



Centre for Maritime Law  
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NUS Centre for Maritime Law Working Paper 17/02  
NUS Working Paper 2017/002

## **THE SAFE PORT IN MARITIME LAW: DECADE OF CERTAINTY OR MUDDIER WATERS?**

Professor Stephen Girvin  
MPA Professor of Maritime Law, Director, Centre for Maritime Law (CML)

**[Uploaded March 2017]**

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# The 'Safe Port' in Maritime Law: Decade of Certainty or Muddier Waters?

*Professor Stephen Girvin\**

The safe port warranty is fundamental to charterparties. The principles of law have been developed by the courts over a period of 150 years or so, but there have only been five decisions in the past decade, each of which is considered in this paper, including *The Ocean Victory*, in which a judgment by the Supreme Court of the United Kingdom is currently awaited. The decisions are considered individually, each of them on different aspects of the safe port warranty. The paper concludes that, with the exception of *The Ocean Victory*, all of the decisions have contributed to certainty in this area of the law.

Keywords: Charterparties, safe ports, implied/express obligation, named or nominated ports, abnormal occurrences.

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\* MPA Professor of Maritime Law, Director, Centre for Maritime Law (CML), Faculty of Law, National University of Singapore. This paper was the subject of an inaugural public lecture as MPA Professor of Maritime Law, held at the Parkroyal on Pickering, Singapore, on 22 April 2016 and revised March 2017.

## 1 Introduction

It is hornbook law,<sup>1</sup> as every maritime law student knows, that whenever a charterer has the right to nominate a port pursuant to an agreed charterparty, it warrants<sup>2</sup> absolutely<sup>3</sup> that the port is 'safe'.<sup>4</sup> Thirty years ago, Charles Baker<sup>5</sup> and Paul David queried whether 'such a question ... [required] lengthy legal analysis'<sup>6</sup> and suggested that 'lawyers recognise a good thing when they see it and have not been slow in finding any number of ways of complicating what ought to be a mainly factual exercise'.<sup>7</sup> While safe port disputes are commonly resolved by arbitrators,<sup>8</sup> four cases have, over the years, been appealed to the highest courts, with two reported appeals to the (former) Judicial Committee of the House of Lords, and one appeal to the Privy Council.<sup>9</sup> Judgment in a fourth appeal, to the Supreme Court of the United Kingdom, is awaited.<sup>10</sup> We should not, however, be surprised that a relatively small number of cases are appealed to the courts, especially beyond the High Court. As with all charterparties which typically incorporate arbitration clauses, there is a

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<sup>1</sup> Standard accounts may be found in *Scrutton on Charterparties and Bills of Lading* (23rd edn Sweet & Maxwell 2015) art 85; *Time Charters* (7th edn, Informa 2014) ch 10; *Voyage Charters* (4th edn, Informa 2014) para 5.30; *Carver on Charterparties* (Sweet & Maxwell 2017) (forthcoming) para 4-002ff. See also Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) para 21.23ff.

<sup>2</sup> Such an obligation generates a promissory obligation, sounding in damages, where there is a breach: see *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork)* [1955] 2 QB 68, 101-103; *Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* [1956] AC 266 (PC); *Transoceanic Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep 272, 277; *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia (No 2))* [1983] 1 AC 736.

<sup>3</sup> *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 52 Ll L Rep 141, 148; *Unitramp v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep 37, 47; London Arbitration 4/91, (1991) 299 LMLN 3. Cf, however, those tanker charterparty clauses which set a standard of 'due diligence' ('Charterers shall exercise due diligence to order the vessel only to ports and berths which are safe for the vessel ...'), eg, BPTIME 3, cl 17.1; BPVoy4, cl 5.1; Shelltime 4, cl 4(c).

<sup>4</sup> The concept of 'safety' is not, however, necessarily an absolute one: *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1992] 2 Lloyd's Rep 545, 551; *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2015] EWCA Civ 16, [2015] 1 Lloyd's Rep 381 [52].

<sup>5</sup> See also Charles GCH Baker, 'The safe port/berth obligation and employment and indemnity clauses' [1988] LMCLQ 43.

<sup>6</sup> Charles GCH Baker and Paul David, 'The politically unsafe port' [1986] LMCLQ 112. See, eg, the first edition of TE Scrutton, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (William Clowes & Son Ltd 1886) art 34, which consists of only three sentences and three cases.

<sup>7</sup> [1986] LMCLQ 112. The authors were writing about the, then recent, case of *The Evia (No 2)* (n 2).

<sup>8</sup> There are approximately ten reported arbitrations in Lloyd's Maritime Law Newsletter (LMLN).

<sup>9</sup> *The Houston City* (n 2); *The Evia (No 2)* (n 2); *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391.

<sup>10</sup> See *The Ocean Victory* (n 4), discussed below, text to n 124.

restricted right of appeal from arbitration awards.<sup>11</sup> A further reason, however, is that Clubs regard the pursuit and defence of unsafe disputes as notoriously difficult and invariably expensive to run<sup>12</sup> because so much turns on the evidence, documentary, visual, and oral.<sup>13</sup>

My purpose in this inaugural lecture is concerned with a consideration of the case law developments<sup>14</sup> and the relevant legal context arising during the course of the past decade.<sup>15</sup> I shall address the question whether these developments have introduced greater certainty in the law relating to safe ports or have succeeded in muddying the waters.

## 2 Commercial background

Why does the safe port warranty matter and why are commercial parties and their insurers prepared to spend so much money taking points to arbitration and, where available,<sup>16</sup> on appeal to the courts? The first reason is a well-worn truism: time is money.<sup>17</sup> Ships are very expensive items of equipment, often running to multiple millions of dollars to manufacture;<sup>18</sup> any factor which inhibits the ability of the shipowner to earn revenue on that investment can be ruinously expensive. Ship mortgages have to be serviced, as do ongoing crewing costs and other potentially expensive items such as bunkers<sup>19</sup> and port charges. As Lord Mustill explained in *The Gregos*:<sup>20</sup>

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<sup>11</sup> In Singapore, arbitration awards are final: International Arbitration Act, cap 143A, s 19B. For the different position in England and Wales (and also Northern Ireland), however, see the Arbitration Act 1996, c 23, s 69 (appeal on point of law). See also s 67 (challenges to awards: substantive jurisdiction) and s 68 (challenging the award: serious irregularity).

<sup>12</sup> This is borne out by *The Ocean Victory* (n 4), discussed below.

<sup>13</sup> See *The Law Relating to Safe Ports* (UK Defence Club), 19. <[http://ukdefence.com/images/assets/documents/UKDC\\_UnsafePorts\\_web.pdf](http://ukdefence.com/images/assets/documents/UKDC_UnsafePorts_web.pdf)> accessed 10 March 2017.

<sup>14</sup> All of the cases are English cases. There are no Singaporean cases.

<sup>15</sup> Ie, the period from 2006 onwards.

<sup>16</sup> See n 11.

<sup>17</sup> The idiom is usually attributed to Benjamin Franklin, *Advice to a Young Tradesman* (1748). For the charterparty context, see, eg, *Torvald Klaveness A/S v Arni Maritime Corporation (The Gregos)* [1994] 1 WLR 1465, 1468; *AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2010] EWCA Civ 713, [2010] 2 Lloyd's Rep 257 [1].

<sup>18</sup> As noted by Professor FJJ Cadwallader, they are a shipowner's 'most cherished possession': 'An Englishman's Safe Port' (1971) 8 San Diego LR 639.

<sup>19</sup> But not in the current markets.

