from merely places where the cargo could be loaded. With the arrival of the Industrial Revolution, the geographical meaning of the port and dangers that the vessel can encounter there expanded and included such categories as political, administrative, and even ecological and informational. The use of the term “good” eventually encompassed all artificial elements made for the convenience of

³²⁶ Id. at §323.

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mariners and merchants, as well as other facilities for safeguarding the goods and supplying the ships.³²⁷

In cases from the nineteenth century, only a port that had facilities that assisted in loading or berthing the vessel would be considered a good port. Modern charterers may imply presence of adequate port management system, proper maintenance of aids to navigation, adequate facilities for the reception of residues and oily mixtures, sewage and garbage. Although today, the use of the term “good” in the context of the safe port warranty has no significance.

Lord Roskill addressed this issue in *The Evia* stating:

My Lords, I propose to consider first the question which arise on clause 2. It will be convenient to quote against those few words in that clause which are relevant – ‘The vessel to be employed ... between good and safe ports...’

Learned counsel were unable to offer any suggestion what in this context the word “good” added to the word “safe”. Your lordship are, I think, all of a like mind. So I will consider only the eight words “the vessel to be employed... between... safe ports...” The argument for the appellants is simple. The relevant restriction during her employment is to safe ports...³²⁸

United States maritime courts and arbitrators took the same approach that the inclusion of the term “good” to the “safe port” wording adds nothing to the charterer’s obligation to trade the vessel between safe ports.³²⁹ Although, the dissenting opinion of Manfred Arnold in *Trade Sol Shipping Limited v. Sea-Land Industries Bermuda Limited* is worth noticing as it has merits in evaluating the parties’ intent:

Clearly, the word good has a meaning and the parties intended it to have one when they added it... If one were to conclude that ‘good’ is a modifier for

³²⁷ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 195 (1991).

³²⁸ *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 A.C. 736, at 756.

³²⁹ *Trade Sol Shipping Limited v. Sea-Land Industries Bermuda Limited*, 2001 WL 36175165 (S.M.A.A.S.).

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discharge, or the problem of the likely availability of any particular dock or berth at any particular time, shipowners and charterers are inclined to lean upon well-trying forms of charterers to generally cover the risks of delay likely to be encountered and allocate their responsibilities and liabilities accordingly.³³²

In a voyage charterparty, the charterer pays freight to the owner. This is a payment, not only for the voyage itself, but also for the agreed time in which to load and discharge his cargo. If a charterer takes longer to load and discharge than the laytime provided for in the charterparty, then he is usually liable to pay damages by way of demurrage. The rate of demurrage is normally fixed on a daily basis and will be payable per day or pro rata for any part of a day.³³³

The determination of whether a charterparty is a berth or a port charterparty can simply be dependent on the order of the words in the relevant clause, or the presence or omission of words. The charterparty will be considered a port charterparty when it only names a port, for example “one safe port Hamburg,” or “Hamburg, one safe berth.”³³⁴ In *The Kyzikos*³³⁵ Lord Brandon of Oakbrook gave the following description of both types of voyage charterparty:

The characteristics of a port charterparty are these. First, the contractual destination of the chartered ship is a named port. Secondly, the ship, in order to qualify as having arrived at the port, and therefore entitled to give notice of readiness to discharge, must satisfy two conditions. The first condition is that, if she cannot immediately proceed to a berth, she has reached a position within the port where waiting ships usually lie. The second condition is that she is at the immediate and effective disposition of the charterers. By contrast, the characteristics of a berth charterparty are these. First, the contractual destination of the chartered ship is a berth designated by the charterers within a named port. Secondly, the ship, in order to qualify as an arrived ship, and therefore entitled to give

³³² W.E. Astle, *The Safe Port or Berth reachable on arrival*, at 81 (1986).

³³³ Berth or port charterparty? The Swedish Club newsletter (2002) available at www.swedishclub.com/.../Extract%20from%20TSCL%202002-2.pdf

³³⁴ See supra § 3.9.

³³⁵ *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd (The Kyzikos)* [1989] AC 1264.

*notice of readiness to discharge, must (unless the charterparty otherwise provides) have reached the berth and be ready to begin discharging.*³³⁶

The charterparty in *The Finix*³³⁷ provided that the vessel “shall proceed for orders to discharge at one or two safe berth, one safe port in Korea...” Upon arrival of the vessel at Nampo there were no berth available, she anchored within the commercial area of the port, and owners tendered a notice of readiness. She was able to proceed to her berth only some twenty-eight days later and charterers argued that the vessel was not an arrived ship and owners were not entitled to demurrage. Justice Donaldson determined that the vessel was not an arrived ship when she waited on the roads and continued: “Where destination is a named berth or there is an express right to nominate a berth, the charter is a berth charter party, i.e. the ship is not an “arrived ship” before she reaches the berth.”

Determination of the vessel’s arrival port is straightforward in berth charterparties. What kind of difficulties can arise in establishing the test for an “arrived ship” in the case of a port charterparty? The difficulties arise because a larger area is involved. Additionally, the difficulty is partly due to the variety of definitions of a port, dependent on whether it is considered from a geographical, administrative and commercial standpoint.³³⁸

Throughout the years, the courts have expanded the area where the vessel can be considered as an “arrived ship,” from merely the port itself to the pilot station and or areas way outside the limits.

In *The President Brand*,³³⁹ owners entered into a port charterparty for the shipment of crude oil. The charterparty provided that charterers “have 120 running hours for loading and discharging ‘at a place or at a dock or alongside lighters reachable on her arrival’ and the laydays were to commence from the time the vessel was ready to discharge, the captain giving six hours’ notice to the charterers’ agents, ‘berth or no berth’; the owners also undertook a maximum draft. On arrival at the port of discharge, the draft was within the prescribed limit, but the vessel was unable to cross the bar for 90 hours, and anchored at a pilot station outside the port, her Master cabling readiness to discharge. Eventually she crossed the bar, anchored to wait for a berth to become free

³³⁶ Id. at 1273.

³³⁷ *Nea Tyhi Maritime Co of Piraeus v Compagnie Graniere SA of Zurich (The Finix)* [1978] 1 Lloyd's Rep. 16.

³³⁸ See Wilson J.F., *The Risk of Time Lost Waiting for a Berth under a Charterparty*, at 6 (1977).

³³⁹ *Inca Co Naviera SA v Mofinol (The President Brand)* [1967] 2 Lloyd's Rep. 338.

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and her Master again gave notice of her readiness; where after she was able to berth and discharge.”³⁴⁰ The argument arose whether the first notice of readiness was valid.

The court construed the charterparty and considered the vessel to be an “arrived” one when she reported at the pilot station, and the charterers’ obligation was to nominate a berth which the vessel could reach on her arrival; loss of time due to the vessel’s inability to cross the bar fell on the charterers, and they were liable inasmuch as a discharging berth was not reachable at a time when the vessel was held up at the bar; accordingly the charterers were liable for loss of time from arrival at the pilot station until the second notice of readiness was given.³⁴¹

The House of Lords in *The Joanna Oldendorff* took a similar position,³⁴² where the vessel upon arrival on the roads to Liverpool had to wait at least 17 miles from the dock area for the berth to open. The court ruled in favor of the owners explaining that before a vessel could be said to have arrived at the port, she must, if she could not proceed immediately to a berth, have reached a position within the port where she was at the immediate and effective disposition of the charterer. If the vessel would be waiting at some other place in the port, it would be for the shipowners to prove that she was fully at the disposition of the charterers as she would have been if in the vicinity of the berth for loading or discharge.³⁴³ In more recent cases, the courts expanded the waiting area, by allowing the area to be an area located a couple miles outside the limits of the port itself. In *The Maratha Envoy*,³⁴⁴ charterers nominated one port on the Weser, but the vessel had to wait at the Weser lightship due to congestion up the river. The court considered the vessel to be an arrived ship because all the ports on the Weser were riverside ports and when they were congested, all vessels had to wait far down the estuary since there were no places on the river where they could anchor. The court reasoned that demanding that the vessel wait at the berth would have a ridiculous result of converting a port charter into the berth charter. The vessel the size of *The Maratha Envoy* would block river traffic and therefore had to wait outside port limits. The vessel should be treated as arrived ship even though she was outside the strict port limits, provided that she reached

³⁴⁰ *Inca Co Naviera SA v Mofinol (The President Brand)* 1967 WL 23085.

³⁴¹ *Id.*

³⁴² *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1974] A.C. 479.

³⁴³ *Id.*

³⁴⁴ *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1978] A.C. 1.

the usual waiting place for the port and was effectively at the disposition of the charterer.³⁴⁵

Recently the courts took a split position of whether a vessel can be considered as an arrived one in a situation where there were two concurrent causes preventing a vessel from berthing, one of which was excepted from laytime, the other not. In *The Hang Ta*,³⁴⁶ the vessel arrived at the discharge port of Amsterdam to discharge coal, but the berth was occupied so that the vessel could not berth. Additionally, tidal conditions were such that the vessel could not have reached the berth in any event. The Master tendered NOR at the usual waiting place. The CIF contract in its relevant part provided that, “the Buyer shall provide a safe berth for the Carrying Vessel at the Discharge Port” and “time waiting for first available tide after arrival was not to count as laytime or time on demurrage.”³⁴⁷

Burton J. ruled that “notwithstanding the presence of tidal conditions also preventing access to the berth, the unavailability of that berth entitled the Master of the *Hang Ta* to give notice of readiness,”³⁴⁸ as it was the responsibility of the buyer to provide a berth.

By contrast, the issue in *Carboex SA v Louis Dreyfus Commodities Suisse SA*³⁴⁹ concerned contracts of affreightment on the Amwelsh form for four vessels to carry coal from Indonesia to Spain. The contracts contained provisions common to berth charterparties. At the time when all four vessels tendered NOR at the discharge port they were delayed in berthing due to congestion caused by a Spanish haulage strike. However, by the time each vessel berthed, the strike was over. Clause 9 of the contracts of affreightment provided that “in case of strikes... beyond the control of the charterers which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage.” Clause 40 provided “if the berth is not available when vessel tenders Notice of Readiness, but provided vessel/owners not at fault in relation thereto, then laytime shall commence 12 hours after first permissible tide.”³⁵⁰

Charterers relied on Clause 9 and stated that the discharge was delayed due to the strikes. Owners argued that, because of Clause 40, the risk of delay caused by

³⁴⁵ See Wilson J.F., *The Risk of Time Lost Waiting for a Berth under a Charterparty*, at 9 (1977).

³⁴⁶ *Suek AG v Glencore International AG* [2011] EWHC 1361 (Comm).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Carboex SA v Louis Dreyfus Commodities Suisse SA* [2011] EWHC 1165 (Comm).

³⁵⁰ *Id.*

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congestion was on the charterers, and that it was charterers only suffered a delay once the vessel had berthed because of a strike in progress that was excluded by Clause 9. Because the strike was over when each vessel berthed, time waiting for berth counted in full.

Field J. held in favor of charterers that the strike exception clause applied. The meaning of the exception clause had to be determined without taking account the “whether in berth or not” provision.³⁵¹ After a thorough review of the available case law, he concluded that the clause was broad enough to cover delay in discharging caused by congestion due to the after effects of a strike that had ended.³⁵²

Unfortunately, when a berth charterparty is overloaded with various conditions, such as when notice of readiness can be tendered or when laytime begins, especially if they contradict each other, the interpretation lies in the hands of the tribunal. It will determine the parties’ intent based solely on the construction of the charterparty. Sometimes the result can be unpredictable. The only advice that I can give to owners and charterers is to describe with particularity each event that can prevent owners from tendering a valid notice of readiness.

³⁵¹Bentleys’ Bulletin (July 2011) available at

<http://bentleys.co.uk/bentleysBulletin.html#interestdamages>.

³⁵² Jo Cullis, Strikes, Congestion and Delays – Whose Risk? (August 2011) available at <http://www.simsl.com/Publications/Articles/Carboex0811.htm>.

4. Attributes of the safety of a port.

It is a well-established principle that a berth or a port may be unsafe at times and that the litmus test for safety of a given berth depends upon the circumstances in each individual case.³⁵³

Most ports and berths, and the approaches to them, are exposed to perils of some sort, but the perils and the dangers associated with them, may generally be overcome by professional ship handling, skillful navigation, and good seamanship. A port may be considered unsafe if more than the expert's skills, expected and required from an experienced and competent ship Master, are necessary to avoid the danger of the port.³⁵⁴

The question of whether a port is safe is mainly a matter of common sense. Safety must be decided by reference to the particular vessel in question.³⁵⁵ Arbitrators make the majority of legal decisions as to whether or not a port is safe; only rarely does the question come before the courts. The effect of this has been to allow arbitrators considerable flexibility in determining the question, and the definition of a "safe port" is not fixed, but depends on the characteristics of the ship and other facts of the case. A port that is deemed unsafe for a particular vessel may well be held to be safe for a vessel with different characteristics entering the port at the same time.

Most accidents occur because the physical unsafety of the port and could have been avoided at the stage when the vessel was chartered or by giving particular voyage orders. However, in situations where the accident has already occurred, the tribunal will look at how often the same condition repeats over the years or whether it is a single occurrence and whether it could have been avoided by good navigation and seamanship.

In general, the safe port and berth obligation will apply to both voyage and time charterparties. However, it is submitted that the time charterer should have a greater responsibility than the voyage charterer for ensuring that he orders the vessel to safe

³⁵³ The Aurora, SMA No. 3609, 2000 WL 35733856.

³⁵⁴ M.T. PRIMO, SMA No.3335, 1997.

³⁵⁵ Safe port and safe berth, available at

http://www.maritimeadvocate.com/security/safe_port_and_safe_berth.htm

ports and berths.³⁵⁶ Safety of the port can be based on various conditions both natural and artificial. Mariners and law practitioners have developed those various conditions. In the last decades, those conditions became more sophisticated, in the same way as the vessels, in order to ensure that minimum dangers surround any call of the vessel. The incidents that lead to the declaration that a port is unsafe for the purposes of a particular vessel may be divided into the following categories: physical, political, administrative, and ecological.

4.1. Physical safety

By far the most numerous of the ship owners' cries as to the unsuitability of the ports fall within this category; the result of ships suffering harshly from the physical phenomena of the ports to which they have been directed.³⁵⁷

Physical safety pertains to the conditions of the port in its geographical and meteorological sense. It will include the access of the sea, landscape of the sea bed, width of the navigable canal, water levels, tides, and the various weather conditions of the port and the ports approaches, such as winds, waves, hurricanes, ice, etc.

A physically safe port must provide a shelter from natural hazards and is a port within its historic meaning, i.e. a harbor. Most natural hazards are straightforward and when a vessel faces them, it will inevitably lead to damage or unreasonable delay. The physical safety of the port provides the ship owner with his first round of ammunition in the running fight with those charterers who will nominate ports that are neither convenient nor safe for use by the vessel.³⁵⁸ Natural conditions have existed throughout the history of commercial shipping industry. However, most of the case law that describes one or another danger, which the vessel might face, dates back to the nineteenth century. The body of case law has created a solid *stare decisis* that can be only overcome through prospective safety approach. When damage to the vessel is caused by one of the physical conditions, the condition itself will not be in dispute because the cause of damage stems from it. The court can use cases covering similar occurrence as a stencil. The tribunal has to deal only with the burden of liability and decide upon it.³⁵⁹

³⁵⁶ See supra §2.4.

³⁵⁷ F.J.J. Cadwallader. An Englishman's Safe Port, 8 San Diego L. Rev. 639 (1971).

³⁵⁸ Id.

³⁵⁹ See The MV Naiad, SMA No.1177, 1977 WL 372763.

4. ATTRIBUTES OF THE SAFETY OF A PORT

In the next chapters, I will discuss each of the natural events that could lead to damage of the vessel. I tried to use only key cases that described surrounding circumstances in the most narrative way. There are certainly more cases which were reviewed by courts.

4.1.1. Ice

Most modern charterparties will contain an ice clause³⁶⁰ together with safe port/berth warranty. Out of the many dangers a vessel may face, the possibility of ice is one that charterers are most often concerned with because they would like the vessel to trade to any destination year round. Ice can, in some instances, keep some ports frozen throughout the entirety of the winter season, thereby jeopardizing one of the charterers main goals, namely, to utilize the vessel throughout the year.

The key question is whether the presence of ice automatically makes the port unsafe. The fact that a port may customarily be affected by ice does not equate that the port is unsafe, particularly when the port is usually safe during the winter with the help of ice breakers.³⁶¹ Several additional conditions must contribute to make an ice bound port unsafe. These conditions include the duration of the period when the port is inaccessible due to icing; the location of the port; the route that is required to reach the port; the skills of the Master and the characteristics of the vessel. Consequently, the presence of ice will not automatically make a port an unsafe one.

In *Limeric Steamship Company Ltd. v. W.H. Scott and Company, Ltd.*,³⁶² charterers ordered the *MV Innisboffin* to sail to Abo, a port in Finland which was naturally icebound in winter, but was kept open all the year by means of icebreakers employed for that purpose by the government of Finland. The court decided that the port of Abo was a safe port as there was an icebreaker service. Judge Devlin in *The Sussex Oak* applying the aforementioned case said:

³⁶⁰ Most often parties use BIMCO General Ice clause for Voyage Charterparties. For the cases mentioned below an older wording was incorporated in the charterparties: “the vessel not to be ordered to nor bound to enter any ice-bound place or any place where lights, lightships, marks and buoys are or are likely to be withdrawn by reason of ice on the vessel’s arrival or where there is risk that ordinarily the vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The vessel not to be obliged to force ice. If on account of ice the Master considers it dangerous to remain at the loading or discharging place for fear of the vessel being frozen in and/or damaged, he has liberty to sail to a convenient open place and await the charterers fresh instructions.”

³⁶¹ See *STX Pan Ocean Co Ltd (formerly Pan Ocean Shipping Co Ltd) v Ugland Bulk Transport AS (The Levanian)* 2007 WL 1623170.

³⁶² *Limeric Steamship Company Ltd. v. W.H. Scott and Company, Ltd.* [1921] 2 K.B. 613.

*Even if ice dangers on the voyage can be taken into account on the actual facts found there is no evidence on which the port can properly be held to have been unsafe. As far as the weather may concern a decision whether port is safe or unsafe has to be made at the time the vessel reaches its approaches.*³⁶³

The decision also made a distinction between an entry to the port and the route that should be taken. When the vessel encountered ice some 200 miles away from the port, it would not render the port to be unsafe. The safety of the port can only be questioned when the entry of the port is inaccessible by reasons of ice. The words in the charterparty “the vessel shall not be obliged to force ice” form a distinct and separate stipulation of the charter and mean that the captain, if ordered to force ice, may refuse. If he refuses, he does not make the shipowner liable for the breach of the charter or prejudice their right to a monthly hire for the use of their ship; if he complies with the orders he does so as the servant of the owners and not merely because it is the order of the charterers. Possession of the steamer remains in the owners and prima facie if the hull is injured the loss falls upon them.³⁶⁴

The case should be reviewed in light of *Johnson v. Saxon Queen Steamship*³⁶⁵ where there was an icebreaker service and the Master and the pilots knew of the risk that *The Sussex Oak* might have been damaged by ice. Thus, when the Master in *The Sussex Oak* made a decision to proceed up the Elbe River, regardless of the fact that it was covered with ice, his decision was considered by the court to be reasonable. Once the vessel encountered strong ice the Master had no opportunity to exercise his discretion and sail away.³⁶⁶ The court held that the safety or unsafety of a port must be assessed with regard to the actual vessel which has been chartered to use the port.³⁶⁷ With an ice situation that can advance, the courts tend to decide the case each time independently, taking different considerations into account and all of the details pertaining to each voyage. The question whether or not a port is safe is in each case one of fact and degree.³⁶⁸ One of the determining factors in deciding whether the port was dangerous is the comparison of the duration of the charterparty and the shortness of voyage. The

³⁶³ See *G.W. Grace & Co. Ltd v General Steam Navigation Co. Ltd.* [1950] 2 K.B. 383 at 387.

³⁶⁴ *Id.*

³⁶⁵ *Johnson v. Saxon Queen Steamship*, 108 L.T. 564.

³⁶⁶ *Knutsford (SS) Ltd v Tillmanns & Co (The Sussex Oak)* [1908] AC 406.

³⁶⁷ *In Johnston Brothers v Saxon Queen Steamship Company* (1913) 108 L.T. 564.

³⁶⁸ *Bornholm v. Exporthleb Moscow*, (1937) 58 Ll. L. R. 59.

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principle was established in *SS Knutsford Ltd v Tillmanns & Co*³⁶⁹ where the vessel encountered ice conditions upon arriving on the roads of Vladivostok, a discharge port, and after waiting for three days sailed away to Nagasaki as a refuge port and discharged cargo there. The tribunal held that

upon the true construction of the bills of lading 'inaccessible' and 'unsafe' must be read reasonably and with a view to all the circumstances; ... and that as a matter of fact the Master was not justified under all the circumstances in this case in failing to deliver the goods at the port for which they were shipped merely because that port was at the moment of their arrival inaccessible on account of ice for three days only.

*...The Master when he gave up the attempt to enter Vladivostok for Japan and there delivered his cargo was acting in the interests of the shipowners so as to get rid of the burden of that cargo, and not in the interests of the charterers. He did not wait the time, which a person acting in the interests of the charterers would have waited, near the mouth of the river to see whether the ice did or did not pass away. If he has done so for a reasonable time none of this litigation would have arisen.*³⁷⁰

If the duration that the vessel might encounter danger is long enough to frustrate the entire commercial purpose of the voyage, the owners have a right to reject calling an ice bound port. It is clearly not sufficient that the access to the port is obstructed for a brief period. The vessel must wait for a reasonable period to ascertain whether the obstruction will clear, unless it is obvious that this will not occur, but, it is submitted, it is not necessary for the delay to be such as to frustrate the commercial purpose of the adventure.³⁷¹ However, in a situation when the Master obeyed the order and proceeded up the river in the conditions that were ordinary and did not lead him as a

³⁶⁹ *SS Knutsford Ltd v Tillmanns & Co*, [1908] A.C. 406 (HL)

³⁷⁰ *Id.*

³⁷¹ J. Cooke, *Voyage Charterers*, at 707 (3-rd Edition, 2007).

reasonable man to believe that they would worsen in such a short period would not amount to *novus actus interveniens*.³⁷²

It seems that most of the arbitrators and courts come to a consensus that navigation through rivers covered with ice will automatically bring them to “waters traversed in reaching or departing from port”³⁷³ even if the distance to the load port can be more than significant. The arbitrators considered that the waters 225 miles downriver from Montreal could be considered as ones covered by safe port warranty. They ruled in favor of the owners and explained their reasoning:

*Whether it be the Amazon or Mississippi or St. Lawrence Rivers, all are direct extensions of the ports they serve at their heads or at any intermediate point insofar as accessibility to the legal or geographical limits of their respective ports are concerned. We believe that indifference to the approach waters, if they were divorced from the port limits per se, would make a hollow mockery of the safe port warranty sort of in the vein of “it’s a safe place if you can overcome the obstacles to get there or get out”. We adhere to the principle promulgated by the court in *The Eastern City*, (1958) 2 Lloyds Rep 127 which is widely accepted as a test of a safe port, and in our opinion applies to approaches thereto as well.³⁷⁴*

Although modern decisions involving damage of the vessel by ice are predictable, there is a contradictory decision in *Pringle v. Mollett*³⁷⁵ dated back to the 19th century. There, a ship was detained by ice after the loading was completed, and it was held that the charterer was not liable for delay and nominating an unsafe port. Although the case is still considered valid case law, in my opinion it has to be reviewed in light of *The Eastern City*³⁷⁶ principle that a ship should be able to reach, use, and return from the port. In modern circumstances, liability of the owners arises only when the charterparty was silent to the safety of the port and the berth and the decision would be in favor of the owners.

³⁷² *Knutsford (SS) Ltd v Tillmanns & Co (The Sussex Oak)* [1908] AC 406.

³⁷³ *M/V TROPICAL VENEER*, 1977 WL 372760 (S.M.A.A.S).

³⁷⁴ *Id.*

³⁷⁵ *Pringle v. Mollett*, 6 M. & W. 80 (1840).

³⁷⁶ *Leeds Shipping Co v Societe Francaise Bunge SA (The Eastern City)* [1957] 2 Lloyd's Rep. 153.

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Many standard forms of charterparties in order to stress the significance of delay and damage to the vessel by ice have special ice clauses.³⁷⁷ Despite the fact that the charterparty may have safe port and/or safe berth clause, a “general ice clause” maintains the right of owners to exercise their right of safe navigation on the approaches of the port. The clause makes it clear that the vessel should not be obliged to force ice, but may reasonably be expected to follow ice breakers where other vessels of the same size, class, and construction are doing so.

4.1.2. Draft

Another common danger that can await a vessel in the port is the lack of draft. What is the standard that the tribunal uses in determining that a safe port warranty was breached because the draft was not sufficient for the vessel? The port must be safe for that particular ship, laden as she is at the relevant time. The port will not be safe if, in order to enter the port, the ship must lighten some of her cargo. Even if the lightening can take place with reasonable dispatch and safely in the immense vicinity of the port or in the port itself, the port will still be considered an unsafe one.³⁷⁸

What is the most common issue argued in breach of safe port warranty because of draft? Rivers with their draft fluctuations have been the cause of many arguments, and the inevitably related disputes over safe port warranties. The hottest argument is apparently not the river itself, but its approaches, canals, and paths and whether or not they form part of the river loading ports.³⁷⁹

In *The Alhambra*,³⁸⁰ the vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, “thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat.” The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbor without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in the Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the Master refused to proceed to Lowestoft to discharge, went to Harwich as the nearest safe port, and there discharged the cargo. The court ruled that the

³⁷⁷ BIMCO Ice Clauses, Special Secular February 2005, available at https://www.bimco.org/~media/Documents/Special_Circulars/SC2005_02_24.aspx

³⁷⁸ See *The Alhambra* (1881) L.R. 6 P.D. 68.

