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

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

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

3.1. Historical development of safe port warranty

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁸ *Id.*

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

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

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

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

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

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

¹⁹¹ Id. at 134.

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

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

¹⁹⁴ Id.

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

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

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

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

¹⁹⁶ Id. at 101.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1.1. Risk allocation between owners and charterers

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

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

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

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

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

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

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

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

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

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

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

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

3.2. Definition of terms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²²⁴ The Reborn [2009] 1 C.L.C. 909.

²²⁵ Id.

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

3.4. Implication of the safe port and berth obligation

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

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

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

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

²²⁶ Id at 910.

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

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

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

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

...

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

3.4.1. Implication of safe ports

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

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

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

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

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

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

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

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

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

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

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

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

3.4.2. Implication of safe berth

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

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

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

3.4.3. Implication of safe approaches or route

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

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

²³⁷ *Id.* at 149.

²³⁸ *Id.*

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

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

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

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

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

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

²⁴¹ *Id.*

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

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

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

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

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

3.4.4. Constructional implication of safe port warranty

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

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

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

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

²⁴⁵ Id.

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

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

²⁴⁸ Id.

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

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transfer to the Trading Exclusions clause had the effect of either (i) limiting the safe port warranty to the second and/or third load ports and discharge ports — thus expressly excluding St. Petersburg which was named and/or (ii) somehow reducing the safe port warranty to a mere trading exclusion provision. We considered that, if anything, the express warranty in clause 67 was wider than the standard provision. Trading was to be worldwide (with certain named country exceptions) between safe ports, safe berth, safe anchorages and places, always afloat. Moreover we did not accept that, by moving the express safe port provisions, it was somehow downgraded.²⁵⁰

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

3.4.5. Conclusions

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

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

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

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

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

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

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

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

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

²⁵³ See supra Chapter 3.3.

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

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

²⁵⁶ *Id.*

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

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

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

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

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

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

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

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

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

²⁶¹ *Id.* at 72-73.

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

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

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

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

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

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

²⁶³ *The Curfew* [1891] P. 131.

²⁶⁴ *Id.* at 135.

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

²⁶⁶ *Id.*

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

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

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

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

²⁶⁷ Id.

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

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

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

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

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

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

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

Lord Watson said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁸⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

²⁸⁴ *Capper v. Wallace*, 5 Q.B.D. 166

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

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

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

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

²⁸⁹ *Id.*

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

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

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

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

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

²⁹⁰ Id.

²⁹¹ BIMCO NAABSA clause: "Always subject to the Owners' approval, which is not to be unreasonably withheld, the Vessel during loading and/or discharging may lie safely aground at any safe berth or safe place where it is customary for Vessels of similar size, construction and type to lie, if so requested by the Charterers, provided always that the Charterers have confirmed in writing that Vessels using the berth or place will lie on a soft bed and can do so without suffering damage.

The Charterers shall indemnify the Owners for any loss, damage, costs, expenses, or loss of time, including any underwater inspection required by Class, caused as a consequence of the Vessel lying aground at the Charterers request, available at https://www.bimco.org/en/Chartering/Clauses/NAABSA_Charter_Party_Wording.aspx

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

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

3.8. Legal significance of “reachable on arrival” clause

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

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

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

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

²⁹⁵ Id at 291.

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

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

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

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

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

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

²⁹⁷ See *infra* §3.14.

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

²⁹⁹ *Id* at 103.

³⁰⁰ *Id.* at 122.

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

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

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

and

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

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

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

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

³⁰² *Id.*

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

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

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

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

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

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

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

³⁰³ Id.

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

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

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

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

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

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

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

3.10. Inconsistency of terms in the charterparties

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

³⁰⁸ Id.

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

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

³¹¹ Id.

³¹² Id.

³¹³ Id. at para 24.

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

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

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

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

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

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

3.11. Express warranty of safety of berth only

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

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

³¹⁵ Id.

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

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

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

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

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

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

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

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

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

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

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

3.12. Express warranty of safety of the port only

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

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

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

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

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

³²⁵ *Id.*

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

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

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

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

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

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

³²⁶ Id. at §323.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³³⁴ See supra § 3.9.

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

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

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

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

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

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

³³⁶ Id. at 1273.

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

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

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

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

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

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

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

³⁴¹ *Id.*

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

³⁴³ *Id.*

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

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

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

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

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

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

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

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

³⁴⁷ *Id.*

³⁴⁸ *Id.*

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

³⁵⁰ *Id.*

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

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

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

³⁵¹Bentleys’ Bulletin (July 2011) available at <http://bentleys.co.uk/bentleysBulletin.html#interestdamages>.

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

