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"A critical analysis of some issues arising from the use of safe port clauses in time charters"

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I. Introduction

"A sailor chooses the wind that takes the ship from a safe port. Ah, yes, but once you're abroad, as you have seen, winds have a mind of their own. Be careful, Charlotte, careful, of the wind you choose..."[1]

It has long been established that for a vessel to safely lie always afloat and effectively carry goods by sea, all around the world, it takes more than good wind. Briefly defined, it takes a number of obligations which are imposed on the parties when signing a contract of affreightment, whether it be embodied in a time or a voyage charter, or evidenced by a bill of lading. Apart from these duties which derive from the express clauses agreed by the parties, a series of additional implied obligations are usually incorporated into the contracts, arising from the custom usage and commercial practice, in so far as they are not inconsistent with any contractual agreement[2].

One of the most important obligations which is implied in every contract of affreightment, is the provision of a seaworthy vessel 'fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of a voyage'[3]. The undertaking as to seaworthiness lies always with the shipowner. On the other hand, the charterer has the general obligation to protect the vessel, to redeliver it in a sound condition, and in some instances, he also has the right to nominate a port, therefore it is not clear whether he is always under a corresponding obligation to nominate a safe port. Depending on the type of charter, no such implied obligation will arise in a voyage charter where the owner may reasonably be assumed to have accepted any risk as to the vessel's safety, whereas a warranty as to the safety of any nominated port or berth, a so-called safe port/safe berth warranty, will invariably be implied in a time charter, obviating that the vessel will be required to trade only between safe ports[4]. As admitted by Donaldson J in *The Evaggelos Th*[5], "I should make this implication because common sense and business efficacy require it in cases in which the shipowner

[1] *Avi (Edward Irving Wortis), The True Confessions of Charlotte Doyle, Published September 2nd 2003 by HarperCollins (first published 1990)*

[2] Wilson F John, *Carriage of Goods by Sea,* (7th edition, 2010, Essex, England Pearson Education Limited) at p.9

[3] Field J in *Kopitoff v Wilson* (1876) 1 QBD 377 at p. 380.

[4] Ibid 2, at p.25

[5] *Vardinoyannis v The Egyptian General Petroleum Corp. (The Evaggelos Th)* [1971] 2 Lloyd's Rep. 200 at p. 204.

surrenders to the charterer the right to choose where his ship shall go and because I think that this is in accordance with the weight of authority."

In English common law, the charterer's safe port promise is mainly concerned with "commercial expediency, not public policy and, therefore, it is ultimately governed by the intention of the parties" as argued by Dr. R. Thomas.[6]

In an attempt to identify the true concept and necessity of the safe port warranty, Roskill LJ in his judgment in *The Hermine*[7], merges the complex conclusions of what has been called a 'trilogy' of decisions[8], composing thereafter a statement of his own, regarding the nature and importance of this warranty "The concept whether a particular port or berth is safe or unsafe is -or at least should be- simple, for the main purpose of such a warranty of safety in a charter-party is to ensure that a charterer, who has an otherwise unfettered right to nominate a port or berth, does not do so in such a way as to imperil the shipowner's ship, or, it may be, the lives of the shipowners' servants, by putting that ship or those lives in danger and thereby impose upon the shipowner the risk of financial loss. The limitation upon the charterer's right of nomination is of crucial importance to the shipowner because, by the terms of the contract of affreightment, whether it be a charter-party for time or for voyage, the shipowner has contracted with the charterer that his servants, that is, the master, officers and crew, will comply with the charterer's orders, so long as those orders are within the terms of the charter-party."

The above observation appears to be particularly important when it comes to time charters, where the conflict of interests between owners and charterers requires a certain balance. As described by Lord Bingham in *Hill Harmony*[9] "A time charterparty such as the present represents a complex commercial bargain between owner and charterer. The owner undertakes for the period of the charter to make his vessel available to serve the commercial purposes of the charterer. […] The owner undertakes these obligations in consideration of the charterer's undertaking to pay for the hire of the vessel at an agreed rate. The charterer agrees to pay hire for the vessel because he wants to make use of it."

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[6] Thomas, Rhidian, *The Safe Port Promise of charterers from the perspective of the English common law,* (2006) The Singapore Academy of Law Journal, 18, 597-628

[7] *Unitramp SA v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep. 212 (C.A.); [1978] 2 Lloyd's Rep. 37

[8] This 'trilogy' of decisions of the 1950s law, as mentioned by Roskill LJ, comprises of *1) The Stork, 2) The Houston City and 3) The Eastern City.*

[9] *Whistler International Limited v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 at 641.

In other words, a time charter is a contractual agreement for the "transfer of the right to exploit the earning capacity of the vessel, in return for the payment of hire."[10]

In order to prevent such a conflict of interests between the contracting parties, certain restrictions apply to the right of the time charterers to make use of the vessel, most important of which being the doctrine of safe ports, a 'logical corollary' to the charterers unrestrained right to order the vessel to any port.[11] The doctrine of safe ports, however, requires that the charterer does not subordinate the safety of the vessel and its crew to the pursuit of its own financial interest.[12] It is to be noted that, the relationship between charterer and shipowner (via the master of the vessel) does not sanction a draconian command by the charterer, because the master can always deny to obey such command to take the vessel to an unsafe port or berth.[13] The very purpose of the safe port clauses is to free the master of such an obligation.[14]

Prior to developing an in-depth survey of certain aspects related to the safe port warranty as incorporated in time charters, it should be worth mentioning that at common law, the charterer's obligation towards the shipowner to always nominate a port which is safe, is primarily, an absolute one.[15] However, this can be modified by inserting an express term in a charterparty clause, most commonly used in some standard forms of voyage charterparties,[16] placing on the charterer an obligation of due diligence rather than adopting the strict liability nature of the safe port undertaking.

The purpose of this essay, is to review the past, examine the present and suggest the best course for the future in an area of maritime law which has become surprisingly complex. In order to provide a thorough and critical analysis of some issues arising from the use of safe port clauses in time charters, special attention will be paid to authorities and legal practice ruling time charterparties, but in addition to that, cases and journals related to voyage charters shall also be examined to such extent necessary as to enlighten some

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[10] Ibid, at 652.

[11] Thomas, R., Legal issues relating to time charterparties, 1st edition, 2008, Informa Publications, per Professor Howard Bennett at p. 47

[12] *Reardon Smith Line v Australian Wheat Board (The Houston City)* [1954] 2 Lloyd's Rep. 148, at p. 153.

[13] Smith, J. Bond Jr, *Time and voyage charters: Safe port/safe berth,* 49 Tulane Law Review 860, [1974-1975]

[14] G. Gilmore & C. Black, *The Law of Admiralty* (2nd edition 1975) at par. 204-05

[15] *Unitramp SA v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep. 37, at p. 37 (per Donaldson J) and *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd* [1935] 52 Ll LR 141 (CA), at p. 148 (per Greer LJ).

[16] Girvin Stephen, *Carriage of Goods by Sea,* (2nd edition, 2011, Published in New York, USA, by Oxford University Press Inc) at p. 323. (par. 21.29)

aspects of the issues being examined herewith. To that effect, the fundamental obligation of the charterer to nominate a safe port, will be analyzed step by step in accordance with the classic statement of what amounts to a safe port, as provided by Sellers LJ in *Leeds Shipping Co Ltd v Societe Francaise Bunge (The Eastern City).* This classic definition of what constitutes a safe port, is undeniably the key point for any further consideration of safe port cases, and will be the starting point of this analysis as well, although it cannot be read "as conveying that all unsafe port cases can now be solved simply by referring to the statement of Lord Justice Sellers and nothing else; and that it is both unnecessary and impermissible to have recourse to previous authorities"[17] using the words of Lord Mustill from *The Mary Lou.* After all, safety may in some cases be 'a question of fact and a question of degree'[18] but on the other hand, the criteria which must be applied in determining whether a port is safe or not, usually involve matters of law,[19] and upon this determination the English Courts have faced many challenges and have issued controversial decisions, in attempting to adopt the correct approach.

Nevertheless, it should always be taken in consideration that, what is ultimately important and decisive in an event of a charterparty dispute, is the charterparty itself, its terms and clauses which define the contractual relationship of the parties, and designates their bilateral obligations, not to mention the eternal quest for discovering their true intentions. That will be examined further on, along with the interrelation of the contractual parties' conduct when encountering unsafe port conditions, with commercial common sense and business efficacy.

II. The meaning of safety

a) General overview

Nowadays, a port can be set up by many different things, ranging from an elaborate dock complex up to a sheltered harbor, or a structure extending offshore to deeper water with

[17] *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep. 272 (per Mustil J at p. 276)
[18] *Palace Shipping Co Ltd v Gans Steamship Line* [1916] 1 KB 138, at p. 141 (Sankey J) and also *Reinante Transoceanic Navegacion SA v The President of India (The Apiliotis)* [1985] 1 Lloyd's Rep. 255
[19] *Kristiansands Tank Rederi A/S v Standard Tankers (Bahamas) (The Polyglory)* [1977] 2 Lloyd's Rep. 353 at p. 362 (per Parker J)

the cargo carried by conveyor belts or pipelines, even a large monobuoy for tankers well offshore, and so many more.[20]

The safety of a port, *prima facie,* implies the absence of any type of risk or danger, whatsoever. As will be examined later, there are indeed many different reasons why a port may be declared to be unsafe, such as physical, non-marine, political, sanitary or other conditions which may render a port unsafe, either temporarily or in a rather permanent way.[21]

However, the following abstract from the judgment of Sellers LJ in *The Eastern City,* remains the classic definition of safety, and this is justifiable as it encapsulates the true essence of a 'safe port' …."If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law. Most, if not all, navigable rivers, channels, ports, harbours 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 of a vessel in accordance with good seamanship."[22] The fact that the above definition remains an authoritative one, was confirmed by Teare J, in the High Court decision of *Ocean Victory.*[23]

Inevitably, several issues arise at this point from the many different elements of this classic definition. Indicatively, they concern the different attributes of safety, the relevant time of the charterer's promise, any possible delays, the particular ship in question, as well as other matters, all off which will be discussed below.

b) Attributes of safety

Considerable regard has been paid to the nature and scope of the charterer's promise of safety, and that is obvious by the amount of cases decided by the English Courts, towards this respect.

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[20] Reynolds, John M, *The concept of safe ports,* [1974] L.M.C.L.Q. 179-183

[21] Thomas Rhidian, *Legal issues relating to time charterparties,* 1st edition, 2008, Informa Publications, par. 4.13, by Professor Howard Bennett

[22] *Leeds Shipping Co Ltd v Societe Francaise Bunge SA (The Eastern City)* [1958] 2 Lloyd's Rep. 127 at p. 131.

[23] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2014] 1 Lloyd's Rep. 59 at p.99.