³⁷⁹ See *The MV Naiad*, SMA No.1177, 1977 WL 372763.

³⁸⁰ *The Alhambra* (1881) L.R. 6 P.D. 68.

Master was not bound by the charterparty to go to Lowesoft but to a “safe port.”³⁸¹ The court reasoned as follows:

It appears to me that it is not made a safe port - it is not made a port in which the ship can lay with safety and discharge afloat - by reason of this, that there is something outside, some little distance from the port, a place in which the ship can lay afloat, and within which place she can discharge part of her cargo, and then when she has discharged a sufficient part of her cargo she can get into the port which is named. That may be all very well, it may be an unreasonable thing or a reasonable thing, but that is not the bargain the parties have entered into. They never entered into a contract to go somewhere not a safe port, to go to a port which would be safe if they stopped at some other place near it and with a little manipulation of the cargo made the ship fit to go into that port. That was not the bargain. The bargain was a plain bargain in plain English, that she should go to a port, provided the other party named a port, which in itself and by itself was a port safe for a ship of such a burden, and complied generally with the other requisites mentioned in the charterparty.³⁸²

The decision itself was quiet provoking, as it rejected a long-standing tradition of applying the custom of the port to resolving various issues between owners and charterers. Apparently, the court created a new rule where the express safety of the port prevailed over the custom of the port. The old principle followed in *Hillstrom v. Gibson*,³⁸³ where the port was considered as a safe one regardless of the fact that the vessel, according to the custom of the port had to be lightened prior to entering it, was reverted. Judge Cotton L.J. stated:

...the custom, if it is proved, is in no way admissible to control what is the true construction of the charterparty...When the port is named, then the

³⁸¹ Id.

³⁸² Id at 71-72.

³⁸³ *Hillstrom v. Gibson*, (1870) 22 LT 248.

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*custom of the port may regulate certain things not expressly provided for in the charterparty.*³⁸⁴

As long as the draft of the vessel and the depth of the water was in contemplation of the parties, a safe port warranty will exist. To a big extent, a lot will depend on the Master, whose actions will dictate in whose favor the Tribunal would rule. In a situation when the vessel was not able to cross the bar and charterers agents refused to give cargo outside it at the charterers' expense, contending that the charterer was not liable under the charterparty to give cargo outside the bar, she had a right to sail away after waiting for a reasonable time.³⁸⁵ Justice Pullock ruled, "the vessel need not to cross the bar at all, as she was only called to Bolderaa [loading port] as she could safely go, and she went inside solely for the defendant's accommodation and to save him expense."³⁸⁶

Shield v. Wilkins should be distinguished from *General Steam Navigation Co. v. Slipper*,³⁸⁷ where the vessel, having loaded a complete cargo, could not get over the bar and it was held that the ship might have stayed outside the bar, and have put the expense on the charterers for sending the cargo there. But, the duty of the charterers was at end because the Master had gone to the jetty and there taken on board the cargo.³⁸⁸

In recent years, the courts reconfirmed a principle that safety of the port is "measured" by a fully loaded vessels' ability to enter it. In *The Archimidis*, the judge stated:

....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.

*... 'safely' means 'safely as a laden ship'*³⁸⁹

³⁸⁴ *The Alhambra* (1881) L.R. 6 P.D. 68 at 75.

³⁸⁵ See *Shield v. Wilkins*, 5 Ex 304.

³⁸⁶ *Id.* at 305.

³⁸⁷ *General Steam Navigation Co v Slipper* (1862) 11 C.B. N.S. 493.

³⁸⁸ *Id.*

³⁸⁹ *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366.

Once again, Sellers L.J.'s classic definition of safety, that the particular vessel must be able to reach, use, and return from the warranted port was reconfirmed.

In deciding whether a port was safe, a crucial role may play how many ports are available for nomination. Some voyage charters name only a single port of loading or discharge, others provide for a range of ports. The number of the ports will be considered in light of the abnormal occurrence and ability of the parties to estimate the risk at the time of nomination. In *The Naiad*,³⁹⁰ the parties entered into a voyage charter of the vessel with a maximum draft of 40' fresh water. The charterparty provided "1 safe port at Charterers' option U.S. Gulf of Mexico, excluding Brownsville, Texas with New Orleans/Destrehan/Ama, Myrtle Grove/Reserve counting as one port to 1/2 safe berths each, 1/2 safe ports in the Ghent Belgium-Hamburg, Germany range, both ports included but excluding Weser River ports."³⁹¹ The vessel successfully entered the Mississippi River through the Southwest Pass and anchored in New Orleans for holds' inspection. During that time, local authorities reduced the recommended draft for transiting through Southwest Pass from 40' to 38'. As a result, the vessel loaded less cargo.

Owners contended that they were entitled to receive and load a full and complete cargo up to a freshwater draft of 40' and because charterers had in their option a wide range of load ports to choose from, the obligation of selecting a safe port with sufficient draft was upon charterers. The change in draft conditions at the Southwest Pass, after the vessel had arrived at her designated load port in the Mississippi River, and had commenced loading, in owners' opinion, is a situation for which not they but charterers bear the liability and consequences.³⁹²

The Tribunal agreed with the owners and ruled:

It is the opinion of the majority that Charterers' contractual responsibility of warranting a safe loadport for this vessel were not waived by their nomination of a specific loadport out of the range of ports. Had this Charter Party named New Orleans as sole loadport from the outset, the question of safe port would not have arisen. In our case, however, Charterers had a wide selection of ports to chose from, and even though this mere fact does not

³⁹⁰ The MV *Naiad*, SMA No.1177, 1977 WL 372763.

³⁹¹ *Id.*

³⁹² *Id.*

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absolve the Owners completely from their responsibility from assuring that this vessel in fact was physically suitable for any of the possible loadports, it does put the burden of "safe port" on the Charterers. This was even further amplified by the Charter Party agreement that the vessel was not to exceed a sailing draft of 40' freshwater. Although this warranty burdens the Owners with compliance, it surely implies that Charterers were to load the vessel to this draft, if Owners so chose and if the cargo quantity needed to arrive at this draft, was within the quantity limits of the Charter Party.

... In our case it was upto Charterers to select a suitable and safe port out of several possible loadports where, if they had so wished, they would not have been subject to the possibility of inherent draft fluctuations. Their decision entailed all the responsibilities that the Charter Party burdens them with.³⁹³

A negative of this decision is that the responsibility of the owners to exercise due diligence in selecting the ports at the stage of negotiating a charterparty is completely rejected. By having several ports in the range together with restrictions to call certain ports creates an assumption that, although all parties in contract negotiations have equal rights, it nevertheless turns out that charterers are prejudiced. The commercial intent of the parties to nominate a safe port from a range of other ports extends also to the vessel's route and places that can be hundred miles away from the port. Stranding of the vessel due to abnormal, unusual, unknown, or unforeseen conditions on route should not be charterers' responsibility. This is contrary to any commercial intent and to accepted maritime practices.³⁹⁴

In the ports that are influenced by a regular change of the draft, local port authorities monitor it on a daily basis and issue their recommendations to vessels. The charterers and the owners use these recommendations in order to determine the amount of cargo that can be loaded on the vessel and the ability of the vessel to proceed up or down some waterways. Although compliance with the recommendations can initially save a vessel from grounding, it will not save the charterers if there is an unforeseen

³⁹³ Id.

³⁹⁴ Id., see dissent opinion to the decision and award.

condition that causes grounding of the vessel. The tribunal in *The Ross Isle*,³⁹⁵ where the vessel grounded on a mud lump in the Mississippi River while sailing from her load port after loading up to recommended draft, ruled:

The stranding of March 25, 1974 was caused by a well known phenomenon of this river which was or should have been known to both parties but was not necessarily foreseeable on this voyage since the sailing draft was in accordance with the then existing recommendation of the Pilot Authority. In our opinion the inability of this vessel to safely exit the Mississippi River at the time directed by Charterers was a breach of the safe port warranty of the contract.

*In our opinion the definition to be applied here of a "safe port Mississippi River" must of necessity include the river that is the only means of approaching and/or departing from the Port. The river proved to be unsafe for this vessel at this time and Charterers suffered the resulting consequences.*³⁹⁶

It should be noted that where the owner knew or should have known of draft restrictions at a loading berth selected for its own convenience, its claim for deadfreight allegedly due to an unsafe berth will be denied. In *The Lady Helene*,³⁹⁷ the vessel was chartered to load a parcel of fatty alcohol at "one safe berth Paktank Richmond, California."³⁹⁸ The published draft for the Paktank terminal was 35 feet. Owners intended to arrive at Paktank with a draft in excess of 36 feet with a plan to use the rising tide which would allow the vessel to depart safely. Upon the vessels arrival to the berth and in an attempt to dock, the vessel grounded because the Paktank terminal draft was only 33 feet. Owners brought a claim for breach of safe berth warranty despite the fact that the vessel had a draft of over 36 feet when it attempted to berth. In the decision in favor of charterers the tribunal stated:

³⁹⁵ *The Ross Isle*, SMA No. 1340, 1979 WL 406546.

³⁹⁶ *Id.*

³⁹⁷ *The Lady Helene*, SMA No. 3457 (1998).

³⁹⁸ *Id.* at 1.

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Armada [Owner] must bear the consequences of that choice. Ordinarily, responsibility for an unsafe berth would lie with a charterer. However, as successful parcel tanker trading requires the maximum amount of operational flexibility, Armada's [owner's] decision to require loading at Paktank was clearly in furtherance of its own ends, for which P&G [charterer] is not responsible... While both Paktank and Armada were negligent, the consequences of that negligence cannot be imparted to P&G.³⁹⁹

The tribunal found that at the time the vessel was chartered, owners demanded Paktank as the loading berth in order to have two parcels of cargo to be loaded at the same terminal and in that way save on time and cost of shifting to another berth. Charterers had no interest in loading at the Paktank berth as the cargo was stored at their usual terminal, but since *the Lady Helene* was the only opportunity to ship this parcel, they had to agree on owners' terminal.⁴⁰⁰

4.1.3. Air Draft

The safety of the vessel can be jeopardized not only by an underwater obstruction, but also by inability to sail freely in the rivers and canals, under the bridges, and other obstacles such as power lines. In the past, the air draft was measured as the distance from the deck to the highest point of the vessels masts, but today the air draft is measured from the distance from the surface of the water to the highest point of the vessel.

The vessel is more prone to facing a problem with her air draft on her return voyage, when the cargo has been discharged and she is much lighter than when she sailed into the discharge port because the safety of the port presumes that she can get safely to and return from the port. In *Limerick Steamship Co Ltd v. WH Stott & Co Ltd*,⁴⁰¹ the *MV Innisboffin* went loaded through a canal on her way to Manchester, her masts were just low enough to clear the bridges. But, after discharging her cargo at Manchester, she came up in the water, and when she proceeded down the canal from Manchester her masts would not clear the bridges and accordingly they had to be cut.

³⁹⁹ Id at 9.

⁴⁰⁰ Id at 6.

⁴⁰¹ *Limerick Steamship Co Ltd v WH Stott & Co Ltd* [1921] 1 K.B. 568.

The court attributed the expense of cutting the masts to the charterers, because they were only entitled to order the *Innisboffin* to a safe port.⁴⁰²

In the modern shipping world, an incorrect description of a vessel could result in her impossibility to call a port due to air draft restrictions. Unfortunately, this problem is not as easily remedied as in the past when the ship could just be dismantled. In *Buyuk Camlica Shipping Trading & Industry Co Inc. v. Progress Bulk Carriers Ltd.*,⁴⁰³ the air draft restrictions for the vessels loading at Misurata in Libya to which the Charterers ordered the vessel to load a cargo of HBI⁴⁰⁴ varied from the one stated in the charterparty. If the vessel's actual moulded depth had complied with her described moulded depth as set out in the charterparty, her air draft would have come within the applicable restrictions at both of those ports. As it was, however, the vessel's actual moulded depth meant that the vessel's actual air draft inevitably exceeded the air draft restrictions at Misurata by some margin.⁴⁰⁵ Thus, charterers' nomination of Misurata was considered as a valid one and owners had to bear the loss.

4.1.4 Wind

As much as the wind is a friend of any sailor by blowing the sail, it can also become a foe by pushing a vessel into rocks or other perils of the sea. In modern shipping, with the growing number of large size vessels, wind conditions most often affect the stability of the vessel, and her ability to load and discharge cargos. Current weather criteria included in stability standards for merchant, passenger, as well as naval ships relate the lateral wind heeling moment to the pressure force on the windward exposed lateral area and place the center of such force in the geometric center of the area.⁴⁰⁶

The effect that wind can have on a vessel may be particularly strong in case of large ships with regular shapes, featuring small superstructures and wide flat deck areas, like tankers and bulkers. On the contrary, a smaller impact of the phenomenon is envisaged for ships with superstructures of complicated shapes (naval vessels) or when

⁴⁰² *Id.*

⁴⁰³ *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd.* 2010 WL 666279.

⁴⁰⁴ Hot Briquetted Iron.

⁴⁰⁵ *Id.*

⁴⁰⁶ Stefano Brizzolara and Enrico Rizzuto, *Wind Heeling Moments on Very Large Ships. Some Insights through CFD Results*, University of Genoa (2006).

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the predominant parts of the areas exposed to wind are vertical (i.e. normal to the wind), like in passenger or container vessels.

Safety is determined not only on the day of nomination, but also based on the conditions of the port at the given time for that particular vessel. In *Johnson Brothers v. Saxon Queen Steam Company*,⁴⁰⁷ a ship was ordered by the charterers to go to Craster, a port in the United Kingdom which was perfectly safe to make provided the sea were smooth, but which might become dangerous if a change of wind altered conditions. The court held that the port was not safe, although nomination was made when the sea was smooth.

The only contest in the case was whether the port was safe, having a contingency that the wind might shift round to seaward, and if the wind did not come strong from the seaward she could get out again by heaving on the warp from the mooring buoy. Although it could have been done, there was always a risk of something going wrong, and one could not say it was safe to go there even in fine weather because of the contingency of the wind shifting and some problem occurring in the vessels attempt at getting out. The court came to the conclusion that if there is a possibility that the port will become dangerous so near that, unless there are special circumstances in the nature of the charterparty, the port will not be considered safe, even if the vessel could have entered the port safely for a very short period of time.⁴⁰⁸

A similar result was reached in *The Houston City*⁴⁰⁹ where the charterer directed the ship to proceed to Geraldton and load a full and complete cargo of wheat in bulk. No specific berth was ordered, but at the port of Geraldton, the No. 1 berth was the only berth from which a ship could load wheat in bulk. The wharf at Geraldton ran east and west and was exposed to weather from the north, from which direction gales were to be expected between the months of May and November. The Number 1 berth was at the eastern end of the wharf and was the most exposed. The wharf was constructed of concrete with two horizontal timber waling-pieces and, during bad weather, it was necessary to keep vessels off the wharf by means of bow and stern hawsers attached to hauling-off buoys. The ship berthed in fine weather. The hauling-off buoy to which the stern hawser could be attached had been removed for repair and the harbor Master advised the Master that it was about to be replaced. The harbor Master did not suggest that the ship take any precautions in the meantime. Some fifty feet of the upper waling-

⁴⁰⁷ *Johnston Bros v Saxon Queen SS Co* (1913) 108 LT 564.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Australian Wheat Board v Reardon Smith Line Ltd. (The Houston City)* 93 CLR 577, 582.

piece in the center of the berth was missing and it was not suggested that this would be replaced while the ship was in port. Several days later without warning a gale blew from the north, which forced the ship against the wharf and caused damage to the ship and the wharf.

The case went through multiple appeals and finally was decided by the House of Lords. The House of Lords ruled in favor of the owners and gave the following reasoning:

*The words of the clause in their Lordships' opinion are an undertaking by the charterers to nominate a safe port and a safe dock, etc., within that port. The charterer is given a choice, within limits prescribed, as to where he will have his cargo available for loading. It seems natural that he should give at any rate some undertaking as to its safety and that the owners should be entitled to rely on the place nominated being safe. If he breaks this undertaking and nominates an unsafe port and the ship is damaged through going there he will be liable for the damage, subject of course to possible questions of remoteness, or novus actus interveniens.*⁴¹⁰

The case can be considered to prove a good guideline in answering the question whether a safe port warranty is breached if the port is safe for the vessel to stay in the port, but it is impossible to conduct cargo operation. In heavy lift shipping, wind and swells can be one of the crucial factors whether a vessel can safely load or discharge cargo. It seems to me that the principles established in *The Evia* and *The Houston City* have to be reviewed together. If the vessel is unable to load the cargo because of wind, it can be treated as if the cargo was not available, as the charterers were given a choice to find a safe port or berth, provided, that the vessel can load the cargo under normal circumstances.

4.1.5 Tides

Another danger that can render a port unsafe is tides. Although in the recent years, they are ones of the discovered and anticipated dangers because modern means of weather tracking and forecasting have led to the creation of reliable charts for

⁴¹⁰ Id. at 267.

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navigation. In the old days, tides were one of the dangers that could capture a ship in the port.

Despite the fact that the draft of the port and its exposure to tides can be well known to the Masters, it should be reviewed in combination with several factors like speed of the vessel, delay in sailing to the port or other safe ports the vessel can reach instead of her nominated port at the time when the water level is low. In *Aktieselskabet Ericksen v. Foy, Morgan & Co.*,⁴¹¹ the *MV Hjeltenaes* was chartered and at the time, the anticipated draft matched the tide of Preston. It was expected that the vessel would reach the discharge port during high spring tides. However, the vessel was delayed due to her unseaworthy condition and she arrived to the roads of Preston when the water level dropped significantly. As a result, charterers had to employ lighters in order to discharge the vessel, and owners suffered damage because of the delay and claimed demurrage.

The court found that the delay in reaching the port was caused by the unseaworthiness of the vessel and thus, owners could not resort to the unsafety of the port at the time of vessel's arrival. Such a result raises a question of whether the charterers will be responsible for the port being unsafe if the delay was caused by something outside the parties' control, such as adverse weather conditions or a strike in the previous ports.

It seems to me that *The Evia* had answered this question:

The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs [author's emphasis added] which creates conditions of unsafety where conditions of unsafety had previously existed and as a result the ship is delayed, damaged or destroyed, that

⁴¹¹ *Aktieselskabet Ericksen v. Foy, Morgan & Co* [1926] 25 Lloyd's List L.R. 442 (K.B.).

*contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial.*⁴¹²

Because tide conditions for most of the ports have been recorded and tracked year after year, they cannot be considered an abnormal occurrence. Charterers, as a party responsible for port nomination, will bear the full burden of nominating an unsafe port, even if they had no control over delay of the vessel. The only situation when owners are responsible for lost time is when ocean voyage is not complete and parties anticipated neap tides in the port. In *Parker v Winlow* the vessel had to lay on the sand some days, till the tides got higher and she could reach the place in the port, which the consignee had the option of naming. It was held that the delay in getting to it was only occasioned in the ordinary course of navigation in a tidal harbor, and the shipowner must bear the loss.⁴¹³

4.1.6. Current

Current is one of the factors that can affect river ports. They are very seasonal and often can depend on prevailing weather conditions in the regions in a far distance from the port. Navigational charts will usually describe them. It is suggested that at the time of nomination of a river port that it is worth assessing potential for high current conditions at the time of vessel's arrival. Agreeing to the port that is subject to seasonal high currents will not waive safe port or berth warranty by the owners.

In *The Aristides*⁴¹⁴ the arbitration proceedings took place after vessel head owners won arbitration in London against time charterers. Time charterers brought indemnity action in New York arbitration against voyage charterers. The argument arose whether possibility to berth and discharge cargo at a different berth on the Mississippi River would prejudice owners right for safe port warranty and question good seamanship skills of the Master. The *MV Aristides* was chartered for a voyage to carry steel slabs from Taranto to New Orleans. The vessel arrived to New Orleans and proceeded to Nashville Avenue Berth in order to off-load part of her cargo. Then, charterers directed the vessel to Mile-121 (ADM Buoys) to discharge the remaining cargo into the barges with the help of a floating crane. Because of stronger than normal current conditions, mooring to the buoys, even with assistance of two tugs, took close to 4.5 hours, for an

⁴¹² *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No. 2)* [1982] 1 Ll Rep 334.

⁴¹³ In *Parker v. Winlow*, 7 E. & B. 942.

⁴¹⁴ *The Aristides*, SMA NO. 3686, 2001 WL 36175174

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operation normally accomplished in just one hour. Two lines each were put out to the three bows, two aft buoys, and both anchors were employed. The discharge plan called for two floating cranes to be moored alongside to offload the remaining 25,000 tons of cargo onto barges. The unusually strong current, however, caused the vessel to repeatedly break out of her berth, raising concerns about the safety of such an unwieldy operation. At 01:30 on March 23, before any of the discharge equipment had arrived on location, the starboard anchor stopper gave way and at 06:00 two stern lines and one bowline parted. Again, bearing in mind the contemplated discharge operation, with cranes and barges alongside, the Master determined this berth to be unsafe and, at 07:40, requested a pilot to relocate to a more suitable location. Just as the vessel was about to depart, another stern line and the port-side anchor stopper failed.

The Tribunal did not agree with the charterer's argument that the berth was not unsafe as the owners agreed to call it and neither the higher river level nor the stronger currents should have come as a surprise to them. Having carefully examined all of the evidence, the Tribunal came to the conclusion

...that the shipmaster did what was and could be expected of him in bringing the vessel to the ADM moorings, tying her up and trying to maintain her safely in that berth to allow for ship-to-ship discharge operations. That he did not succeed was not for any lack of skills, good seamanship or hard efforts in general, but is attributable to the prevailing river conditions and the particular location of the ADM moorings within the Mississippi River. There is no way of knowing now whether a discharge at Zito Buoys, as originally contemplated, would have fared any more successful but it is the Panel majority's opinion that Klaveness[disponent owners] did not waive the safe berth warranty when it accepted ADM as substitute berth. We do not presume to say that ADM is an unsafe berth generally, but it demonstratively was unsafe at the time in question.⁴¹⁵

⁴¹⁵ The Aristides, SMA NO. 3686, 2001 WL 36175174 at 10.

4.1.7. Silting

Another danger of a river port is silting. Although ocean ports are not affected by silting, very often an ocean-going vessel can enter the river port and get caught by surprise. Unless an experienced Master or a pilot navigates the vessel it can easily ground. What can create an even bigger problem to the charterers and the shipowners is when they have to bear the loss of time when another vessel is grounded and navigation in the channel or the river is closed.

The *MV Hermine* encountered a similar occurrence when she was ordered to Destrehan on the Mississippi River, about 140 miles from the open sea. While going down the river on the outbound voyage the vessel had to pass through the Southwest Pass, which is a scoured and dredged channel. The depth of the channel varied from time to time according to the time of the year, the speed of the river, and the energy and resources of the dredging authority. The grounding of another vessel in the channel and subsequent reduction of the water level nevertheless delayed the vessel. The argument arose whether delay of the vessel in completing her previous voyage and subsequent delay to enter the Southwest Pass can indemnify charterers for liability for the breach of safe port warranty.

The arbitrators and the court concurred that silting of the river is one of the events that parties can contemplate when nominating a port in a river:

*It was in the reasonable contemplation of the parties that if the charterers nominated a Mississippi port, the owners would accept the risk of delay in transit through the Southwest Pass by reason of fog, congestion or blockage of the channel by vessels grounding or other accidents.*⁴¹⁶

However, a delay of the vessel in the Southwest Pass lasting longer than anticipated duration of the voyage was not within reasonable contemplation of the parties. For that reason

The detention arising from the siltation of the Mississippi River was commercially unacceptable

⁴¹⁶ *Unitramp v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212 at 48.

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*and not within the contemplation of the parties at the time of contracting.*⁴¹⁷

The court found in owners favor, holding that Destrehan was unsafe port.

4.1.8. Swell

Although under normal weather conditions the port can be perfectly safe when strong winds develop and cause a swell, it could still create dangers for a vessel. What can be one of the reasons that can lead to the breach of a safe port warranty in such weather conditions? In certain circumstances, the unsafety may rest on a minor failure of the charterers to give the Master advanced notice of expected bad weather. In *The Dagmar*,⁴¹⁸ the owners chartered their vessel for a trip from the St. Lawrence ports to West Italy under a charterparty that provided *inter alia* “the vessel to be employed ... for the carriage of ... merchandise only between ... safe ports or places where she can safely lie always afloat.” The vessel was ordered to Cape Chat, Quebec, and the Master expected to receive a notice from the charterers if bad weather threatened so that he might put his engines in readiness and put to sea if the weather worsened.⁴¹⁹ A strong breeze, which the berth gave no shelter from, created a heavy swell and because of this, the vessel’s mooring lines parted and she was driven aground. There were no means of communications to warn of the approach of bad weather and therefore the captain was not warned of the impending change in the weather and so could not take evasive action. The shipowner claimed that his vessel was damaged when the wind and swell increased while the vessel was at the port nominated by the charterer; the port was not safe for *Dagmar* to load in October. The port was physically safe for the vessel, but the pier gave no protection against northerly winds.⁴²⁰ The court held:

The mere fact that MV Dagmar could not remain in safety at Cape Chat in certain conditions did not mean that it was not a safe port; that unless Dagmar was warned that she would receive no weather information from the shore and must obtain her own weather information, and that in strong winds and sea the port was unsafe, then it was unsafe, and

⁴¹⁷ Id.

