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Steven M. Rubin

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Safe Port and Berth Provisions in Time Charter Agreements: Apportioning Liability to Deter Accidents and Minimize Costs

STEVEN M. RUBIN*

This article surveys the safe port and berth provisions that typically are found in charter party agreements. The author argues that courts and arbitrators often interpret these provisions unpredictably and inconsistently, creating uncertainty in maritime transactions. The author concludes by proposing a solution to this problem and offers a model safe berth provision that the parties to a charter should incorporate into their agreement.

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I. INTRODUCTION

The perils of the sea are legend;¹ the perils of safe port and berth² provisions in charter party agreements are not as widely known. Typically, charter party agreements contain one of these provisions. Interpretation of these provisions by courts and arbitrators determine whether the charterer or the owner is liable for damages that a vessel may sustain while entering, using, or leaving

* A.B. (1976), Brown University; J.D. (1979), University of Southern California; Member of the California and the District of Columbia Bars; Associate with Kaplan Russin & Vecchi, Washington, D.C.

1. See, e.g., HOMER, THE ODYSSEY (W. Shewring trans. 1980).

2. The terms "port" and "berth" will be used interchangeably in this article unless the context requires otherwise.

a port. This article considers the safe port and berth provisions found in these agreements and discusses the constructions that courts and arbitrators have given them. With this background in mind, this article examines the development and effect of several ancillary doctrines that the courts and arbitrators have applied to these provisions.

Analysis of the numerous problems inherent in safe berth provisions and their related legal doctrines demonstrates the law's failure to achieve the objectives that the contracting parties intended the safe berth provisions to serve. These provisions and their related legal doctrines frequently do not provide predictability and orderliness in the administration of marine operations conducted under a charter party agreement. Furthermore, they often fail to apportion fairly liability in accordance with responsibility for the injuries a vessel may sustain. This situation is highly undesirable because it does not provide the proper incentive for the avoidance of unnecessary injury to a vessel while at berth. This article proposes a solution to these problems and demonstrates this proposal's ability to achieve order and predictability in the administration of charter party affairs, to apportion liability fairly, and to minimize the occurrence of injuries to vessels while at berth.

II. SAFE BERTH PROVISIONS

Courts and arbitration panels confront two distinct problems in interpreting safe berth provisions as they typically appear in charter party agreements. First, the decisionmakers must determine the standard of care that the provision requires. Second, they must determine the meaning of a safe port or berth in the context of the litigation or arbitration. These two problems of interpretation should be discussed separately.

A. *Standards of Care*

Safe berth³ provisions in time charters take a variety of forms. For example, the proceeding in *The M.V. Oceanic First*⁴ revolved around the following provision in the New York Produce Exchange

3. "A 'berth' is the location where the loading and discharging operation occurs. It may include a dock, anchorage, offshore mooring, or may be alongside another vessel. Additionally, the approaches to a berth may be included in its definition." Smith, *Time and Voyage Charter: Safe Port/Safe Berth*, 49 TUL. L. REV. 860, 861 (1975).

4. *Oceanic Freighters Corp. v. Louis Dreyfus Corp. (The M.V. Oceanic First)*, S.M.A. No. 1054 (Arb. at N.Y. 1976). See generally M. WILLFORD, T. COGLIN & N. HEALY, *TIME CHARTERS* 86-89 (1975) [hereinafter cited as *TIME CHARTERS*].

Type Time Charter Form:

That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct provided the vessel can *safely lie always afloat* at any time of tide⁵

Charter party agreements frequently contain this or a similar provision. Courts and arbitrators usually interpret the requirement that a vessel be able to "safely lie always afloat" as an express warranty of safe berth running from the charterer to the vessel owner.⁶

The charterer's warranty embodies an express undertaking or assurance on which the shipowner has the right to rely that the vessel "could proceed to discharge her cargo and depart from the port and that in the absence of some abnormal and unforeseen occurrence and given good navigation and seamanship this could be done without undue risk of physical damage to the vessel."⁷ The warranty therefore represents a charterer's assurance of safety in the approach to, use of, and departure from, a berth. If a shipowner shows that the berth was unsafe,⁸ the express assurance is contravened, and the charterer is liable for damages caused by the berth's unsafe conditions.⁹

Although the warranty construction of the term "safely lie always afloat" is generally well-established,¹⁰ it occasionally has been

5. The M.V. Oceanic First, S.M.A. No. 1054, at 2 (emphasis added).

6. See, e.g., *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469 (2d Cir.), cert. denied, 419 U.S. 998 (1974); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962), cert. denied, 372 U.S. 967 (1963); *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804 (2d Cir.), cert. denied, 343 U.S. 862 (1951); *Athina Shipping Co. v. Amerada Hess Corp.*, 1972 A.M.C. 796 (M.D. Fla. 1971); *Universal Tramp Shipping Co. v. Irish Salt Mining Co.*, 1970 A.M.C. 1783 (D. Mass.); *Red Star Barge Line v. Lizza Asphalt Constr. Co.*, 164 F. Supp. 97 (E.D.N.Y. 1958), aff'd, 264 F.2d 467 (2d Cir. 1959); *Appeal of the United States Lines*, 1977 A.M.C. 318, 335 (Armed Servs. Bd. Contract App. 1976). See generally *TIME CHARTERS*, supra note 4, at 86. The historical derivation of the warranty rule is examined in Smith, supra note 3, at 862-69. An analysis of other warranties in time charter agreements appears in Barak, *Time Charters: Who Bears the Burden of Complying with Subsequent Legislation—The Port and Tanker Safety Act of 1978*, 16 J. INT'L L. & ECON. 271 (1982).

7. The M.V. Oceanic First, S.M.A. No. 1054, at 5; see A. MOCATTA, M. MUSTILL & S. BOYD, *SCRUTTON ON CHARTER PARTIES AND BILLS OF LADING* 122-23 (18th ed. 1974) [hereinafter cited as *SCRUTTON ON CHARTER PARTIES*]; *TIME CHARTERS*, supra note 4, at 86-89.

8. For a discussion of the legal implications of the term "safe berth," see *infra* notes 26-54 and accompanying text.

9. *TIME CHARTERS*, supra note 4, at 86-89. In actual practice, however, a determination of liability is usually much more complicated. See *infra* notes 55-117 and accompanying text.

10. See *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962), cert. denied, 372 U.S. 967 (1963).

criticized.¹¹ According to a minority position, "the safe berth appears merely to exonerate the owner from any duty to berth the vessel at a place its master deems unsafe."¹² The minority reasons that unless a shipowner or his representative, the master, refuses to berth at a designated location, the shipowner alone will be responsible for any injuries to the vessel caused by its berth.¹³

Some safe berth provisions either eliminate the term "safely lie always afloat," or emphasize that the term is not of central importance to the provision. The arbitrators in *The S.T. Hilda*,¹⁴ for example, interpreted a "due diligence" provision.¹⁵ Under these clauses, the shipowner must prove not only that a berth is unsafe, but also that in ordering a vessel to the berth the charterers failed to exercise due diligence.¹⁶ Because arbitrators rely heavily on prevailing maritime customs and practices, the panels usually give this term a more summary treatment than it receives in other contexts.¹⁷ Apparently, however, the parties often intend "due dili-

11. See, e.g., G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 202-07 (2d ed. 1975); see also *Bunge Corp. v. MV Furness Bridge*, 396 F. Supp. 852, 858 (E.D. La. 1975), *aff'd in part*, 558 F.2d 790 (5th Cir. 1977) (describing two conflicting interpretations of safe berth provisions), *cert. denied*, 435 U.S. 924 (1978).