Before the decision of the House of Lords in *The Evia (No. 2),* it was accepted that the charterer's obligation as to safety, was a continuous and absolute guarantee that the port would be safe, subject to the exception of 'abnormal occurrences', as defined by Sellers LJ. In his speech, Lord Diplock refers directly to that approach adopted by Mustill J in *The Mary Lou*, which he considers to be 'heretical'[24], while the House of Lords finally goes on to conclude that the charterer's contractual promise refers to the *prospective* safety of the port at the time of nomination. This decision of the House of Lords, has been criticized as being pro-charterer and as will be seen further below, notwithstanding its great importance, it actually had the effect of 'plunging the law into new areas of uncertainty.'[25]

In *The Khian Sea*[26] a natural or human peril that could cause unsafety to the port, under certain circumstances, was overcome by security measures sufficient to combat the danger, so this port was finally considered as 'conditionally safe'. In the same decision, and having mentioned a number of other similar cases[27], Lord Denning insisted on the fact that a port or berth is not necessarily unsafe, just because a vessel may have to leave it because of bad weather conditions, and he then took the opportunity of enumerating the special requirements of the port, which ought to be satisfied, so that it may be considered as safe: "First, there must be an adequate weather forecasting system. Secondly, there must be adequate availability of pilots and tugs. Thirdly, there must be adequate searoom to manoeuvre. And, fourthly, there must be an adequate system for ensuring that the searoom and room for manoeuvre is always available."[28]

Moreover, a port may be rendered unsafe due to a temporary characteristic of the port as happened in *The Houston City*[29] where the defects of the port were neither permanent, nor recurrent, but still were of a "sufficiently long standing to be, for the time being, a characteristic of the port", as Mustill J observed, in *The Mary Lou.*[30] In this sense, it could be suggested that all ports are conditionally safe, provided that any possible risk or peril, is eliminated before endangering or causing any damage to the vessel, or as Lord Denning

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[24] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 A.C. 736 at p.750, per Lord Diplock

[25] Charles G.C.H Baker & Paul David, *The politically unsafe port*, (1986) L.M.C.L.Q. 112-128, at p. 115

[26] *Islander Shipping Enterprises SA v Empresa Maritima del Estado SA (The Khian Sea)* [1979] 1 Lloyd's Rep. 545 at 547.

[27] One of those cases mentioned by Lord Denning is *Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar)* [1968] 2 Lloyd's Rep. 563 where the port was considered unsafe because services in the port were not adequate, and a similar point was also raised in *Axel Brostrom & Son v Louis Dreyfus & Co* [1932] 44 Ll. L. Rep. 136; (1932) 38 Com. Cas. 79

[28] Ibid.

[29] *Reardon Smith Line v Australian Wheat Board (The Houston City)* [1954] 2 Lloyd's Rep. 148.

[30] *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep. 272 (per Mustil J at p. 279)

clearly stated in the Court of Appeal decision in *The Evia (No.2):* "Reasonably safe, that is, in its geographical configuration on the coast or waterway and in the equipment and aids available for her movement and stay. In short; it must be safe in its set-up as a port"[31] and Teare J said in *The Ocean Victory* "Safety is not absolute, but the measure of safety is not what is 'reasonable' but whether any dangers in a port can be avoided by good navigation and seamanship."[32]

So, the question whether the available security measures can eliminate the danger, remains one of fact, in such an extent, that even compliance of a port with the International Ship and Port Facility Security Code (ISPS Code)[33] is not a guarantee that a port is safe. On the contrary, the designation of a port as of high risk and requiring an exceptional security level, by ISPS code, does not automatically render a port unsafe. In the same context, it should be concluded that, whether a nominated port is ISPS Code-compliant or not, should not be determinative of the actual and true safety of the port, and consequently, of the breach of a safe port undertaking by the charterer, without having previously considered *ad hoc* its actual condition. It is accepted that any opposite view, would seem rather harsh, irrational and thus misleading.

c) The relevant time

Notwithstanding the contradicting views and debates of the past as to the safety of the port, it is now beyond doubt that the charterer's undertaking refers to the specific time the port is to be used, and the 'absolute continuing obligation' approach has been rejected, as being erroneous. The construction of 'prospective safety', is indeed less demanding and more acceptable, commercially and businesswise.

So, what the House of Lords unanimously decided in *The Evia (No. 2)* is that the warranty of safety does not amount to a continuing guarantee of the port's safety, or to a guarantee that the port is immediately safe at the time the promise is made, but only to a prospective safety of the port at the time of nomination. According to Lord Roskill, "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

[31] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1982] 1 Lloyd's Rep. 334 at p. 338.
[32] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2014] 1 Lloyd's Rep. 14, at par. 100-101
[33] As implemented through the International Convention for the Safety of Life at Sea 1974 (SOLAS), chapter XI-2.

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 which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial."[34]

The aforementioned case, has been considered a leading authority in the concept of 'safety' and 'reasonable foreseeability' as it halted the further movement of the law towards the approach that charterers were actually turned into 'insurers' against damage and detention in ports[35] and that they had an absolute continuing promise of safety from all events apart from 'abnormal occurrences'.[36] The test applied in *The Evia (No 2)* has clarified, not only the fact that charterers will not be held liable for unpredictable events, but also the fact that they are allowed to nominate a port which is not safe at the time of nomination, as long as it is expected to be safe, by the time the vessel arrives. The significance of this leading case is also demonstrated by the fact that it has been applied and reported in several other cases, such as *The Lucille*[37], to the same effect and with similar results.

But in *The Stork* as well, Devlin J made it clear that the charterer's promise as to safety, is not negated, even if the ship may have to wait before entering the port: "The law does not require the port to be safe at the very time of the vessel's arrival. Just as she may encounter wind and weather conditions which delay her on her voyage to the loading port, so she may encounter similar conditions which delay her entry into the port, and the charterer is no more responsible for the one than for the other."[38] So, to sum up the relevant time issues, it is accepted that the relevant time for which a port must be prospectively safe, is the time of actual use, including arrival and departure.

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[34] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 A.C. 736 at p. 757

[35] Ibid, per Roskill LJ "So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall upon the ship's insurers under the policies of insurance the effecting of which is the owner's responsibility…"

[36] Rogers Anthony, Chuah Jason and Dockray Martin, *Cases and Materials on The Carriage of Goods by Sea,* (4th edition, 2016, Oxon, Routledge London and New York, Taylor & Francis Group) at p. 187

[37] *Uni-Ocean Lines Pte of Singapore Ltd v C-Trade of Geneva S.A. (The Lucille)* [1983] 1 Lloyd's Rep. 387, [1984] 1 Lloyd's Rep. 244 (C.A.)

[38] *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork)* [1954] 2 Lloyd's Rep. 397 at p. 415

d) Delay

Further to the issues of time, as explained above, the fact that a vessel may be delayed either while entering a port, or before departing from it, might alone be a factor which could cause the declaration of a port as unsafe, under certain circumstances. It should be noted, though, that the apportionment of risks of delay amongst parties, is a concern mostly of voyage charterparties, and not of time charters where the charterers take the risk of delay in any event, but as courts recently tend to include the issue of delay in safe port obligations generally, some clarifications on the subject matter could prove enlightening.[39]

In *The Hermine*,[40] the vessel was delayed several weeks, due to a silting-up of the Mississippi River. It was held that the warranty of safety, which was an express term of the charterparty, covered not only the port itself, but access to and departure from it. The court affirmed that "delay [does] not render a port unsafe unless the delay [is] sufficient to frustrate the adventure", in other words adopted the relevant test, and thus determined the level of responsibility of the charterers. In this case, the cause of the delay was merely a temporary hazard encountered away from the port and was not considered as an abnormal occurrence. So, the Court of Appeal finally decided that the port of Destrehan was not an unsafe port, because the delay was only a temporary one.

In a case with similar facts, *The Count,*[41] the principle of delay was slightly refined by the Court. Here, the delay was caused from inadequate monitoring of buoys by the port authorities, and this deficiency was considered as a characteristic of the port of Beira, rather than a temporary hazard. Unlike in *The Hermine,* although the delay was not sufficient such as to frustrate the charterparty, there was a breach of the safe port clause in any event, so the port was rendered an unsafe port to nominate, and the award against the charterers was upheld. It has been supported that *The Count* "highlights the value of evidence of administrative shortcomings"[42] which is true bearing in mind the final consequence of these port deficiencies. The effect of this decision, as Todd explains it, is that "where the only risk is of delay, there will not normally be a breach of a safety

[39] Todd, P, *Laytime, demurrage, and implied safety obligations,* JBL [2012] 668-682, at p. 674
[40] [1979] 1 Lloyd's Rep. 212
[41] *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)* [2008] 1 Lloyd's Rep. 72
[42] McKinnon A, *Administrative shortcomings and their legal implications in the context of safe ports,* 23 Austl. & N.Z. Mar.L.J. 186, 204 (2009)

warranty, but if the port or berth is unsafe in other respects, the shipowners will be entitled to claim, even where the only loss occasioned is delay."[43]

On the other hand, in *The Vine*[44] the delay occurred at a different stage of the voyage i.e. after notice of readiness (NOR) had been tendered, and the charterers were not entitled the benefit of the exception to laytime, but they were held liable for breach of the independent safe berth warranty. Also, in *The Delian Spirit*[45] the Court of Appeal held that despite her delay in berthing, the vessel was an "arrived ship", so the shipowners couldn't support a separate claim for damages for detention of the ship, but only the normal laytime and demurrage provisions would apply. Ultimately, it should be noted that when the unsafety of a nominated port or its surroundings, leads the master to select a safer route by making a necessary deviation, delay could also be caused by this deviation of the vessel, resulting in damages being awarded for delay, even when these damages do not arise naturally from the breach of the contract or do not result from circumstances communicated to the owner at the time of contracting.[46]

e) Safe for the particular ship

Considering the aforementioned classic definition of safety, provided by Sellers J, one should bear in mind that the port must be safe for the particular ship chartered. That is to say, the fact that a port may be safe for another vessel of different type, size, draught etc. does not automatically render it safe for the particular ship in question. Whether a port is safe or not for a particular vessel, is a question of fact, depending on the above circumstances as well as on the conditions pertaining in the port at the relevant time.[47] Mankabady accurately illustrates how the concept of a safe port has evolved, proving the importance of the particular ship, not merely for determining the safety factor of a port, but also as a measure of the size of a port/berth when it is actually built: 'There was a time when the size of the berths available in ports, dictated the limits to which the size of ships could be increased, especially as far as their length and draught were concerned. Nowadays, the ships dictate the size of the berths'.[48]

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[43] Ibid 38, at p. 676

[44] *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2011] 1 Lloyd's Rep. 301 QBD

[45] *Shipping Developments Corp v V/O Sojuzneftexport (The Delian Spirit)* [1972] 1 Q.B. 103 (CA and QBD in the same report)

[46] Tetley "Bill" William, *Marine Cargo Claims,* (4th edition, 2008, Editions Yvon Blais, Thomson Reuters) at p. 810.

[47] Ibid 2, at p. 27

[48] Mankabady, S, *The Concept of Safe Port,* [1974] 5 JMLC 633-643

In *Brostrom v Dreyfus*[49], it was held that the port was an entirely safe port for the majority of the ships seeking to resort thereto, but that it was only unsafe for the particular ship which was the largest ever to go there, i.e. the Sagoland, laden as she was, with cargo, at the relevant time. In *The Archimidis*[50], the court rejected charterer's submission that the port of Ventspils could not have been unsafe at the time the particular ship was there, simply because the lightering operations were not adequate for it to load the minimum quantity of cargo required by the charterparty. This case is one whose implications cannot be ignored, neither by owners nor by charterers, as it actually increases the safety obligations of both parties, enhancing the existing security and resulting thus to safer ships and safer ports.[51]

f) Safety of approach

One of the most important elements emanating from the 'classic definition' of a safe port, is that the vessel must be able to make a safe passage to and from the port, in other words to reach the port, use it and return from it, without being exposed to any kind of danger, whatsoever.

