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The safe port warranty in charterparty agreements

The certain problematic aspects under English Law

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1 Introduction

1.1 The field of the research

One of the most usual ways to engage the ship in trade is to contract her out on a basis of the charterparty agreement. There are different types of charterparty agreements known under English Law, however, more common are those where the crew is directly employed by the owner.¹ That is time and voyage charterparty agreements. Usually, they are concluded on a standard contractual terms applicable to the particular trade with the certain amendments made by the parties to reflect their business needs.

Generally speaking, a voyage charterparty is a contract under which the shipowner agrees to carry specified goods by sea from a specified port of loading to a specified port of discharge upon paying of the freight.² To simplify, the ship then would be chartered out for a specific voyage.

In contrast, a time charterparty agreement is defined by a period of time, rather than a geographical voyage. Thus, upon the payment of the hire, the time charterer acquires the right to “exploit the earning capacity of the vessel”³. The effect of it is that the time charterer will become in charge of the economic employment of the ship and direct it to any place he finds reasonable, within the trading limits imposed by the contract.

The main difference between time and voyage charterparty agreements, in fact, lies in this continuing right and obligation of the time charterer to give orders for the vessel’s

¹ “Charterparties,” in *Southampton on Shipping Law*, 1st Edition, 2008, 200.

² C. Debattista, *Sale of Goods Carried by Sea*, 2nd ed. (London: Butterworths, 1998).

³ Lord Hobhouse in *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 at 652

employment.⁴ If to consider the “classic” voyage charterparty, no such right is given to the charterer even in terms of the nomination of the port of loading or discharge.⁵

However, the modern trade has called for the flexibility of the voyage charterparties.⁶ The reason for that lies in the fact that in vast majority of cases, the voyage charterparty agreement is not merely a contract of affreightment, but one of the integral elements of the international contract of sale concluded on the shipment terms.⁷ In essence, it means that the voyage charterparty is stemming from the contract of sale which has a dominant position: the transporting agreement would be framed in a way that enables the charterer to fulfill his obligations under the sale contract.

The flexibility of the voyage charterparties, among others, relates to the ports of loading and discharge, or the places of loading and discharge within the concrete ports.⁸ This has been reflected in contemporary standard voyage charterparty terms that frequently give a voyage charterer a right to nominate a port. Although such flexibility gives a positive impact on the business efficiency, it also imposes the additional obligations on the parties to the voyage charter.⁹ To be precise, once the voyage charterer obtains the right to nominate a port, he has to make sure that this port is a safe one. Therefore, the concept of the safe port obligation has become a vital aspect of both time and voyage charterparty agreements. This concept is frequently referred to as the primary obligation to nominate the safe port or the safe port warranty.

Although, the concept of safe port warranty might be seen as rather elastic at the first glance, the disputes on safe ports in vast majority of cases are hardly straightforward. This

⁴ C. Debattista, *Sale of Goods Carried by Sea*.

⁵ *The Evolving Law and Practice of Voyage Charterparties*, Prof. D. Rhidian Thomas (London: Informa, 2009), 2.

⁶ Julian Cooke et al., *Voyage Charters*, 3rd Edition, 2007, 103–104.

⁷ For the deep evaluation on that matter see C. Debattista, *Sale of Goods Carried by Sea*.

⁸ *The Evolving Law and Practice of Voyage Charterparties*, 2.

⁹ *Ibid.*

might be explained by the fact that the safe port obligations sometimes interfere with other matters, such as the validity of nomination or voyage orders for instance, that are more complicated in their nature.

The issues of safe port warranty have always been considered as those that require lengthy legal analysis in practise.¹⁰ This statement seems to be valid even today. In accordance with the recently published data, ship incidents at port have constituted the largest loss claims in the latest years.¹¹ From this perspective, the matters of the safe port warranty should form a subject of charterers' and shipowners' interest. However, some authors claim that there is an obvious lack of accurate understanding of the warranty in question within the shipping industry.¹²

Indeed, there are quite a few fundamental studies that analyse the nature and ambit of the safe port warranty.¹³ Notwithstanding the fact that those academic works provide a deep examination of the charterer's responsibility towards the safe port obligation, consequences for breaching it and the defences available, they have one problem in common: the papers were published more than 20 years ago and thus, an update on some vital points was needed.

¹⁰ C Baker and P David, *The politically unsafe port* [1986] LMCLQ 112 cited in Paul Todd, "Safe port issues: the Ocean Victory" Lloyd's maritime and commercial law quarterly at 1.

¹¹ Niklas Sonnenschein, *Unsafe ports and berths: charterers' defenses* (2014).

¹² Michael Wagener, "A relative concept" (2008) Maritime Risk International, online: <<http://www.ilaw.com/ilaw/doc/view.htm?queryString=Saga+Cob&sort=date&sort=date&sea>

¹³ Andrei Kharchanka, *The Meaning of a Good Safe Port and Berth in a Modern Shipping World*

(rijksuniversiteit groningen, 2014); Rhidian Thomas, "The safe port promise of charterers from the perspective of the English Common Law" (2006) Singapore Academy of Law Journal 597 at 598;

Even though, this gap has been recently covered¹⁴, there are still some problematic areas that remained untouched, both in terms of the primary and secondary safe port obligation. At the first place, it applies to certain elements that construct the charterer's primary promise of safe port. Thus, although it is commonly agreed that the port should be prospectively safe to be used by the vessel, there is a very little evaluation made on what exactly the term "prospective safety" means. The second unresolved issue concerns the situations when the charterer seem to fulfill his obligation towards safety of the port, but some events take place afterwards that render the port unsafe. The question arises then, whether the charterer has any further obligation towards the owner, or, to put it differently, the secondary obligation towards the safe port should be introduced. The existence of such secondary obligation is not doubted in terms of time charterparties. When it comes to voyage charterparties, the matter in question provides a ground for some discussion due to the nature of the voyage charters specified above.

1.2 The objective of the master thesis

There are also some other problems that might be highlighted with regard to the safe port warranty in the charter parties, that can be summarized as the following:

1. What constitutes the safe port, and how the safety of the port can be determined?
2. Where the breach of the contractual obligation in question lies?
3. Whether the notions on the essence and scope of the safe port warranty in general and on the secondary obligation to nominate the safe port in particular are applicable to the voyage charterparty agreements?

¹⁴ Andrei Kharchanka, *The Meaning of a Good Safe Port and Berth in a Modern Shipping World*, Doctoral Series 15 (rijksuniversiteit groningen, 2014).

These are the main issues to be analysed in the present paper. With that aim, structurally the work will be divided in two major parts: firstly, the elements of the primary safe port promise will be examined with the particular focus on the meaning of prospective safety of the port. The examination would be made preliminary on the basis of the English Law with the particular focus on the case law related to the time charterparty agreement. That is due to the fact that the most groundbreaking cases regarding safe port warranty were based on the time charterparties agreements. This is also partly explained by the fact that there are very few reliable sources that touch upon the abovementioned problems. This, however, should be seen not as an indication that the topic is not important, but that the more extensive research is needed.

When it comes to the second part, the paper will concentrate on the issues of secondary obligation with the particular focus on the voyage charterparties.

2 The safe port warranty: general observations

Subject to some exceptions, it is common to stipulate, both in time and voyage charterparty agreements, or any hybrid of them, that ports and berths of loading and discharge to which the vessel is designated should be safe. Generally, this responsibility is allocated on the charterer's side and known as the safe port warranty. However, the term "warranty" in the present context might be rather misleading. Thus, it is purely a matter of historical usage, and should not be viewed as a reference to the classification of contractual terms under English Law of Contract that determine the remedies available to the affected party in case of breach of the contractual agreement.¹⁵ Neither should the term "safe port warranty" be seen in line with a marine insurance warranty with a charterer as an insurer of port risks.¹⁶ Rather, the safe port warranty is a contractual promise given by the charterer that the chartered ship would be employed between the safe ports.¹⁷

Although the concept of safety is commonly viewed through public policy spectacles, the charterer's contractual obligation discussed in this paper should be seen as an issue of commercial expediency.¹⁸ Hence, the nature and the ambit of the promise are defined by the parties' intentions. To put it differently, the concept of the safe port is a matter of contract and should be considered pursuant to a correspondent clause of the parties' agreement with due regard to its wording. It is to note though, the parties are usually reluctant to base their contractual relationship on the standard charterparty forms. This has considerably helped in unifying law and providing a clear understanding of the essence of the promise.

¹⁵ Lord Roskill [1983] A.C. 736 at 765

¹⁶ Rhidian Thomas, "The safe port promise of charterers from the perspective of the English Common Law" (2006) Singapore Academy of Law Journal 597 at 598.

¹⁷ Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading*, Sweet & Maxwell ed (London, 2011).

¹⁸ Rhidian Thomas, "The safe port promise of charterers from the perspective of the English Common Law" (2006) Singapore Academy of Law Journal 597 at 598-599.

2.1 The source of the safe port warranty

The vast majority of charterparty agreements, but not all of them, contain an express provision that frames a safe port warranty. This notion is particularly applicable to time charterparties. For instance, Cl. 2 of *Baltimex 1939* as revised in 2001 stipulates the following:

“ The vessel shall be employed in lawful trades ... only between good and safe ports and places”¹⁹.

Similarly, line 27 of the *New York Produce Exchange Form 1946* (NYPE 1946) states that the vessel is to be engaged into lawful trades “between safe ports and/or places”²⁰.

Another example of the safe port warranty can be found in the *BIMCO General Time Charter Party (Gentime)* from 1999, Cl. 2(a) of which provides:

“The Vessel shall be employed in lawful trades...between safe ports or safe places where she can safely enter, lie always afloat, and depart”²¹.

In case if the time charterparty agreement is silent on the safe port charterer’s obligation, the warranty in question may be implied due to business efficacy.²² This is particularly applied to those charterparties where the port is designated in accordance with the time charterer’s voyage orders.²³

¹⁹ The Baltic and International Maritime Council Uniform Time- Charter Code (the *Baltimex 1939* as revised in 2001), Cl. 2.

²⁰ The *New York Produce Exchange Form 1946* (NYPE 1946), line 27.

²¹ The *BIMCO General Time Charter Party (Gentime)* from 1999, Cl. 2(a).

²² *Bingham LJ in The AJP Priti* [1987] 2 *Lloyd’s Rep* 37 at 42.

²³ *Lord Goff of Chieveley in the Kanchenjunga* [1990] 1 *Lloyd’s Rep* 391 at 397.

When it comes to standard voyage charterparties, the express obligation towards the port's safety is not always stipulated. There are some forms that contain it though. For example, the tanker voyage charterparty Asbatankvoy from October 1977 that states:

“The vessel...shall with all convenient dispatch, proceed as ordered to Loading Port named in accordance with Clause 4 hereof, or so near thereunto as she may safely get”²⁴

Similar contractual promise towards the port safety is also contained in Cl. 1 of The North American Grain Charterparty 1973 (the Northgrain 89) form and in the United Nations World Food Programme Voyage Charter Party (the Worldfood 99) Cl. 2(a).

