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

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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.

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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.

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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 inito* 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.

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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.