The determination of whether a ship is able to enter a port safely, was the main concern of the court in *The Sussex Oak*[52] *w*here the vessel was ordered by the charterers to load a cargo from Hamburg, and then proceed to London. On her passage up to River Elbe, ice was encountered, and approaching to Hamburg the vessel reached a certain point where there was no other option than to force her way through the ice, following relevant advice from the pilot. The consequence was that damage was sustained to the vessel, and it was the charterers who were finally held liable for this damage, on the grounds that Hamburg was -at the relevant time- an unsafe port. The charter-party contained the usual provision in Clause 2 that the vessel was "to be employed …between good and safe ports." According to the judgment, Devlin LJ argued that[53] "…there is a breach of Clause 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The

[49] *Axel Brostrom & Son v Louis Dreyfus & Co* [1932] 44 Ll. L. Rep. 136; (1932) 38 Com. Cas. 79
[50] *AIC Ltd v Marine Pilot Ltd (The Archimidis)* [2008] EWCA Civ 175; [2008] 2 All E.R. (Comm) 545; [2008] 1 Lloyd's Rep. 597; [2008] 1 C.L.C. 366.
[51] Knowles B. & Tilley M. (Clyde & Co), *From safe ships to safe ports,* MRI, (01 Apr) 2008
[52] *GW Grace & Co Ltd v General Steam Navigation Co Ltd (The Sussex Oak)* [1950] 2 K.B. 383; [1950] 1 All E.R. 201; (1949-50) 83 Ll. L. Rep. 297
[53] Ibid, at p. 304.

charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skillful master can find a way of making in safety."

The view of the law expressed by Devlin LJ as above, is supported by the authority of *Palace Shipping Company Ltd v Gans Steamship Line*[54], which was a First World War case about the concept of safety, and how this concept is affected by the risk of a possible attack or seizure of the vessel, while proceeding to the nominated port. So, in deciding whether the port in question, i.e. Newcastle could be considered as a safe port, at a time when Germany had officially announced that it would attack any hostile merchant ships sailing around the area, it was accepted that the risk of physical attack of a ship, must be a normal feature of the nominated port so that the port is rendered unsafe, which, however, were not the facts of this case. The findings in *The Saga Cob* were to the same effect, and Parker LJ, giving the judgment of the court, argued that "All that can be said in this case is that since a guerilla attack may take place anywhere at any time and by any means, that the guerillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either *en route* from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept."[55] Indeed, as Parker LJ describes it, what should be taken into consideration is whether a risk as the present one, which could be regarded as a political risk, becomes a characteristic of the port in a way that affects the decision of any prudent shipowner or master, as to whether he will attempt to reach that port or not, and expose his vessel to any possible danger: " It will not, in circumstances such as the present, be regarded as unsafe unless the "political" risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there."[56]

Another element sufficient to suggest that a port is not safe, is such as when a vessel must dismantle part of her structures, so that she may safely enter a port. That is exactly what happened with *Vanduara,* a vessel which had to dismantle her masts, in order to pass

[54] [1916] 1 K.B. 138

[55] *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1992] 2 Lloyd's Rep. 545; CA (Civ Div); 26 July 1992, at p. 550-551

[56] Ibid, at p. 551

under Runcorn Bridge and reach the port of Manchester with safety.[57] Ever since this decision, it has been accepted that a port cannot be considered safe, if a vessel needs to be disassembled in any way, so that she may access the port.

g) Safety in use

Taking the analysis, a step further, just because a particular vessel has managed to enter a port safely, does not automatically mean that the port is safe for her to use and remain there indefinitely. Factors which usually determine this possibility, have to do with the physical safety of the port's location, size, and general set-up, as they apply to the particular ship at the relevant time, having always regard to its natural and artificial aspects[58]. The constantly changing weather conditions, for instance, may create problems of unsafety to a vessel, while in port, rendering thus the port unsafe for the particular ship at that time, as was the case in the leading authority *Johnston v Saxon Queen Steamship*[59] where the port was safe to enter, with the weather conditions prevailing at the time of entry, but became dangerous enough in the meantime, so as to be regarded unsafe.

Moreover, courts have held that a port does not have to be safe for 'uninterrupted use' which means that it can be safe for a period of time, then by reasons of bad weather the vessel might need to put in to sea for a while until the weather conditions improve, and then it may be safe to enter the port again. That was clearly defined by Teare J in the First Instance Court decision of *The Ocean Victory,*[60] in which he said, "Thus the fact that a vessel may have to interrupt discharge and leave the port of Kashima on account of a typhoon, bad weather from a non-tropical depression or long waves does not make the port unsafe". Under these circumstances, therefore, the port will be considered safe provided that the necessity to leave the port is predictable, and that the vessel is able to act proactively and in safety.[61] This was established by Pearson J and upheld on appeal by Sellers J, in *The Eastern City* [62] as follows "Be it supposed that a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that

[57] *Goodbody and Balfour, Williamson* [1899] 5 Com. Cas. 59
[58] T. Coghlin, A. Baker, J. Kenny, J. Kimball, T.H. Belknap Jr, *Time Charters,* 7th edition, 2014, Informa Publications, at par. 10.28
[59] [1913] 108 L.T. 564
[60] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2014] 1 Lloyd's Rep. 14, at par. 103
[61] Ibid 46, at par. 10.29
[62] *Leeds Shipping Co Ltd v Societe Francaise Bunge SA (The Eastern City)* [1957] 2 Lloyd's Rep. 153 at p. 172, upheld on appeal at [1958] 2 Lloyd's Rep. 127 per Sellers LJ at p. 131

the imminence of such weather conditions will be recognized in time and that the ship will be able to leave the port safely."

In addition to the above, Lord Denning has placed a number of essential requirements and characteristics which every port should have at its disposal, so that it may provide safety to all vessels using it.[63] Adequate local warnings and weather forecasts provided to the master, notifying him of the onset of bad weather, can prove very helpful, so long as the vessel is able to depart on time without getting trapped due to inadequate sea room. Proper berthing and mooring facilities of the port are also of utmost importance as far as the safety of a port is concerned, as it was seen in *The Carnival*[64] where the vessel and its cargo sustained serious damage due to a fender which was not properly maintained.

Finally, the safety of a port while at use from a particular vessel, is often related to the existence of efficient navigational aids, such as pilots, buoys and lights, which must be available at all times. Such is the suggestion of Parker LJ in *The Saga Cob*,[65] where he clarifies that a charterer will not be held liable should such auxiliary, precautionary measures were to be taken by the port authorities, because that would not be an assumption that the port was unsafe: "What would be significant is the adequacy or inadequacy of the precautions. If a port authority appreciates that there is some navigational hazard in the port which creates a risk and takes precautions which will result in a properly handled vessel being able to avoid the risk, the taking of precautions cannot be relied on to show that the port was unsafe."

h) Safety in departure

In order for a port to be considered safe for a particular ship, she must be able not only to reach and enter with safety, remain there and use it for so long as the charter requires, but also to be able to depart from it, without being endangered in any way.

The leading authority describing this situation, is *Limerick v Stott* [66] which is a case concerning the port of Manchester, and describes how the vessel *Innisboffin* encountered difficulty in leaving from the port, via the Manchester Ship Canal, after having discharged

[63] Ibid 22.
[64] *Prekookeanska Plovidba v Felstar Shipping Corp (The Carnival)* [1994] 2 Lloyd's Rep. 14; [1994] C.L.C. 277; Independent, March 14, 1994; CA (Civ Div); 03 March 1994
[65] *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1992] 2 Lloyd's Rep. 545; CA (Civ Div); 26 July 1992, at p. 550
[66] *Limerick Steamship Company Limited v W.H. Stott and Company Limited* [1920] 5 Ll.L.Rep. 190

her cargo in port and having subsequently, decreased her draught. The discharge of the cargo, made the vessel sit higher in the water, and as a result she couldn't clear the canal bridges on her outward passage throughout the canal, rendering thus Manchester an unsafe port for her, at the relevant time.

Upon the departure of a vessel from a port, the question which inevitably arises is how far from the departure port is the requirement of safety considered to exist. That is to say, in a case where the ship has reached and departed from an up-river port with safety, and encounters an obstruction several miles down its way, can it be suggested that this port was unsafe for the particular ship? This remains unclear from the authorities on this field, therefore the answer should be anticipated in the context of the particular circumstances, not strictly as a matter of pure distance, but mainly as a question of degree. The fact that there is usually no alternative route in narrow passages such as rivers, for a vessel departing from an up-river port and sailing towards the open sea, contributes to the determination and interpretation of the above question of degree, in a broader way.

To that effect, several disputes have taken place amongst parties, which have been illustrated in the judgments of highly regarded judges of the English courts. Such was the case in *The Hermine*[67], where the Court of Appeal had great doubts and could not unconditionally accept that the port of Destrehan, on the Mississippi river, was unsafe, due to a physical hazard which was encountered miles away, in the ship's passage towards the open sea.

The matter was clarified in the *Mary Lou*, where Lord Mustill held that the grounding of the vessel in the Pass of Mississippi, could not be attributed to poor navigation of the ship, by the master or the pilots. On the contrary, charterers were to be held liable, having breached their safe port obligation by nominating a port which was unsafe to depart from, even if the ship was grounded a great distance away, and in an attempt to justify the reasons of his decision, he explained:[68] "There remains the question whether the warranty extends only to areas in reasonably close proximity to the port itself. Certainly, it is not easy to accept at first sight the idea that hazards existing nearly one hundred miles away can be treated as features of the port. But logically the distance should make no difference, although the further away the obstacle, the less likely it will be that there is no alternative route which will enable the ship to reach the port in safety. In the present case, however, there was no such alternative; the Southwest Pass provided the only means of

[67] *Unitramp SA v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep. 212 (C.A.)
[68] *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep. 272 at p. 280

access. Notwithstanding the doubts tentatively expressed by the Court of Appeal in *The Hermine*, I would regard any unsafe feature of the Pass as a breach of the warranty."

i) Abnormal occurrence

It is accepted that, in the absence of an express agreement to the contrary, charterers are only liable for damage or loss caused by events which can be attributed to the normal characteristics and features of the port, and their safe port promise does not extend to subsequent events that are regarded as 'unexpected and abnormal'. Whether a risk is abnormal is in each case a question of fact.[69] The types of risk which could fall into this category, include any exceptional meteorological or geological occurrence, unpredictable political events, accidents occurring in the port or any other occasion which would appear to be the 'antithesis' (i.e. the opposite) of normal, for the particular port.[70]

This aspect of law, was primarily construed in *The Evia (No. 2)*[71] where the vessel *Evia* became trapped in the Shatt-al-Arab waterway, due to the outbreak of war between Iraq and Iran, in September 1980. The Court of Appeal in its majority held that the outbreak of war was an abnormal occurrence which exempted the charterers from their absolute safe obligation. With regard to the matter of the charterer's liability, Lord Denning stated "…if the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated, abnormal or extraneous occurrence - unconnected with the set-up - then the charterer is not in breach of his warranty"[72] and further on concluded that "When the full-scale war erupted on Sept. 22, 1980, that was an utterly abnormal and extraneous occurrence. It rendered the port unsafe, but this unsafeness was not a breach of the warranty of a 'safe port'."[73]

However, under certain circumstances, it is possible that the political unsafety or any other abnormal event, may become a normal feature of the port, which off course will then result to an unsafe port, within Sellers LJ's classic definition.[74] In *The Concordia Fjord*[75] it was held that the hostilities taking place at that time in Beirut, were an inherent