It is to discuss then whether the safe port warranty shall be implied, if a voyage charterparty contract contains no express obligation with that regard. For many years the position present by Morris LJ in *the Stork*²⁵ prevailed, according to which the warranty of safety would be automatically implied. If to consider law as it stands today, this notion is no longer valid. Hence, the courts are more reluctant to view a safe port warranty in line with the true construction of the charterparty agreement.²⁶ As it was clarified in *The Aegean Sea*²⁷, when the voyage charterparty calls for the nomination of a port or berth but contains no obligation towards its safety, the safe port warranty would usually, but not universally, be implied.²⁸ The question of the implication of safe port warranty in that case would then be resolved pursuant to general contractual rules for the implication of terms; however, the degree of freedom to choose the port granted to the charterer would be considered. To be precise, if the charterer has the large discretion to choose the port, it is reasonable to imply a warranty of safety. In the same vein, if the charterparty agreement is quite concrete regar-

²⁴ The Asbatankvoy 1977, Cl. 1.

²⁵ *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).

²⁶ Julian Cooke et al, *Voyage Charters*, 3rd Edition ed (2007) at 112.

²⁷ *Aegean Sea Traders Corp v Repso; Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep 39.

²⁸ Thomas J. in *the Aegean Sea* [1998] 2 Lloyd's Rep 39 at p. 67.

ding the intended ports and destinations, the owner is assumed to be satisfied with the level of safety of those places.²⁹

However, the issue of implied warranty falls outside the scope of this work. In case of the reader's interest, the deep analysis of it might be found in Chris Ward, "Unsafe berths and implied terms reborn"³⁰ and in Julian Cooke et al, *Voyage Charters*³¹.

²⁹ Rhidian Thomas, *supra* note 7 at 610.

³⁰ Chris Ward, "Unsafe berths and implied terms reborn" *Lloyd's maritime and commercial law quarterly* 489.

³¹ Julian Cooke et al, *Voyage Charters*, 3rd Edition ed (2007).

3 The primary safe port contractual obligation

3.1 Safe port: the meaning of the term

The question of what should be understood under the safe port is frequently seen as a matter of construction of the charterparty agreement.³² In other words, the parties can exercise their right of the freedom of the contract and agree on any port characteristics they find reasonable. However, in practice that is rarely done and the parties usually stay within the standard terms.³³

Interestingly, when the earliest safe port cases were to be considered, there was a notion that the term “port” already implied the concept of safety, and the formulation of the “safe port” was unnecessary.³⁴

As to the classical definition³⁵ of a safe port, the dictum of Sellers LJ in *The Eastern City*³⁶ should be considered. The dispute arose with regard to a voyage charter party agreement that provided that the vessel was to proceed from one or two safe ports in Morocco to a safe port in Japan. The vessel, *the Eastern City*, safely arrived and anchored in the nominated port, Mogador. It is to note though, that during the wintertime this port was not safe for the vessel as big as the Eastern City was. Thus, when the weather conditions changed, the master, suspecting that his anchor was dragging, made a decision to leave the port that resulted in grounding.

The shipowners therefore claimed that the charterers were in breach with the voyage charterparty, as the nominated port was not safe for the vessel.

³² Bernard Eder et al., *Scrutton on Charterparties and Bills of Lading*, 150.

³³ Rhidian Thomas, “The Safe Port Promise of Charterers from the Perspective of the English Common Law,” 606.

³⁴ *Ogden v Graman and Another* [1861] 1 B&S 773.

³⁵ Bernard Eder et al, *supra* note 8.

³⁶ Sellers LJ in *The Eastern City* [1958] 2 Lloyd’s Rep 127.

Addressing this issue, Seller LJ established that:

“ ... a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship”³⁷

This statement of principle might be seen as one of a paramount importance at least from the two perspectives. Firstly, Sellers’ dictum might be seen as a precise unification of all views on the safe port term known in the case law before.³⁸

Secondly, the honorable judge established a basic threefold test for estimating the ports safety.³⁹ This test has become a starting point in examining the problems of safety in judicial courts and arbitration⁴⁰, and can be broken down into three stages.

Thus, following the Sellers LJ’s approach, the court is to sequentially examine the following:

First, whether the ship can proceed to a port, use it and return without being exposed to the danger;

Then, if not, it is to establish whether the good navigation and seamanship could have helped to avoid the danger;

³⁷ Sellers LJ in *The Eastern City* [1958] 2 Lloyd’s Rep 127 at 131.

³⁸ Roskill LJ in *the Hermine* at page 214; the house of lords lord Diplock in *the Evia No 2* as a “classic passage”; in Wilford on time charters, 6th edition, para 10.3

³⁹ *The Ocean Victory* [2014] 1 Lloyd’s Rep 59 at 98-99.

⁴⁰ *Transoceanic Petroleum Carriers V Cook Industires Inc (the Mary Lou)* [1981] 2 Lloyd’s Rep 272 at 276; Lord Roskill LJ in *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd’s Rep 212 at 214, Lord Diplock in *the Evia No.2* [1983] AC 736 at 749; Terence Coghlin, Andrew W Baker & Julia, *Time Charters*, 6th Edition ed (2008).

Finally, if the ship was not able to proceed without being exposed to danger and if the danger could not be avoided by good navigation and seamanship, the courts are to determine whether this danger stemmed from any other event than an abnormal occurrence in the port.

The port can be rendered as unsafe when the answers to the first two questions are negative, whereas the last one is answered positively.

As it can be seen from above, the matters of good navigation and seamanship and abnormal occurrences are vital for understanding the meaning and effect of the safe port warranty. Therefore, a brief evaluation of both points is necessary to capture the issue in question.

3.1.1 Good navigation and Seamanship

Defining the safe port, Sellers LJ clarifies that the charterer's contractual obligation of safety does not imply that the charterer would be liable for every causality that might occur within the port, and does not release the master and the shipowner from liability. The master, the shipowner or any servants or agents acting on his behalf, including tugs and pilots unless agreed otherwise, would still be found liable in case of negligence attributed to their side.⁴¹ This is directly implied by "danger which cannot be avoided by good navigation and seamanship"⁴² wording.

To make it clear, every port naturally presents a certain degree of danger to a ship, starting from rocks and shallows and ending with waves, ice or storms. Therefore, the master has to present ordinary degree of care and good seamanship skills that would help him to avoid

⁴¹ Julian Cooke et al, *supra* note 17 at 130.

⁴² Sellers LJ in the *Eastern City* [1958] 2 Lloyd's Rep 127 at 131

the normal port risks. By “normal port risks” in this regard, the risks that could be avoided by a reasonable competent master are understood.⁴³ Therefore, the lack of competence of the master to avoid some natural obstructions of the port cannot be attributed to the charterer’s failure to nominate a safe port.⁴⁴

Generally, the “good navigation and seamanship” element of the safe port definition is interpreted in two ways. Thus, some authors claim that the avoidable risks do not constitute the part of the safe port warranty, as the latter mentioned relates only to unavoidable dangers.⁴⁵

The majority of the legal thinkers, however, are of the opinion that the matter is not that straightforward and raise the question of causation.⁴⁶ Namely, the master’s negligence might be viewed as a *novus actus interveniens*. This means that the negligence on the master’s side could be the effective cause and break the causation link between the charterer’s non-fulfillment of the safe port obligation and the damage or loss to the ship.⁴⁷ It follows then, that even though avoidable risks fall within the scope of the safe port obligation, the charterer’s position is protected pursuant to the rule of causation.⁴⁸

It is to note that the master is not expected to obtain any extraordinary skills. Thus, it is well established in practice, that if the high standard of seamanship and skills in the navigation are needed to avoid the danger presented in the port, the port should be considered

⁴³ They also referred to as the “risks which can be avoided by good seamanship” or “avoidable risks” in the legal literature, see, for instance, Julian Cooke et al, *supra* note 14 at 130; Tage Berglund v Montoro Shipping Corporation Ltd (*The Dagmar*) [1968] 2 Lloyd’s Rep 563 at 571.

⁴⁴ The similar conclusion was made in St Vincent Shipping Co Ltd v Bock, Godeffroy & Co (*The Helen Miller*) [1980] 2 Lloyd’s Rep 95.

⁴⁵ Rhidian Thomas, *supra* note 7 at 617.

⁴⁶ See, for instance, Julian Cooke et al, *supra* note 14 at 130; Tage Berglund v Montoro Shipping Corporation Ltd (*The Dagmar*) [1968] 2 Lloyd’s Rep 563 at 571.

⁴⁷ Julian Cooke et al, *supra* note 17 at 130.

⁴⁸ David Chong Gek Sian, “Revisiting the safe port” (1992) Singapore Journal of Legal Studies 79 at 618.

unsafe, unless the danger is related to the abnormal occurrence that is to be discussed below.⁴⁹ It is also to mention that even the damage sustained in the port, given that the master showed the requisite degree of care and skill, does not automatically mean that the port was unsafe and that the charterer was in breach of the safe port warranty. As rightly suggested by Mustill J, sometimes the causality occurring in the port is merely the question of bad luck.⁵⁰

In deciding on the matters of master's negligence, the courts take into consideration the fact that masters are usually put into a difficult position and pressured by charterers and shipowners.⁵¹ Thus, the master can often be trapped in a position where he would have to choose in between the commercial expediency of the adventure or its safety.⁵² That is why the court will first of all address the question whether the master acted reasonably under the existed circumstances.⁵³

3.1.2 Abnormal occurrence

As it has been already submitted, the safe port warranty should not be regarded as a promise that the port would be completely free of risks. Instead, by undertaking the safe port obligation, the charterer guarantees that the inherent characteristics of the port would present no danger to the vessel. To put it differently, it follows from Sellers' definition, that the charterer's obligation to provide a safe port does not extend to abnormal occurrences or the risks of abnormal danger. Those risks are commonly characterized as those that do not form characteristics of the particular port. In this vein, it seems logical to evaluate on what is in fact understood under the normal

⁴⁹ Parker J in the *Polyglory* [1977]

⁵⁰ Mustill J in *the Mary Lou* [1981] 2 Lloyd's Rep 272 at 279.

⁵¹ Julian Cooke et al., *Voyage Charterers*, at 127-128.

⁵² Rhidian Thomas, *supra* note 7 at 618.

⁵³ Singleton J in *Compania Naviera Maropan S.A. v Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)* [1955] 2 QB 68 at 89.

risks or inherent characteristics of the port, before highlighting the core matters of abnormal occurrences.

3.1.2.1 Normal risks

Thus, it goes without saying that the safe port warranty is confined with the characteristics of the nominated port, as the charterer's liability for the breach of safe port warranty is triggered by the loss or damage sustained due to the danger that is a normal feature of the port. It is to note that not the general safety of the port should be considered, in accordance to Seller LJ's wording, but the safety of the *specific* port for a *specific* ship at the *specific* time.⁵⁴

This position is easily justified. Evidently, each port has its own genuine characteristics as to physical condition of the port structures, depth of water and etc. While the port can be absolutely safe for one ship to enter, stay and leave, it can present significant danger to another.⁵⁵ Hence, Seller LJ declares that the question whether a port is a safe one should be seen as a matter of fact and degree with a particular ship to be considered.⁵⁶ In other words, all relevant circumstances of the case are to be assessed: the type, class, characteristics and capabilities of the ship.⁵⁷ Furthermore, the port should be safe not only for the ship *per se*, but also for the crew, meaning that if there is the danger of health or security risks, the port can be rendered unsafe as well.⁵⁸

There are numerous characteristics of the port that present different types of unsafety detected in the legal literature. They can relate to the terrestrial, marine or environmental cha-

⁵⁴ Seller LJ in *the Eastern City* [1958] 2 Lloyd's Rep 127 at 131.