<sup>20</sup> (n 17) 1468.

A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements must be made for the shipment and receipt of the cargo, or for the performance of obligations under subcontracts. These demands encourage the planning and performance of voyages to the tightest of margins. Yet even today ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree, or by the intervention of wholly adventitious events.

The second reason is that it is in the nature of some kinds of charterparties that the shipowner hands over the commercial use of the vessel to the charterer. Lord Bingham, speaking of time chartering in *The Hill Harmony*,<sup>21</sup> where ownership and possession of the vessel, which remain in the owner, are separated from use of the vessel, explained that:

As one would expect, the safety and security of the vessel, her crew and her cargo are treated as matters of the highest importance. The charterers may only (under the present charter) send the vessel to safe berths, safe ports and safe anchorages, always afloat and always within Institute Warranty Limits, and the parties in this case agreed a long list of further exclusions. The owners are to remain responsible for the navigation of the vessel.

The shipowner may, therefore, find that its vessel has been ordered to a port which is strike-bound, ice-bound, or congested, or may have to wait for the tide to turn in order to reach the berth designated by the charterer. All of these incidents, and others, cause delay. Shipowners look to fix their vessels for employments ahead of existing contractual undertakings; the inability to deliver (or re-deliver) on time can see charterers and other commercial parties taking the news of late delivery as a repudiatory breach of the shipowners' obligations under the charterparty and looking to fix on better terms with other shipowners.<sup>22</sup>

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<sup>21</sup> *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638, 641 (see also Lord Hobhouse at 652); *Cascade Shipping Inc v Eka Jaya Agencies (S) Pte Ltd* [1993] SGCA 7, [1993] 1 SLR(R) 187 [46].

<sup>22</sup> For a classic example, following a collision, see *The Vicky I* [2008] EWCA Civ 101, [2008] 2 Lloyd's Rep 45.

The third reason follows from the second; no two ports are the same. In 1768, Matthew Bacon<sup>23</sup> wrote that a port was<sup>24</sup>

*quid aggregatum*, consisting of something that is natural, viz. an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade: something that is artificial, as keys,<sup>25</sup> and wharfs, and cranes, and warehouses, and houses of common receipt: and something that is civil, viz. privileges and franchises, viz. *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

Several hundred years later, however, ports<sup>26</sup> have proliferated worldwide and become ever more sophisticated as trading and the ships carrying cargoes have evolved.<sup>27</sup> Writing in 1974, John M Reynolds remarked that:<sup>28</sup>

Since the end of the 1939-45 world war, great changes have been taking place in ports throughout the world. There have been improvements and modernizations, some caused by greater mechanization, some by the fact that the size of the average vessel has greatly increased. There are still coasters and other specialized craft, of course, but most ships encountered are well beyond the war-time 'Liberty ship' in size, as well as in speed and other particulars. And, of course, there is an ever increasing number of 'monsters' — particularly tankers — which can carry 15 or more times as much cargo as a respectable size vessel of not too many years ago. In addition, new ports are frequently appearing on stretches of coast where there was no trace of a major port not too many years ago.

Nowadays, a 'port' can be many different things. It can range all the way from an elaborate dock complex well up a sheltered harbour or estuary, to a spindly appearing structure extending offshore to deeper water with the cargo carried to and fro by

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<sup>23</sup> Quoting Sir Matthew Hale. See, generally, MJ Pritchard and DEC Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society 1993).

<sup>24</sup> 'Prerogative' B(5) in *A New Abridgement of the Law* (London, A Strahan 1768).

<sup>25</sup> le, quays.

<sup>26</sup> Generally as to the commercial and other meanings of port in voyage chartering, see Simon Baughen, *Summerskill on Laytime* (5th edn, Sweet & Maxwell 2013) para 4-12.

<sup>27</sup> Generally as to ships and their cargoes, see Girvin (n 1) ch 1.

<sup>28</sup> 'The Concept of Safe Ports' [1974] LMCLQ 179.

conveyor belt or pipeline, to a large monobuoy for tankers well offshore and connected by a submarine pipeline, even to an open roadstead such as some mahogany ports where the question of 'surf days' is usually covered in the charter-party.

It is, therefore, unsurprising that when fixing their vessels with charterers, shipowners have looked to protect their investment in sophisticated ways, sometimes in more than one clause of their charterparty agreements. As Roskill LJ explained in *The Hermine*,<sup>29</sup> the purpose of these clauses

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 shipowners' 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.

### 3 Historical background

The first known reported case on safe ports<sup>30</sup> was *Ogden v Graham* in 1861.<sup>31</sup> The claimant was the owner of the barque *Respigadera*,<sup>32</sup> which it had voyage chartered to Liverpool merchants to carry a full and complete cargo of iron and coal loaded at Swansea bound for 'a safe port in Chili (with leave to call at Valparaiso)'. After calling at Valparaiso, the port of Carrisal Bajo<sup>33</sup> was named as the final discharging port. That port had, however, been closed on the orders of the Chilian government<sup>34</sup> and the *Respigadera* was detained in Valparaiso for 38 days until Carrisal Bajo was again open for business. Was the charterer liable to the shipowner in damages for their failure to send the vessel to a safe port? The two judges

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<sup>29</sup> *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep 212 (CA) 214.

<sup>30</sup> There are older authorities which address the related wording in the so-called 'near' clause ('so near thereunto as she may safely get'): see *Shield v Wilkins* (1850) 5 Exch 304; *Schilizzi v Derry* (1855) 4 E & B 873. See also *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639, discussed below, text to n 49.

<sup>31</sup> (1861) 1 B & S 773. See also *Duncan v Köster (The Teutonia)* (1872) LR 4 PC 171, 181-182.

<sup>32</sup> The subject of an oil painting, 'The Barque *Respigadera* of Liverpool, Calling for a Pilot off the South Stack, Holyhead, North Wales' by Francis Hustwick (1797-1865), a significant contributor to the Liverpool School of Marine Artists.

<sup>33</sup> A harbour in the Atacama Region, Chile.

<sup>34</sup> This was because the district in which the port was located was in a state of rebellion: *Ogden v Graham* (n 31) 777.

hearing the case in the Queen's Bench, Sir William Wightman and Sir Colin Blackburn, held that the charterer was in breach. Blackburn J stated that:<sup>35</sup>

Now, in the absence of all authority, I think that, on the construction of this charter-party, the charterers are bound to name a port which, at the time they name it, is in such a condition that the master can safely take his ship into it: but, if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charter-party. ... [The charterers] named a port which had been a safe port, and would probably thereafter become a safe port; but if, at the time they named it, it was a port into which the ship-owner could not take his ship and earn his freight, it seems to me that they have not complied with the conditions in the charter-party that they should name a safe port.

The case is uniquely important because the court recognised that there was an 'absence of all authority'.<sup>36</sup> While not all aspects of the case would, today, go unchallenged,<sup>37</sup> the case is nevertheless authoritative in laying down that the safety of a port imposes an obligation on the charterers to name a port into which the master can safely take the ship.<sup>38</sup> Later authority has added that the port must also be safe for the vessel to leave.<sup>39</sup>

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<sup>35</sup> Ibid 781-782.

<sup>36</sup> Ibid.

<sup>37</sup> For example, the statement that the port must be safe at the time that the charterers name it: see now *The Evia (No 2)* (n 2) 757, where Lord Roskill stated that 'The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question and in my view means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave.'

<sup>38</sup> *Ogden v Graham* (n 31) 781.

<sup>39</sup> *Islander Shipping Enterprises SA v Empresa Maritima del Estado SA (The Khian Sea)* [1979] 1 Lloyd's Rep 545.