[69] *Unitramp SA v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep. 37, at p. 219, per Geoffrey Lane LJ.
[70] Ibid.
[71] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2) (Court of Appeal)* [1982] 1 Lloyd's Rep. 334
[72] Ibid, per Lord Denning at p. 338
[73] Ibid, per Lord Denning at p. 339
[74] Todd Paul, *Principles of the carriage of goods by sea* (1st edition, 2016, Oxon, Routledge London and New York, Taylor & Francis Group) at p. 221
[75] *D/S A/S Idaho v Colossus Maritime SA (The Concordia Fjord)* [1984] 1 Lloyd's Rep. 385

feature of the port, so the port couldn't be considered as safe. In *The Chemical Venture*[76] Gatehouse J doubted the validity of the test applied in *The Saga Cob*[77], in order to determine whether the Kuwaiti terminal at Mina Al Ahmadi was unsafe, and preferred to apply the classic definition of Sellers LJ, concluding that the port was unsafe, because the subsequent increase of some risks, which already pre-existed, should not amount to an abnormal occurrence: "If the Court comes to the conclusion that one of the characteristics of the port was that an order to proceed there gave rise to a particular prospective source of danger it is no longer possible (if it ever was) for the charterer to deny that the port was unsafe merely on the basis that such risk had only been realized on one or two occasions."[78]

On a similar context, R. Thomas observed that "…what initially may have been a wholly unprecedented and unexpected occurrence may subsequently recur in circumstances such that the abnormal is transmogrified to the normal, and the risk becomes a characteristic of the port."[79] But caution should be kept, when considering the notion of an abnormal occurrence, not to equate it with something simply opposite to the characteristics of the port, and vice versa,[80] as this would not be an accurate description of what constitutes an abnormal occurrence, but rather an "unfortunate and misleading finding".[81]

j) Good navigation and seamanship

Ultimately, a port will not be considered unsafe if any risks or dangers related to it, can be avoided by ordinary good navigation and seamanship. The level of such good navigation and seamanship which is admittedly required, is that expected from "the ordinary

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[76] *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep. 508; QBD (Comm)
[77] Which measured the unsafety of a port by observing a reasonable shipowner's or master's decision to accept or decline to send or sail their vessel at that port, under circumstances of political risk.
[78] Ibid 64, at p. 517
[79] Thomas, Rhidian, *The Safe Port Promise of charterers from the perspective of the English common law,* (2006) The Singapore Academy of Law Journal, 18, 597-628, at p. 617
[80] Yim, Choi Wai Bridget, *Safe port promise by charterers: rethinking outstanding complications,* 30 Austl. & N.Z. Mar L.J. 1, 12 [2016]
[81] This was held by the Court of Appeal, in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2015] EWCA Civ 16 [53]. The abstract of the court criticised here by Yim is "…a similarly realistic approach has in our view to be adopted to the determination of the essentially factual question whether the event giving rise to the particular casualty is to be characterized as an 'abnormal occurrence' or as resulting from some 'normal' characteristic of the particular port at the particular time of the year."

prudent and skillful master" as per Teare J in *The Ocean Victory.*[82] If, however, ordinary skill is not sufficient to overcome the dangers, but further abilities of a higher standard are required, then the port will not be rendered safe. In other words, the test which should be applied is whether a competent master, would be expected to avoid the danger under the circumstances, by exercising reasonable care.[83]

In *The Polyglory,* a tanker caused damage to an underwater pipeline, in Port La Nouvelle, while attempting to leave the berth due to increasing wind forces, under the instructions of a pilot. The arbitrator held that the port was unsafe and that the pipeline was damaged due to the pilot's negligence, which however did not break the chain of causation between the order to proceed to the port and the subsequent damage. In court, Parker J, upheld this arbitration award, his reasoning being that a higher level of navigation and seamanship, beyond the standard, was required in order to avoid the particular risk. As far as the pilot's negligence is concerned, he held that it was immaterial to the damage sustained, as it was not the effective cause of it, even though it was the most immediate cause as a matter of chronological proximity.[84]

It should be mentioned, though, that after a ship has suffered certain damage, despite the exercise of reasonable skill and care by its master and crew, it does not always mean that the port is unsafe. There might be other reasons, as have been explained by Mustill J in *The Mary Lou*[85] "…care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely that the casualty was the result of simple bad luck."[86] This was also emphasized in *The Mediolanum,* where it was made clear that the charterer's undertaking as to the safety of the port, does not imply that the vessel will be free from danger in the nominated port, even though it is properly navigated, nor does the charterer's promise signify that every spot within the nominated port, will be safe for the chartered vessel.[87]

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[82] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2014] 1 Lloyd's Rep. 59 at par. 112

[83] T. Coghlin, A. Baker, J. Kenny, J. Kimball, T.H. Belknap Jr, *Time Charters,* 7th edition, 2014, Informa Publications at par. 10A.40

[84] The doctrine of proximate cause was illustrated in *Leyland Shipping Company v Norwich Union Fire Insurance Society* [1918] A.C. 350 which remains the authority on this matter.

[85] [1981] 2 Lloyd's Rep. 272

[86] See also *The Apiliotis* [1985] 1 Lloyd's Rep. 255

[87] *Mediolanum Shipping Co v Japan Line Ltd (The Mediolanum)* [1984] 1 Lloyd's Rep. 136

III. The express and implied warranty of safety

The safe port warranty is usually reinforced by an express term in the charterparty. The majority of the standard forms of time charterparties include such a clause.[88] However, this may not be the case, in circumstances where no such express clause exists, so the question arises whether the court will have to imply one or not.[89] It seems that they will only do so, if necessary to give business efficacy to the charter. As already seen, the doctrine of safe ports is a 'logical corollary' of the charterer's right to direct the employment of the vessel, by nominating ports of loading and discharge.

The implication of a safe port warranty will only be possible if the charterer has the right to nominate a port in the particular case, and it will be subject to any inconsistency with other clauses of the charter. Under a voyage charterparty, the port or ports may already be named and specified, without any express reference as to their safety, so the charterer will be bound to nominate a port from the named ones, and no such obligation of safety will be implied.[90]

Undeniably, the court will not imply a safe port warranty when the charterparty allows the charterers to trade in a war zone. In *The APJ Priti,*[91] the parties were well aware that the voyage would take place in a war risk area (between Iran and Iraq), therefore it is submitted that they had accepted the relevant risk. Even though an express clause regarding only the safety of a specific berth was included in the charterparty, as the damage to the vessel was caused *en route* to the port, by a hostile missile, it couldn't be considered as applying to that damage. The court of Appeal refused to widen the safe berth obligation and imply it to the port, as well. Lord Justice Bingham pointed out that "There is no ground for implying a warranty that the port declared was prospectively safe because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter."[92]

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[88] See for example, clause 5 of the NYPE 1993 form which provides "Trading Limits -The vessel shall be employed in such lawful trades between safe ports and safe places within…..excluding…as the charterers shall direct", or clause 2 of the Baltime 1939 form "Trade-The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat".

[89] Baughen Simon, *Shipping Law,* (6th edition, 2015, Oxon, Routledge London and New York, Taylor & Francis Group)

[90] Ibid 20, at p.71

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

[92] Ibid, per Bingham LJ at p. 42

Another case where the Court of Appeal was quite reluctant to imply a safe port obligation, upholding both the decisions of the arbitrators and the Commercial Court, is *The Reborn.*[93] This case involved a voyage charterparty with loading at Chekka where there were many possible alternative berths to which the vessel could be directed, within the port. After the vessel's hull being damaged at the loading berth, the shipowners claimed compensation, but the charterers argued that there was no express warranty as to safety of the berth, so the loss would lie with the owners. The Court reached its final decision having been influenced by the opinion of the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd*[94] which redefined the process of implication by drawing a distinction between reasonable and necessary implication of a term into a contract.[95] As C. Ward suggests, the essence of this opinion is that "…having no power to make or improve the parties' agreement, the only question the court should ask in contemplating an implied term is whether that is what the agreement, read as a whole against its background, would be reasonably understood to mean."[96] Lord Clarke of Stone-cum-Ebony MR, emphasized the observation which Lord Hofmann had made in *The Belize,* i.e. that if a contract does not expressly provide for what will happen when a certain event occurs, then possibly nothing is supposed to happen, otherwise the parties would have made some provision to that effect. He concluded on this point saying "If the event has caused loss to one or other of the parties, the loss lies where it falls…. Absent an implied term, the default position is that the owners must bear their own loss."[97] And furthermore, he added that whether a safety warranty should be implied, would be determined by the degree of liberty which the charterers enjoyed under the charterparty, and approved the statement as expressed by Cooke on *Voyage Charters*[98] that "In principle, the more extensive that liberty, the greater the necessity to imply a warranty".[99]

The principles mentioned above were also illustrated in two other cases with similar facts, but with a stipulation of named ports in the charterparties involved, which however contained express safe port clauses. In *The Livanita*[100] Langley LJ held that "In my

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[93] *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531

[94] [2009] UKPC 10; Bus LR 1316, [16-27]

[95] Georgiou Konstantinos, *Safe berths and implied terms,* S.T.L. (26 Aug) 2009. The author here explains that the criterion for a safe term to be implied, is whether it is truly *necessary* to make the contract work, and he adds that it won't suffice if the term is simply reasonable.

[96] Ward Chris, *Unsafe berths and implied terms reborn,* [2010] LMCLQ, 489, at p. 490

[97] Ibid 90, per Lord Clarke of Stone-cum-Ebony MR, quoting Lord Hoffmann's opinion, at par. [10]

[98] Cooke Juliane & others, *Voyage Charters,* (3rd edition, 2007, Informa Publications) at par. 5.32

[99] Ibid 90, at par. [28]

[100] *STX Pan Ocean Co Ltd (formerly known as Pan Ocean Shipping Co Ltd) v Ugland Bulk Transport AS (The Livanita)* [2007] EWHC 1317 (Comm); [2008] 1 Lloyd's Rep. 86

judgment there is no principle of construction which permits a negative answer to the general question raised by this ground. There is no inherent inconsistency between a safe port warranty and a named loading or discharging port."[101]

In *The Archimidis*[102]the vessel was unable to load a full cargo due to draft restrictions of the port of Ventspils, after a stilting up of the channel which was generated by adverse weather conditions. The owners argued that the charterers were in a breach of their safe port warranty, whereas the charterers claimed they had undertaken no such obligation of safety, as the port was named in the charter. The Court of Appeal decided that the owners were entitled to claim dead freight, also that the words 'One safe port Ventspils' imported a warranty that the nominated port would be safe, even though the port of Ventspils was the only port named in the charterparty, so the charterers had no other option than to nominate that as the load port. The use of these words when drafting a charterparty, has been a matter of discussions and has been severely criticized, based on the acceptance of English commercial law that "considerations of fairness in a particular case should give way to the requirement for a clear rule which can be readily applied."[103]

It is accepted that the safety warranty in this case could not have been construed in any other way, and the opposite would seem odd bearing in mind that there was another clause regarding the discharge port as well. If this case was decided otherwise, S. Diggory explains[104], shipowners would be facing an unacceptable and unfair dilemma, as they would be obliged to send their vessel to a port which they already knew or suspected as unsafe, and on the other hand, they would have breached the charterparty by refusing *a priori* to enter the port. The judgment of Coleman J, in *The Greek Fighter*, was to the same effect: "The identification of a named port or anchorage, thereby limiting the charterer's choice as to the location of performance is not inconsistent with a warranty that it is safe, any more than the sale of goods by description would be inconsistent with an express term as to quality."[105]

Summing up this rather complicated but fairly interesting matter, it is concluded that much care should be taken when drafting charterparties, as to the allocation between the

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[101] Ibid at par. [18]

[102] *AIC Ltd v Marine Pilot Ltd (The Archimidis)* [2008] EWCA Civ 1754

[103] Gay, Robert, *Safe port undertakings: named ports, agreed areas and avoiding obvious dangers (The Archimidis),* [2010] L.M.C.L.Q. 119-139.

