THE SAFE PORT PROMISE OF CHARTERERS FROM THE PERSPECTIVE OF THE ENGLISH COMMON LAW

The safe port promise of charterers is a vital aspect of charterparty contracts but it is one which is not always accurately understood within the shipping industry. Notwithstanding that its basic concern is with safety, the basis of the promise is commercial expediency, not public policy and, therefore, the nature and breadth of the promise is ultimately governed by the intention of the parties. Nonetheless, there is sufficient consistency and uniformity in the law to make it possible to present a clear image of the substantive promise, which emerges as a much more limited and qualified undertaking than popular imaginings. The promise operates in the same manner as contractual promises generally, but it also, more widely, impinges on the validity of port nominations and voyage orders, a fact which contributes to the surprising complexity of the law and the survival of several unresolved outstanding issues.

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I. Introduction

1 It is a general but not universal rule of commercial contracting practice and the English common law that ports and places of loading and discharge to which a chartered ship is despatched to under the terms of a voyage or time charterparty, or any hybrid of the two, shall be safe.[1] It is customary to refer to this branch of the law as the charterer's safe port warranty, though this is a historic and potentially misleading form of words. In this context the word "warranty" means nothing more than promise; it does not indicate the classification of the promise for the purpose of determining the remedies of the owner in the event of breach,

1 See, generally, Michael Wilford, Terence Coghlin & John D Kimball, *Time Charters*, (LLP, 5th Ed, 2003) at ch 10; Julian Cooke *et al*, *Voyage Charters*, (LLP, 2nd Ed, 2001) at ch 5; *Scrutton on Charterparties and Bills of Lading* (S C Boyd, A Burrows & D Foxton eds) (Sweet & Maxwell, 20th Ed, 1996) at Art 69; *Carver: Carriage by Sea* vol 2 (Raoul P Colinvaux ed) (Stevens & Sons, 13th Ed, 1982) at para 1504 *et seq*.

nor does it suggest a term in the nature of a marine insurance warranty.[2] The broad purpose underlying the extraction of the promise is to avoid danger to the chartered ship.[3] It is inevitably a limitation on the manner in which the charterer can use the chartered ship, and when so viewed the safe port promise exists alongside cargo, trading and geographical limitations customarily found in charterparties.

2 It would be another misconception to interpret the promise as making the charterer an insurer of port risks. As it will be seen, the promise is much more limited than this. Nor does it imply that the chartered ship will come to actual harm if she visits an unsafe port; more precisely it implies that the ship will be exposed to the risk of harm arising from some danger, which may or may not materialise into actual harm.[4] Ultimately the concept of a safe port is a question of contract and not law, for it turns on the proper construction of the precise words, express and implied, agreed by owners and charterers in their contracts.[5] Nonetheless, a substantial degree of uniformity has been achieved by the adoption of the standard charterparty forms currently available and also widely used in practice.

3 The concept of a safe port is a question of mixed law and fact,[6] but the precise question whether or not any particular port is safe is, predominantly, a question of fact.[7] The subjective opinions of owners, charterers and masters are neither individually nor collectively conclusive. A port is unsafe only if it can be established to be unsafe on the facts and circumstances of each individual case. Consequently, it is particularly appropriate to refer safe port disputes to arbitration by experienced maritime arbitrators, and in the context of English law, because of the high factual element present, only in exceptional circumstances will leave to appeal from the award be given.[8]

2 *Cf* Marine Insurance Act 1906 (c 41) (UK), ss 33 and 34.
3 *Reardon Smith Line Ltd v Australian Wheat Board* (*The Houston City)* [1954] 2 Lloyd's Rep 148 (High Court of Australia) at 153 *per* Dixon CJ.
4 *The Polyglory* [1977] 2 Lloyd's Rep 353 at 365, *per* Parker J.
5 *Cf The Mary Lou* [1981] 2 Lloyd's Rep 272 at 283, *per* Mustill J.
6 *The Polyglory, supra* n 4.
7 *Reinante Transoceanic Navegacion SA v President of India* (*The Apiliotis)* [1985] 1 Lloyd's Rep 255.
8 *Pioneer Shipping Ltd v BTP Tioxide Ltd* (*The Nema)* [1982] AC 724 at 744, *per* Lord Diplock; see D Rhidian Thomas, *Law and Practice of Appeals from Arbitration Awards* (LLP, 1994) at para 5.2.5.

4 Although quite clearly an important aspect of charterparty contracts,[9] with particular relevance to time charterparties,[10] the safe port promise does not occupy any elevated and protected position in terms of public policy. Nor is the promise universal. Where it exists, whether express or implied, it is founded not on considerations of public policy but commercial expediency. It follows that by adopting appropriate contractual words, subject to any constraint imposed by the governing law, the liability of the charterer for breach of the safe port promise may be excluded or limited.[11]

5 The safe port promise is most directly associated with the trading of chartered ships at and between ports of loading and discharge. But potentially the promise has a wider remit. It may be associated with many other performance obligations arising under charterparties, such as delivery and re-delivery of the chartered ship, or bunkering during the course of the charterparty. The promise is also of direct concern to the contractual relation between owner and charterer, but when an allegation of unsafe port is made third parties may become implicated in the dispute, for example, port authorities and other port users.[12]

II. Source of the promise

6 In contemporary practice the safe port promise is frequently made expressly in charterparties. To take some examples from dry cargo time charterparties, cl 2 of the Baltic and International Maritime Council Uniform Time-Charter, Code Name: "Baltime 1939" ("Baltime 1939") provides:

> The vessel to be employed ... only between good and safe ports or places.

7 In the 2001 revision the wording is changed to "only between safe ports and places".

9 *Compania Naviera Maropan S/A v Bowater's Lloyd Pulp and Paper Mills Ltd (The Stork)* [1954] 2 Lloyd's Rep 397 (HC), [1955] 1 Lloyd's Rep 349 (CA).

10 *The APJ Priti* [1987] 2 Lloyd's Rep 37 at 40, *per* Bingham J.

11 The governing law may in part be mandatory and to this extent regulate exclusion and limitation agreements: see, for example, the Unfair Contract Terms Act 1977 (c 50) (UK).

12 *Prekookeanska Plovidba v Felstar Shipping Corp (The Carnival)* [1992] 1 Lloyd's Rep 449.

8 In the New York Produce Exchange Form 1946 ("NYPE 1946"), line 27, it is stipulated that the vessel is to be employed "between safe port and/or ports". In cl 5 of the 1993 edition the language is changed to "between safe ports and places".

9 In the BIMCO General Time Charter Party issued in September 1999 ("GENTIME"), cl 2(a), it is stipulated that the vessel shall be employed "between safe ports or safe places where she can safely enter, lie always afloat, and depart".

10 Express safe port undertakings are less frequently encountered in dry cargo voyage charterparties, but they are far from being unknown.[13]

11 In the absence of an express promise, the promise may exist by implication, based usually on considerations of business efficacy.[14] An implied promise of safety will usually be recognised with regard to ports nominated under the terms of a voyage charterparty, or ports designated in pursuance to voyage orders given by a time charterer.[15] In these instances the implied promise is necessary for the owner has no advance knowledge of the precise port(s) the vessel will be ordered to proceed to and use. An implied promise does not normally exist in connection with a port(s) specified (in the sense of being named) in the charterparty. In this circumstance it is for the owner, before entering into the charterparty, to determine that the port(s) specified is safe for the vessel to use.[16] In relation to specified ports, the safe port promise exists only when it is expressly made; in other words, when there is an express promise in the charterparty to that effect. It follows that the implied promise, at least potentially, has a wide role to play in connection with time charterparties, and also in connection with voyage charterparties where, as is often the case, the port(s) of loading and/or discharge are to be nominated by the charterer from a geographical range of ports. But, it would appear, that

13 For an example, see the United Nations World Food Programme Voyage Charter Party, Code Name: "Worldfood 99", cl 2(a).

14 *The AJP Priti, supra* n 10, at 42, *per* Bingham LJ. It must not, however, be overlooked that a term may be implied for reasons other than business efficacy, and any one or more of these other sources may assume a significance on the facts of any particular case; see Sir Guenter Treitel, *The Law of Contract*, (Sweet & Maxwell, 11th Ed, 2003) at ch 6.

15 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL) at 397 *per* Lord Goff of Chieveley. But note the cautious judicial tone in *Aegean Sea Traders Corpn v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep 39 at 67, *per* Thomas J; *The AJP Priti*, *supra* n 10, *per* Bingham LJ.