## 4 A classic statement of the law

The classic modern statement<sup>40</sup> of what constitutes a safe port is the dictum by Sir Frederick Sellers (Sellers LJ) in *The Eastern City*:<sup>41</sup>

If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach 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.

That definition is invariably regarded as the starting point for any consideration of safe ports and berths,<sup>42</sup> but we should also keep in mind Sir Michael Mustill's cautionary remark that it should not be read as conveying that all unsafe port cases can now be solved simply by referring to it.<sup>43</sup> Indeed, whether a port or berth is safe will in each case be 'a question of fact and a question of degree',<sup>44</sup> determined by reference to the particular ship, whether laden or in ballast.

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<sup>40</sup> See, eg, *The Hermine* (n 29) 214; *The Evia (No 2)* (n 2) 749; *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2013] EWHC 2199 (Comm), [2014] 1 Lloyd's Rep 59 [97].

<sup>41</sup> *Leeds Shipping Co Ltd v Société Française Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127, 131, adopting and expanding the wording of Morris LJ in *The Stork* (n 2) 105: 'There can, I think, be no question as to the meaning of the word "safe" when used in the contexts now being considered. A place will not be safe unless in the relevant period of time the particular ship can reach it, remain in it, and return from it, without, in the absence of some abnormal occurrence, being exposed to danger.' Sellers LJ's dictum is referred to in *The Ocean Victory* (n 40) [100]; *The Ocean Victory* (n 4) [14], discussed below, text to n 124.

<sup>42</sup> The statement is usually manipulated so that it applies also to berths: see *Prekookeanska Plovidba v Felstar Shipping Corp (The Carnival)* [1992] 1 Lloyd's Rep 449.

<sup>43</sup> *The Mary Lou* (n 2), 276.

<sup>44</sup> *Palace Shipping Co Ltd v Gans Steamship Line* [1916] 1 KB 138, 141 (Sankey J); *Brostrom & Son v Dreyfus & Co* (1932) 44 Ll L Rep 136, 137. In some cases, a question of law might also arise: *Bornholm (Owners) v Exporthleb, Moscow* (1937) 58 Ll L Rep 59, 60.

## 5 Implied and express obligations

It is usual to find an express 'safe port' clause in standard form voyage charterparties<sup>45</sup> and time charterparties.<sup>46</sup> Certain earlier authorities suggested that such an obligation should be implied, an example being the following statement by Devlin J in *The Stork*:<sup>47</sup>

There must, therefore, be an obligation to nominate at least one loading place, and there must be implicit in that some condition about safety to prevent the making of a derisory nomination. The obligation on the ship to proceed to a loading place 'or so near thereunto as she may safely get' suggests strongly that the loading place itself must be safe. And when one finds the obligation on the charterers to nominate a loading place of some sort amplified by an express right to nominate one or two safe loading places, it does not require much effort of construction to conclude that any loading place which is nominated must be safe.

That said, the courts in subsequent cases have usually refused to imply such an obligation, in the absence of such an express clause, save where necessary for the business efficacy of the charterparty. In *The APJ Priti*, in the context of an undertaking as to '1/2 safe berths' at certain named Iranian ports, Bingham LJ stated that there was<sup>48</sup>

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.

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<sup>45</sup> Such clauses are found quite commonly in voyage chartering standard forms: See, eg, Amwhelsh 93, cl 27.3 (line 323); Asbatankvoy, cl 9; Norgrain 89, cl 1 (line 14); Synacomex 2000, cl 2 (line 12).

<sup>46</sup> See, eg, Balttime 1939, cl 2; NYPE 1946, line 27; NYPE 93, cl 5; NYPE 2015, cl 1(b); Shelltime 4, cl 4(c).

<sup>47</sup> (n 2) 72. See also *Brostrom & Son v Dreyfus & Co* (n 44) 138; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1960] 1 QB 439, 488; *Eurico SpA v Phillipp Bros (The Epaphus)* [1986] 2 Lloyd's Rep 387, 391.

<sup>48</sup> *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep 37 (CA) 42.

My first case, *The Reborn*,<sup>49</sup> returned to this issue. The charterparty in question was on amended Gencon terms for the carriage of a cargo of cement in bulk from Chekka to Algiers. There was no express undertaking that either the port or loading berth would be safe. Indeed, somewhat unusually, a modified clause<sup>50</sup> struck out express Gencon wording as to safety:

The said Vessel shall ... proceed to the loading port(s) or place(s) stated ... or so near thereto as she may ~~safely~~ get and lie always afloat ... and being so loaded the Vessel shall proceed to the discharging port(s) or place(s) stated ... or so near thereto as she may safely get and lie always afloat, and there deliver the cargo.

However, an added clause<sup>51</sup> provided that the shipowner warranted that the vessel on arrival at loading and discharging ports would 'comply with all restrictions whatsoever of the said ports (as applicable at relevant time) including their anchorages, berths and approaches'.<sup>52</sup>

The shipowner sought compensation as a result of damage suffered to the *Reborn's* hull after penetration by a hidden underwater projection at the loading berth.<sup>53</sup> It was argued that the charterparty was subject to an implied term to select and nominate, out of any number of potential berths, a berth that would be prospectively safe. Three arbitrators<sup>54</sup> rejected this argument and this was upheld by the High Court<sup>55</sup> and also a unanimous Court of Appeal.<sup>56</sup>

After reviewing the developing law relating to implied terms,<sup>57</sup> Lord Clarke of Stone-cum-Ebony expressly agreed with Thomas J in *The Aegean Sea* that 'whether or not there is an implied warranty of safety will depend upon the normal contractual rules for the implication

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<sup>49</sup> (n 30), upholding [2008] EWHC 1875 (Comm), [2008] 2 Lloyd's Rep 628.

<sup>50</sup> Cl 1.

<sup>51</sup> There is no such clause in either Gencon (1976) or Gencon (1994).

<sup>52</sup> Cl 20.

<sup>53</sup> *The Reborn* (n 30) [2].

<sup>54</sup> Bruce Harris, Mark Hamsher, and Michael Baker-Harber.

<sup>55</sup> [2008] EWHC 1875 (Comm), [2008] 2 Lloyd's Rep 628.

<sup>56</sup> *The Reborn* (n 30).

<sup>57</sup> Judgment was handed down three months after *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

of terms'.<sup>58</sup> It is of critical importance that he stressed that whether such a warranty would be implied would be influenced greatly by the degree of liberty which the charterers enjoyed under the terms of the charter to choose the port or place where the ship was to load or discharge.<sup>59</sup> Noting what he described as Sir Thomas Bingham's 'insightful phrase that such an implied term would at best lie uneasily beside the express terms of the charter',<sup>60</sup> Rix LJ, in a concurring judgment, likewise agreed that:<sup>61</sup>

It is, I think, relatively easy to say in this case ... that the charterers did not here implicitly warrant the safety of the berth at Chekka to which they directed the vessel. After all, the charterers did not expressly warrant the safety of the port or berth; the port was a named, accepted and agreed port; it is hard to think that it does not follow that the (two assumed) berths in the port are also to be regarded as berths of which the owners had agreed to accept the risk ... To cap this, there is no single case ... in which the safety of a berth at a named port, whose safety has not itself been expressly warranted, has been implicitly warranted.