12. *Bunge Corp. v. MV Furness Bridge*, 396 F. Supp. at 858.

13. G. GILMORE & C. BLACK, *supra* note 11, at 206-07.

14. *Victoria Transp. Corp. v. Antco Shipping Co. (The S.T. Hilda)*, S.M.A. No. 1196 (Arb. at N.Y. 1978).

15. The provision in *S.T. Hilda* stated,

Charterer shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks. . . . Charterer shall not be deemed to warrant the safety of any port, place, berth, dock . . . and shall be under no liability in respect thereof except for loss or damage caused by its failure to exercise due diligence as aforesaid.

Id. at 2. A similar provision is found in a standard charter party form:

The Vessel shall be loaded, discharged, or lightened, at any port, place, berth, dock, anchorage, or submarine line or alongside lighters or lightening vessels as Charterer may direct. Notwithstanding anything contained in this Clause or any other provisions of this Charter, Charterer shall not be deemed to warrant the safety of any port, berth, dock, anchorage, and/or submarine line and shall not be liable for any loss, damage, injury, or delay resulting from conditions at such ports, berths, docks, anchorages, and submarine lines not caused by Charterer's fault or neglect or which could have been avoided by the exercise of reasonable care on the part of the Master or Owner.

STB Form of Tanker Time Charter, *reprinted in* TIME CHARTERS, *supra* note 4, at xxviii, xxxi.

16. See *The S.T. Hilda*, S.M.A. No. 1196, at 7; see also *Aquarian Navigation Ltd. v. Clark Oil & Ref. Corp. (The Athenoula)*, S.M.A. No. 1413 (Arb. at N.Y. 1980) (charterers did not fail to exercise due diligence because grounding of vessel not caused by a navigational hazard).

17. Compare cases cited *supra* note 16 (summary treatment of due diligence) with *Grand Trunk Ry. v. Ives*, 144 U.S. 408 (1891) (what constitutes care and prudence will vary

gence" to impose a negligence standard of care, rather than strict liability for breach of warranty.¹⁸

In addition to the interpretational difficulties posed by the terms "safely lie always afloat" and "due diligence," the safe berth clauses in some instances display even more ambiguity. The clause below, for example, appears to repudiate warranty and embrace instead a standard of prudence—but this interpretation is certainly not an inevitable result of the provision's wording:

(A) The Vessel shall be employed in lawful offshore activities restricted to the services stated in box 12 and on voyages between any good and safe port or place and any place or offshore unit where the Vessel can safely lie always afloat within the trading limits indicated . . . provided always (i) that the Charterers do not warrant the safety of any such port or place or offshore units but shall act with prudence in the orders to Vessel as if the Vessel were their own property and having regard to her capabilities in the nature of her employment, (ii) Charterers shall be responsible for any loss or damage sustained by the Vessel by reason of the condition of berth or offshore unit.¹⁹

The terms "prudence" and "due diligence" both presumably represent a negligence standard of liability, but this conclusion is neither apparent from the language of the provision nor directly supported by the prominent treatises on the subject.²⁰

The absence of a safe berth provision, however, does not preclude the implication of a warranty in the charter party agreement. In *The Atlantis*,²¹ the agreement contained no safe berth provision per se, but instead allowed the consignee discretion to order the vessel to a "second safe wharf or berth if required."²² After the vessel grounded at its designated port, Piraeus, Greece, a panel of the Society of Maritime Arbitrators quickly dismissed this ambiguous provision: "[I]t is debatable whether the reference to a second safe berth implies that the first is also safe. It may also be inter-

under different circumstances).

18. Cf. *Union Metal Co. v. Rondondo Shipping Co. (The M/V Grigoroussa)*, S.M.A. No. 1424 (Arb. at N.Y. 1980) (relying on SCRUTTON ON CHARTER PARTIES, *supra* note 7, at 423) (describing owner's duty to discover "latent defects" under a "due diligence" provision).

19. The clause is one of endless variations of a standard charter party form. See generally *Baltic and International Maritime Conference Uniform Time Charter Party for Offshore Service Vessels*, reprinted in *TIME CHARTERS*, *supra* note 4, at xxiv.

20. Cf. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 149-80 (4th ed. 1971) (analysis of the reasonable man of ordinary prudence).

21. *Petrol Shipping Corp. v. Kingdom of Greece (The Atlantis)*, S.M.A. No. 788 (Arb. at N.Y. 1972).

22. *Id.* at 4.

puted to mean that the second berth must be safe, the first being known to both parties to be safe."²³ Nevertheless, the panel did not find significant the absence of a safe berth provision warranting that the vessel could lie safely afloat. The panel reasoned that the "safety of the port, even if not warranted verbatim, is always implied and the liability for damages due to unsafety depends upon the knowledge of the parties."²⁴ In relieving the charterer of warranty liability, however, the panel relied on the owner's familiarity with both the port and the particular wharf at which the *Atlantis* docked.²⁵

B. *The Meaning of the Term "Safe Berth"*

Courts and arbitrators also have had difficulty determining whether a particular berth is "safe." Ordinarily, a berth is safe if a vessel can approach, use, and depart from the berth without undue risk of physical damage, given good navigation, seamanship, and the absence of some abnormal or unforeseen occurrence.²⁶ This definition is easier to state than to apply. Although the courts and arbitrators have attempted to give the term a precise meaning, many questions remain unanswered.

1. SAFETY IN APPROACH AND DEPARTURE

A safe port or berth is one in which the approach and departure is unobstructed. Accordingly, a vessel must be able to enter its berth fully laden with cargo, discharge the cargo, load new cargo, and depart without touching ground.²⁷ Thus, the depth of a port is

23. *Id.* at 9.

24. *Id.*

25. The panel explained its holding as follows:

[T]he Panel does not attribute great importance to the fact that the Charter Party does not warrant the Port of Piraeus to be safe or that the Vessel shall be always afloat. But it attributes particular significance to the fact that Piraeus is *named* in the Charter Party and that there is only one grain berth thereat where vessels of the "ATLANTIS" size can discharge fully laden, which is commonly known to the entire trade. Also to the fact that representative of the Owners inspected the known berth before the arrival of the Vessel and was fully satisfied after the dredging. Were he not satisfied, he could veto the berthing of the ship and request the application of the lighterage clause.

Id. (emphasis in original). In this respect, the decision resembles another arbitration award that also invoked the doctrine of assumption of risk, without ever denoting it as such. See *Conсорico Naviera Peruana, S.A. v. Amerop Corp. (The Zaneta)*, 1970 A.M.C. 807 (Arb. at N.Y.); see also *infra* text accompanying notes 67-69.

