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

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#### 4. Attributes of the safety of a port.

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

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

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

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

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

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<sup>353</sup> The Aurora, SMA No. 3609, 2000 WL 35733856.

<sup>354</sup> M.T. PRIMO, SMA No.3335, 1997.

<sup>355</sup> Safe port and safe berth, available at

[http://www.maritimeadvocate.com/security/safe\\_port\\_and\\_safe\\_berth.htm](http://www.maritimeadvocate.com/security/safe_port_and_safe_berth.htm)

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

#### 4.1. Physical safety

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

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

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

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<sup>356</sup> See supra §2.4.

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

<sup>358</sup> Id.

<sup>359</sup> See The MV Naiad, SMA No.1177, 1977 WL 372763.

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

### 4.1.1. Ice

Most modern charterparties will contain an ice clause<sup>360</sup> together with safe port/berth warranty. Out of the many dangers a vessel may face, the possibility of ice is one that charterers are most often concerned with because they would like the vessel to trade to any destination year round. Ice can, in some instances, keep some ports frozen throughout the entirety of the winter season, thereby jeopardizing one of the charterers main goals, namely, to utilize the vessel throughout the year.

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

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

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

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

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

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

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

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

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

<sup>364</sup> *Id.*

<sup>365</sup> *Johnson v. Saxon Queen Steamship*, 108 L.T. 564.

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

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

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

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

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

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

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

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

<sup>370</sup> *Id.*

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

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

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

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

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

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

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

<sup>374</sup> *Id.*

<sup>375</sup> *Pringle v. Mollett*, 6 M. & W. 80 (1840).

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

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

### 4.1.2. Draft

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

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

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

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<sup>377</sup> BIMCO Ice Clauses, Special Secular February 2005, available at [https://www.bimco.org/~media/Documents/Special\\_Circulars/SC2005\\_02\\_24.aspx](https://www.bimco.org/~media/Documents/Special_Circulars/SC2005_02_24.aspx)

<sup>378</sup> See *The Alhambra* (1881) L.R. 6 P.D. 68.

<sup>379</sup> See *The MV Naiad*, SMA No.1177, 1977 WL 372763.

<sup>380</sup> *The Alhambra* (1881) L.R. 6 P.D. 68.



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

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

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

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

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<sup>381</sup> Id.

<sup>382</sup> Id at 71-72.

<sup>383</sup> *Hillstrom v. Gibson*, (1870) 22 LT 248.

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

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

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

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

*....we agreed with the Owners that whilst in the present case there was no question of unsafety in the ordinary usage of that word, there is authority for the view that a port can be unsafe because of a need for lightering to get into or out of it.*

*... 'safely' means 'safely as a laden ship'*<sup>389</sup>

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

<sup>385</sup> See *Shield v. Wilkins*, 5 Ex 304.

<sup>386</sup> *Id.* at 305.

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

<sup>388</sup> *Id.*

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

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

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

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

The Tribunal agreed with the owners and ruled:

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

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<sup>390</sup> The MV *Naiad*, SMA No.1177, 1977 WL 372763.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

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

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

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

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

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<sup>393</sup> Id.

<sup>394</sup> Id., see dissent opinion to the decision and award.

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

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

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

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

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<sup>395</sup> *The Ross Isle*, SMA No. 1340, 1979 WL 406546.

<sup>396</sup> *Id.*

<sup>397</sup> *The Lady Helene*, SMA No. 3457 (1998).

<sup>398</sup> *Id.* at 1.

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

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

### 4.1.3. Air Draft

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

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

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<sup>399</sup> Id at 9.

<sup>400</sup> Id at 6.

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

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

In the modern shipping world, an incorrect description of a vessel could result in her impossibility to call a port due to air draft restrictions. Unfortunately, this problem is not as easily remedied as in the past when the ship could just be dismantled. In *Buyuk Camlica Shipping Trading & Industry Co Inc. v. Progress Bulk Carriers Ltd.*,<sup>403</sup> the air draft restrictions for the vessels loading at Misurata in Libya to which the Charterers ordered the vessel to load a cargo of HBI<sup>404</sup> varied from the one stated in the charterparty. If the vessel's actual moulded depth had complied with her described moulded depth as set out in the charterparty, her air draft would have come within the applicable restrictions at both of those ports. As it was, however, the vessel's actual moulded depth meant that the vessel's actual air draft inevitably exceeded the air draft restrictions at Misurata by some margin.<sup>405</sup> Thus, charterers' nomination of Misurata was considered as a valid one and owners had to bear the loss.

### 4.1.4 Wind

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

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

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<sup>402</sup> Id.

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

<sup>404</sup> Hot Briquetted Iron.

<sup>405</sup> Id.

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

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

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

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

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

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

<sup>408</sup> *Id.*

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



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

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

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

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

#### 4.1.5 Tides

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

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<sup>410</sup> Id. at 267.

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

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

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

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

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

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

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

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

#### **4.1.6. Current**

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

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

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

<sup>413</sup> In *Parker v. Winlow*, 7 E. & B. 942.

<sup>414</sup> *The Aristides*, SMA NO. 3686, 2001 WL 36175174

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

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

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

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<sup>415</sup> The Aristides, SMA NO. 3686, 2001 WL 36175174 at 10.

#### 4.1.7. Silting

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

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

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

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

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

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

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

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*and not within the contemplation of the parties at the time of contracting.*<sup>417</sup>

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

### 4.1.8. Swell

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

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

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<sup>417</sup> Id.

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

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

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

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

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

#### **4.1.9. Reliable seabed**

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

#### **4.1.10. Insufficient room to maneuver**

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

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

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

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

<sup>423</sup> Id.

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

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

### 4.1.11. Radiation

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

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

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

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

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

<sup>427</sup> *Id.*

<sup>428</sup> See W.E. Astle, *The Safe Port or Berth reachable on arrival*, at 27 (1986).



Alternatively, they breached the relevant charterparty and suffered a significant financial loss since deviation away from Japanese port would not be considered a fundamental breach and entitle charterers to terminate a charterparty. Charterers could have sought to capitalize on owners' refusal to follow reasonable instructions and re-enter the market to secure an alternative charter of a vessel at a more favorable rate. What solutions to overcome prospective unsafety of the port and adjacent area were available to the owners?

The Japanese government maintained a 30 km exclusion zone around the Fukushima Daiichi nuclear power station. No ban had been imposed by the Japanese authorities in relation to ship transits or port calls aside from the mentioned exclusion zone.<sup>429</sup> Although the major ports of Japan were not affected by radiation to the level that would allow them to be considered unsafe and/or dangerous by the Japanese government and international organizations, the risk of minor exposure to radiation by the crew and subsequent personal injury claims greatly influenced owners' decisions to declare nominated ports in Japan as prospectively unsafe. If the prevailing winds would bring air from Fukushima to where a vessel was or might be and/or there was the prospect of rain there, then this would increase the risk of radiation to potentially unacceptable levels. Practically speaking, though, it was difficult to assess how adverse weather conditions could be forecast or monitored to allow owners sufficient time to take avoidance actions, for example, by diverting the vessel and moving her off berth to a safe distance. Moreover, rerouting the vessel away from Japan could not be considered as compliance with safe port warranty, namely, approaches to the port.

Although one could see legitimate grounds in owners' decision not to call ports close to Fukushima, they found support also within the insurance community, since claims relating to radiation issues are often excluded from a vessel's usual insurance coverage. Owners attempted to justify the impossibility of a call to a Japanese port by referring to their Hull and Machinery and P&I policies and the risk of a loss of cover for the vessel and her cargo. However, only if there was a real risk of exposure to

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<sup>429</sup> Frequently asked questions (FAQ) concerning Japan earthquake, tsunami and nuclear radiation risks, GARD P&I newsletter, available at [http://www.gard.no/ikbViewer/Content/14786648/Japan\\_Earthquake\\_QA\\_17%20june%202011\\_at1200.pdf](http://www.gard.no/ikbViewer/Content/14786648/Japan_Earthquake_QA_17%20june%202011_at1200.pdf)

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unacceptable levels of radiation would charterers be in breach of the safe port warranty in ordering the vessel to proceed or to continue to proceed.<sup>430</sup>

The effect of calling Japanese ports can be seen in the additional safety measures undertaken by governments of many European countries in order to prevent radiation contamination of their facilities, cargos, vessels, and personnel through contact with vessels affected by radiation. These measures included imposing specific cleaning requirements, screening, or even banning ships that had called at Japanese ports. In Germany, the authorities of the port of Hamburg worked on emergency plans and considered the possibility of refusing contaminated vessels access to the port. Such a docking prohibition could be legally based on general public safety laws in Germany that provide the authorities the right to prohibit the entry to the port in case of a threat to public health.<sup>431</sup>

Despite the fact that many owners considered a fast majority of Japanese ports as prospectively unsafe, only competent authorities who had conducted a careful analysis of the emergency situation were in a position to recommend what public health measures should be taken. BIMCO did not believe that the Master of a ship or owners were appropriately trained or equipped to make such an analysis and decision. Without the necessary analytical and interpretive expertise and the appropriate test environment, it was likely that the results produced by these “domestic” devices could be misleading. A subjective judgment by a ship’s Master based on the readings from such a device not to proceed with a voyage as ordered by charterers could easily lead to a dispute with owners facing a potential breach of contract.<sup>432</sup>

There were inevitably disputes between shipowners and charterers over who should pay for the delays or the extra costs of having to discharge elsewhere or for the cleanup costs in the event that contamination had been identified. Although the argument could not be built around safe port warranty as not all countries employed similar policies towards scrutinized inspection of “contaminated” vessels. The answer might

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<sup>430</sup> Nick Burgess, Shipowners face legal claims for refusing Japan port calls, available at <http://incelaw.com/news-and-events/news/shipowners-face-legal-claims%20for-refusing-japan-port-calls>

<sup>431</sup> Fukushima - some implications for the Shipping Industry, Mondaq Business Briefing 12 April 2011, available at [https://goliath.ecnext.com/coms2/gi\\_0199-14806035/Fukushima-some-implications-for-the.html](https://goliath.ecnext.com/coms2/gi_0199-14806035/Fukushima-some-implications-for-the.html)

<sup>432</sup> BIMCO Radioactivity Risk Clause for Time Charter Parties, Special Circular April 2011, available at [https://www.bimco.org/~media/Documents/Special\\_Circulars/SC2011\\_03.ashx](https://www.bimco.org/~media/Documents/Special_Circulars/SC2011_03.ashx)

differ depending upon whether it was the cargo or ship that were contaminated, and on the precise charter terms, including exclusion clauses.<sup>433</sup>

While there were no available cases to apply to a potential dispute over contamination of the vessel and cargo with radiation, some case law offers helpful guidance as to considerations English Court may bear in mind when deciding whether the carriage of contaminated cargo will lead to the vessel being on or off hire. In *The Laconian Confidence*,<sup>434</sup> the charterers ordered the vessel to sail from Yangon to Chittagong in Bangladesh where, following the discharge of the cargo (bagged rice), the survey established the presence of rejected residue sweepings onboard the vessel. On this basis, the Bangladesh port authorities refused to allow the vessel to proceed to her next port incurring a delay of 18 days. A dispute arose between owners and charterers as to whether the vessel was off-hire during this time. Charterers claimed the vessel was off hire because of the following clause (on an amended NYPE form):

*...in the event of the loss of time from deficiency of [and/or default] men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...*<sup>435</sup>

The tribunal and the High Court on appeal held that the vessel was on hire throughout as the delay did not arise from the damaged cargo, but as a result of the remarkable reaction and interference of the authorities.

In this case, the High Court also considered the inclusion of the term “any other cause whatsoever” in the list of possible reasons why a vessel can be put off hire.<sup>436</sup> The High Court commented:

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<sup>433</sup> Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

<sup>434</sup> *Andre et Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep. 139.

<sup>435</sup> *Id.*

<sup>436</sup> Fukushima - some implications for the Shipping Industry, Montaq Business Briefing, [https://goliath.ecnext.com/coms2/gi\\_0199-14806035/Fukushima-some-implications-for-the.html](https://goliath.ecnext.com/coms2/gi_0199-14806035/Fukushima-some-implications-for-the.html)

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*In my judgment it is well established that those words [i.e., 'any other cause'], in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause...A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context...that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in Court Line, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. Prima facie it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so.*

Shortly after Fukushima disaster, many shipowners started to use “home-made” radioactivity clauses and BIMCO came up with its own “radioactivity clause.” Shipowners insisted on inserting the clause into charterparties in order to have a right to divert the vessel away from Japanese ports if radiation levels were considered risky in

the wake of the explosions at the Fukushima power plant. The “radiation clause”<sup>437</sup> would require charterers to nominate a safe port in case the discharge port was declared unsafe because of abnormally high radiation levels and to bear the deviation cost. The “radioactivity clause” makes it clear that owners cannot refuse an order to proceed to a port or place unless the competent authorities confirm the risk of harmful levels of radiation. Certainly, no one can make charterers agree to the amendments to the charterparty that can significantly diminish their rights; however, for the new charterparties it seems to be a fair solution. Another solution for new charterparties could be to impose charterparty clauses requiring shipowners to confirm that the vessel had not traded in Japan or carried cargo from Japan since the explosion at Fukushima occurred<sup>438</sup> or make certain that Japanese ports are excluded from the vessel trade area.

In a situation when a risk of nuclear contamination exists, it is impossible to estimate whether a vessel or a port will be affected by radiation at the time the vessel calls. For that reason parties could be taken disadvantageous to them decisions. In case there is a physical damage caused by radiation, charterers are not the only party against whom a claim can be brought on a safe port theory. Although most claims for direct damage to property in Japan resulting from the nuclear explosion at the Fukushima power plant would be brought in the Japanese courts and would be subject to Japanese law, for the international shipping community, there might be ways and means to seek recovery of losses under contracts subject to English law. Philip Roche suggests that it may be helpful to look briefly at some decisions of the English courts in regards to liability arising from nuclear incidents.<sup>439</sup>

In *Merlin v. British Nuclear Fuels*,<sup>440</sup> the English courts rejected a home owner’s claim for economic damages under the Nuclear Installations Act 1965 as a result of the reduction in value of their house due to radioactive contamination following the Sellafield disaster. Radioactive contamination of the house was not enough to constitute physical damage, and a claim for economic loss did not fall within the terms of the statute. Only when the statutory level of radioactive contamination is exceeded will the court grant recovery of economic damages.<sup>441</sup> More recently, the court in

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<sup>437</sup> BIMCO Radioactivity Risk Clause for Time Charter Parties, Special Circular April 2011, available at [https://www.bimco.org/~media/Documents/Special\\_Circulars/SC2011\\_03.ashx](https://www.bimco.org/~media/Documents/Special_Circulars/SC2011_03.ashx)

<sup>438</sup> See Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

<sup>439</sup> *Id.*

<sup>440</sup> *Merlin v British Nuclear Fuels* [1990] 2 Q.B. 557.