Much of the analysis in the case was concerned with reviewing the English law on implied terms<sup>62</sup> but, so far as the safe port obligation is concerned, this case now authoritatively affirms, at least for voyage charterparties,<sup>63</sup> that the question whether it is necessary to imply a safe port warranty must be determined by the normal contractual rules for implied terms. On the facts of the case, it was not necessary to imply a term as to safety to make the contract work.<sup>64</sup> The shipowner's case failed, moreover, because it agreed to delete the safety undertaking in the charterparty and to accept the risk of damage occurring in a named, accepted and agreed port.<sup>65</sup> On that basis, it would have been profoundly

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<sup>58</sup> *Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep 39, 68. That case did not, however, concern the implication of the term in a charterparty, but a bill of lading.

<sup>59</sup> *The Reborn* (n 30) [28].

<sup>60</sup> *The APJ Priti* (n 48) 42.

<sup>61</sup> *The Reborn* (n 30) [48].

<sup>62</sup> *Attorney General of Belize v Belize Telecom Ltd* (n 57); *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843. For the Singapore approach, see Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing 2012), ch 6; Goh Yihan, 'A new framework for the implication of terms in fact' (2013) 13 OUCLJ 379.

<sup>63</sup> For time charterparties, see *Vardinoyannis v The Egyptian General Petroleum Corp (The Evaggelos Th)* [1971] 2 Lloyd's Rep 200, 205.

<sup>64</sup> *The Reborn* (n 30) [45].

<sup>65</sup> *Ibid* [48].

unsatisfactory if the court had found that such a term as to safety should be implied. If the shipowner had contracted with the voyage charterer on the standard Gencon printed terms, the outcome would have been certain; the port would have been held unsafe because of danger from a physical cause.<sup>66</sup>

## 6 Named or nominated ports or berths

In those cases where a voyage (or consecutive voyage) charterparty specifies a named loading or discharging port or berth but does not specify the safety of such a port or berth, the courts in two cases have confirmed that the word 'safe' will be interpreted as a warranty by the charterer that the named port is safe. If, on the other hand, the port is named but the shipowner has not included an express warranty as to safety, it is unlikely that such a term will be implied. In *The Houston City*, Dixon CJ stated that:<sup>67</sup>

When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place then, subject to excepted perils, his liability to have his ship there is definite.

My second case, *The Livanita*,<sup>68</sup> concerned a trip time charterparty, on modified NYPE terms, which provided for 'one time charter trip via St Petersburg, Baltic/Conti to the far east with duration 60/70 days without guarantee'. The words 'between safe port and/or ports ...' were deleted<sup>69</sup> but a trading exclusion clause provided for 'trading to be worldwide between safe ports, safe berths and safe anchorages and places'.<sup>70</sup> During an outbound convoy from the port St Petersburg, with icebreakers, the hull of the *Livanita* was damaged

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<sup>66</sup> See, eg, *The Alhambra* (1881) LR 6 PD 68 and the text to n 86.

<sup>67</sup> *Australian Wheat Board v Reardon Smith Line Ltd* [1954] 2 Lloyd's Rep 148 (HCA) 153, and upheld in the Privy Council (n 2).

<sup>68</sup> *STX Pan Ocean Co Ltd v Uglan Bulk Transport AS (The Livanita)* [2007] EWHC 1317 (Comm), [2008] 1 Lloyd's Rep 86.

<sup>69</sup> Ie, line 27 of the NYPE (1946) form.

<sup>70</sup> Cl 67.

by ice. The two arbitrators<sup>71</sup> held that St Petersburg was covered by the express warranty of safety and that the trip charterer was liable for breaching the trading clause. On appeal to the Commercial Court,<sup>72</sup> the issue of law was whether a safe port warranty in a trading clause applied also to the named loading port. Langley J confirmed that it did:<sup>73</sup>

There is no principle of construction which permits a negative answer to the general question raised ... There is no inherent inconsistency between a safe port warranty and a named loading or discharging port.

... Effect should be given 'to all the terms of the charter which are not inconsistent. The identification of a named port of anchorage, thereby limiting the charterer's choice as to the location of performance is not inconsistent with a warranty that it is safe' ...

A related issue in the case was whether the shipowner was entitled to rely upon the safe port warranty in circumstances where it knew or should reasonably have known that St Petersburg was unsafe at the time that the charterparty was entered into. On the evidence, the court found that neither party knew or should reasonably have known that St Petersburg was unsafe at the time the charterparty was entered into.<sup>74</sup> Thus, the effect of the case was that the safe port warranty will apply to a named port even where the shipowner has consented to it; the mere fact of consent to the named port is not to be taken as inconsistent with a warranty by the charterer that that port will be safe for the ship.

My third case, *The Archimidis*,<sup>75</sup> concerned a consecutive voyage charterparty,<sup>76</sup> on the

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<sup>71</sup> Graham Clark and Patrick O'Donovan.

<sup>72</sup> Langley J noted that this was a small claim 'but one said ... to raise important issues of law': *The Livanita* (n 68) [5].

<sup>73</sup> Ibid [18]-[19], citing with approval *Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter)* [2006] EWHC 1729 (Comm), [2006] 2 CLC 497 [313]. See also *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty (The Doric Pride)* [2006] EWCA Civ 599, [2006] 2 Lloyd's Rep 175 [31].

<sup>74</sup> Ibid [23].

<sup>75</sup> *AIC Ltd v Marine Pilot Ltd (The Archimidis)* [2008] EWCA Civ 175, [2008] 1 Lloyd's Rep 597. The case also dealt with an important point concerning deadfreight, on which the Court of Appeal allowed the appeal: see Girvin (n 1) para 22.31.

<sup>76</sup> See *Anglo-Saxon Petroleum v Adamastos Shipping Co (The Saxon Star)* [1957] 2 QB 233 (CA), 275-276; *Chiswell Shipping Ltd & Liberian Jaguar Transports Inc v National Iranian Tanker Co (The World Symphony & World Renown)* [1991] 2 Lloyd's Rep 251, 257.

Asbatankvoy form, for the loading of gasoil or unleaded Mogas '1 safe port Ventspils', discharge at '1/2 safe ports in the UK Continent Bordeaux/Hamburg range'.<sup>77</sup> On the sixth voyage, the master served a notice of readiness that he did not expect to be able to load a full cargo at Ventspils because previous bad weather conditions had silted up the dredged channel as a result of a lack of water.<sup>78</sup> It was argued that there was no warranty of safety at the port because the wording indicated that the parties were agreeing between themselves, but not warranting, that the port was safe. The arbitrators<sup>79</sup> decided that the charterparty contained a warranty by the charterer that the port was safe and gave judgment for the shipowner. In the Commercial Court,<sup>80</sup> Gloster J held that as the words '1 safe port' were not part of the printed charterparty form but had been expressly agreed and typed into the contract, there was a safe port warranty which had been breached by the charterer.<sup>81</sup> The Court of Appeal agreed. Sir Anthony Clarke MR gave two reasons:<sup>82</sup>

It is not in dispute that the words 'discharge 1/2 safe ports ...' import a warranty on the part of the charterers that the port or ports of discharge are or will be safe. It would I think be odd to construe the words 'load one safe port Ventspils' as having any different meaning and, in particular as having the meaning that it is agreed that Ventspils is or will be safe. The natural meaning of the whole provision is that the charterers warranted that both Ventspils and the one or two discharge ports are or will be safe.

My second reason is that the word 'safe' must have some meaning in the expression '1 safe port Ventspils'.

The case therefore emphasises the importance, as a matter of construction, of giving primacy to written terms over printed terms<sup>83</sup> and confirms what, for the non-specialist, may appear a rather technical point, that the word 'safe' when used in the different contexts of an express loading port and a range of discharging ports has the same

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<sup>77</sup> The unamended Asbatankvoy form also includes an express safety warranty in cl 1.