16 *Supra* n 3, at 153, *per* Dixon CJ.

no implication is made where the nomination is from a range of specified (named) ports.[17]

12 The prevalence and significance of the implied promise will, of course, bear a direct relation to contracting practice at any point in time; the wider the adoption of express terms the less it will be necessary to rely on implied terms. And where the parties have made an express promise, an inconsistent implied promise will not be recognised. In contemporary practice there tends to be no difference of substance between express and implied safe port promises.

III. Ambit of the promise

13 In enunciating and analysing this branch of the law it is customary to allude to the safe "port" promise of charterers, but in commercial practice the promise may extend more widely to include places within or outside a port where the chartered ship is or may be obliged to load or discharge. There is a clear distinction between a port, which may be an extensive area defined by law or custom, and a place within a port where ships load and discharge cargoes, such as a dock, wharf, quay, anchorage, terminal, offshore facility, submarine pipeline, *etc*. From the owner's point of view it is desirable that the promise of safety extend beyond the port in its generality to include the precise place(s), whether within or outside a port, where the vessel will be required to proceed to and use, and this is often expressly stipulated for in the charterparty terms.[18]

14 The precise reach and ambit of the promise will depend on the drafting and proper construction of the charterparty words. It seems that when the promise is made with regard to a "port" alone, it will be construed as alluding both to the port and to the loading and unloading places within the port used by the chartered ship.[19] This result is achieved either as a question of construction or by implying a term to complement the express term, though the former approach appears the more supportable. Where the express promise is expansive, for example, extending beyond the port to include "wharves" and "other places", the promise follows to a corresponding extent. In this circumstance questions may arise as to the proper meaning of words such as "wharf" and "other

17 *The AJP Priti, supra* n 10.
18 See PB VOY4, cll 3.1 and 5.1.
19 *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 52 Ll L R 141 (CA).

places" and as to the precise nature of the obligation.[20] On the other hand, an express promise of safety made solely in relation to a "wharf" or "other place" situated within a named port is confined to the "wharf" or "other place" and does not, more generally, extend to the port.[21] This rule is consistent with the refusal by the law to imply a safe port promise in relation to a specified port.

15 The ambit of the promise will in all instances turn on the proper construction of the relevant words of the particular charterparty; or, on the formulation of the implied promise.

IV. Nature of the contractual promise

16 At common law the implied safe port promise is absolute, and an express promise is construed in the same way, save where the words used suggest the contrary. If, as events turn out, the port is not safe and loss or prejudice results to the ship, the charterer is absolutely liable. No excuses will be entertained. The fact that the charterer has acted reasonably, or exercised reasonable care and diligence, or had no specific knowledge of, or any way of acquiring knowledge of, the risk associated with the use of the port, represents no defence or mitigation. The charterer is liable by virtue of the fact that the port is unsafe.[22]

17 However, the position at common law may be modified by appropriate express terms in the charterparty. Typically, this is done in tanker charterparties where the safe port promise is customarily expressed as a due diligence obligation. Clause 5.1 of BPVOY 4 provides an example:

> … Charterers do not warrant the safety of any port and shall be under no liability in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence.

18 Another example is provided by cl 4 of the time charterparty form issued by Shell in December 1984 ("Shelltime 4"):

20 *The Stork* [1955] 1 Lloyd's Rep 349 (CA); *The APJ Priti, supra* n 10; *The Carnival* [1992] 2 Lloyd's Rep 14 (CA).

21 *The APJ Priti, supra* n 10.

22 *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd, supra* n 19; *Unitramp v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep 37 at 47, *per* Donaldson J (reversed on appeal, but this aspect of the judgment unaffected).

> Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places … where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause in this charterparty, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.

19 Under due diligence clauses[23] it is insufficient solely to establish that a particular port is unsafe; it has to be further established that the charterer has failed to exercise due diligence with regard to the unsafety of the port. The burden of proof is probably distributed between owner and charterer. It is for the owner to adduce evidence that the port is unsafe, and, thereafter, for the charterer to rebut liability by adducing evidence that, notwithstanding the unsafety of the port, due diligence had been exercised to ascertain that the port was safe. The charterer is put to his proof only if it is first established that the port is unsafe.[24]

20 In this context "due diligence" probably bears a meaning synonymous with "reasonable care"; it is an objective standard, assessed by reference to the standard of a reasonably careful and prudent charterer. The object underlying these clauses is to protect charterers from liability when the danger associated with a port was not known to them and could not be ascertained by making reasonable enquires. The effectiveness of the defence will depend on how demanding a construction is placed on the words "due diligence".

21 In *The Saga Cob*,[25] Parker LJ, giving the judgment of the court, in the context of a risk arising from political unsafety,[26] which was considered to give rise to different considerations from physical unsafety, was of the opinion that the test of reasonable care was necessarily subjective, meaning that it embodied a judgmental element. If in such a case a charterer arrived at a reasonable conclusion about the safety of a port, as where he makes enquires of a number of owners who use the

23 See, also, STB Time cl 6(b).

24 *Cf Pearl Carriers Inc v Japan Line Ltd* (*The Chemical Venture)* [1993] 1 Lloyd's Rep 508: see, also, the due diligence obligation to make the carrying ship seaworthy under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924) ("Hague Rules") and Hague Rules as modified by the Visby Amendments (Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading) (Brussels, 1968) ("Hague-Visby Rules"), Art III r 1 and Art IV r 1.

25 [1992] 2 Lloyd's Rep 545 (CA).

26 See the discussion of "political unsafety" at paras 46–47 of the main text below.

port and receives satisfactory assurances, Parker LJ considered that it would be hard to conclude that the charterer had not exercised reasonable care. The mere fact that the charterer was aware of all the material facts would not inevitably lead to the conclusion that there had been a failure to exercise reasonable care, for the risk of danger materialising from the existing political risk had also to be judged. It was arguable, Parker LJ suggested, that the test of reasonable care was satisfied "if a reasonable careful charterer *would* on the facts known have concluded that the port was prospectively safe".[27]

22 Beyond the special category of political unsafety, the objective standard of the reasonable careful charterer would appear to be solely, or, at least, predominantly, factual. The due diligence obligation extends, with necessary adjustment, to delegates of charterers, that is persons through whom a charterer exercises his rights. Such persons include employees and agents, and also independent contractors. In *Dow Europe SA v Novoklav Inc*,[28] Timothy Walker J was of the opinion that cl 4 of Shelltime 4 required due diligence to be exercised not only by the charterer but also by a port authority to which the power to nominate a berth had been delegated.[29] In adopting this approach, the clause was construed in a way similar to the interpretation given to the carrier's obligation to exercise due diligence to provide a seaworthy ship under the Hague and Hague-Visby Rules.[30] Ultimately, the question whether the obligation to exercise due diligence is personal to charterers or extends to persons who are delegates of charterers will depend on the proper construction of the clause in question.[31] When regard is had to the way safe port clauses are currently drafted, the obligation appears to extend to include delegates.

23 It is improbable that due diligence clauses significantly dilute the potential liabilities of charterers in connection with unsafe ports. If a port is unsafe in fact only in exceptional circumstances will charterers be able to adduce evidence of due diligence. Where on the evidence a port is

27 *Supra* n 25, at 551.
28 [1998] 1 Lloyd's Rep 306.
29 *Id,* at 308–309. See also *The Saga Cob* [1991] 2 Lloyd's Rep 398 (first instance) at 408 *per* Judge Diamond QC. On the question of port authorities and others acting as a delegate of charterers, see *The Isabelle* [1982] 2 Lloyd's Rep 81; *Mediolanum Shipping Co v Japan Lines Ltd (The Mediolanum)* [1984] 1 Lloyd's Rep 136 (CA); *The Erechthion* [1987] 2 Lloyd's Rep 180.
30 *Cf Riverstore Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807; [1961] 1 Lloyd's Rep 57.
31 *Supra* n 28, at 309.