<sup>441</sup> See *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289.

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*Magnohard Ltd v. United Kingdom Atomic Energy Authority*,<sup>442</sup> recognized that there was a potential for recovery of compensation and expenses incurred as a result of cleaning up contamination to a beach following radiation leakage from the Dounreay power station.

There is therefore perhaps some precedent under English law for considering increased levels of radioactivity on ships or cargoes as being physical damage for which compensation, in the form of loss of value and cleaning costs, might be recoverable, where the exposure was due to breach of contract or negligence.<sup>443</sup> At the same time, a recovery for the breach of a safe port warranty can be problematic as many Japanese ports remained opened and only third party countries demanded increased safety measures to vessels calling Japan.

### 4.1.12. Legal significance of accident free history of the port

In the previous chapters, I reviewed dangers of the port. Now I would like to bring your attention to defenses, which charterers can use in breach of safe port and/or berth warranty cases. One of the defenses charterers often use in the owners' claims for nominating unsafe port is the long accident free history of a particular port. Although the courts will be very cautious in considering the history of the port, under several circumstances it may help. In general, when the argument of the accident free history is brought, the tribunal will consider first whether the port was safe for that particular vessel at a given time before reviewing supplemental evidence that other vessels were able to call it safely. The evidence of accident free history has to be proven by a preponderance of the evidence in order to allow the tribunal to compare the description of the vessel in question with other vessels calling the port, exact times, weather conditions, and other circumstances that surrounded that particular call.

In *The Gazelle*,<sup>444</sup> by the express terms of the charterparty, the charterers were bound to order the vessel "to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get, and always lay and discharge afloat."<sup>445</sup> The clear meaning of this is that she must be ordered to a port that she can safely enter with her

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<sup>442</sup> *Magnohard Ltd v United Kingdom Atomic Energy Authority* [2004] S.C. 247.

<sup>443</sup> Fukushima - some implications for the Shipping Industry, Newsletter April 2011, available at <http://www.nortonrose.com/in/knowledge/publications/48529/fukushima-some-implications-for-the-shipping-industry>

<sup>444</sup> *The Gazelle*, 128 U.S. 474 (1888).

<sup>445</sup> *Id* at 474.

cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. The charterers insisted upon ordering her to the port of Aalborg.

The Supreme Court agreed with the circuit court finding that the Aalborg port is in a fiord or inlet having a bar across its mouth, which made it impossible for the *Gazelle* to pass, either in ballast or with cargo; and that the only anchorage outside the bar was not a reasonably safe anchorage, nor a place where it was reasonably safe for a vessel to lie and discharge. These positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of fact) that large English steamers habitually, and 31 American vessels in the course of several years, had in fact discharged the whole or part of their cargoes at that anchorage, without accident or disaster. A dangerous place may often be stopped at or passed over in safety. The evidence on the other side is not stated in the findings; and, if it were, this court, in an admiralty appeal, has no authority to pass upon the comparative weight of conflicting evidence.

It seems that if *The Gazelle* would have been decided not in 1888, but today, the result might have been different. In today's world when every call of the vessel is documented not only by the parties, but also by port authorities, it is easy to ascertain the conditions surrounding each call and to track the good history of any port. This system was successfully employed by the charterers in *The Cepheus*<sup>446</sup> to show that Anchorage was a safe port regardless of the time of the year and negligence of a single pilot, and that the fast flooding tide and the ice conditions would not bring the port to being unsafe.

The vessel was chartered for a voyage from Freeport, Bahamas to Anchorage, Alaska with a cargo of jet fuel. The charterparty, in its relevant part, provided for a safe port and safe berth warranty. While proceeding to Anchorage with a pilot on board, the vessel grounded on the southern edge of the shoal. Owners claimed that because the harbor is subject to unusual tidal ranges, swift tidal currents, sloppy ice conditions, frequent fog, short daylight hours in winter time, and poor radar imaging because of low lying terrain and ice distortion, that the port was not safe.<sup>447</sup>

After the panel received considerable evidence on the physical layout of the Port of Anchorage and the port of loading dock, heard the testimony of the Master, pilot and various other Anchorage harbor pilots, it accepted evidence on the nature of vessel traffic into the Port of Anchorage and the long term accident record of vessels calling there. It was ascertained that the Port of Anchorage has a long and impressive accident

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<sup>446</sup> *The Cepheus*, SMA NO. 2663, 1990 WL 10555646.

<sup>447</sup> *Id.*

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free record<sup>448</sup> for all sizes of vessels entering and leaving during all seasons and under all weather conditions. The tribunal found that Anchorage was a safe port and that the Cepheus' stranding was the result of acts attributable to the shipowner.

*The Marinicki*<sup>449</sup> raised a different type of concern to a prudent charterer, whether a popular port can be considered as unsafe, because of a single accident that was not properly investigated by port authorities. By a charterparty on an amended NYPE form owners chartered the vessel for one time charter trip via safe port from Vancouver to Indonesia. The charterers ordered the vessel to proceed to Jakarta. Prior to the vessel's arrival at her discharge berth in Jakarta she sustained serious bottom damage. The owners claimed that the damage was caused by an underwater obstruction located just to the north of the breakwater and within the dredged channel, which constituted the designated route into and out of Jakarta.

The Court found that there was no buoy to mark the obstacle, no notice to mariners, and no warning given by the pilot that the dredged channel had any obstacle. After the incident, the local authorities made no investigation as to how the incident occurred or whether there was an object in the channel. There was conflicting evidence from two witnesses from Jakarta that the channel was dredged in 1997 and 1999. The Court held:

*that the port of Jakarta was unsafe on the day of nomination because there was no proper system in place to investigate reports of obstacles in the channel and/or to find and remove such obstacles and in the interim to warn vessels that there was such an obstacle in the channel by means of notice to mariners and by buoying the obstruction..*<sup>450</sup>

In my opinion, the decision can be a good guideline for the charterers. Regardless of the fact that hundreds of other vessels enter and leave a port every day, charterers still have to ascertain that at the time of nomination the port is safe. Although *The Marinicki* decision was not commercially oriented, it maintained a balance between the warranties owners and charterers exchange.

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<sup>448</sup> The Port of Anchorage records revealed a total of 2,122 dry cargo vessels and 140 tankers called during the period January 1979 - October 1987; close to 500 vessels arrived and departed during the months of November through February. Of all these vessels, only two aside from Cepheus reported casualties; the Sealand Philadelphia struck bottom while backing away from the berth.

<sup>449</sup> Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (*The Marinicki*) [2003] 2 Lloyd's Rep 655.

<sup>450</sup> *Id.*



#### 4.1.13. Fouling

It would seem that charterers are responsible for breaking a safe port warranty from most of the cases that concern physical safety of the port when the vessel was damaged in the absence of an abnormal occurrence. Surprisingly, there are situations where the charterers will not be responsible for the damage to the vessel in such cases.

The court upheld a decision of the arbitrators in *The Kitsa*,<sup>451</sup> where they found that owners were not entitled to recover under an “implied indemnity” expenses for removing marine growth from the bottom of the ship after she spent three weeks waiting to discharge at a warm water port. The bulk carrier *MV Kitsa* was time chartered on a standard NYPE form that in its relevant part provided. “[t]ime charter period of minimum 4 months to about 6 months ... always via safe port(s), safe berth(s), safe anchorage(s), always afloat, always within Institute Warranty Limits ... within below mentioned trading limits ...”<sup>452</sup> The vessel was sub-chartered and ordered for a trip to bring a cargo of coal from South Korea to Visakhapatnam (“Visak”), India. The vessel remained in Visak for approximately 22 days. That was longer than, in ideal circumstances, might have been expected. As a result of this prolonged stay in the warm waters, without any movement, the bottom was fouled by barnacles<sup>453</sup> that were removed in the yard at owners’ expense. Although the owners did not bring the safe port argument they insisted that trading within Institute Warranty Limits does not carry an assumption by the shipowners of all risks of ordinary incident at each port within those limits. The court decided that:

*Neither the Charterers nor those “below” them in the charterparty chain sought to delay the vessel from the performance of her most obvious commercial purpose in calling at Visak, i.e. to discharge the cargo and then depart. The vessel was kept waiting to discharge at Visak, but that was only because of operational considerations at the port and not for any other reason. Because the vessel was gearless, she was in the hands of the shore as to the rate and manner of her discharge.*

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<sup>451</sup> Action Navigation Inc v Bottiglieri di Navigazione SpA (*The Kitsa*) [2005] EWHC 177 (Comm).

<sup>452</sup> *Id.* at 177.

<sup>453</sup> Presence of barnacles on the hull of the vessel slightly reduces vessel’s speed and increases fuel consumption.

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*Because employment (which was within Institute Warranty Limits — “IWL”) was permitted under the Charterparty, therefore the Owners had agreed to accept the risks (falling short of danger) ordinarily incident at the ports of the subcontinent, including fouling of the hull and the costs of removing it.<sup>454</sup>*

From the ruling, it seems that the liability of charterers will exist when the vessel’s employment, namely, the part that concerns the duration of her stay at certain ports, is intentionally exceeded by the charterers from a normal length or when an owners reasonable expectation as to the vessel’s employment was exceeded, or when the order as to employment of the vessel were unforeseen.<sup>455</sup>

### 4.1.14. Conclusion

I would like to conclude this section with a ruling of *The Marathonian*,<sup>456</sup> which established that no port is a safe port under all possible weather conditions and it will depend on the good seamanship and navigation to avoid dangers. Physical conditions can be anticipated and discovered by charterers and owners at the time of port nomination. Most of the time, proper examination of navigational charts and maps, weather forecasts, and seasonal draft changes can prevent an accident and save a vessel.

### 4.2. Political safety

Cases decided because of political activity inland, rendering the nominated port unsafe, are somewhat sparse, although ports so affected are nonetheless unsafe for that. The probable explanation is that a port suffering from such debility at the time of nomination tend to be known to the shipowners and can thus be treated as nugatory nominations, whilst the incident does not exist at the time of nomination, its subsequent

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<sup>454</sup> Id at 163.

<sup>455</sup> See *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] C.L.C. 734.

<sup>456</sup> *The Marathonian*, 1978 A.M.C. 821. The shipowner was not entitled to recover from the charterer under a safe berth clause of the voyage charterparty for detention and damage to the vessel directed to Manzanillo for a two-weeks loading during hurricane season. Owner had adequate time to acquaint himself with conditions prevailing in Manzanillo during hurricane season; and the captain could have avoided damage by leaving pier and anchoring during surge periods.

manifestation will in the category an abnormal occurrence.<sup>457</sup> Wars, confiscation, blockades, political unrest, piracy, politically-inspired “retaliation” against vessels of specific flag,<sup>458</sup> and embargoes will bring political unsafety to the port. These non-seafaring events embrace dangers that affect the physical integrity of the vessel and the owners’ proprietary rights.

#### 4.2.1. War

Clearly, where there is a state of war existing at the port or place that would cause physical danger to the vessel, the port is unsafe. A classic example of war related activities that made the port unsafe can be seen in *The Teutonia*,<sup>459</sup> where the Master of a Prussian vessel, having onboard a cargo of nitrate of soda (contraband of war) under a charterparty and bill of lading from Pisagua, bound to Cork, Cowes, or Falmouth. After learning that a war was declared between France and Prussia, the Master turned the vessel from Dunkirk, France, the nominated port of discharge, and sailed to Dover where he finally discharged the cargo. The court held:

*That the Master committed no breach of contract in refusing to deliver the cargo at Dunkirk, and as the Charterparty provided<sup>460</sup> what freight was to be paid if the Cargo was delivered, the delivery at Dover was within the terms of the Charterparty, and the Master was entitled to freight for the Cargo from the Owners before delivery thereof.*

*...The question is not when the War actually broke out, but whether at the time when the Teutonia was off Dunkirk, and the Master was informed by the Pilot that War was likely to be declared, though it had not been actually declared, between France and Prussia, it was so imminent as to justify the Master's abstaining from entering the port at Dunkirk. ... Here the information given by*

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<sup>457</sup> F.J.J. Cadwallader. An Englishman’s Safe Port, 8 San Diego L. Rev. 639 (1971).

<sup>458</sup> Marko A. Pavliha, Implied Terms of Voyage Charters, McGill University, Montreal, at 214 (1991).

<sup>459</sup> *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 172.

<sup>460</sup> The relevant part of the charterparty stated: “...to proceed to any safe port in Great Britain or on the Continent between Havre and Hamburg, both included, and there deliver the cargo, “the act of God, the Queen’s enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted.”

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*the French Pilot at Dunkirk and the general rumour of War were sufficient to justify, first the Vessel going to the Downs, and then the sailing into Dover harbor.*<sup>461</sup>

Without any hesitation, the courts in *The Evia*<sup>462</sup> went even further and established a principle of prospective unsafety. Although warlike activities between Iran and Iraq broke up when the vessel completed discharge, the charterers' contractual promise under the safe port warranty clause of the charterparty was that at the time when the order was given for the vessel to go to a particular port or place, that port or place was prospectively safe for the vessel to get to it, stay at it, so far as necessary, and in due course leave it; that if while the vessel was in such a port or place some unexpected or abnormal event suddenly occurred that made it unsafe the charterers' contractual promise did not extend to making the charterers liable for any resulting loss or damage.

Sometimes the court will review war activities in light of whether any harm was actually suffered by the vessel. A mere threat that the vessel can be damaged by calling a port in the state of war will not be considered as a sufficient danger. In *Palace Shipping v. Gans*,<sup>463</sup> when the war between Great Britain and Germany was underway charterers ordered the vessel to sail from a port in France to a port in England through the waters which were declared a military area by Germany. While the shipowner protested, charterers nevertheless ordered the ship to sail and she arrived to the discharge port safely. Justice Sankey held:

*It is impossible to regard the results achieved [in relation to the threatened sinking] as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine.*<sup>464</sup>

Although the result of this case is somewhat a “burst of pride,”<sup>465</sup> modern charterparties shield shipowners from facing a risk of war on route from one safe port to another through hostile areas by inserting a “war risk areas” clause. BIMCO’s war risks

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<sup>461</sup> *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 172

<sup>462</sup> *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No. 2) [1982] 1 Ll Rep 334.