⁴¹⁸ Tage Berlund v Montoro Shipping Corp Ltd (*The Dagmar*), [1968] 2 Lloyd's Rep. 563.

⁴¹⁹ F.J.J. Cadwallader, *An Englishman's Safe Port*, 8 San Diego L. Rev. 639, 647 (1971).

⁴²⁰ C.H.Spurin, *Time Charter-parties*, Chapter 9, Nationwide Mediation Academy, 50 (2005).

*charterers had not given warning; that the Master and crew had not been negligent.*⁴²¹

The court found in the owners favor because the vessel was not able to lie safely at the pier unless her engines were kept at constant readiness and sufficient officers and crew were maintained on board at all times in order to be able to leave the port in the advent of bad weather.

4.1.9. Reliable seabed

In the often-cited case of *The Eastern City*,⁴²² the charterers of a ship nominated Mogador, on the coast of Morocco, as a safe port. The ship, when attempting to enter the port, ran aground on the rocks because of bad weather. While determining whether the port was unsafe the Court of Appeals, among other factors, considered that the lack of reliable holding capacity for the anchor in the anchorage area.

4.1.10. Insufficient room to maneuver

The movement of the vessel inside the port can be restricted not only by the natural factors such as the size of a harbor, but also artificial factors, such as the presence of other vessels in the port. In each particular case, the court will compare the size of the vessel to the available space for maneuvering in the port in normal and adverse conditions.

A classic example of the inability of the vessel to maneuver in the port due to natural characteristics of the port can be seen in *The Eastern City*.⁴²³ The vessel had a length of 415 feet and a 55 foot beam. She was chartered to proceed to Mogador in Morocco. As a large ship, the *Eastern City* was order to anchor in the roadstead and be loaded from lighters. When a vessel of such a size was anchored in the middle of the roadstead there was a radius of no more than about 2 ½ cables of deep water all around. A large ship anchored in the roadstead would, if certain weather conditions were threatened, have to escape to the open sea, and, to be safe, would have had to escape before such weather conditions reached the roadstead. In addition, to escape from the roadstead after bad weather conditions had arrived would not have been an easy

⁴²¹ Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar), [1968] 2 Lloyd's Rep. 563.

⁴²² Leeds Shipping Co v Societe Francaise Bunge SA (The Eastern City) [1958] 2 Lloyd's Rep. 127.

⁴²³ Id.

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maneuver.⁴²⁴ The vessel grounded after weather conditions deteriorated and the vessel was unable to leave the anchorage in time. The court ruled that Mogador was not a safe port for a vessel the size of *Eastern City* in the winter season, when lack of enough room for maneuvering, lack of mooring facilities, and a necessity to anchor caused the vessel to run aground.⁴²⁵

Another example is *The Khian Sea*,⁴²⁶ where the vessel was chartered on a NYPE form for a round voyage via safe ports. On May 18, 1973, the vessel was ordered to proceed to Baron Wharf in Valparaiso and berth there. Later that evening two other vessels came to the port and anchored not far away from the place where the *Khian Sea* was lying. The following morning bad weather approached and, although the *Khian Sea* had the ability to be shifted to the anchorage away from the berth, two other vessels were too close to her and she could not be moved. She eventually got away from the vessels, but was damaged by ranging against the pier.⁴²⁷ The owners brought a claim against the charterers and after several appeals the Court of Appeals held that the berth was only conditionally safe, in the sense that it might be necessary to leave in bad weather and, in the absence of a system to ensure that vessels using the berth would have adequate sea room if they had to leave in a hurry, the berth was unsafe.⁴²⁸ The case made a good point that charterers can be held responsible for breach of a safe port warranty if there is congestion in the port, which can prevent normal navigation.

4.1.11. Radiation

In the aftermath of the 2011 radiation leaks from the Fukushima nuclear plant, the ports directly affected by the earthquake, tsunami, and high levels of radiation were closed. The concern for shipowners, charterers, and cargo interests were that those ports that were declared to be open, but were exposed to higher background levels of radiation and where cargoes should be loaded or discharged. These ports could not be declared as unsafe, which can enable owners to bring a recourse action from charterers.

Owners had to decide either to maintain safety of the crew on board by refusing to sail to Japanese ports below Kashima that had a risk of being exposed to radiation in case the preventative measures to stop a reactor failed, or if weather conditions changed.

⁴²⁴ W.E. Astle, *The Safe Port or Berth reachable on arrival*, at 20 (1986).

⁴²⁵ *Leeds Shipping Co v Societe Francaise Bunge SA (The Eastern City)* [1958] 2 Lloyd's Rep 127.

⁴²⁶ *The Khian Sea* [1979] 1 Lloyd's Rep 545 (CA).

⁴²⁷ *Id.*

⁴²⁸ See W.E. Astle, *The Safe Port or Berth reachable on arrival*, at 27 (1986).

Alternatively, they breached the relevant charterparty and suffered a significant financial loss since deviation away from Japanese port would not be considered a fundamental breach and entitle charterers to terminate a charterparty. Charterers could have sought to capitalize on owners' refusal to follow reasonable instructions and re-enter the market to secure an alternative charter of a vessel at a more favorable rate. What solutions to overcome prospective unsafety of the port and adjacent area were available to the owners?

The Japanese government maintained a 30 km exclusion zone around the Fukushima Daiichi nuclear power station. No ban had been imposed by the Japanese authorities in relation to ship transits or port calls aside from the mentioned exclusion zone.⁴²⁹ Although the major ports of Japan were not affected by radiation to the level that would allow them to be considered unsafe and/or dangerous by the Japanese government and international organizations, the risk of minor exposure to radiation by the crew and subsequent personal injury claims greatly influenced owners' decisions to declare nominated ports in Japan as prospectively unsafe. If the prevailing winds would bring air from Fukushima to where a vessel was or might be and/or there was the prospect of rain there, then this would increase the risk of radiation to potentially unacceptable levels. Practically speaking, though, it was difficult to assess how adverse weather conditions could be forecast or monitored to allow owners sufficient time to take avoidance actions, for example, by diverting the vessel and moving her off berth to a safe distance. Moreover, rerouting the vessel away from Japan could not be considered as compliance with safe port warranty, namely, approaches to the port.

Although one could see legitimate grounds in owners' decision not to call ports close to Fukushima, they found support also within the insurance community, since claims relating to radiation issues are often excluded from a vessel's usual insurance coverage. Owners attempted to justify the impossibility of a call to a Japanese port by referring to their Hull and Machinery and P&I policies and the risk of a loss of cover for the vessel and her cargo. However, only if there was a real risk of exposure to

⁴²⁹ Frequently asked questions (FAQ) concerning Japan earthquake, tsunami and nuclear radiation risks, GARD P&I newsletter, available at http://www.gard.no/ikbViewer/Content/14786648/Japan_Earthquake_QA_17%20june%202011_at1200.pdf

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unacceptable levels of radiation would charterers be in breach of the safe port warranty in ordering the vessel to proceed or to continue to proceed.⁴³⁰

The effect of calling Japanese ports can be seen in the additional safety measures undertaken by governments of many European countries in order to prevent radiation contamination of their facilities, cargos, vessels, and personnel through contact with vessels affected by radiation. These measures included imposing specific cleaning requirements, screening, or even banning ships that had called at Japanese ports. In Germany, the authorities of the port of Hamburg worked on emergency plans and considered the possibility of refusing contaminated vessels access to the port. Such a docking prohibition could be legally based on general public safety laws in Germany that provide the authorities the right to prohibit the entry to the port in case of a threat to public health.⁴³¹

Despite the fact that many owners considered a fast majority of Japanese ports as prospectively unsafe, only competent authorities who had conducted a careful analysis of the emergency situation were in a position to recommend what public health measures should be taken. BIMCO did not believe that the Master of a ship or owners were appropriately trained or equipped to make such an analysis and decision. Without the necessary analytical and interpretive expertise and the appropriate test environment, it was likely that the results produced by these “domestic” devices could be misleading. A subjective judgment by a ship’s Master based on the readings from such a device not to proceed with a voyage as ordered by charterers could easily lead to a dispute with owners facing a potential breach of contract.⁴³²

There were inevitably disputes between shipowners and charterers over who should pay for the delays or the extra costs of having to discharge elsewhere or for the cleanup costs in the event that contamination had been identified. Although the argument could not be built around safe port warranty as not all countries employed similar policies towards scrutinized inspection of “contaminated” vessels. The answer might

⁴³⁰ Nick Burgess, Shipowners face legal claims for refusing Japan port calls, available at <http://incelaw.com/news-and-events/news/shipowners-face-legal-claims%20for-refusing-japan-port-calls>

⁴³¹ Fukushima - some implications for the Shipping Industry, Mondaq Business Briefing 12 April 2011, available at https://goliath.ecnext.com/coms2/gi_0199-14806035/Fukushima-some-implications-for-the.html

⁴³² BIMCO Radioactivity Risk Clause for Time Charter Parties, Special Circular April 2011, available at https://www.bimco.org/~/_media/Documents/Special_Circulars/SC2011_03.ashx

differ depending upon whether it was the cargo or ship that were contaminated, and on the precise charter terms, including exclusion clauses.⁴³³

While there were no available cases to apply to a potential dispute over contamination of the vessel and cargo with radiation, some case law offers helpful guidance as to considerations English Court may bear in mind when deciding whether the carriage of contaminated cargo will lead to the vessel being on or off hire. In *The Laconian Confidence*,⁴³⁴ the charterers ordered the vessel to sail from Yangon to Chittagong in Bangladesh where, following the discharge of the cargo (bagged rice), the survey established the presence of rejected residue sweepings onboard the vessel. On this basis, the Bangladesh port authorities refused to allow the vessel to proceed to her next port incurring a delay of 18 days. A dispute arose between owners and charterers as to whether the vessel was off-hire during this time. Charterers claimed the vessel was off hire because of the following clause (on an amended NYPE form):

*...in the event of the loss of time from deficiency of [and/or default] men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...*⁴³⁵

The tribunal and the High Court on appeal held that the vessel was on hire throughout as the delay did not arise from the damaged cargo, but as a result of the remarkable reaction and interference of the authorities.

In this case, the High Court also considered the inclusion of the term “any other cause whatsoever” in the list of possible reasons why a vessel can be put off hire.⁴³⁶ The High Court commented:

⁴³³ Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

⁴³⁴ *Andre et Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep. 139.

⁴³⁵ *Id.*

⁴³⁶ Fukushima - some implications for the Shipping Industry, Montaq Business Briefing, https://goliath.ecnext.com/coms2/gi_0199-14806035/Fukushima-some-implications-for-the.html

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In my judgment it is well established that those words [i.e., 'any other cause'], in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause...A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context...that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in Court Line, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. Prima facie it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so.

Shortly after Fukushima disaster, many shipowners started to use “home-made” radioactivity clauses and BIMCO came up with its own “radioactivity clause.” Shipowners insisted on inserting the clause into charterparties in order to have a right to divert the vessel away from Japanese ports if radiation levels were considered risky in

the wake of the explosions at the Fukushima power plant. The “radiation clause”⁴³⁷ would require charterers to nominate a safe port in case the discharge port was declared unsafe because of abnormally high radiation levels and to bear the deviation cost. The “radioactivity clause” makes it clear that owners cannot refuse an order to proceed to a port or place unless the competent authorities confirm the risk of harmful levels of radiation. Certainly, no one can make charterers agree to the amendments to the charterparty that can significantly diminish their rights; however, for the new charterparties it seems to be a fair solution. Another solution for new charterparties could be to impose charterparty clauses requiring shipowners to confirm that the vessel had not traded in Japan or carried cargo from Japan since the explosion at Fukushima occurred⁴³⁸ or make certain that Japanese ports are excluded from the vessel trade area.

In a situation when a risk of nuclear contamination exists, it is impossible to estimate whether a vessel or a port will be affected by radiation at the time the vessel calls. For that reason parties could be taken disadvantageous to them decisions. In case there is a physical damage caused by radiation, charterers are not the only party against whom a claim can be brought on a safe port theory. Although most claims for direct damage to property in Japan resulting from the nuclear explosion at the Fukushima power plant would be brought in the Japanese courts and would be subject to Japanese law, for the international shipping community, there might be ways and means to seek recovery of losses under contracts subject to English law. Philip Roche suggests that it may be helpful to look briefly at some decisions of the English courts in regards to liability arising from nuclear incidents.⁴³⁹

In *Merlin v. British Nuclear Fuels*,⁴⁴⁰ the English courts rejected a home owner’s claim for economic damages under the Nuclear Installations Act 1965 as a result of the reduction in value of their house due to radioactive contamination following the Sellafield disaster. Radioactive contamination of the house was not enough to constitute physical damage, and a claim for economic loss did not fall within the terms of the statute. Only when the statutory level of radioactive contamination is exceeded will the court grant recovery of economic damages.⁴⁴¹ More recently, the court in

⁴³⁷ BIMCO Radioactivity Risk Clause for Time Charter Parties, Special Circular April 2011, available at https://www.bimco.org/~media/Documents/Special_Circulars/SC2011_03.ashx

⁴³⁸ See Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

⁴³⁹ Id.

⁴⁴⁰ *Merlin v British Nuclear Fuels* [1990] 2 Q.B. 557.

⁴⁴¹ See *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289.

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Magnohard Ltd v. United Kingdom Atomic Energy Authority,⁴⁴² recognized that there was a potential for recovery of compensation and expenses incurred as a result of cleaning up contamination to a beach following radiation leakage from the Dounreay power station.

There is therefore perhaps some precedent under English law for considering increased levels of radioactivity on ships or cargoes as being physical damage for which compensation, in the form of loss of value and cleaning costs, might be recoverable, where the exposure was due to breach of contract or negligence.⁴⁴³ At the same time, a recovery for the breach of a safe port warranty can be problematic as many Japanese ports remained opened and only third party countries demanded increased safety measures to vessels calling Japan.

4.1.12. Legal significance of accident free history of the port

In the previous chapters, I reviewed dangers of the port. Now I would like to bring your attention to defenses, which charterers can use in breach of safe port and/or berth warranty cases. One of the defenses charterers often use in the owners' claims for nominating unsafe port is the long accident free history of a particular port. Although the courts will be very cautious in considering the history of the port, under several circumstances it may help. In general, when the argument of the accident free history is brought, the tribunal will consider first whether the port was safe for that particular vessel at a given time before reviewing supplemental evidence that other vessels were able to call it safely. The evidence of accident free history has to be proven by a preponderance of the evidence in order to allow the tribunal to compare the description of the vessel in question with other vessels calling the port, exact times, weather conditions, and other circumstances that surrounded that particular call.

In *The Gazelle*,⁴⁴⁴ by the express terms of the charterparty, the charterers were bound to order the vessel "to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get, and always lay and discharge afloat."⁴⁴⁵ The clear meaning of this is that she must be ordered to a port that she can safely enter with her

⁴⁴² *Magnohard Ltd v United Kingdom Atomic Energy Authority* [2004] S.C. 247.

⁴⁴³ Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

⁴⁴⁴ *The Gazelle*, 128 U.S. 474 (1888).

⁴⁴⁵ *Id* at 474.

cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. The charterers insisted upon ordering her to the port of Aalborg.

The Supreme Court agreed with the circuit court finding that the Aalborg port is in a fiord or inlet having a bar across its mouth, which made it impossible for the *Gazelle* to pass, either in ballast or with cargo; and that the only anchorage outside the bar was not a reasonably safe anchorage, nor a place where it was reasonably safe for a vessel to lie and discharge. These positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of fact) that large English steamers habitually, and 31 American vessels in the course of several years, had in fact discharged the whole or part of their cargoes at that anchorage, without accident or disaster. A dangerous place may often be stopped at or passed over in safety. The evidence on the other side is not stated in the findings; and, if it were, this court, in an admiralty appeal, has no authority to pass upon the comparative weight of conflicting evidence.

It seems that if *The Gazelle* would have been decided not in 1888, but today, the result might have been different. In today's world when every call of the vessel is documented not only by the parties, but also by port authorities, it is easy to ascertain the conditions surrounding each call and to track the good history of any port. This system was successfully employed by the charterers in *The Cepheus*⁴⁴⁶ to show that Anchorage was a safe port regardless of the time of the year and negligence of a single pilot, and that the fast flooding tide and the ice conditions would not bring the port to being unsafe.

The vessel was chartered for a voyage from Freeport, Bahamas to Anchorage, Alaska with a cargo of jet fuel. The charterparty, in its relevant part, provided for a safe port and safe berth warranty. While proceeding to Anchorage with a pilot on board, the vessel grounded on the southern edge of the shoal. Owners claimed that because the harbor is subject to unusual tidal ranges, swift tidal currents, sloppy ice conditions, frequent fog, short daylight hours in winter time, and poor radar imaging because of low lying terrain and ice distortion, that the port was not safe.⁴⁴⁷

After the panel received considerable evidence on the physical layout of the Port of Anchorage and the port of loading dock, heard the testimony of the Master, pilot and various other Anchorage harbor pilots, it accepted evidence on the nature of vessel traffic into the Port of Anchorage and the long term accident record of vessels calling there. It was ascertained that the Port of Anchorage has a long and impressive accident

⁴⁴⁶ *The Cepheus*, SMA NO. 2663, 1990 WL 10555646.

⁴⁴⁷ *Id.*

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free record⁴⁴⁸ for all sizes of vessels entering and leaving during all seasons and under all weather conditions. The tribunal found that Anchorage was a safe port and that the Cepheus' stranding was the result of acts attributable to the shipowner.

*The Marinicki*⁴⁴⁹ raised a different type of concern to a prudent charterer, whether a popular port can be considered as unsafe, because of a single accident that was not properly investigated by port authorities. By a charterparty on an amended NYPE form owners chartered the vessel for one time charter trip via safe port from Vancouver to Indonesia. The charterers ordered the vessel to proceed to Jakarta. Prior to the vessel's arrival at her discharge berth in Jakarta she sustained serious bottom damage. The owners claimed that the damage was caused by an underwater obstruction located just to the north of the breakwater and within the dredged channel, which constituted the designated route into and out of Jakarta.

The Court found that there was no buoy to mark the obstacle, no notice to mariners, and no warning given by the pilot that the dredged channel had any obstacle. After the incident, the local authorities made no investigation as to how the incident occurred or whether there was an object in the channel. There was conflicting evidence from two witnesses from Jakarta that the channel was dredged in 1997 and 1999. The Court held:

*that the port of Jakarta was unsafe on the day of nomination because there was no proper system in place to investigate reports of obstacles in the channel and/or to find and remove such obstacles and in the interim to warn vessels that there was such an obstacle in the channel by means of notice to mariners and by buoying the obstruction..*⁴⁵⁰

In my opinion, the decision can be a good guideline for the charterers. Regardless of the fact that hundreds of other vessels enter and leave a port every day, charterers still have to ascertain that at the time of nomination the port is safe. Although *The Marinicki* decision was not commercially oriented, it maintained a balance between the warranties owners and charterers exchange.

⁴⁴⁸ The Port of Anchorage records revealed a total of 2,122 dry cargo vessels and 140 tankers called during the period January 1979 - October 1987; close to 500 vessels arrived and departed during the months of November through February. Of all these vessels, only two aside from Cepheus reported casualties; the Sealand Philadelphia struck bottom while backing away from the berth.

⁴⁴⁹ Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (*The Marinicki*) [2003] 2 Lloyd's Rep 655.

⁴⁵⁰ *Id.*

4.1.13. Fouling

It would seem that charterers are responsible for breaking a safe port warranty from most of the cases that concern physical safety of the port when the vessel was damaged in the absence of an abnormal occurrence. Surprisingly, there are situations where the charterers will not be responsible for the damage to the vessel in such cases.

The court upheld a decision of the arbitrators in *The Kitsa*,⁴⁵¹ where they found that owners were not entitled to recover under an “implied indemnity” expenses for removing marine growth from the bottom of the ship after she spent three weeks waiting to discharge at a warm water port. The bulk carrier *MV Kitsa* was time chartered on a standard NYPE form that in its relevant part provided. “[t]ime charter period of minimum 4 months to about 6 months ... always via safe port(s), safe berth(s), safe anchorage(s), always afloat, always within Institute Warranty Limits ... within below mentioned trading limits ...”⁴⁵² The vessel was sub-chartered and ordered for a trip to bring a cargo of coal from South Korea to Visakhapatnam (“Visak”), India. The vessel remained in Visak for approximately 22 days. That was longer than, in ideal circumstances, might have been expected. As a result of this prolonged stay in the warm waters, without any movement, the bottom was fouled by barnacles⁴⁵³ that were removed in the yard at owners’ expense. Although the owners did not bring the safe port argument they insisted that trading within Institute Warranty Limits does not carry an assumption by the shipowners of all risks of ordinary incident at each port within those limits. The court decided that:

Neither the Charterers nor those “below” them in the charterparty chain sought to delay the vessel from the performance of her most obvious commercial purpose in calling at Visak, i.e. to discharge the cargo and then depart. The vessel was kept waiting to discharge at Visak, but that was only because of operational considerations at the port and not for any other reason. Because the vessel was gearless, she was in the hands of the shore as to the rate and manner of her discharge.

...

⁴⁵¹ Action Navigation Inc v Bottiglieri di Navigazione SpA (The Kitsa) [2005] EWHC 177 (Comm).

⁴⁵² Id. at 177.

⁴⁵³ Presence of barnacles on the hull of the vessel slightly reduces vessel’s speed and increases fuel consumption.

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Because employment (which was within Institute Warranty Limits — “IWL”) was permitted under the Charterparty, therefore the Owners had agreed to accept the risks (falling short of danger) ordinarily incident at the ports of the subcontinent, including fouling of the hull and the costs of removing it.⁴⁵⁴

From the ruling, it seems that the liability of charterers will exist when the vessel’s employment, namely, the part that concerns the duration of her stay at certain ports, is intentionally exceeded by the charterers from a normal length or when an owners reasonable expectation as to the vessel’s employment was exceeded, or when the order as to employment of the vessel were unforeseen.⁴⁵⁵

4.1.14. Conclusion

I would like to conclude this section with a ruling of *The Marathonian*,⁴⁵⁶ which established that no port is a safe port under all possible weather conditions and it will depend on the good seamanship and navigation to avoid dangers. Physical conditions can be anticipated and discovered by charterers and owners at the time of port nomination. Most of the time, proper examination of navigational charts and maps, weather forecasts, and seasonal draft changes can prevent an accident and save a vessel.

4.2. Political safety

Cases decided because of political activity inland, rendering the nominated port unsafe, are somewhat sparse, although ports so affected are nonetheless unsafe for that. The probable explanation is that a port suffering from such debility at the time of nomination tend to be known to the shipowners and can thus be treated as nugatory nominations, whilst the incident does not exist at the time of nomination, its subsequent

⁴⁵⁴ Id at 163.

⁴⁵⁵ See *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] C.L.C. 734.

⁴⁵⁶ *The Marathonian*, 1978 A.M.C. 821. The shipowner was not entitled to recover from the charterer under a safe berth clause of the voyage charterparty for detention and damage to the vessel directed to Manzanillo for a two-weeks loading during hurricane season. Owner had adequate time to acquaint himself with conditions prevailing in Manzanillo during hurricane season; and the captain could have avoided damage by leaving pier and anchoring during surge periods.

manifestation will in the category an abnormal occurrence.⁴⁵⁷ Wars, confiscation, blockades, political unrest, piracy, politically-inspired “retaliation” against vessels of specific flag,⁴⁵⁸ and embargoes will bring political unsafety to the port. These non-seafaring events embrace dangers that affect the physical integrity of the vessel and the owners’ proprietary rights.

4.2.1. War

Clearly, where there is a state of war existing at the port or place that would cause physical danger to the vessel, the port is unsafe. A classic example of war related activities that made the port unsafe can be seen in *The Teutonia*,⁴⁵⁹ where the Master of a Prussian vessel, having onboard a cargo of nitrate of soda (contraband of war) under a charterparty and bill of lading from Pisagua, bound to Cork, Cowes, or Falmouth. After learning that a war was declared between France and Prussia, the Master turned the vessel from Dunkirk, France, the nominated port of discharge, and sailed to Dover where he finally discharged the cargo. The court held:

That the Master committed no breach of contract in refusing to deliver the cargo at Dunkirk, and as the Charterparty provided⁴⁶⁰ what freight was to be paid if the Cargo was delivered, the delivery at Dover was within the terms of the Charterparty, and the Master was entitled to freight for the Cargo from the Owners before delivery thereof.

...The question is not when the War actually broke out, but whether at the time when the Teutonia was off Dunkirk, and the Master was informed by the Pilot that War was likely to be declared, though it had not been actually declared, between France and Prussia, it was so imminent as to justify the Master's abstaining from entering the port at Dunkirk. ... Here the information given by

⁴⁵⁷ F.J.J. Cadwallader. An Englishman’s Safe Port, 8 San Diego L. Rev. 639 (1971).

⁴⁵⁸ Marko A. Pavliha, Implied Terms of Voyage Charters, McGill University, Montreal, at 214 (1991).

⁴⁵⁹ *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 172.

⁴⁶⁰ The relevant part of the charterparty stated: “...to proceed to any safe port in Great Britain or on the Continent between Havre and Hamburg, both included, and there deliver the cargo, “the act of God, the Queen’s enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted.”