clearly unsafe, the failure on the part of the charterer to exercise due diligence will be plain and the facts will speak for itself, a case of *res ipsa loquitur*.[32] The primary purpose of the clauses is to protect charterers from the consequence of unknown and unknowable port risks; but the characteristic risks associated with any particular port, which represent the basis of the safe port promise, will in the vast majority of cases be either known or knowable, in the sense that they can be ascertained by reasonable enquires made by reasonably competent charterers. A significant amount of information about the ports of the world is available to charterers from accessible sources. In this day and age a danger which is not knowable by the exercise of reasonable care will be exceptional. Therefore, it will be rare for charterers to be able to establish reasonable care and prudence notwithstanding personal ignorance of a characteristic risk of a particular port. An example might be an unchartered subterranean ridge of hard rock in the silted bed of a port.[33]

24 There is one outstanding difficulty relating to the due diligence promise. At what point in time must the charterer establish due diligence? Is it, as may be appropriate, at and before the time when the port is specified when making the contract, or at and before the time the port is nominated or the voyage instruction is given; or is it a continuing obligation? To make the point in another way, is due diligence to be established at and before the time when the promise that the port is prospectively safe is made,[34] or must due diligence be established at all times prior and subsequent to making the charterparty contract? The answer to these questions is probably dependant on the proper construction of the particular clause in issue, but when the clauses typically found in contemporary tanker charterparties are examined no conclusive answer is provided. The principled answer would seem to be that due diligence must be shown to have been exercised at and before the time when the express or implied promise that the port is prospectively safe is made.[35] Events that occur or information acquired subsequently which provide evidence that the port is or may be unsafe will either be immaterial or, when appropriate, fall to be responded to in accordance with the terms of the charterer's secondary obligation, the nature of which will be discussed later.[36]

32 *The Chemical Venture, supra* n 24.
33 *Cf The Mediolanum, supra* n 29.
34 See paras 27, 60–61 of the main text below on the discussion of "prospective safety".
35 See Pt VI of the main text below on "Voyage orders, nominations, and the secondary obligation of charterers".
36 *Ibid*.

V. Construing the primary "safe port" promise

A. Definition of "safe" port

25 The true meaning of the "safe port" promise is a question of construction. In practice rarely, if ever, do the parties adopt any alternative or additional words. Sometimes the word "good" is also used, but this would appear to add nothing to the word "safe".[37] The same remains true whether the promise is express or implied. In these circumstances the meaning of "safe port" has become settled around the definition propounded in *The Eastern City*[38] by Sellers LJ, who said:[39]

> [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.

26 This definition is today accepted as definitive and represents the starting point to any judicial or arbitral examination of the safe port promise.[40] It emerged gradually from the preceding case-law[41] and subsequently has consistently attracted judicial approval, in particular by Lords Diplock and Roskill in *The Evia (No 2)*.[42] It has become the keystone concept in this branch of the law, for it succinctly identifies the principal elements of the concept of a "safe port".[43] When the promise relates to a safe berth or other place, the established approach is to manipulate the formulation proposed by Sellers LJ so that it applies to the berth or other place in issue.[44]

27 The promise of safety is not that the port is immediately safe at the time the promise is made and that it will, thereafter, continue to be safe; the promise is that the port is prospectively safe, meaning that the

37 *Cf* The Baltic and International Maritime Council ("BIMCO") Uniform Time-Charter (as revised 2001), Code Name: "Baltime 1939", cl 2; *Kodros Shipping Corpn v Empresa Cubana de Fletes (No 2) (The Evia (No 2))* [1983] 1 AC 736 at 756; [1982] 2 Lloyd's Rep 307 at 314.
38 [1958] 2 Lloyd's Rep 127.
39 *Id*, at 139.
40 *The Hermine* [1979] 1 Lloyd's Rep 212 (CA) at 214–215 *per* Roskill LJ.
41 *Cf The Hermine*, *ibid*; *The Mary Lou*, *supra* n 5.
42 *Supra* n 37.
43 But not necessarily all; see *The Mary Lou, supra* n 5, at 276 *per* Mustill J.
44 *Cf The Carnival, supra* n 12.

port will be safe at the time the ship has cause to use the port.[45] Consequently, the port need not be safe at the time the promise is made, nor subsequently; in these circumstances there is no breach of contract provided that the source of the unsafety ceases to exist by the time the vessel has cause to use the port.

28 At one stage in the development of the law there was uncertainty surrounding the precise nature of the safe port promise and some judges favoured the "absolute continuing obligation" construction. According to this construction, in the context of a time charterparty, the charterer promised that the designated port was safe at the time of the voyage order and that it would remain safe throughout the duration of the approach voyage.[46] This construction was rejected as erroneous by the House of Lords in *The Evia (No 2)*, the House unanimously favouring the prospective safety construction.[47] This latter construction is less demanding and in commercial terms far more practical and realistic. The promise when made by the charterer is that the port is prospectively safe, meaning that it will be safe at the time the charterered ship has cause to use the designated port. Therefore, the crucial moment when the test of safety is to be adjudicated is when the chartered ship arrives at, uses or departs from the port, whichever mode of user is in issue. There is no breach if at the time the promise is made the designated port is unsafe, or if it is unsafe at any stage during the approach voyage, provided that the source of the unsafety ceases to exist by the time the chartered ship has cause to use the port, in the wide sense applicable to the promise.

B. Safety – focus on the particular

29 The test of safety is whether the *particular* port is safe for the *particular* ship at the *particular* time the ship approaches, uses or departs from the port.

30 In the first place, it is to be noted that the test of safety relates to the particular ship and the particular port; it does not relate to shipping generally. A port hazard may be a danger to all shipping using the port, but such universal danger is not necessary. On the other hand, it matters

45 *The Evia (No 2), supra* n 37. See also *The Kanchenjunga, supra* n 15, at 397 *per* Lord Goff of Chieveley, the "port was prospectively safe for the vessel to get to it, stay at, so far as necessary, and in due course, leave".

46 *The Mary Lou, supra* n 5, at 276–278 *per* Mustill J; *The Evia (No 2)* [1981] 2 Lloyd's Rep 613 (first instance) at 620, *per* Goff J.

47 *The Evia (No 2), supra* n 37, at 756–763; 314–319, *per* Lord Roskill.

not that the port is safe for all other shipping, if it is unsafe for the particular ship.[48] Consequently, the preceding or subsequent safety record of the particular port is not directly of relevance, save possibly as supporting evidence. The particular port must be safe for the particular ship, taking into account her type, class, attributes, characteristics, features and capabilities; whether the ship is laden and, if so, the nature of her cargo,[49] and also her crew. If the particular ship is laden, the port must be safe for the ship in her laden state;[50] if she is in ballast, the port must be safe for the ship in that condition.[51] The port must be safe not only for the ship but also, in all probability, for her crew; if the crew is exposed to a contagious disease or other serious health risks or security risks the port may be unsafe.

31 Further, the port must be safe at the particular time the chartered ship has reason to use the port.[52] The safety of a port may be affected by such considerations as the seasons or time of year, the different conditions that may prevail between day and night, deteriorating labour relations and a changing civil and political climate.

C. The relevant period of time

32 The promise prevails during "the relevant period of time". In a general sense this alludes to the period when the ship is using the port; but the notion of using the port is to be understood in an extended sense. It relates not only to the time when the ship is within the port but also to the period when the ship is making for and returning from the port.

33 There is little difficulty with regard to the notion of "using" a port, save for the occasional problem that might be encountered in defining the precise boundaries of a port. On the other hand, there are as yet unanswered difficulties associated with the notion of "making for" and "returning from" a port.

34 If a ship is on a preliminary voyage making for a port of loading, does the safe port promise apply to the entire voyage or only to that part of it which may be identified as the approach to the port? And following

48 *Brostrom & Son v Dreyfus & Co* (1932) 44 Ll L R 136.
49 *The Alhambra* (1881) 6 PD 68.
50 *Hall Bros Steamship Co Ltd v R & W Paul Ltd* (1914) 19 Com Cas 384; *Brostrom & Son v Dreyfus & Co*, *supra* n 48.
51 *Limerik Steamship Co Ltd v WH Stott & Co Ltd* (1920) 5 Ll L R 190.
52 *The Evia (No 2)*, *supra* n 37, at 749; 310, *per* Lord Diplock.

loading, the same question may be asked in connection with the carrying voyage from the port of loading to the port of discharge. Does the promise apply to the entire voyage to the port of destination or only that part of it which may be regarded as returning from or leaving the load port? The authorities do not provide conclusive answers to these questions.