26. See *supra* note 7 and accompanying text.

27. See, e.g., *The Gazelle*, 128 U.S. 474 (1888); *Carbon Slate Co. v. Ennis*, 114 F. 260

an important factor in determining its safety. In *The Gazelle*,²⁸ for example, the Supreme Court of the United States held that a port was unsafe because a sandbar obstructed its entry.²⁹ One arbitration panel even concluded that a berth or port may be rendered unsafe when it is not possible to ascertain accurately the depths of its waters.³⁰

Underwater and overwater objects may also render a berth unsafe. In *Mencke v. A Cargo of Java Sugar*,³¹ the Supreme Court concluded that a berth beyond the Brooklyn Bridge was unsafe for a ship with masts too high to permit it to sail underneath the bridge.³² Similarly, in *The M/S Silvercove*,³³ a panel of the Society of Maritime Arbitrators held the charterers liable when an underwater object adjacent to the ship's berth damaged the rudder.³⁴

A port or berth must also be safe for the particular vessel named in a charter party.³⁵ The vessel's size is therefore an important factor in determining the safety of the berth. A berth that is safe for one vessel may be unsafe for another.³⁶

2. SAFETY IN USE

A berth must provide not only a safe approach and departure, but also must have characteristics that enable a vessel to use it safely. Weather conditions, for example, are often a source of injury to a vessel at berth. Although in unusual instances weather conditions may render a berth unsafe as a matter of law,³⁷ this is

(3d Cir. 1902); *Crisp v. United States & Australasia S.S. Co.*, 124 F. 748 (S.D.N.Y. 1903); see also *Neptune Maritime Co. v. Cook Indus. (The N.V. Naiad)*, S.M.A. No. 1177 (Arb. at N.Y. 1977) (safe port warranty encompasses entrance to river as well as to berth along the river). These cases are discussed in *TIME CHARTERS*, *supra* note 4, at 86-87.

28. 128 U.S. 474 (1888).

29. *Id.* at 485-86.

30. *Astrodevoto Compania Naviera, S.A. v. Carbonavi (The Eastern Eagle)*, 1971 A.M.C. 236 (Arb. at N.Y. 1970).

31. 187 U.S. 248 (1902).

32. *Id.* at 257. In *Mencke* the Court held the charterers liable for the expense of lighterage from the vessel to a dock below the Brooklyn Bridge.

33. *Silverline Ltd. v. Seabord [sic] Shipping Co. (The M/S Silvercove)*, S.M.A. No. 813 (Arb. at N.Y. 1973).

34. *Id.* at 4. In *The M/S Silvercove*, tugboats damaged the vessel while pushing it from the pier.

35. See *Consorico Naviera Peruana, S.A. v. Amerop Corp. (The Zaneta)*, 1970 A.M.C. 807, 808 (Arb. at N.Y. 1970). In *The Zaneta*, the owners were not allowed to collect damages from the charterers because they should have known that the vessel could not proceed according to the contract.

36. *TIME CHARTERS*, *supra* note 4, at 86.

37. See, e.g., *Oceanic Freighters Corp. v. Louis Dreyfus Corp. (The M.V. Oceanic First)*,

not the general rule. As the panel of arbitrators in *The S.S. Stadt Schleswig*³⁸ stated, "Major ports can become temporarily unsafe, as a result of storms and hurricanes, tidal waves and other acts of God. This does not *per se* make it unsafe or entitle that label at any given moment."³⁹ Courts and arbitrators ordinarily will not find a breach of the safe berth warranty when a storm has damaged a vessel at berth, because a storm is simply "one of the perils of the sea" for which a charterer cannot be held responsible.⁴⁰

Charterers nonetheless may be held liable for injuries to a vessel resulting from damaged bumpers or fenders insulating the perimeters of a berth. For example, the panel in *Appeal of the United States Lines*⁴¹ determined that dilapidated fendering made a berth unsafe. The panel specifically identified several hazards created by the inadequate fendering system:⁴² "[T]he ship pounded and surged against three remaining vertical pilings and steel rods protruding from the concrete pier."⁴³ According to the panel, "[t]he most damage was caused by the piling located at the transverse bulkhead between #3 and #4 hatches which protruded further away from the pier than the others and acted as a pivot around which the vessel turned."⁴⁴

3. UNCHARTED TERRITORY

Although many principles governing the meaning of safe port provisions are well-established,⁴⁵ there remains ample opportunity for parties to a charter to disagree about whether particular conditions are "safe" within the meaning of the law. For example, a sandbar at the mouth of a port or berth may render either "unsafe."⁴⁶ This determination does not resolve the question whether a temporary shoal formed by unusual weather and currents should produce the same result.⁴⁷ Similarly, is a berth unsafe because a

S.M.A. No. 1054 (Arb. at N.Y. 1976).

38. *Horn v. Christensen Canadian Enters. Ltd.* (The S.S. Stadt Schleswig), 1971 A.M.C. 362 (Arb. at N.Y. 1970).

39. *Id.* at 365. The panel accordingly held that the high winds that damaged the vessel did not render the port unsafe.

40. *Esso Standard Oil, S.A. v. The S.S. Sabrina*, 154 F. Supp. 720, 724 (D.C.Z. 1957).

41. 1977 A.M.C. 318 (Armed Servs. Bd. Contract App. 1976).

42. *Id.* at 331-33.

43. *Id.* at 332.

44. *Id.*

45. See generally TIME CHARTERS, *supra* note 4, at 86-89; Smith, *supra* note 3, at 870-74 (explaining the generally accepted characteristics of a safe port).

46. See *The Gazelle*, 128 U.S. 474 (1888).

47. *Cf. Neptune Maritime Co. v. Cook Indus.* (The M.V. Naiad), S.M.A. No. 1177 (Arb.

shoal will sometimes form in its entry at certain times of the year?⁴⁸ What should be the result if a temporary, permanent, or recurring shoal partially, but not completely, obstructs the mouth of a port or the entry to a berth?⁴⁹ What if a rock formation, underwater cables, or pipes partially obstruct the entry to a berth?⁵⁰ Under these circumstances, the courts and arbitrators must determine what constitutes good navigation and seamanship and how they may relate to a determination of whether a berth is unsafe.

Grounds for disagreement are not limited to issues concerning safety in arrival and departure from a berth; difficult questions concerning use of a berth also remain unanswered. Although bad weather does not ordinarily render a berth "unsafe,"⁵¹ seasonal storms, which are somewhat predictable, may result in disagreement over a berth's safety.⁵² The adequacy of fendering around a berth can also raise thorny issues. For example, is a berth without fendering safer than one with inadequate fendering?⁵³ If a failure to install fendering was sufficient to give rise to liability, then most ports in many parts of the world would be deemed "unsafe" and safe port provisions would become a trap for the unwary charterer. Furthermore, it is not clear how much fendering is necessary to make a berth safe⁵⁴ or how much scarring and abrasion a vessel must sustain, beyond normal wear and tear, to support an owner's claim for damages.