<sup>463</sup> *Palace Shipping Co. v. Gans SS Line* [1916], 1K.B. 138.

<sup>464</sup> *Id* at 142.

<sup>465</sup> F.J.J. Cadwallader. *An Englishman’s Safe Port*, 8 San Diego L. Rev. 639 at 648 (1971).

clauses such as CONWARTIME<sup>466</sup> and VOYWAR<sup>467</sup> are a well-established standard. These clauses have been regularly updated in recent years in order to reflect all dangers of warfare and the risks the vessel can be subjected to. The clauses require charterers to obtain consent of the owners before a vessel can transit through war risk area:

*The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.*<sup>468</sup>

Older case law also provides a heads up to the owners when there is an argument whether an approach to the port, far from its limits, can be considered as an area to which a safe port warranty extends. In *Nobel's Explosives Co. v. Jenkins*,<sup>469</sup> the court considered whether the area between Hong Kong and Yokohama could be considered an extension of Yokohama at the time when China declared war against Japan and the vessel had contraband of war cargo on board. The court decided that when there was "actual and operative restraint, and not a merely expected and contingent one, mere apprehension of danger [was] not enough,"<sup>470</sup> and the route from Hong Kong and Yokohama was held to render the entering of the port of Yokohama unsafe.

Presence of "war risk clauses" together with a safe port warranty only ensures that the shipowners' right of trading between safe ports is protected. Any exposure of

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<sup>466</sup> The wording of the clause can be accessed at [https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War\\_Risks\\_Clause\\_for\\_Time\\_Charters\\_2004.aspx](https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Time_Charters_2004.aspx)

<sup>467</sup> The wording of the clause can be accessed at [https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War\\_Risks\\_Clause\\_for\\_Voyage\\_Chartering\\_2004.aspx](https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Voyage_Chartering_2004.aspx)

<sup>468</sup> War Risks Clause for Time Charters, 2004, available at [https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War\\_Risks\\_Clause\\_for\\_Time\\_Charters\\_2004.aspx](https://www.bimco.org/en/Chartering/BIMCO%20Clauses/War_Risks_Clause_for_Time_Charters_2004.aspx)

<sup>469</sup> *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q.B. 326.

<sup>470</sup> *Id.* at 328.

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the vessel by the charterers to a risk of military activities, whether at sea or at port, will automatically trigger the owners' right to claim damages or rectification.

### 4.2.2. License

Under some circumstances, an export license can be required in order to bring the cargo in the port of discharge for its further consignment. Absence of the license can result in the vessel's detention and confiscation of the cargo. Most of the time, the party shipping the goods will have superior knowledge of the export requirements and a lack of a license will be considered as a breach of the safe port warranty. What party will be responsible for the delay of the vessel if neither party knew of the licensing requirements? In such circumstances, the knowledge of the licensing requirements will be implied on the party that has some kind of relationship with the port of discharge. In *The Lisa*,<sup>471</sup> a Swedish vessel was chartered to bring a cargo of rosin from Pensacola to Narvik for its further transshipment to Petrograd, Russia. At the time the vessel was chartered, there were export regulations in Sweden forbidding export of rosin, except under license, to Russia. Upon arrival to the discharge port, the vessel was detained for almost three months. It was decided by Sir Henry Duke that:

*Obtaining of such license was his [charterer's] affair and not that of shipowners. [However, when] knowledge the parties or either of them had of export regulations before the making of the charterparty was not shown by the evidence; but the plaintiffs were Swedish shipowners, and, in the absence of proof to the contrary, I assume them to have had such knowledge.*

Although the court found in charterers favor and declared the port of Narvik to be a safe port, the delay that was caused due to charterers' decision to keep the vessel in alternative port in order to overcome the deadlock in Sweden had to be for charterers' account.

### 4.2.3. Confiscation

The threat to the owners' proprietary interest in the vessel is a clear danger, although the vessel herself might not be in danger of physical harm. The risk of

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<sup>471</sup> *Karin AB v Strauss & Co (The Lisa)* [1921] P. 38.

confiscation as a characteristic of the port to which the vessel is ordered may therefore suffice to render it unsafe.<sup>472</sup> What surrounding circumstances can put charterers on notice that the vessel can be confiscated and the port eventually would be rendered unsafe?

In *Ogden v Graham*,<sup>473</sup> the vessel was ordered to proceed to Valparaiso. At the time, the charterparty was made, both the owner and the charterers were ignorant of the fact of any port in Chili being closed by the government of that country. When the vessel arrived at Valparaiso, charterers knew that the port of Carrisal Bajo, the discharge port, as well as all other ports in the mining districts, both major and minor ports, had been declared closed by the Chilean government and that all vessels unloading there without a permit would be liable to confiscation. The port of Carrisal Bajo had been declared closed by the Chilean government itself because the district in which it was situated was in a state of rebellion; but, except for this rebellion and the interdict of the government, it was, by nature, a safe port. When the rebellion was suppressed the government removed the interdict, and gave the Master a permit, and he went and discharged his cargo at Carrisal Bajo. The vessel lay at Valparaiso thirty-eight days. Owners brought a claim against the charterers for the lost time because Carrisal Bajo was not a politically safe port. Justice Blackburn J., on appeal, ruled:

*... it is not in terms so stated, it follows by necessary implication that the charterers are to name a safe port to the shipowner, who will then be able to earn his freight by proceeding there. It appears, from the facts stated in the case, that this was a perfectly honest and bonâ fide transaction, and we must take it that the charterers had really sent out to their agent at Valparaiso instructions for the vessel to go to this particular port in Chili, and to deliver the cargo there. It however so happened that, before Carrisal Bajo was named to the shipowner or the Master, that port was closed, not merely by the Custom House regulations ..., but by the Government of the country. At that time there was a rebellion in some of the provinces of Chili, and an order was issued by the Government prohibiting, under pain of confiscation, any ship from entering certain ports, of which Carrisal Bajo was one,*

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<sup>472</sup> Voyage Charters, (3-rd Edition, 2007) at 122.

<sup>473</sup> *Ogden v Graham*, 121 E.R. 901.

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*without a license of the Government, and the Government at that time refused to grant any such license. ...They named a port which had been a safe port, and would probably thereafter become a safe port; but if, at the time they named it, it was a port into which the shipowner could not take his ship and earn his freight, it seems to me that they have not complied with the conditions in the charter-party that they should name a safe port. That being so, [charterers] are liable for damages for not naming a safe port within a reasonable time, and the measure of damages will be regulated by the detention of the ship at Valparaiso beyond that time.*<sup>474</sup>

In recent years, the threat of a vessel's confiscation became extremely relevant to owners' interests. With involvement of international community in controlling trade with oppressive regimes by means of embargo or various sanctions, the vessel and her cargo can be seized anywhere in the world. It can even turn out that the cause of confiscation is not the cargo that is presently on board, or the port where the vessel was directed, but the activities of the vessel and the cargos of which present charterers could not have been even aware of. The issue can become extremely complex as it can involve multiple jurisdictions and restrictions on the cargos that can be legal under one regime and illegal under another.

A good example when the court discussed awareness of the owners and the charterers as to the nature of charterers business and the ports of call can be found in *The Greek Fighter*.<sup>475</sup> The charterparty provided that "no voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."<sup>476</sup> Nevertheless the court concluded that there was no breach of the safe port warranty because the confiscation of the vessel took place not at the time when the port was nominated or the vessel was directed there, but after nine months the vessel spent in Khorfakkan as an oil storage facility. The court further explained that,

*The shipowner requires to be put into the position where he can rely on the charterer, who, it can be anticipated, has access to all relevant information, to ensure that the cargo which the vessel is required*

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<sup>474</sup> Id at 904-905.

<sup>475</sup> Ullises Shipping Corp v Fal Shipping Co Ltd (*The Greek Fighter*) [2006] 2 C.L.C. 497.

<sup>476</sup> Id.



*to load will not expose the shipowners to loss due to the vessel being detained or fined or otherwise delayed on account of a breach of the local law. In other words, this is an absolute warranty.*

*...Thus, even though the cargo may lawfully be loaded at the port of loading, it must not be such that presents a risk that the vessel will be captured or seized by rulers or governments anywhere following loading. Here again the obligation of the charterer is, in my judgment, absolute: it is nothing to the point that the charterer may have been ignorant of that characteristic of the cargo which gave rise to the risk of capture or seizure...<sup>477 478</sup>*

It is well settled that, in the context of an express or implied safe port warranty, the attribute of safety includes political and similar risks having a bearing on the safety of the vessel. The prospective risk of loss of a vessel due to confiscation, without justification and absence of any effective means of preventing it under the justice system, and conduct by the state authorities would not fall [emphasis added by the author] within the mutual restraint of princess exception for the specific safe port warranty and would supersede the general exception.<sup>479</sup>

*The Greek Fighter* answered many questions. One of them was that charterers have to anticipate that the vessel and cargo might be detained when sailing to or from ports of the countries subject to the sanctions. The arrest of the vessel can take place in the intermediate port and render it unsafe. Charterers should use more precaution in examining the origin of the cargo, and determining whether shippers, consignees, or cargo owners are sanctioned entities when calling ports, which are subject to international sanctions.<sup>480</sup>

#### **4.2.4. Blockade**

A blockade is an effort to cut off food, supplies, war material, or communications from a particular area by force, either in part or totally. A blockade

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<sup>477</sup> The court gave its interpretation of “unlawful merchandise” clause “No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments.”

<sup>478</sup> *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497.

<sup>479</sup> *Id.*

<sup>480</sup> See *infra* §3.2.6.

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should not be confused with an embargo or sanctions, which are legal barriers to trade, and is distinct from a siege in that a blockade is usually directed at an entire country or region, rather than a fortress or city.<sup>481</sup> Within maritime law, the blockade can be either internal, one that is organized by the citizens of the country where the port is located in order to achieve certain goals, or external, one done by foreign forces. Most blockades historically took place at sea, with the blockading power seeking to cut off all maritime transport from and to the blockaded country. Although a blockade in the port will make it unsafe, very often charterparties or bills of lading have an additional clause that mentions blockade as one of the events that will excuse owners from calling a nominated port.

An example of an internal blockade was described in *The Caspiana*.<sup>482</sup> After loading at the ports of Vancouver and Nanaimo, British Columbia, the vessel sailed for the United Kingdom, Nanaimo being her last port of loading on the Pacific coast. At the time of sailing from Nanaimo, labor relations were tranquil at United Kingdom ports generally, including London and Hull. There was at that time no special indications that any strike or stoppage of work by dock labor might shortly arise. The vessel passed through the Panama Canal and proceeded upon her voyage across the Atlantic. By the time she arrived in London, the port was virtually at a standstill. At that time, there was no similar strike at other United Kingdom ports, although at all the major ports (including Hull) and at some continental ports, dockers, while freely unloading cargo originally destined for the port in question, were refusing to unload cargo diverted to that port from London.<sup>483</sup> After several attempts to find alternative ports to discharge the London bound cargo, charterers sent her to Hamburg. The issued bills of lading in their relevant part provided: “No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.” The court on appeal found that

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<sup>481</sup> Encyclopædia Britannica, available at <http://www.britannica.com/EBchecked/topic/69580/blockade>

<sup>482</sup> *GH Renton & Co Ltd v Palmyra Trading Corp of Panama (The Caspiana)* [1956] 1 Q.B. 462.

<sup>483</sup> *Id.*

owners had a right to deviate to Hamburg in order to discharge cargo consigned for London because London was not a safe port.

*Tillmanns & Co. v. Knutsford S.S. Ltd.*<sup>484</sup> is the first case in which a “blockade clause” was considered by the courts. The defendants in that case did not establish facts that would have brought the clause into play, but it was treated as permitting an alternative discharge if the shipowner could get within the clause. In *Mongaldai Tea Co. Ltd. v. Ellerman Lines Ltd.*,<sup>485</sup> Greer J., referring to a similar clause, said:

*That is an exception which specifically provides that in certain events not only will the owner of the ship be excused for any breach of contract in delivering the goods, but it also provides for a substituted method of performing the contract when these events happen.*<sup>486</sup>

No question was ever raised as to the validity of the clause.<sup>487</sup> It is the Masters’ right to discharge cargo in the alternative port if the nominated port is inaccessible because of ice, blockade, or interdict. Political factors such as the outbreak of war, the fear of capture by hostile forces, or blockade can be justifiable reasons for the vessel to deviate. The risk, however, must be of reasonable permanence in its nature. Also, the inconvenience of deviating must be compared with the faced danger.<sup>488</sup>

#### 4.2.5. Piracy

In recent years, piracy, one of the most ancient threats to all of seafarers, has emerged again. Although most pirate attacks take place outside of the port, the question arises whether the nominated route or approaches to the port can be considered as an extension of the port to which the safe port/berth warranty applies. The recent increase in the number of attacks in the Gulf of Aden may well be such as to make any ports in the

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<sup>484</sup> *Tillmanns & Co. v. Knutsford S.S. Ltd* [1908] A.C. 406; 24 T.L.R. 786.

<sup>485</sup> *Mongaldai Tea Co. Ltd. v. Ellerman Lines Ltd.* [1927] 2 K.B. 456, 460-461; 43 T.L.R. 675.

<sup>486</sup> *Id.*

<sup>487</sup> *Tillmanns & Co. v. Knutsford S.S. Ltd* [1908] A.C. 406; 24 T.L.R. 786.

<sup>488</sup> Wilson, John F, *Carriage of Goods by Sea*, 6 ed., Pearson Education, Dorchester, United Kingdom (2008), at 18-19.

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area 'unsafe' if the threat of attack can be said to be a characteristic of ports in the area.<sup>489</sup>

In the context of piracy, it may be difficult to rely on the safe port warranty in a charterparty. Most of the time, charterparties are for worldwide trading and the charterer does not guarantee the safety of any sea passage the vessel may have to take. An international transit route, such as the Gulf of Aden, cannot be characterized as an "approach" to a port, unless, of course, the vessel is destined for a port in the area.<sup>490</sup> The usual test for the prospective unsafety of a port or the approach to a port is whether whatever has made the port or the approach to the port unsafe can be avoided by good seamanship and navigation. If the charter party precludes deviation from the customary route ordered by charterers (if re-routing would avoid the risk area), the owners will have to be able to demonstrate that the level of risk from pirates to the vessel in approaching the port would be unacceptable to any reasonable owner or Master. As the risk factor varies depending on factors such as speed and design of vessel, time of transit, and actions taken by the owners to minimize the risk, it may be difficult for the owner to establish that the level of risk renders the approach to the port unsafe. If the vessel is not trapped, but merely required to seek an alternative route, courts generally hold that the charterparty is not frustrated.