35 In *The Sussex Oak*,[53] Devlin J expressed the opinion *obiter* that the safe port promise related to the entirety of a voyage to a port of destination performed under a time charterparty, but at the same time recognised that, as a question of fact, the more remote the occurrence of a danger from the port of destination the less likely it was to interfere with the safety of the voyage. In the opinion of Devlin J the charterer did not promise that the most direct or any particular route to the port specified in the voyage order was safe, only that the order specified a voyage which an ordinarily prudent and skilful master could navigate safely.[54]

36 The factual qualification substantially neutralises the impact of the legal construction adopted of the safe port promise. Nevertheless, there must be doubt whether the promise, as a question of construction, extends as widely as was suggested by Devlin J, in the absence of an express term to that effect. The charterer's promise relates to the use of a port, albeit in a wide sense; but Devlin J extends the promise materially wider to cover what may be described as voyage risks which may be separately allocated between owner and charterer under the terms of the charterparty. It is also difficult to reconcile the wider view adopted by Devlin J with the precise words used by Sellers LJ in defining a safe port,[55] and also with the concept of prospective safety.[56] In *The Evia (No 2),* Lord Roskill alludes to "the approaches" to a port,[57] which expresses a more restricted and, it is suggested, more acceptable approach. In commerce there would appear to be recognised a very clear divide between port and voyage risks, and it seems desirable that this division should also be recognised by the law.

37 The narrower and preferred approach carries the difficulty of identifying precisely when a ship ceases to be on a voyage to a port of

53 *G W Grace & Co Ltd v General Steam Navigation Company Ltd (The Sussex Oak)* [1950] 2 KB 383.
54 *Id,* at 304.
55 *Supra* n 39.
56 See above at paras 25–28, "Definition of 'safe' port".
57 *Supra* n 37, at 757; 315, *per* Lord Roskill.

destination and is to be regarded as approaching that port; and, also, when a ship ceases to be leaving a port and is to be regarded as having embarked on her outward voyage. There can be no blanket answer to these difficulties; they involve questions of fact and are best answered by reference to the understanding of commercial and maritime people. Quite clearly, the legal, administrative or customary boundaries of a port do not represent the critical demarcation; a ship may be described as approaching or leaving a port although outside the boundaries of the port.[58] On the facts in *The Sussex Oak*, when a ship encountered ice in the Elbe when making for and leaving Hamburg, it is probable that any reasonable member of the commercial and maritime community would have had no hesitation in saying that when the ship was endangered by ice she was successively approaching and leaving the port of Hamburg,[59] and would have held to this conclusion even if the source of the danger was located outside the limits of the port. But not all cases will be capable of being this readily resolved.

38 The same problems do not arise in relation to safe berths and other places. These promises relate specifically to a berth or place after the ship has arrived at the port; the promise, therefore, is restricted to movements within the relevant port to and from, and whilst using, the named or nominated berth(s) or place(s).[60]

D. Exposure to the risk of normal danger

39 A port is not safe if the chartered ship will or might be exposed to danger or prejudice at any stage during the relevant period of time, namely whilst approaching, using or departing from the particular port. It is not necessary that the ship be actually lost or damaged, or otherwise prejudiced; it is sufficient that there is a risk of any such consequence.[61] On the other hand, the charterer's promise of safety does not relate to all port risks; if it did, it is probable that no port in the world would be safe, for it is improbable that any port is completely free of risk. The charterer is not an insurer of all port risks. The promise relates to risks that are characteristic of the port, which may be described as the normal or

58 *Cf The Hermine*, *supra* n 40, where a vessel leaving Distrahan on the Mississippi was held up for 30 days at a point 115 miles down river due to silting: the port of Distrahan was held to be unsafe.

59 But confronted with facts as in *The Hermine*, *ibid*, it can be imagined that consensus would be a rarer commodity.

60 *The APJ Priti*, *supra* n 10.

61 *The Hermine*, *supra* n 40.

inherent risks,[62] which cannot be avoided by the exercise of good seamanship and navigation on the part of the master of the chartered vessel.[63] Consequently, the promise of safety does not extend to embrace abnormal risks;[64] nor does it exclude or dilute the responsibility of owners and masters from continuing to exercise reasonable care and skill in the management and navigation of the vessel.[65]

40 That the risk of danger or prejudice must arise from some normal characteristic of the port was emphasised by the House of Lords in the leading case *The Evia (No 2)*.[66] Lord Diplock was of the opinion that the risk must result "from some normal characteristic of the particular port at the particular time of year".[67] On the facts of the case the outbreak of hostilities between Iran and Iraq in September 1980 were not regarded as a normal characteristic of the port of Basrah.[68] In *The Saga Cob*[69] a tanker was attacked by Eritrean guerrillas while anchored outside the port of Massawa. The Court of Appeal held the port not to be unsafe for on the facts the risk of guerrilla attacks had not become a characteristic either of the route to or the anchorage at Massawa.[70]

41 A normal characteristic suggests a phenomenon or feature which is established and capable of being proved by evidence. It suggests something which has existed over a period of time. Nevertheless, such preconceptions do not necessarily represent the law and the moral appears to be that it is unwise to attempt to lock the concept within the parameters of a rigid definition. A characteristic of a port must at some stage first emerge, when of necessity the characteristic of longevity is absent. Also, an established characteristic may with the passage of time change its nature or even cease to exist.[71] As a matter of authority, a recently emerged or short-lived or temporary circumstance may be a characteristic of a port.[72] Moreover, the characteristic of a port need not

62 *The Dagmar* [1968] 2 Lloyd's Rep 563; *The Eastern City* [1957] 2 Lloyd's Rep 153 (first instance), *supra* n 38; *The Evia (No 2)*, *supra* n 37.
63 See Pt F of the main text below on "Risks avoidable by good navigation and seamanship".
64 See Pt E of the main text below on "Abnormal risks".
65 *Supra* n 63.
66 *Supra* n 37.
67 *Id*, at 749; 310.
68 See Pt E of the main text below on "Abnormal risks, where the case is further considered".
69 *Supra* n 25.
70 See also n 101.
71 *The Mary Lou*, *supra* n 5.
72 *Ibid*.

have the quality of constancy, it may arise periodically or cyclically, for example, with the seasons or time of the year or in connection with peculiar local conditions;[73] also, the prevailing social, civil and political conditions of a port may change.[74] In the final analysis, whether a risk may be regarded as a normal characteristic of a port is a question of fact, to be determined having regard to all the facts and circumstances appertaining to the particular port in question.

42 Although there is no necessary relation between a port characteristic and duration, a hazard which is temporary may not amount to a breach of the safe port warranty. A ship, for example, before entering or leaving a port may wait for high water or for a storm to abate or for an obstruction to be removed or for a condition prevailing at the port to be attended to by the port authority. The fact that the ship cannot immediately enter or leave the port without risk does not mean that the port is unsafe and the charterer liable.[75] In these circumstances the risk is both transient and obvious, and it falls to be managed under the continuing duty of the master to exercise reasonable care and good seamanship. It is not the case that a temporary risk cannot as a matter of law amount to a characteristic of a port; it is that a temporary risk is often a manageable risk.[76] But this is not necessarily true of all temporary risks. To be contrasted with the examples previously considered, a hazard of short duration, such as the temporary absence of navigational aids or a brief period of adverse weather conditions, may be sufficient to render the port unsafe.[77]

43 The concept of a risk which is a normal characteristic of a port is potentially one of considerable breadth. It embraces risks characteristic of the terrestrial, marine and environmental attributes of a port; the organisation and administration of a port and also the political and other contextual circumstances relating to a port. The latter head is a broad residual category which embraces characteristics that do not fall within either of the first two categories.

73 *The Evia (No 2)*, *supra* n 37, at 749; 310, *per* Lord Diplock.
74 *Ibid*, see also *Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1984] 1 Lloyd's Rep 244 (CA).
75 *The Stork* [1954] 2 Lloyd's Rep 397; *Smith v Dart* (1884) 14 QBD 105; *The Heinrich Horn* [1971] AMC 362.
76 See Pt F of the main text below on "Risks avoidable by good navigation and seamanship".
77 *The Mary Lou*, *supra* n 5, at 279, *per* Mustill J; *The Eastern City*, *supra* n 38.