Determining whether a port or berth is "unsafe" as a matter of law is only one of several questions that a court or arbitration panel must consider when evaluating liability for port or dockside damages. Liability and the apportionment of damages are also affected by issues related to several warranty liability exceptions borrowed from tort law.

at N.Y. 1977) (river known to have seasonal draft changes can be considered unsafe).

48. *See id.*

49. *See The Gazelle*, 128 U.S. 474 (1888) (permanent shoal across entry to harbor unsafe for a vessel that cannot cross it).

50. *See Mencke v. A. Cargo of Java Sugar*, 187 U.S. 248 (1902) (bridge under which a vessel cannot pass renders port unsafe).

51. *See supra* notes 37-40 and accompanying text.

52. *See, e.g., Appeal of the United States Lines*, 1977 A.M.C. 318 (Armed Servs. Bd. of Contract App. 1976) (port can be unsafe due to faulty fendering and unusual, but not unforeseeable, winter winds).

53. *See, e.g., id.*

54. *See, e.g., Appeal of the United States Lines*, 1977 A.M.C. 318 (Armed Servs. Bd. Contract App. 1976) (berth with wooden fendering unsafe when deteriorated vertical fender piles led to damage of vessel).

III. EXCEPTIONS TO THE SAFE BERTH WARRANTY

Judicial and administrative decisions recognize four exceptions to the contractual safe berth warranty: assumption of risk,⁵⁵ intervening negligence,⁵⁶ avoidance by good navigation and seamanship,⁵⁷ and comparative or mutual fault.⁵⁸ Although the courts and arbitration panels treat each of these defenses differently, they are all based on the owner's or master's ability to avoid or mitigate the loss.⁵⁹

A. Assumption of Risk

If a charterer shows that a shipowner has "assumed the risk" of unsafe berth conditions, he may shift liability entirely to the shipowner for losses arising from the berth conditions.⁶⁰ In *Tweedie Trading Co. v. New York & Boston Dyewood Co.*,⁶¹ for example, the court held a vessel's owner fully responsible for dead freight charges incurred when the charterer refused to load the full cargo because the ship would have been unable to cross a sandbar fifty miles downriver.⁶² Because the owner possessed complete information regarding the depth of the river, the court determined that the vessel assumed all risks attending her movement to and from the port of loading.⁶³ In another instance of liability-shifting, in *Pan Cargo Shipping Corp. v. United States*⁶⁴ the shipowner, rather than the charterer, was held liable for losses incurred when the Saudi Arabian government prohibited the vessel from entering

55. See *infra* text accompanying notes 60-73.

56. See *infra* text accompanying notes 74-88.

57. See *infra* text accompanying notes 89-101.

58. See *infra* text accompanying notes 102-117.

59. Recognition of the exceptions implies that the courts and arbitrators do not fully adhere to the view that a safe berth provision imposes on the charterer an absolute contractual duty to provide a completely safe berth. The owner's liability arises because the courts and arbitrators interpret the safe berth provision as merely exonerating the owner from any duty to berth the vessel anywhere the master deems unsafe. See *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 801 (5th Cir. 1977) (dicta), *cert. denied*, 435 U.S. 924 (1978).

60. See *Tweedie Trading Co. v. New York & Boston Dyewood Co.*, 127 F. 278 (2d Cir.), *cert. denied*, 193 U.S. 669 (1903); *Pan Cargo Shipping Corp. v. United States*, 234 F. Supp. 623 (S.D.N.Y. 1965), *aff'd per curiam*, 373 F.2d 525 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967); *Petrol Shipping Corp. v. Kingdom of Greece (The Atlantis)*, S.M.A. No. 788 (Arb. at N.Y. 1972); *Conсорico Naviera Peruana, S.A. v. Amerop Corp. (The Zaneta)*, 1970 A.M.C. 807 (Arb. at N.Y.).

61. 127 F. 278 (2d Cir.), *cert. denied*, 193 U.S. 669 (1903).

62. *Id.* at 279.

63. *Id.* at 280.

64. 234 F. Supp. 623 (S.D.N.Y. 1965), *aff'd per curiam*, 373 F.2d 525 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967).

the port of Ras Tanura, where it was to load a cargo of oil. The Saudis barred the ship after it had previously visited Israeli ports, in violation of a boycott imposed by several Arab states.⁶⁵ Affirming the decision, the Second Circuit Court of Appeals observed, "While this possibility was known to the shipowner it was not known to the charterer; the risk of the denial of pratique was thus on the owner."⁶⁶

Arbitrators also invoke the doctrine of assumption of risk. In *The Zaneta*,⁶⁷ for example, a panel of arbitrators held that the charterer was not liable for grounding damages sustained by the ship at the named port of Buenaventura because the shipowners had "knowledge of the conditions," and therefore, "entered into the charter at their own risk."⁶⁸ The panel observed that the shipowners "could have instructed the Captain to load cargo only until the vessel would obviously ground then remove the vessel from the berth awaiting Charterers' instructions or, alternatively, sail and claim dead freight."⁶⁹

These decisions demonstrate that it is difficult to predict accurately when courts or arbitrators will invoke assumption of risk to override a charterer's warranty liability. The analysis in *Pan Cargo* correctly suggests that assumption of risk should apply only when a shipowner has knowledge of a specific risk unknown to the charterer.⁷⁰ Otherwise, a charterer could negate any protection that a safe berth provision affords a shipowner merely by showing that the shipowner had some general knowledge of the risks involved.⁷¹ Nevertheless, all decisions do not follow this reasoning. In *Tweedie Trading Co.*, the court did not consider whether the charterers also were aware of the hazards involved.⁷² Moreover, the charterers in *The Zaneta* knew or should have known of the risk, but the panel held the owners liable for the loss.⁷³

65. *Pan Cargo*, 373 F.2d 525, 525 (2d Cir. 1965), *aff'g per curiam* 234 F. Supp. 623 (S.D.N.Y.), *cert. denied*, 389 U.S. 836 (1967).

66. *Id.*

67. *Conсорico Naviera Peruana, S.A. v. Amerop Corp. (The Zaneta)*, 1970 A.M.C. 807 (Arb. at N.Y.).

68. *Id.* at 808.

69. *Id.*

70. Because the owners "knew the facts as to the voyage . . . to Israel and . . . deliberately took the risk thereby created," imposing liability on the owners is "the fair and equitable decision." *Pan Cargo*, 234 F. Supp. at 634.

71. This is somewhat ironic because a shipowner's knowledge of potential hazards may have prompted him to bargain for a safe berth clause.

72. 127 F. 278, 280 (2d Cir.), *cert. denied*, 193 U.S. 669 (1903).

73. 1970 A.M.C. 807, 808 (Arb. at N.Y.).

B. *Intervening Negligence and Avoidability by Good Navigation and Seamanship*

These exceptions focus on the master's or captain's conduct of a vessel. The courts discuss the captain's role in terms of "intervening negligence"⁷⁴ while the arbitrators refer to "avoidability by good navigation and seamanship."⁷⁵ These differences in terminology reflect meaningful differences in the standards actually applied.