In *The Hill Harmony*,<sup>491</sup> the charterers instructed the Master to use the great circle from Vancouver to Japan, but the Master took a more southerly and longer route after previously encountering adverse weather on the route chosen by the charterers. Other ships had followed the great circle route, and in the House of Lords, it was established that the order given by the charterers was an order with regard to employment. It is not up to the Master to question the orders of the charterers, but the Master remains responsible for the safety of the vessel. However, if an order is given, compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the Master is entitled to refuse to obey it. If we compare this with the situation where the charterers order the vessel to proceed through the Gulf of Aden, then in the first place, with respect to a worldwide trading time charter, you cannot imply that the owners have accepted the risks present all over the world. You will have to consider the actual situation. On the

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<sup>489</sup> Piracy, Loss prevention newsletter, September 2008, available at <http://www.simsl.com/Loss-Prevention-and-Safety-Training/Piracy0908.html>.

<sup>490</sup> Anders Ulrik, Piracy – some contractual aspects, Newsletter, Danish Defense Club, available at <http://www.danishdefenceclub.com/News/list.phtml?show=194>.

<sup>491</sup> *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 All E.R. 403.

other hand, if a voyage charter has been fixed where the normal route is taking the vessel through the Gulf of Aden, the owners will have difficulties in changing the route unless an escalation of the situation in the Gulf of Aden has taken place.<sup>492</sup>

Recent court decisions only confirmed this proposition. In *The Paiwan Wisdom*,<sup>493</sup> the time chartered vessel was given an order for a laden voyage from Taiwan to Kenya. Before loading, the vessel owners rejected the order and charterers had to hire a substitute vessel in order to perform a shipment. The charterparty included a standard CONWARTIME 2004 clause, which in a relevant part read:

*The vessel, unless the written consent of the Owners be first obtained, shall not be ordered to ... any port, place, area or zone ... where it appears that the Vessel ... in the reasonable judgment of the ... Owners, may be ... exposed to War Risks...*<sup>494</sup>

Kenya was also not excluded in the trade limits clause and the charterers could trade the vessel there, but in order to reach it, the vessel had to pass through areas affected by frequent pirate attacks. When the charterparty was concluded, the shipping community was aware of the threat of piracy and the risks inherent in passing through the Gulf of Aden. That is why there was no material change in the relevant war risk after the date the charterparty was concluded and the refusal to obey charterers' orders and proceed to Kenya.

The judges found in favor of owners. They pointed that owners were not aware, when entering into a time charterparty, that the vessel was likely to be employed on one or more voyages to Kenya. Furthermore, the CONWARTIME 2004 clause did not contain a requirement that the relevant war risk must have escalated since the date of the charterparty. Lastly, owners rejected to trade Kenya before any cargo was loaded.

The decision has to be read in tandem with a decision in *The Triton Lark*,<sup>495</sup> where owners refused to comply with the order of time charterer to carry a cargo of potash in bulk from Hamburg to China via Suez. The order was refused because the

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<sup>492</sup> Anders Ulrik, Piracy – some contractual aspects, Newsletter, Danish Defense Club, available at <http://www.danishdefenceclub.com/News/list.phtml?show=194>

<sup>493</sup> Taokas Navigation SA v Komrowski Bulk Shipping KG (*The Paiwan Wisdom*) [2012] EWHC 1888 (Comm).

<sup>494</sup> Id. at 2012 WL 2500470.

<sup>495</sup> Pacific Basin IHX Limited v Bulkhandling Handymax AS [2011] EWHC 2862 (Comm).

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route via Suez involved transiting the Gulf of Aden, which would expose the vessel, cargo, and crew to the risk of attack by pirates. Instead, the vessel went the long way via the Cape of Good Hope to avoid the risk. This resulted in an extra cost in hire and bunkers.<sup>496</sup>

There the court clarified uncertainty and explained that the use of “may be or likely to be exposed to War Risks” in sub-clause 2 of the CONWARTIME 1993<sup>497</sup> clause of the charterparty required that owners reasonably conclude that there was a real likelihood that the vessel would be exposed to acts of piracy. The likelihood cannot be fanciful or speculative, but must be a “real likelihood,” which could include an event that had a less than only a chance of happening. In other words, the statistical information that owners tried to introduce to show the likelihood of attack would not be sufficient.<sup>498</sup> Only previous attacks on the vessel, whether successful or not, while passing though the Gulf of Aden, or certain characteristics of the vessel that would make her an easy target for the pirates, can be considered as a real threat by the Master or the owners when making an assessment to sail through the Gulf of Aden or take an alternative route.

The event that became part of the argument between owners and charterers of *The Triton Lark* took place in August 2008 when the shipping community only first started to experience a risk of being exposed to pirate attacks originating from the Gulf of Aden. In order to extend the safe port warranty to the route of the vessel, some shipping companies had responded quickly to the need for a model piracy clause. The CONWARTIME 1993 clause, which was used primarily at that time, was not aimed to protect the interests of shipowners from that emerging risk. INTERTANKO and BIMCO produced “piracy clauses” in December 2008 for both voyage and time charters. Their main purpose was to protect shipowners and give the Masters exclusive authority on choosing defensive measures to protect the vessel and the crew on the given itinerary against the pirates at the additional expense of the charterer.

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<sup>496</sup> James Mackay, CONWARTIME 2004 - Was the long way round the wrong way round? November 2011, available at <http://www.hfw.com/publications/client-briefings/conwartime-2004-was-the-long-way-round-the-wrong-way-round>.

<sup>497</sup> The wording of the clause can be accessed at [http://www.ipta.org.uk/conwartime\\_.htm](http://www.ipta.org.uk/conwartime_.htm)

<sup>498</sup> In determining real likelihood Owners brought an argument that in 1998 the vessel had 1 in 300 chances of being hijacked by pirates.

According to the new INTERTANKO “piracy clause” for time<sup>499</sup> and voyage<sup>500</sup> charterparties owners shall not be required to follow charterers’ orders that the Master or owners determine would expose the vessel, her crew, or cargo to the risk of acts of piracy. The protective measures include, but were not limited to, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the vessel. Additionally, shipowners can nominate an alternative route. The vessel remains on hire for any time lost because of taking the defensive measures and for any time spent during or because of an actual or threatened attack or detention by pirates. Charterers also indemnify ship owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy or any preventive or other measures taken by ship owners additional insurance premiums, additional crew costs, and costs of security personnel or equipment.

Unfortunately, piracy puts owners between two fires. On one hand, they have to comply with charterers’ nomination of the port which could be safe, but sail through the areas affected by pirate attacks. On the other hand, the vessels underwriters may deny coverage due to willful misconduct.<sup>501</sup> This situation was considered in the context of *Papadimitiou v Henderson*,<sup>502</sup> where the court concluded the owner was not guilty of willful misconduct even if he had tried to proceed with his contracted voyage through the areas that were regularly attacked by enemy submarines.<sup>503</sup> However, deliberately directing the ship towards areas known to have frequent attacks might give rise to an inference that the owner was not attempting to complete the chartered voyage. If so, that would constitute willful misconduct.<sup>504</sup>

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<sup>499</sup> INTERTANKO Piracy Clause – Time Charterparties, available at <http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/INTERTANKO%20Piracy%20Clause%20-%20Time%20Charterparties.pdf>.

<sup>500</sup> INTERTANKO Piracy Clause – Voyage Charterparties, available at <http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/INTERTANKO%20Piracy%20Clause%20-%20Voyage%20Charterparties.pdf>.

<sup>501</sup> See Section 55(2) of the Marine Insurance Act.

<sup>502</sup> *Papadimitriou v. Henderson* [1939] 3 All E.R. 908.

<sup>503</sup> Hodges, S., *Marine Insurance Law* at 222 (1996).

<sup>504</sup> See Stephen Askins, *Piracy off Aden and Somalia: an overview of legal issues for the insurance industry*, <http://incelaw.com/documents/pdf/Legal-Updates/Piracy-off-Aden-and-Somalia-an-overview-of-legal-issues-for-the-insurance-industry.pdf>

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Since the area where the ships are at risk is enormous and covers thousands of square kilometers<sup>505</sup> owners cannot assume that an attack of the vessel in a certain location would most likely lead to a new attack. *The Saga Cob*<sup>506</sup> showed that the risk of anticipating an attack and the employment of military escort to protect the vessel was not sufficient in order to consider the port to be unsafe. In *The Saga Cob*, the time chartered vessel was attacked on September 7, 1998 by Ethiopian guerillas while at anchor outside the port of Massawa, Ethiopia. By mid-June, Ethiopian authorities decided to patrol the waters outside Massawa and to set approach routes to Massawa further out from the coast, although for almost two years there were no reported incidents of attacks. On August 26, the vessel was ordered by the charterers to proceed to Massawa. The Court of Appeals overruled the decision of the High Court holding charterers responsible for nomination of unsafe port by pointing that:

*...risk was too slight to be characteristic of the port and hence to be considered unsafe. If such risk shall render the port unsafe then all ports in the area would turn unsafe even though there was no evidence of any such threat. A terrorist attack, however, can occur at all times and cannot be taken into account when reflecting over the safety of a certain port.*<sup>507</sup>

Safe port warranty cannot be used as a defense of owners' financial interest in continuous employment of the vessel because most of the pirate attacks take place in the open sea. Nevertheless, it is worth reviewing recently English court decisions dealing with off-hire of the vessel, in case pirate attack takes place in the port. While the decision of the English High Court may not come as a total surprise to the wider shipping community, it does illuminate the requirement for parties to address, at the time of negotiating charterparty terms, the issue of delays caused by piracy.<sup>508</sup> In *The Saldanha*,<sup>509</sup> pirates captured the vessel and the charterers ceased payment of charter hire

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<sup>505</sup> See War Risk Committee circular JWLA016 that extended war risk area attributed to Gulf of Aden pirate attacks from Somalia to territorial waters of India, available at <http://www.lmalloyds.com/CMDownload.aspx?ContentKey=9e7398e8-415a-44c6-a17a-783fb412c663&ContentItemKey=cb878d50-3f6a-4b2a-84e8-57932c08d08f>

<sup>506</sup> *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)*, (1992) 2 Lloyd's Rep. 545.

<sup>507</sup> *Id.* at 551.

<sup>508</sup> Paul Amos, Piracy - an Off Hire Event? SSM newsletter, September 2010, available at <http://www.sims1.com/Publications/Articles/Saldanha0910.html>

<sup>509</sup> *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340.



and put the vessel off-hire. The judge noted that the charterparty included a “bespoke” seizure and detention clause (clause 15 of NYPE), which omitted any reference to piracy. In his conclusion, the judge reinforced the point:

*Should parties be minded to treat seizures by pirates as an off-hire event under time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a “seizures” or “detention” clause. Alternatively and at the very least, they can add the word “whatsoever” to the wording “any other cause”, although this route will not give quite the same certainty as it presently hinges on obiter dicta, albeit of a most persuasive kind.<sup>510</sup>*

Whether a vessel will be off hire because of a pirate attack will depend on the charterparty off hire clause. A vessel is likely to be off hire if, as a result of a pirate attack, the vessel is not able to render the service then required of her by charterers, and provided that the time thereby lost is a consequence of one of the causes listed in the off hire clause.<sup>511</sup>

It is for charterers to bring themselves clearly within an off hire clause. The clause is often amended by the addition of the words “or by any other cause whatsoever” or “or by any other cause”. The word “whatsoever” is a key. None of the off-hire events listed under a typical off hire clause covers pirate attacks. If the off-hire clause does not contain the word “whatsoever” but does contain the words “or by any other cause,” off-hire events have been construed by the courts to be restricted to the causes listed in the clause, and to any other causes that are similar to those expressly listed and “internal” to the vessel. In a clause of this type, the vessel will probably remain on hire unless or until one or more of the causes occurs.<sup>512</sup>

By incorporating express terms into the charterparty, the parties can seek to avoid any such disputes. The inclusion of such may have been capable of activating an off-hire event caused by an extraneous factor. However, the provision of a tailored

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<sup>510</sup> Id.

<sup>511</sup> *Actis Co v Sanko Steamship Co (The Aquacharm)* [1982] 1 W.L.R. 119.

<sup>512</sup> Paul Amos, Piracy - an Off Hire Event? SSM newsletter, September 2010, available at <http://www.simsl.com/Publications/Articles/Saldanha0910.html>

“seizures and detention clause,” which lists all events that can lead to off-hire, may prove to be more effective.

### **4.2.6. Politically-Inspired “Retaliation” Against Vessels of Specific Flag**

Events in the Middle East and North Africa have precipitated an increase in the use of economic sanctions as a tool to try to put further pressure on various regimes to alter their policies and to “encourage” them to refrain from actions disapproved by the international community. With the increasing involvement of the international community in fighting with oppressive regimes and a growing number of countries, companies, and individuals against whom these sanctions are aimed, owners and charterers should be extremely careful in selecting a port. Recent marathon of sanctions began with the United Nations, the European Union and the United States laying sanctions against Iran. They followed with sanctions against the Ivory Coast, Syria, and Libya.<sup>513</sup> The wide-ranging reach of sanctions legislation and the consistent interest of the media in reporting possible sanctions breaches have made sanctions a prominent focus area for the shipping industry and international traders. The high profile of sanctions in the news, and the risk of adverse media coverage in the event of breach, not to mention the penalties and fines that may result from their breach, means it remains of vital importance that international businesses carefully consider their operations within the framework of sanctions legislation and ensure that they have effective compliance programs in place.<sup>514</sup> Most of the sanctions are extra-territorial and calling a sanctioned country will automatically trigger scrutinized review by relevant authorities whether there has been a violation. For shipowners, it can mean that they can be the only party facing charges, especially in situations when the cargo has already been discharged.