44 With regard to terrestrial, marine and environmental characteristics a port may be unsafe because of any circumstances relating to its physical structures, geographical location, geological and marine configuration, sea conditions and exposure to the elements. Thus a port may be unsafe because of structural unsafety,[78] insufficient depth of water,[79] tidal fluctuations, sea swells, presence of ice,[80] sandbanks, vulnerability to silting,[81] an exposed or rocky sea bed, uncharted reef,[82] deficient anchorages,[83] exposure to unpredictable gales,[84] wind conditions[85] and other kinds of adverse weather,[86] absence of shelter,[87] insufficient room to manoeuvre within or to leave a port in safety in the face of dangerous conditions.[88]

45 Even if otherwise safe, a port may be unsafe by reason of the absence of or the defective nature of navigational aids and safety equipment,[89] or by reason of mismanagement on the part of the port authority. Thus a port may be unsafe because of the absence or malfunctioning of appropriate navigational and safety equipment, such as marker buoys, warning lights,[90] radar; or because of the failure to make available salvage assistance, tugs,[91] pilots and other appropriate support and rescue facilities. A port is also unsafe if it fails to provide appropriate weather reports or warnings of approaching bad weather[92] or to put in place appropriate systems to ensure prompt and effective responses on the part of the port or any ship using the port to dangerous situations that may arise.[93]

78 *The Houston City* [1956] 1 Lloyd's Rep 1(HL).
79 *The Alhambra, supra* n 49; *Hall Bros Steamship Co Ltd v R & W Paul Ltd*, *supra* n 50.
80 *Knutsford (SS) Ltd v Tillmanns & Co* [1908] AC 406; *The Sussex Oak*, *supra* n 53.
81 *The Hermine*, *supra* n 40.
82 *The Mediolanum*, *supra* n 29.
83 *The Eastern City*, *supra* n 38.
84 *Ibid*.
85 *Johnston Bros v Saxon Queen SS Co* (1913) 108 LT 564.
86 *Johnston Bros v Saxon Queen SS Co*, *ibid*; *The Dagmar*, *supra* n 62.
87 *The Houston City*, *supra* n 78.
88 *Smith v Dart & Son*, *supra* n 75; *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ld (The Stork)* [1955] 2 QB 68.
89 *The Mary Lou*, *supra* n 5; *The Dagmar*, *supra* n 62.
90 *The Mary Lou*, *supra* n 5, at 279, *per* Mustill J.
91 *Brostrom & Son v Dreyfus & Co*, *supra* n 48.
92 *The Eastern City*, *supra* n 38; *The Dagmar*, *supra* n 62.
93 *Smith v Dart & Son*, *supra* n 75; *Islandar Shipping Enterprises SA v Empresa Maritima del Estado SA (The Khian Sea)* [1979] 1 Lloyd's Rep 545; *Dow Europe SA v Novoklav Inc*, *supra* n 28.

46 The inclusion of political risks is a recognition that the safety of a port may extend to considerations beyond the physical, marine and elemental features or attributes of ports, or matters relating to port management.[94] In *The Evia (No 2)*, Lord Roskill refused to accept that the safety of a port was restricted to physical unsafety.[95] It has become the practice to assemble these other risks collectively under the utility title "political risks", though they do not all relate to risks of a political character, such as war, revolution, terrorism, civil commotion *etc*. If a ship is exposed to the risk of unlawful confiscation, detention, seizure or arrest the port may be unsafe. In contemporary conditions security may readily touch upon safety, with the absence of appropriate certification under the ISPS Code capable of rendering a port unsafe.[96]

47 This wider understanding of unsafety was adopted and applied in the early case *Ogden v Graham*,[97] where the chartered ship was ordered to discharge at a Chilean port. At the time of the order the port had been closed by order of the government and the chartered ship could not proceed to the nominated port without risk of confiscation. The port was held to be politically unsafe. The decision in *The Evia (No 2)*[98] makes it clear that a port may be unsafe when it is caught up in hostilities of war,[99] and it may be assumed that the same would be true of a port caught up in civil disruption or strife, or which has been blockaded or is under the threat of blockade, or which is vulnerable to guerrilla and terrorist attacks.[100] Parker LJ in *The Saga Cob* expressed the opinion that a political risk is not to be regarded as a characteristic of a port unless the "risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there".[101] This approach characterises the question as one of fact and degree, and also embodies a judgment. Once a political risk is established, it renders the port unsafe only if the risk prevails to such an extent that a reasonable owner or master would be justified in refusing to trade to the port. This suggests a different approach to that adopted in relation to other categories of risk, where risk is a simple question of fact.

94 *Duncan v Köster (The Teutonia)* (1872) LR 4 PC 171; *Palace Shipping Co v Gans Steamship Line* [1916] 1 KB 138; *Brostrom & Son v Dreyfus & Co*, *supra* n 48. For a contrary opinion, see judgment of Sir Sebag Shaw in *The Evia (No 2)* [1982] 1 Lloyd's Rep 334 (CA).

95 *Supra* n 37, at 765; 320.

96 Baris Soyer & Richard Williams, *Potential Legal Ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law* [2005] LMCLQ 515.

97 (1861) 1 B & S 773.

98 *Supra* n 37.

99 *Ibid*; see also *Palace Shipping Co v Gans Steamship Line*, *supra* n 94.

100 *The Saga Cob*, *supra* n 25.

101 *Ibid*, at 551.

E. Abnormal risks

48 In the absence of an express agreement to the contrary, the safe port promise does not extend to abnormal risks, by which is meant risks that are not characteristic of the particular port. As previously emphasised, the charterer is not an insurer of all port risks; the charterer only agrees to bear those risks that are a normal and characteristic incident of the port. There is no promise that the port will be free from risks arising from abnormal occurrences. Provided the port is otherwise inherently safe, the charterer is not liable for any damage or loss caused by a wholly exceptional or unpredictable event.[102] This qualification to the charterer's safe port promise is again made clear in the definition enunciated by Sellers LJ, where the obligation is stated to exist "in the absence of some abnormal occurrence".[103] The same qualification is to be found in earlier and subsequent authorities.[104]

49 Whether an event is wholly exceptional or unpredictable must be judged in the context of the facts and circumstances of the particular case; thus an event may be adjudged wholly exceptional or unpredictable in the context of such variables as the season or time of year in question. It may be assumed that even in relation to abnormal events the master continues to be under a duty to exercise reasonable care and good seamanship,[105] but, in these circumstances, rarely would failure to avoid the consequences of the hazard amount to breach of duty on the part of the master.

50 Therefore, whether a risk is abnormal is in each case a question of fact.[106] The kinds of risk that may fall within the category include exceptional storms and seas, such as typhoons and tsunamis; earthquakes and other similar geological occurrences; political events, such as the outbreak of war, terrorism or civil commotions, tumults and risings. But what is abnormal should not always be equated with exceptional acts of God or man. In the present context abnormal would appear to be the antithesis of normal: If a risk is not a normal characteristic of a port then probably it is to be characterised as abnormal, irrespective of any further

102 *The Mary Lou*, *supra* n 5, at 283, *per* Mustill J.
103 *Supra* n 39.
104 *The Stork*, *supra* n 20, at 373, *per* Morris LJ; *The Evia (No 2)*, *supra* n 37, at 757, 760; 315, 317, *per* Lord Roskill.
105 See Pt F of the main text below on "Risks avoidable by good navigation and seamanship".
106 *The Hermine*, *supra* n 40, at 219, *per* Geoffrey Lane LJ.

consideration of scale and impact. There is yet another dimension to abnormality. Beyond the notion that a risk may be inherently abnormal, it is also possible for the manifestations or consequences of a characteristic risk to be abnormal.[107] For example, it may be a characteristic of a port that it is vulnerable to unpredictable gales, but, on the occurrence of a particular unpredicted gale, its ferocity and consequences may be so great as to qualify as an abnormal risk.

51 This aspect of the law is well illustrated by examining two cases relating to the first Iran-Iraq conflict. In the *The Evia (No 2)*,[108] the *Evia*, which had been chartered on an amended Baltime 1939 form, was in March 1980 ordered to load a cargo for carriage from Cuba to Basrah. The ship arrived in the Shatt-al-Arab waterway on 1 July 1980, but because of port congestion her entry to a berth was delayed until 20 August 1980. Discharge of the cargo was completed on 22 September 1980. By that date the first Iran-Iraq war had broken out and the port of Basrah and the surrounding area was engulfed by hostilities. Thereafter no ships were able to escape and all were trapped in the port. At the time when the ship had been ordered to proceed to Basrah and also when she had entered the port there existed no reason to anticipate the outbreak of war between Iran and Iraq. The outbreak of war and the threat it represented to the *Evia* had occurred after her arrival at the port of Basrah. It was, in the circumstances, an unexpected and abnormal event and consequently there was no breach on the part of the charterer of the safe port promise made in cl 2 of the amended Baltime 1939 form.