⁵⁵ Julian Cooke et al., *Voyage Charters*, supra note 14 at 123.

⁵⁶ Bernard Eder et al., *Scrutton on Charterparties and Bills of Lading*, 152.

⁵⁷ Julian Cooke et al, supra note 17 at 123.

⁵⁸ Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," 608.

racteristics of the port, as well as to its administrative set-up. However, the evaluation on this subject lies outside the scope of this work, and it has been covered extensively by Andrei Kharchanka⁵⁹ in his recent study.

The question arises then which characteristics of the port should be viewed as normal ones. Generally, those characteristics are defined as inherent and intrinsic attributes of a port that are well-established in a sense that their existence can be capable proved by evidence. It is suggested that the inherent characteristics of the port should have a continuous character, but it is not entirely correct. First of all, the established characteristics by their own can have a changeable nature, such as weather conditions, for instance.⁶⁰

That is to say that the longevity of the port's characteristic can be of importance, but even the danger of a temporary character might render a port unsafe.⁶¹ This, however, would again depend on the length of time during which the temporary obstacle would exist. Thus, if the temporary danger prevails during considerable time, it can be qualified as attributes of the nominated port.⁶²

This idea has been firstly suggested in *the Houston City*⁶³. In the case at hand, the nominated berth was exposed to strong gales during certain season and thus, two hauling-off buoys were usually used to prevent a ship from ranging. However, when the ship was staying in the port, they stern buoy was damaged and was under the repair, while the waling piece was missing for several months. It was acknowledged at first instance that although the absence of the hauling-off buoys and the waling piece by their own did not constitute the characteristics of the port and have no impact on its safety, they were essential to be used in

⁵⁹ Andrei Kharchanka, *The Meaning of a Good Safe Port and Berth in a Modern Shipping World* (rijksuniversiteit groningen, 2014).

⁶⁰ Similar thought was expressed by Mustill J in the *Mary Lou* [1981] 2 Lloyd's Rep 272 at 283.

⁶¹ Bernard Eder et al, *supra* note 8.

⁶² Julian Cooke et al, *supra* note 17 at 126.

⁶³ Readon Smith Line Ltd c Australian Wheat Board (*The Houston City*) [1954] 2 Lloyd's Rep 148

the winter weather.⁶⁴ Consequently, since the named constructions were absent for a sufficient time, the port was declared unsafe.

As a drawback, the *Houston City* decision is silent on the matter of how long the temporary obstacle should operate to be treated as permanent attributes of the contractual port. This, however, was the subject of consideration in *the Hermine*. This case dealt with the delay of the vessel that was claimed to be caused by the unsafety of the port.⁶⁵ It therefore was established that the obstacles of temporary character should be in operation for such period of time that would subsequently frustrate the nature of adventure and the nature of the contract.⁶⁶

Overall, it should be highlighted once again that there should be a causation link between the occurrence resulted in damage or loss to the vessel and a port's normal or inherent characteristic for establishing the breach of the charterer's liability in question. The conditions of port's safety depend on concrete facts; the standards of safety are established by law though. Hence, although the evaluation on the port's safety should be performed pursuant to the concrete merits of the case, it also should be based on the solid legal principles.⁶⁷

3.1.2.2 Abnormal risks

As it has been stressed above, the safe port warranty undertaken by the charterer, pursuant to by Sellers LJ's definition, exists only "in the absence of some abnormal occurrence"⁶⁸. That is to say, that the charterer's contractual obligation in question extends only to the risks of normal danger, whereas the abnormal risks are left outside the scope of the safe

⁶⁴ *Ibid.* at 159-161.

⁶⁵ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep. 212

⁶⁶ Julian Cooke et al, *supra* note 17 at 128.

⁶⁷ Julian Cooke et al., *Voyage Charters*, 119.

⁶⁸ [1958] 2 Lloyd's Rep 127 at 139.

port warranty. It is to note that the master is still expected to exercise requisite degree of skill, care and good seamanship.⁶⁹

The Sellers LJ's notion on the abnormal occurrence is silent on the extent of such restriction and on what the criteria of the abnormality are. It has been generally accepted that the abnormality of the event should be assessed on the basis of the concrete facts and circumstances of every particular case.

As to the kind of risks that can fall within the abnormal category, it was suggested by Mustill J in *the Mary Lou*⁷⁰ that everything not constituting the normal characteristics of the port is abnormal.⁷¹ That is to say, the safe port warranty excludes everything that is not included in it by the definition. However, it has been proved in practice, that even a normal risk, i.e. a risk that stems from the inherent attributes of the port, can cause an abnormal consequences resulting in damage or loss sustained by the vessel.⁷² For instance, unpredictable gales might form an inherent and intrinsic characteristic of the port, but the consequences of one particular gale can be so unexpectedly severe that it can be viewed as an abnormal occurrence.

There are two cases that might be referred to as a good example for the abovementioned. One of them is the famous *the Evia No.2*⁷³, that is considered to be groundbreaking for the wide survey of the law regarding safe port warranty and the consequent clarification with that regard. As to the merits of the case, the dispute arose with regard to the time charterparty agreement on the basis of the Baltimore 1939 form, amended by the parties. Clause 2 of the charterparty contained a safe port warranty. The chartered vessel was to carry cement

⁶⁹ Mustill J in *the Mary Lou* [1981] 2 Lloyd's Rep 272 at 278.

⁷⁰ *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep 272.

⁷¹ Mustill J in *the Mary Lou* [1981] 2 Lloyd's Rep 272 at 278.

⁷² Julian Cooke et al, *supra* note 17 at 139.

⁷³ *Kodros Shipping Corp'n v Empresa Cubana de Fletes (No 2) (The Evia No. 2)* [1983] 1 AC 736; [1982] 2 Lloyd's Rep 307.

from Cuba to Basrah, when she was trapped in the Shatt-al-Arab waterway due to the outbreak of hostilities between Iraq and Iran.⁷⁴ However, the House of Lords established that the outbreak of war and the consequent threat to the vessel materialized after her arrival to the port and nothing in the time of ordering and approaching the port made it possible to predict such outbreak. Therefore, it was established that the charterer fulfilled his safe port obligation and there was no breach of cl 2 of the time charterparty agreement.

However, in *the Evia No. 2* the charterer would have been found liable for the breach of the safe port promise, if the outbreak of war occurred before the vessel was ordered or at the time she was approaching the port. Furthermore, the charterer would also have been liable, if the risk of the outbreak could have been estimated at the mentioned time, as if the danger of the war existed for a substantial time and become an attribute of the port. That was a case in *The Lucille*⁷⁵, the factual background of which quite resembles that of *Evia No. 2*. However, the charterer in the *Lucille* ordered the vessel to Basrah when the outbreak of war was already evident. The Court of Appeal highlighted that abnormal occurrences, although they were abnormal, should have nevertheless been expected.⁷⁶ Therefore, the charterer by ordering the vessel to the unsafe port was acting in breach of safe port warranty and was the one responsible for the entrapment of the vessel and the consequential damage.

Overall, the charterer would not be liable for any loss or damage stemmed from extraordinary or unpredicted event, *i.e.* something that follows outside inherent characteristic of the port. The issue of normal characteristic of the port and abnormal occurrences is usually viewed as a matter of fact and thus, should be decided in accordance with factual background of particular case.

⁷⁴ *Kodros Shipping Corpn v Empresa Cubana de Fletes (No 2) (The Evia No. 2)* [1983] 1 AC 736; [1982] 2 Lloyd's Rep 307 at 309.

⁷⁵ *Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1984] 1 Lloyd's Rep 244.

⁷⁶ Julian Cooke et al, *supra* note 17 at 129.

It has already been noted the definition of the safe port provided by Sellers LJ in *The Eastern City* is commonly considered as the “classic passage” that correctly explains the meaning and the effect of the warranty in question.⁷⁷ However, in the recent case dealing with the safe port warranty, *The Ocean Victory*, Teare J suggested that the Sellers LJ’s test should be slightly elaborated and introduced a new stage to the test, that will be briefly overviewed below.

The present paper will share the position that indeed, the Seller LJ’s test for the port’s safety calls for some specifications. Though, those specifications should relate not to the understanding of the safe port *per se*, as the Seller LJ’s definition proved to be a solid one and all attempts to adjust it, in essence might be clarified as rewriting Sellers LJ’s test using the different terms. What really calls for further elaboration is the matters of applicability and operation of the safe port test. Thus, first of all, Seller LJ does not indicate where the breach of the safe port promise lies: whether it is in the giving of the order to proceed to a port, or the charterer would breach his safe port promise when the damage or loss is actually sustained by the vessel. Secondly, it is unclear at what time the test of port’s safety should be applied. Those issues were partly resolved in the leading *the Evia No. 2* case. The position reached by the Court in the mentioned case would also be discussed in the following part of the paper.

3.2 *The Ocean Victory*: the new approach towards the Sellers LJ’s test of safety

As it has already been submitted, although it is commonly accepted that the Sellers’ evaluation on the safe port fully and correctly clarifies the nature of the contractual promise in question, recently the dispute that challenged this position arose recently. Thus, in the

⁷⁷ Teare J in *Gard Marine & Energy LTD v China National Chartering Co LTD (The Ocean Victory)* [2014] 1 Lloyd’s Rep 59 at 78.

*Ocean Victory*⁷⁸ the High Court was to decide whether the charterer fulfilled his obligation regarding the safe port nomination. Among other issues, the Sellers' test of safety was reconsidered and the new stage to the Sellers LJ's test was introduced.

The decision of the first instance at hand has been published quite recently and, to the best of the knowledge and information available, has not received any substantial academic comment. The present paper shares the position, that although the nice overview of the core aspects of the safe port warranty can be found in *The Ocean Victory*, the attempt of Teare J to introduce a new stage to the test was not that essential for the understanding of nature of the safe port warranty, as the threefold Sellers LJ's test covers it in a great extent. However, it is fair to note that only future will show whether the courts will be reluctant to follow the Teare J's evaluation, or will go for a classic approach introduced in *The Eastern City*.

As to the factual background of the case, it seems to be rather exemplary for those disputes where the safe port issue is involved. The parties to the dispute entered into a time charter-party agreement based on Barecon 89 form amendment by the parties: part II of Cl 5 regarding the trade limits was deleted and instead, the additional Cl 29 was introduced that provided that the chartered vessel should be employed only between good and safe ports.