Largely, it is not the port itself that can endanger the financial interest of the shipowner in the vessel, but the cargo on board. Delivery of the cargo to a consignee that is blacklisted by one country or the international community can outlaw the owners and subject the vessel to confiscation. International authorities are continually investigating the links between sanctioned entities and other parties and it is therefore extremely important that full and proper due diligence is carried out on any counterparty and

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<sup>513</sup> A complete list of sanctions imposed by various authorities can be found at <http://www.simsl.com/Liabilities-and-Claims/Sanctions.htm>

<sup>514</sup> Michelle Linderman, International Sanctions against Iran, Libya and Syria, June 2011, available at [https://extranet.skuld.com/upload/News%20and%20Publications/Publications/Iran%20sanctions/I NCE\\_International-sanctions-against-Iran-Libya-Syria.pdf](https://extranet.skuld.com/upload/News%20and%20Publications/Publications/Iran%20sanctions/I NCE_International-sanctions-against-Iran-Libya-Syria.pdf)

transaction that may have a link to sanctioned entities. The sanctions not only aimed to stop the flow of goods, but also to restrict the flow of financial resources and to freeze assets. Most sanctions are aimed against entities not directly connected with the port and to trigger application of safe port warranty will require scrutinized review of the entire transaction by the shipowner. Only the sanctions against port authorities prohibit all vessels from trading with those destinations. The restrictions will prevent the payment of fees to port authorities and other dues and expenses that allow a vessel to berth at the port.<sup>515</sup> For the shipping industry, this can mean that the only security, in the event of an accident with the vessel or the cargo owners, that the shipowner can provide, is the vessel herself. As the scope of the sanctions is still vague, most underwriters unilaterally call for the application of an omnibus clause and reserve their right to deny coverage when the vessel calls a sanctioned port.<sup>516</sup>

Violation of sanctions is closely connected with confiscation of the vessel and it can be one of the most severe punishments for shipowners. It is not uncommon to arrest the vessel for a violation because it is the only way to obtain security and insure that a responsible party will face a court. In *The Greek Fighter*,<sup>517</sup> the vessel and her cargo were detained by the Coastguard of the United Arab Emirates (“UAE”) at Khorfakkan. At the time of the detention, the vessel was on time charter to Fal Shipping Company Ltd (“Fal”). The detention, confiscation, and sale of the vessel and her cargo were justified by the UAE authorities because the vessel had oil of Iraqi origin onboard, which the charterers were in the course of attempting to smuggle or deal with, in contravention of UN sanctions.

Owners submitted that Fal’s orders to load the relevant cargo caused the seizure and eventual sale of their vessel, whether or not that cargo included unlawfully traded Iraqi oil. Their primary case was that the cargo was in fact Iraqi oil, which consequently attracted suspicion, whether or not it was in truth contraband. Further, Fal’s movements involving other vessels also aroused a justifiable suspicion on the part of the UAE authorities that Fal was involved in smuggling Iraqi oil. Even if the authorities in the UAE victimized Fal without any proof of unlawfulness with regard to the relevant cargo, or any other cargo, the express or implied indemnities were still engaged because it was

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<sup>515</sup> Id.

<sup>516</sup> See IUMI 2010: Underwriters facing chaos over Iran sanctions, Lloyd’s List, 15 September 2010, available at <https://extranet.skuld.com/Publications/Sanctions/Iran-Sanctions/Links-and-Materials/IUMI-2010-Underwriters-facing-chaos-over-Iran-sanctions/>

<sup>517</sup> *Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter)* (2006) 703 LMLN 1.

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Fal's orders to load the cargo that caused the loss of the vessel.<sup>518</sup> The court agreed with the Owners.

Although the safe port warranty was not breached by the charterers because the court found that contraband oil was not a direct cause for confiscation and subsequent sale of the vessel,<sup>519</sup> it concluded that charterers bear absolute warranty as to the lawfulness of the cargo and "if the transshipment by Fal of contraband cargo of Iraqi origin caused the Greek Fighter to be detained, confiscated and sold, Fal would be liable for the loss, regardless of whether it knew the origin of the oil."<sup>520</sup>

The court held that on the evidence, a small amount of contraband Iraqi oil had in fact been transhipped into *the Greek Fighter* by Fal from another vessel, *the Gulf Prince*, although Fal was unaware of the origin of the oil. Clause 4<sup>521</sup> of the charter constituted an absolute warranty as to the lawfulness of the cargo, not merely an undertaking that the cargo was lawful to the best of the charterer's belief. Clause 28<sup>522</sup> "reinforced and expanded the protection given by the lawful merchandise warranty. Thus, even though the cargo might lawfully be loaded at the port of loading, it must not be such that presented a risk that the vessel would be captured or seized by rulers or governments anywhere following loading. Again, the obligation of the charterers was absolute, and it was irrelevant that the charterers might have been ignorant of the characteristic of the cargo which gave rise to the risk of capture or seizure."<sup>523</sup>

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<sup>518</sup> Lloyd's Maritime Newsletter (2006) available at [http://www.simic.net.cn/news\\_show.php?id=14996](http://www.simic.net.cn/news_show.php?id=14996)

<sup>519</sup> See further explanation in § 4.2.3.

<sup>520</sup> *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497, 563.

<sup>521</sup> Clause 4 of Shelltime 4 provided: "Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charters. Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

<sup>522</sup> Clause 28 of Shelltime 4 provided:

"No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."

<sup>523</sup> *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 2 C.L.C. 497, 499.

The “sanctions clause”<sup>524</sup> was issued by BIMCO in response to the increasing scope of sanctions against Iran and other countries. The objective of the new clause is to provide owners with a means to assess and act on any voyage order issued by a time charterer that might expose the vessel to the risk of sanctions.<sup>525</sup>

As sanctions are often brought into force within a short period, the clause covers the application of sanctions after the vessel has begun an employment under the charter. Whether the sanctions existed at the time the order of employment was issued or whether they were subsequently applied, the owners will have the right to not comply with such orders or to refuse to proceed to the discharge port. The owners must advise the charterers promptly of their refusal to proceed with the voyage and the charterers must provide alternative voyage orders with 48 hours of being notified by the owners. Failure of the charterers to issue alternative voyage orders will result in the owners having the right to discharge any cargo on board at a safe port at charterers’ cost.<sup>526</sup>

The clause will not be able to shield the shipowners from liability imposed by governments. Unless owners performed their due diligence check before the cargo was loaded onboard or immediately after the order was given to proceed to the sanctioned port, the government can impose sanctions on the owners. Sanctions are imposed both on the owners and charterers and no indemnity can be sought from the charterers by the owners. The nature of the sanctions is such that they have an anti-avoidance clause and parties can be prosecuted simply for examining ways in which you can avoid the sanctions.<sup>527</sup>

### **4.2.7. Embargo**

The most severe type of sanctions a country may face is embargo. Embargoes are complex in their international meaning. Embargoes are considered strong diplomatic measures imposed in an effort, by the imposing country, to elicit a given national-

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<sup>524</sup> BIMCO sanctions clause, available at

[https://www.bimco.org/Chartering/BIMCO%20Clauses/Sanctions\\_Clause.aspx](https://www.bimco.org/Chartering/BIMCO%20Clauses/Sanctions_Clause.aspx)

<sup>525</sup> New BIMCO Sanctions Clause for Time Charter Parties, Newsletter June 2010, available at

[https://www.bimco.org/en/News/2010/07/12\\_New\\_Sanctions\\_Clause\\_published.aspx](https://www.bimco.org/en/News/2010/07/12_New_Sanctions_Clause_published.aspx)

<sup>526</sup> Id.

<sup>527</sup> See IUMI 2010: Underwriters facing chaos over Iran sanctions, Lloyd's List, 15 September 2010, available at <https://extranet.skuld.com/Publications/Sanctions/Iran-Sanctions/Links-and-Materials/IUMI-2010-Underwriters-facing-chaos-over-Iran-sanctions/>

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interest result from the country on which it is imposed. Embargoes are similar to economic sanctions and are generally considered legal barriers to trade.<sup>528</sup>

Having a similar aim as sanctions, embargos will have the same application of a safe port warranty. How are owners able to initially protect themselves from trading within ports affected by embargoes? Most modern charterparties will expressly provide for areas where the vessel can trade, restricting, or excluding areas that have an embargo in force. Since an embargo is a complete restriction on trade with a certain country, owners and charterers are *ab inito* on notice that calling a restricted port will amount to owners' consent to all risks and consequences.

Embargoes have been regulated by case law dating back to the 19<sup>th</sup> century and the jurisprudence is well settled.<sup>529</sup> In *Atkinson v. Ritchie*,<sup>530</sup> the Master (owner) and the charterer of a vessel having mutually agreed in writing, that the ship, being fitted for voyage, should proceed to St. Petersburg, and there load a complete cargo of hemp, and iron, and proceed therewith to London, and deliver the same, on being paid freight. The Master, after taking in at St. Petersburg about half a cargo, sailed away upon a general rumor of a hostile embargo being laid on British ships by the Russian Government. An embargo and seizure was in fact laid on those ships six weeks later. Lord Ellenborough C.J. delivered the opinion of the Court:

*..he [Master] is so, at any rate, on the ground of his paramount duty to the State; which required him to save the property and crew under his charge from impending peril of an instantly expected embargo: and, that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the State is materially involved. ... Neither can it be questioned, that, if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his Sovereign*

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<sup>528</sup> See Encyclopædia Britannica available at

<http://www.britannica.com/EBchecked/topic/185507/embargo?anchor=ref751106>

<sup>529</sup> See also *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 171.

<sup>530</sup> *Atkinson v Ritchie* (1809) 103 E.R. 877.

*and the State of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject.*<sup>531</sup>

The court, after reviewing the case, drew several important conclusions. First, that the safe port warranty and the right to leave the port would be implied, if there an existing embargo or restraints of princess, regardless of the fact that a charterparty was silent to it or provided otherwise. Second, in order for the vessel to leave the port, or to not call one affected by an embargo, the danger in the remaining in the port has to be “immediate and certain.”<sup>532</sup>

### 4.3. Administrative safety

The administrative safety of the port is closely connected to the political safety of the port and some authors review them under one category. However, the administrative safety of a port has its own peculiarities that require treatment separate and distinct to the political safety of a port. The principle established in *The Eastern City*<sup>533</sup> was used by the lawyers to justify the creation of a new category of unsafety for the vessel. There, Sellers L.J. commented:

*Most, if not all, navigable rivers, channels, ports, harbors and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimized by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling on a vessel in accordance with good seamanship.*<sup>534</sup>

Administrative safety pertains to the man-made conditions that surround the port: berthing and mooring facilities, pilots, warning systems, navigational lights, services provided by the tugs, courts, and other government bodies. In other words, the port must

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<sup>531</sup> Id at 534-535.

<sup>532</sup> Id.

<sup>533</sup> Leeds Shipping Co v Societe Francaise Bunge SA (*The Eastern City*) [1958] 2 Lloyd’s Rep. 127.

<sup>534</sup> Id at 131.

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be safe in its set-up, and the above are some deficiencies in set-up that may be held and, indeed, have been held to render a port unsafe.<sup>535</sup>

### 4.3.1. Wharf

Safety of the wharf or dock actually stems from the nature of the safe port and berth warranty. If an accident to the vessel occurs when she was alongside the wharf, the first question to ask is whether the wharf was suitable for the vessel. The wharf must always be safe for the vessel of a particular size to dock. Alternatively, charterers or wharf owners have a duty to warn ships of the hidden defects of the wharf which are either known or discoverable through the exercise of due diligence.<sup>536</sup>

In *Paragon Oil Co. v. Republic Tankers, S. A.*,<sup>537</sup> the court found that the charterer was liable for damage the vessel sustained when she grounded after proceeding to a berth that was occupied. Although the vessel's agent and captain had known the berth was occupied and nevertheless sailed toward it, they had been assured that berth was expected to be available when vessel arrived.

The *MV Greenpoint* was chartered for a voyage from Puerto La Cruz to Buenos Aires. The charter party contained a safe berth clause. Upon arrival at the discharge port, owners' agent had learned from the receivers of the barges at Dock C, where the vessel should berth; however, they advised that it would finish discharging shortly, and later that day confirmed that it had. The vessel ordered the pilot and proceeded to her berth. Upon approach, it was discovered that the barge was still at the berth. She anchored alongside the barge, some 35 meters from the dock. After the barge departed attempts were made to move the *MV Greenpoint* to the dock, but she was aground. The court ruled:

*Where charterer had warranted safe berth in contract with vessel's owner, and purchaser of cargo had made substantially identical warranty in contract with charterer, and ship came aground and was damaged when promised berth was not clear on vessel's arrival, owner's direct claim against purchaser might have been sustained on theory akin*

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<sup>535</sup> Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, 1991 at 203.

<sup>536</sup> See supra §2.4.4.5.

<sup>537</sup> *Paragon Oil Co. v. Republic Tankers, S. A.*, 310 F.2d 169.



*to liability to shipowner of stevedoring company that contracts with charterer or consignee.*<sup>538</sup>

The Master is required to use only ordinary skills in bringing the vessel to berth. In *The Vine*,<sup>539</sup> it was established that when the skill required by the Master went beyond the ordinary skills of seamanship the berth was not a safe one.<sup>540</sup> The court concluded that contingency plan used by the Master was abnormal when

*... for a stern-on berthing required the Master and pilot “to look down over the side and visually line the side of the vessel up with the line of the jetty.” The gyro heading required to be constantly monitored and very careful control of the vessel’s heading was required by the use of tugs and the port anchor.*<sup>541</sup>

There are several conclusions to be drawn. First, a wharf should be able to accommodate the vessel. Second, charterers should ensure the availability of the wharf at the time of vessel arrival. Third, ordinary navigational skills should allow berthing of the vessel.

#### 4.3.2. Charts

Although navigation of the vessel is purely the owners’ concern, in some cases, charterers or their agents are required to provide a vessel with reliable and up-to-date charts in order to ensure that she can safely enter a port. For example, the bottom of some rivers rapidly changes and only continuous monitoring and soundings can guaranty that a vessel of a given size can safely enter and leave river-bound ports.

*The Eastern Eagle* provides an example of a deficient port system and port authority.<sup>542</sup> In *The Eastern Eagle*,<sup>543</sup> charterers ordered the vessel to proceed in ballast to Macapa, on the Amazon River in Brazil, and instructed the vessel to load a full cargo of manganese ore to “Amazon River draft limitations” for discharge at Rotterdam, the

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<sup>538</sup> Id.

<sup>539</sup> *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 (Comm).

<sup>540</sup> See *infra* §3.3.3.

<sup>541</sup> *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] 1 C.L.C. 993, 1015.

<sup>542</sup> Alexander McKinnon, *Administrative shortcomings and their legal implications in the context of safe ports*, 23 A&NZ Mar LJ 186, 198 (2009).