52 The position would have been different had the outbreak of war taken place before the ship was ordered to proceed to Basrah or her subsequent entry to the port, or if war could, reasonably, have been anticipated on either of these dates. If these circumstances had prevailed, the war hostilities or the threat of such hostilities would have become a characteristic of the port and the safe port promise would have operated. This was the factual situation that prevailed in *The Lucille*.[109] Because of congestion at the port of Basrah the *Lucille* was not ordered into Basrah until 20 September. On this date it was clear that hostilities between Iran and Iraq were imminent and, consequently, the port was unsafe. The subsequent entrapment of the *Lucille* by the closure of the Shat-al-Arab

107 *Ibid*.
108 *Supra* n 37.
109 *Supra* n 74.

on 22 September was accordingly the fault and responsibility of the charterer.

53 The distinction between normal and abnormal risks may on occasions involve difficult questions of fact and degree.[110] It is also necessary to appreciate 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.

F. Risks avoidable by good navigation and seamanship

54 This further qualification is again given clear expression to in the definition enunciated by Sellers LJ, who makes reference to "danger which cannot be avoided by good navigation and seamanship".[111] The qualification makes it plain that the charterer's promise of safety does not mean that the owner and master may surrender all responsibility for the ship when within the port and its vicinity. The master continues to be under a duty to navigate the chartered ship with the requisite degree of care, diligence, and good seamanship; in other words to avoid the consequences of those port risks that could have been avoided by a reasonable competent master. Failure to achieve the requisite standard of care and good seamanship renders the master responsible for the resulting damage and loss; responsibility cannot be attributed to the charterer.[112]

55 There are two ways of interpreting this aspect of the safe port promise. First, it could be said that risks which are capable of being avoided by the exercise of reasonable care and good seamanship, which may conveniently be alluded to as manageable risks, do not fall within the safe port promise. The promise relates to the characteristic risks of the port (as distinct from abnormal risks) which cannot be avoided by the exercise of reasonable care and good seamanship. If, therefore, a risk falls into the category of manageable risks, the charterer is not liable because the risk is outside the ambit of the safe port promise.

110 *The Saga Cob*, *supra* n 25, provides an example of the potential difficulties.
111 *Supra* n 39.
112 *St Vincent Shipping Co Ltd v Bock, Godeffroy & Co (The Helen Miller)* [1980] 2 Lloyd's Rep 95.

56 The second way of viewing the matter is as a question of causation, with the master's breach of duty amounting to a *novus actus interveniens*. The breach of duty on the part of the master is the effective cause of the damage or loss suffered by the owner and it breaks the causal potency of any breach of the safe port promise. The implication of this analysis is that manageable risks remain within the safe port promise, but the charterer is protected by virtue of the rule of causation.

57 Which approach represents the correct analysis has yet to be specifically highlighted for judicial consideration, though the causation analysis appears to be favoured in the authorities.[113] In many instances nothing of consequence will turn on the question, for each analysis leads substantially to the same result. But this will not necessarily be true of all situations; it could, for example, become relevant if a question arose concerning the concurrent liability of charterer and master. There is, of course, nothing to prevent charterer and master being individually liable for separately identified losses attributable to breach of their respective duties.

58 The master is only required to exercise *ordinary* care, skill and seamanship. If the danger could be avoided only by the exercise of a very high standard of care, skill and seamanship in the navigation of the ship, the danger may render the port unsafe,[114] provided it otherwise cannot be characterised as an abnormality. Also, the fact that damage or detriment has been suffered, notwithstanding the exercise of ordinary care, skill and seamanship, does not inevitably mean that the port is unsafe. In the words of Mustill J, there is always the third possibility that "the casualty was the result of simple bad luck".[115]

59 In the face of allegations of negligence, the courts are disposed to take a sympathetic view of the position of ships' masters. They are frequently under great pressure from charterers and indeed owners to trade their ships and not to take objection to ports on the itinerary. Consequently, a master may be confronted with the invidious decision of choosing between what is commercially expedient and his responsibilities for the safety of the adventure. This potential dilemma is appreciated by the judiciary and taken into account when determining questions of

113 *The Houstan City*, *supra* n 3; *The Dagmar*, *supra* n 62; *The Polyglory*, *supra* n 4; *The Mary Lou*, *supra* n 5.
114 *Supra* n 4.
115 *The Mary Lou*, *supra* n 5 at 279. See, also, *The Apiliotis*, *supra* n 7.

negligence and causation.[116] Where the master can be shown to have acted reasonably in the circumstances it is unlikely that he will be found to be negligent or, alternatively, that any breach of duty will be interpreted as causal.[117] Negligence is ultimately a question of fact; but the fact that the master has obeyed an order to enter a particular port is not itself evidence of negligence;[118] and a master may also be justified in relying on advice given by qualified persons.[119]

VI. Voyage orders, nominations, and the secondary obligation of charterers

60 There are two general ways the safe port promise can operate and be breached. The first is where the ports to be visited by the vessel are specified (named) in the charterparty and accompanied by an express promise that the ports will be safe, which, as previously observed, is construed as prospectively safe. This is the situation that exists in a voyage charterparty where the ports of loading and discharge are specified and expressly promised to be safe. In this circumstance the promise of safety is made when the charterparty is entered into, and it is breached when the vessel suffers damage or loss when using the contractual port of loading or discharge as a result of that port's unsafety; or when the master correctly assesses either port to be unsafe and refuses to enter or leaves prematurely.

61 The second, and probably more frequent way, is when a port is designated under voyage orders given by a time charterer, with the safe port promise either express or implied. In this circumstance there are three stages associated with the safe port promise. Initially, there is the designation of the port by the time charterer in his voyage order; secondly, the ship proceeds on her voyage to the designated port; and, finally, the vessel arrives at, uses and departs from the designated port. Different legal issues may arise in connection with each stage. The express or implied promise that the designated port is prospectively safe is made at the time of the voyage order. As previously analysed, the meaning of the promise is that the designated port will be safe when the chartered ship has cause to use the port. The promise is not that the port is safe at the time of the order, nor that it will be safe throughout the period of the

116 *The Houston City*, *supra* n 3, at 158, *per* Dixon CJ.
117 *The Stork*, *supra* n 20, at 363, *per* Sellers LJ.
118 *The Houston City*, *supra* n 3, at 158–159, *per* Dixon CJ.
119 *The Mary Lou*, *supra* n 5; *The Saga Cob*, *supra* n 25.

voyage to the designated port, it is that the port will be safe at the time of user.[120] If the port was unsafe at the time of the order, only if the source of the unsafety continues to exist at the time of the ship's use of the port is the charterer's promise broken. And, of course, if at the time of the order the port is unsafe and it is clear that it will remain so, the order is invalid from the time it is given and may be rejected. In all instances, in the event of breach, as a consequence of which the owner suffers damage or loss, the breach relates back to the promise of safety (express or implied) accompanying the making of the voyage order. In contrast to breach of an express promise of safety embodied in the terms of the charterparty, considered above, the breach relates to the promise of safety made when the voyage order was given.[121]

62 A further factual possibility is that the designated port is safe at the time of the voyage order but to the knowledge of the charterer it becomes unsafe during the course of the voyage to the designated port. In the face of such an event, the charterer is under a secondary obligation to withdraw the original voyage order and, if it is possible and feasible, give a new safe port order.[122] The obligation arises as a question of construction of the safe port promise and highlights the fact that it is the charterer's duty to do all that he can effectively do to protect the ship from the danger which has arisen. The secondary obligation comes into effect even if the vessel has arrived at the port designated, and even if discharge of cargo has commenced, though in these circumstances the feasibility of a new safe port order may be significantly less likely than when the vessel is en route to the designated port.[123] The secondary obligation is not without its limitations: a charterer is not required to give a new voyage order if it would be ineffective, as, for example, where it would be impossible for the ship to comply with the new voyage order.[124] Subject to this qualification, a charterer who fails to withdraw the original order and give a new safe port order is in breach of the secondary obligation, sounding in damages. Further, a refusal to give a new safe port order, or persistent failure to give such an order, is probably repudiatory with the

120 *Supra* n 45.
121 *Ogden v Graham*, *supra* n 97; *The Sussex Oak*, *supra* n 53; *The Houston City*, *supra* n 3, at 153, *per* Dixon CJ; *The Evia (No 2)*, *supra* n 37, at 757–763; 315–319, *per* Lord Roskill.
122 *The Houston City* [1956] AC 266 at 284; [1956] 1 Lloyd's Rep 1 at 10, *per* Lord Somervell; *The Evia (No 2)*, *supra* n 37, at 763–764; 319–320, *per* Lord Roskill.
123 *The Evia (No 2)*, *ibid*.
124 *Ibid*.

owner entitled to accept the breach as terminating the charterparty.[125] The secondary obligation is not free of problems because it could place a charterer in contractual difficulties where a subcharter or bill of lading contracts have been entered into. There would appear to be no protection available in respect of such potential liabilities unless the charterer has had the foresight to agree protective clauses into the subcharter or bill of lading contracts.