<sup>78</sup> The master's notice stated that he expected to load a cargo of 'approximately 67,000 mt': *The Archimidis* (n 75) [6].

<sup>79</sup> Robert Gaisford, David Macfarlane, and Christopher Moss.

<sup>80</sup> [2007] EWHC 1182 (Comm), [2007] 2 Lloyd's Rep 101.

<sup>81</sup> *Ibid* [32].

<sup>82</sup> *The Archimidis* (n 75) [19]-[20].

<sup>83</sup> *Robertson v French* (1803) 4 East 130, 136; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715 [11].

meaning.<sup>84</sup>

## 7 Unsafety factors

### 7.1 Physical risks

The principal test for determining whether a port is safe is whether the vessel in question will be exposed to some physical danger during the approach to, while using, or while departing the port.<sup>85</sup> The risks which the charterer promises to indemnify the shipowner against are the normal or inherent risks of the port which cannot be avoided by the exercise of good seamanship and navigation by the master of the vessel.<sup>86</sup> The most frequently encountered danger in an unsafe port will be the risk of physical damage to the vessel, such as an insufficient depth of water;<sup>87</sup> periodic silting;<sup>88</sup> the presence of ice;<sup>89</sup> an uncharted reef;<sup>90</sup> an underwater fender which, by reason of its design and construction, causes damage to a ship;<sup>91</sup> or an underwater obstruction within a dredged channel which constitutes the designated route to a port.<sup>92</sup> A port is also unsafe if the approach is such that the port cannot be reached without dismantling part of the ship's structure;<sup>93</sup> if the ship has to lighten her cargo to enter the port;<sup>94</sup> if there is no proper system of weather forecasts or navigational aids;<sup>95</sup> where buoys are out of position and there is no procedure

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<sup>84</sup> See *The Greek Fighter* (n 73) [313].

<sup>85</sup> In *GW Grace & Co Ltd v General Steam Navigation Co Ltd (The Sussex Oak)* [1950] 2 KB 38, the vessel was damaged on both the approach and return voyages from Hamburg.

<sup>86</sup> See *The Evia (No 2)* (n 2) 749; *Tage Berglund v Montoro Shipping Corp Ltd (The Dagmar)* [1968] 2 Lloyd's Rep 563.

<sup>87</sup> *The Alhambra* (n 66); *Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* [2003] EWHC 1894, [2003] 2 Lloyd's Rep 655.

<sup>88</sup> *The Hermine* (n 3).

<sup>89</sup> *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406; *The Sussex Oak* (n 85); *The Livanita* (n 68).

<sup>90</sup> *Mediolanum Shipping Co v Japan Lines Ltd (The Mediolanum)* [1984] 1 Lloyd's Rep 136.

<sup>91</sup> *Prekookeanska Plovidba v Felstar Shipping Corp (The Carnival)* [1994] 2 Lloyd's Rep 14.

<sup>92</sup> *The Marinicki* (n 87); *The Reborn* (n 30).

<sup>93</sup> *Re Goodbody & Balfour* (1899) 5 Com Cas 59; *Hall Brother Steamship Co Ltd v R & W Paul Ltd* (1913) 19 Com Cas 384; *Limerick Steamship Co Ltd v WH Stott & Co Ltd* (1920) 5 Ll L Rep 190.

<sup>94</sup> *The Archimidis* (n 75) [39]-[41].

<sup>95</sup> See also London Arbitration 9/08, (2008) 748 LMLN 3 (absence of navigational lights).

for monitoring changes in the configuration of the access channel to a port;<sup>96</sup> ports where there is an absence of tugs.<sup>97</sup>

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<sup>96</sup> *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)* [2006] EWHC 3222 (Comm), [2008] 1 Lloyd's Rep 72.

<sup>97</sup> *Brostrom & Son v Louis Dreyfus & Co* (1932) 44 Ll L Rep 136; *Palm Shipping Inc v Vitol SA (The Universal Monarch)* [1989] 2 Lloyd's Rep 483.

## 7.2 Political risks

A further set of factors which can impact on the safety of a port are political factors. As we have seen, in *Ogden v Graham*<sup>98</sup> the port of Carrisal Bajo, named as discharge port, had been closed on the orders of the Chilian government, rendering it unsafe for the purpose of the charterparty warranty. Other cases of political unsafety have arisen during conditions of war<sup>99</sup> although the leading modern authority, *The Saga Cob*,<sup>100</sup> considered the effect of risk of a hostile seizure or attack. The charterparty, on the Shelltime 3 form,<sup>101</sup> provided that the vessel was to be employed in the Red Sea, the Gulf of Aden, and east Africa. During 1988, the vessel called about 20 times at Massawa, without incident, but on the occasion in question was attacked by Eritrean guerrillas. His Honour Judge Diamond QC<sup>102</sup> held that the charterers in ordering the vessel to discharge at Massawa had committed a breach of the safe port warranty. The Court of Appeal, however allowed the appeal. In the words of Parker LJ,<sup>103</sup>

[a port] 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. There is no evidence in the present case that this was so and subsequent history shows that Massawa was on 26 August 1988 and for a long time thereafter not regarded as presenting any such risk.

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<sup>98</sup> (n 31). See also *The Teutonia* (n 31) 181-182.

<sup>99</sup> See *The Teutonia* (n 31). But cf *Palace Shipping Co Ltd v Gans Steamship Line* (n 44) 138 where it was held that the port of Newcastle-upon-Tyne was a safe port notwithstanding German threats to destroy hostile ships in English waters.

<sup>100</sup> (n 4).

<sup>101</sup> This contains a 'due diligence' warranty of employment 'between and at safe ports ... where she can always lie safely afloat'. See n 3 above.

<sup>102</sup> [1991] 2 Lloyd's Rep 398.

<sup>103</sup> *The Saga Cob* (n 4) 551. Cf, however, *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep 508 where a missile attack on a vessel, following three earlier attacks on tankers, was held not to be an 'abnormal and unexpected event', but a normal characteristic of the approach voyage, making the port unsafe.

## 8 Temporary obstacles and delays

A temporary danger or obstacle which causes delay, such as a neap tide,<sup>104</sup> low water in a river,<sup>105</sup> or temporary icing of a port,<sup>106</sup> will not render a port unsafe. However, if the danger or obstacle were to be operative for a period which would be commercially unacceptable, the port might be unsafe.<sup>107</sup> This brings me to my fourth case, *The Count*.<sup>108</sup> A charterparty, on the Asbatankvoy form, provided for the delivery of a cargo of petroleum products '1, 2 or 3 safe ports East Africa Mombasa/Beira range'. Beira having been selected, on the day of arrival another inbound vessel, the *British Enterprise*, went aground in the channel linking the port with the sea. After re-floating, the *British Enterprise* went aground a second time. The *Count* proceeded to the discharge berth only after the *British Enterprise* completed discharge. After completion of her own discharge, the *Count* was unable to sail from the port because a different inbound container ship, *Pongola*, had grounded in the approach channel at almost the same spot as *British Enterprise*. As the *Pongola* was blocking the channel, the port authorities closed the channel. The arbitrators<sup>109</sup> found for the owners that the port was unsafe. Toulson J held that:<sup>110</sup>

[A temporary obstacle] ... different from the situation where the characteristics of the port at the time of the nomination are such as to create a continuous risk of danger. Moreover, since good seamanship cannot necessarily be expected to protect against hidden hazards, it is particularly possible in the case of a latent hazard to envisage that there may be a continuous risk of danger (making the port unsafe to nominate) although whether it results in actual danger to the vessel may be a matter of chance.