The intervening negligence doctrine was discussed in *American President Lines v. United States*.⁷⁶ In that case, the United States District Court for the Northern District of California overturned a decision rendered by the Armed Services Board of Contract Appeals. The Board had found the charterer liable for damages sustained while the vessel was moored at an unsafe berth in high winds, but not responsible for additional damages occurring after the master departed the berth in an attempt to prevent further damage by anchoring in a nearby bay.⁷⁷ Although the Board found that the charterer breached the charter party agreement by directing the ship to unload at an unsafe port, it also reasoned that the master acted unreasonably because high winds prevailing in the area created a foreseeable risk of harm if the vessel was transferred to the bay.⁷⁸ In addition, the Board found that the master could have steered clear of the unfavorable weather altogether and consequently, the intervening negligence of the master in moving the vessel broke the chain of causation and shifted liability to the shipowner for those damages that occurred after the ship left its berth.⁷⁹

In rejecting the Board's holding and deciding instead that the charterer was liable for all damages, the district court focused on the "difficult dilemma" confronting the captain when the charterer directs the vessel to a port that the captain believes is unsafe.⁸⁰ A captain who refuses to comply runs the risk of a later determination that the port was safe. On the other hand, a captain who attempts to comply with the order runs the risk of a miscalculation.⁸¹

74. See *infra* text accompanying notes 76-88.

75. See *infra* notes 89-101 and accompanying text.

76. 208 F. Supp. 573 (N.D. Cal. 1961).

77. *Id.* at 575.

78. *Id.*

79. *Id.*

80. *Id.* at 576.

81. *Id.*

The court reasoned that when a charterer places a captain in this dilemma, a court should not burden him with the entire responsibility for the vessel's safety. In the court's view, if the captain attempts to comply with the charterer's directive, it would be inequitable to relieve the charterer of liability for harm caused by the charterer's wrongful demand merely because the captain's choice of alternatives proves incorrect.⁸² The court concluded that the charterer is liable for the consequences of his breach of contract unless the course followed by the captain is so imprudent that it constitutes an intervening act of negligence.⁸³ This principle requires the captain to do more than merely make a decision involving some foreseeable risk of harm. "To constitute an intervening act of negligence," the court stated, "the course followed by the captain must entail an unreasonable risk of harm."⁸⁴

The United States Court of Appeals for the Second Circuit, in *Venore Transportation Co. v. Oswego Shipping Corp.*,⁸⁵ also established a stringent test to prove intervening negligence. In *Venore* the charterers alleged intervening negligence. The master relied on the charterer's agent's assurance that it was "all right" to enter a berth where only one of two pontoons remained.⁸⁶ The court stated that "even had no assurances been given, the charter party was itself an express assurance that the berth was safe, upon which the Master had a right to rely."⁸⁷ Indeed, this decision may reach beyond the standard of unreasonable risk that the court in *American President Lines* required in order to constitute an intervening act of negligence. The *Venore* court indicated that an owner is insulated from liability, even if the risk taken by the captain is unreasonable, when the charterer provides an express assurance of safe berth, which may consist of nothing more than a warranty clause in the charter party itself.⁸⁸

In contrast to the courts, arbitration panels have adopted less rigorous standards for establishing intervening negligence.⁸⁹ The

82. *Id.*

83. *Id.*

84. *Id.*

85. 498 F.2d 469 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974).

86. *Id.* at 471.

87. *Id.* at 472.

88. *Id.* at 473.

89. *See, e.g., San Cecilio Cia. Nav., S.A. v. Greenwich Marine, Inc. (The M.V. Sifnos)*, S.M.A. No. 1252 (Arb. at N.Y. 1978); *Europa Shipping Corp. v. Amerop Corp. (The S.S. Marathonian)*, S.M.A. No. 1166 (Arb. at N.Y. 1977); *Hyman-Michaels Co. v. Westminster Corp. (The M/V Preveza)*, S.M.A. No. 870 (Arb. at N.Y. 1974) (interim award).

arbitrators abandon the distinction between a foreseeable and an unreasonable risk of harm. Instead, the arbitrators simply inquire whether the danger involved "cannot be avoided by good navigation and seamanship."⁹⁰ Not surprisingly, this analysis yields results very different from the judicial approach previously described.⁹¹

In *The S.S. Marathonian*, a shipowner sought to recover damages when a growing swell in the harbor, emanating from hurricanes at sea, damaged a vessel at berth.⁹² The Society of Maritime Arbitrators found that the port and berth at Manzanillo, Mexico, where the vessel was damaged, were safe in normal weather. Because the vessel's owner accepted named ports in the charter party, the panel stated that "it was his responsibility to check on them."⁹³ The panel reasoned further that the master could have left the berth, anchored in the harbor, and returned to the dock after the surging ceased.⁹⁴ The panel, therefore, concluded that the charterers did not breach the safe port or berth warranty and held the owner responsible for the damage to the vessel caused by the master's negligence.⁹⁵

The panel in *The M.V. Sifnos*⁹⁶ also relieved a charterer from liability when the master's negligence damaged a vessel. The damage occurred during a period of untoward weather while the ship was at berth in Valparaiso, Chile.⁹⁷ In support of its conclusion, the panel observed that the master had failed to make timely decisions necessary for the vessel's safety. If the master had requested tug assistance earlier or had left the berth, the panel reasoned, then the damage would not have happened or would have been minimal.⁹⁸

The decision in *The M.V. Preveza*⁹⁹ is also based on the master's ability to avoid the damage. While arriving in Quebec during inclement weather, the vessel dragged her anchor over un-

90. *Europa Shipping Corp. v. Amerop Corp. (The S.S. Marathonian)*, S.M.A. No. 1166, at 6 (Arb. at N.Y. 1977) (quoting *The Eastern City*, 2 Lloyd's Rep. 127 (1958)).

91. See *supra* notes 76-88 and accompanying text.

92. *The S.S. Marathonian*, S.M.A. No. 1166, at 4.

93. *Id.* at 6.

94. *Id.* at 5.

95. *Id.* at 6.

96. *San Cecilio Cia. Nav., S.A. v. Greenwich Marine, Inc. (The M.V. Sifnos)*, S.M.A. No. 1252, at 4 (Arb. at N.Y. 1978).

97. *Id.* at 3.

98. *Id.*

99. *Hyman-Michaels Co. v. Westminster Corp. (The M/V Preveza)*, S.M.A. No. 870 (Arb. at N.Y. 1974) (interim award).

derwater communication cables.¹⁰⁰ To free the ship, it was necessary to cut the anchor chain and connect a new anchor. The arbitrators did not discuss whether the master undertook an unreasonable risk. Rather, the panel held that the master's navigational error in inclement weather—and not the charterer's instructions to proceed to Quebec—caused the damages.¹⁰¹

Thus, the courts and arbitrators apply different standards for determining when the acts of the owner or his agent relieve the charterer of liability under the charter party agreement. The courts require more egregious conduct before shifting liability to the owners. This divergence between the courts and arbitrators does not exist with findings of mutual fault.