The vessel *Ocean Victory* was ordered to a port Kashima, Japan where she was to discharge and berth. However, once the discharge procedures were completed, the port was affected by long waves. As opposed to the swell waves, the long one could cause dangerous ranging or surging, and hence, jeopardize the integrity of the vessel's mooring. Since the weather conditions were expected to worsen, the master after the consultation with a local pilot, decided to leave the port and anchor out till the time the weather conditions improved. However, on the way out, the vessel was exposed to extremely strong winds and was caught in between the shore on the one side and a breakwater on the other, limiting her

⁷⁸ Gard Marine & Energy LTD v China National Chartering Co LTD (*The Ocean Victory*) [2014] 1 Lloyd's Rep 59.

maneuvering capability. Consequently, the steerage way was lost and the vessel foundered against the breakwater, went aground, was abandoned by the crew, and some time later broke, notwithstanding the salvage operation efforts.

In determining whether Kashima could be considered as a safe port for the vessel, the Sellers' test was commonly used as a starting point. However, while applying the classic test of the safe port, Teare J slightly deviated from it and asked a couple of elaborative questions.⁷⁹ Those questions are claimed to constitute an additional, the fourth stage of the test of the port safety. Some authors also refer to it as a preliminary stage, since it is designated to examine the remoteness of the risks of danger.⁸⁰

To be precise, before following the Sellers LJ's approach, Teare J questioned whether the risk of long waves, which challenged the port's safety, was so remote that no precautions were required:

“The first question is thus whether, when Ocean Victory was ordered to proceed to Kashima [...], there was a risk that Ocean Victory might have to leave the port on account of long waves and bad weather because it was feared that she could not be restrained by her moorings...”⁸¹

Also, the honorable judge stressed that it is of paramount importance that:

“there was a real, as opposed to a fanciful risk, that long waves might occur at the same time as a low pressure system giving rise to gale force northerly winds in the channel”⁸².

⁷⁹ Paul Todd, *supra* note 1 at 4.

⁸⁰ Paul Todd, “Safe Port Issues: The Ocean Victory,” 4.

⁸¹ Teare J in *The Ocean Victory* [2014] 1 Lloyd's Rep 59 at 105.

⁸² *Ibid.* at 110

This introduction of a preliminary stage of the safety test has been roughly criticized by some authors. Thus, it has been submitted that the Teare L's preliminary stage in essence just re-states that the charterer's liability does not extend to abnormal risks, or to occurrences of abnormal character, that, as it is already known, constitutes the third stage of Seller LJ's test.⁸³

Since the differences between the abnormal occurrence and remoteness of the risk of damage is rather difficult, if not impossible, to find, and the mentioned decision is silent on any differentiating line between those terms as well, the preliminary stage has been qualified by some scholars as irrelevant.⁸⁴ Furthermore, it has been argued that the introduction of the first stage might cause some unnecessary complication for the courts, if the test suggested by Teare J is to be followed in the future.⁸⁵

On the one hand, the examination of remoteness of the risk of danger separately from the issue of abnormal occurrence might be seen reasonable in this particular case. It is explained by the differences in the factual merits of *The Ocean Victory* and *The Eastern City* disputes. Thus, the factual background of both cases is quite the same, in a sense that the causality happened at the time the vessels were to leave the port due to the weather conditions. The main distinguishing line is that in *The Ocean Victory* such conditions were uncommon for the port, whereas in *The Eastern City* high winds were expected. However, hardly can this reason justify the necessity of adjusting the Sellers LJ's test with a separate remoteness test.

Overall, it can be concluded, that although the Sellers LJ's test is quite basic and straightforward, it covers all the essential elements needed for understanding the meaning of port's safety. The test as towards the nature of the safe port can be evaluated and adjusted, as it

⁸³ Paul Todd, "Safe Port Issues: The Ocean Victory," 5.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

was a case in *The Ocean Victory*, but such adjustments do not always bring any positive input in the understanding of the term.

3.3 *The Evia No.2*: the essential specification to the Sellers LJ's test

It has already been suggested, that if the Sellers LJ's test is to be specified, the main focus should be on the problems of the moment to which the breach of the warranty can be attached, and the time when the safety of the port test should be applied. Those issues remained rather problematic up till the time *The Evia No. 2* case was resolved in the House of Lords. The case is rightly considered to be leading and groundbreaking in terms of the understanding the nature and the effect of the safe port warranty in general, and the meaning of a safe port in particular.

The merits of the case were overviewed above, however for the sake of clarity might be briefly repeated. The dispute arose on the basis of time charterparty agreement based on the Baltimore 1939 form, Cl 2 of which stipulated that "the vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports"⁸⁶. In accordance with the present agreement, the charterer ordered the vessel for the carriage of cement from Cuba to Basrah in March 1980. On the 1 July 1980 the *Evia* reached the waterway in Shatt-al-Arab, but her entrance to a berth was delayed for almost two months, till 20 August 1980 due to the port congestion. On 22 September 1980 the cargo was discharged and the vessel could leave the port. However, by that date the war between Iran and Iraq had started with the effect that Basrah and the area nearby were blocked by hostilities. Consequently, the ships being employed in this area were trapped in the port. It is important to note that nothing suggested the outbreak of the war at the time the order to proceed to Basrah was given. Furthermore, even when the ship entered the port the war was still not expected. To specify, the vessel was exposed to danger only after the arrival to the

⁸⁶ *The Evia No. 2* [1982] 2 Lloyd's Rep 307.

port, and this danger could not have been predicted beforehand. In order to establish whether the charterer was in breach of the safe port warranty, the House of Lords reconsidered the charterer's contractual obligation in question and its relation to the content of the safe port warranty. The decision therefore, brings a light on some fundamental problems that will be discussed below. To be precise, it clarified two facts essential for the understanding of the doctrine:

- it is **giving the order to go to a particular port or place of loading or discharge** that constitutes the breach of the safe port contractual obligation⁸⁷;
- the safety of the port should be assessed **at the time of such order** is given.⁸⁸

The justification for this position will be given below.

Pursuant to the position expressed by Lord Roskill in the case at hand, the charterer's contractual obligation towards the port's safety stems from the right to direct the employment of the ship. Thus, the nomination of the port is viewed as an active exercise of the charterer's mentioned right. For that reason, "it is clearly at that point of time when that order is given that that contractual promise by the charterer regarding the safety of that intended port or place must be fulfilled"⁸⁹. However, the charterer's promise relates not to the state of the port at the time of the nomination, rather it relates to a certain period of time in the future when the vessel actually get to the port stay in, so far as necessary, and in due course, leave.⁹⁰

By stipulating this, the House of Lords effectively abolished the concept of absolute continuing safe port obligation that had prevailed in the legal world before and introduced the

⁸⁷ Lord Roskill in *The Evia No. 2* [1982] 2 Lloyd's Rep 307 at 315

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," 607.

concept of the prospective safety of the port.⁹¹ The absolute continuing obligation to provide a safe port in essence means that once the charterer undertook the obligation in question, he declares that the port is safe starting from the time of nomination and that it would remain as such during the whole voyage.⁹²

On the other hand, the requirement of the prospective safety means that the port is guaranteed to be safe for the particular vessel when the ship is actually to get to, stay in, so far as necessary, and in due course, leave the port.⁹³ Hence, as apposed to the absolute safety construction, the prospective safety obligation relates to the point of time in the future when the vessel would actually arrives to the port.⁹⁴ Therefore, the actual state of the port at the moment when the ship arrives is of the paramount importance for the assessing whether the charterer fulfilled his contractual obligation in question or not. The fact that the charterer exercised reasonable care in determining the port's conditions would usually be seen as irrelevant.⁹⁵ Thus, the safe port obligation would be fulfilled, even if at the time of nomination or during the approach voyage the port was unsafe, as long as the set-up of the port is perfectly safe by the time the vessel has caused to use the port.⁹⁶

It is to note that the previously mentioned notions on the good navigation and seamanship requirement and the abnormal occurrence exception are still relevant: the prospective safety obligation does not allocate the risk of abnormal and unexpected event on the charterer, neither the charterer should be responsible for danger which could have been avoided by requisite degree of care and seamanship.

⁹¹ Lord Roskill in *The Evia No. 2* [1982] 2 Lloyd's Rep at 315.

⁹² Mustill J in *The Mary Lou* [1981] 2 Lloyd's Rep 272 at 276-278; Goff J in *The Evia No 2* [1981] 2 Lloyd's Rep (first instance) 613 at 620.

⁹³ Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," 607.

⁹⁴ *Kodros Shipping Corporation v Empresa Cubana de Fletes (The "Evia" (No.2))* [1982], 2 1982 Lloyd's Law Rep 307.

⁹⁵ Prof D Rhidian Thomas, ed, *Legal Issues relating to Time Charterparties* (London: Informa, 2008) at 61.

⁹⁶ Bernard Eder et al., *Scrutton on Charterparties and Bills of Lading*, 151.

It is important to highlight once again that the crucial moment when the safety of the port should be assessed is at time of nomination, although the promise itself relates to the future state of the port. In this vein, the concept of prospective safety should be seen as a tool to link the temporal dislocation between the time of the fulfillment of the obligation in question (the time when the order to proceed is given) and the time to which the essence of the promise in fact relates (the prospective safety of the port on the moment of the arrival of the vessel). From this perspective, the prospective safety construction is rightly considered to be more practical and reasonable in commercial terms than the absolute ones.⁹⁷ It reflects the modern position adopted by the courts that port's safety is not merely a matter of fact and the state of the port at the moment of the nomination; the potential risks related to the use of a port should also be estimated.⁹⁸

To sum up, the fact whether the charterer fulfilled his obligation regarding the safe port warranty should be assessed on the time when the order to proceed is given. The promise itself, however, relates to the prospective state of the port, namely to the upcoming point of time when the vessel would actually get to the port. Thus, the charterer would be liable for the breach of the warranty in question only when the port is proved to be unsafe at the moment when the vessel is approaching, staying in and leaving it.

⁹⁷ *Ibid.*

⁹⁸ Prof. D. Rhidian Thomas, *Legal Issues Relating to Time Charterparties*, 55–56.

4 The prospective safety of the port: some practical and theoretical problems

It follows from above that prospective safety of the port estimated at the time when the vessel is ordered to proceed is an important criterion to measure the fulfillment of the charterer's safe port obligation. Interestingly though, Lord Roskill provided no further evaluation on this term in his historical decision. Therefore, the meaning of the term and its ambit have formed a subject of a rigid discussion in the legal world. One of the problems that is mentioned is that prospective safety relates to the prospective or potential dangers to which the ship might be exposed in the port.⁹⁹ Such prospective risks do not always constitute the initial characteristics of the port. Nevertheless, they fall within the charterer's undertakings regarding safety if there is a "prospective" likelihood of those risks materialising and negatively affecting the vessel. Hence, the problem arises how exactly prospective safety of the port might be estimated. The discussion of this matter would constitute the next part of the present paper.

4.1 The test for the prospective safety: should the concept of foreseeability be applicable?

Some authors suggest that the prospective safety should be examined in accordance with the concept of foreseeability.¹⁰⁰ However, this concept presents a considerable practical and theoretical difficulty. Precisely, there is a dispute whether the test of foreseeability is an accurate one and can be applicable to the prospective safety in general. Secondly, it is questioned whether the foresight of the diligent charterer, shipowner or any other person should be considered.