[104] Diggory Samantha, *Named ports and safe ports-must they be one and the same?* [2008] S.T.L., 01 Oct. 08

[105] *Ullises Shipping Corp. v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 1 Lloyd's Rep. Plus 99, quoted from *St Vincent Shipping Co v Bock, Godeffroy & Co (The Helen Miller)* [1980]2 Lloyd's Rep. 95

parties, of the risk related to the nomination of ports or berths.[106] The words of Davies come up as clarifying exactly the appropriate and suggested approach towards implied terms: "Implication and interpretation are distinct…..mutually agreed contracts deserve the utmost respect and judges should be very wary of interfering with written agreements freely made by contracting parties."[107]

IV. Incidents of nomination

Generally speaking, voyage charters usually name certain ports where the vessel is to sail, accompanied by an express promise of safety, and agreed bilaterally by the contractual parties, when concluding the charterparty,[108] whereas in time charters no particular port is specified but the charterer may choose to direct the employment of the vessel to any loading or discharging port, from within an agreed geographical range of ports, with the safe port promise either express or implied and made at the time of the voyage order.[109] Nominating a port outside this range, will *prima facie* constitute an illegitimate order[110] but this matter shall be discussed further below.

a) Primary obligation

The charterer's primary undertaking as to the safety of the port, has already been said to refer at the time the port is to be used, and not at the time of nomination. In other words, the warranty of safety does not amount to a continuing guarantee of the charterer that the port will be safe, by the time it is nominated, and during the time which the vessel is about to approach the port, reach it, use it and depart from it, but rather that it will be 'prospectively safe' for the vessel, by the appropriate time it is intended to be used. In the words of Lord Diplock, "It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is

[106] Turnbull Elizabeth, *Finding a safe berth*, [2009] M.R.I., 28 Sep 09

[107] Davies Paul S, *Recent developments in the law of implied terms,* [2010] L.M.C.L.Q. 140-149

[108] See *Aegean Sea Traders Corp. v Repsol Petroleo S.A. and another (The Aegean Sea)* [1998] 2 Lloyd's Rep. 39, p. 68 per Thomas J.

[109] See Thomas, Rhidian, *The Safe Port Promise of charterers from the perspective of the English common law,* (2006) The Singapore Academy of Law Journal, 18, 597-628, at p. 619 where Thomas describes the three stages of a time charter, related to the safe port promise, the first being the phase when the voyage order is given, i.e. the time of designation of a port by the charterer, and the other two being the approach voyage towards the designated port, and finally the arrival/use/departure stage, from the designated port.

[110] Baughen Simon, *Shipping Law,* (6th edition, 2015, Oxon, Routledge London and New York, Taylor & Francis Group) at p. 202-203

concerned and the contractual promise itself is given at the time when the charterer gives the order to the master or other agent of the shipowner to proceed to the loading or unloading port."[111]

Thus, this primary obligation of the charterer, will not be considered as having been disobeyed, if at the time of nomination, the port is not safe, but it is expected to become safe in a later stage.[112]

In *The Evia (No. 2),* the old doctrine of safety which identified the charterer's undertaking as an absolute continuing guarantee of safety, and had caused many debates, was finally rejected by the House of Lords[113] where their Lordships adopted a totally new approach which was summarized in Lord Roskill's speech as follows: "My Lords, on the view of the law which I take, since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after the *Evia's* arrival and was due to an unexpected and abnormal event, there was at the former time no breach of clause 2 by the respondents, and that is the first ground upon which I would dismiss this appeal."[114]

But the charterer's obligation does not cease to operate at this stage, as will be seen below.

b) Secondary obligation

Notwithstanding the fact that the charterer's obligation of safety is not a continuing one, after *The Evia (No. 2)* was issued and the test of 'prospective safety' was generally accepted, another issue ensued: What was about to happen if the nominated port became actually or prospectively unsafe, to the knowledge of the charterer, while the vessel was *en route* to the port, or had already arrived? The House of Lords, decided to resolve this matter, by imposing on the time charterer a secondary obligation, i.e. an obligation to renominate a new port, by cancelling the original order and issuing fresh orders to another port which will be prospectively safe.

The owners, on their behalf, are entitled to cease to obey the initial orders of the charterers, should they become aware of such changing circumstances concerning the safety of the port to which they are approaching, in order to protect their ship from being

[111] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 A.C. 736 at p. 749

[112] See also *Maintop Shipping Company Limited v Bulkindo Lines PTE Limited (The "Marinicki")* [2003] 2 Lloyd's Rep. 655, where the owner's allegation of unsafety, failed for want of proof that the hazard already existed when the nomination of the port was made.

[113] The old doctrine was described as an 'heresy' by Lord Diplock in p.750

[114] Ibid 107, at p. 763

exposed to any possible risk or danger which they have not agreed to bear.[115] Lord Roskill explains that "This is because clause 2 should be construed as requiring the time charterer to do all that he can effectively do to protect the ship from the new danger in the port which has arisen since his original order for her to go to it was given."[116] A relevant statement is also encountered in *The Hill Harmony,* where the main concerns are of a different nature, however, when referring to safe port issues Lord Hobhouse clearly accepts the above, "The master remains responsible for the safety of the vessel, her crew and cargo. 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: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order."[117]

Similarly, the second situation which must be considered, is when the vessel has already entered the port. In this occasion, a distinction should be drawn, between the ability of the vessel to avoid the danger by leaving the port or not. In the first case, if the vessel can safely leave the port and avoid the relevant hazard, then a secondary obligation is imposed on the charterer, to provide new voyage orders to the vessel by nominating another port which will be prospectively safe for her to trade, no matter if she has completed loading or discharging. If there is no such possibility, because the vessel might be exposed to danger by attempting to leave the port, then no further obligation is imposed to the charterers, and the reason for that is well justified in *The Evia*, by the exact same words which are repeated from Lord Roskill, as mentioned above.

On the facts of *The Evia*, however, is should be reminded that no secondary obligation arose for the charterers to renominate a port, because by the outbreak of the war, the vessel had already been trapped as the Shatt al Arab channel was not navigable, for indefinite time. The situation was different in *The Lucille*, in which case although the facts were similar, the port was prospectively safe when nominated but became unsafe in the meantime, so a further obligation did arise for the charterers to nominate a new port, but was disobeyed.

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[115] T. Coghlin, A. Baker, J. Kenny, J. Kimball, T.H. Belknap Jr, *Time Charters,* 7th edition, 2014, Informa Publications, at par. 10.51

[116] Ibid 107, at p. 764

[117] *Whistler International Limited v Kawasaki Kisen Kaisha Ltd, (The Hill Harmony)* [2001] 1 AC 638 at p. 658, per Lord Hobhouse.

c) Refusal of nomination

It goes without saying that a shipowner has the right to refuse a nomination made by the charterers, especially on the grounds that the nominated port is prospectively unsafe, which renders the relevant employment instructions illegitimate, providing him thus a right to disobey. Since such an order is considered illegitimate, the charterers are in breach of the contract, so as explained by Devlin J in *The Sussex Oak,*[118] "I cannot think that the clause in a time charterparty which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give". It is also suggested, by Professor H. Bennett, that the fact of prospective unsafety and its subsequent consequences, may be regarded as a limitation of the charterer's right to direct the employment of the vessel, even if he wouldn't be held liable for nominating an unsafe port, if due diligence clauses incorporated in the time charterparty, relieved him of such liability.[119]

Moreover, an entitlement of the shipowner not to comply with a nomination, may be also provided, when circumstances generate the formulation of an opinion (either on the shipowner or the master) that the nominated port is 'dangerous'.[120] To that effect, both their opinions seem critical, but the extent to which they can exercise their right to alter the voyage orders, by declining a nomination of a port, due to this opinion, is open to scrutiny, as explained by Leggatt LJ in *The Product Star*[121]*:* "But the exercise of judicial control of administrative action is an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised. The essential question always is whether the relevant power has been abused. Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any

[118] *GW Grace & Co Ltd v General Steam Navigation Co Ltd (The Sussex Oak)* [1950] 83 Ll. L. Rep. 297 at p. 307 per Devlin J.

[119] Thomas Rhidian, Legal issues relating to time charterparties, (1st edition, 2008, Informa Publications) per Prof. H. Bennett at p.74

[120] See for example clause 40 of the Beepeetime 2 form, which provides that the vessel may decline the nomination of a port which is, by reason of war risks, "considered by the master or owners in his or their discretion dangerous" and see also clause 35 of the Shelltime 4 form, which refers to the "reasonable opinion" of the master and owners.

[121] *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star No. 2)* [1993] 1 Lloyd's Rep. 397

necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application."[122]

The courts however, will intervene only if the owner's discretion to refuse orders for the vessel to proceed to a port, are exercised in a way "capricious or arbitrary or so outrageous in its defiance of reason, that it can be properly categorized as perverse".[123] So, in reaching his decision (which was upheld by the Court of Appeal), what Diamond LJ finally considered as the most determinative factor, was not the concept of fairness, but whether the exercise of discretion was reasonable or not, and in applying such a test, found that the owner's refusal to allow the *Product Star* to proceed to the port of Ruwais, was indeed a repudiatory breach.

On a final note, B.J. Davenport comments on this decision, and wonders whether this discretion, which must be exercised 'so as to be reasonable in the interests of both parties', could ever truly be in the charterers' interest. His opinion is provided in the relevant article, and his argument is mainly based on the fact that good faith on behalf of the owner, and the interest of the safety of the ship and her crew, would suffice.[124]

d) Waiver of refusal

In certain circumstances, the shipowners may not exercise their right to decline an uncontractual nomination or a nomination which would take the ship outside the agreed geographical limits[125], and they may do so by communicating their choice to waive this right. That was the case in *The Kanchenjunga*[126], where the war between Iraq and Iran rendered the nominated port of Kharg Island prospectively unsafe, however the conduct of the owners under the circumstances did not indicate any signs of disapproval or objection to the specific nomination, on the ground of unsafety. On the contrary, they acted in a manner inconsistent with refusing the uncontractual nomination, which made the House of Lords decide that they had waived their right to object to the nominated port. According to Lord Goff, "In these circumstances, the owners were asserting a right inconsistent with their right to reject the charterers' orders. The right which they were

[122] Ibid at p. 404

[123] *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd's Rep. IR 221, para. 35, per Brooke LJ.

[124] Davenport, B.J., *Unsafe ports again,* [1993] L.M.C.L.Q. 150-154

[125] i.e. the limits within which the owners have agreed that she should be employed, under the time charterparty. See also *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd (The Terneuzen)* [1935] 52 Ll.L.Rep. 141.

[126] *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391; Times, February 19, 1990; HL; 15 February 1990

asserting was that laytime had started to run against the charterers at Kharg Island, with the effect that the charterers had become bound to load the cargo there within the laytime fixed by the charter and, if they failed to do so, to pay demurrage to the owners at the contractual rate. In these circumstances, …the owners must be taken in law to have thereby elected not to reject the charterers' nomination, and so to have waived their right to do so or to call for another nomination."[127]

Therefore, it is worth mentioning that refusal by the owner, of a nomination which is uncontractual, is totally different from refusing to proceed to a nominated port under a contractual discretion. Apparently, if the owner waives his right to refuse a nomination on the grounds of unsafety (uncontractual nomination), this doesn't automatically mean that he has prejudiced any relevant contractual right to claim damages for any loss caused by the unsafety of the nominated ports, by the charterers.[128] In each of the two different situations, it is accepted that the remedies provided are different, and waiver on one does not constitute a waiver of the other,[129] as will be explained below.

e) Consequences of nominating an unsafe port

One of the main consequences occasioned by an uncontractual nomination of the charterers, as to the safety of a port, is that the charterers become liable to pay damages to the shipowners, in respect of any loss sustained. The recoverable damages might either relate to physical loss or damage to the vessel, intentional sacrifice, detention losses, or any other loss or expense which flows causally and proximately form the breach, or even indirectly, as was the case in *The Vine.*[130]

A rather common situation is that a vessel gets indefinitely trapped in a port due to the outbreak of a war, the concept of which, has been defined by Professor L.F.L. Oppenheim as "…a contention between two or more States, through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor

[127] Ibid, at p. 400

[128] Thomas Rhidian, Legal issues relating to time charterparties, (1st edition, 2008, Informa Publications) per Prof. H. Bennett at p.76

[129] *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, at p. 393, 397 and 400.