C. *Mutual Fault*

When charterers have breached a safe berth provision, both courts and arbitrators occasionally are willing to apportion some liability to the owners. This typically occurs when the owners had prior knowledge of the hazards involved.¹⁰²

In *Ore Carriers of Liberia, Inc. v. Navigen Corp.*,¹⁰³ for example, the United States Court of Appeals for the Second Circuit affirmed a district court judgment dividing damages evenly between the charterer and owner after the vessel crashed into some machinery while navigating a river without tug assistance. The court observed that both the owner and charterer had agreed that it would be hazardous for the ship to navigate the Black River without tug assistance.¹⁰⁴ Although the charterers had contractually warranted the safety of port and this warranty was breached, the court rea-

100. *Id.* at 4.

101. The panel stated:

The charterers instructed the Master to proceed to Quebec without pilot "weather permitting." The Master could and should refuse to comply, if he considered the venture to be dangerous. However, he reached Quebec safely without pilot and the incident occurred [sic] several hours after his arrival while he had the benefit of expert advice by radiotelephone from the Pilot Station. Therefore, the instructions of the Charterers were not the cause of the incident. The cause of it was a typical error in navigation . . . for which the Master and Owners are liable.

Id. at 8.

102. See, e.g., *Ore Carriers of Liberia, Inc. v. Navigen Corp.*, 435 F.2d 549 (2d Cir. 1970); *Appeal of the United States Lines*, 1977 A.M.C. 318 (Armed Servs. Bd. Contract App. 1976); *Oceanic Freighters Corp. v. Louis Dreyfus Corp. (The M.V. Oceanic First)*, S.M.A. No. 1054 (Arb. at N.Y. 1976).

103. 435 F.2d 549 (2d Cir. 1970).

104. *Id.* at 550.

soned that the shipowner had acted with full knowledge of the probable unavailability of tug assistance.¹⁰⁵ In apportioning liability, the court specifically found that the shipowner's vice president had known before the voyage commenced that the ship, because it was registered in Liberia, might be picketed and consequently, that tug assistance was unlikely.¹⁰⁶

Arbitration panels have also apportioned liability in a variety of situations that would support a finding of mutual fault. In *Appeal of the United States Lines*,¹⁰⁷ a panel of the Armed Services Board of Contract Appeals found both the owner and the charterer at fault. The owner alleged that the charterer had breached a safe berth provision because the fendering system at the berth was seriously deteriorated. Although the master had placed temporary fenders between the vessel and the pier,¹⁰⁸ exposed pilings and protruding steel rods damaged the ship.¹⁰⁹ The panel found mutual fault and apportioned liability between the parties.¹¹⁰ Although the hazardous condition of the berth was known to the charterer,¹¹¹ the panel pointed out that the hazard was also known, or should have been known, to the shipowner and master of the vessel because they continually used the terminal.¹¹² Reasoning that both the shipowner and charterer should be held responsible for placing the vessel in a situation where she sustained damage, the panel ordered them to share liability for damages.¹¹³

*The M. V. Oceanic First*¹¹⁴ also illustrates the predisposition of decisionmakers to mitigate the charterer's liability under a warranty clause. In that case, a panel of the Society of Maritime Arbitrators stressed that both parties had prior knowledge of the adverse weather conditions that ultimately caused injury to the vessel. Each party had become familiar with both weather and berth conditions after repeated calls to the port during a one-year period.¹¹⁵ Reluctant to allow a warranty of safe berth to become a trap for the unwary charterer, the panel declared that the "owner's

105. *Id.*

106. *Id.*

107. 1977 A.M.C. 318 (Armed Servs. Bd. Contract App. 1976).

108. *Id.* at 329.

109. *Id.* at 332.

110. *Id.* at 343.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Oceanic Freighters Corp. v. Louis Dreyfus Corp. (The M.V. Oceanic First)*, S.M.A. No. 1054 (Arb. at N.Y. 1976).

115. *Id.* at 8.

right to rely upon the safe port, safe berth warranties of the Contract does not extend to their ignoring obvious unsafe and dangerous conditions that in all probability could exist."¹¹⁶ The panel accordingly held that the owners and charterers must share responsibility for damages.¹¹⁷

D. *Summary of the Exceptions*

This survey demonstrates that the confusion inherent in the ambiguous safe berth provisions is often exacerbated by the doctrines that courts and arbitrators have developed as exceptions to warranty liability. It is impossible to predict when a reviewing body will determine that the owner's intervening negligence or assumption of risk completely eliminates the charterer's warranty liability. Similarly, it is difficult to anticipate when the owner's prior knowledge, navigational error, or mutual fault will reduce the charterer's liability. One point, however, is clear: the courts and arbitrators employ these doctrines to achieve equity. As a result, the decisionmakers are inclined to override the charterer's warranty, even if the parties expressly agreed to it, when notions of "fairness" require that the owner be held liable for damages that he should have foreseen or could have avoided.

IV. A PROPOSAL FOR A MORE RATIONAL JURISPRUDENCE

Safe berth provisions should achieve several easily identifiable goals. The obligations that these provisions impose, like the obligations imposed under any statutory, judicial, or contractual pronouncement, should be clear and subject to precise interpretation. This would enable the persons governed by these provisions to conduct their business affairs securely according to the requirements of law because they would be reasonably certain of the consequences of their conduct. To achieve fairness, the courts and arbitrators should interpret these provisions predictably and consistently. Indeed, fairness requires the decisionmaker to consider several frequently competing factors. These factors include not only procedural fairness through evenhanded application, but also substantive fairness through compliance with the intentions of the parties as expressed by their contract, and the apportionment of liability in accordance with their fault. A party's blameworthy

116. *Id.*

117. *Id.* at 9.

actions or omissions should give rise to liability.¹¹⁸

The current law of safe berth provisions in charter party agreements fails to establish clearly defined obligations in several respects. The clauses themselves are often ambiguous and subject to conflicting interpretations.¹¹⁹ Furthermore, courts and arbitrators do not apply the exceptions to the warranty liability of safe berth provisions consistently or predictably.¹²⁰ When the courts or arbitrators do invoke these exceptions, they appear to adjust their terms in accordance with the desired outcome in a particular case.¹²¹ Thus, for a charterer to establish an owner's liability, he must prove that the owner either assumed an unreasonable risk of harm or failed to use good navigation or seamanship in controlling the vessel.¹²² The decisions do not explain why the owner's knowledge of a risk of harm will in some instances completely cut off a charterer's liability by reason of assumption of risk, but will in other instances merely reduce the charterer's liability on a determination of mutual fault.

In addition, these rules frequently contravene the express intentions of the parties. The owner's knowledge of unsafe berth conditions, for example, frequently overcomes a warranty provision and distributes at least some liability to the owner, despite the charterer's contractual agreement to assume complete responsibility for damage to a vessel at berth. In achieving these results, courts and arbitrators demonstrate a regrettable disregard for the intentions of the parties as expressed in their agreements.¹²³

In many respects, the failure of the courts and arbitrators to develop clear rules that are consistently applied, or to respect the intentions of the parties, as expressed in their contract, results from their attempts to avoid the harsh consequences of the conventional warranty interpretation. The charterer may be unfamiliar with the implications of these provisions since they arise from the archaic concepts of traditional maritime law. In their attempts

118. See W. PROSSER, *THE LAW OF TORTS* 16-21 (4th ed. 1971). In other words, "corrective justice payments should be assessed against those guilty of flawed conduct." Blum & Kalven, *The Empty Cabinet of Dr. Calabresi—Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 272 (1967).