⁹⁹ David Chong Gek Sian, "Revisiting the Safe Port," 80.

¹⁰⁰ *Ibid.*

As it has been mentioned, the term “prospective safety of the port” was firstly introduced in *The Evia No. 2*, but left without any other specification as towards how the prospective safety of the port should be determined. Despite the fact that the fundamental decision of *the Evia No. 2* was ruled more than thirty years ago, there is still no consensus on this issue among the legal authorities. There is also an obvious lack of the fundamental legal decisions and academic works that might specify the problem.

In some publications that followed *The Evia No. 2* decision¹⁰¹, it was suggested that prospective safety of the port should be subject to the test of foreseeability.¹⁰² Likewise, a brief notion of foreseeability could also be found in *Reardon Smith Line Ltd.*¹⁰³, to which Lord Roskill referred in his ruling, although regarding a different matter. To be precise, Lord Somerwell of Harrow mentioned that

4.2 *The Saga Cob* case: is the applicability of the doctrine of foreseeability towards the prospective safety issues revealed?

One of the first attempts to clarify the applicability of the doctrine in question towards the prospective safety of a port can be found in *the Saga Cob*¹⁰⁴.

In accordance with the factual background, the *Saga Cob* vessel was chartered to carry an aviation fuel on the basis of the Shelltime 3 standard form, clause 3 of which contained a due diligence obligation regarding the safety of the nominated ports. The dispute between the parties stemmed from an attack on the vessel by Eritrean guerillas. The attack took place while the vessel was anchored about four to five miles north east of the Massawa

¹⁰¹ See, for example, Charles G. C.H. Baker and Paul Davids, “The Politically Unsafe Port” (1986), L.M.C.L.Q. 112.

¹⁰² Ibid. at 118.

¹⁰³ *Reardon Smith Line Ltd. v Australian Wheat Board* [1956] A.C. 266.

¹⁰⁴ Prof. D. Rhidian Thomas, *supra* note 81 at 56–57.

harbor entrance, the Ethiopian port the chartered vessel had successfully called at over 20 times. Due to the attack, the considerable damage to the vessel was made, including her hull, engine room, and steering gear, among others. The shipowner brought a case against the charterer claiming damages for breach of the safe port warranty. The court was to decide whether at the time the ship was ordered, the designated port was safe for her to use.

At first instance, *Diamond J* ruled that the port was unsafe and therefore, the charterers were liable for the breach of the contractual obligation in question. Although this decision was reversed at the Court of Appeal later on, *Diamond J*'s understanding of prospective safety of the port presents a certain academic interest.

Diamond J submits that in order to determine whether the charterer fulfilled his preliminary safe port contractual obligation, one should consider whether there was a foreseeable risk at the time of nomination that the vessel might be exposed to danger.¹⁰⁵ Given that the risk was foreseeable, it forms a characteristic of the port. In that vein, the judge stressed:

“This characteristic may not have involved a high degree of risk but equally the risk cannot properly be regarded as negligible.”¹⁰⁶

It can be concluded then, that the safe port warranty includes all risks that could not be dismissed as negligible.

Further, the *Diamond J* specified that the issues of prospective safety should be estimated in the context of the wider situation around the port.¹⁰⁷ To be precise, the question of prospective safety would depend on the factual background that is to be known by a rea-

¹⁰⁵ *Diamond J* in *K/S Penta Shipping AS v Ethiopian Shipping Lines Corp (The Saga Cob)* [1991] 2 Lloyd's Rep 398 at 406.

¹⁰⁶ *Diamond J* in *The Saga Cob* [1991] 2 Lloyd's Rep 398 at 408.

¹⁰⁷ *Diamond J* in *The Saga Cob* [1991] 2 Lloyd's Rep 398 at 407-408

sonably well-informed person.¹⁰⁸ For instance, in the *Saga Cob* case, the political situation around the designated port was such that the attacks on strategic targets, as the vessel in question with the aviation fuel on board, could have been easily predicted by a reasonable person who possessed the historical and geographical knowledge about the region.¹⁰⁹ Hence, Diamond J also introduced the element of the reasonability to the concept of foreseeability.¹¹⁰

Whereas there are some cases that seem to follow this reasonable foreseeability pathway, there is also a considerable amount of legal thinkers that profoundly challenged the applicability of the discussed doctrine towards the issues of prospective safety of the port.¹¹¹ Thus, they insist that in practice the test of foreseeability scrutinizes and unnecessarily complicates the litigation.¹¹² Furthermore, even if to assume that the reasonable foreseeability test is an accurate criterion for determining the prospective safety, it is uncertain whose foresight should be taken into consideration. For the sake of clarity, the latter issue will be discussed now, after which the paper will focus on the criticism of *The Sage Cob* decision at first instance.

“ There was a discussion [...] as to the position if, at the time of nomination, the port would so far as could be foreseen be safe for the vessel when loading but became unsafe later through circumstances unforeseeable by the charterer...”¹¹³,

but again no further evaluation on this issue was made.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ David Chong Gek Sian, *supra* note 38 at 85.

¹¹¹ Robert Gay, “Safe port undertaking: named ports, agreed areas and avoiding obvious dangers” *Lloyd’s maritime and commercial law quarterly* 119 at 126.

¹¹² David Chong Gek Sian, *supra* note 38 at 86.

¹¹³ *Reardon Smith Line Ltd. v Australian Wheat Board* [1956] A.C. 266 at 284.

On the other hand, the applicability of the foreseeability test was challenged in practise. Thus, in his speech, Staughton J stressed that nothing in *the Evia No. 2* implies the applicability of the foreseeability test to the matters of the safe port warranty.¹¹⁴ Indeed, no reference to the foreseeability doctrine can be found in Lord Roskill's speech. Though, some authors claim that if his whole speech and its ambit are to be considered, the different conclusion might be made.¹¹⁵

That is to say, Lord Roskill specified that the fact that a contractual obligation towards the port's safety should be fulfilled at the moment when the order to proceed is given does not automatically imply that the port should be safe at that time.¹¹⁶ If it was so, the charterer would be deprived from nominating the ice-bound port which, however, both to his and shipowner's knowledge, "in all human possibility would be ice-free by the time that vessel reached it"¹¹⁷. Adherents of the applicability of the foreseeability doctrine claim that this part of the ruling can be of an interest from two perspectives.¹¹⁸

First of all, and it has been already highlighted above, the case illustrates that obstacles that contribute to the port's unsafety, but which can be removed or avoided by the time the ship proceeds, have no impact on the nature of the contractual obligation in question. Secondly, Lord Roskill's numerous refers both to the charterer's and shipowner's state of knowledge that those obstacles are "in all human possibility" temporary in nature. It is suggested that this notion implicitly invokes the test of foreseeability for determining the possible charterer's knowledge regarding the prospective safety of the port.¹¹⁹ To be concrete, the

¹¹⁴ *The Erechton* [1987] 2 Lloyd's Rep 180 at 181-182.

¹¹⁵ Michael Wagener, "A relative concept" (2008) Maritime Risk International, online: <<http://www.ilaw.com/ilaw/doc/view.htm?queryString=Saga+Cob&sort=date&sort=date&searchType=advanced-search&se=3&id=170326&searched=true>>.

¹¹⁶ Lord Roskill in *Kodros Shipping Corporation v Empresa Cubana de Fletes (The "Evia" (No.2))* [1982], 2 Lloyd's Law Rep 307 at 315.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ David Chong Gek Sian, *supra* note 38 at 80-81.

¹¹⁹ *Ibid* at 82.

port can be rendered prospectively safe when it could have been foreseeable for the charterer that temporary obstacles would be eliminated by the time the vessel required to enter.¹²⁰

The certain affirmation of this position can be found in *The Evaggelos TH*¹²¹ case, in which Donaldson J approved that if the state of the port as to its safety changed after the nomination, the reasonable foreseeability of that change is to be considered.¹²² However, no further evaluation on the test of foreseeability was made in this decision. Remarkably, Donaldson J's argumentation was expressly criticized by Lord Roskill in *The Evia No. 2*.¹²³ This fact undoubtedly contributes to uncertainty regarding the question whether the test of foreseeability is an accurate criterion for assessing the prospective safety of the port.

4.3 The test of foreseeability: whose foresight should be considered?

Although Diamond J was one of the first authorities that viewed the doctrine of foreseeability as a criterion for estimating the port's prospective safety, his ruling does not specify a personnel who is to foresee the safety of the port.

Thus, the judge throughout the whole ruling expressly and implicitly highlighted the necessity to estimate the risk of danger to the vessel from the reasonably informed person's perspective.¹²⁴ However, in some parts the mentioned judge referred to the knowledge of the reasonably informed charterer, and in others, to the knowledge of reasonably informed port-master.¹²⁵ No further specification regarding the personnel, from whose perspective the prospective safety is to be considered, can be found in *The Saga Cob* ruling. Some

¹²⁰ *Ibid.*

¹²¹ Vardinoyannis v Egyptian General Petroleum Corp (*The Evaggelos Th.*) [1971] 2 Lloyd's Rep 200.

¹²² Donaldson J in *The Evaggelos Th.* [1971] 2 Lloyd's Rep 200 at 206.

¹²³ Lord Roskill in *The Evia No. 2* [1982], 2 Lloyd's Law Rep 307 at 315.

¹²⁴ Martin Dockray, *Cases & Materials on the Carriage of Goods by Sea*, 3rd ed (London: Cavendish Publishing Limited, 2004) at 306–307.

¹²⁵ At 407

authors argue, that this is mainly due to the fact that the factual background of *The Saga Cob* case makes this issue immaterial.¹²⁶

However, if to consider other rulings that are dealing with reasonable foreseeability¹²⁷, the three main approaches to the personnel whose foresight should be considered in order to estimate the prospective safety of the port can be detected.

First of all, there are those who claim that the charterer's reasonable view on prospective safety of the port is of the preliminary importance. Secondly, there are some scholars that insist that the charterer should have absolute, rather than reasonable, knowledge on the prospective safety. Thirdly, the opponents of the abovementioned positions can be found. They submit that the foresight of the shipowner or post-master is the determinative one for estimating the port's prospective safety.¹²⁸ As a matter of fact, there is also a position that the decision to send a vessel to a port eventually is a risk estimated by both parties to the charterparty agreement¹²⁹, therefore both foresights should be taken into consideration.

Interestingly, these three approaches adopted by legal thinkers to a large extent reflect their different understanding of nature of the contractual obligation to nominate a safe port. Those positions can be summarized as the following:

¹²⁶ David Chong Gek Sian, *supra* note 38 at 85.

¹²⁷ See, for example, the *Saga Cob* case at the appeal, [1992] 2 Lloyd's Rep 545; *Pear Carrier Inc v Japan Line Ltd (the Chemical Venture)* [1993] 1 Lloyd's Rep 508 at pp. 519-520

¹²⁸ Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading*, Sweet & Maxwell ed (London, 2011).

¹²⁹ Michael Wagener, *supra* note 24.