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*the French Pilot at Dunkirk and the general rumour of War were sufficient to justify, first the Vessel going to the Downs, and then the sailing into Dover harbor.*⁴⁶¹

Without any hesitation, the courts in *The Evia*⁴⁶² went even further and established a principle of prospective unsafety. Although warlike activities between Iran and Iraq broke up when the vessel completed discharge, the charterers' contractual promise under the safe port warranty clause of the charterparty was that at the time when the order was given for the vessel to go to a particular port or place, that port or place was prospectively safe for the vessel to get to it, stay at it, so far as necessary, and in due course leave it; that if while the vessel was in such a port or place some unexpected or abnormal event suddenly occurred that made it unsafe the charterers' contractual promise did not extend to making the charterers liable for any resulting loss or damage.

Sometimes the court will review war activities in light of whether any harm was actually suffered by the vessel. A mere threat that the vessel can be damaged by calling a port in the state of war will not be considered as a sufficient danger. In *Palace Shipping v. Gans*,⁴⁶³ when the war between Great Britain and Germany was underway charterers ordered the vessel to sail from a port in France to a port in England through the waters which were declared a military area by Germany. While the shipowner protested, charterers nevertheless ordered the ship to sail and she arrived to the discharge port safely. Justice Sankey held:

*It is impossible to regard the results achieved [in relation to the threatened sinking] as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine.*⁴⁶⁴

Although the result of this case is somewhat a “burst of pride,”⁴⁶⁵ modern charterparties shield shipowners from facing a risk of war on route from one safe port to another through hostile areas by inserting a “war risk areas” clause. BIMCO’s war risks

⁴⁶¹ *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 172

⁴⁶² *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No. 2) [1982] 1 Ll Rep 334.

⁴⁶³ *Palace Shipping Co. v. Gans SS Line* [1916], 1K.B. 138.

⁴⁶⁴ *Id* at 142.

⁴⁶⁵ F.J.J. Cadwallader. *An Englishman’s Safe Port*, 8 San Diego L. Rev. 639 at 648 (1971).

clauses such as CONWARTIME⁴⁶⁶ and VOYWAR⁴⁶⁷ are a well-established standard. These clauses have been regularly updated in recent years in order to reflect all dangers of warfare and the risks the vessel can be subjected to. The clauses require charterers to obtain consent of the owners before a vessel can transit through war risk area:

*The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.*⁴⁶⁸

Older case law also provides a heads up to the owners when there is an argument whether an approach to the port, far from its limits, can be considered as an area to which a safe port warranty extends. In *Nobel's Explosives Co. v. Jenkins*,⁴⁶⁹ the court considered whether the area between Hong Kong and Yokohama could be considered an extension of Yokohama at the time when China declared war against Japan and the vessel had contraband of war cargo on board. The court decided that when there was "actual and operative restraint, and not a merely expected and contingent one, mere apprehension of danger [was] not enough,"⁴⁷⁰ and the route from Hong Kong and Yokohama was held to render the entering of the port of Yokohama unsafe.

Presence of "war risk clauses" together with a safe port warranty only ensures that the shipowners' right of trading between safe ports is protected. Any exposure of

⁴⁶⁶ The wording of the clause can be accessed at https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Time_Charters_2004.aspx

⁴⁶⁷ The wording of the clause can be accessed at https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Voyage_Chartering_2004.aspx

⁴⁶⁸ War Risks Clause for Time Charters, 2004, available at https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Time_Charters_2004.aspx

⁴⁶⁹ *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q.B. 326.

⁴⁷⁰ *Id.* at 328.

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the vessel by the charterers to a risk of military activities, whether at sea or at port, will automatically trigger the owners' right to claim damages or rectification.

4.2.2. License

Under some circumstances, an export license can be required in order to bring the cargo in the port of discharge for its further consignment. Absence of the license can result in the vessel's detention and confiscation of the cargo. Most of the time, the party shipping the goods will have superior knowledge of the export requirements and a lack of a license will be considered as a breach of the safe port warranty. What party will be responsible for the delay of the vessel if neither party knew of the licensing requirements? In such circumstances, the knowledge of the licensing requirements will be implied on the party that has some kind of relationship with the port of discharge. In *The Lisa*,⁴⁷¹ a Swedish vessel was chartered to bring a cargo of rosin from Pensacola to Narvik for its further transshipment to Petrograd, Russia. At the time the vessel was chartered, there were export regulations in Sweden forbidding export of rosin, except under license, to Russia. Upon arrival to the discharge port, the vessel was detained for almost three months. It was decided by Sir Henry Duke that:

Obtaining of such license was his [charterer's] affair and not that of shipowners. [However, when] knowledge the parties or either of them had of export regulations before the making of the charterparty was not shown by the evidence; but the plaintiffs were Swedish shipowners, and, in the absence of proof to the contrary, I assume them to have had such knowledge.

Although the court found in charterers favor and declared the port of Narvik to be a safe port, the delay that was caused due to charterers' decision to keep the vessel in alternative port in order to overcome the deadlock in Sweden had to be for charterers' account.

4.2.3. Confiscation

The threat to the owners' proprietary interest in the vessel is a clear danger, although the vessel herself might not be in danger of physical harm. The risk of

⁴⁷¹ *Karin AB v Strauss & Co (The Lisa)* [1921] P. 38.

confiscation as a characteristic of the port to which the vessel is ordered may therefore suffice to render it unsafe.⁴⁷² What surrounding circumstances can put charterers on notice that the vessel can be confiscated and the port eventually would be rendered unsafe?

In *Ogden v Graham*,⁴⁷³ the vessel was ordered to proceed to Valparaiso. At the time, the charterparty was made, both the owner and the charterers were ignorant of the fact of any port in Chili being closed by the government of that country. When the vessel arrived at Valparaiso, charterers knew that the port of Carrisal Bajo, the discharge port, as well as all other ports in the mining districts, both major and minor ports, had been declared closed by the Chilean government and that all vessels unloading there without a permit would be liable to confiscation. The port of Carrisal Bajo had been declared closed by the Chilean government itself because the district in which it was situated was in a state of rebellion; but, except for this rebellion and the interdict of the government, it was, by nature, a safe port. When the rebellion was suppressed the government removed the interdict, and gave the Master a permit, and he went and discharged his cargo at Carrisal Bajo. The vessel lay at Valparaiso thirty-eight days. Owners brought a claim against the charterers for the lost time because Carrisal Bajo was not a politically safe port. Justice Blackburn J., on appeal, ruled:

... it is not in terms so stated, it follows by necessary implication that the charterers are to name a safe port to the shipowner, who will then be able to earn his freight by proceeding there. It appears, from the facts stated in the case, that this was a perfectly honest and bonâ fide transaction, and we must take it that the charterers had really sent out to their agent at Valparaiso instructions for the vessel to go to this particular port in Chili, and to deliver the cargo there. It however so happened that, before Carrisal Bajo was named to the shipowner or the Master, that port was closed, not merely by the Custom House regulations ..., but by the Government of the country. At that time there was a rebellion in some of the provinces of Chili, and an order was issued by the Government prohibiting, under pain of confiscation, any ship from entering certain ports, of which Carrisal Bajo was one,

⁴⁷² Voyage Charters, (3-rd Edition, 2007) at 122.

⁴⁷³ *Ogden v Graham*, 121 E.R. 901.

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*without a license of the Government, and the Government at that time refused to grant any such license. ...They named a port which had been a safe port, and would probably thereafter become a safe port; but if, at the time they named it, it was a port into which the shipowner could not take his ship and earn his freight, it seems to me that they have not complied with the conditions in the charter-party that they should name a safe port. That being so, [charterers] are liable for damages for not naming a safe port within a reasonable time, and the measure of damages will be regulated by the detention of the ship at Valparaiso beyond that time.*⁴⁷⁴

In recent years, the threat of a vessel's confiscation became extremely relevant to owners' interests. With involvement of international community in controlling trade with oppressive regimes by means of embargo or various sanctions, the vessel and her cargo can be seized anywhere in the world. It can even turn out that the cause of confiscation is not the cargo that is presently on board, or the port where the vessel was directed, but the activities of the vessel and the cargos of which present charterers could not have been even aware of. The issue can become extremely complex as it can involve multiple jurisdictions and restrictions on the cargos that can be legal under one regime and illegal under another.

A good example when the court discussed awareness of the owners and the charterers as to the nature of charterers business and the ports of call can be found in *The Greek Fighter*.⁴⁷⁵ The charterparty provided that "no voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."⁴⁷⁶ Nevertheless the court concluded that there was no breach of the safe port warranty because the confiscation of the vessel took place not at the time when the port was nominated or the vessel was directed there, but after nine months the vessel spent in Khorfakkan as an oil storage facility. The court further explained that,

The shipowner requires to be put into the position where he can rely on the charterer, who, it can be anticipated, has access to all relevant information, to ensure that the cargo which the vessel is required

⁴⁷⁴ Id at 904-905.

⁴⁷⁵ Ullises Shipping Corp v Fal Shipping Co Ltd (*The Greek Fighter*) [2006] 2 C.L.C. 497.

⁴⁷⁶ Id.

to load will not expose the shipowners to loss due to the vessel being detained or fined or otherwise delayed on account of a breach of the local law. In other words, this is an absolute warranty.

...Thus, even though the cargo may lawfully be loaded at the port of loading, it must not be such that presents a risk that the vessel will be captured or seized by rulers or governments anywhere following loading. Here again the obligation of the charterer is, in my judgment, absolute: it is nothing to the point that the charterer may have been ignorant of that characteristic of the cargo which gave rise to the risk of capture or seizure...^{477 478}

It is well settled that, in the context of an express or implied safe port warranty, the attribute of safety includes political and similar risks having a bearing on the safety of the vessel. The prospective risk of loss of a vessel due to confiscation, without justification and absence of any effective means of preventing it under the justice system, and conduct by the state authorities would not fall [emphasis added by the author] within the mutual restraint of princess exception for the specific safe port warranty and would supersede the general exception.⁴⁷⁹

The Greek Fighter answered many questions. One of them was that charterers have to anticipate that the vessel and cargo might be detained when sailing to or from ports of the countries subject to the sanctions. The arrest of the vessel can take place in the intermediate port and render it unsafe. Charterers should use more precaution in examining the origin of the cargo, and determining whether shippers, consignees, or cargo owners are sanctioned entities when calling ports, which are subject to international sanctions.⁴⁸⁰

4.2.4. Blockade

A blockade is an effort to cut off food, supplies, war material, or communications from a particular area by force, either in part or totally. A blockade

⁴⁷⁷ The court gave its interpretation of “unlawful merchandise” clause “No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments.”

⁴⁷⁸ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497.

⁴⁷⁹ *Id.*

⁴⁸⁰ See *infra* §3.2.6.

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should not be confused with an embargo or sanctions, which are legal barriers to trade, and is distinct from a siege in that a blockade is usually directed at an entire country or region, rather than a fortress or city.⁴⁸¹ Within maritime law, the blockade can be either internal, one that is organized by the citizens of the country where the port is located in order to achieve certain goals, or external, one done by foreign forces. Most blockades historically took place at sea, with the blockading power seeking to cut off all maritime transport from and to the blockaded country. Although a blockade in the port will make it unsafe, very often charterparties or bills of lading have an additional clause that mentions blockade as one of the events that will excuse owners from calling a nominated port.

An example of an internal blockade was described in *The Caspiana*.⁴⁸² After loading at the ports of Vancouver and Nanaimo, British Columbia, the vessel sailed for the United Kingdom, Nanaimo being her last port of loading on the Pacific coast. At the time of sailing from Nanaimo, labor relations were tranquil at United Kingdom ports generally, including London and Hull. There was at that time no special indications that any strike or stoppage of work by dock labor might shortly arise. The vessel passed through the Panama Canal and proceeded upon her voyage across the Atlantic. By the time she arrived in London, the port was virtually at a standstill. At that time, there was no similar strike at other United Kingdom ports, although at all the major ports (including Hull) and at some continental ports, dockers, while freely unloading cargo originally destined for the port in question, were refusing to unload cargo diverted to that port from London.⁴⁸³ After several attempts to find alternative ports to discharge the London bound cargo, charterers sent her to Hamburg. The issued bills of lading in their relevant part provided: “No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.” The court on appeal found that

⁴⁸¹ Encyclopædia Britannica, available at <http://www.britannica.com/EBchecked/topic/69580/blockade>

⁴⁸² *GH Renton & Co Ltd v Palmyra Trading Corp of Panama (The Caspiana)* [1956] 1 Q.B. 462.

⁴⁸³ *Id.*

owners had a right to deviate to Hamburg in order to discharge cargo consigned for London because London was not a safe port.

*Tillmanns & Co. v. Knutsford S.S. Ltd.*⁴⁸⁴ is the first case in which a “blockade clause” was considered by the courts. The defendants in that case did not establish facts that would have brought the clause into play, but it was treated as permitting an alternative discharge if the shipowner could get within the clause. In *Mongaldai Tea Co. Ltd. v. Ellerman Lines Ltd.*,⁴⁸⁵ Greer J., referring to a similar clause, said:

*That is an exception which specifically provides that in certain events not only will the owner of the ship be excused for any breach of contract in delivering the goods, but it also provides for a substituted method of performing the contract when these events happen.*⁴⁸⁶

No question was ever raised as to the validity of the clause.⁴⁸⁷ It is the Masters’ right to discharge cargo in the alternative port if the nominated port is inaccessible because of ice, blockade, or interdict. Political factors such as the outbreak of war, the fear of capture by hostile forces, or blockade can be justifiable reasons for the vessel to deviate. The risk, however, must be of reasonable permanence in its nature. Also, the inconvenience of deviating must be compared with the faced danger.⁴⁸⁸

4.2.5. Piracy

In recent years, piracy, one of the most ancient threats to all of seafarers, has emerged again. Although most pirate attacks take place outside of the port, the question arises whether the nominated route or approaches to the port can be considered as an extension of the port to which the safe port/berth warranty applies. The recent increase in the number of attacks in the Gulf of Aden may well be such as to make any ports in the

⁴⁸⁴ *Tillmanns & Co. v. Knutsford S.S. Ltd* [1908] A.C. 406; 24 T.L.R. 786.

⁴⁸⁵ *Mongaldai Tea Co. Ltd. v. Ellerman Lines Ltd.* [1927] 2 K.B. 456, 460-461; 43 T.L.R. 675.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Tillmanns & Co. v. Knutsford S.S. Ltd* [1908] A.C. 406; 24 T.L.R. 786.

⁴⁸⁸ Wilson, John F, *Carriage of Goods by Sea*, 6 ed., Pearson Education, Dorchester, United Kingdom (2008), at 18-19.

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area 'unsafe' if the threat of attack can be said to be a characteristic of ports in the area.⁴⁸⁹

In the context of piracy, it may be difficult to rely on the safe port warranty in a charterparty. Most of the time, charterparties are for worldwide trading and the charterer does not guarantee the safety of any sea passage the vessel may have to take. An international transit route, such as the Gulf of Aden, cannot be characterized as an "approach" to a port, unless, of course, the vessel is destined for a port in the area.⁴⁹⁰ The usual test for the prospective unsafety of a port or the approach to a port is whether whatever has made the port or the approach to the port unsafe can be avoided by good seamanship and navigation. If the charter party precludes deviation from the customary route ordered by charterers (if re-routing would avoid the risk area), the owners will have to be able to demonstrate that the level of risk from pirates to the vessel in approaching the port would be unacceptable to any reasonable owner or Master. As the risk factor varies depending on factors such as speed and design of vessel, time of transit, and actions taken by the owners to minimize the risk, it may be difficult for the owner to establish that the level of risk renders the approach to the port unsafe. If the vessel is not trapped, but merely required to seek an alternative route, courts generally hold that the charterparty is not frustrated.

In *The Hill Harmony*,⁴⁹¹ the charterers instructed the Master to use the great circle from Vancouver to Japan, but the Master took a more southerly and longer route after previously encountering adverse weather on the route chosen by the charterers. Other ships had followed the great circle route, and in the House of Lords, it was established that the order given by the charterers was an order with regard to employment. It is not up to the Master to question the orders of the charterers, but the Master remains responsible for the safety of the vessel. However, if an order is given, compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the Master is entitled to refuse to obey it. If we compare this with the situation where the charterers order the vessel to proceed through the Gulf of Aden, then in the first place, with respect to a worldwide trading time charter, you cannot imply that the owners have accepted the risks present all over the world. You will have to consider the actual situation. On the

⁴⁸⁹ Piracy, Loss prevention newsletter, September 2008, available at <http://www.simsl.com/Loss-Prevention-and-Safety-Training/Piracy0908.html>.

⁴⁹⁰ Anders Ulrik, Piracy – some contractual aspects, Newsletter, Danish Defense Club, available at <http://www.danishdefenceclub.com/News/list.phtml?show=194>.

⁴⁹¹ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 All E.R. 403.

other hand, if a voyage charter has been fixed where the normal route is taking the vessel through the Gulf of Aden, the owners will have difficulties in changing the route unless an escalation of the situation in the Gulf of Aden has taken place.⁴⁹²

Recent court decisions only confirmed this proposition. In *The Paiwan Wisdom*,⁴⁹³ the time chartered vessel was given an order for a laden voyage from Taiwan to Kenya. Before loading, the vessel owners rejected the order and charterers had to hire a substitute vessel in order to perform a shipment. The charterparty included a standard CONWARTIME 2004 clause, which in a relevant part read:

*The vessel, unless the written consent of the Owners be first obtained, shall not be ordered to ... any port, place, area or zone ... where it appears that the Vessel ... in the reasonable judgment of the ... Owners, may be ... exposed to War Risks...*⁴⁹⁴

Kenya was also not excluded in the trade limits clause and the charterers could trade the vessel there, but in order to reach it, the vessel had to pass through areas affected by frequent pirate attacks. When the charterparty was concluded, the shipping community was aware of the threat of piracy and the risks inherent in passing through the Gulf of Aden. That is why there was no material change in the relevant war risk after the date the charterparty was concluded and the refusal to obey charterers' orders and proceed to Kenya.

The judges found in favor of owners. They pointed that owners were not aware, when entering into a time charterparty, that the vessel was likely to be employed on one or more voyages to Kenya. Furthermore, the CONWARTIME 2004 clause did not contain a requirement that the relevant war risk must have escalated since the date of the charterparty. Lastly, owners rejected to trade Kenya before any cargo was loaded.

The decision has to be read in tandem with a decision in *The Triton Lark*,⁴⁹⁵ where owners refused to comply with the order of time charterer to carry a cargo of potash in bulk from Hamburg to China via Suez. The order was refused because the

⁴⁹² Anders Ulrik, Piracy – some contractual aspects, Newsletter, Danish Defense Club, available at <http://www.danishdefenceclub.com/News/list.phtml?show=194>

⁴⁹³ Taokas Navigation SA v Komrowski Bulk Shipping KG (*The Paiwan Wisdom*) [2012] EWHC 1888 (Comm).

⁴⁹⁴ Id. at 2012 WL 2500470.

⁴⁹⁵ Pacific Basin IHX Limited v Bulkhandling Handymax AS [2011] EWHC 2862 (Comm).

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route via Suez involved transiting the Gulf of Aden, which would expose the vessel, cargo, and crew to the risk of attack by pirates. Instead, the vessel went the long way via the Cape of Good Hope to avoid the risk. This resulted in an extra cost in hire and bunkers.⁴⁹⁶

There the court clarified uncertainty and explained that the use of “may be or likely to be exposed to War Risks” in sub-clause 2 of the CONWARTIME 1993⁴⁹⁷ clause of the charterparty required that owners reasonably conclude that there was a real likelihood that the vessel would be exposed to acts of piracy. The likelihood cannot be fanciful or speculative, but must be a “real likelihood,” which could include an event that had a less than only a chance of happening. In other words, the statistical information that owners tried to introduce to show the likelihood of attack would not be sufficient.⁴⁹⁸ Only previous attacks on the vessel, whether successful or not, while passing though the Gulf of Aden, or certain characteristics of the vessel that would make her an easy target for the pirates, can be considered as a real threat by the Master or the owners when making an assessment to sail through the Gulf of Aden or take an alternative route.

The event that became part of the argument between owners and charterers of *The Triton Lark* took place in August 2008 when the shipping community only first started to experience a risk of being exposed to pirate attacks originating from the Gulf of Aden. In order to extend the safe port warranty to the route of the vessel, some shipping companies had responded quickly to the need for a model piracy clause. The CONWARTIME 1993 clause, which was used primarily at that time, was not aimed to protect the interests of shipowners from that emerging risk. INTERTANKO and BIMCO produced “piracy clauses” in December 2008 for both voyage and time charters. Their main purpose was to protect shipowners and give the Masters exclusive authority on choosing defensive measures to protect the vessel and the crew on the given itinerary against the pirates at the additional expense of the charterer.

⁴⁹⁶ James Mackay, CONWARTIME 2004 - Was the long way round the wrong way round? November 2011, available at <http://www.hfw.com/publications/client-briefings/conwartime-2004-was-the-long-way-round-the-wrong-way-round>.

⁴⁹⁷ The wording of the clause can be accessed at http://www.ipta.org.uk/conwartime_.htm

⁴⁹⁸ In determining real likelihood Owners brought an argument that in 1998 the vessel had 1 in 300 chances of being hijacked by pirates.

According to the new INTERTANKO “piracy clause” for time⁴⁹⁹ and voyage⁵⁰⁰ charterparties owners shall not be required to follow charterers’ orders that the Master or owners determine would expose the vessel, her crew, or cargo to the risk of acts of piracy. The protective measures include, but were not limited to, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the vessel. Additionally, shipowners can nominate an alternative route. The vessel remains on hire for any time lost because of taking the defensive measures and for any time spent during or because of an actual or threatened attack or detention by pirates. Charterers also indemnify ship owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy or any preventive or other measures taken by ship owners additional insurance premiums, additional crew costs, and costs of security personnel or equipment.

Unfortunately, piracy puts owners between two fires. On one hand, they have to comply with charterers’ nomination of the port which could be safe, but sail through the areas affected by pirate attacks. On the other hand, the vessels underwriters may deny coverage due to willful misconduct.⁵⁰¹ This situation was considered in the context of *Papadimitiou v Henderson*,⁵⁰² where the court concluded the owner was not guilty of willful misconduct even if he had tried to proceed with his contracted voyage through the areas that were regularly attacked by enemy submarines.⁵⁰³ However, deliberately directing the ship towards areas known to have frequent attacks might give rise to an inference that the owner was not attempting to complete the chartered voyage. If so, that would constitute willful misconduct.⁵⁰⁴

⁴⁹⁹ INTERTANKO Piracy Clause – Time Charterparties, available at <http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/INTERTANKO%20Piracy%20Clause%20-%20Time%20Charterparties.pdf>.

⁵⁰⁰ INTERTANKO Piracy Clause – Voyage Charterparties, available at <http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/INTERTANKO%20Piracy%20Clause%20-%20Voyage%20Charterparties.pdf>.

⁵⁰¹ See Section 55(2) of the Marine Insurance Act.

⁵⁰² *Papadimitriou v. Henderson* [1939] 3 All E.R. 908.

⁵⁰³ Hodges, S., *Marine Insurance Law* at 222 (1996).

⁵⁰⁴ See Stephen Askins, *Piracy off Aden and Somalia: an overview of legal issues for the insurance industry*, <http://incelaw.com/documents/pdf/Legal-Updates/Piracy-off-Aden-and-Somalia-an-overview-of-legal-issues-for-the-insurance-industry.pdf>

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Since the area where the ships are at risk is enormous and covers thousands of square kilometers⁵⁰⁵ owners cannot assume that an attack of the vessel in a certain location would most likely lead to a new attack. *The Saga Cob*⁵⁰⁶ showed that the risk of anticipating an attack and the employment of military escort to protect the vessel was not sufficient in order to consider the port to be unsafe. In *The Saga Cob*, the time chartered vessel was attacked on September 7, 1998 by Ethiopian guerillas while at anchor outside the port of Massawa, Ethiopia. By mid-June, Ethiopian authorities decided to patrol the waters outside Massawa and to set approach routes to Massawa further out from the coast, although for almost two years there were no reported incidents of attacks. On August 26, the vessel was ordered by the charterers to proceed to Massawa. The Court of Appeals overruled the decision of the High Court holding charterers responsible for nomination of unsafe port by pointing that:

*...risk was too slight to be characteristic of the port and hence to be considered unsafe. If such risk shall render the port unsafe then all ports in the area would turn unsafe even though there was no evidence of any such threat. A terrorist attack, however, can occur at all times and cannot be taken into account when reflecting over the safety of a certain port.*⁵⁰⁷

Safe port warranty cannot be used as a defense of owners' financial interest in continuous employment of the vessel because most of the pirate attacks take place in the open sea. Nevertheless, it is worth reviewing recently English court decisions dealing with off-hire of the vessel, in case pirate attack takes place in the port. While the decision of the English High Court may not come as a total surprise to the wider shipping community, it does illuminate the requirement for parties to address, at the time of negotiating charterparty terms, the issue of delays caused by piracy.⁵⁰⁸ In *The Saldanha*,⁵⁰⁹ pirates captured the vessel and the charterers ceased payment of charter hire

⁵⁰⁵ See War Risk Committee circular JWLA016 that extended war risk area attributed to Gulf of Aden pirate attacks from Somalia to territorial waters of India, available at <http://www.lmalloyds.com/CMDownload.aspx?ContentKey=9e7398e8-415a-44c6-a17a-783fb412c663&ContentItemKey=cb878d50-3f6a-4b2a-84e8-57932c08d08f>

⁵⁰⁶ *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)*, (1992) 2 Lloyd's Rep. 545.

⁵⁰⁷ *Id.* at 551.