[130] *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2011] 1 Lloyd's Rep. 301, where the charterers were liable for time lost in waiting to berth, even though laytime did not run due to the operation of a laytime exception.

pleases"[131] and in that case charterers will not be able to rely on the doctrine of frustration of the contract, but instead, they will be liable to pay damages for the detention of the ship, as well as hire or demurrage, depending on the type of charter. [132]

Given that, a nomination to a prospectively unsafe port is considered as a breach of the safe port warranty, not only are the charterers exposed to the above-mentioned liabilities, but the owners have the right to refuse compliance with orders that the charterers are not entitled to give. If, however, the owners decide to comply with these unlawful orders voluntarily -despite the fact that the nomination is uncontractual- and the vessel subsequently suffers any type of loss, then it follows that the owners will be entitled to damages, and the ordinary principles of causation and remoteness of damage will apply. Furthermore, some other inferences may also be drawn by the owners' compliance to uncontractual orders. Such inferences might be that they have waived their right to reject a nomination, as already discussed above, or that they have consented to that nomination, so they have become *volenti non fit inuria.*[133]

Nevertheless, the situation is not always that straightforward, and one could suggest that the master has an obligation on his part, to be aware of the dangers when accepting a nomination to an unsafe port, or at least rationally examine the order given to him before he complies with it. Yet, generally speaking, the master has no such obligation, and he is normally entitled to assume that the charterer has acted within its contractual obligation when nominating a port. The acceptance of this approach, has been illustrated in *The Stork*[134] by the words of Morris LJ "But if under the terms of a contract there is the duty on the one party to give an order and on the other party to obey it, it would seem strange doctrine if it were laid down that the latter must, before obeying, take elaborate steps to test the validity of an apparently valid order."

However, this does not signify that the master can avoid all responsibility, by following any instructions given to him regardless of their risk, without critically considering the possible danger involved, and afterwards seeking to claim damages from the charterer, if

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[131] Oppenheim, L.F.L., *International Law: A Treatise, Vol. II: War and Neutrality* (Published in 1906 by Longmans, Green & Co), at par. 54 page 56, where he adds to his definition that "War is a fact recognized, and with regard to many points regulated, but not established, by International Law."

[132] Baughen Simon, *Shipping Law,* (6th edition, 2015, Oxon, Routledge London and New York, Taylor & Francis Group) at p. 206-207

[133] Todd Paul, *Principles of the carriage of goods by sea,* (1st edition, 2016, Oxon, Routledge London and New York, Taylor & Francis Group) at p. 224

[134] *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork)* [1955] 1 Lloyd's Rep. 349 at p. 372.

an unfortunate event of a loss occurs due to the instructions given.[135] This was regarded in *The Kanchenjunga,* where Hobhouse J stated: "Generally speaking a person is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. Even if the breach of contract is clear it is vital to the proper conduct of business that the relevant party should be able if he considers the breach a minor one to proceed without sacrificing his right to be indemnified. But this does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. It is also the rule that an aggrieved party must act reasonably and try to minimize his damage."[136]

In other words, in so far as the master relies on the charterer's warranty of safety, and complies with his orders in a reasonable manner, then his conduct will rarely be regarded as being the effective cause of a damage which may take place, unless it has broken the chain of causation between the charterer's breach of warranty, and the damage. It is held that this may happen by an intervening act or default of the master or crew, which will deprive the charterers, of any liability.[137] So, if the owner's compliance with the charterer's orders does not amount to a *novus actus interveniens*[138], then damages will be recoverable by the ordinary principles of remoteness of damage in contract, notwithstanding that there are certain limits imposed, as emphasized in *The Stork:* "Though there would have been a breach of contract in giving the order to go to an unsafe place, this would not justify the deliberate act of allowing the ship to suffer damage. The owner must not throw their ship away."[139] To that effect, the master's conduct will always be taken into consideration. If accepted that the nature of the unsafety was such that even if the master had competently navigated the vessel with reasonable care and skill, therefore the casualty would not have been avoided, then the charterer's nomination will

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[135] Rogers A, Professor of Maritime Law, *Time Charters 2016-2017 class handouts.*

[136] *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1987] 2 Lloyd's Rep. 509, at p. 515, per Hobhouse J.

[137] See, for example, *The Dagmar* [1968] 2 Lloyd's Rep. 563, per Mocatta J, at p. 571 "If Cape Chat were unsafe for this vessel and if her master and crew were negligent, the difficult question arises whether in law the proper conclusion should be that the casualty was caused by such negligence in the sense that it constituted *a break in the chain of causation* between the unsafety of Cape Chat and the casualty, or whether the unsafety was, notwithstanding what may have been done by those on board or omitted to be done, nevertheless still the direct and effective cause of the casualty." And see also *The Polyglory* and the judgment of Mustill J in *The Mary Lou.*

[138] The owner's conduct would constitute a 'novus actus interveniens' if for example, he ignored an obvious danger and entered a port, sustaining thus a damage to his vessel. But if he discovered the danger after having entered the port, then it is accepted that he could ask the charterer to make an alternative nomination, only in the case of a time charter, not a voyage charter. See eg, London Arbitration 12/00 (LMLN 546)

[139] Ibid 128 at p. 373, per Morris LJ.

remain the operative cause of the loss, and the master's negligence (if any) will -at most- give rise to a defence of *contributory* negligence. [140] In that case, it is accepted that damages may be divided proportionally between the master and the charterer.

In the context of an unsafe port nomination or where the master or the owner have doubts about the safety of the port, it should be added that the master can take some time for consideration and is not obliged to obey the orders instantly. As Millett LJ said in *The Houda* "In my judgment, the authorities establish two propositions of general application: 1) the master's obligation on receipt of an order is not one of instant obedience but of reasonable conduct; and 2) not every delay constitutes a refusal to obey an order; only an unreasonable delay does so."[141]

It has been previously noted that it makes no difference whether the charterer has exercised reasonable care as to the safety of a port or not, when making a nomination. His liability is strict and absolute, so the owner will be entitled to damages, should he suffer a loss. In that case, the owner's knowledge of the unsafety of the port, does not deprive him of the right to claim damages, if he simply complies with the charterer's orders and suffers a loss because of his obedience. However, if the owner has done more than merely comply with the charterer's orders, then he will be considered as having waived his contractual right to claim damages, and all his remedies for breach of a safe port undertaking, will be lost. [142] That was the case in *The Chemical Venture* [143] where the owners accepted an extra war bonus from the charterers, in order to proceed to a dangerous port where they had initially refused to proceed, and after being attacked and sustaining serious damages, they made a claim against charterers for breach of their safe port undertaking, which however did not succeed. The reasoning of the judgment was based on the founding that, at no stage of the voyage or during the relevant communications between owners, master and charterers, were the owners held to have claimed that the port was dangerous or at least to have clearly reserved their rights as to its safety, and this conduct of the owners[144] was

[140] Provided that the safe port clause in the specific charter, generates a due diligence obligation and not a strict liability obligation to the charterer, as described by Prof. H Bennett, in *Legal issues relating to time charterparties,* (1st edition, 2008, Informa Publications) at p.80-81.

[141] *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541 at p. 555.

[142] Hill Christopher, *Maritime Law,* (6th edition, 2003, London-Hong Kong, LLP, Informa Professional) at p. 180-181

[143] *Pearl Carriers Inc v Japan Line Ltd* [1993] 1 Lloyd's Rep. 508

[144] Ibid, at p. 551, as illustrated by Gatehouse J, it was "by a combination of what [the owners] said, and more particularly what they did not say taken in context" that they were regarded as having waived their right to claim damages.

considered as a waiver of their right to assert that the nomination breached the terms of the charterparty.

It is worth mentioning that an order to proceed to a prospectively unsafe port, may even provide shipowners the right to terminate the charter, if charterers persist in the invalid orders. Such a situation arose in *The Gregos,*[145] causing a great deal of debates and contradicting opinions, from the Arbitration Award, all the way up to the House of Lords, as to whether the owner had to carry out a last voyage which was legitimate at the time the order was given, but became illegitimate in the meantime, and whether a claim for wrongful repudiation and damages was soundly based.[146] It was finally held that the charterers had committed a repudiatory breach by giving illegitimate orders to the owners, and persisting on them, so the owners were entitled to damages and additional remuneration, apart from terminating the charter.

On a final note, it is accepted that ordinary expenses and losses of trading and navigation are not recoverable by the owners, even when falling within the compliance with the orders of the charterers. This was illustrated by Lloyd J in *The Aquacharm*[147], as follows: "It is off course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because, had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote."

Similarly, under English Law, courts will rarely impose punitive damages for a breach of charterparty, and only in particular tort cases, in circumstances where there is a damage to the vessel or cargo and "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to plaintiff."[148]

V. Alternatives to the safe port obligation

In time charters, it is very common to insert other clauses apart from the safe port warranty of the charterer, in order to protect the owners' interests in a more efficient

[145] *Torvald Klaveness A/S v Arni Maritime Corp. (The Gregos)* [1992] 2 Lloyd's Rep 40; [1995] 1 Lloyd's Rep 1; [1994] 1 WLR 1465; 4 All ER 998

[146] See also B. J. Davenport, Q.C. and M. White, *Last Voyage Orders-again (The Gregos)* [1994] L.M.C.L.Q. 154.

[147] *Actis Co. v Sanko Steamship Co. (The Aquacharm)* [1980] 2 Lloyd's Rep. 237

[148] See *Rookes v Barnard* [1964] A.C. 1129 at 1226.

way. Whereas a safe port clause may be equally often encountered, both in time and in voyage charterparties, an 'employment and indemnity' clause is incorporated mostly in time charterparties, due to the nature of this type of charter. In time charters, the vessel is commercially placed under the instructions of the charterer, who is entitled to give orders with respect to the 'employment' of the vessel, while on the other hand, matters of navigation of the vessel, remain under the control of the shipowner, through his master and crew. In the absence of an express clause to the same effect, the well-known 'employment & indemnity clause' is said to be implied in any time charterparty under English Law. The rationale behind such an indemnity was expressed by Devlin J in *The Ann Stathatos*, where having reviewed the matter from the owner's point of view, he states: "If he (i.e. the owner) is to surrender his freedom of choice and put his master under the orders of the charterer, there is nothing unreasonable in his stipulating for a complete indemnity in return."[149]

The 'employment and indemnity' clause, has been considered as a "residuary" clause[150], which can be relied upon only if and when any other relevant clause of the charterparty, does not suffice to cover the breach by the charterer. It is not unusual though, that if a claim under the safe port warranty fails, a claim under the 'indemnity' clause may well fail for the same reason, as was the case in both *The Lucille*[151] and *The Greek Fighter*[152], where the safe port claims failed on causation. Once again, the issue raised with regard to this clause, will be a matter of causation, i.e. it will always be necessary to prove that the proximate cause of the loss, was the master's compliance with the charterer's orders, as to the employment of the vessel.