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<sup>104</sup> Tides at a certain time of the month when there is the least difference between high and low water: *Bastifell v Lloyd* (1862) 1 H & C 388; *Aktiselskabet Eriksen & Anderson's Rederi v Foy, Morgan & Co* (1926) 25 Ll L Rep 442, 444.

<sup>105</sup> *The Hermine* (n 3).

<sup>106</sup> *SS Knutsford Ltd v Tillmanns & Co* (n 89) (icing-up of the port of Vladivostock for three days insufficient to render the port unsafe).

<sup>107</sup> See *Ogden v Graham* (n 31); *The Hermine* (n 3), 218. But cf *The Count* (n 96) [22]; *The Evia (No 2)* (n 2) 762.

<sup>108</sup> (n 96).

<sup>109</sup> Bruce Buchan and Michael Baker-Harber.

<sup>110</sup> *The Count* (n 96) [22].

On the facts, the port was not unsafe because of a mere temporary hazard, but because buoys were out of position as a result of shifting sands and also because there was no adequate system for monitoring the channel. These characteristics created a continuing risk of danger to vessels, including the *Count*, when approaching and leaving the port, and it was therefore an unsafe port for the charterers to nominate.<sup>111</sup>

## 9 Good navigation and competent seamanship

It is established that risks which can be avoided by good navigation and competent seamanship do not render a port unsafe.<sup>112</sup> Thus, in *The Eastern City*,<sup>113</sup> Sellers LJ stated that:

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.

Thus, where more than ordinary skill is required to avoid such dangers, the port will be unsafe.<sup>114</sup> The mere fact that a vessel has suffered damage, notwithstanding the exercise of reasonable skill and care, does not necessarily make a port unsafe. In *The Mary Lou*,<sup>115</sup> Mustill J stated that:

Proof of reasonable skill and care will go a long way towards establishing unsafety; proof of a lack of reasonable skill and care will greatly weaken the inferences which would otherwise be drawn from the nature of the accident. But care and safety are not

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<sup>111</sup> Ibid [30].

<sup>112</sup> See D Rhidian Thomas, 'The safe port promise of charterers from the perspective of the English common law' (2006) 18 SAclJ 597, 617ff; *Time Charters* (n 1) para 10.46ff.

<sup>113</sup> (n 41) 131. See also *Kristiansands Tankrederi A/S v Standard Tankers (Bahamas) Ltd (The Polyglory)* [1977] 2 Lloyd's Rep 353, 361.

<sup>114</sup> *The Sussex Oak* (n 85) 391; *The Polyglory* (n 113) 365-366. But cf *The Dagmar* (n 86).

<sup>115</sup> (n 2) 279.

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.

In *The Ocean Victory*, discussed below, in finding that the port of Kashima was unsafe, Teare J accepted the evidence of an expert that 'ordinary seamanship and navigation could not ensure a safe exit ... Good luck was also required'.<sup>116</sup>

## 10 Abnormal risks

It is well established that the charterer will be responsible to the shipowner for those risks which are the normal and characteristic feature of the port.<sup>117</sup> Abnormal risks or occurrences,<sup>118</sup> on the other hand, are not within the scope of the safe port warranty<sup>119</sup> and the charterer will not be responsible for damage or loss which is caused by a 'wholly exceptional or wholly unpredictable' event.<sup>120</sup> These questions inevitably become a question of fact in each case<sup>121</sup> and were raised in acute form in *The Ocean Victory*.<sup>122</sup> While, in 1971, Professor Cadwallader could, perhaps, legitimately say that abnormal risks were problems which tended 'to titillate academics rather more than it troubles the courts, shipowners or charterers'<sup>123</sup> might in the light of *The Ocean Victory* be forced to recant from that view.

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<sup>116</sup> The point was not considered further by the Court of Appeal, because it found that the port of Kashima was safe: *The Ocean Victory* (n 4) [65].

<sup>117</sup> A concrete block may be a normal occurrence if its presence has become a characteristic of the port: see London Arbitration 16/87, (1987) 208 LMLN 4.

<sup>118</sup> See the discussion in Thomas (n 112) 615ff; *Time Charters* (n 1) para 10.39ff.

<sup>119</sup> Sellers LJ in *The Eastern City* uses the phrase '... in the absence of some abnormal occurrence ...': (n 41) 131. See also *The Stork* (n 2) 105; *The Evia (No 2)* (n 2) 757.

<sup>120</sup> *The Mary Lou* (n 2) 283.

<sup>121</sup> *The Hermine* (n 3) 219. Disturbed sea conditions, caused by the disadvantageous congruence of two ocean currents such as to generate swell conditions which normally did not occur, made a port unsafe: London Arbitration 1/89, (1989) 242 LMLN 3.

<sup>122</sup> *The Ocean Victory* (n 4).

<sup>123</sup> (n 18) 643.

## 11 *The Ocean Victory*

### 11.1 Commercial Court

The *Ocean Victory*<sup>124</sup> was on demise charter for 10 years,<sup>125</sup> sub-time chartered ‘minimum 5 month maximum 7 months via safe anchorage(s), safe berth(s), safe port(s)’, and sub-sub-time trip chartered ‘via safe port(s) safe anchorages(s) South Africa’.<sup>126</sup> The sub-charter and sub-sub-charters were essentially on back-to-back terms. After loading iron ore at the port of Saldanha Bay on the Cape west coast in South Africa, the *Ocean Victory* was given orders to discharge at the port of Kashima, located about 110km north of Tokyo, Japan. On arrival at Kashima, the *Ocean Victory* was ordered to discharge at Berth C of the Raw Materials Quay in the Central Fairway of the port. Within 48 hours of commencing discharge, however, the weather worsened rapidly to Beaufort force 8 and, by the following morning force 9, with recorded gusts of force 10. There was also a considerable swell, as a result of a phenomenon known as ‘long waves’,<sup>127</sup> affecting the vessel’s berth.

The charterer’s representative boarded the *Ocean Victory* and gave instructions to leave the port but local pilots postponed departure because of the difficulty of unberthing the vessel. A pilot subsequently boarded, informing the master that the *Ocean Victory* had to leave port for safety reasons. By now, however, the master’s preference was to remain in port but the *Ocean Victory* nevertheless left the berth and was confronted by gale force winds and heavy seas. She was driven onto the breakwater where she ran aground and subsequently broke apart.<sup>128</sup> As Teare J remarked in the High Court, ‘this was a remarkable maritime casualty’,<sup>129</sup> giving rise to a claim of US\$137.6 million, comprising the loss of the vessel (US\$88.5 million), loss of hire charges (US\$2.7 million), SCOPIC costs pursuant to LOF 2000

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<sup>124</sup> (n 40).

<sup>125</sup> The demise charterparty, on an amended Barecon 89 form, provided that the vessel was to be employed ‘only between good and safe ports’.

<sup>126</sup> It was not clear on what terms these charterparties were negotiated. As to the nature of a trip time charterparty, see *SBT Star Bulk & Tankers (Germany) GmbH & Co KG v Cosmotrade SA (The Wehr Trave)* [2016] EWHC 583 (Comm), [2016] 2 Lloyd’s Rep 170 [12]-[13].

<sup>127</sup> *The Ocean Victory* (n 4) [23]-[29].

<sup>128</sup> On 27 December 2006.

<sup>129</sup> *The Ocean Victory* (n 40) [2]. Longmore LJ in the Court of Appeal described the casualty, additionally, as ‘unprecedented’: *The Ocean Victory* (n 4) [46].