119. See *supra* notes 5-25 and accompanying text.

120. See *supra* notes 60-101 and accompanying text.

121. See *supra* notes 76-101 and accompanying text.

122. Compare *Pan Cargo Shipping Corp. v. United States*, 234 F. Supp. 623, 634 (S.D.N.Y. 1965), *aff'd per curiam*, 373 F.2d 525 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967) with *American President Lines v. United States*, 208 F. Supp. 573, 576 (N.D. Cal. 1961).

123. See *supra* notes 102-117 and accompanying text.

to mitigate the inequity resulting from the traditional interpretation of these provisions, courts and arbitrators rely on loss-allocation devices to distribute liability between the parties.¹²⁴ In allocating losses, however, the decisionmakers use *ad hoc* determinations that create confusion rather than promote certainty in maritime transactions.

Grant Gilmore and Charles Black, in their treatise on admiralty law, have expressed dissatisfaction with the typical warranty construction of safe berth and port provisions.¹²⁵ They argue that the owners alone, and not the charterers, should be liable for port and berth damages.¹²⁶ The authors reason that the owner is in the best position to avoid accidents or injuries to a vessel while in port or berth because the vessel's master or captain controls navigation and dockside handling.¹²⁷ Specifically, the authors observe that the captain is "on the spot" and therefore may readily identify potential hazards.¹²⁸ Furthermore, the captain is empowered to refuse to enter a port or berth that he deems unsafe.¹²⁹

Although the underlying premise of Gilmore and Black's analysis is correct, their reasoning is flawed. The authors correctly assume that imposing liability on the party possessing the most in-

124. *Id.*

125. G. GILMORE & C. BLACK, *supra* note 11.

It is quite inconsonant with the position of the parties, in the usual case, to charge the charterer with the consequence of the master's having entered an unsafe port or tied up at an unsafe berth. It is the master who ordinarily has the best means of judging the safety of a port or berth, first because he is an expert in navigation, furnished with aids thereto, secondly because he knows his vessel (including its draft and its present trim), and thirdly because he is on the spot. The charterer, on the other hand, need not be a nautical expert at all, knows nothing about the vessel except its capacity, and normally is far from the scene of decision as to safety; his designations of port and berth are made (and are known to be made) on commercial rather than on nautical grounds.

Further, the master, by the very words of the usual clauses, is *not* obligated to take his vessel to any unsafe port or berth. The very purpose of the clauses is to free him of his obligation. Since these clauses can be and have been given this meaning, it is by no means necessary that they be given the quite different meaning of creating an affirmative liability of charterer to ship, in case of mishap. Indeed, as just suggested, they might easily be read to contradict this latter meaning, since they place it outside the charterer's power to force the master to imperil the ship. If the charterer, by the clauses, is disabled from forcing the ship into an unsafe place, then his designation of an unsafe berth can hardly be said to cause the ship's going there.

Id. at 204-05 (emphasis in original).

126. *Id.*

127. *Id.*

128. *Id.* at 204.

129. *Id.* at 204-05.

formation and control efficiently deters the occurrence of injuries and minimizes costs.¹³⁰ In particular, they correctly point out that the owner's captain or master is in a position to avoid port and dockside accidents or damages.¹³¹ Contrary to the authors' reasoning, however, charterers are also in a position to avoid damages and frequently have as much information concerning, and control over, the vessel's safety as do its owners.¹³²

Charterers are often familiar with the ports and berths involved in the itinerary for which they charter a vessel. Frequently, the charterer has used these ports as a source of company business for extended periods of time. In fact, the charterer's familiarity with port authorities, port personnel, and port and berth conditions may exceed the owner's.¹³³ Indeed, the charterer may have permanent employees stationed in the different ports of operation. A charterer, therefore, may be more informed than the owner about local weather conditions, compatibility of berth and vessel, permanent or recurring obstructions in the area, necessity and availability of tug assistance or other navigational aids, and the competency of dockside personnel.¹³⁴ Through business contacts

130. See *infra* notes 138-39 and accompanying text.

131. See, e.g., *San Cecilio Cia. Nav., S.A. v. Greenwich Marine, Inc.* (The M.V. Sifnos), S.M.A. No. 1252 (Arb. at N.Y. 1978) (damage to vessel during a storm).

132. See, e.g., *Oceanic Freighters Corp. v. Louis Dreyfus Corp.* (The M.V. Oceanic First), S.M.A. No. 1054 (Arb. at N.Y. 1976) (both owner and charterer knew, or should have known, of dangers at port).

133. See, e.g., *Astrovigia Compania Naviera S.A. v. Maritime Found. Ltd.* (The T.T. Michael), S.M.A. No. 1277 (Arb. at N.Y. 1978); *Oceanic Freighters Corp. v. Louis Dreyfus Corp.* (The M.V. Oceanic First), S.M.A. No. 1054 (Arb. at N.Y. 1976).

134. For example, in *The T.T. Michael*, the arbitration panel observed:

Of particular interest and importance appeared to be a letter from the Chief Pilot apparently having been sent to the Charterer's Agents PNOC some three months prior to "MICHAEL'S" arrival. In this letter the Pilots association demanded higher fees to dock vessels at MMIC because of the natural hazards including strong flood and ebb and counter currents in that area, that often spoiled a docking and generally comprised dangerous work for the pilots on a heavily loaded large vessel.

S.M.A. No. 1277, at 5. In holding the charterer liable for damages incurred when an extraordinarily strong countercurrent broke the vessel adrift from its berth, the panel ruled,

Evidence indicates that the Charterer did have prior knowledge of existing dangerous physical conditions and anticipatory tidal problems at that terminal because their own vessel had been there and their affiliate's employee had visited and reported in detail in November 1976 on the facility. Charterer must have known something more about rip tides affecting vessels at this berth than they acknowledge in this arbitration. Therefore Charterer was bound to amplify on them and forewarn the Master or Owner to have an extra supply of mooring lines and to deploy same in some superior manner an expert study might have concluded as best to cope with excessive conditions that might arise.

and professional affiliations, a charterer may be in the best position to identify and secure the berths that meet its requirements in the designated ports.

The charterer will also control the procedures to be used for vessel loading and discharge.¹³⁵ For example, in "roll-on" and "roll-off" carriage, the charterer's stevedores may use a variety of methods to load and unload cargo. They may remove fendering from a dock to position a vessel flush along the pier, thus facilitating the passage of cargo. This procedure can expedite cargo operations and eliminate the substantial risks of harm posed by a dilapidated fendering system. The scarring and abrasion that results from placing a vessel against a smooth concrete surface is often preferable to the holes and dents that may result from placing a vessel against a splintered and deteriorated fendering system with exposed, protruding iron bolts.¹³⁶ Whatever the procedure selected, the charterer often possesses sufficient information and control to help avoid or mitigate dockside damages.¹³⁷

Leading economists and legal scholars considering the apportionment of liability for accidents have argued that the party with sufficient information and control to prevent an accident should bear the cost of damages resulting from the accident.¹³⁸ In charter party agreements, both owners and charterers possess vital information and exercise considerable control with respect to the avoidance of port and berth damages. The charterer's knowledge of port conditions and personnel and his control over cargo loading and discharge operations may be especially relevant in evaluating whether port and berth damages could have been avoided.¹³⁹

Id. at 9.