⁵⁰⁸ Paul Amos, Piracy - an Off Hire Event? SSM newsletter, September 2010, available at <http://www.sims1.com/Publications/Articles/Saldanha0910.html>

⁵⁰⁹ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340.

and put the vessel off-hire. The judge noted that the charterparty included a “bespoke” seizure and detention clause (clause 15 of NYPE), which omitted any reference to piracy. In his conclusion, the judge reinforced the point:

Should parties be minded to treat seizures by pirates as an off-hire event under time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a “seizures” or “detention” clause. Alternatively and at the very least, they can add the word “whatsoever” to the wording “any other cause”, although this route will not give quite the same certainty as it presently hinges on obiter dicta, albeit of a most persuasive kind.⁵¹⁰

Whether a vessel will be off hire because of a pirate attack will depend on the charterparty off hire clause. A vessel is likely to be off hire if, as a result of a pirate attack, the vessel is not able to render the service then required of her by charterers, and provided that the time thereby lost is a consequence of one of the causes listed in the off hire clause.⁵¹¹

It is for charterers to bring themselves clearly within an off hire clause. The clause is often amended by the addition of the words “or by any other cause whatsoever” or “or by any other cause”. The word “whatsoever” is a key. None of the off-hire events listed under a typical off hire clause covers pirate attacks. If the off-hire clause does not contain the word “whatsoever” but does contain the words “or by any other cause,” off-hire events have been construed by the courts to be restricted to the causes listed in the clause, and to any other causes that are similar to those expressly listed and “internal” to the vessel. In a clause of this type, the vessel will probably remain on hire unless or until one or more of the causes occurs.⁵¹²

By incorporating express terms into the charterparty, the parties can seek to avoid any such disputes. The inclusion of such may have been capable of activating an off-hire event caused by an extraneous factor. However, the provision of a tailored

⁵¹⁰ Id.

⁵¹¹ *Actis Co v Sanko Steamship Co (The Aquacharm)* [1982] 1 W.L.R. 119.

⁵¹² Paul Amos, Piracy - an Off Hire Event? SSM newsletter, September 2010, available at <http://www.simsl.com/Publications/Articles/Saldanha0910.html>

“seizures and detention clause,” which lists all events that can lead to off-hire, may prove to be more effective.

4.2.6. Politically-Inspired “Retaliation” Against Vessels of Specific Flag

Events in the Middle East and North Africa have precipitated an increase in the use of economic sanctions as a tool to try to put further pressure on various regimes to alter their policies and to “encourage” them to refrain from actions disapproved by the international community. With the increasing involvement of the international community in fighting with oppressive regimes and a growing number of countries, companies, and individuals against whom these sanctions are aimed, owners and charterers should be extremely careful in selecting a port. Recent marathon of sanctions began with the United Nations, the European Union and the United States laying sanctions against Iran. They followed with sanctions against the Ivory Coast, Syria, and Libya.⁵¹³ The wide-ranging reach of sanctions legislation and the consistent interest of the media in reporting possible sanctions breaches have made sanctions a prominent focus area for the shipping industry and international traders. The high profile of sanctions in the news, and the risk of adverse media coverage in the event of breach, not to mention the penalties and fines that may result from their breach, means it remains of vital importance that international businesses carefully consider their operations within the framework of sanctions legislation and ensure that they have effective compliance programs in place.⁵¹⁴ Most of the sanctions are extra-territorial and calling a sanctioned country will automatically trigger scrutinized review by relevant authorities whether there has been a violation. For shipowners, it can mean that they can be the only party facing charges, especially in situations when the cargo has already been discharged.

Largely, it is not the port itself that can endanger the financial interest of the shipowner in the vessel, but the cargo on board. Delivery of the cargo to a consignee that is blacklisted by one country or the international community can outlaw the owners and subject the vessel to confiscation. International authorities are continually investigating the links between sanctioned entities and other parties and it is therefore extremely important that full and proper due diligence is carried out on any counterparty and

⁵¹³ A complete list of sanctions imposed by various authorities can be found at <http://www.simsl.com/Liabilities-and-Claims/Sanctions.htm>

⁵¹⁴ Michelle Linderman, International Sanctions against Iran, Libya and Syria, June 2011, available at https://extranet.skuld.com/upload/News%20and%20Publications/Publications/Iran%20sanctions/I NCE_International-sanctions-against-Iran-Libya-Syria.pdf

transaction that may have a link to sanctioned entities. The sanctions not only aimed to stop the flow of goods, but also to restrict the flow of financial resources and to freeze assets. Most sanctions are aimed against entities not directly connected with the port and to trigger application of safe port warranty will require scrutinized review of the entire transaction by the shipowner. Only the sanctions against port authorities prohibit all vessels from trading with those destinations. The restrictions will prevent the payment of fees to port authorities and other dues and expenses that allow a vessel to berth at the port.⁵¹⁵ For the shipping industry, this can mean that the only security, in the event of an accident with the vessel or the cargo owners, that the shipowner can provide, is the vessel herself. As the scope of the sanctions is still vague, most underwriters unilaterally call for the application of an omnibus clause and reserve their right to deny coverage when the vessel calls a sanctioned port.⁵¹⁶

Violation of sanctions is closely connected with confiscation of the vessel and it can be one of the most severe punishments for shipowners. It is not uncommon to arrest the vessel for a violation because it is the only way to obtain security and insure that a responsible party will face a court. In *The Greek Fighter*,⁵¹⁷ the vessel and her cargo were detained by the Coastguard of the United Arab Emirates (“UAE”) at Khorfakkan. At the time of the detention, the vessel was on time charter to Fal Shipping Company Ltd (“Fal”). The detention, confiscation, and sale of the vessel and her cargo were justified by the UAE authorities because the vessel had oil of Iraqi origin onboard, which the charterers were in the course of attempting to smuggle or deal with, in contravention of UN sanctions.

Owners submitted that Fal’s orders to load the relevant cargo caused the seizure and eventual sale of their vessel, whether or not that cargo included unlawfully traded Iraqi oil. Their primary case was that the cargo was in fact Iraqi oil, which consequently attracted suspicion, whether or not it was in truth contraband. Further, Fal’s movements involving other vessels also aroused a justifiable suspicion on the part of the UAE authorities that Fal was involved in smuggling Iraqi oil. Even if the authorities in the UAE victimized Fal without any proof of unlawfulness with regard to the relevant cargo, or any other cargo, the express or implied indemnities were still engaged because it was

⁵¹⁵ Id.

⁵¹⁶ See IUMI 2010: Underwriters facing chaos over Iran sanctions, Lloyd’s List, 15 September 2010, available at <https://extranet.skuld.com/Publications/Sanctions/Iran-Sanctions/Links-and-Materials/IUMI-2010-Underwriters-facing-chaos-over-Iran-sanctions/>

⁵¹⁷ *Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter)* (2006) 703 LMLN 1.

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Fal's orders to load the cargo that caused the loss of the vessel.⁵¹⁸ The court agreed with the Owners.

Although the safe port warranty was not breached by the charterers because the court found that contraband oil was not a direct cause for confiscation and subsequent sale of the vessel,⁵¹⁹ it concluded that charterers bear absolute warranty as to the lawfulness of the cargo and "if the transshipment by Fal of contraband cargo of Iraqi origin caused the Greek Fighter to be detained, confiscated and sold, Fal would be liable for the loss, regardless of whether it knew the origin of the oil."⁵²⁰

The court held that on the evidence, a small amount of contraband Iraqi oil had in fact been transhipped into *the Greek Fighter* by Fal from another vessel, *the Gulf Prince*, although Fal was unaware of the origin of the oil. Clause 4⁵²¹ of the charter constituted an absolute warranty as to the lawfulness of the cargo, not merely an undertaking that the cargo was lawful to the best of the charterer's belief. Clause 28⁵²² "reinforced and expanded the protection given by the lawful merchandise warranty. Thus, even though the cargo might lawfully be loaded at the port of loading, it must not be such that presented a risk that the vessel would be captured or seized by rulers or governments anywhere following loading. Again, the obligation of the charterers was absolute, and it was irrelevant that the charterers might have been ignorant of the characteristic of the cargo which gave rise to the risk of capture or seizure."⁵²³

⁵¹⁸ Lloyd's Maritime Newsletter (2006) available at http://www.simic.net.cn/news_show.php?id=14996

⁵¹⁹ See further explanation in § 4.2.3.

⁵²⁰ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497, 563.

⁵²¹ Clause 4 of Shelltime 4 provided: "Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charters. Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

⁵²² Clause 28 of Shelltime 4 provided:

"No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."

⁵²³ *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497, 499.

The “sanctions clause”⁵²⁴ was issued by BIMCO in response to the increasing scope of sanctions against Iran and other countries. The objective of the new clause is to provide owners with a means to assess and act on any voyage order issued by a time charterer that might expose the vessel to the risk of sanctions.⁵²⁵

As sanctions are often brought into force within a short period, the clause covers the application of sanctions after the vessel has begun an employment under the charter. Whether the sanctions existed at the time the order of employment was issued or whether they were subsequently applied, the owners will have the right to not comply with such orders or to refuse to proceed to the discharge port. The owners must advise the charterers promptly of their refusal to proceed with the voyage and the charterers must provide alternative voyage orders with 48 hours of being notified by the owners. Failure of the charterers to issue alternative voyage orders will result in the owners having the right to discharge any cargo on board at a safe port at charterers’ cost.⁵²⁶

The clause will not be able to shield the shipowners from liability imposed by governments. Unless owners performed their due diligence check before the cargo was loaded onboard or immediately after the order was given to proceed to the sanctioned port, the government can impose sanctions on the owners. Sanctions are imposed both on the owners and charterers and no indemnity can be sought from the charterers by the owners. The nature of the sanctions is such that they have an anti-avoidance clause and parties can be prosecuted simply for examining ways in which you can avoid the sanctions.⁵²⁷

4.2.7. Embargo

The most severe type of sanctions a country may face is embargo. Embargoes are complex in their international meaning. Embargoes are considered strong diplomatic measures imposed in an effort, by the imposing country, to elicit a given national-

⁵²⁴ BIMCO sanctions clause, available at

https://www.bimco.org/Chartering/BIMCO%20Clauses/Sanctions_Clause.aspx

⁵²⁵ New BIMCO Sanctions Clause for Time Charter Parties, Newsletter June 2010, available at

https://www.bimco.org/en/News/2010/07/12_New_Sanctions_Clause_published.aspx

⁵²⁶ Id.

⁵²⁷ See IUMI 2010: Underwriters facing chaos over Iran sanctions, Lloyd's List, 15 September 2010, available at <https://extranet.skuld.com/Publications/Sanctions/Iran-Sanctions/Links-and-Materials/IUMI-2010-Underwriters-facing-chaos-over-Iran-sanctions/>

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interest result from the country on which it is imposed. Embargoes are similar to economic sanctions and are generally considered legal barriers to trade.⁵²⁸

Having a similar aim as sanctions, embargos will have the same application of a safe port warranty. How are owners able to initially protect themselves from trading within ports affected by embargoes? Most modern charterparties will expressly provide for areas where the vessel can trade, restricting, or excluding areas that have an embargo in force. Since an embargo is a complete restriction on trade with a certain country, owners and charterers are *ab inito* on notice that calling a restricted port will amount to owners' consent to all risks and consequences.

Embargoes have been regulated by case law dating back to the 19th century and the jurisprudence is well settled.⁵²⁹ In *Atkinson v. Ritchie*,⁵³⁰ the Master (owner) and the charterer of a vessel having mutually agreed in writing, that the ship, being fitted for voyage, should proceed to St. Petersburg, and there load a complete cargo of hemp, and iron, and proceed therewith to London, and deliver the same, on being paid freight. The Master, after taking in at St. Petersburg about half a cargo, sailed away upon a general rumor of a hostile embargo being laid on British ships by the Russian Government. An embargo and seizure was in fact laid on those ships six weeks later. Lord Ellenborough C.J. delivered the opinion of the Court:

..he [Master] is so, at any rate, on the ground of his paramount duty to the State; which required him to save the property and crew under his charge from impending peril of an instantly expected embargo: and, that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the State is materially involved. ... Neither can it be questioned, that, if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his Sovereign

⁵²⁸ See Encyclopædia Britannica available at

<http://www.britannica.com/EBchecked/topic/185507/embargo?anchor=ref751106>

⁵²⁹ See also *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 171.

⁵³⁰ *Atkinson v Ritchie* (1809) 103 E.R. 877.

*and the State of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject.*⁵³¹

The court, after reviewing the case, drew several important conclusions. First, that the safe port warranty and the right to leave the port would be implied, if there an existing embargo or restraints of princess, regardless of the fact that a charterparty was silent to it or provided otherwise. Second, in order for the vessel to leave the port, or to not call one affected by an embargo, the danger in the remaining in the port has to be “immediate and certain.”⁵³²

4.3. Administrative safety

The administrative safety of the port is closely connected to the political safety of the port and some authors review them under one category. However, the administrative safety of a port has its own peculiarities that require treatment separate and distinct to the political safety of a port. The principle established in *The Eastern City*⁵³³ was used by the lawyers to justify the creation of a new category of unsafety for the vessel. There, Sellers L.J. commented:

*Most, if not all, navigable rivers, channels, ports, harbors and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimized by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling on a vessel in accordance with good seamanship.*⁵³⁴

Administrative safety pertains to the man-made conditions that surround the port: berthing and mooring facilities, pilots, warning systems, navigational lights, services provided by the tugs, courts, and other government bodies. In other words, the port must

⁵³¹ Id at 534-535.

⁵³² Id.

⁵³³ Leeds Shipping Co v Societe Francaise Bunge SA (*The Eastern City*) [1958] 2 Lloyd’s Rep. 127.

⁵³⁴ Id at 131.

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be safe in its set-up, and the above are some deficiencies in set-up that may be held and, indeed, have been held to render a port unsafe.⁵³⁵

4.3.1. Wharf

Safety of the wharf or dock actually stems from the nature of the safe port and berth warranty. If an accident to the vessel occurs when she was alongside the wharf, the first question to ask is whether the wharf was suitable for the vessel. The wharf must always be safe for the vessel of a particular size to dock. Alternatively, charterers or wharf owners have a duty to warn ships of the hidden defects of the wharf which are either known or discoverable through the exercise of due diligence.⁵³⁶

In *Paragon Oil Co. v. Republic Tankers, S. A.*,⁵³⁷ the court found that the charterer was liable for damage the vessel sustained when she grounded after proceeding to a berth that was occupied. Although the vessel's agent and captain had known the berth was occupied and nevertheless sailed toward it, they had been assured that berth was expected to be available when vessel arrived.

The *MV Greenpoint* was chartered for a voyage from Puerto La Cruz to Buenos Aires. The charter party contained a safe berth clause. Upon arrival at the discharge port, owners' agent had learned from the receivers of the barges at Dock C, where the vessel should berth; however, they advised that it would finish discharging shortly, and later that day confirmed that it had. The vessel ordered the pilot and proceeded to her berth. Upon approach, it was discovered that the barge was still at the berth. She anchored alongside the barge, some 35 meters from the dock. After the barge departed attempts were made to move the *MV Greenpoint* to the dock, but she was aground. The court ruled:

Where charterer had warranted safe berth in contract with vessel's owner, and purchaser of cargo had made substantially identical warranty in contract with charterer, and ship came aground and was damaged when promised berth was not clear on vessel's arrival, owner's direct claim against purchaser might have been sustained on theory akin

⁵³⁵ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, 1991 at 203.

⁵³⁶ See supra §2.4.4.5.

⁵³⁷ *Paragon Oil Co. v. Republic Tankers, S. A.*, 310 F.2d 169.

*to liability to shipowner of stevedoring company that contracts with charterer or consignee.*⁵³⁸

The Master is required to use only ordinary skills in bringing the vessel to berth. In *The Vine*,⁵³⁹ it was established that when the skill required by the Master went beyond the ordinary skills of seamanship the berth was not a safe one.⁵⁴⁰ The court concluded that contingency plan used by the Master was abnormal when

*... for a stern-on berthing required the Master and pilot “to look down over the side and visually line the side of the vessel up with the line of the jetty.” The gyro heading required to be constantly monitored and very careful control of the vessel’s heading was required by the use of tugs and the port anchor.*⁵⁴¹

There are several conclusions to be drawn. First, a wharf should be able to accommodate the vessel. Second, charterers should ensure the availability of the wharf at the time of vessel arrival. Third, ordinary navigational skills should allow berthing of the vessel.

4.3.2. Charts

Although navigation of the vessel is purely the owners’ concern, in some cases, charterers or their agents are required to provide a vessel with reliable and up-to-date charts in order to ensure that she can safely enter a port. For example, the bottom of some rivers rapidly changes and only continuous monitoring and soundings can guaranty that a vessel of a given size can safely enter and leave river-bound ports.

The Eastern Eagle provides an example of a deficient port system and port authority.⁵⁴² In *The Eastern Eagle*,⁵⁴³ charterers ordered the vessel to proceed in ballast to Macapa, on the Amazon River in Brazil, and instructed the vessel to load a full cargo of manganese ore to “Amazon River draft limitations” for discharge at Rotterdam, the

⁵³⁸ Id.

⁵³⁹ *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 (Comm).

⁵⁴⁰ See *infra* §3.3.3.

⁵⁴¹ *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] 1 C.L.C. 993, 1015.

⁵⁴² Alexander McKinnon, *Administrative shortcomings and their legal implications in the context of safe ports*, 23 A&NZ Mar LJ 186, 198 (2009).

⁵⁴³ *The Eastern Eagle*, 1971 A.M.C. 236 (1971).

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Netherlands. The vessel proceeded to Macapa and loaded a cargo of manganese ore to a draft of 34 feet 8 inches fresh water. The Master and his officers carefully plotted their course inbound, and made the ballast trip inbound without incident. Proceeding outward from Macapa the vessel stranded in an area of the Amazon River known as Banco do Meio in the north channel of the river while proceeding on an identical but reversed course to that which had been safely followed inbound. After refloating, the vessel proceeded to Rotterdam, and after completion of discharge, went into drydock. After returning from the drydock owners rejected to proceed to Macapa claiming that it was not a safe port.

The Tribunal gave careful consideration to all of the facts placed before it and came to the conclusion that

...it cannot consider that Macapa, because of the hazards in approaching thereto and departing therefrom, is a safe port for the Vessel's size and draft during any season of the year. The shipper, Industria e Comercio de Minerios, S.A. (hereinafter referred to as "Icomi") is the only regulatory body controlling the port of Macapa and its approaches. The information that is distributed to ship Masters in the trade is prepared by Icomi's Port Superintendent, and is issued without guarantee. Navigational charts of the area are distributed by Icomi and in the subject case were found, without dispute, to be inaccurate. ... No accurate charts of the area are presently available. Based on the evidence and testimony before the panel it is convinced that what navigational aids that do exist in the approaches to Macapa are insufficient in number and functionally inadequate. There are no buoy markers, and there is no competent pilotage service available, because no one really knows the varying depths of water in the approaches to Macapa. The banks and the river bottom are constantly changing and no surveys are conducted to record such changes.⁵⁴⁴

⁵⁴⁴ Id at 239.

In a situation where the bottom of the river and the draft changes rapidly it is vital to have up to date information onboard the vessel. The charterers can only comply with the prospective safety of the port requirement by constantly updating the Master of changes to the river bed. *The Eastern Eagle* confirmed that a time charterers' obligation in nominating a safe port is continuous, especially when charterers are nominating a port that is known for rapid changes in port conditions.

4.3.3. Pilotage, Buoys, and Tug Assistance

What other conditions concerning setup of the given port can be a determining factor in deciding its safety? If tug assistance is required and is essential for the vessel to proceed to her berth and if no such assistance is available at the port itself, that port, as regards to that vessel, is not safe within the meaning of the charterparty. In the *U.S. v. Atlantic Refining Co.*,⁵⁴⁵ the owners alleged violation by charterer of terms of charter party by consuming laytime in excess of its allowance, wherein it appeared that a strike of tugboat employees had existed and that the Master was consequently unable to dock the vessel. The court ruled:

*Under terms of charter party agreement making it duty of charterers to elect and designate a safe and proper place for discharge of cargo, charterer had duty of selecting not only a place safe for vessel to lie after it was reached, but which could be safely approached, and there was duty on Master to bring vessel into berth indicated, and any delay in so doing, that arose not from the unsuitableness of the berth or its approaches, or fault of the charterer, would be imputable to Master.*⁵⁴⁶

It is clear from the decision that if reasonable diligence cannot be exercised to bring the vessel alongside, charterers will be responsible for nominating an unsafe berth. The court in *The Sea Queen*⁵⁴⁷ and *The Sagoland*⁵⁴⁸ confirmed this position.

The tugs and pilots have to be available at any time of day and night otherwise the port will not be safe. In circumstances when the weather can change rapidly, the

⁵⁴⁵ U.S. v. Atlantic Refining Co., 112 F. Supp. 76.

⁵⁴⁶ Id.

⁵⁴⁷ Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen), [1988] 1 Lloyd's Rep. 500.

⁵⁴⁸ Broston & Son v. Dreyfus & Co. [1932] 44 Lloyd's Rep. 136.

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inability of the vessel to leave or approach the berth can easily cause damage to the ship. *The Nautilus* was chartered under a voyage charterparty on a Gencon form. The vessel proceeded without any incident to the port of Manzanillo and started discharge. On the afternoon of 20 September, the Master began monitoring the progress of Hurricane Olivia. Later that evening the weather conditions deteriorated and the Master contacted the local agent to arrange pilots and tugs to move the vessel to anchorage. Although the sailing directions described the port as one which provided a tug and pilotage service, there were no tugs available at that time and the only pilot was engaged elsewhere.⁵⁴⁹ At nighttime, the vessel banged several times against the berth and was damaged. The tribunal found that the Master acted reasonably by not attempting to leave the berth without tug and pilot assistance and ruled that it was “inexcusable for the port to operate without a full complement of pilots on duty,”⁵⁵⁰ especially during hurricane season.

The question can arise how to separate owners’ and charterers’ obligations towards pilots. It seems that the charterers’ obligation ends once a qualified pilot boards the vessel. Unless there are substantial deficiencies in the training of the pilot, his actions will be attributable to the Master, i.e. owners.⁵⁵¹ Nevertheless, the Master has authority to overwrite pilot’s instructions and act at his will. The court in *The Vine*⁵⁵² found that regardless of the fact that the pilot had superior knowledge of the berth condition, it was the Master’s responsibility to berth the vessel safely. The court further stated:

There is no evidence of any system whereby Masters were made aware of these matters [contingency plan]. The obvious person to inform the Master would be the pilot but the evidence from the Master and pilot of NORDSTAR does not suggest that such information was passed on by the pilot to the Master prior to berthing. Thus neither the Master nor the pilot made reference to such information being communicated by the pilot prior to the berthing. Of course a Master may observe during berthing that D3 [fender] is damaged ... but that is too late and in any event he would remain unaware of the

⁵⁴⁹ *The Nautilus* SMA 2622 (Arb. at N.Y. 1990).

⁵⁵⁰ *Id.* at 6.

⁵⁵¹ See *supra* §2.4.4.1.

⁵⁵² *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 (Comm).

*contingency plan and the lesser capacity of D2 unless informed of those matters by the pilot.*⁵⁵³

In the circumstances when cause of an accident was negligence of the pilot, the competence of the pilot, his instructions to the master and system of pilot's training in the port would be examined, before deciding that the master failed to use good navigation and seamanship while proceeding to the berth.

Will administrative shortcomings of the port authority breach a safe port warranty? In *The Aristagelos*,⁵⁵⁴ the Tribunal ruled that the lack of navigational aids, inadequate pilotage, and towage, as well as the fact that charted soundings were two years old made the port unsafe. The panel also took account of subsequent events: "dredging of the channel and its approaches and placement of new buoys and repositioning of existing buoys were all undertaken shortly after this grounding took place in an effort to improve the safety of the port."⁵⁵⁵

Sending a vessel to a small, unknown port can be a red flag for the tribunal to review carefully all of the surrounding circumstances. Although the port can be unsafe, charterers can escape liability by showing that the Master was also negligent and acted unseamanlike. In *The Star B*,⁵⁵⁶ the vessel was sent to Boca Chica, a small port about 20 miles east of Rio Haina, for discharge of the Rio Haina cargo after discovering congestion there. While attempting to enter the channel to Boca Chica, the vessel went aground. Regardless of the fact that there was sufficient evidence to support owner's contention that there were deficiencies in the entrance buoys, the range markers, the charts and navigation guides, as well as with the pilot because he was unlicensed, rendered Boca Chica an unsafe port and the tribunal ruled in the charterers favor. Destruction of the evidence by the Master and his subsequent alteration of the log book and his failure to inform flag authorities also contributed to the decision in charterers' favor. Even though a number of nautical publications and charts warned mariners that "lights and buoys are unreliable in the Dominican Republic and should not be relied on,"⁵⁵⁷ the panel held that the port was unsafe notwithstanding the given precautions and consent of the owners to sail there.

⁵⁵³ Id.

⁵⁵⁴ *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980).

⁵⁵⁵ Id. at 5.

⁵⁵⁶ *The Star B* SMA 3813 (Arb. at N.Y. 2003).

⁵⁵⁷ Id. at 3.

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It is an obvious requirement of a safe berthing that a contingency plan is in operation that the pilots are aware of and that they have accepted. The IMO code of practice for the safe loading and unloading of bulk carriers⁵⁵⁸ provides that the terminal should give the ship, as soon as possible, “features of the berth or jetty the Master may need to be aware of, including the position of fixed and mobile obstructions, fenders, bollards and mooring arrangements.”⁵⁵⁹

It is important to note that the location of bunkering places in the port was decided to be outside safe port warranty for which a charterer is responsible. The tribunal in *The Mediolanum*,⁵⁶⁰ reasonably concluded that “within the limits of every port there are bound to be areas which will be unsafe for almost every size of vessel if she goes there.”⁵⁶¹ Safe navigation to the bunkering location is the responsibility of the owners despite the fact that it is the responsibility of the charterers to bunker the vessel. Bunkering agents are viewed as those performing similar functions to that of a harbor Master or port authority and only owners are responsible for their negligence.