<sup>543</sup> *The Eastern Eagle*, 1971 A.M.C. 236 (1971).

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Netherlands. The vessel proceeded to Macapa and loaded a cargo of manganese ore to a draft of 34 feet 8 inches fresh water. The Master and his officers carefully plotted their course inbound, and made the ballast trip inbound without incident. Proceeding outward from Macapa the vessel stranded in an area of the Amazon River known as Banco do Meio in the north channel of the river while proceeding on an identical but reversed course to that which had been safely followed inbound. After refloating, the vessel proceeded to Rotterdam, and after completion of discharge, went into drydock. After returning from the drydock owners rejected to proceed to Macapa claiming that it was not a safe port.

The Tribunal gave careful consideration to all of the facts placed before it and came to the conclusion that

*...it cannot consider that Macapa, because of the hazards in approaching thereto and departing therefrom, is a safe port for the Vessel's size and draft during any season of the year. The shipper, Industria e Comercio de Minerios, S.A. (hereinafter referred to as "Icomi") is the only regulatory body controlling the port of Macapa and its approaches. The information that is distributed to ship Masters in the trade is prepared by Icomi's Port Superintendent, and is issued without guarantee. Navigational charts of the area are distributed by Icomi and in the subject case were found, without dispute, to be inaccurate. ... No accurate charts of the area are presently available. Based on the evidence and testimony before the panel it is convinced that what navigational aids that do exist in the approaches to Macapa are insufficient in number and functionally inadequate. There are no buoy markers, and there is no competent pilotage service available, because no one really knows the varying depths of water in the approaches to Macapa. The banks and the river bottom are constantly changing and no surveys are conducted to record such changes.<sup>544</sup>*

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<sup>544</sup> Id at 239.

In a situation where the bottom of the river and the draft changes rapidly it is vital to have up to date information onboard the vessel. The charterers can only comply with the prospective safety of the port requirement by constantly updating the Master of changes to the river bed. *The Eastern Eagle* confirmed that a time charterers' obligation in nominating a safe port is continuous, especially when charterers are nominating a port that is known for rapid changes in port conditions.

### 4.3.3. Pilotage, Buoys, and Tug Assistance

What other conditions concerning setup of the given port can be a determining factor in deciding its safety? If tug assistance is required and is essential for the vessel to proceed to her berth and if no such assistance is available at the port itself, that port, as regards to that vessel, is not safe within the meaning of the charterparty. In the *U.S. v. Atlantic Refining Co.*,<sup>545</sup> the owners alleged violation by charterer of terms of charter party by consuming laytime in excess of its allowance, wherein it appeared that a strike of tugboat employees had existed and that the Master was consequently unable to dock the vessel. The court ruled:

*Under terms of charter party agreement making it duty of charterers to elect and designate a safe and proper place for discharge of cargo, charterer had duty of selecting not only a place safe for vessel to lie after it was reached, but which could be safely approached, and there was duty on Master to bring vessel into berth indicated, and any delay in so doing, that arose not from the unsuitableness of the berth or its approaches, or fault of the charterer, would be imputable to Master.*<sup>546</sup>

It is clear from the decision that if reasonable diligence cannot be exercised to bring the vessel alongside, charterers will be responsible for nominating an unsafe berth. The court in *The Sea Queen*<sup>547</sup> and *The Sagoland*<sup>548</sup> confirmed this position.

The tugs and pilots have to be available at any time of day and night otherwise the port will not be safe. In circumstances when the weather can change rapidly, the

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<sup>545</sup> U.S. v. Atlantic Refining Co., 112 F. Supp. 76.

<sup>546</sup> Id.

<sup>547</sup> Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen), [1988] 1 Lloyd's Rep. 500.

<sup>548</sup> Broston & Son v. Dreyfus & Co. [1932] 44 Lloyd's Rep. 136.

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inability of the vessel to leave or approach the berth can easily cause damage to the ship. *The Nautilus* was chartered under a voyage charterparty on a Gencon form. The vessel proceeded without any incident to the port of Manzanillo and started discharge. On the afternoon of 20 September, the Master began monitoring the progress of Hurricane Olivia. Later that evening the weather conditions deteriorated and the Master contacted the local agent to arrange pilots and tugs to move the vessel to anchorage. Although the sailing directions described the port as one which provided a tug and pilotage service, there were no tugs available at that time and the only pilot was engaged elsewhere.<sup>549</sup> At nighttime, the vessel banged several times against the berth and was damaged. The tribunal found that the Master acted reasonably by not attempting to leave the berth without tug and pilot assistance and ruled that it was “inexcusable for the port to operate without a full complement of pilots on duty,”<sup>550</sup> especially during hurricane season.

The question can arise how to separate owners’ and charterers’ obligations towards pilots. It seems that the charterers’ obligation ends once a qualified pilot boards the vessel. Unless there are substantial deficiencies in the training of the pilot, his actions will be attributable to the Master, i.e. owners.<sup>551</sup> Nevertheless, the Master has authority to overwrite pilot’s instructions and act at his will. The court in *The Vine*<sup>552</sup> found that regardless of the fact that the pilot had superior knowledge of the berth condition, it was the Master’s responsibility to berth the vessel safely. The court further stated:

*There is no evidence of any system whereby Masters were made aware of these matters [contingency plan]. The obvious person to inform the Master would be the pilot but the evidence from the Master and pilot of NORDSTAR does not suggest that such information was passed on by the pilot to the Master prior to berthing. Thus neither the Master nor the pilot made reference to such information being communicated by the pilot prior to the berthing. Of course a Master may observe during berthing that D3 [fender] is damaged ... but that is too late and in any event he would remain unaware of the*

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<sup>549</sup> *The Nautilus* SMA 2622 (Arb. at N.Y. 1990).

<sup>550</sup> *Id.* at 6.

<sup>551</sup> See *supra* §2.4.4.1.

<sup>552</sup> *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 (Comm).

*contingency plan and the lesser capacity of D2 unless informed of those matters by the pilot.*<sup>553</sup>

In the circumstances when cause of an accident was negligence of the pilot, the competence of the pilot, his instructions to the master and system of pilot's training in the port would be examined, before deciding that the master failed to use good navigation and seamanship while proceeding to the berth.

Will administrative shortcomings of the port authority breach a safe port warranty? In *The Aristagelos*,<sup>554</sup> the Tribunal ruled that the lack of navigational aids, inadequate pilotage, and towage, as well as the fact that charted soundings were two years old made the port unsafe. The panel also took account of subsequent events: "dredging of the channel and its approaches and placement of new buoys and repositioning of existing buoys were all undertaken shortly after this grounding took place in an effort to improve the safety of the port."<sup>555</sup>

Sending a vessel to a small, unknown port can be a red flag for the tribunal to review carefully all of the surrounding circumstances. Although the port can be unsafe, charterers can escape liability by showing that the Master was also negligent and acted unseamanlike. In *The Star B*,<sup>556</sup> the vessel was sent to Boca Chica, a small port about 20 miles east of Rio Haina, for discharge of the Rio Haina cargo after discovering congestion there. While attempting to enter the channel to Boca Chica, the vessel went aground. Regardless of the fact that there was sufficient evidence to support owner's contention that there were deficiencies in the entrance buoys, the range markers, the charts and navigation guides, as well as with the pilot because he was unlicensed, rendered Boca Chica an unsafe port and the tribunal ruled in the charterers favor. Destruction of the evidence by the Master and his subsequent alteration of the log book and his failure to inform flag authorities also contributed to the decision in charterers' favor. Even though a number of nautical publications and charts warned mariners that "lights and buoys are unreliable in the Dominican Republic and should not be relied on,"<sup>557</sup> the panel held that the port was unsafe notwithstanding the given precautions and consent of the owners to sail there.

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<sup>553</sup> Id.

<sup>554</sup> *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980).

<sup>555</sup> Id. at 5.

<sup>556</sup> *The Star B* SMA 3813 (Arb. at N.Y. 2003).

<sup>557</sup> Id. at 3.

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It is an obvious requirement of a safe berthing that a contingency plan is in operation that the pilots are aware of and that they have accepted. The IMO code of practice for the safe loading and unloading of bulk carriers<sup>558</sup> provides that the terminal should give the ship, as soon as possible, “features of the berth or jetty the Master may need to be aware of, including the position of fixed and mobile obstructions, fenders, bollards and mooring arrangements.”<sup>559</sup>

It is important to note that the location of bunkering places in the port was decided to be outside safe port warranty for which a charterer is responsible. The tribunal in *The Mediolanum*,<sup>560</sup> reasonably concluded that “within the limits of every port there are bound to be areas which will be unsafe for almost every size of vessel if she goes there.”<sup>561</sup> Safe navigation to the bunkering location is the responsibility of the owners despite the fact that it is the responsibility of the charterers to bunker the vessel. Bunkering agents are viewed as those performing similar functions to that of a harbor Master or port authority and only owners are responsible for their negligence.

### 4.3.4. Monitoring System

Modern standard for vessel safety require not only the presence of physical assistance for the vessel to come to the port such as pilots and buoys, but also a system that can monitor accidents in the areas close to, and within, the port and close to its approaches in order to warn the vessel of any dangers.

Although the Master himself is responsible for monitoring conditions of the sea while navigating the vessel, such external assistance can assure that the vessel avoids dangers that cannot be revealed by exercise of good seamanship.

In *The Count*,<sup>562</sup> the vessel was chartered for the carriage of a cargo of petroleum products from Sitra to “1, 2 or 3 safe ports East Africa Mombasa/Beira range.” *The Count* arrived at Beira and tendered her notice of readiness on 29 June 2004. On the day

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<sup>558</sup> Manual on loading and unloading of solid bulk cargos for terminal representatives, International Maritime Organization, October 11, 2004, available at <http://www.uscg.mil/imo/dsc/docs/dsc9-report.pdf>.

<sup>559</sup> Id. at clause 3.3.1(3).

<sup>560</sup> See supra.

<sup>561</sup> *Mediolanum Shipping Co. v. Japan Lines Ltd. (The Mediolanum)* [1984] 1 Lloyd's Rep.136, 141 (C.A.).

<sup>562</sup> *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)*, [2006] EWHC 3222 (Comm).

of her arrival, another inbound vessel, the *British Enterprise*, went aground in the channel which links the port with the sea. After being re-floated, *the British Enterprise* grounded a second time in the channel on 1 July. *The Count* proceeded to the discharge berth on 4 July after *the British Enterprise* had completed discharge operations. *The Count* completed the discharge of her cargo early on 9 July, but she was unable to sail from the port because on 5 July an inbound container ship, *The Pongola*, had grounded in the approach channel at almost the same spot as the *British Enterprise* had first grounded. As *The Pongola* was blocking the channel, the port authorities closed the channel to vessel traffic, and *the Count* was not able to sail from Beira until 13 July. The owners claimed from the charterers the amount of their loss resulting from the delay to *The Count* caused by the blockage of the channel by *The Pongola* on the ground that this loss resulted from a breach by the charterers of the safe port provisions. The court on appeal from an arbitrators' decision ruled:

*In the present case the arbitrators' finding that the port was unsafe was not based on the fact that there might be a merely temporary hazard. It was based on characteristics which were not merely a temporary hazard, namely that the buoys were out of position as a result of shifting sands and that there was no adequate system for monitoring the channel. The reasoning in The Hermine<sup>563</sup> does not bar a finding by the arbitrators that these characteristics, existing at the time of the nomination, were such as to create a continuing risk of danger to vessels, including the Count, when approaching and leaving the port, and it was therefore an unsafe port to nominate.<sup>564</sup>*

Is the danger of grounding or delay of the vessel linked with the use of the port? According to Devlin J in *Grace v General SN Co.*,<sup>565</sup> it is. It is obvious, as a matter of fact, that the more remote the danger is from the port, the less likely it is to interfere with the safety of the voyage. In recent years, however, owners started to consider the absence of a proper monitoring system as one of the ways to shift liability on the charterers when the cause of the damage falls on them. In *The Marinicki*,<sup>566</sup> when all the

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<sup>563</sup> *Unitramp v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

<sup>564</sup> *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)*, [2006] EWHC 3222 (Comm) at para 30.

<sup>565</sup> *Grace v General SN Co.* [1950] 2 KB at 391.

<sup>566</sup> See also § 4.1.11.

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facts showed that the presence of a hard object in the channel was due to an abnormal occurrence, the deputy judge then considered whether the port of Jakarta was unsafe, “because there was no proper system in place to check and/or monitor the safety of the channel to the port and/or to warn traffic using the channel of any such danger as might exist.”<sup>567</sup>

Miss Bucknall QC identified a number of shortcomings in the port authority: there was no immediate investigation by the port authority, either after the Master’s VHF radio call, or after his written report; no warning was given to other users of the port indicating the possibility that an obstruction may exist in the channel; and the port authority’s subsequent actions were defensive rather than proactive. In addition, after receiving the sounding that showed the possibility of an obstruction in the channel, the port authority dismissed it; its excuse was that it did not want to waste money and had disbelieved the Master’s report. It was found that there was a “very unsatisfactory regime prevailing in the port administration in relation to the safety of vessels using the dredged channel.”<sup>568</sup> The decision was odd, as it allowed to the court to consider a busy port of Jakarta with a good safety history to be considered unsafe. The tendency to put monitoring system of the port above accident free history found its way in *The Ocean Victory*,<sup>569</sup> a recent decision of the High Court.

Obviously, the presence or lack of a monitoring system will not protect the vessel from the damage if the object damaging the vessel happened to be in the sea bottom for a short period of time and it was not discoverable by reasonable means. However, a need for such a system was restated in Article 15(2) of the Geneva Convention on the Territorial Sea 1958, which required the coastal state “to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.”<sup>570</sup>

### 4.3.5. Weather Forecasting System

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<sup>567</sup> *Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* [2003] 2 Lloyd's Rep 655, 669.

<sup>568</sup> *Id.* at 770.

<sup>569</sup> *Gard Marine & Energy Limited v China National Chartering Co. Ltd.* (formerly known as and/or successor in title to China National Chartering Corp.) [2013] EWHC 2199 (Comm).

<sup>570</sup> The Geneva Convention on the Territorial Sea 1958, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_territorial\\_sea.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf)



Adequate weather forecasts must be available and the organization of the port must be such as to enable a competent Master to take necessary avoidance action.<sup>571</sup> Thus, in the case of *The Khian Sea*,<sup>572</sup> the Court of Appeal held a port was unsafe when, although the Master obtained adequate warning of an approaching storm, he was prevented from leaving his berth by the presence of two other vessels anchored close by. Lord Denning MR took the opportunity of enumerating the requirements that had to be satisfied in such circumstances under the safe port warranty.