4.3.1 The foresight of the reasonable charterer as a criterion for estimating the prospective safety

The adherents of this position build it upon the fact that the promise to provide a safe port is initially the charterer's one. For that reason, the view of the reasonable well-informed charterer should be of the preliminary importance for foreseeing the perspective safety of the nominated port.

4.3.2 The foresight of the charterer with the absolute knowledge

The advocates of the present position focus on the fact that the contractual obligation in question stems from the charterparty agreement and has the nature of the warranty.¹³⁰ Therefore, it presumes the strict liability of the charterer who guarantees the safety of the nominated port, certainly with the abnormal occurrences reservation.¹³¹ In that vein, it seems to be illogical to expect only the reasonable knowledge on the side of the charterer when it comes to the foreseeability test.¹³² Rather, the knowledge regarding the prospective port safety should be absolute.¹³³

As it might be noticed, this approach ignores some fundamental theoretical notions previously discussed in this paper. First of all, it has been submitted from the beginning that although the charterer's safe port obligation is often referred to as a warranty, it does not have the same effect. The term warranty does not imply any legal sense, thus it should be considered as a synonym to the contractual promise. Secondly, it is well established that the contractual promise of the port's safety is not of the absolute character. Furthermore, the charterer's obligation does not extend to abnormal risks, thus, no responsibility for the

¹³⁰ Prof. D. Rhidian Thomas, *supra* note 81 at 61.

¹³¹ *Ibid.*

¹³² David Chong Gek Sian, *supra* note 38 at 87.

¹³³ *Ibid.*

consequent loss or damage can be attached to the charterer if such abnormal risks materialize. Overall, these facts put in doubt the validity of the absolute knowledge approach.

4.3.3 The foresight of the port-master

The position that in the test of foreseeability as applied to the prospective safety of the port issue should be seen through the port-master prospective is, in fact, closely connected to the reasonable charterer approach discussed above. Thus, it is claimed that the reasonably informed charterer can estimate only the possibility of the risk of danger, whereas the real risk of danger, along with facts and knowledge crucial for establishing the prospective safety, are known only to the port-master. Hence, in fulfilling his contractual obligation, the charterer is expected to contact the port-master, whose foresight on the prospective safety has a paramount importance.¹³⁴ Therefore, it is claimed that the port-master's perspective on the safe port issues should be considered at the first place, as even a reasonably well-informed charterer cannot obtain all the information needed for assessing the safety of the port.¹³⁵ Hence, the charterer is to rely on the facts provided by the port-master.

The theoretical justification of this notion can be found in David Chong Gek Sian work "Revising the safe port"¹³⁶, but unfortunately, it is the only source known arguing in favor of this position. No profound criticism of it has been found in the legal literature either. It can be suggested though, that since the reasonable knowledge on the prospective safety obtained by the port-master is initially the same knowledge that the reasonable charterer can obtain¹³⁷, it might be enough to consider the foresight of the latter mentioned for the application of the foreseeability test. Furthermore, the consideration of the port-master fo-

¹³⁴ *Ibid* at 86.

¹³⁵ *Ibid*.

¹³⁶ David Chong Gek Sian, *supra* note 38.

¹³⁷ As suggested by *Ibid*.

resight in terms of the port's prospective safety might unnecessarily complicate the litigation and lead to very uncertain results.

4.3.4 The foresight of the master of the ship or the shipowner

The role of the shipowner or master seems to be of a great importance due to the fact that both in voyage and time charterparty agreements, the owner by means of the master retains the control over the vessel.¹³⁸ That is why, at the first glance, it seems to be reasonable to consider the master's or shipowner's foresight while applying the test of foreseeability to the issues of the port's prospective safety.¹³⁹

As it has been mentioned above, the first authority in which the perspective of a reasonable master or shipowner was mentioned is Diamond J's ruling in the *Saga Cob*. Although, the decision was reversed on the appeal¹⁴⁰, the House of Lords accepted the importance of reasonable shipowner's or master's foresight on estimating the port's safety. Precisely, Parker LJ highlighted that:

“One is considering whether the port should be regarded as unsafe by owners, charterers or masters of vessels. It is accepted that this does not mean that it is unsafe unless shown to be absolutely safe. It will not, in circumstances such as the present, be regarded as unsafe unless the ‘political’ risk is sufficient for *a reasonable shipowner or master*¹⁴¹ to decline to send or sail his vessel there”¹⁴².

¹³⁸ Michael Wagener, *supra* note 24.

¹³⁹ Robert Gay, *supra* note 108 at 126.

¹⁴⁰ Parker LJ in *K/S Penta Shipping AS v Ethiopian Shipping Lines Corp (The Saba Cob)* [1992] 2 Lloyd's Rep, 545

¹⁴¹ Emphasis added.

¹⁴² Parker LJ in *K/S Penta Shipping AS v Ethiopian Shipping Lines Corp (The Saba Cob)* [1992] 2 Lloyd's Rep, 545 at 551

Therefore, even though the contractual obligation to order a ship to a prospectively safe port rests on the charterer, the prospective safety should be estimated in accordance with the fact whether a reasonable well-informed shipowner or master would agree to proceed to the nominated port, having the knowledge of its set-up.¹⁴³ Hence, pursuant to Parker LJ, if there is a risk to a ship, which however, in the view of shipowner or master, does not present any danger to her, the risk is accepted by the latter. Consequently, the port will not be rendered unsafe within this accepted risk.

The main difficulty that might arise in the present context is that in case of the dispute regarding the subsequent liability for damage or loss sustained by the ship as a result of being exposed to this accepted risk, the shipowner or the master are to give evidence and justify their position as towards what kind of ports they would agree to proceed or not.¹⁴⁴ This problem is claimed to be resolved similarly to the seaworthiness testimonies that are also required from the shipowner. It is submitted that the test of seaworthiness under English law frequently relates to the fact whether a reasonable shipowner, that is well-informed that the vessel to a certain extent does not meet the requirements for seaworthiness, would agree for a voyage.¹⁴⁵ However, the courts proved to be able to apply a standard even without the evidence produced by the shipowner.¹⁴⁶

To sum up, although it seems that the reasonable foreseeability test has been frequently followed by the courts, some authors seriously question whether the doctrine in question provides an adequate assessment of the port's perspective safety. Thus, it is submitted that the foreseeability test as applied to the port's safety matters would lead to the practical difficulties and provide an inconsistent result. This notion seems to be particularly correct in the light of the abovementioned discussion on whose foresight is to be chosen, given that in

¹⁴³ Robert Gay, *supra* note 108 at 126.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 127.

practice, the decision to send a ship to a particular port is usually a calculated risk equally estimated by the charterer and shipowner.¹⁴⁷

4.4 The Saga Cob criticism

The Saga Cob decision at first instance was frequently criticized in practice. Whereas some authorities put in doubt the validity of Diamond J's submissions *per se*, others point at the inconsistency between the legal reasoning and argumentation provided by the mentioned judge and subsequent conclusions he reached.¹⁴⁸

To be precise, Diamond J's attempt to apply the foreseeability doctrine towards the safety of the port for some scholars seems to be rather inaccurate from the beginning.¹⁴⁹ Thus, the underlying agreement to this dispute was the charterparty based on the Shelltime 3 form that contained the due diligence obligation towards port safety. However, the clause was viewed by the named judge as the one that puts a distinctive line between the warranty of safety and the obligation to exercise due diligence.¹⁵⁰ Consequently, Diamond J suggested that if the vessel was ordered to the port that prospectively was not safe but neither of the responsible parties obtained any factual knowledge with that regard, there will be no breach of the due diligence obligation on the side of the charter.¹⁵¹ In that vein, the due diligence obligation would be breached only when the charterer possessed or ought to possess the essential information that the port is prospective unsafe and still ordered the vessel to that destination.

¹⁴⁷ Michael Wagener, *supra* note 24.

¹⁴⁸ Prof. D. Rhidian Thomas, *supra* note 81 at 56.

¹⁴⁹ David Chong Gek Sian, *supra* note 38 at 95.

¹⁵⁰ *The Saga Cob* [1991] 2 Lloyd's Rep. 398 at 408.

¹⁵¹ *Ibid.*

It is submitted that the wording that the charterer “ought to know” as used by Diamond J explicitly calls for the test of reasonable foreseeability, as the matters of which the charterer was ought to know are initially those that he could *have reasonably foreseen*.¹⁵² Given that the charterparty in *the Saga Cob* contained the due diligence obligation to nominate a safe port, it is unclear how the fulfillment of this contractual obligation can be measured in line with the reasonable foreseeability test. The distinction between the duty to nominate a safe port and duty to exercise due diligence regarding such nomination proposed in *the Saba Cob* seems to be rather unclear and ambiguous as well.

Interestingly, on the appeal, Parker J challenged the outcome of the litigation, but did not comment on Diamond J’s findings on the test of foreseeability.¹⁵³ The validity of the test was challenged only in *The Chemical Venture*¹⁵⁴ by Gatehouse J. He expressed his reasonable doubts, as to whether the test of safety proposed by Diamond J accords with the traditional approach to the matters of the safe port obligation presented in *The Eastern City*.¹⁵⁵ No precise clarification on this submission was made though.

However, the notion that the test of foreseeability contradicts the classic understanding of the essence of the contractual obligation in question has found its reflection in legal world. Thus, the opponents of the application of the test of foreseeability to the port’s safety issues build their argumentation upon the Lord Roskill’s dictum where the term of prospective safety has been introduced for the first time. Namely, it is suggested that nothing in *The Evia No. 2* decision gives a ground to assume that the test of foreseeability is to be used as a criterion for anticipating the prospective state of the port.

¹⁵² David Chong Gek Sian, *supra* note 38 at 95.

¹⁵³ Prof. D. Rhidian Thomas, *supra* note 81 at 56–57.

¹⁵⁴ *Pear Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyd’s Rep 508.

¹⁵⁵ Gatehouse J in *The Chemical Venture*[1993] 1 Lloyd’s Rep 508 at 519-520.

4.5 Did Lord Roskill in his ruling imply the applicability of foreseeability doctrine as an appropriate test for the port's perspective safety?

The proponents of the position that the test of reasonable foreseeability should be applied towards the prospective safety issues mainly justify it by the wording used by Lord Roskill in his ruling. The main focus was given on the following passage:

“But that contractual promise cannot mean that that port or place must be safe when that order is given, for were that so, a charterer could not legitimately give orders to go to an ice-bound port which he and the owner both knew *in all human probability*¹⁵⁶ would be ice-free by the time that vessel reached it. Nor, were that the nature of the promise, could a charterer order the ship to a port or place the approached to which were at the time of the order blocked as a result of a collision or by some submerged wreck or other obstacles even though such obstacles would *in all human probability*¹⁵⁷ be out of the way before the ship required to enter”¹⁵⁸

As it has already been stressed in this work, this passage was mistakenly understood as the one suggesting that the safety of the port should be estimated against the state of knowledge of the charterer and hence, the test of foreseeability is the most reasonable method to estimate this knowledge. However, as it is submitted by the opponents of the applicability of foreseeability doctrine, the true meaning of the cited notion should be understood in line with the subsequent paragraphs.¹⁵⁹

Namely, this part of Lord Roskill's ruling preliminary focuses on the abnormal events and the fact that the charterer should be realized from the liability if the damage or loss occurs

¹⁵⁶ Emphasis added.