4.3.4. Monitoring System

Modern standard for vessel safety require not only the presence of physical assistance for the vessel to come to the port such as pilots and buoys, but also a system that can monitor accidents in the areas close to, and within, the port and close to its approaches in order to warn the vessel of any dangers.

Although the Master himself is responsible for monitoring conditions of the sea while navigating the vessel, such external assistance can assure that the vessel avoids dangers that cannot be revealed by exercise of good seamanship.

In *The Count*,⁵⁶² the vessel was chartered for the carriage of a cargo of petroleum products from Sitra to “1, 2 or 3 safe ports East Africa Mombasa/Beira range.” *The Count* arrived at Beira and tendered her notice of readiness on 29 June 2004. On the day

⁵⁵⁸ Manual on loading and unloading of solid bulk cargos for terminal representatives, International Maritime Organization, October 11, 2004, available at <http://www.uscg.mil/imo/dsc/docs/dsc9-report.pdf>.

⁵⁵⁹ Id. at clause 3.3.1(3).

⁵⁶⁰ See supra.

⁵⁶¹ *Mediolanum Shipping Co. v. Japan Lines Ltd. (The Mediolanum)* [1984] 1 Lloyd's Rep.136, 141 (C.A.).

⁵⁶² *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)*, [2006] EWHC 3222 (Comm).

of her arrival, another inbound vessel, the *British Enterprise*, went aground in the channel which links the port with the sea. After being re-floated, *the British Enterprise* grounded a second time in the channel on 1 July. *The Count* proceeded to the discharge berth on 4 July after *the British Enterprise* had completed discharge operations. *The Count* completed the discharge of her cargo early on 9 July, but she was unable to sail from the port because on 5 July an inbound container ship, *The Pongola*, had grounded in the approach channel at almost the same spot as the *British Enterprise* had first grounded. As *The Pongola* was blocking the channel, the port authorities closed the channel to vessel traffic, and *the Count* was not able to sail from Beira until 13 July. The owners claimed from the charterers the amount of their loss resulting from the delay to *The Count* caused by the blockage of the channel by *The Pongola* on the ground that this loss resulted from a breach by the charterers of the safe port provisions. The court on appeal from an arbitrators' decision ruled:

In the present case the arbitrators' finding that the port was unsafe was not based on the fact that there might be a merely temporary hazard. It was based on characteristics which were not merely a temporary hazard, namely that the buoys were out of position as a result of shifting sands and that there was no adequate system for monitoring the channel. The reasoning in The Hermine⁵⁶³ does not bar a finding by the arbitrators that these characteristics, existing at the time of the nomination, were such as to create a continuing risk of danger to vessels, including the Count, when approaching and leaving the port, and it was therefore an unsafe port to nominate.⁵⁶⁴

Is the danger of grounding or delay of the vessel linked with the use of the port? According to Devlin J in *Grace v General SN Co.*,⁵⁶⁵ it is. It is obvious, as a matter of fact, that the more remote the danger is from the port, the less likely it is to interfere with the safety of the voyage. In recent years, however, owners started to consider the absence of a proper monitoring system as one of the ways to shift liability on the charterers when the cause of the damage falls on them. In *The Marinicki*,⁵⁶⁶ when all the

⁵⁶³ *Unitramp v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

⁵⁶⁴ *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)*, [2006] EWHC 3222 (Comm) at para 30.

⁵⁶⁵ *Grace v General SN Co.* [1950] 2 KB at 391.

⁵⁶⁶ See also § 4.1.11.

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facts showed that the presence of a hard object in the channel was due to an abnormal occurrence, the deputy judge then considered whether the port of Jakarta was unsafe, “because there was no proper system in place to check and/or monitor the safety of the channel to the port and/or to warn traffic using the channel of any such danger as might exist.”⁵⁶⁷

Miss Bucknall QC identified a number of shortcomings in the port authority: there was no immediate investigation by the port authority, either after the Master’s VHF radio call, or after his written report; no warning was given to other users of the port indicating the possibility that an obstruction may exist in the channel; and the port authority’s subsequent actions were defensive rather than proactive. In addition, after receiving the sounding that showed the possibility of an obstruction in the channel, the port authority dismissed it; its excuse was that it did not want to waste money and had disbelieved the Master’s report. It was found that there was a “very unsatisfactory regime prevailing in the port administration in relation to the safety of vessels using the dredged channel.”⁵⁶⁸ The decision was odd, as it allowed to the court to consider a busy port of Jakarta with a good safety history to be considered unsafe. The tendency to put monitoring system of the port above accident free history found its way in *The Ocean Victory*,⁵⁶⁹ a recent decision of the High Court.

Obviously, the presence or lack of a monitoring system will not protect the vessel from the damage if the object damaging the vessel happened to be in the sea bottom for a short period of time and it was not discoverable by reasonable means. However, a need for such a system was restated in Article 15(2) of the Geneva Convention on the Territorial Sea 1958, which required the coastal state “to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.”⁵⁷⁰

4.3.5. Weather Forecasting System

⁵⁶⁷ *Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* [2003] 2 Lloyd's Rep 655, 669.

⁵⁶⁸ *Id.* at 770.

⁵⁶⁹ *Gard Marine & Energy Limited v China National Chartering Co. Ltd.* (formerly known as and/or successor in title to China National Chartering Corp.) [2013] EWHC 2199 (Comm).

⁵⁷⁰ The Geneva Convention on the Territorial Sea 1958, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf

Adequate weather forecasts must be available and the organization of the port must be such as to enable a competent Master to take necessary avoidance action.⁵⁷¹ Thus, in the case of *The Khian Sea*,⁵⁷² the Court of Appeal held a port was unsafe when, although the Master obtained adequate warning of an approaching storm, he was prevented from leaving his berth by the presence of two other vessels anchored close by. Lord Denning MR took the opportunity of enumerating the requirements that had to be satisfied in such circumstances under the safe port warranty.

*First there must be an adequate weather forecasting system. Second, there must be an adequate availability of pilots and tugs. Thirdly, there must be adequate sea room to maneuver. And fourthly, there must be an adequate system for ensuring that sea room and room for maneuver is always available.*⁵⁷³

In the Court of Appeal, Lord Denning MR recognized that there were unsatisfactory administrative features of the port. Specifically, the port's safety system effectively shut down at night.⁵⁷⁴ The forecasting system should not only be operative continuously, but its reports have to reach the vessel in a timely manner. In *The Dagmar*,⁵⁷⁵ Mocatta J. held that the burden to prove that the vessel received weather reports was on the charterers, but only if it was a "relatively simple" matter for them. He further stated:

*...unless a vessel of approaching the Dagmar's size ordered to load at Cape Chat (or a place similar thereto) is specifically warned that (a) she will receive no weather information from the shore and must rely upon her own resources for obtaining weather forecasts; and (b) is also warned that in strong winds and seas the place is unsafe for her to remain in, such place is unsafe...*⁵⁷⁶

⁵⁷¹ Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 186 (2009).

⁵⁷² *The Khian Sea* [1979] 1 Lloyd's Rep 545 (CA).

⁵⁷³ *Id.*

⁵⁷⁴ *Id.* at 172.

⁵⁷⁵ *Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar)*, [1968] 2 Lloyd's Rep. 563, see *supra* § 4.1.8.

⁵⁷⁶ *Id.* at 586.

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The court concluded that without access to the forecast service, Cape Chat was not a good and safe port or place for *The Dagmar* within the meaning of the charterparty.

The case should be distinguished from *The Adamatos*,⁵⁷⁷ where the time charterparty provided that the “vessel was to perform a transatlantic voyage always ‘via safe port(s), safe berth(s), safe anchorage(s), in/out geographical rotation always within I.W.L. and below mentioned trading limits.’”⁵⁷⁸ Upon arrival, the vessel anchored approximately three miles from the breakwater. Dangerous weather progressed and in spite of the Master’s efforts to maneuver the vessel safely from danger, she drifted toward the shore and grounded. The owner argued that because of the suddenness with which the storms could strike, it was “imperative that port data and port systems, weather services and other relevant port and berth information be furnished vessels at anchor so they may be on a heightened alert.” The Tribunal found in charterers favor because there was sufficient information to place the Master and crew on alert. Specifically, the South American Pilot book, which the Master had read, described in detail dangerous weather patterns affecting the port. Weather transmissions that would have further alerted the Master to the impending storm were available.⁵⁷⁹ *The Adamatos* is a good example where negligence of the Master and bad seamanship saved the charterers from breaching a safe port warranty.

4.3.6. Dredging

Quiet often the physical dangers, such as silting, can be avoided by timely dredging the port and its approaches. The point of a warranty is that it speaks from the date of nomination, but it speaks about the anticipated state of the port when the vessel arrives.⁵⁸⁰ Under what circumstances can the failure to dredge the port not be considered an abnormal occurrence?

Natural silting of the port occurs yearly and can be anticipated by mariners. Owners and charterers can evaluate the depth of the port while examining maps and charts. The depth certainly fluctuates, but very often, it can be cured by interference of port authorities who are responsible for keeping the port open for the vessels having a certain draft. If dredging is done on a regular basis and port authorities continuously monitor depth, charterers will not be in breach of a safe port warranty in the absence of circumstances when rapid change of the draft was normal for the port. In *The*

⁵⁷⁷ *The Adamastos* SMA 3416 (Arb. at N.Y. 1998).

⁵⁷⁸ *Id.* at 2.

⁵⁷⁹ *Id.* at 8.

⁵⁸⁰ *Unitramp v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

Hermine,⁵⁸¹ the court, after carefully examining all the evidence, came to the conclusion “that the means available locally to the US Corp of Engineers for dredging the channel were inadequate.” However, the port remained safe after Port Authorities of New Orleans showed that substantial resources capable of reversing the deterioration of the draft were brought. Determination whether measures undertaken by port authorities were sufficient would be recognized by the tribunal only if anticipated siltation and weather conditions were taken into consideration by charterers, but also charterers’ knowledge that the event that gave rise to the incident occurs year after year.

4.3.7. Judicial System

Another element of unsafety is the inability of the judicial system to give adequate relief where a vessel was unlawfully detained. Owners can lose their proprietary interest in the vessel due to their own or a charterer’s mistake. However, the events that might lead to release of the vessel can be interrupted by corrupt or undeveloped judicial systems. In such circumstances, the executive decision to confiscate or detain the vessel will have unreputable power.

The Greek Fighter,⁵⁸² illustrates how a court looked at the operation of the judicial branch of the United Arab Emirates and its balance with the executive branch. The court found that, “the lack of facilities for obtaining release of a vessel was not an abnormal occurrence but an intrinsic feature of the UAE judicial system.”⁵⁸³

Although the owners tried to convince the court that because of the immense personal influence of a member of the President’s family, such as the son of the President, Sheikh Zayed bin Khalifa, would, in practice, be impossible to obtain judicial relief against acts of the Coastguard, such as the detention of the vessel which, as in the present case, had been personally approved by him or by his officials. The evidence presented showed that the courts would not be likely to make orders against state organizations or ministers, the judges being largely non-UAE Arab lawyers appointed by the Ministry of Justice on fixed term contracts renewable for good behavior. Decree 41/2002 which removed from the courts’ jurisdiction all matters related to breach of UN

⁵⁸² Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter) [2006] 2 C.L.C. 497.

⁵⁸³ Id.

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sanctions reflected the traditional approach of the Government, leaving owners with some recourse to the Ministerial Committee as the only available remedy.

The court was not persuaded by the argument and ruled that judicial system functioned properly and adoption of the decree could not lead to an assumption that the judiciary was not capable of acting independently. The port was considered safe at all times.

A good example of judicial system that was found by the court to be corrupt was described in *The Island Archon*.⁵⁸⁴ The owners of the *MV Island Archon* time chartered her to the appellants for a term of 36 months on a NYPE form. In the course of her employment under the charterparty, the vessel was ordered on a voyage from European ports to Iraq. The Iraqi receivers asserted cargo claims. German sub-charterers gave the orders, but they had become insolvent. The shipowners had to provide security before the ship was allowed to leave Basrah, Iraq and this gave rise to some delay. The shipowners claimed an indemnity against their losses from the time charterers.

The argument arose whether knowledge of the owners of the judicial system at the time of nomination could be considered as assumption of risk to call a nominated port and bar their claim for indemnification. Both the arbitrator and the court found that, “any ship ordered to discharge general cargo in Iraq was almost bound to have cargo claims made against it and to have those claims taken to court locally, leading to adverse judgments, regardless of whether there was any actual shortage or damage, or otherwise any other liability on the ship under the bills of lading.”⁵⁸⁵ The courts accepted certificates of shortage, issued by port authorities, as conclusive evidence against the carrier. The ruling was for the owners as the loss arose directly from an instruction improperly given by the charterer, “and on fair reading of the charterparty the shipowner cannot be understood to have accepted this risk when he agreed to act on the charterers’ instructions.”⁵⁸⁶

4.3.8. Security System

The International Ship and Port Facility Security (“ISPS”) Code entered into force on 1 July 2004 as an amendment to the International Convention for the Safety of

⁵⁸⁴ Triad Shipping Co v Stellar Chartering & Brokerage Inc (*The Island Archon*) [1994] C.L.C. 734.

⁵⁸⁵ Id at 736.

⁵⁸⁶ Id at 747.

Life at Sea 1974 (SOLAS).⁵⁸⁷ ISPS, designed to protect ports and international shipping from terrorism, takes the approach that ensuring the security of ships and port facilities is a risk management activity. Under the Code, contracting governments are required to ensure security information is provided to port facilities and ships prior to entering a port and whilst in their territory. Three security levels apply. Additionally, ships and owners are required to establish ship security plans and act upon the security levels set by governments. Moreover, a port facility security assessment must be undertaken and periodically reviewed. This may culminate in the development of a port facility security plan, and the appointment of a port facility security officer.⁵⁸⁸

Aside from the physical threat to vessels, there is now the very real possibility of substantial delays and refusal of entry. Many port state control regimes have now tightened and the chance of detention, expulsion, or refusal of entry for vessels that are deemed to pose a risk has inevitably increased. This can have an enormous effect on a vessel's commercial viability.⁵⁸⁹

*The Mary Lou*⁵⁹⁰ is a typical example where an inefficient port security system could have rendered the port to be unsafe. There, Judge Mustil said: "A port may have geographical, climatic or other characteristics which entail that it will be safe if, a particular system for securing its safety remains effectively in operation..."⁵⁹¹ The Court of Appeal appears to be saying that it is the owner, rather than the charterer, who should bear the risk that the safety system of a particular port may prove in practice to be inadequate, notwithstanding that it is the charterer who promises that the ship will be sent only to safe ports.

Many countries started to employ special security instruments in order to warrant that the vessel entering the port will not threaten safety of the port. Largely, the principle inverted and encompassed mutual responsibility as it required cooperation of owners and charterers in order to ensure that the vessel will not face any detention and consequential

⁵⁸⁷ International Convention for the Safety of Life at Sea (SOLAS), opened for signature 1 November 1974, International Maritime Organisation (IMO), chapter XI-2 (entered into force 25 May 1980; as amended by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974: 9 - 13 December 2002) ('ISPS Code'). Part A of the Code is mandatory and part B provides guidelines on compliance with part A.

⁵⁸⁸ Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 189 (2009).

⁵⁸⁹ Julio Espin-Digon et al, Lloyd's MIU Handbook of Maritime Security, at 90 (2008).

⁵⁹⁰ *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep.

272.

⁵⁹¹ *Id.*

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delays. Although the safety of the port remains a charterers' warranty, owners now have a burden of proof that their vessel was fit to call a particular port that introduced security measures.

New policy introduced, for example, by the United States Safe Port Act⁵⁹² specifically focuses on protocols for the prioritization of vessels and cargo, identifies incident management practices specific to trade resumption, and describes guidance for the redeployment of resources and personnel. "In doing so, the strategy recognizes that many different types of incidents exist that might impact the supply chain, but the resumption of trade following an incident is an 'all hazards requirement.'"⁵⁹³

There is a growing trend, both on the national and international level, to increase the duties of control exercised by port authorities over the shipping industry. Some ports adopted compulsory schemes for the control of the movements of ships within the port while others performed voluntarily schemes. A traffic control scheme that includes routing of the vessels offers the shipping industry a variety of services. This includes radar facilities, the removal and marking of wrecks, the buoying of channels, lights, monitoring systems, etc.⁵⁹⁴ Nevertheless, administrative shortcomings and failures of port authorities may render a port unsafe. The law is, however, largely unsettled, and the court or the tribunal may look at the event as one caused by any deficiency in port management. The ports themselves are not interested in being listed as administratively unsafe as it can decrease vessel's traffic and the revenue port authorities, pilots, and wharfingers expect. On the other hand, court decisions provide an external evaluation of services provided by the port and can, in the end, benefit both owners and charterers.

4.4. Environmental Safety

Problems relating to the environmental unsafety of a port could have been discussed under the physical or administrative safety of the port chapters. However, due to increased importance and scrutinized regulation, they have to be reviewed

⁵⁹² Safe Port Act, 42 U.S.C. 5122.

⁵⁹³ Strategy to Enhance International Supply Chain Security, Department of Homeland Security Newsletter (July 2007), available at www.dhs.gov%2Fxlbrary%2Fassets%2Fplcy-internationalssupplychainsecuritystrategy.pdf&ei=1IxeUoStK4rBswbuq4CYBg&usg=AFQjCNGN Ng6fXexfZ2DVQVDI7TCVXMuww&sig2=ZO4JJjwyDNWtgVZmtEYPnQ

⁵⁹⁴ Dr. S Mankabady, The concept of safe port, 5 J. Mar. L. & Com 633, 634 (1973-1974).

separately.⁵⁹⁵ With the increasing consciousness of society to environmental issues, there is a need to review environmental safety as a separate category.

4.4.1. Diseases

A port must be sanitarily safe. International Health Regulations (“IHR”)⁵⁹⁶ prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.⁵⁹⁷

Recently, the Human Swine flu made world headlines because the rare Influenza A H1N1 virus⁵⁹⁸ evolved from a swine associated virus. According to the World Health Organization the Influenza A H1N1 virus reached pandemic status in 2010, i.e. it was global. In terms of shipping, it can only mean that the vessel’s crew and passengers could be exposed to disease at any port of call anywhere in the world.⁵⁹⁹

At least in the countries that have implemented the IHR, it could be relevant to consider whether a port is unsafe. Relevant to the issue, the IHR requires member states to develop facilities to assess, notify, and report events, and requires them to ensure they are able to respond promptly and effectively to public health risks and public health emergencies of international concern.⁶⁰⁰

⁵⁹⁵ See also Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 211 (1991).

⁵⁹⁶ International Health Regulations (2005), available at <http://www.who.int/ihr/9789241596664/en/index.html>

The IHR require States to strengthen core surveillance and response capacities at the primary, intermediate and national level, as well as at designated international ports, airports and ground crossings. They further introduce a series of health documents, including ship sanitation certificates and an international certificate of vaccination or prophylaxis for travelers.

⁵⁹⁷ Id at Art. 5.

⁵⁹⁸ A much smaller number of people are pre-immune to A H1N1 virus than to regular seasonal flu viruses. The Influenza A H1N1 virus was expected to spread faster and among higher percentage of the population.

⁵⁹⁹ Gard Loss Prevention Circulars, March 2011 at 74, available at <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBgQFjAA&url=http%3A%2F%2Fwww.gard.no%2FikbViewer%2FContent%2F72995%2FGard%2520Loss%2520Prevention%2520Circulars%2520March%25202011.pdf&ei=XsxGTpfbJs7FtAaMvq22CQ&usq=AFQjCNGoZHjOoGBKLg90aakYKxpfNe3ADA>

⁶⁰⁰ IHR, art 5.

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Recent press reports⁶⁰¹ indicated that there had been instances of shore side medical authorities not permitting ship's crew or passengers ashore when Human Swine flu cases were suspected and/or confirmed on board.⁶⁰² This, in turn, caused logistical problems for the vessel. The delay of the vessel even for a short time can make the port an unsafe one as the vessel will not be a working one any longer. At the same time, it can allow charterers to appeal that the delay was caused by reasons that relate to the deficiency of the vessel and her crew, for which charterers cannot be responsible. By analogy, it can be considered a defense for the charterers in calling an unsafe port, such as incompetence or negligence of the Master that caused damage to the vessel or deficiency of her crew. It seems that the spread of contagious disease onboard the vessel will not be considered an abnormal occurrence; however, IHR in the port will be considered something that the charterers should have been aware of when nominating the port.

Will the position of the courts be different in deciding in favor of owners when the crew is infected in the port that does not have such a system of disease prevention or while onboard and the owners subsequently suffer an economic loss? Older case law only confirms that charterers will not be responsible for the delay of the vessel caused by port authorities' preventative measures to clear the vessel when there is a sick crewmember on board. Although in *The Delian Spirit*,⁶⁰³ Lord Denning, M.R. discussed the right of the owners to call an alternative port when the nominated port was unavailable. He briefly discussed a situation when free pratique for the vessel was not given because of the sick crew member:

I can understand that, if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her

⁶⁰¹ Rebecca Richardson and Peter Hawkins, Cruise ship stuck in swine flu scare, *The Sydney morning Herald* May 25, 2009, available at [http://www.smh.com.au/travel/travel-news/cruise-ship-stuck-in-swine-flu-scare-20090525-bjw.html](http://www.smh.com.au/travel/travel-news/cruise-ship-stuck-in-swine-flu-scare-20090525-bjw.html#ixzz1UwGEq94C)

⁶⁰² *Id.*

⁶⁰³ *Delian Spirit Shipping Developments Corporation v V/O Sojuzneftexport (The Delian Spirit)* [1971] 1 Lloyd's Rep 506.

*pratique, she is entitled to give notice of readiness, and lay time will begin to run.*⁶⁰⁴

The established understanding in shipping circles is that the general rule is that the ship owner is entitled to look to the charterers for an indemnity against the consequences of complying with an order as to the employment of the ship.⁶⁰⁵ But, not every loss arising in the course of the voyage can be recovered. For example, the owners cannot recover for heavy weather damage to the vessel merely because had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered; or the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense the cost of ballasting is incurred as a consequence of complying with the charterers' orders. The connection is too remote.⁶⁰⁶ Similarly, the owners cannot recover for disease of the crewmember or passenger when the outbreak of a contagious disease occurred for the first time, regardless of whether the port had an IHR system in place, as it will be too remote to hold charterers responsible. It seems in the modern world most likely the courts will take a much stricter approach in the event of an international concern or emergency.⁶⁰⁷ If the crewmember was infected in a port with a poor IHR system and the vessel was delayed in the next port, charterers can be held responsible for breaching a safe port warranty in the earlier port.

4.4.2. Pollution

Charterers are exposed to pollution liabilities in a variety of ways. In many circumstances the owners bring the claims for damage to the environment as a claim for indemnification of expenses for cleanup. Under the Civil Liability Convention ("CLC"),⁶⁰⁸ environmental pollution claims are channeled solely to the registered ship owner.⁶⁰⁹ Under the so-called channeling provisions, compensation claims may not be pursued against the servants or agents of the owner, the members of the crew, the pilot, any other person performing services for the ship (and not being a member of the crew), any charterer (including a bareboat charterer), manager or operator of the ship, or any

⁶⁰⁴ Id. at 124.

⁶⁰⁵ See Athanasia Comminos and Georges Chr Lemos, The, [1990] 1 Lloyd's Rep. 277, 290.

⁶⁰⁶ Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon) [1994] C.L.C. 734, 743.

⁶⁰⁷ See Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 186, 203 (2009).

⁶⁰⁸ International Convention on Civil Liability for Oil Pollution Damage, opened for signature, Nov. 29, 1969, reprinted in full 3 Benedict on Admiralty §116.

⁶⁰⁹ 33 U.S.C. §§2701(32), 2702(a) (2006).

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person performing salvage operations, or taking measures to prevent or minimize pollution damage. This prohibition does not apply, however, if the pollution damage resulted from the personal act or omission of the person concerned, “committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”⁶¹⁰

By comparison, under the Oil Pollution Act (“OPA 90”),⁶¹¹ liability may be imposed on any person owning, operating, or demise chartering the vessel, and there are no channeling provisions corresponding to those in the 1992 Civil Liability Convention (“CLC”). Moreover, OPA 90 subjects an owner, operator, or demise charterer to strict liability.⁶¹² The term “operator” as it relates to oil spill liability is not specifically defined in the oil pollution statutes or in cases analyzing such liability, but it has been defined in numerous court decisions construing other pollution laws to mean the person vested with the day-to-day operational responsibility for a polluting facility.⁶¹³ This includes the person or organization responsible for maintenance, upkeep, crewing, contracting, generally management of the vessel, and general safety so as to be in a position to minimize the risk of pollution.⁶¹⁴ Typically, time and voyage charterers are not involved in these activities, thus in the typical case, time charterers, or voyage charterers should not be found to be an operator under OPA 90.⁶¹⁵

However, not all jurisdictions recognize the CLC. In some places, for example, the USA and Japan, charterers can incur direct and even strict liability for pollution caused by a ship. Individual states in the US (e.g., Alaska, California, and Washington) have enacted their own legislation and most states target the “transporter of oil”, “person

⁶¹⁰ Id. art. IV(4).

⁶¹¹ Oil Pollution Act, 33 U.S.C. 2701-2761.

⁶¹² 33 U.S.C. §2702(a).

⁶¹³ Charles B. Anderson, *Liability of Charterers and Cargo Owners from pollution from Ships*, 26 Tul. Mar. L.J. 1 at 9 (2001-2002).