*First there must be an adequate weather forecasting system. Second, there must be an adequate availability of pilots and tugs. Thirdly, there must be adequate sea room to maneuver. And fourthly, there must be an adequate system for ensuring that sea room and room for maneuver is always available.*<sup>573</sup>

In the Court of Appeal, Lord Denning MR recognized that there were unsatisfactory administrative features of the port. Specifically, the port's safety system effectively shut down at night.<sup>574</sup> The forecasting system should not only be operative continuously, but its reports have to reach the vessel in a timely manner. In *The Dagmar*,<sup>575</sup> Mocatta J. held that the burden to prove that the vessel received weather reports was on the charterers, but only if it was a "relatively simple" matter for them. He further stated:

*...unless a vessel of approaching the Dagmar's size ordered to load at Cape Chat (or a place similar thereto) is specifically warned that (a) she will receive no weather information from the shore and must rely upon her own resources for obtaining weather forecasts; and (b) is also warned that in strong winds and seas the place is unsafe for her to remain in, such place is unsafe...*<sup>576</sup>

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<sup>571</sup> Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 186 (2009).

<sup>572</sup> *The Khian Sea* [1979] 1 Lloyd's Rep 545 (CA).

<sup>573</sup> *Id.*

<sup>574</sup> *Id.* at 172.

<sup>575</sup> *Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar)*, [1968] 2 Lloyd's Rep. 563, see *supra* § 4.1.8.

<sup>576</sup> *Id.* at 586.

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The court concluded that without access to the forecast service, Cape Chat was not a good and safe port or place for *The Dagmar* within the meaning of the charterparty.

The case should be distinguished from *The Adamatos*,<sup>577</sup> where the time charterparty provided that the “vessel was to perform a transatlantic voyage always ‘via safe port(s), safe berth(s), safe anchorage(s), in/out geographical rotation always within I.W.L. and below mentioned trading limits.’”<sup>578</sup> Upon arrival, the vessel anchored approximately three miles from the breakwater. Dangerous weather progressed and in spite of the Master’s efforts to maneuver the vessel safely from danger, she drifted toward the shore and grounded. The owner argued that because of the suddenness with which the storms could strike, it was “imperative that port data and port systems, weather services and other relevant port and berth information be furnished vessels at anchor so they may be on a heightened alert.” The Tribunal found in charterers favor because there was sufficient information to place the Master and crew on alert. Specifically, the South American Pilot book, which the Master had read, described in detail dangerous weather patterns affecting the port. Weather transmissions that would have further alerted the Master to the impending storm were available.<sup>579</sup> *The Adamatos* is a good example where negligence of the Master and bad seamanship saved the charterers from breaching a safe port warranty.

### 4.3.6. Dredging

Quiet often the physical dangers, such as silting, can be avoided by timely dredging the port and its approaches. The point of a warranty is that it speaks from the date of nomination, but it speaks about the anticipated state of the port when the vessel arrives.<sup>580</sup> Under what circumstances can the failure to dredge the port not be considered an abnormal occurrence?

Natural silting of the port occurs yearly and can be anticipated by mariners. Owners and charterers can evaluate the depth of the port while examining maps and charts. The depth certainly fluctuates, but very often, it can be cured by interference of port authorities who are responsible for keeping the port open for the vessels having a certain draft. If dredging is done on a regular basis and port authorities continuously monitor depth, charterers will not be in breach of a safe port warranty in the absence of circumstances when rapid change of the draft was normal for the port. In *The*

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<sup>577</sup> *The Adamastos* SMA 3416 (Arb. at N.Y. 1998).

<sup>578</sup> *Id.* at 2.

<sup>579</sup> *Id.* at 8.

<sup>580</sup> *Unitramp v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

*Hermine*,<sup>581</sup> the court, after carefully examining all the evidence, came to the conclusion “that the means available locally to the US Corp of Engineers for dredging the channel were inadequate.” However, the port remained safe after Port Authorities of New Orleans showed that substantial resources capable of reversing the deterioration of the draft were brought. Determination whether measures undertaken by port authorities were sufficient would be recognized by the tribunal only if anticipated siltation and weather conditions were taken into consideration by charterers, but also charterers’ knowledge that the event that gave rise to the incident occurs year after year.

#### 4.3.7. Judicial System

Another element of unsafety is the inability of the judicial system to give adequate relief where a vessel was unlawfully detained. Owners can lose their proprietary interest in the vessel due to their own or a charterer’s mistake. However, the events that might lead to release of the vessel can be interrupted by corrupt or undeveloped judicial systems. In such circumstances, the executive decision to confiscate or detain the vessel will have unreputable power.

*The Greek Fighter*,<sup>582</sup> illustrates how a court looked at the operation of the judicial branch of the United Arab Emirates and its balance with the executive branch. The court found that, “the lack of facilities for obtaining release of a vessel was not an abnormal occurrence but an intrinsic feature of the UAE judicial system.”<sup>583</sup>

Although the owners tried to convince the court that because of the immense personal influence of a member of the President’s family, such as the son of the President, Sheikh Zayed bin Khalifa, would, in practice, be impossible to obtain judicial relief against acts of the Coastguard, such as the detention of the vessel which, as in the present case, had been personally approved by him or by his officials. The evidence presented showed that the courts would not be likely to make orders against state organizations or ministers, the judges being largely non-UAE Arab lawyers appointed by the Ministry of Justice on fixed term contracts renewable for good behavior. Decree 41/2002 which removed from the courts’ jurisdiction all matters related to breach of UN

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<sup>582</sup> Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter) [2006] 2 C.L.C. 497.

<sup>583</sup> Id.

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sanctions reflected the traditional approach of the Government, leaving owners with some recourse to the Ministerial Committee as the only available remedy.

The court was not persuaded by the argument and ruled that judicial system functioned properly and adoption of the decree could not lead to an assumption that the judiciary was not capable of acting independently. The port was considered safe at all times.

A good example of judicial system that was found by the court to be corrupt was described in *The Island Archon*.<sup>584</sup> The owners of the *MV Island Archon* time chartered her to the appellants for a term of 36 months on a NYPE form. In the course of her employment under the charterparty, the vessel was ordered on a voyage from European ports to Iraq. The Iraqi receivers asserted cargo claims. German sub-charterers gave the orders, but they had become insolvent. The shipowners had to provide security before the ship was allowed to leave Basrah, Iraq and this gave rise to some delay. The shipowners claimed an indemnity against their losses from the time charterers.

The argument arose whether knowledge of the owners of the judicial system at the time of nomination could be considered as assumption of risk to call a nominated port and bar their claim for indemnification. Both the arbitrator and the court found that, “any ship ordered to discharge general cargo in Iraq was almost bound to have cargo claims made against it and to have those claims taken to court locally, leading to adverse judgments, regardless of whether there was any actual shortage or damage, or otherwise any other liability on the ship under the bills of lading.”<sup>585</sup> The courts accepted certificates of shortage, issued by port authorities, as conclusive evidence against the carrier. The ruling was for the owners as the loss arose directly from an instruction improperly given by the charterer, “and on fair reading of the charterparty the shipowner cannot be understood to have accepted this risk when he agreed to act on the charterers’ instructions.”<sup>586</sup>

### 4.3.8. Security System

The International Ship and Port Facility Security (“ISPS”) Code entered into force on 1 July 2004 as an amendment to the International Convention for the Safety of

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<sup>584</sup> *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] C.L.C. 734.

<sup>585</sup> *Id* at 736.

<sup>586</sup> *Id* at 747.

Life at Sea 1974 (SOLAS).<sup>587</sup> ISPS, designed to protect ports and international shipping from terrorism, takes the approach that ensuring the security of ships and port facilities is a risk management activity. Under the Code, contracting governments are required to ensure security information is provided to port facilities and ships prior to entering a port and whilst in their territory. Three security levels apply. Additionally, ships and owners are required to establish ship security plans and act upon the security levels set by governments. Moreover, a port facility security assessment must be undertaken and periodically reviewed. This may culminate in the development of a port facility security plan, and the appointment of a port facility security officer.<sup>588</sup>

Aside from the physical threat to vessels, there is now the very real possibility of substantial delays and refusal of entry. Many port state control regimes have now tightened and the chance of detention, expulsion, or refusal of entry for vessels that are deemed to pose a risk has inevitably increased. This can have an enormous effect on a vessel's commercial viability.<sup>589</sup>

*The Mary Lou*<sup>590</sup> is a typical example where an inefficient port security system could have rendered the port to be unsafe. There, Judge Mustil said: "A port may have geographical, climatic or other characteristics which entail that it will be safe if, a particular system for securing its safety remains effectively in operation..."<sup>591</sup> The Court of Appeal appears to be saying that it is the owner, rather than the charterer, who should bear the risk that the safety system of a particular port may prove in practice to be inadequate, notwithstanding that it is the charterer who promises that the ship will be sent only to safe ports.

Many countries started to employ special security instruments in order to warrant that the vessel entering the port will not threaten safety of the port. Largely, the principle inverted and encompassed mutual responsibility as it required cooperation of owners and charterers in order to ensure that the vessel will not face any detention and consequential

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<sup>587</sup> International Convention for the Safety of Life at Sea (SOLAS), opened for signature 1 November 1974, International Maritime Organisation (IMO), chapter XI-2 (entered into force 25 May 1980; as amended by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974: 9 - 13 December 2002) ('ISPS Code'). Part A of the Code is mandatory and part B provides guidelines on compliance with part A.

<sup>588</sup> Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 189 (2009).

<sup>589</sup> Julio Espin-Digon et al, Lloyd's MIU Handbook of Maritime Security, at 90 (2008).

<sup>590</sup> *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep.

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<sup>591</sup> *Id.*

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delays. Although the safety of the port remains a charterers' warranty, owners now have a burden of proof that their vessel was fit to call a particular port that introduced security measures.

New policy introduced, for example, by the United States Safe Port Act<sup>592</sup> specifically focuses on protocols for the prioritization of vessels and cargo, identifies incident management practices specific to trade resumption, and describes guidance for the redeployment of resources and personnel. "In doing so, the strategy recognizes that many different types of incidents exist that might impact the supply chain, but the resumption of trade following an incident is an 'all hazards requirement.'"<sup>593</sup>

There is a growing trend, both on the national and international level, to increase the duties of control exercised by port authorities over the shipping industry. Some ports adopted compulsory schemes for the control of the movements of ships within the port while others performed voluntarily schemes. A traffic control scheme that includes routing of the vessels offers the shipping industry a variety of services. This includes radar facilities, the removal and marking of wrecks, the buoying of channels, lights, monitoring systems, etc.<sup>594</sup> Nevertheless, administrative shortcomings and failures of port authorities may render a port unsafe. The law is, however, largely unsettled, and the court or the tribunal may look at the event as one caused by any deficiency in port management. The ports themselves are not interested in being listed as administratively unsafe as it can decrease vessel's traffic and the revenue port authorities, pilots, and wharfingers expect. On the other hand, court decisions provide an external evaluation of services provided by the port and can, in the end, benefit both owners and charterers.

### 4.4. Environmental Safety

Problems relating to the environmental unsafety of a port could have been discussed under the physical or administrative safety of the port chapters. However, due to increased importance and scrutinized regulation, they have to be reviewed

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<sup>592</sup> Safe Port Act, 42 U.S.C. 5122.

<sup>593</sup> Strategy to Enhance International Supply Chain Security, Department of Homeland Security Newsletter (July 2007), available at [www.dhs.gov%2Fxlbrary%2Fassets%2Fplcy-internationalssupplychainsecuritystrategy.pdf&ei=1IxeUoStK4rBswbuq4CYBg&usg=AFQjCNGN Ng6fXexfZ2DVQVDI7TCVXMuww&sig2=ZO4JJjwyDNWtgVZmtEYPnQ](http://www.dhs.gov%2Fxlbrary%2Fassets%2Fplcy-internationalssupplychainsecuritystrategy.pdf&ei=1IxeUoStK4rBswbuq4CYBg&usg=AFQjCNGN Ng6fXexfZ2DVQVDI7TCVXMuww&sig2=ZO4JJjwyDNWtgVZmtEYPnQ)

<sup>594</sup> Dr. S Mankabady, The concept of safe port, 5 J. Mar. L. & Com 633, 634 (1973-1974).

separately.<sup>595</sup> With the increasing consciousness of society to environmental issues, there is a need to review environmental safety as a separate category.

#### 4.4.1. Diseases

A port must be sanitarly safe. International Health Regulations (“IHR”)<sup>596</sup> prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.<sup>597</sup>

Recently, the Human Swine flu made world headlines because the rare Influenza A H1N1 virus<sup>598</sup> evolved from a swine associated virus. According to the World Health Organization the Influenza A H1N1 virus reached pandemic status in 2010, i.e. it was global. In terms of shipping, it can only mean that the vessel’s crew and passengers could be exposed to disease at any port of call anywhere in the world.<sup>599</sup>

At least in the countries that have implemented the IHR, it could be relevant to consider whether a port is unsafe. Relevant to the issue, the IHR requires member states to develop facilities to assess, notify, and report events, and requires them to ensure they are able to respond promptly and effectively to public health risks and public health emergencies of international concern.<sup>600</sup>

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<sup>595</sup> See also Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 211 (1991).

<sup>596</sup> International Health Regulations (2005), available at <http://www.who.int/ihr/9789241596664/en/index.html>

The IHR require States to strengthen core surveillance and response capacities at the primary, intermediate and national level, as well as at designated international ports, airports and ground crossings. They further introduce a series of health documents, including ship sanitation certificates and an international certificate of vaccination or prophylaxis for travelers.

<sup>597</sup> Id at Art. 5.

<sup>598</sup> A much smaller number of people are pre-immune to A H1N1 virus than to regular seasonal flu viruses. The Influenza A H1N1 virus was expected to spread faster and among higher percentage of the population.

<sup>599</sup> Gard Loss Prevention Circulars, March 2011 at 74, available at <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBgQFjAA&url=http%3A%2F%2Fwww.gard.no%2FikbViewer%2FContent%2F72995%2FGard%2520Loss%2520Prevention%2520Circulars%2520March%25202011.pdf&ei=XsxGTpfbJs7FtAaMvq22CQ&usq=AFQjCNGoZHjOoGBKLg90aakYKxpfNe3ADA>

<sup>600</sup> IHR, art 5.