On an alternative note, it is widely accepted that sometimes, charterers attempt to reduce their exposure to risk as regards the safe port warranty, by inserting into the charter a clause that is known as a "due diligence" clause. When the charterers' safe port obligation is restricted to due diligence only, then they are not in breach if they are able to prove that they have made diligent enquiries as to the safety of the port which they have nominated.

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[149] *Royal Greek Government v Minister of Transport (The Ann Stathatos)* [1949] 83 Ll. L. Rep. 228, at p. 234

[150] Mankabady, S, *The Concept of Safe Port,* [1974] 5 JMLC 633-643 at p. 640. The author of this article further explains that, the opinion that the charterer's order to an unsafe port is an order within 'employment' tends to gain more support, because as he believes, the damage sustained by this illegitimate order may be recovered under other clauses. However, the shipowner will not be deprived of his right to rely on the indemnity clause, as an '*ultimum refugium*'.

[151] [1983] 1 Lloyd's Rep. 387, per Bingham J, at p. 395-397

[152] [2006] 1 Lloyd's Rep. Plus 99, per Colman J, at [294]-[309]

This clause is said to apply in the case of political as well as physical dangers, as it was held in *The Chemical Venture.*[153]

Furthermore, it is well established that a port may be unsafe, not only because of physical reasons or the overall set-up of the port, but also due to political reasons, including war and piracy. In that case, the insertion of relevant clauses in the charterparties, appears to be more than necessary, for the protection of all contractual parties. In time charters, especially, war clauses seem an integral part of the charterparty because the nature of the commitment in this case, is of a longer term and also due to the charterer's greater freedom to direct the employment of the vessel, compared to the restrictions he has under a voyage charterparty.

So, before considering other aspects of war clauses, it should be clarified what exactly constitutes a war, legally speaking. Apart from the famous definition of war, provided by Professor L.F.L. Oppenheim as above, Christopher Hill attempts to define the nature of this risk and whether the war has to be formally declared or not. His definition, includes even a war which has not necessarily been declared but is only threatened,[154] a civil war, hostilities, revolutions and terrorist attacks. He characterizes war as a 'frustrating event' which he describes as an event not intended or expected by either of the parties, which causes the contract to evolve in a different way than its original purpose was and to be totally undermined".[155] An outbreak of war, may indeed frustrate the commercial purpose of the adventure, so the war clause operates as a cancelling clause to cover this eventuality.

A war clause, generally, entitles the owner to refuse to proceed to any area which he considers dangerous or of a high risk, or if he consents to go, then the clause enables him to claim form the charterers the cost of an increased war risk insurance which he will have to pay, as well as any related war expenses.[156] In order for a war clause to operate, it must be triggered by some kind of event which is usually the act of refusal of the master to proceed to a port or an area, because he considers it to be dangerous. It has been held by the Court of Appeal though, that the owner's and master's discretion to reject a nomination, thereby contending that the nominated port (or area generally) is of a high

[153] [1993] 1 Lloyd's Rep. 508, per Gatehouse J.
[154] See also the legal definition of 'war' and 'civil war' in the article of Martin D. & Pilkington S., *Sanctions and Political Risk*, MRI (01 Jul) 2011
[155] Hill Christopher, *A frustrating time,* M.R.I. (01 Dec) 2001
[156] Todd Paul, *Principles of the carriage of goods by sea,* (1st edition, 2016, Oxon, Routledge London and New York, Taylor & Francis Group), at p. 229

war risk, should be exercised honestly, in good faith, and not 'arbitrarily, capriciously or unreasonably'.[157]

Moreover, a war risk clause may usually deprive the time charterer of the right to 'off-hire' the vessel, when the cause of the delay is a facet of war, and at this point the issue of the complete or exhaustive code arises, as a second *ratio* which was presented in *The Evia (No. 2)*[158]. In this case, their Lordships decided that the charterers were not in breach of the safe port clause (cl. 2 of the Baltime form) because the war clause (cl. 21) constituted a "complete code" dealing with war risks, it was exhaustive of the owner's rights and therefore overrode the express safe port promise, exonerating thus the charterers, from their liability. This view has not been accepted easily by the majority of arbitrators, judges, and several authors who seem reluctant to extend the second *ratio* beyond the facts of *The Evia (No. 2)* and construe the war clause as "giving charterers a license to send the ship to an unsafe port",[159] merely because they paid an additional war risk premium to the owners.

From another perspective, war risk exception clauses inserted into voyage charterparties, seem to operate differently. Here, the owners are free to cancel the charter, should their vessel be ordered to an endangered war zone, and a distinction should be drawn as to the onus which is now placed on the owners to identify whether the port is safe or not. As D. Powles puts it "no degree of legal sophistry" would be needed for the owners to understand that no liability for a potential breach of the safe port warranty could be imposed on the voyage charterers.[160]

Finally, it should be noted that nowadays, when preparing and drafting time charterparties, shipowners and charterers choose to incorporate more alternative security clauses, related to port security issues and potential risks from piracy. To that effect, the International Ship and Port Facility Security Code (ISPS code) which came into force through the SOLAS convention, in 2004, as a special measure to enhance maritime security, has established five different levels of Security, which help identifying the risk

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[157] This was decided in a case which remains an authority on this matter, i.e. *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star No. 2)* [1993] 1 Lloyd's Rep. 397

[158] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 AC 736, at p. 766 per Lord Roskill "My Lords, this result would no doubt be highly attractive to war risk insurers, but the less fortunate time charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which clause 2 would, apart from clause 21, impose upon them." However, in no other war clause case has it been accepted that the mere payment of premiums, relieves the charterers of liability in respect of risks which have materialized.

[159] Baker, Charles G.C.H, *The safe port/berth obligation and employment and indemnity clauses*, [1988] L.M.C.L.Q. 43-59

[160] Powles David G, *Safe ports and voyage charterparties,* [1987] JBL, Nov, 491-493

or potential hazard which may qualify a port as physically or politically unsafe, so that relevant preventive measures may be adopted. The ISPS Code is considered to be the most revolutionary change brought about by the SOLAS amendments, as it is intended to provide a "standardized consistent framework for evaluating risk and for detecting security threats affecting ships or port facilities used in international trade"[161] but it also imposes significant restrictions in the trading freedom of the vessels.

On the other hand, as far as the threat of piracy is concerned, existing in specific areas of the world, it has been a common practice for the shipowners to refuse to operate their vessels in these 'dangerous' waters. In order to overcome the fear of pirate attacks and facilitate the safe passage of vessels through the dangerous zones, some standard forms of piracy clauses have been issued by organizations such as BIMCO, available for all types of charterparties[162], in order to be uniformly applied and accepted. These clauses, impose certain restrictions on the shipowner's right to avoid approaching to a port which he or the master considers unsafe because of a possibility to be attacked. Furthermore, the war risk clauses operate in an objective way, and require this discretion to be exercised reasonably, within a real prospective risk and that the final judgment is based on careful and realistic consideration of the factual surroundings.[163]

Additionally, as regards insurance, piracy is normally treated as a marine risk by insurers, although payment of ransom is not covered, save for the situation where ransom is paid by owners, so it may be covered by general average.[164] Subsequently, appropriate insurance cover matched to the above clauses is more likely to make contractual arrangements equally attractive to all parties involved, both to charterers wishing to trade in these 'high risk' areas, and to shipowners having an increased necessity to protect their relevant interests.

VI. "The Ocean Victory"

Ever since the First Instance Court decision of *The Ocean Victory* was delivered by Teare J, it has provoked thorough discussions and has played a significant role in formulating

[161] Soyer B. & Williams R., *Potential legal ramifications of the international Ship and Port Facility Security (ISPS) Code on Maritime Law* [2005] L.M.C.L.Q. 515-553
[162] Such as BIMCO's piracy clauses for single voyage charterparties, piracy clauses for consecutive voyage charterparties, and Piracy Clauses for Time charterparties.
[163] Ellevsen A., *A contractual view on piracy,* S.T.L (23 Jan) 2009
[164] Ibid.

the legal opinions related to safe port issues and especially, what constitutes a breach of the safe port clause in charterparties and how could an 'abnormal occurrence' be defined.

The trial judge held that the time charters who had ordered the vessel *Ocean Victory* to the port of Kashima in Japan, were in breach of the safe port clause, and the breach, along with a series of other events, finally led to the vessel becoming a total loss. Specifically, the casualty occurred as a result of a combination of 'long waves' and 'very high northerly winds', not so rare in isolation, as described by Todd, but "very rare in combination." Overall, this judgment was observed to have been very 'pro-owner'.[165]

Subsequently, the charterers appealed and the Court of Appeal set aside the judgment of Teare J and held that there was no breach of the safe port warranty on the part of the charterers, providing a different construction as to the safe port clause, both on the issue of its breach (definition of 'abnormal occurrence') and on the complete code argument. Permission was granted to appeal to the Supreme Court.

The eagerly anticipated -by the legal world- decision of the Supreme Court, was finally issued, a few months ago. All five Law Lords unanimously held that the appeal on the safe port issue should be dismissed, the port of Kashima was indeed rendered safe, and that the Court of Appeal had adopted a correct approach regarding the assessment of safety of the port. It should be noted that, amongst the issues decided in this case, our analysis is mostly concerned with the matters of safety and that of 'abnormal occurrence'.

The Supreme Court provided the proper construction of this phrase, which is said to be something far from a term of art.[166] The test which the Court used, was not whether the events which caused the casualty, could have been reasonably foreseen, but whether these events could be considered as something well removed from the normal situation within the port. An event which is theoretically foreseeable, does not necessarily mean it is a 'normal characteristic' of the port, but it all amounts to a question of fact.[167] Lord Clarke of Stone-cum-Ebony agreed with this realistic approach which the Court of Appeal adopted, by admitting in his speech that what needs to be clarified is "…the essentially factual question whether the event giving rise to the particular casualty is to be characterized as an "abnormal occurrence" or as resulting from some "normal" characteristic of the particular port at the particular time of year. The Court of Appeal,

[165] Todd, P, (*Case and Comment) Safe Port Issues, "The Ocean Victory"* [2014] L.M.C.L.Q. 1-12
[166] Howard, Mark QC & others, *"The Ocean Victory-Supreme Court",* Lloyd's Maritime Law Newsletter (L.M.L.N.) 26 May 17
[167] Liu, Edward Yang, *"The Ocean Victory"*, Shipping & Trade Law (S.T.L.) 6 Jun 17

emphasized the word "normal" in the term "normal characteristic"…"[168] In the same regard, Lord Clarke approved and followed the well-known definition of "abnormal occurrence" provided by Lord Mustill in *The Mary Lou,*[169] demonstrating thus, to the contentment of Sir Richard Aikens,[170] that Mustill J's description of what constitutes an abnormal occurrence, does indeed remain good law, 35 years after his judgment was delivered![171]

To that effect, the Supreme Court, examined very thoroughly and evaluated all the evidence which the Court of Appeal had found, and which led to its decision that, even though the two different meteorological features of the port, i.e. "long waves" and "gale force winds" were occasionally encountered in the Port of Kashima, however, it was the combination of both that was very rare and could be considered as 'abnormal'. There was no evidence in the port's history that these events or characteristics had ever coincided again in such a simultaneous way, or had ever caused any vessel to be trapped in the same way, before. In other words, the correct approach as to the safety of the port where loss results from concurrent causes, was accepted to be the "unitary question" adopted by the Court of Appeal and upheld by the Supreme Court, rather than Teare J's approach of dividing the concurrent causes in its constituent parts, and examining each one separately and not as a whole. As Todd comments "…the extremely rare combination, of already fairly rare events, could not properly be regarded as a normal characteristic of the port. Each event in isolation might be, but each event in isolation would not have led to the casualty."[172]

Summing up, the Supreme Court decision in *The Ocean Victory* has attracted well-deserved attention. The main reason for that is because it has introduced certain novelties, which were warmly welcomed especially by charterers, who will be able to rely on the 'abnormal occurrence' defence in the future. Undoubtedly, there are certain other

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[168] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; [2017] 1 W.L.R. 1793, *per* Lord Clarke at [32].