63 The preceding analysis applies equally to port nominations made under a voyage charterparty. The promise of prospective safety is made at the time of the port nomination. But, whereas the concept of the secondary obligation of charterers fits neatly into the scheme of time charterparties, except, possibly, when the secondary obligation arises towards the end of the charter period and the question of "legitimate last voyage" comes into question,[126] the same cannot be said of voyage charterparties. There are difficulties because there does not exist a true parallel between specified and nominated ports under voyage charterparties and ports designated under voyage orders given by time charterers. Where the ports the ship is required to visit are specified in the voyage charterparty, it is impossible to substitute a new safe port without a contractual variation, which can only be achieved with the agreement of both parties. Where the ports are nominated by the charterer from a named or geographical range of ports, the traditional analysis is that once nominated the port is treated as if it had been specified in the charterparty from the time of its initial making. In other words, the nomination operates retrospectively and irrevocably.[127] Of course, to have this effect the nomination must be valid; in particular the charterer must nominate a port which is not prohibited or otherwise excluded under the terms of the charterparty. Where a named or geographical range of ports is specified, at the very least, the nomination must be of a port from within the range.[128] If a nominated port is unequivocally prospectively unsafe, the nomination is again invalid and the owner may reject the nomination and call for a new nomination of a safe port.[129] But such a clear-cut situation is unlikely to be usual; more probable will be the case

125 *Cf The Kanchenjunga* [1987] 2 Lloyd's Rep 509 (first instance); *Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos)* [1995] 1 Lloyd's Rep 1 (CA).
126 See Wilford, Coghlin & Kimball, *supra* n 1, at ch 4.
127 *Bulk Shipping AG v IPCO Trading SA (The Jasmine B)* [1992] 1 Lloyd's Rep 39 at 42, *per* Judge Diamond QC.
128 See Cooke *et al*, *supra* n 1, at ch 5, para 5.26 *et seq*.
129 *The Kanchenjunga*, *supra* n 15.

of a nominated port subsequently being identified as unsafe. In this circumstance there is no reason why the subsequent events should undermine the validity of the original nomination. If the nomination is both valid and retrospective in effect it is again difficult to see how the concept of the secondary obligation can have any impact. To admit it would amount to permitting a unilateral variation of the charterparty, which is contrary to principle. Of course, the position would be wholly different if the charterparty expressly permitted a new nomination to be made.

64 The problem of applying the secondary obligation of charterers to voyage charterparties was identified by the House of Lords in *The Evia (No 2)*,[130] but because the matter was not directly in issue the House refused to express a final opinion on the matter. In the practice of shipping the difficulty may be avoided by reference to the wider terms of the charterparty, for, customarily, the owner does not undertake an absolute obligation to reach a named or nominated port, but only to get "so near thereto as she may safely get".[131] Where these words are present and a specified or nominated port is unsafe, in such a sense as will bring these words into effect, the master has the option to take his ship to the nearest alternative port which the ship can safely use.[132]

VII. Characterising the contractual promise, nominations, voyage orders and remedies

65 In analysing these questions it is necessary to return to the distinction between a substantive express promise of safety embodied in the terms of a charterparty at the time of its making and an express or implied promise of safety which is made in association with the exercise of a contractual power to nominate a port or to give a voyage order designating a port.

66 There is considerable uncertainty surrounding the proper characterisation of a substantive safe port promise, whichever way the promise comes into existence. The question is whether the promise is a condition, warranty or intermediate term of the contract. Breach of the promise obviously sounds in damages and in practice rarely will there be

130 *Supra* n 37.

131 See The BIMCO Uniform General Charter (as revised 1922, 1976 and 1994), Code Name: "Gencon" cl 1.

132 *Cf Metcalfe v Britannia Ironworks Company* (1877) 2 QBD 423; *The Athamas (Owners) v Dig Vijay Cement Co Ltd (The Athamas)* [1963] 1 Lloyd's Rep 287.

cause to seek any additional remedy. Damages will customarily compensate for the physical loss or damage to property, expenditure incurred in avoiding the danger and detention losses. The dominance of damages as the only necessary remedy also accounts for the prevailing uncertainty surrounding the question whether the breach may also be repudiatory, and, if so, in what circumstances.

67 The key to the answer to this question may possibly be found in the accepted right of a master not to enter an unsafe port or to leave a port prematurely once it is discovered to be unsafe.[133] When such a right arises, it is frequently exercised as a temporary and not a permanent remedy, as a means of delaying entry or of leaving the port until the risk has passed. But where the port is and will remain unsafe the master is clearly justified in refusing to enter in any circumstances or of leaving the port permanently. When this circumstance arises the terms of the charter may entitle the master to take the vessel to an alternative safe port, but it will be a question of construction whether such a term is a liberty or an obligation, with the former possibility often determined by the courts to be the proper construction.[134] The fact that there exists such an alternative contractual remedy may not necessarily be an influence on the characterisation of the safe port promise. What might be a significant influence is the range of different factual situations of varying degrees of consequence in which the question of the remedial effect of breach of a safe port promise may arise. This fact, coupled with a regard to the way this branch of the law has developed, suggests that the obligation might be characterised as an intermediate term, with the right to treat a breach as repudiatory governed by the seriousness and/or consequences of the breach. Thus where a master exercises his right not to enter an unsafe port, the breach may be repudiatory if the resulting delay is inordinate and frustrates the adventure.[135] A master may, of course, waive the right to refuse to enter or to leave a port, with the waiver irrevocable; but such waiver does not, without special facts, extend to damages.[136] But where the facts are supportive, the right to damages may also be waived.[137]

133 *The Teutonia*, *supra* n 94; *Vardinoyannis v The Egyptian General Petroleum Corporation (The Evaggelos TH)* [1971] 2 Lloyd's Rep 200.
134 *The Varing* [1931] P 79; *The Athamas*, *supra* n 132.
135 In contrast, delay caused by a port hazard is a breach of the safe port promise only where the delay is of a frustrating nature, see *Knutsford (SS) Ltd v Tillmans & Co*, *supra* n 80; *The Sussex Oak*, *supra* n 53; *The Hermine*, *supra* n 40.
136 *Cf The Kanchenjunga*, *supra* n 15.
137 *The Chemical Venture*, *supra* n 24.

68 An invalid port nomination or voyage order is a breach of the charterparty, with the owner entitled to damages.[138] The owner is also entitled to reject an invalid nomination or voyage order and demand a new valid nomination or order.[139] A breach only becomes repudiatory where the charterer refuses or persistently fails to make or give a new valid nomination or voyage order.[140] At precisely what point in time such conduct becomes repudiatory may involve difficult questions of fact. However, there is no obligation to reject an invalid nomination or order; it may be accepted, with the right to reject thereupon irrevocably waived. Such waiver by election may be express of implied, so for a master to act in any way which is consistent with the acceptance of the nomination or order may amount to an implied waiver. Nonetheless, a waiver of the right to reject a nomination or order does not, without more, amount to a waiver of the right to damages. A ship which, with knowledge of the facts, enters an unsafe port, in the absence of special circumstances, retains the right to damages.[141]

69 In the present context a port nomination or voyage order will be invalid if at the time it is made the designated port is not and will not be safe. The fact that the designated port becomes unsafe after the nomination or voyage order does not retrospectively affect the validity of either, but, as it has been seen, it may in certain circumstances trigger the "secondary obligation" of the charterer. It is at the time of the nomination or voyage order that the charterer expressly or impliedly promises that the designated port is prospectively safe. But in the event that the nominated or designated port should be unsafe and as a consequence the owner suffers damage or loss, the legal consequences would appear to be precisely the same as when the promise of safety operates from the moment the charterparty was entered into.[142] When analysing the safe port promise in the context of port nominations and voyage orders there becomes visible a bifurcation in the safe port concept, for it has a twin influence. It feeds the substantive promise, whichever way it arises, and also regulates the validity of the port nomination or order. In the result a bridge is established between two very distinct concepts.