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Recent press reports<sup>601</sup> indicated that there had been instances of shore side medical authorities not permitting ship's crew or passengers ashore when Human Swine flu cases were suspected and/or confirmed on board.<sup>602</sup> This, in turn, caused logistical problems for the vessel. The delay of the vessel even for a short time can make the port an unsafe one as the vessel will not be a working one any longer. At the same time, it can allow charterers to appeal that the delay was caused by reasons that relate to the deficiency of the vessel and her crew, for which charterers cannot be responsible. By analogy, it can be considered a defense for the charterers in calling an unsafe port, such as incompetence or negligence of the Master that caused damage to the vessel or deficiency of her crew. It seems that the spread of contagious disease onboard the vessel will not be considered an abnormal occurrence; however, IHR in the port will be considered something that the charterers should have been aware of when nominating the port.

Will the position of the courts be different in deciding in favor of owners when the crew is infected in the port that does not have such a system of disease prevention or while onboard and the owners subsequently suffer an economic loss? Older case law only confirms that charterers will not be responsible for the delay of the vessel caused by port authorities' preventative measures to clear the vessel when there is a sick crewmember on board. Although in *The Delian Spirit*,<sup>603</sup> Lord Denning, M.R. discussed the right of the owners to call an alternative port when the nominated port was unavailable. He briefly discussed a situation when free pratique for the vessel was not given because of the sick crew member:

*I can understand that, if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her*

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<sup>601</sup> Rebecca Richardson and Peter Hawkins, Cruise ship stuck in swine flu scare, The Sydney morning Herald May 25, 2009, available at [http://www.smh.com.au/travel/travel-news/cruise-ship-stuck-in-swine-flu-scare-20090525-bjw.html](http://www.smh.com.au/travel/travel-news/cruise-ship-stuck-in-swine-flu-scare-20090525-bjw.html#ixzz1UwGEq94C)

<sup>602</sup> Id.

<sup>603</sup> *Delian Spirit Shipping Developments Corporation v V/O Sojuzneftexport (The Delian Spirit)* [1971] 1 Lloyd's Rep 506.



*pratique, she is entitled to give notice of readiness, and lay time will begin to run.*<sup>604</sup>

The established understanding in shipping circles is that the general rule is that the ship owner is entitled to look to the charterers for an indemnity against the consequences of complying with an order as to the employment of the ship.<sup>605</sup> But, not every loss arising in the course of the voyage can be recovered. For example, the owners cannot recover for heavy weather damage to the vessel merely because had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered; or the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense the cost of ballasting is incurred as a consequence of complying with the charterers' orders. The connection is too remote.<sup>606</sup> Similarly, the owners cannot recover for disease of the crewmember or passenger when the outbreak of a contagious disease occurred for the first time, regardless of whether the port had an IHR system in place, as it will be too remote to hold charterers responsible. It seems in the modern world most likely the courts will take a much stricter approach in the event of an international concern or emergency.<sup>607</sup> If the crewmember was infected in a port with a poor IHR system and the vessel was delayed in the next port, charterers can be held responsible for breaching a safe port warranty in the earlier port.

#### 4.4.2. Pollution

Charterers are exposed to pollution liabilities in a variety of ways. In many circumstances the owners bring the claims for damage to the environment as a claim for indemnification of expenses for cleanup. Under the Civil Liability Convention ("CLC"),<sup>608</sup> environmental pollution claims are channeled solely to the registered ship owner.<sup>609</sup> Under the so-called channeling provisions, compensation claims may not be pursued against the servants or agents of the owner, the members of the crew, the pilot, any other person performing services for the ship (and not being a member of the crew), any charterer (including a bareboat charterer), manager or operator of the ship, or any

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<sup>604</sup> Id. at 124.

<sup>605</sup> See Athanasia Comminos and Georges Chr Lemos, The, [1990] 1 Lloyd's Rep. 277, 290.

<sup>606</sup> Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon) [1994] C.L.C. 734, 743.

<sup>607</sup> See Alexander McKinnon, Administrative shortcomings and their legal implications in the context of safe ports, 23 A&NZ Mar LJ 186, 203 (2009).

<sup>608</sup> International Convention on Civil Liability for Oil Pollution Damage, opened for signature, Nov. 29, 1969, reprinted in full 3 Benedict on Admiralty §116.

<sup>609</sup> 33 U.S.C. §§2701(32), 2702(a) (2006).

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person performing salvage operations, or taking measures to prevent or minimize pollution damage. This prohibition does not apply, however, if the pollution damage resulted from the personal act or omission of the person concerned, “committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”<sup>610</sup>

By comparison, under the Oil Pollution Act (“OPA 90”),<sup>611</sup> liability may be imposed on any person owning, operating, or demise chartering the vessel, and there are no channeling provisions corresponding to those in the 1992 Civil Liability Convention (“CLC”). Moreover, OPA 90 subjects an owner, operator, or demise charterer to strict liability.<sup>612</sup> The term “operator” as it relates to oil spill liability is not specifically defined in the oil pollution statutes or in cases analyzing such liability, but it has been defined in numerous court decisions construing other pollution laws to mean the person vested with the day-to-day operational responsibility for a polluting facility.<sup>613</sup> This includes the person or organization responsible for maintenance, upkeep, crewing, contracting, generally management of the vessel, and general safety so as to be in a position to minimize the risk of pollution.<sup>614</sup> Typically, time and voyage charterers are not involved in these activities, thus in the typical case, time charterers, or voyage charterers should not be found to be an operator under OPA 90.<sup>615</sup>

However, not all jurisdictions recognize the CLC. In some places, for example, the USA and Japan, charterers can incur direct and even strict liability for pollution caused by a ship. Individual states in the US (e.g., Alaska, California, and Washington) have enacted their own legislation and most states target the “transporter of oil”, “person

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<sup>610</sup> Id. art. IV(4).

<sup>611</sup> Oil Pollution Act, 33 U.S.C. 2701-2761.

<sup>612</sup> 33 U.S.C. §2702(a).

<sup>613</sup> Charles B. Anderson, *Liability of Charterers and Cargo Owners from pollution from Ships*, 26 Tul. Mar. L.J. 1 at 9 (2001-2002).

<sup>614</sup> Financial Responsibility for Water Pollution (Vessels), 59 Fed. Reg. 34, 210 (July 1, 1994) (to be codified at 33 C.F.R. 4, 130, 131, 132, 137, and 138).

<sup>615</sup> The most helpful regulatory guidance on the issue of time and voyage charterer liability under OPA-90 may be found in 59 FR 34210-01. There are entities, such as agents, “manager”, traditional time charterers and traditional voyage charterers (i.e., charterers who do not take operational responsibility for the vessels they charter) that are not intended to be included in this definition.

having control over oil”, and “person taking responsibility”, as the liable party; therefore, a time charterer can be at risk.<sup>616</sup>

In the safe port and safe berth context the liability of the charterer can be enormous. Owners can always pursue a claim for indemnification when because of damage to the vessel, there is subsequent oil pollution, especially in a country that is member of CLC. Considering the fact that both owners and charterers can be responsible under OPA, it is hard to consider that a claim of charterers for indemnification from the owners will prevail in a situation when there was no violation of a safe port warranty. Mainly, because the government applies a strict liability standard, the fact that there was oil pollution would make all parties involved in the shipment responsible. The fault of the charterers for nominating a particular port while causing an oil spill will not even be an issue under OPA. Even if the Master’s negligence was the cause of the incident, charterers can be held responsible even without fault.

Although pollution caused by the vessel might be rare, the vessel can be subject to contamination while entering areas polluted with oil from other sources. The fouling of the hull constitutes “physical damage to the vessel” and, as such, claims for other losses directly resulting from the damage, should be recoverable by owners.<sup>617</sup> The question is under what condition oil contamination of the vessel can be considered a breach of safe port warranty. Numerous vessels were affected by the recent accident on the Deepwater Horizon platform. Until now, there was no jurisprudence directly on the issue as to whether or not a port is unsafe if its approaches were affected by oil pollution. Assessing whether a port is unsafe is a question of fact on each occasion but if an alternative safe route or the exercise of good seamanship can avoid the danger, it is unlikely that the port will be considered unsafe. Nevertheless, it seems clear that, dependent on the timing of the voyage, orders, and the precise location of the oil, in the port or areas in the imminent vicinity of the port, oil pollution would be capable of rendering a port unsafe.

In relation to the geographical limits of the safe port warranty, it was stated in *The Hermine*<sup>618</sup> that, “if a ship departed a port safely and without delay, but then encountered a danger 100 miles downriver from the port, it was unlikely that the port

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<sup>616</sup> Charterers Brochure 2011, UK P&I, available at <http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Charterers/CharterersBrochure2011.pdf>

<sup>617</sup> Oil Pollution and its implications for charterers’ liability for damage to hull (CLH), SKULD P&I newsletter, (October 2010), available at <http://www.skuld.com/Publications/Pollution/>

<sup>618</sup> *Unitram v Garnac Grain Co. Inc. (The Hermine)* [1979] 1 Lloyd's Rep. 212.

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could be described as ‘unsafe’.” However, in practice, it is probable that if there is no other route by which to reach or depart from the relevant port, irrespective of the distance of the danger from the port, the port could be considered unsafe and it is difficult to imagine an arbitration tribunal finding, as a question of fact, to the contrary.<sup>619</sup> In light of this, ports near an oil spill are also unlikely to be considered as unsafe such as to allow an owner to refuse an order to go to such a port under a time charter, or to refuse such a nomination under a voyage charter.<sup>620</sup> Largely, it will be the owners who will have to bear the additional expenses for deviating a vessel in order to escape pollution in the vicinity of the port. Only if the roads of the port are contaminated can charterers be held responsible for the lost time based on a breach of safe port warranty.

In response to the Deepwater Horizon incident, BIMCO issued a Gulf of Mexico Oil Spill Clause for use in voyage charterparties. It is designed to address directly the incident in the US Gulf and is not intended to cover oil spills in general.<sup>621</sup> Although the clause shifted responsibility for additional expenses on the charterers, generally this kind of risk will fall on the owners, unless

*...a Master receives credible information that if he continues in the direct course of his voyage his Ship will be exposed to some imminent peril, as from Pirates, or Icebergs, or other dangers of navigation, he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for the purpose of avoiding the danger.*<sup>622</sup>

Furthermore, some voyage charterparties expressly stipulate the shipowners’ obligation to indemnify the charterers against liability which may be imposed on them or which they may incur under any statute regarding liability for pollution of navigable waters by oil.

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<sup>619</sup> See Oil Pollution and its implications for charterers’ liability for damage to hull (CLH), SKULD P&I newsletter, (October 2010), available at <http://www.skuld.com/Publications/Pollution/>

<sup>620</sup> US Gulf oil pollution’s impact on charterparties, May 2010, available at [http://www.ukdefence.com/images/assets/documents/UKDC\\_Soundings\\_May-2\\_web.pdf](http://www.ukdefence.com/images/assets/documents/UKDC_Soundings_May-2_web.pdf)

<sup>621</sup> See Gulf of Mexico Oil Spill Clause for Voyage Charter Parties, available at [http://editor.bimco.org/en/Chartering/BIMCO%20Clauses/Gulf\\_of\\_Mexico\\_Oil\\_Spill\\_Clause\\_for\\_Voyage\\_Charter\\_Parties.aspx](http://editor.bimco.org/en/Chartering/BIMCO%20Clauses/Gulf_of_Mexico_Oil_Spill_Clause_for_Voyage_Charter_Parties.aspx)

<sup>622</sup> *Duncan v Koster (The Teutonia)* (1871-73) L.R. 4 P.C. 171.

#### 4.4.3. Waste management

Deficiencies in port construction or poor vessel traffic control may cause damage not only to environment, but it may also place a vessel in the predicament of having to discharge pollutants into the sea, risking liability under local legislation or international regime.<sup>623</sup> Appropriate facilities in the port and organized system of garbage removal in the port should minimize accidental or intentional pollution of the sea.

The principle of nominating an environmentally safe port can be corroborated by the International Convention for the Prevention of Pollution from Ships.<sup>624</sup> Annexes IV and V deal with requirements to control pollution of the sea by sewage and different types of garbage and specifies the distances from land and the manner in which they may be disposed of respectably. The requirements set in the convention are much stricter in a number of “special areas” than local regulations in many countries. The convention requires its parties to provide adequate facilities for the reception of residues and oily mixtures at oil loading terminals, repair ports in which ships have oily residues to discharge, and imposes a complete ban on the dumping into the sea of all forms of plastic.<sup>625</sup> Additionally, the convention requires that sewage reception facilities and reception facilities for garbage are available in all ports.<sup>626</sup>

The major problem is that many developing countries and smaller ports do not have sufficient funds for construction of such facilities. Consequently, most of these ports are inadequately equipped for the prevention of pollution, and by nominating them, charterers are *per se* violating the safe port warranty. Although there have not been any legal precedents regarding this kind of violation, it seems that the only defense charterers can use to overcome their breach is consent of the owners to nomination of the port, calling the port, and or subsequent intentional or negligent improper disposal of waste.

S, ballast water treatment and garbage removal procedures. Most of these measures require direct cooperation between owners and charterers as they pertain a lot to the equipment that is available on board the vessel. At the same time, charterparties

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<sup>623</sup> Marko A. Pavliha, *Implied Terms of Voyage Charters*, McGill University, Montreal, at 211 (1991).

<sup>624</sup> International convention for the Prevention of Pollution from Ships, Marpol 73/78, Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II).

<sup>625</sup> See Annex I, IV and V.

<sup>626</sup> See Annex IV.

rarely provide any details about waste or water treatment equipment available on the ship at the time she is chartered. To a large extent, the fines related to a charterers demand to sail to a port that has implemented stricter rules as to waste disposal can be considered a risk charterers undertook while sending a nominated vessel to an unsafe port. Owners will always seek to defend themselves by alleging that an economic loss resulted not from a deficiency of the vessel, but through measures that required extra-ordinary skills and care. Only when all ports have standard waste management procedure will that risk fall, unarguably, on the owners.

#### **4.4.4. Conclusion**

Although environmental safety is a relatively new category, its impact on vessel owners can be tremendous. Environmental liabilities are the most expensive to deal with as they involve government and international community interests. Charterers should be extremely cautious when they direct certain types of vessels (oil tankers, LNG carriers) to ports of countries that employed strict measures to protect their environment. As developing countries become conscious about pollution and disease control measures that are common for many ports in Europe and America, it will affect operation of many ports in Asia and Africa.