¹⁵⁷ Emphasis added.

¹⁵⁸ Lord Roskill in *The Evia No. 2* [1982] 2 Lloyd's Rep 307 at 315.

¹⁵⁹ David Chong Gek Sian, *supra* note 38 at 87.

due to the mentioned reason.¹⁶⁰ Hence, the “in all human probabilities” wording by no means refers to the state of charterer’s knowledge. Instead, it highlights the distinctions between the normal risks to which the vessel is expected to be exposed and those which occurrence is impossible to predict “in all human probabilities”. Although, the following passage contains the reference to the prospective safety of the port, the judge does not go into further evaluation with that regard. Therefore, it seems to be unreasonable to undertake the “in all human probabilities” wording as an implicit suggestion to use the concept of the foreseeability in order to establish the prospective safety of the port.

Furthermore, there is nothing in Lord Roskill’s ruling that makes it possible to submit that the lack of the charterer’s knowledge is culpable.¹⁶¹ It is not the knowledge possessed by the charterer that constitutes the breach of the safe port warranty, but the order to proceed to a port.¹⁶² The prospective safety of the port in the cited context should not be seen as an invitation to apply the test of the foreseeability. Rather, the concept of prospective safety is used to highlight the time gap between the time of when the safety of the port should be assessed, namely, at the time of the nomination, and the time to which the safe port warranty initially relates, thus to the moment when the vessel actually arrives at the port, stays there and leaves it.¹⁶³ Although prospective safety of the port is assessed upon the facts available at the moment of the nomination, the charterer guarantees not the reasonably expected safe port’s conditions, but the actual safety of the port in the future. In essence, it means that the prospective safety of the port is a prediction made by the charterer on the basis of the information available to him.¹⁶⁴

¹⁶⁰ David Chong Gek Sian, *supra* note 38 at 88–89.

¹⁶¹ Michael Wagener, *supra* note 24.

¹⁶² Scrutton at 9.??

¹⁶³ Prof. D. Rhidian Thomas, *supra* note 81 at 62.

¹⁶⁴ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1987] 2 Lloyd’s Rep 37 at 47

Although, it might be mistakenly assumed that the prediction of the prospective safety is practically the same as the foreseeability, there is a considerable difference between these terms.

First of all, the foreseeability is closely connected to reasonability; namely, which port's conditions can reasonably be expected. In contrast, the prediction is a matter of facts resulting in the conclusion of the port's safety in the future perspective. Further, the concept of foreseeability is usually viewed as the tort of negligence, where the standard of care will always be the one of prudence and caution.¹⁶⁵ In reality, charterer's obligation to provide a safe port usually stems from a contract that can equally impose a higher standard.

Overall, it might be concluded that the application of the test of foreseeability leads to a great confusion. The prediction of the port's safety based on the facts, on the other hand, is quite easy and straightforward. To be precise, if the nominated port becomes unsafe following the nomination, the only question to answer is whether the conditions that rendered the port unsafe could have been anticipated based on the facts known at the time of the nomination.

The distinctive line between the foreseeability of the port's safety and the prediction on the port's state as towards its safety seems to be rather tricky, but in fact, this notion was used as a benchmark for developing the test that seems to be a fairly precise criterion to estimate the prospective safety of the port.

¹⁶⁵ David Chong Gek Sian, *supra* note 38 at 93.

4.6 The alternative to the doctrine of foreseeability found in practice

The alternative to the test of reasonable foreseeability was proposed by Bingham J in *The Lucille* at first instance, confirmed on appeal and slightly elaborated in some other cases¹⁶⁶.

As a starting point, it should be assumed that the charterer's obligations regarding the ports safety directly relates to the particular characteristics of the port.¹⁶⁷ Therefore, Bingham J suggests that the matter of prospective safety should be resolved pursuant to the twofold test. Thus, it is submitted that rather than assuring whether the certain conditions that rendered port unsafe could have been reasonably expected or not, the court should answer two principal questions:

Firstly, it is to be established what the source of the prospective unsafety was.¹⁶⁸ Secondly, the court is to decided whether the damage or loss sustained by the vessel occurred due to the source of the prospective unsafety or due to any other reason that falls outside the charterer's safe port obligation.¹⁶⁹

Thus, in the first stage of the test the court would have to consider the inherent characteristics and attributes of the port with the aim to estimate whether the conditions of unsafety existed at the time of nomination. Not only the physical state of the port *per se* should form the basis of the court's consideration, but also the surrounding facts and circumstances.¹⁷⁰

It should be stressed again that the crucial time for estimating the port's safety is the time of nomination. If the court agrees that at the time of giving an order to proceed, there was a

¹⁶⁶See the the *Polyglory* and the *Apiliotis*, and *Mediolanum*

¹⁶⁷ Prof. D. Rhidian Thomas, *supra* note 81 at 52.

¹⁶⁸ Bingham J in *Uni-Ocean Lines PTE. Ltd v C-Trade S.A. (The Lucille)* [1983]1 Lloyd's Rep 387 at 393

¹⁶⁹ Bingham J in *Ibid.* at 394

¹⁷⁰ David Chong Gek Sian, *supra* note 38 at 98–99.

prospect that the ship would be exposed to a danger stemming from the inherent attributes of the port that cannot be avoided by good navigation and seamanship.

Since the court makes its evaluation on the prospective safety of the port on the basis of the concrete facts and circumstances, some authors question whether the charterer's state of knowledge on those facts is of relevance for establishing the breach of safe port warranty.¹⁷¹

The right answer to this question lies in the fact that the safe port obligation in vast majority of cases is embodied into a contract and thus, should be viewed as a contractual duty of the charterer. By signing the charterparty agreement, the charterer is bound under the obligation to perform all the duties imposed on him, the safe port warranty included. From this perspective, the knowledge that he has or ought to have regarding the prospective safety of the port is irrelevant. Unless the charterparty states otherwise, the contractual duty would be of a strict character. From this perspective, the knowledge that the charterer has or ought to have regarding the prospective safety of the port seems to be irrelevant. The only fact that matters then is whether the charterer in essence fulfilled his safe port warranty obligations or not.

As to the second stage of the test, it should be specified that the mere fact that a vessel was ordered to the unsafe port or that loss or damage was sustained there, does not automatically imply the charterer was in breach of his primary safe port obligation.¹⁷² The charterer's undertakings regarding the safe port do not guarantee that a vessel, properly navigated with reasonable skill and care, would be absolutely safe in the nominated port.¹⁷³ Furthermore, even if the vessel would be exposed to danger in the port and the higher standards of navigation and seamanship are required, it would not follow automatically that the contractual

¹⁷¹ *Ibid* at 101.

¹⁷² Prof. D. Rhidian Thomas, *supra* note 81 at 52.

¹⁷³ *Ibid* at 80.

promise regarding the port's safety was unfulfilled. The causation link between loss and damage sustained by the ship and the unsafety of the port should be established.

Overall, it can be concluded that despite the fact that the *The Eastern City* and *The Evia No. 2* decision was ruled decades ago, there are still some uncertainties left regarding some principal matters of the operating of the safe port warranty. Although, those matters were partly resolved in *The Evia No. 2* case, there is still place for further specification and evaluation. To be precise, Lord Roskill's decision is silent on how exactly the prospective safety of the port should be assessed. There are two main approaches to this problem that have been overviewed in the present paper. There are some authors that suggest that the prospective safety of the port should be viewed in line with the doctrine of foreseeability. The proponents of this idea stress that the matters of prospective safety are determined of the concrete facts and therefore, the estimation of the prospective safety is a prediction made on the basis of factual determination. It should be noted that very few legal decisions deal with that matter in depth, although the importance of the matter in question is well recognizable.

This is particularly applicable to the matters of the prospective safety of the port that by so far have not formed the subject of deep judicial analysis. Very few cases are known that address this problem, but within them the matters of prospective safety are only briefly overviewed without any further deep evaluation.

5 Subsequent unsafety of the port and secondary obligation of the charterer regarding the safe port warranty

As it has been numerously mentioned, the charterer's safe port warranty does not extend to the situations of the abnormal character. However, the essence of the safe port warranty is underpinned by the idea that the time charterer should make everything in his power to assure the safety of the ship at the port and to protect her from any further arising danger.¹⁷⁴ Thus, if an unexpected event took place that rendered or would render the port unsafe, the time charterer would usually be found under the obligation to cancel his primary order and to direct the vessel to another port. This subsequent order is known as the secondary obligation to nominate a safe port.

There is a certain limitation to the secondary obligation towards the safe port nomination though. Thus, the charterer is not required to re-nominate a port if the vessel is not able to comply with the new voyage order, for example, when the vessel has already reached the nominated port and it is impossible for her to leave it.¹⁷⁵ Apart from this exception, the failure to re-nominate the port in case of the subsequent unsafety of the first nomination would constitute the breach of the contract resulting in damages.¹⁷⁶

In essence, the basic observations on the operation of the primary safe port obligation, that are made in the first chapter of this work, are equally applicable to the secondary safe port obligation imposed on the charterer. Namely, the charterer is to redirect the ship to a prospectively safe port that is to be determined at the time when such order is given.¹⁷⁷

¹⁷⁴ Lord Roskill in *The Evia No. 2* [1982] 2 Lloyd's Rep. 307 at 315, 319-320.

¹⁷⁵ *Ibid.*

¹⁷⁶ Rhidian Thomas, *supra* note 7 at 620.

¹⁷⁷ Lord Roskill in *The Evia No. 2* at 320.

The need to fulfill the secondary obligation to nominate a safe port can cause some additional difficulties, in case the charterer had also entered into sub-chartering or bill of lading agreements.¹⁷⁸ The possible solution for the charterer would be to include protective clauses to the abovementioned agreements that would tackle the question of his subsequent liability.

Since the time charterer is the one responsible for the employment of the ship, the secondary obligation to nominate a safe port generally causes no technical difficulties, apart from the effect such nomination might have on third parties. However, the question arises whether the scheme of perspective safety and the further secondary obligation towards it, as explained by Lord Roskill, can operate successfully when the voyage charterer parties are to be considered.¹⁷⁹ Although this problem was mentioned in *The Evia No. 2*, Lord Roskill abstained from giving this issue a deep consideration.¹⁸⁰

As it has been noted, one of the main distinctive features between time and voyage charterparties is that the time charterer is responsible for the employment of the ship, so that the redirection of the ship should present no major difficulty, apart from the effect such redirection might have on third parties.¹⁸¹ On the other hand, the voyage charterparty is usually fixed from the beginning. The ports of loading and discharge are generally written down in the agreement and constitute the binding term of the contract. It is practically impossible to draw a parallel between specified and nominated ports under voyage charterer and ports to which the ship is ordered by the time charterer. Therefore, at the first place, it might be rather problematic to make a fair comparison between of how the analysis of the safe port warranty made by Lord Roskill in *The Evia No. 2* is applicable to the voyage

¹⁷⁸ Bernard Eder et al, *supra* note 8 at 127.