138 *Ogden v Graham*, *supra* n 97.
139 *The Kanchenjunga*, *supra* n 15.
140 *Cf The Gregos*, *supra* n 125. See also *The Kanchenjunga*, *supra* n 125.
141 *The Kanchenjunga*, *supra* n 15.
142 *Cf The Mary Lou*, *supra* n 5.

70 In relation to breach of the safe port promise the owner has a right to damages subject to the ordinary rules relating to causation, remoteness and quantification. The damages recoverable may relate to physical loss or damage to the ship, intentional sacrifice, detention losses, expenses incurred in extricating the vessel from danger or lightening the cargo, excess port expenses and any other loss or expense which flows causally and proximately from the breach.

VIII. Indemnity as an alternative to damages

71 In the context of a time charterparty the trading of a chartered ship to an unsafe port will be associated with a voyage order given by the charterer under the terms of the employment clause.[143] If port damage or loss suffered by the owner can be shown to be causally attributable to the voyage order it will be possible to pursue a claim for an indemnity against the charterer rather than for damages for breach of the safe port promise.[144] The right to an indemnity, in such circumstances, is often expressly provided for by the charterparty;[145] but, when not express, it may be implied.[146] A voyage order directing the vessel to proceed to and use an unsafe port is not a valid contractual employment order and it may be rejected. But, otherwise, the order is not void on grounds of illegality or public policy,[147] and, consequently, the right to reject the order may be waived, with the waiver not necessarily prejudicial to the right to an indemnity.

72 Where a port is unsafe and as a consequence the owner suffers damage or loss it would seem that there is no advantage to the owner in taking the alternative course of claiming an indemnity. The primary remedy is for breach of the contractual promise that the port is prospectively safe and the quantum recoverable as an indemnity would appear to be the same as that recoverable as damages. But, in particular circumstances, the right to an indemnity may be wider and, for example, exist for port losses and damage in circumstances when there has been no breach of an express or implied safe port promise,[148] or where the safe

143 See Wilford, Coghlin & Kimball, *supra* n 1, at ch 10.
144 *The White Rose* [1969] 2 Lloyd's Rep 52; *The Aquacharm* [1980] 2 Lloyd's Rep 237.
145 For example, Baltime 1939, cl 9.
146 *The Nogar Marin* [1988] 1 Lloyd's Rep 412; *The Island Archon* [1994] 2 Lloyd's Rep 227.
147 *Cf The Sussex Oak*, *supra* n 53.
148 *The Erechthion*, *supra* n 29.

port promise is of a restricted nature.[149] Of course, such wider rights of indemnity will only continue to exist if the reasons which make the safe port promise inapplicable or ineffective do not also undermine the claim to an indemnity, for example, causal negligence on the part of the master.[150] But, when there is no safe port promise, the owner's only remedy will be to claim an indemnity, provided such a right can be established.

IX. Liability of consignees

73 There are occasions when a receiver of cargo carried on a chartered vessel may become liable for breach of the safe port promise made by the charterer. This may result when the charterer is also shipper and a bill of lading incorporating charterparty terms is negotiated to a consignee or indorsee, or, in the case of a bearer bill, simply delivered. If the incorporation clause in the bill of lading is effective to incorporate the safe port promise in the charterparty[151] the consignee/indorsee/deliveree may, in English law, become liable for the consequences of a breach of the safe port promise, provided the provisions of the Carriage of Goods by Sea Act 1992 (c 50) (UK) are satisfied.[152] In practice such a position is very improbable, but not impossible.

74 Under the 1992 Act the rights arising under a negotiable shipped or received for shipment bill of lading are transferred to the lawful holder of the bill.[153] A holder of a bill alludes to a consignee, indorsee or deliveree in possession, or a person in possession of a bill who would have fallen into any of these categories had he not taken possession of the bill at a time when the bill no longer gave, as against the carrier, a right of possession of the goods to which the bill relates.[154] But the liabilities under a bill are only transferred if the lawful holder takes or demands delivery of any part of the cargo to which the bill relates from the carrier, or makes

149 *The Evaggelos TH*, *supra* n 133.

150 *The Lucille* [1983] 1 Lloyd's Rep 387 (first instance); *Stag Line Ltd v Ellerman & Papayanni Lines Ltd* (1949) 82 Ll L Rep 826.

151 Incorporation clauses in bills of lading are construed very strictly and the safe port promise is unlikely to be incorporated save where the wording of the incorporation clause is unambiguous in its intent. General words of incorporation are unlikely to suffice. For a recent useful judicial survey of incorporation clauses, see *Siboti K/S v BP France SA* [2003] 2 Lloyd's Rep 364.

152 For a detailed analysis of the Act, see Sir Guenter Treitel & Francis M B Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 2nd Ed, 2005), at ch 5.

153 Section 2(1).

154 Section 5(2).

a claim under the contract of carriage against the carrier in respect of any of those goods, or is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods.[155] But even when liabilities are transferred, the liabilities of the original shipper remain.[156]

X. Limitation of liability

75 The consequences of breach of the safe port promise may be excluded or limited by the charterparty terms provided and to the extent such exclusion or limitation is permitted by the governing law of the charterparty.

76 More generally, charterers do not have a right to limit liability globally under the Convention on Limitation of Liability for Maritime Claims (19 November 1976) (entered into force 1 December 1986) (the "London Convention 1976"), at least under the interpretation given to the London Convention 1976 in English law,[157] with regard to the consequences of breach of the safe port promise. The London Convention 1976 extends to "charterers" by virtue of the extended meaning given to "shipowner" in Art 1(2), which word is construed by the English courts to bear its ordinary unrestrictive meaning.[158] The right to limit, however, is restricted to limitable claims set out in Art 2 of the London Convention 1976, which article is interpreted as not extending to include claims by owners against charterers for loss or damage to the chartered ship arising from breach of duty on the part of the charterers.[159] Consequently a claim against a charterer for breach of the safe port promise is not limitable under the London Convention 1976, as interpreted in English law.

155 Section 3(1).
156 Section 3(3).
157 The Convention is given the force of law in the UK by the Merchant Shipping Act 1995 (c 21) (UK), s 185 and Sched 7, Pts 1 and 2.
158 *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtgesellschaft mbH and Co* [2004] 1 Lloyd's Rep 460. Contrast *The Aegean Sea*, *supra* n 15.
159 *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtgesellschaft mbH and Co*, *supra* n 158.

XI. Conclusion

77 The safe port promise of charterers is an important feature of charterparty contracts. It is, however, attended by a number of complexities and it is not as wide and unconditional as many within the shipping industry believe it to be. The charterer is far from being the insurer of port risks. There also remain several outstanding issues which have yet to be resolved by the courts. The law, nonetheless, possesses a significant degree of uniformity which is attributable primarily to the wide adoption of standard form contracts and the manner in which safe port promises are drafted in these contracts. But, ultimately, it must be borne in mind that the safe port promise is a contractual and not a legal concept and therefore the nature of the promise may be materially influenced by the manner in which it is drafted. With regard to tanker charterparties it would appear that there is now an established practice to draft safe port promises as due diligence obligations, and it would be no surprise if this practice were to be adopted increasingly in the drafting of dry cargo charterparties.

78 The safe port promise offers protection to owners when trading their ships under the terms of voyage, time and hybrid charterparties. But in this regard it does not stand alone; the safe port promise is usually one of several provisions in a typical charterparty which serve this purpose. The safe port promise itself is often expanded to include a provision that the chartered ship shall "always lie safely afloat" or "lie safe aground where vessels are accustomed to lie safely". Customarily, there will also be further clauses which offer protection to owners against specific categories of port risks, such as war clauses, ice clauses and quarantine clauses. On occasions, the precise relationship between these clauses and the specific safe port promise will come into question.[160]

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160 *The Evia (No 2)*, *supra* n 37; *The Chemical Venture*, *supra* n 24.