[169] *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep. 272

[170] In his article *Lord Mustill and Maritime Law* [2017] L.M.C.L.Q. 349-359, Sir Richard Aikens pays tribute to an outstanding maritime and commercial lawyer, but also advocate, judge and scholar, Lord Mustill, who he had the pleasure of knowing and very much appreciating for his whole contribution and influence on Maritime Law.

[171] Aikens, Richard (Sir), *(Case and Comment) Safe port undertakings, "Abnormal Occurrences" and Insurance Clauses in Demise Charters, "The Ocean Victory",* [2017] L.M.C.L.Q. 467-473. In this article, Aikens briefly presents the description of what constitutes an 'abnormal occurrence' which Mustill J (as he then was) gave in *The Mary Lou,* and has never been doubted, compared to the 'heretical' views which he expressed in the same case, regarding -erroneously- the nature of the safe port undertaking as a continuing obligation, which was criticised and reversed by Lord Diplock in *The Evia (No. 2)* [1983] 1 A.C. 736 at p.750

[172] Todd, P, *Case and Comment, Safe Port Issues "The Ocean Victory"* [2015] L.M.C.L.Q. 265-271

important issues involved in this decision as well, which have not been examined on this analysis, as they are of a different nature,[173] such as charterers' limitation of liability matters or possible waiver of subrogation of hull insurers under many charterparties which could make contractual claims against charterers more difficult, under the safe port warranty.[174] The overall impact of this case is indisputably great, however, the precise definition of the 'abnormal occurrence' exception, still remains an unsolved matter and even if it were not, it is unlikely to provide answers to the real issues concerning liability for port unsafety.[175]

VII. Commercial Interrelation Issues

In the modern law governing the interpretation of time charters, such as any other written contract, it is essential to consider some terms in a wider sense, under the context of commercial practice and business efficacy, in other words to apply the concept of "commercial common sense" (CCS). The notion of CCS in a broad sense, is considered to be a very useful criterion, a tool which could facilitate the interpretation of the -sometimes- complex issue of safe port warranties, especially when there is no such express clause in the time charter, and the question arises whether it should be implied or not. Moreover, it is noted that the construction of whether a port is safe or unsafe, will always depend upon the factual matrix as well, and this element constitutes a significant factor which operates in combination and alongside the notion of "commercial common sense", for the achievement of the best possible interpretation of a contract. However, attention should be drawn to judges, not to give undue importance or overemphasize this notion, whose utility should be limited in certain aspects.[176]

The meaning of this concept may be better understood by reference to certain cases where Courts have intended to make relevant interpretations. In *The Rainy Sky* the Supreme Court held that: "If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the

[173] See further the article of Ozlem Gurses "*Subrogation against a contractual beneficiary: a new limitation to insurers' subrogation?"* [2017] JBL, 7, 557-575, which offers a wide understanding of the complex issues of co-insurance and subrogation waiver clauses.
[174] *Rourke Andrew, of Clyde & Co LLP, Victory for charterers as Court of Appeal rules on safe port warranty,* MRI, (20 Aug) 2015.
[175] Kverndal Simon, QC, *"The Ocean Victory and the test of Abnormal Occurrence",* presented in a Conference organized by London Shipping Law Centre, Maritime Business Forum, with title "Unsafe Ports", held in London, UK, on 15/4/2015.
[176] Andrews, Neil, *Interpretation of Contracts and "Commercial Common Sense": do not overplay this useful criterion,* Cambridge Law Journal [2017] CLJ 76 (1), 36-62

other."[177] Moreover, Lord Neuberger in *Arnold v Britton* placed the concept of CCS amongst the few factors which enhance one of the leading principles of English contract law, that of "objectivity": "When interpreting a written contract, the Court is concerned to identify… 'what a reasonable person having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean'… And it does so by focusing on the meaning of the relevant words….in their documentary, factual and commercial context."[178] It should be noted, that even though this judgment refers to residential leases, however it offers an invaluable guidance on how the concept of "commercial common sense" relates to the interpretation of all types of contracts and charterparties[179].

One of the several manifestations of "commercial common sense" is about trade practices and market assumptions, a field more closely related to the safe port clauses which are of our concern.[180] This demonstration takes place in *The Evia (No. 2)* where the court, being aware of the commercial usage of the safe port warranties in time charterparties, proceeded directly to defining the nature of this commercially significant type of obligation, as not an absolute and continuing promise, providing thus an authoritative interpretation of its meaning: "…I venture to think this is plain as a matter of construction. But when one looks at the authorities one sees that they strongly support the view which I have just expressed."[181]

Moreover, in the factual matrix of commercial shipping contracts, the use of trade practices or customs are commonly encountered, and their main purpose is to provide clarifications or alternative methods of acting in commercial practice. Where the meaning of a contract is clear, custom may not be introduced in support of an alternative meaning.[182] Apparently, customs should neither be regarded as a source of law, nor as a justification for interpreting contractual terms in a very broad sense, which could effectively mean that a new provision, not expressly agreed by the parties, is added to the contract.[183] In a situation, for example, where there is no express safe port clause in a time

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[177] *Rainy Sky SA v Kookmin Bank,* [2011] UKSC 50; [2011] 1 W.L.R. 2900, at [21] per Lord Clarke.
[178] *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [15]
[179] John de Waal QC, *Arnold v Britton and commercial common sense,* published 12/10/2015 in http://www.hardwicke.co.uk/insights/articles/arnold-v-britton-and-commercial-common-sense
[180] Ibid 169
[181] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia No.2)* [1983] 1 A.C. 736 (HL) at p. 757.
[182] *Reardon Smith Line v Black Sea and Baltic General Insurance Co* [1939] A.C. 562 (HL), at 578 per Lord Wright.
[183] Thomas, Rhidian, "*Custom of the port" as a category of commercial custom* [2016] L.M.C.L.Q. 436-450

charterparty and a casualty occurs, subsequently a dispute arises between shipowners and charterers as to the safety of the port. It could be suggested that the owners will impose liability to the charterers, by enforcing the implication of such a warranty but on this respect, Dr Mandaraka Sheppard suggests[184] that when any dispute of this kind reaches to court, the courts should apply "a purposive interpretation of contracts, and not a literal one, especially when the contract is poorly drafted."

Undeniably, appropriate contractual interpretation has evolved into a matter of importance and to that effect, the factual matrix was the subject matter of *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*[185] in which the House of Lords held that "there are no conceptual limits to the factual matrix: the factual matrix includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]".

On a final point, it is worth mentioning that the dichotomy between the two theories of formalism and contextualism which is generated upon the interpretation of a contract, as examined by Zhong Xing Tan, proves insufficient in practice. When the Courts reach the point where they have to choose between two interpretations surrounding a document, it cannot be accepted that what they choose signifies that they support either of the two theories. Their choice should be considered as aiming to preserve the contractual coherence, i.e. to make the most coherent sense of the contractual terms, either express or implied, and by bearing in mind the available context, reach the true intentions of the contractual parties, probably hidden behind words.[186]

VIII. Conclusion

Summing up, it is accepted that the development of the safe port doctrine in English Law, has not been an easy task and has passed through some remarkable skirmishes in the recent years. Charterers on the one hand, have always strived to protect their right to direct the employment of the vessel and take advantage of the income that may be generated, in other words 'to exploit the vessel's earning capacity'[187], their rights being restricted, therefore, by certain limitations imposed by other express or implied clauses

[184] Dr. Aleka Mandaraka-Sheppard, *The English Courts Apply Business Common Sense to the Interpretation of Commercial Contracts*, JIML 17 [2011] 5, 333-336
[185] [1998] 1 All E.R. 98 (H.L.)
[186] Tan, Zhong Xing, *Beyond the real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation,* Modern Law Review (2016) 79 (4) MLR 623-654
[187] By the words of Lord Hobhouse in *The Hill Harmony,* [2001] 1 AC 638, at p. 652

of the charterparty, particularly the safe port clause. Their freedom of choice in determining the ports to which ships may safely go, is also balanced by the constant risk of being in breach of their safe port undertaking. This breach could be considered as 'the price to pay'[188] for charterers who nominate an unsafe port, due to their ignorance of the port's shortcomings or due to other factors, and it operates as the *logical corollary*[189] towards a series of opposing rights and valuable interests of the shipowners, which also need to be safeguarded.

As a result of these contradictions, the use of the safe port clause has evolved, and it may be suggested that a 'semblance of equity'[190], in other words a balance between fairness and flexibility, has been established between shipowners and charterers, who may both enjoy the effects of such a needful clause, in their everyday shipping practice. This equity has been very expressly illustrated by M. Wagener: "Safety is a relative concept. Both charterer and shipowner are engaged in an enterprise to earn profit in return for taking risks."[191] Safety of both the vessel and crew, is of paramount importance to the shipowner and the charterer cannot pursue financial interest at the expense of this safety and thereby expose the shipowner to financial loss.[192] As Roskill LJ has stated, "…this concept should be simple, but unfortunately its very simplicity has led to a multitude of decisions which at one time raised considerable doubt as to the exact meaning and extent of the promise of safety."[193] It is hoped that the doctrine of safe port will be made simpler, as it was once intended to be.[194]

From their side, courts and jurists seem to have contributed to the significant degree of uniformity, which is nowadays observed in law, and which is attributable also to the wide adoption of standard form contracts and to appropriate drafting of these clauses in charterparties.[195] Moreover, as the safe port promise is considered mostly as a contractual and not a legal concept, courts are correct in following a more factual approach, which is reconciled with the shipping industry requirements and this is achieved by making the

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[188] Cadwallader, F.J.J., *An Englishman's Safe Port,* An, 8 San Diego Law Review, 639-652 (1971)
[189] Thomas R., *Legal issues relating to time charterparties,* (1st edition, 2008, Informa Publications) at p. 47.
[190] Ibid.
[191] Wagener, M., *A relative concept,* M.R.I. (Sep.) 2008
[192] Yim, Choi Wai Bridget, *Safe port promise by charterers: rethinking outstanding complications,* 30 Austl. & N.Z. Mar L.J. 1, 12 [2016]
[193] *The Hermine,* [1979] 1 Lloyd's Rep. 212, at 214 *per* Roskill LJ
[194] Ibid 191
[195] Thomas, Rhidian, *The Safe Port Promise of charterers from the perspective of the English common law,* (2006) The Singapore Academy of Law Journal, 18, 597-628

relevant construction and interpretation of the contract terms, bearing in mind the parties' deepest intentions and respecting their written agreement. After all, business efficacy may be better achieved when the factual matrix is considered and when the terms of the charterparties are construed within the context of commercial common sense. From that respect, the courts' contribution is invaluable.

Subsequently, by adopting a mutually accepted interpretation of the contract, which remains the keystone around which any safety dispute should be negotiated and settled, along with the appropriate allocation of risk amongst the stakeholders, one may observe that safe pot clauses will never cease to be *a conditio sine qua non* for time charterparties, an indispensable tool which can be expected to always produce fair results, for the benefit of safe transportation and trade and -ultimately- for the perpetual circular of goods by sea.

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