135. *TIME CHARTERS*, *supra* note 4, at 137-38.

136. *See, e.g.*, Appeal of the United States Lines, 1977 A.M.C. 318, 324-25 (Armed Servs. Bd. Contract App. 1976).

137. *See id.* at 325, 343.

138. G. CALABRESI, *THE COSTS OF ACCIDENTS* 68-73 (1979).

139. *See supra* note 134. Commentators have argued that liability insurance seriously erodes the incentive to avoid accidents because the adverse financial impact is diluted. *See* Blum & Kalven, *supra* note 118, at 243. Marine insurance premiums, however, would surely reflect the safe port or berth record, the specific locations covered by a charter, and any measures adopted to forestall possible injuries. These measures could include stowage of bumpers and fenders, plans for conscientious loading and discharge operations, previous port and berth experience, quality of navigational equipment aboard the vessel, and arrangements for assisting tugs or dockside personnel.

Although commentators have observed that a motorist who takes proper safety precautions may nonetheless become involved in an automobile collision through the fault of another motorist, *id.*, that phenomenon has little applicability to port and berth accidents. Maritime vessels, unlike automobiles, do not usually operate in congested traffic conditions

Accordingly, this article proposes that owners and charterers should be presumed equally liable for damages to a vessel at berth, unless either one or both of the parties contributed to the damages by their negligence. In that event, liability for damages should be apportioned between the parties according to their comparative fault.¹⁴⁰ Any liability for damages not caused by the fault of either party should be distributed evenly between them.¹⁴¹

This proposal differs markedly from the recommendation of Professors Gilmore and Black;¹⁴² it recognizes the role of the charterer in assuring a safe berth. As a matter of public policy, it is therefore more desirable because it is more efficient. This proposal provides an incentive for charterers to use the information and control they possess to prevent port and berth injuries and minimize their associated costs. Simultaneously, it also provides an incentive for owners to avoid these injuries.

The courts and arbitrators could adopt this proposal by reconciling two conflicting lines of cases. Recent cases have almost uniformly imposed liability on the charterer by adopting a warranty construction of the language, "safely lie always afloat."¹⁴³ On the other hand, a line of earlier decisions, never overruled, supports the view that the owners should bear the responsibility for safe berth incidents because the vessel is under their immediate control.¹⁴⁴ Neither one extreme nor the other is likely to conform to

and the risk of harm is therefore largely limited to the parties to a charter and their agents.

140. The Supreme Court has specifically determined that liability for property damage in a maritime collision is to be allocated among the parties in proportion to the comparative degree of their fault, and that liability should be allocated equally only when the parties are equally at fault or when it is not possible to measure their comparative fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

141. *See id.*

142. *See supra* notes 125-29 and accompanying text.

143. *See supra* note 6 and accompanying text.

144. This line of cases has been identified and discussed by several commentators. *See, e.g.*, G. GILMORE & C. BLACK, *supra* note 11, at 205-07; Smith, *supra* note 3, at 863. The major decision in this area is *Atkins v. The Disintegrating Co.*, 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd*, 85 U.S. (18 Wall.) 272 (1873), in which the district court declared, "The master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel; and he is the proper person to determine whether his vessel can or cannot enter any particular port." 2 F. Cas. at 79. On an appeal taken on another ground, the Supreme Court agreed with the trial judge's decision:

In regard to the merits—after a careful examination of the record—we have found no reason to dissent from the views of the learned district judge by whom the case was heard. However full might be our discussion, we should announce the same conclusions. They are clearly expressed and ably vindicated in his opinion.

Atkins v. The Disintegrating Co., 85 U.S. (18 Wall.) 272, 299 (1873).

the realities of maritime transactions or to the intentions of the parties. Based on the holdings in these cases, and their reasoning, the adjudicators could construct a centrist position designed to accommodate and reconcile the divergent rulings.

Despite this reasoning, courts and arbitrators may be slow in changing their interpretation of the standard safe berth provisions. The parties to a charter, however, could adopt this proposal for themselves by incorporating it into their agreement. The following safe berth provision could serve as a model:

SAFE PORT AND BERTH. Owners and charterers of a vessel shall be presumed liable in equal degree for any damages caused to a vessel by reason of unsafe port or berth, in the absence of fault by either or both parties causing the damages. In the event damages are caused by the fault of either or both of the parties, then liability for such damages shall be allocated among the parties proportionately to the comparative degree of their fault, and liability for any remaining damages caused by reason of unsafe port or berth and not determined to be caused by the fault of the parties will be allocated equally among the parties in accordance with the presumption stated above.

This proposal has several advantages. Most importantly, it is workable. The trend in arbitration decisions already is towards findings of mutual liability, as an exception to the prevailing warranty construction. This proposal is consistent with that trend—it simply accomplishes the desired outcome more forthrightly and directly than the other alternatives. In contrast to Professors Gilmore and Black's conclusion that the vessel owner alone should be presumed liable,¹⁴⁵ this proposal does not entail a dramatic and abrupt departure from recent case law. Being consistent with current doctrine, it is also likely to comport with the expectations of the parties.

In addition, a rule that presumes both parties equally liable for damages not specifically shown to be the fault of either party is simple, easily understood, and subject to consistent application. Moreover, the proposed rule is fair because it distributes liability rationally on the basis of fault or the possession of information and

The liability of the charterer was likewise limited in *Hastorf v. O'Brien*, 173 F. 346 (2d Cir. 1909). In *Hastorf* the Second Circuit explained that the charterers "did their full duty when they sent the scow only to a place where their own vessel had lain in safety under similar conditions but a few days before. As men of ordinary prudence they might well have concluded that [the] place was safe." *Id.* at 347.

145. See *supra* notes 125-32 and accompanying text.

control. The courts and arbitrators will therefore be disinclined to invoke ancillary doctrines such as "assumption of risk" or "poor navigation." Courts and arbitrators usually rely on these doctrines to mitigate the harsh consequences of irrational or unfair rules. Not only is the proposal more consistent with the parties' intuitive expectations, it also avoids the misleading or unrealizable legal expectation that the charterer alone will be held liable for damages that the current rules foster. Under this proposal adjudicators still will have discretion in determining what constitutes fault and in apportioning liability, but the discretion will not appear to be unbounded. The adjudicators no longer will search in the interest of fairness for instances of mutual fault, override the parties' warranty provision, and divide damages evenly.

Finally, this proposal serves the public interest because it is efficient. It provides the parties with the proper incentives to use their information and control to reduce the frequency and severity of damages to vessels at berth. Neither party would be enticed into complacency on the assumption that the other party will pay. Nor would the parties gamble on the uncertainties of litigation; rather, they would negotiate and settle on the basis of a clear and rational contractual agreement or rule of law.