⁶¹⁴ Financial Responsibility for Water Pollution (Vessels), 59 Fed. Reg. 34, 210 (July 1, 1994) (to be codified at 33 C.F.R. 4, 130, 131, 132, 137, and 138).

⁶¹⁵ The most helpful regulatory guidance on the issue of time and voyage charterer liability under OPA-90 may be found in 59 FR 34210-01. There are entities, such as agents, “manager”, traditional time charterers and traditional voyage charterers (i.e., charterers who do not take operational responsibility for the vessels they charter) that are not intended to be included in this definition.

having control over oil”, and “person taking responsibility”, as the liable party; therefore, a time charterer can be at risk.⁶¹⁶

In the safe port and safe berth context the liability of the charterer can be enormous. Owners can always pursue a claim for indemnification when because of damage to the vessel, there is subsequent oil pollution, especially in a country that is member of CLC. Considering the fact that both owners and charterers can be responsible under OPA, it is hard to consider that a claim of charterers for indemnification from the owners will prevail in a situation when there was no violation of a safe port warranty. Mainly, because the government applies a strict liability standard, the fact that there was oil pollution would make all parties involved in the shipment responsible. The fault of the charterers for nominating a particular port while causing an oil spill will not even be an issue under OPA. Even if the Master’s negligence was the cause of the incident, charterers can be held responsible even without fault.

Although pollution caused by the vessel might be rare, the vessel can be subject to contamination while entering areas polluted with oil from other sources. The fouling of the hull constitutes “physical damage to the vessel” and, as such, claims for other losses directly resulting from the damage, should be recoverable by owners.⁶¹⁷ The question is under what condition oil contamination of the vessel can be considered a breach of safe port warranty. Numerous vessels were affected by the recent accident on the Deepwater Horizon platform. Until now, there was no jurisprudence directly on the issue as to whether or not a port is unsafe if its approaches were affected by oil pollution. Assessing whether a port is unsafe is a question of fact on each occasion but if an alternative safe route or the exercise of good seamanship can avoid the danger, it is unlikely that the port will be considered unsafe. Nevertheless, it seems clear that, dependent on the timing of the voyage, orders, and the precise location of the oil, in the port or areas in the imminent vicinity of the port, oil pollution would be capable of rendering a port unsafe.

In relation to the geographical limits of the safe port warranty, it was stated in *The Hermine*⁶¹⁸ that, “if a ship departed a port safely and without delay, but then encountered a danger 100 miles downriver from the port, it was unlikely that the port

⁶¹⁶ Charterers Brochure 2011, UK P&I, available at <http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Charterers/CharterersBrochure2011.pdf>

⁶¹⁷ Oil Pollution and its implications for charterers’ liability for damage to hull (CLH), SKULD P&I newsletter, (October 2010), available at <http://www.skuld.com/Publications/Pollution/>

⁶¹⁸ *Unitram v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

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could be described as ‘unsafe’.” However, in practice, it is probable that if there is no other route by which to reach or depart from the relevant port, irrespective of the distance of the danger from the port, the port could be considered unsafe and it is difficult to imagine an arbitration tribunal finding, as a question of fact, to the contrary.⁶¹⁹ In light of this, ports near an oil spill are also unlikely to be considered as unsafe such as to allow an owner to refuse an order to go to such a port under a time charter, or to refuse such a nomination under a voyage charter.⁶²⁰ Largely, it will be the owners who will have to bear the additional expenses for deviating a vessel in order to escape pollution in the vicinity of the port. Only if the roads of the port are contaminated can charterers be held responsible for the lost time based on a breach of safe port warranty.

In response to the Deepwater Horizon incident, BIMCO issued a Gulf of Mexico Oil Spill Clause for use in voyage charterparties. It is designed to address directly the incident in the US Gulf and is not intended to cover oil spills in general.⁶²¹ Although the clause shifted responsibility for additional expenses on the charterers, generally this kind of risk will fall on the owners, unless

*...a Master receives credible information that if he continues in the direct course of his voyage his Ship will be exposed to some imminent peril, as from Pirates, or Icebergs, or other dangers of navigation, he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for the purpose of avoiding the danger.*⁶²²

Furthermore, some voyage charterparties expressly stipulate the shipowners’ obligation to indemnify the charterers against liability which may be imposed on them or which they may incur under any statute regarding liability for pollution of navigable waters by oil.

⁶¹⁹ See Oil Pollution and its implications for charterers’ liability for damage to hull (CLH), SKULD P&I newsletter, (October 2010), available at <http://www.skuld.com/Publications/Pollution/>

⁶²⁰ US Gulf oil pollution’s impact on charterparties, May 2010, available at http://www.ukdefence.com/images/assets/documents/UKDC_Soundings_May-2_web.pdf

⁶²¹ See Gulf of Mexico Oil Spill Clause for Voyage Charter Parties, available at http://editor.bimco.org/en/Chartering/BIMCO%20Clauses/Gulf_of_Mexico_Oil_Spill_Clause_for_Voyage_Charter_Parties.aspx

⁶²² *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 171.

4.4.3. Waste management

Deficiencies in port construction or poor vessel traffic control may cause damage not only to environment, but it may also place a vessel in the predicament of having to discharge pollutants into the sea, risking liability under local legislation or international regime.⁶²³ Appropriate facilities in the port and organized system of garbage removal in the port should minimize accidental or intentional pollution of the sea.

The principle of nominating an environmentally safe port can be corroborated by the International Convention for the Prevention of Pollution from Ships.⁶²⁴ Annexes IV and V deal with requirements to control pollution of the sea by sewage and different types of garbage and specifies the distances from land and the manner in which they may be disposed of respectably. The requirements set in the convention are much stricter in a number of “special areas” than local regulations in many countries. The convention requires its parties to provide adequate facilities for the reception of residues and oily mixtures at oil loading terminals, repair ports in which ships have oily residues to discharge, and imposes a complete ban on the dumping into the sea of all forms of plastic.⁶²⁵ Additionally, the convention requires that sewage reception facilities and reception facilities for garbage are available in all ports.⁶²⁶

The major problem is that many developing countries and smaller ports do not have sufficient funds for construction of such facilities. Consequently, most of these ports are inadequately equipped for the prevention of pollution, and by nominating them, charterers are *per se* violating the safe port warranty. Although there have not been any legal precedents regarding this kind of violation, it seems that the only defense charterers can use to overcome their breach is consent of the owners to nomination of the port, calling the port, and or subsequent intentional or negligent improper disposal of waste.

S, ballast water treatment and garbage removal procedures. Most of these measures require direct cooperation between owners and charterers as they pertain a lot to the equipment that is available on board the vessel. At the same time, charterparties

⁶²³ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 211 (1991).

⁶²⁴ International convention for the Prevention of Pollution from Ships, Marpol 73/78, Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II).

⁶²⁵ See Annex I, IV and V.

⁶²⁶ See Annex IV.

rarely provide any details about waste or water treatment equipment available on the ship at the time she is chartered. To a large extent, the fines related to a charterers demand to sail to a port that has implemented stricter rules as to waste disposal can be considered a risk charterers undertook while sending a nominated vessel to an unsafe port. Owners will always seek to defend themselves by alleging that an economic loss resulted not from a deficiency of the vessel, but through measures that required extra-ordinary skills and care. Only when all ports have standard waste management procedure will that risk fall, unarguably, on the owners.

4.4.4. Conclusion

Although environmental safety is a relatively new category, its impact on vessel owners can be tremendous. Environmental liabilities are the most expensive to deal with as they involve government and international community interests. Charterers should be extremely cautious when they direct certain types of vessels (oil tankers, LNG carriers) to ports of countries that employed strict measures to protect their environment. As developing countries become conscious about pollution and disease control measures that are common for many ports in Europe and America, it will affect operation of many ports in Asia and Africa.

5. Damages for nominating an unsafe port

5.1. Type of damages

In relation to a breach of the safe port warranty, owners' right to damages is subject to the ordinary rules relating to causation, remoteness, and quantification. The damages recoverable may relate to physical loss or damage to the ship, intentional sacrifice, detention losses, expenses incurred in extricating the vessel from danger or lightening the cargo, excess port expenses, and any other loss or expense which flows causally and proximately from the breach.

5.1.1. Physical damage to the vessel

The most common type of damages for nominating an unsafe port suffered by the owners is the physical damage to the vessel. It usually consists of repair costs or the costs of the market value of the vessel and loss of income resulting from detention through repairs.

In deciding the amount of money owners can spend in repairing their vessel, the court will look at the scope of work to be done and the value of the ship. As Lord Lloyd in *Ruxley Electronics v. Forsyth* said:

*If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value." In this case they say that whilst the cost of remedial work will exceed the value of the property when remediated, for example for Plot 20 the remediation cost is £291,707 (including VAT) while the value of the property if in good condition is £232,500, the cost is not "out of all proportion to the benefit to be obtained."*⁶²⁷

What is a measure of direct damages? If the damage to the ship for which charterers are responsible can be repaired simultaneously with other necessary repairs or maintenance that must be carried out on the same occasion, the charterers are only liable for the specific costs of repairing the damage caused by their own breach, and are under

⁶²⁷ *Ruxley Electronics v Forsyth* [1996] AC 344.

no liability for loss of income and repair costs incurred solely for the benefit of the owners.⁶²⁸

In any event, owners must mitigate their expenses. The owners may claim the time that the vessel was under repairs in dry dock or in the port. If the vessel lost her next employment because of the damages caused by the breach of safe port warranty owners are entitled to claim hire or freight at prevailing market rates. Obviously, if the damage can be repaired without sending the vessel to the dry dock, owners have to attempt to repair the vessel in most cost efficient way.

5.1.2. Economic damages of shipowners

The second large part of owners' damages is economic damages. They include expenses that the shipowner encountered in order to avoid obvious dangers, detention of the vessel, lost freight and deadfreight.

Is there a bright line test in determining the kind of economic expenses that are recoverable? *The Archimidis*,⁶²⁹ provided clear guidelines that only unusual expenses in avoiding obvious dangers can be claimed against the charterers. If the vessel is able to avoid a danger by the exercise of ordinary good navigation and seamanship, and the means adopted involve expense (such as tugs to keep the vessel alongside in a heavy swell; lighters to allow heavy laden vessel to pass over the sand bar or temporarily removing parts of the vessel superstructure to decrease her air draft) then the owners are entitled to recover those expenses.⁶³⁰ If the expenses are encountered by the owners in any event, for example, ordering pilots or tugs to proceed to the port, the expenses remain owners' responsibility.

A question may arise, whether owners can chose to avoid expenses and wait until an unsafe condition disappears and then claim for the vessel's lost time, i.e. detention. If the means of avoiding an obvious danger involve delay for the vessel, the position of the English law established in *The Hermine*,⁶³¹ rejects recovery of such delay unless the delay is of such extent that it might give rise to a frustration of the contract.⁶³²

⁶²⁸ *Carslogie v. Royal Norwegian Government* [1952] A.C. 292.

⁶²⁹ See *infra* *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, 405.

⁶³⁰ Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, at 7 (2009).

⁶³¹ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep 37.

⁶³² See Robert Gay, *The Archimidis*, Forum for Shipping, Insurance, Trade and Maritime Safety, *Unsafe Port and Berth Obligation*, London shipping Law Centre, at 7-9 (2009).

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Usually, voyage charterparties will provide for a specific rate at which detention is calculated, typically based on demurrage rate. In the circumstances when a charterparty is silent as to detention calculations, or when detention of the vessel is unlawful or caused by an order of the charterers, the current market rates of hire will be taken into consideration⁶³³ together with the amount of bunkers a vessel consumed.

Time charterparties do not have detention provisions. Instead they enumerate events, which can bring the vessel off-hire, i.e. when the charterer's responsibility to pay hire is suspended. Such events refer to the working condition of the vessel, her equipment, and crew. Under time charterparty matters referring to navigation and the maintenance of the vessel remain owners' responsibility. In circumstances when the damage to the vessel was caused by fault of the charterers, they are still responsible to pay hire for the vessel. If the vessel is damaged due to a breach of a safe port warranty, the vessel is considered a working vessel and owners will only have to properly mitigate damages and ensure that she can resume her normal operation as soon as possible.

In voyage charterparties owners' revenue is measured by received freight. On one hand, owners have a right to receive and load a full and complete cargo up to the draft of the vessel or an amount agreed in the charterparty. It is the charterers' obligation to select a safe port and ensure that the vessel, being fully and duly described as to her dimension in the charterparty, may safely enter, load, and depart from the port that charterers themselves elected out of the allowed range of ports. It is charterers' responsibility to monitor any natural artificial events such as tides or strikes, when they nominate a port.

Owners are in principle entitled to claim deadfreight in respect of the difference between minimum contractual quantities under the charterparty. The claim for deadfreight is an alternative defense of owner's rights and can be pursued in conjunction with damages for breaking a safe port warranty.

*The Archimidis*⁶³⁴ provides a recent example of when the court confirmed this principle. By a charter dated 27th October 2004, based substantially on the Asbatankvoy form with amendments and incorporating charterers' standard terms, *The Archimidis*, an Aframax oil tanker of 94,999 metric tons deadweight, drawing 13.47 meters in fully laden conditions, was fixed for three consecutive voyages to load gas oil from "1 safe port Ventspils" with "discharge 1/2 safe ports" in the "UK Continent

⁶³³ *Zim Israel v. Tradex (The Timna)* [1971] 2 Lloyd's Rep. 91.

⁶³⁴ *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, 405.

Bordeaux/Hamburg range.”⁶³⁵ This original fixture was extended to cover eight voyages. The dispute related to a claim by Owners for deadfreight in relation to the sixth voyage.

On 11th January 2005, the vessel arrived at Ventspils to load its cargo. The dredged channel had silted up and draft restrictions were in place. Because of this, the Master served a notice of readiness stating that he expected to load a cargo of “approximately 67,000 mt.” For the purposes of the preliminary issues, the arbitral tribunal was asked to assume that the vessel could not have safely proceeded to Ventspils, loaded the minimum contracted cargo of 90,000 mt at the vessel’s berth, and departed safely with that cargo. The tribunal was also asked to assume that it would have been possible for a ship-to-ship (“STS”) transfer to have taken place in a deep water location off Ventspils, which would not have involved the subsequent use of the dredged channel with its draft limitation. The vessel, therefore, could have loaded 67,000 mt at the berth and the balance of the cargo by STS transfer.⁶³⁶

The tribunal concluded in owners’ favor. It held that the charterers had failed to supply the minimum quantity of cargo and were therefore liable to pay deadfreight in respect of the difference between the amount actually loaded and the contractual minimum quantity of 90,000 mt. It was held that, although charterers had formally tendered for loading a quantity of 93,410 mt, since all the parties concerned were aware it would not be possible to load this quantity (because of the draft restrictions), charterers’ tender was a gesture without legal significance. It was further held that owners’ alternative claim for damages for breach of warranty that Ventspils was a safe port was legally sustainable, but would require determination on full hearing of the evidence. Such evidence included whether the silting up of the channel at Ventspils constituted an abnormal occurrence such that the safety of the vessel was not something for which the charterer could be liable.

The position of the court to treat deadfreight and breach of safe port warranty as one event that stems from another leaves charterers with only few options on how to persuade the court that the owners were fully aware of the risks related to the maritime adventure when they accepted the port nomination. One argument charterers can bring is that seasonal changes in weather conditions are well known and well publicized facts in the trade and therefore must be considered an inherent vice of the loading area. With the increasing growth of electronic resources that allow ports to accurately monitor port conditions, charterers have a good chance at success. Once owners accepted a port

⁶³⁵ Id. at 599.

⁶³⁶ English Maritime Law Update: 2008, *Journal of Maritime Law and Commerce*, July, 2009 at 407.

nomination, they have evaluated the risks of the port and any changes of conditions that can be inherent to it. Thus, owners could bear the burden of short loading cargo and return unearned freight or wait in the port on their own expenses until the changed condition improves in order to comply with the charterparty.

5.1.3. Unrecoverable damages

What expenses can the owner not recover from the charterer? The ordinary expenses and losses of trading are not recoverable, despite the fact that, in a broad sense, they are incurred as a result of their obedience to the orders of the charterers. This was expressed by Lloyd J. in *The Aquacharm*,⁶³⁷ in the following words:

It is of course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote.

Similarly, the owners cannot recover the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense, the cost of ballasting is incurred as a consequence of complying with the charterers' orders.⁶³⁸

Both English and American tribunals will rarely impose punitive damages for a breach of a charterparty. Under English law, punitive damages are intended to punish and deter a defendant or to vindicate the strength of law. They may not be imposed for breach of contract,⁶³⁹ but in may be imposed in very particular tort cases. In other words, only in circumstances when there is damage to a vessel or cargo and "the defendants conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to plaintiff,"⁶⁴⁰ may a party recover punitive damages.

⁶³⁷ *Actis Co v Sanko Steamship Co (The Aquacharm)* [1980] 2 Lloyd's Rep. 237.

⁶³⁸ See *Weir v Union Steamship Co Ltd* [1900] AC 525.

⁶³⁹ *Addis v. Gramophone Co.* [1909] A.C. 488 (H.L.).

⁶⁴⁰ See *Rookes v. Barnard* [1964] A.C. 1129 at 1226.

American law is more lenient and punitive damages can be awarded for a breach of contract where the breach itself is so extraordinary as to be an independent tort.⁶⁴¹ Although in terms of maritime law, punitive damage is a rare occurrence. In *The Octonia Sun*,⁶⁴² punitive damages were awarded to the charterers in addition to damages for cargo loss when the owners of a tanker made an ongoing practice of diverting oil cargos into its vessel's bunkers.

5.2. Claims of cargo interests

The situation that most shipowners fear the most is the damage to cargo that is connected to an unjustified rejection to call a nominated port. In such circumstances, the owner breaches not only its obligation with time and voyage charterers, but also becomes responsible for misdelivery of the cargo. In terms of Hague⁶⁴³ and Hague-Visby⁶⁴⁴ Rules⁶⁴⁵ such a breach will be treated as a deviation, i.e. an intentional and unreasonable change in the geographic route of the voyage as contracted for.⁶⁴⁶ How does one distinguish a reasonable deviation from an unreasonable one? Determining whether a deviation was reasonable would be a question of fact in light of the interests of all the parties to the common venture as contracted for.⁶⁴⁷ As opposed to a reasonable deviation, an unreasonable one will, in the words of Greer L.J., “mean a deviation whether in the interests of the ship or the cargo owner or both, which no reasonable minded cargo-owner would raise any objection to.”⁶⁴⁸

When the shipowner deviates without authority from the agreed route, cargo loses its insurance protection, and the shipowner consequentially becomes the “insurer” of the cargo and is precluded from raising the defense that the loss or damage might

⁶⁴¹ Williston on Contracts, 4 Edition, vol 24, at 241-248 (2002).

⁶⁴² *Octonia Trading Ltd. v. Stinnes Interoil GmbH*, 1988 A.M.C. 832.

⁶⁴³ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules), effective 2 June 1931, available <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/portrait>

⁶⁴⁴ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules), effective 23 June 1977, available at <http://www.jus.uio.no/sisu/sea.carriage.hague.visby.rules.1968/landscape>

⁶⁴⁵ Although the Rules do not expressly define deviation and its consequences article 4(4) reads: “Any deviation on saving and attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

⁶⁴⁶ See *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 All E.R. 403.

⁶⁴⁷ William Tetley, *Marine Cargo Claims*, Fourth Edition, at 1815 (2008).

⁶⁴⁸ *Stag Line v. Foscolo, Mango & Co.* [1931] 2 K.B. 48 at 69.

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occur independently from the deviation, except for circumstances that do not directly relate to a deviation. In order to exculpate himself, the owner has to prove that the loss or damage was caused by either an act of God, the Queen's enemies, or the inherent vice of the goods, and also that this loss or damage must have occurred irrespective of the deviation.⁶⁴⁹ As a result of deviation, owners can lose one of the following rights: the package limitation, one year statute of limitations to file a claim for damage to the cargo, the defense of due diligence,⁶⁵⁰ the exculpatory defenses,⁶⁵¹ the limitations and exclusions of the contract, which would otherwise be upheld despite article 3(8)'s ban on exculpatory provisions, including all defenses and benefits otherwise available to the carrier (e.g. jurisdiction and arbitrations clauses, etc.).

Any damage or delay of the vessel to proceed to the port can be accompanied by the claim of the cargo interests for the damage to the cargo and consequential damages caused by delay. A deviation can result in damages being awarded for delay even when these damages do not arise naturally from the breach of the contract or do not result from circumstances communicated to the owner at the time of contracting.⁶⁵² Thus in *The Heron II*,⁶⁵³ where the vessel deviated to several other ports on her way to Basrah, the discharge port, and the price of sugar fell during nine days of deviation, the court awarded damages arising from lost markets and the drop of price. The main reason for such an award was the owners' knowledge of the price fluctuation and delay in delivery due to the deviation.

If the court finds that damage to the vessel or loss was caused by the breach of a safe port warranty, the indemnity from the claim brought by shippers or consignees will go down the line from voyage charterers to time charterers and owners. In *The Island Archon*⁶⁵⁴ the shipowners had to provide security before the ship was allowed to leave Basrah in order to secure a claim of cargo receivers, which gave rise to some delay.⁶⁵⁵

The shipowners suffered a loss in the form of the payments that they were required to make, first as security for cargo claims, and then in order to satisfy the order of the Iraqi courts, even though no shortage or damage to cargo had occurred. These damages were a direct consequence of the charterers' order for the vessel to proceed to

⁶⁴⁹ See William Tetley, *Marine Cargo Claims*, Fourth Edition (2008) at 1827.

⁶⁵⁰ Article 3(1) of the Hague-Visby Rules.

⁶⁵¹ Article 4(2) (a) to (q) of the Hague-Visby Rules.

⁶⁵² William Tetley, *Marine Cargo Claims*, Fourth Edition, at 810 (2008).

⁶⁵³ *Czarnikow Ltd. v. Koufos (The Heron II)* [1969] 2 Lloyd's Rep 457.

⁶⁵⁴ *Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] C.L.C. 734.

⁶⁵⁵ See § 4.3.7.

Basrah and deliver the cargo there. The court found that the port of Basrah was unsafe due to a default of the Iraqi court system. The court reviewed a standard whether complying with an order as to the employment of the ship can be implied when the order was lawfully given.⁶⁵⁶ Where the losses claimed were the direct consequence of complying with charterers' order the shipowners were entitled to indemnity, notwithstanding that it was an order that the time charterers were entitled to give and the shipowners were bound to obey.⁶⁵⁷

Besides physical damages to the vessel and or the cargo, the court can sometimes award economic ones, which include loss of future business and loss of reputation. Consequential losses are not precluded from recovery by Hague-Visby Rules.⁶⁵⁸ However, it has been held that owners would not be responsible for delay in delivery of the cargo caused by deviation unless there is a physical damage to it, unless the charterparty provides otherwise.

5.3. Quantum of damages

How can the tribunal measure the quantum of the owners' damages? For time charterparties the amount of owner's recovery due to non-employment of the vessel during the repairs is measured by the hire rate of the charterparty when the damage to the vessel occurred. The court can go even further and adjudicate to the owners' damages that amount of loss the owners suffered as a result of non-performance of a subsequent charter. These damages can be higher than ones prevailing on the market. There is a simple reason behind this, charterers ought to contemplate that the vessel is likely to be engaged for her next voyage when performance of the charter is proceeding.⁶⁵⁹ In *The Argentino*,⁶⁶⁰ while awarding the damages, Lord Herschell said:

I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings

⁶⁵⁶ Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The Island Archon) [1994] C.L.C. 734, 738.

⁶⁵⁷ Id. at 742.

⁶⁵⁸ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules), effective 23 June 1977, available at <http://www.jus.uio.no/sisu/sea/carriage.hague.visby.rules.1968/landscape>

⁶⁵⁹ Voyage Charters, at 609 (Third edition, 2007).

⁶⁶⁰ Owners of the Steamship Gracie v Owners of the Steamship Argentino (The Argentino) (1889) L.R. 14 App. Cas. 519.

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*which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision.*⁶⁶¹

For the lost voyage charterparties it seems that the amount of freight lost because of non-employment of the vessel is an appropriate measure of damages. If freight is not lost and the vessel is repaired during the voyage, owners can claim damages at the detention rate for the time lost for the repairs. As long as lost hire or the freight rate are reasonable and are not too remote will owners be able to recover. Only if any subsequent engagement is proved by the owners will the court assess damages based on anticipated profit from the daily employment of the vessel, which can be higher than prevailing market rate.⁶⁶²

In the circumstances when owners operate a fleet of vessels and have an opportunity to find a substitute ship to complete a voyage of one damaged and under repairs, the court will not take increased profits from the other vessel into account.⁶⁶³ However, if a gain results from a step taken in mitigation, it is never to be treated as being merely collateral.⁶⁶⁴

The legal implication of a safe port warranty for voyage charterparties besides liability for the actual damage to the vessel can be seen in the responsibility of the charterer to reimburse owners for a deadfreight claim when the port is deemed unsafe and the cargo is not loaded or short loaded on the vessel; or when the charterers' claim

⁶⁶¹ Id. at 523.

⁶⁶² See *Owners of the Dirphys v Owners of the Soya (The Soya)* [1956] 1 W.L.R. 714.

⁶⁶³ *Jebsen v East and West India Dock Co* (1874-75) L.R. 10 C.P. 300.