(US\$12 million), and wreck removal costs (US\$34.5 million). The vessel's hull insurer, Gard, paid for a total loss in what may well be one of the highest value unsafe port disputes ever.

Gard, the assignee of the claims of the shipowner and demise charterer, brought proceedings against the sub-charterer and submitted that the port was prospectively unsafe for the vessel because there was a risk that vessels moored in port might be advised to leave on account of long waves and bad weather when there were northerly gale force winds in the fairway. Safe navigation required the exercise of something more than good navigation and seamanship, and yet there was no system to ensure that vessels left in good time and in conditions which did not threaten safe navigation, or that vessels did not attempt to depart in conditions which did pose a threat.

The sub-charterer argued that a port was not unsafe because its systems failed to guard against every conceivable hazard. It argued, moreover, that the emphasis was on 'reasonable safety' and the taking of reasonable precautions.<sup>130</sup> The storm which affected the port of Kashima was an exceptional and abnormal event and so the port was not unsafe; the cause of the casualty was the master's misapprehension that the vessel had been ordered to leave port and/or his negligent navigation when leaving the port.

Unusually for a charterparty dispute,<sup>131</sup> the case was not decided by arbitrators<sup>132</sup> but heard by Mr Justice Teare in the Commercial Court in London in a trial lasting sixteen days, reinforcing the earlier point about the cost of such actions.<sup>133</sup> In a 40-page judgment,<sup>134</sup> handed down on 30 July 2013, the judge found for Gard because the port of Kashima was prospectively unsafe when the sub-charterer ordered the vessel there.<sup>135</sup> There was a risk or danger that a Capesize vessel when leaving the port in a gale might, notwithstanding the

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<sup>130</sup> Referring to the dictum of Lord Denning MR in *The Evia (No 2)* (n 2) 338. This was expressly rejected by Teare J: (n 40) [100].

<sup>131</sup> See *The Reborn* (n 30), *The Livanita* (n 68), *The Archimidis* (n 75), and *The Count* (n 92), all of which started in arbitration.

<sup>132</sup> It is unclear whether this was because the parties did not incorporate an arbitration clause in the sub-charterparties (unlikely) or because they agreed to litigate their dispute. As between the shipowner and demise charterer, cl 26 of the (unamended) Barecon 89 charterparty includes such a clause.

<sup>133</sup> Text to n 12.

<sup>134</sup> With an index: *The Ocean Victory* (n 40).

<sup>135</sup> *Ibid* [134].

exercise of good navigation and seamanship, be unable to maintain the desired course line in the narrow fairway, and so be unable to leave the port safely.<sup>136</sup> Moreover, the low pressure system which had produced gale force winds was not an unusual meteorological event.<sup>137</sup> In Teare J's view, the effective cause of the casualty remained the advice to leave the port which, given without considering whether it was safe to leave, reflected the unsafety of the port and, on the true construction of the charterparty as a whole, the sub-charterer was liable in damages for breach of a safe port warranty.

As one would expect in a trial case, the decision is notable for the judge's detailed consideration of the evidence, including the weather conditions, the port 'set-up', events on arrival at Kashima, the worsening weather conditions, and the fateful departure of the vessel. The judge noted that if navigation out of a port was 'very difficult' such that 'high standard of navigation and seamanship' were required to avoid a danger, then the port was unsafe, citing *The Polyglory*.<sup>138</sup> In that case Parker J held that Port la Nouvelle was unsafe because the vessel's starboard anchor dragged and fouled an underwater pipe line, causing it damage. The basis for so finding in that case was that if something more than ordinary prudence and skill was required at the port to avoid exposure to danger, then the port was not safe within the meaning of the safe port clause.<sup>139</sup> It is notable, however, that an earlier first instance case, *The Dagmar*,<sup>140</sup> was not discussed in any detail in the judgment. In that case a vessel ordered to Cape Chat, Quebec, to load timber was damaged when her moorings parted in conditions of increased wind and swell. Moccata J held that<sup>141</sup>

the mere fact ... that in certain conditions of wind and sea the *Dagmar* and, indeed, vessels substantially smaller than her, could not remain in safety at Cape Chat, does not by itself and without more establish that Cape Chat was unsafe for the vessel.

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid [110].

<sup>138</sup> (n 113).

<sup>139</sup> Ibid 366.

<sup>140</sup> (n 86).

<sup>141</sup> Ibid 572.

In the light of the available evidence as to the conditions at Kashima, where the particular storm was exceptional in terms of its rapid development, duration,<sup>142</sup> and severity, Teare J nevertheless took the view that this was exacerbated by the prevailing characteristics of Kashima, namely its vulnerability to long waves and the vulnerability of its fairway to northerly gales. The storm was not, in his view, ‘an unusual meteorological event’.<sup>143</sup>

It is submitted that this was a surprising conclusion,<sup>144</sup> given the judge’s earlier finding that the port of Kashima was a large modern port able to service a variety of vessels, from smaller coastal ships to VLCCs, Capesize bulk carriers, and LPG and chemical tankers.<sup>145</sup> The evidence showed that a large number of vessels had visited the port and that there was no history of incidents such as those which befell the *Ocean Victory*.<sup>146</sup> Thus, the effect of this judgment was that the port of Kashima, which had a first class safety record, was unsafe in 2006 and had been unsafe for many years previously, even though there had been no previous casualty of a similar nature and, indeed, none since. The judgment attracted negative reaction, particularly among other insurers and charterers and regular users of ports,<sup>147</sup> including Kashima and elsewhere, who were concerned about the effect of the judgment and some, admittedly anecdotal, evidence that the number of unsafe port claims was rising following the decision.<sup>148</sup> In those circumstances, it was perhaps unsurprising that the charterer appealed.

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<sup>142</sup> Indeed, another vessel, the then Panamanian-registered *Ellida Ace* (now called *Cape Brazilia* — see <[www.classnk.or.jp/register/regships/one\\_dsp.aspx?imo=9134220](http://www.classnk.or.jp/register/regships/one_dsp.aspx?imo=9134220)> accessed 10 March 2017), ran aground on the same day: see Mike Grinter, ‘Bulkers run aground off Japan’s coast’, *Lloyd’s List* (London, 25 October 2006).

<sup>143</sup> *The Ocean Victory* (n 40).

<sup>144</sup> A view also held by the Court of Appeal: *The Ocean Victory* (n 4) [46].

<sup>145</sup> *The Ocean Victory* (n 40) [5].

<sup>146</sup> *Ibid.* See also *The Ocean Victory* (n 4) [19].

<sup>147</sup> The Hong Kong Marine Department recommended that ‘masters should obtain the latest weather information and liaise with the agent and port authority with a view to seeking shelter from atrocious weather caused by depression or typhoon at an early stage’: see <[www.mardep.gov.hk/en/publication/pdf/mai061024.pdf](http://www.mardep.gov.hk/en/publication/pdf/mai061024.pdf)> accessed 10 March 2017.

<sup>148</sup> See Max Tingyao Lin, ‘*Ocean Victory* case: Kashima and other ports are safe again’ *Lloyd’s List* (London, 9 March 2015).

## 11.2 Court of Appeal

On appeal<sup>149</sup> there were three issues of law for consideration, only two<sup>150</sup> of which are considered in this paper:<sup>151</sup> (i) whether as a matter of law in the circumstances there had been a breach of the safe port warranty; (ii) whether, even on the assumption that there had been a breach of the safe port warranty, the cause of the casualty was not the breach, but rather the master's navigational decision to put to sea in extreme conditions, rather than to stay at the berth.

