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

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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.).

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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.