⁶⁶⁴ See *British Westinghouse v. Underground Electric Railways* [1912] A.C. 673, 691.

for freight differential for cargo left behind if the port is safe. Where owners refuse to obey the order to proceed to an unsafe port, the damage may consist of detention alone, while waiting for a new order, and, if a new order is given, extra costs in reaching the loading port.⁶⁶⁵

The most severe liability for violating a safe port/berth warranty can be seen when there is oil pollution. Despite the fact that time and voyage charterers will not be directly liable for oil pollution, owners can recover their expenses and costs through a suit for indemnification. Such a situation arose after *The Aegean Sea* accident.⁶⁶⁶ By a charterparty on an ASBATANKVOY form, owners chartered their vessel *The Aegean Sea* to the Spanish oil company Repsol to carry a cargo of crude oil from Sullom Voe to “one or two safe ports European Mediterranean.”⁶⁶⁷ The vessel was ordered to discharge at La Coruna where she arrived and waited two days for a berth. While proceeding to berth in darkness and bad weather, she ran aground, broke in two, and exploded. The vessel and most of her cargo were lost, and the casualty resulted in a major oil pollution incident.⁶⁶⁸

The owners brought arbitration proceedings in London against the charterers, claiming that La Coruna was an unsafe port, and seeking to recover the sums they had to pay in respect of pollution, together with the value of the vessel, her bunkers and freight. These claims amounted in aggregate to approximately US \$65 million. The charterers denied liability, and contended that if they were found liable they were entitled to limit their liability to approximately \$12 million pursuant to the 1976 London Convention on Limitation of Liability for Maritime Claims.⁶⁶⁹ The question whether the charterers were entitled to limit liability under the Convention was referred to the High Court by way of preliminary issue.

In rejecting the charterers’ claim to limitation Mr. Justice Thomas concluded:

(1) having regard to the background to the Convention, its structure and language, the benefit of limitation available to a charterer was the same

⁶⁶⁵Id at 606.

⁶⁶⁶ *Aegean Sea Traders Corp. (Aegean Sea) v. Repsol Petroleo S.A.*, [1998] 2 Lloyd's Rep. 39, 54 (Q.B.) at 39.

⁶⁶⁷ Id.

⁶⁶⁸ Id.

⁶⁶⁹ Convention on Limitation of Liability for Maritime Claims (LLMC) Adoption: 19 November 1976; Entry into force: 1 December 1986; Protocol of 1996: Adoption: 3 May 1996; Entry into force: 13 May 2004.

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as that available to the shipowner; it did not entitle the charterers in this case to limit liability for claims such as those brought against them by the owners;

(2) the Convention required all claims arising from a distinct occasion where the owners and the charterers are responsible to be subject to one limit and, if a fund is constituted, to one fund; it could not have been intended that the fund be reduced as a result of claims such as those brought in this case by the owners against the charterers.⁶⁷⁰

The High Court held that the 1976 Convention gave no right to the charterers to limit liability in respect of an unsafe port claim brought against them by the owners under the charter party thus potentially exposing charterers to unlimited claims based on a recourse action.⁶⁷¹ To some extent such a position of law puts charterers in a very difficult situation as the issues of vessel navigation is purely an owner's matter, which requires owners to have significant insurance to cover the risks associated with liability for pollution. By rejecting application of the convention to the charterers, the court created a precedent that requires charterers to face a risk of increased exposure to liability when the vessel causes an environmental disaster.

⁶⁷⁰ Id. at 50.

⁶⁷¹ See Charles B. Anderson, Liability of Charterers and Cargo Owners from Pollution from the ships, 26 Tul. Mar. L.J. 1. at 45 (2001).

6. CONCLUSION

A besetting sin of many charterers in breach of their undertaking is an ignorance of their ports' infirmities.⁶⁷² The price they are paying for their freedom of choice is strict liability when it comes to safety of the port.

Although English and American law have enjoyed a relatively gradual development throughout the decades, with ever increasing threats of terrorism, outbreaks of diseases, and the ability to obtain accurate information of the condition of the port at any time, it is unclear the risk of a threat materializing to render a port unsafe.⁶⁷³ What has been definitely resolved is that a charterer is far from being the insurer of ports risks.⁶⁷⁴ Courts have taken into consideration all of the facts that precede nomination of the port and arrival of a vessel there. Moreover, parties were given liberty to select various charterparty forms that contractually apportioned liability between the parties, subject to any constraints imposed by governing law.

The safe port warranty in most cases concerns trading of the chartered vessel at and between ports of loading and discharge. Potentially the promise of charterers has a wider remit. It may be associated with many other obligations that arise under the charterparty such as bunkering, delivery, and redelivery of the vessel,⁶⁷⁵ calling a refuge port, when its application can extend beyond contractual relationships of the parties and involve various third parties.

The law possesses a significant degree of uniformity that is attributable primarily to the wide adoption of standard form contracts and the manner in which safe port promises are drafted in these contracts.⁶⁷⁶ It is important to determine whether the warranty as to safety of a port in a charterparty is couched in absolute or qualified terms. The NYPE 1994 form, for example, provides "worldwide trading always via good and safe port(s), good and safe berth(s), good and safe anchorage(s), always afloat." If the

⁶⁷² F.J.J. Cadwallader, *An Englishman's safe port*, 8 *San Diego Law Review* 639, 652 (1971).

⁶⁷³ Alexander McKinnon, *Administrative shortcomings and their legal implications in the context of safe ports*, 23 *A&NZ Mar LJ* 186, 204 (2009).

⁶⁷⁴ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 *SAC LJ* 597, 628 (2006).

⁶⁷⁵ *Id.* at 599.

⁶⁷⁶ *Id.* at 628.

charterparty contains this type of clause, the principles established in *The Eastern City*⁶⁷⁷ apply: at the time of nomination the port should be prospectively safe for the chartered ship to get at, stay at and in due course, leave without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

However, if the warranty as to safety is qualified, other factors have to be brought into the equation and the owners' protection will be reduced. For example, The SHELLTIME 3 form contains a qualified safe port warranty in the following terms: "Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks, anchorages and submarine lines where she can also lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage or submarine line and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."⁶⁷⁸ In the context of this clause, the due diligence obligation merely requires the charterers to display reasonable care and that this duty would be discharged if a reasonably careful charterer would, on the facts known, have concluded that the port was prospectively safe."⁶⁷⁹ Ultimately, it must be born in mind that the safe port promise is a contractual, not a legal, concept, and therefore, the nature of the promise may be materially influenced by the manner in which it is drafted.⁶⁸⁰

In rare circumstances, when the charterparty is silent to safe port and/or berth warranty, the court shall construe the policy "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry."⁶⁸¹ Ambiguity will also be resolved by ascertaining how a reasonable party would construe the clause at the time the contract was entered. In interpreting charterparties, nonetheless, a wide range of general interpretation rules guide the courts in their inevitable (and unenviable) task of

⁶⁷⁷ Leeds Shipping Co v Societe Francaise Bunge SA (*The Eastern City*) [1957] 2 Lloyd's Rep. 153.

⁶⁷⁸ Safe Port and Safe Berth Warranties – Time and Voyage Charters, Sea Venture, volume 18, June 1999, available at <http://www.scribd.com/doc/45797363/Safe-Port-and-Safe-Berth-Warranties>

⁶⁷⁹ K/S Penta ShippingA/S v Ethiopian Shipping Lines Corp (*The Saga Cob*) [1992] 2 Lloyd's Rep 545.

⁶⁸⁰ D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 SAclJ 628 2006.

⁶⁸¹ Richards on the Law of Insurance § 11:2[f] (6th Ed.1990), at § 11:2[g].

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having to interpret a contract that can, on its face, be ambiguous.⁶⁸² A court will always try to discover the intentions of the contracting parties using the plain, ordinary, and popular meanings of the words used. Reference to a common usage dictionary is perfectly in order. A court will not try to rewrite a contract using interpretation rules but, rather, use these rules to pinpoint the intentions of the parties at the moment of contract.

In some instances, the implication of contract will be necessary to give effect to the reasonable expectations of parties.⁶⁸³ The failure to mention the word “safe” in the charterparty generally will not allow the court to imply it, unless it can be shown that the parties had foreseen the eventuality which in fact occurred⁶⁸⁴ or if it concerns certain areas, where a safe port warranty was previously extended by the courts. The implication of safety will generally concern time charterparties because the obligation to nominate a safe port is continuous and is not limited to nomination of a single loading or discharge port as in voyage charterparties. In voyage charterparties, the tribunal will only consider the extension of a safe port warranty to berth or to approaches to the port, when the safe port warranty was guaranteed.

Sometimes the printed clauses in standard charterparty forms provide for the express safe port and safe berth warranties and sometimes typed clauses do so. Whether to do so is a matter of choice of the parties during contract negotiations.⁶⁸⁵ Freedom of contract should not be disturbed in order to assist one of the parties to rectify its breach. Justice Cohen L.J in *The Cydonia* said:

*It seems to me that one should do as little violence as possible to the wording of a commercial document, in order to arrive at a sensible construction of its provisions.*⁶⁸⁶

In general, the same criteria as to safety apply to both time and voyage charterparties. However, it is submitted that the time charterer should have a greater responsibility than the voyage charterer for ensuring that it orders the vessel to safe port

⁶⁸² Interpretation of Contracts available at <http://www.duhaime.org/LegalResources/Contracts/LawArticle-92/Part-7-Interpretation-of-Contracts.aspx>

⁶⁸³ *Equitable Life Assurance Society v Hyman*, at pg 459.

⁶⁸⁴ *Trollope & Colls Ltd v North West Metropolitan Hospital Board* [1973] 1 WLR 601 at 609-610.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Stag Line LD v. Board of Trade* [1950] 2 K.B. 194, 197.

and berth.⁶⁸⁷ It is presently unclear if voyage charterers come under such a secondary obligation to nominate an alternative safe port once the first nominated port becomes unsafe. It has been argued that only time charterers who have a continuing right and/or obligation to give orders as to the employment of the vessel can owe this secondary obligation. However, this ignores the fact that owners guaranteed and warranted the vessel's compliance with the restrictions of the loading and discharging ports at the time of nomination. The matter is clearly one upon which the courts will have to issue definitive guidance. If voyage charterers do not owe such a secondary obligation, the position under voyage charterers would be governed by the doctrine of frustration unless there is some other relevant provision in the charterparty (which might be the case if the charterparty provided that the vessel was to proceed to the nominated port "or so near thereto as she may safely get).

Good chartering practices can prevent owners and charterers from entering into a long argument over the unsafety of the port or berth by simply avoiding an accident to the vessel. The extent to which charterers audit the safety of a port before ordering a vessel there can make a difference. Full audit of the port done by charterers through whole contractual chain, firstly, may help to step away from entering into a contract, which can lead to drastic for the charterers consequences. Secondly, demonstrate that charterers exercised due diligence in selecting the port. Thirdly, provide a solid base of defense to build a case against the owners that the incident occurred either by want of good navigation and seamanship on the part of owners, or by some abnormal occurrence. Crucially, charterers who anticipate that owners may advance an unsafe port claim are well advised to undertake a prompt pre-emptive and thorough investigation of the port, preferably involving the port authority, in order to ensure that they are in the best possible position to defend such an action. An early investment in the fees and expenses of an investigator may prove to be worthwhile.⁶⁸⁸

In reflecting on the definition of a safe port, the relevant safety of the port "is inseparably connected with the fulfillment 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."⁶⁸⁹ Failure of the vessel to enter or to leave the port as a

⁶⁸⁷ Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 193-194 (1991).

⁶⁸⁸ Eleferios D. Katarellos, Aristotelis B. Alexopoulos, *What is a Safe Port? The "Unsafe Port" Dilemma - Who is at Fault?* available at <http://www.stowMasters.com/Mastersrole.pdf>

⁶⁸⁹ *Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* [1954] 2 Ll Rep 148 at 153.

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fully loaded vessel will expose charterers not only to the breach of a safe port warranty, but also for deadfreight,⁶⁹⁰ and extraordinary expenses of owners claim.

Unfortunately, charterers cannot control or prevent various natural and political occurrences. These types of events occur without any involvement or fault of charterers. In the recent years, new categories of unsafety have emerged, namely, administrative and environmental categories of unsafety. They require more due diligence for charterers to inspect the port prior to nominating it.

The issue concerning the unsafety of the port will always exist. It cannot be eliminated no matter how many precautions have been undertaken by the charterers. At the same time, owners are becoming less concerned of the dangers since most of the ports have a well-developed system to inform of forthcoming dangers. With the recent decrease of charter hire and freight rates, the ability to call any ports and adhere to charterers' orders became a necessity of the owners to survive in a hard financial market. As such, the responsibility for calling an unsafe port "unconsciously" shifts from the charterers to the owners. It is only for the courts now to acknowledge new realities and adopt due diligence approach in interpreting safe port and berth clauses.

⁶⁹⁰ See *AIC Ltd v Marine Pilot Ltd (The Archimidis)*, [2008] 1 C.L.C. 366, [2008] EWCA Civ 175 and *Hall Brothers Steamship Co Ltd. v. R & W Paul Ltd.* (1914) 19 Com. Cas, 384.

SUMMARY

Sailing from one port to another in order to deliver goods is one of the main purposes of any commercial maritime adventure. Although most of the ports in the world have some kind of navigational history and are described in detail on maps, groundings, delays, and other accidents still occur to vessels. With the growing complexity of vessels and the increasing cost of their operation, the amount of damages that the shipowner can suffer by delaying a vessel due to congestion or repairs can be significant. Although the vessel belongs to the owners, this does not mean that they look for the cargos to employ her. Modern shipping is a very specialized sphere where matters of crew, maintenance, and navigation of a vessel are handled by the owners and the charterers handle the vessels commercial employment. Both owners and charterers aim to earn a profit from the vessel; however, the means that each party uses are different. The owners are primarily concerned about the preservation of the vessel to receive constant hire; the charterers are primarily concerned about the rotation of the vessel among different ports to fully exploit her.

The issue of safe ports and berths naturally stems from the vessel's operation. This dissertation starts with delineating a meaning of safe ports and berth under English and American law, discusses a standard of culpability of the parties, and sets benchmarks on physical, political, administrative and ecological safety.

Chapter two of the dissertation establishes a standard of liability of the parties responsible for nomination of the port. It explains in detail the differences in application to voyage and time charterparties, sets the responsibilities of the parties on various stages of the voyage, including the time when the vessel was chartered, the time when the port was nominated, and when the port became unsafe after it was nominated. A standard of safety is explained as it is applied under English and American law.

Under English law, it is a warranty of the charterers that encompasses strict liability for nomination of an unsafe port. American law provides two approaches and depends on a court circuit where the case involving the breach of safe port obligation is reviewed. A majority of the circuits follow the Second Circuit position that considers nomination of the port as a warranty given by the charterers. The Fifth Circuit (States of Louisiana and Texas) and the Third Circuit (States of Virginia and Pennsylvania) employ a different standard that imposes a duty of due diligence on the charterers in selecting a port. Various conditions such as good navigation and seamanship,

intervening negligence of third parties, and the previous accident history of the port are reviewed in connection with the obligation of the charterers.

Chapter three discusses the historical development of the safe port warranty and the current trends with regard to its future interpretation. Further, it is impossible to understand the safe port warranty without defining each of the terms that comprise the warranty, e.g., “one good safe port, one good safe berth.” The exclusion or changing of the order of the terms has a legal significance and can lead to a different results in defining the responsibility of owners and charterers. In certain circumstances, tribunals will imply a safe port warranty; however, this is only done when certain conditions are met.

In chapter four, the physical, political, administrative and environmental safety of the port are discussed in detail. Typically, most incidents occur due to the physical conditions of the port, such as ice, draft, wind, current, and silting; however, depending on the port, the breach of physical conditions can extend more broadly, including the passage of the vessel.

Political safety describes social activities that can render the nominated port unsafe. Special attention is given to such categories as sanctions and embargos in light of the recent cooperation of the world community in fighting oppressive regimes. Piracy is also described in light of the recent escalation of attacks in the Gulf of Aden. The enforcement of safe port warranties has become increasingly important for shipowners and has led to the development of new clauses for voyage and time charterparties, such as a piracy clause, sanctions clause, and radiation clause. Occasionally, these clauses give owners significant priority over charterers in deciding whether to call a nominated port.

Administrative safety pertains to the infrastructure of the port. The global shipping community would like to see worldwide standards in port maintenance due to the growing size and complexity of vessels. Unjustifiably these standards sometimes transfer responsibility for ensuring this on the charterers.

Lastly, a new emerging category of environmental safety is becoming increasingly important, especially in light of tightening antipollution legislation worldwide. As the limit of liability for violation of this legislation can exceed the value of the vessel, owners are looking for indemnification from charterers when there is subsequent oil pollution as a result of vessel damage.

SUMMARY

The measure of damages that owners can recover from charterers for breaching safe port warranty and damages charterers can recover from owners for not calling safe port are discussed in chapter five. Special attention is drawn to the liability of the owners to cargo interests for misdelivery of the cargo because of unlawful deviation. Remedy of cargo interest against the owners is extra-contractual and is regulated by the Hague and Hague-Visby Conventions. Economical and non-economical (punitive) damages are discussed in light of different approach to their imposition by English and American courts.

The final chapter draws a line that in interpreting safe port and berth clauses tribunals will try to discover intentions of the contracting parties. Application of the warranty has much greater use. Besides ports of loading and discharge, it applies to bunkering ports, ports of refuge, and the route of the vessel. Although most of the standard charterparty forms provide for safe port/berth warranty, parties can chose to incorporate clauses that change culpability of charterers from strict liability to negligence standard for nominating unsafe port. In addition, pre-contractual investigation of the ports and port conditions can save owners and charterers from an argument for breach of safe port warranty, unless there was an unexpected abnormal occurrence. The dissertation concludes with a proposal that the due diligence approach will best reflect the modern realities of the shipping world.

SAMENVATTING

Het varen van de ene naar de andere haven om goederen af te leveren is een van de hoofddoelen van elk commercieel avontuur op zee. Alhoewel de meeste havens van de wereld wel een vorm van zeevaartgeschiedenis hebben, en gedetailleerd zijn beschreven op kaarten, lopen schepen nog steeds aan de grond, hebben ze vertraging, of vinden er andere ongelukken plaats. Met de steeds groter wordende complexiteit van vaartuigen en de steeds hoger wordende operationele kosten, kan vertraging door reparatie of drukte een belangrijke schadepost zijn. Het schip is van de eigenaars, maar dat betekent nog niet dat zij ook naar goederen zoeken om hem werkzaam te houden. De hedendaagse scheepvaart is een zeer gespecialiseerd vakgebied waar bemanningszaken, navigatiezaken en onderhoudszaken door de eigenaars worden verzorgd, terwijl het commercieel gebruik door de bevrachter geregeld wordt. Eigenaars en bevrachters willen beide winst maken met het schip, maar de middelen die ze daarvoor gebruiken zijn verschillend. De eigenaars zijn vooral gericht op het behoud van het schip, terwijl de bevrachters zich vooral bezig houden met de route van het schip langs verschillende havens om het schip optimaal te benutten.

De kwestie van veilige havens en veilige ankerplaatsen vloeit voort uit de werkzaamheden van het schip. Dit proefschrift begint met het schetsen van de betekenis van veilige havens en veilige ankerplaatsen binnen de Engelse en Amerikaanse wetgeving, behandelt een aansprakelijkheidsnorm voor de betrokken partijen, en stelt maatstaven voor fysieke, politieke, administratieve en ecologische veiligheid.

Hoofdstuk twee van het proefschrift stelt een aansprakelijkheidsnorm vast voor de partijen die verantwoordelijk zijn voor het bepalen van de bestemmingshaven. Het legt gedetailleerd de verschillen tussen haar toepassing op tijdsbevrachting en reisbevrachting uit, en stelt de verantwoordelijkheden van de partijen tijdens verschillende fasen van de reis vast, inclusief het moment waarop het schip gecharterd werd, het moment waarop de haven werd bepaald, en het moment waarop de haven onveilig werd na de bepaling daarvan. In het hoofdstuk wordt een analyse gemaakt van de norm die wordt aangelegd bij het vaststellen of er sprake is van een veilige haven en een veilige ankerplaats volgens Engels recht en volgens Amerikaans recht.

Onder Engels recht omvat een garantie van de bevrachters de risicoaansprakelijkheid voor het aanwijzen van een onveilige haven. Het Amerikaanse recht kent daarentegen twee benaderingen, afhankelijk van het *US Circuit Court* waar de zaak over een schending van de verplichting tot het aanwijzen van een veilige haven wordt behandeld. De meeste *Circuit Courts* volgen het standpunt van het Second Circuit,

dat het aanwijzen van een haven als een garantie beschouwt, gegeven door de bevrachters. Het Fifth Circuit (de staten Louisiana en Texas) en het Third Circuit (de staten Virginia en Pennsylvania) houden een andere norm aan, die een plicht tot gepaste zorgvuldigheid (due diligence) oplegt aan de bevrachters wanneer zij een haven aanwijzen. Allerlei omstandigheden, zoals goede stuurmanskunst en goed zeemanschap, nalatigheid van betrokken derden, en het voorkomen van andere ongelukken in de betreffende haven, worden betrokken in het oordeel of de bevrachters hebben voldaan aan hun zorgvuldigheidsplicht bij het bepalen van een veilige haven.

Hoofdstuk drie bespreekt de historische ontwikkeling van de veilige-havenplicht en de trends met betrekking tot haar toekomstige interpretatie. Verder kan de veilige-havenplicht niet volledig begrepen worden zonder de voorwaarden waaruit zij bestaat te definiëren, bijv. “one good safe port, one good safe berth.” Uitsluiting of veranderingen in de volgorde van de voorwaarden heeft een juridische betekenis en kan leiden tot verschillende uitkomsten bij het bepalen van de verantwoordelijkheden van eigenaars en bevrachters. Onder bepaalde omstandigheden zullen rechtbanken een veilige-havengarantie veronderstellen, maar slechts onder zeer specifieke voorwaarden.

In hoofdstuk vier wordt ingegaan op de fysieke, politieke, administratieve en ecologische veiligheid van de haven. Incidenten hangen meestal samen met de fysieke conditie van de haven, zoals bijvoorbeeld ijs, diepgang, wind, stroming, en verzanding. Afhankelijk van de haven kan de ongeschiktheid van de fysieke conditie zich ook uitstrekken tot buiten de haven, inclusief de doorvaart van het schip.

Ook politieke onveiligheid, kan de aangewezen haven onveilig kan maken. Bijzondere aandacht gaat hierbij uit naar categorieën als sancties en embargo's in het kader van de recente samenwerking van de wereldgemeenschap in de strijd tegen onderdrukkende regimes. Piraterij wordt eveneens besproken, gezien de recente escalatie van aanvallen in de Golf van Aden. Het handhaven van veilige-havengaranties is steeds belangrijker geworden voor eigenaren van schepen en heeft tot het opstellen van nieuwe clausules voor reis- en tijdsbevrachters geleid, zoals een piraterijclausule, een sanctieclausule en een stralingsclausule. Onder omstandigheden geven deze clausules de scheepseigenaren het recht om te bepalen of zij de door de bevrachters aangewezen haven zullen aandoen.

Administratieve veiligheid heeft betrekking op de infrastructuur van de haven. De scheepvaartwereld zou wegens de toenemende grootte en complexiteit van schepen graag wereldwijde normen voor havenonderhoud zien. Ten onrechte verleggen deze normen soms de verantwoordelijkheid hiervoor naar de bevrachters.

Ten slotte wordt een opkomende categorie, de ecologische veiligheid, steeds belangrijker, vooral gezien de wereldwijd steeds strenger wordende regelgeving tegen vervuiling. Aangezien de aansprakelijkheidslimiet voor het overtreden van deze regelgeving de waarde van het schip kan overstijgen, zoeken eigenaren naar schadeloosstellingen van bevrachters wanneer er sprake is van olievervuiling als gevolg van beschadigingen aan het schip.

De mate van schadevergoeding die een eigenaar bij het breken van veilige-havengaranties kan terugvorderen van bevrachters, en de schadevergoeding die bevrachters bij het niet aandoen van een veilige haven van eigenaars kunnen terugvorderen, worden besproken in hoofdstuk vijf. Specifieke aandacht wordt besteed aan de aansprakelijkheid van de eigenaren tegenover ladingbelanghebbenden voor verkeerde aflevering van de lading wegens onrechtmatige koersafwijking. Schadevergoedingszaken van ladingbelanghebbenden tegen de eigenaren zijn extracontractueel en worden geregeld in de Hague en Hague-Visby Conventions. Economische en niet-economische (bestraffende) schadevergoedingen worden hier besproken gelet op de verschillende wijzen waarop dezeworden opgelegddoor Engelse en Amerikaanse rechtbanken.

Het laatste hoofdstuk richt zich op het gegeven dat rechters bij het interpreteren van clausules over veilige havens en ankerplaatsen, de intenties van de contractpartijen zullen trachten te achterhalen. De veilige-haven garantie heeft een groot bereik. Behalve laad- en loshavens geldt deze ook voor bunkerhavens, schuilhavens, en de route van het schip. Ondanks het feit dat de meeste standaard charterovereenkomsten een veilige-haven/ankerplaatsgarantie bieden, kunnen partijen bepalingen opnemen die de aansprakelijkheid van bevrachters veranderen van risicoaansprakelijkheid naar een nalatigheidsnorm voor het aanwijzen van onveilige havens. Daarbij kan voorafgaand onderzoek naar de haven en havenomstandigheden eigenaren en bevrachters een beroep op een inbreuk van de veilige-havengarantie voorkomen, tenzij er een onverwacht en ongebruikelijk voorval heeft plaatsgevonden. Het proefschrift besluit met de conclusiedat een aanpak van gepaste zorgvuldigheid het beste past bij de realiteit van de hedendaagse scheepvaart.

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