The full court<sup>152</sup> reversed the decision of Teare J, handing down a 30-page judgment on 22 January 2015. It considered that Teare J's conclusion that the port was unsafe was 'somewhat surprising'.<sup>153</sup> A charterer did not assume responsibility for unexpected and abnormal events which occurred suddenly and which created conditions of unsafety after orders were given to proceed to the relevant port.<sup>154</sup> Whether the event giving rise to the particular casualty was to be characterised as an 'abnormal occurrence' or as resulting from some 'normal' characteristic of the particular port at the particular time of year was an essentially factual question and had to be approached realistically and having regard to whether the event had occurred sufficiently frequently to become a characteristic of the port.<sup>155</sup> Thus, the court noted the dictum of Mustill J in *The Mary Lou*,<sup>156</sup> which 'implicitly recognised the need to approach the identification of an abnormal occurrence realistically and having regard to whether the event had occurred sufficiently frequently so as to become a characteristic of the port'.<sup>157</sup>

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<sup>149</sup> *The Ocean Victory* (n 4).

<sup>150</sup> Leave to appeal on these two grounds was given by Aikens LJ on 25 February 2014: *ibid* [12].

<sup>151</sup> The third ground of appeal concerned the 'recoverability issue', namely whether, on a true construction of the terms of the demise charterparty, the demise charterers, who had insured the vessel at their expense, had any liability to the shipowner in respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty.

<sup>152</sup> Delivered by Longmore LJ, with Lady Justice Gloster and Lord Justice Underhill, and in which all members contributed: *The Ocean Victory* (n 4) [1].

<sup>153</sup> *Ibid* [46].

<sup>154</sup> *Ibid* [52].

<sup>155</sup> *Ibid* [53].

<sup>156</sup> (n 2) 278.

<sup>157</sup> *The Ocean Victory* (n 4) [54].

Having identified the relevant applicable principles, the Court of Appeal considered that the logic of the judge's approach to the issue of an abnormal occurrence was flawed<sup>158</sup> and that his analysis went wrong in a number of respects.<sup>159</sup> In particular, he had erred in failing to formulate the critical, and *unitary*, question whether the simultaneous coincidence of the swell from long waves, which made it dangerous for a vessel to remain at berth at the Raw Materials Quay, and the gale force winds in the Kashima Fairway, was an abnormal occurrence or a normal characteristic of the port of Kashima.<sup>160</sup> He had, instead, focused on the respective constituent elements of the combination (swell from long waves making it dangerous for a vessel to remain at the Raw Materials Quay and gale force winds from the northerly/north-easterly quadrant making navigation of the Fairway dangerous or impossible for Capesize vessels) separately.<sup>161</sup> The judge had looked at each component and decided that, viewed on its own, neither could be said to be rare and both were attributes or characteristics of the port.<sup>162</sup> He had compounded his error by concluding that, even if the critical combination was rare, nonetheless it was a characteristic of the port.<sup>163</sup> He had also wrongly applied a test of foreseeability, without giving sufficient weight to the evidence relating to the past history of the port and the very severe nature of the storm on the casualty date.<sup>164</sup> Even if the individual dangers were normal characteristics or attributes of the port, it did not follow that the combination was also a normal characteristic or attribute of the port. One had to<sup>165</sup>

look at the reality of the particular situation in the context of all the evidence, to ascertain whether the particular event was sufficiently likely to occur to have become an attribute of the port, otherwise the consequences of a mere foreseeability test lead to wholly unreal and impractical results ... whether, in such circumstances, there would be a breach of the safe port warranty, or the event would be characterised as an abnormal occurrence, would necessarily depend on an evidential evaluation of the particular event giving rise to the damage and the relevant history of the port.

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<sup>158</sup> Ibid [50].

<sup>159</sup> Ibid [55].

<sup>160</sup> Ibid [55]-[56].

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid [57].

<sup>164</sup> Ibid [58].

<sup>165</sup> Ibid [59].

The evidence relating to the past frequency of such an event occurring and the likelihood of it occurring again led to the conclusion that the event which occurred was an abnormal occurrence. Accordingly, there was no breach by the charterers of the safe port obligation.<sup>166</sup>

This outcome on the safe port issues no doubt pleased the charterer, providing reassurance that the 'abnormal occurrence' exception might be invoked to counter the otherwise absolute warranty given when undertaking to trade only to safe ports. The shipowner and its insurer, faced with the consequences of the enormous liabilities in the case, no doubt legitimately felt that the charterer escaped too lightly from its obligation to bear the risk of unsafety at Kashima and, for that reason, leave to appeal to the Supreme Court was granted,<sup>167</sup> and the appeal has been heard.<sup>168</sup> It remains, therefore, to be seen whether the Supreme Court will be in sympathy with the views of Teare J or those of the Court of Appeal. While it is by no means unheard of for the highest court to prefer the views of the trial judge or the arbitrators in charterparty cases, it is submitted that the better reasoning is that provided by the judges in the Court of Appeal. The temptation to view the charterer as an unwilling underwriter for an 'all risks' port policy in safe port cases, without any realistic chance of success in raising the exception for abnormal risks, should, it is submitted, be avoided.

## 12 Conclusion

This lecture set out to answer the question whether five reported cases during the past decade had produced greater certainty in the law relating to safe ports or merely succeeded in muddying the waters. It is submitted that, with the exception of *The Ocean Victory*,<sup>169</sup> the cases during the past decade have succeeded in producing greater certainty in the law. *The*

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<sup>166</sup> Ibid [64].

<sup>167</sup> Leave to appeal was granted by Lords Mance, Clarke, and Hodge on 20 May 2015: see <[www.supremecourt.uk/docs/permission-to-appeal-2015-05.pdf](http://www.supremecourt.uk/docs/permission-to-appeal-2015-05.pdf)> accessed 10 March 2017.

<sup>168</sup> On 1-3 November 2016. The panel consisted of Lords Mance, Clarke, Sumption, Hodge, and Toulson.

<sup>169</sup> (n 4) and (n 40).

*Reborn*<sup>170</sup> has settled the point that, in safe port cases, the normal contractual rules for the implication of terms must apply. *The Livanita*<sup>171</sup> and *The Archimidis*<sup>172</sup> have confirmed that a warranty of safety will apply in the contexts of consecutive voyage charterparties and trip time charterparties, respectively, both in the case of a named loading or discharging port and also where a loading or discharge port is selected from a choice or range of ports. Finally, *The Count*<sup>173</sup> has underlined that something more than a temporary obstacle is required before the charterer runs foul of the express safe port warranty.

In 1971, Professor Cadwallader wrote that:<sup>174</sup>

The development of the safe port in English law has been a relatively peaceful and bloodless affair. The skirmishes of the past hundred years have yielded a clear and adaptable set of principles which seek to establish some semblance of equity between the parties. If it is a fact that the only besetting sin of many charterers in breach of their undertaking is an ignorance of their ports' infirmities this must be considered the price to be paid for a freedom of choice in determining those ports to which ships may safely come.

Much the same can be said of the cases discussed in this paper, with the exception of *The Ocean Victory*,<sup>175</sup> which has so far succeeded in muddying the waters on abnormal risks. It is to be hoped that the Supreme Court will in due course provide welcome clarification.

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<sup>170</sup> (n 30).

<sup>171</sup> (n 68).

<sup>172</sup> (n 75).

<sup>173</sup> (n 96).

<sup>174</sup> (n 18), 642.

<sup>175</sup> (n 4) and (n 40).