¹⁷⁹ *Ibid.*

¹⁸⁰ Lord Roskill in *The Evia No. 2* at 320.

¹⁸¹ Prof. D. Rhidian Thomas, *supra* note 81 at 62.

charterparty agreements. The examination of this problem would be provided in the following sub-chapter of the present work.

5.1 The safe port obligation and the voyage charterparty agreements

In the traditional or simple voyage charterparty, that is, roughly speaking, is a voyage from port A to port B, the charterer has no right to nominate the port and to supervise its safety. However, the modern trade has called for the flexibility of the voyage charterparties.¹⁸² The reason for that lies in the fact that in vast majority of cases, the voyage charterparty agreement is not merely a contract of affreightment, but one of the integral elements of the international contract of sale concluded on the shipment terms.¹⁸³ In essence, it means that the voyage charterparty is stemming from the contract of sale which has a dominant position: the transporting agreement would be framed in a way that enables the charterer to fulfill his obligations under the sale contract.

The flexibility of the voyage charterparties, among others, relates to the ports of loading and discharge, or the places of loading and discharge within the concrete ports. This has been reflected in contemporary standard voyage charterparty terms that frequently give a voyage charterer a right to nominate a port. This right is rather unusual for “classic” voyage charterparties.¹⁸⁴ Although such flexibility gives a positive impact on the business efficiency, it also imposes the additional obligations on the parties to the voyage charter.¹⁸⁵ To be precise, once the voyage charterer obtains the right to nominate a port, he has to make sure that this port is a safe one. Therefore, the concept of the primary safe port obligation is also known in terms of voyage charterers.

¹⁸² Julian Cooke et al, *supra* note 17 at 103–104.

¹⁸³ For the deep evaluation on that matter see C Debattista, *Sale of Goods Carried by Sea*, 2nd ed (London: Butterworths, 1998).

¹⁸⁴ *The Evolving Law and Practice of Voyage Charterparties*, Prof. D. Rhidian Thomas ed (London: Informa, 2009) at 2.

¹⁸⁵ *Ibid.*

The analysis of legal literature shows that when it comes to the nature of the safe port warranty in terms of the voyage charterparty agreement, it basically remains the same, as in the time charters.¹⁸⁶ Thus, the voyage charterer should be found under the contractual promise to nominate the port that is prospectively safe for the vessel to approach, use and depart from it.¹⁸⁷ The crucial time for the assessing the port's safety is at the time when the nomination is made.¹⁸⁸

The peculiarity of a voyage charterparty agreement, as opposed to time charterers, is that once the port is nominated and written down in the contract, it becomes a bounding term of the contract and is seen as irrevocable and operating retroactively, provided that such nomination is valid.¹⁸⁹ The situation is even more simplified in terms of a traditional voyage charterer, when there is only single port of loading and discharge stipulated with no right for the charterer to order the vessel elsewhere. Therefore, it is highly debatable whether the secondary obligation of the charterer to nominate another port in case of unsafety occurred after the first nomination exists in the voyage charterparties. Nevertheless, the position that the voyage charterer has the right of re-nomination appears in the legal literature¹⁹⁰ and thus, provides a room for the discussion.

5.2 Should the voyage charterer should be granted a right to re-nominate the port?

Although the specified nature of the voyage charterparty agreements makes it illogical to suggest that the secondary obligation towards the safe port warranty exists within the voya-

¹⁸⁶ See generally Julian Cooke et al, *supra* note 17.; Bernard Eder et al, *supra* note 8.

¹⁸⁷ Bernard Eder et al, *supra* note 8.

¹⁸⁸ Lord Roskill in *The Evia No. 2* [1982] 2 Lloyd's Rep 307 at 315.

¹⁸⁹ Bernard Eder et al, *supra* note 8.

¹⁹⁰ *Ibid* at 127.

ge charter ambit, legal authority known declares the opposite. To be precise, in the case *The Teutonia*¹⁹¹ the possibility to renominate the port under the voyage charterparty was recognized. At the case at hand, the nominated port was rendered unsafe due to the outbreak of the war. The Privy Council decided that the right of re-nomination should be granted, since the contractual obligations were fulfilled by the parties and thus, the effort to give the effect to that contract should be made, as it would be at least unfair to leave the shipowner without the freight paid.¹⁹² The freight was ruled to be paid upon the delivery to the nearby port that was to be chosen by the shipowner, rather than the charterer.

The abovementioned ruling has been numerously criticized as the one that contradicts the nature of the voyage charterparties. Thus, in *The Vancouver Strike*¹⁹³, Sellers LJ submitted in *The Teutonia* does not provide any true legal reasoning of the decision and therefore, hardly can be reliable.¹⁹⁴

The existence of secondary obligation towards the safe port warranty was also challenged in *The Jasmine B*¹⁹⁵, where Diamond J strongly disagreed with the position expressed in *The Teutonia*. Thus, the mentioned judge stressed out the retrospective effect that the nomination of the port has in the voyage charterparty and specified that due to this reason the charterer has neither a right nor an obligation of the secondary nomination in case of the port's unsafety.¹⁹⁶

The Teutonia was also commented on in the famous *The Evia No. 2*, where Lord Roskill

¹⁹¹ *Duncan v Koster (The Teutonia)* [1872] LR 4 PC 171.

¹⁹² As summarized by Sellers LJ in *Reardon Smith Line LTD v Ministry of Agriculture, Fishers and Food (The Vancouver Strike)* [1961] 1 Lloyd's Rep. 385 at 407-408.

¹⁹³ *Reardon Smith Line LTD v Ministry of Agriculture, Fishers and Food (The Vancouver Strike)* [1961] 1 Lloyd's Rep. 385.

¹⁹⁴ Sellers LJ in *The Vancouver Strike* [1961] 1 Lloyd's Rep. 385 at 408.

¹⁹⁵ *Bulk Shipping v Ipco Trading SA (The Jasmine B)* [1992] 1 Lloyd's Rep. 39.

¹⁹⁶ Diamond J in *Bulk Shipping v Ipco Trading SA (The Jasmine B)* [1992] 1 Lloyd's Rep. 39 at 42.

draw attention to the fact that at the time when the formerly mentioned case “was decided long before the doctrine of frustration of [of a contract] assumed its modern form”¹⁹⁷.

Although, Lord Roskill restrained from giving any direct answer on whether the secondary obligation exists in terms of the voyage charters, he gave a hint of alternatives that can be used by the parties to this agreement. Thus, Lord Roskill mentioned that the possibility to re-direct the vessel to another safe port can be embodied into ice or war clauses of the discussed agreements.¹⁹⁸

There are also other alternatives that give the parties to the voyage charterparties an option to nominate another port in case of the subsequent unsafety of the first nomination. For instance, the parties can agree on the delivery of the goods to the nominated port “or as near as she can safely get” with the effect that in case a port of the primary nomination is not reachable, the goods can be delivered at the nearest port.¹⁹⁹

If there is nothing in the voyage charterparty that gives the charterer an option to redirect the vessel, the shipowner will face a difficult choice of whether to proceed to the port and expose the ship to the danger, or to frustrate the charterparty and by these means to seek a relief from his contractual obligation.²⁰⁰

As a matter of general knowledge, it is to note that even in case of frustration of the contract, there still a potential solution to earn a freight and get the goods delivered. If the merits of the case make it possible, the parties to the frustrated voyage charter might be advised to enter into a new agreement in order to deliver the goods at the alternative port.²⁰¹ Another option for the parties would be to nominate the shipowner or the master to be an

¹⁹⁷ Lord Roskill in *The Evia No. 2* [1982] at 320.

¹⁹⁸ Lord Roskill in *Ibid.*

¹⁹⁹ Bernard Eder et al, *supra* note 8 at 126.

²⁰⁰ Julian Cooke et al, *supra* note 17 at 118.

²⁰¹ Chan Leng Sun, “Nomination of Ports by the Voyage Charterers” *Singapore Academy of Law Journal* at 215.

agent of necessity for the charterer.²⁰² It is to note though, that these options are available only upon the frustration of the voyage charterparty. Therefore, it seem to be reasonable to accept that no secondary obligation relating to the safe port nomination exists under the voyage charterparty agreement.

As it can be seen from above, there are numerous possibilities available to the parties within the voyage charterparty contract that can tackle the problem of unsafety of the port occurring after the nomination. Some authors view these alternatives as an implicit indication that the secondary obligation to nominate a safe port known under the time charters does not exist in the voyage charterparty agreements.²⁰³

Overall, on the basis of abovementioned it can be concluded that hardly can the concept of safe port warranty as it is known in the time charterparty agreement operate in the same way as in the voyage charterparty agreement. The general understanding of the safe port and the essence of the promise to nominate a port that is prospectively safe for the vessel is the same in voyage and time charterers. Once the right to nominate the port arises, the obligation to nominate a safe one is expressly or implicitly attached to it.²⁰⁴ Hence, as far the primary contractual obligation in question is considered, the same categories are operating in charterparties. Probably, it is the only parity that can be detected in the operation of the safe port warranty in the time and voyage charterparty agreements.

When it comes to the secondary obligation to nominate another safe port due to the unsafety of the first nomination, the submissions made by Lord Roskill can be related only to the time charterparties. Since the port nomination in the voyage charters has the irrevocable and retrospective effect, it seems to be rather difficult to find a voyage charterer under the further obligation to re-nominate a port, if the firstly nominated port is rendered unsafe.

²⁰² *Ibid.*

²⁰³ note 175 at 21.

²⁰⁴ *Ibid.*; Rhidian Thomas, *supra* note 7 at 619.

However, the difficulty that might be caused by the subsequent unsafety of the port in the voyage charterparties can be solved by the sensible construction of the terms of the contract. For instance, the parties might be advised not to stipulate an absolute obligation regarding the nomination port, but to agree on “as near as the vessel may safely get”²⁰⁵ term or to embody the right to make a secondary nomination in ice or war clauses.

²⁰⁵ See, for example, the BIMCO Uniform General Charter (As revised 1922, 1976 and 1994), Gencon, Cl. 2,

6 Conclusion

The present paper aimed at analysing the core issues of the safe port warranty in terms of charterparty agreement. It has been established that traditionally, the right to nominate a port was a time charterer prerogative. However, the needs of modern trade called for the flexibility of the voyage charters, so that the right to nominate a port has also been recognised in terms of voyage charterers.

The right to nominate a port triggers the obligation to ensure that the port is safe for the ship to call at, stay as long as needed and to leave in a due course. This obligation is known as the safe port warranty, although the word “warranty” in present context should be understood as synonym to a “promise”.

What is understood under the safe port undertakings formed the first part of this work. Thus, the nature of the safe port warranty is revealed in *The Eastern City* by Sellers LJ. His definition in mentioned case is considered to be a classic passage on the nature of the safe port. In his ruling he provides a threefold test of how the safety of the port should be determined. Thus, “... 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”²⁰⁶.

The test is pretty simple, but nevertheless quite accurate for understanding the meaning of the safe port. However, it does not specify the very important issues, such as where the breach of the safe port warranty lies and at what time the safety of the port should be estimated.

²⁰⁶ Sellers LJ in *The Eastern City* [1958] 2 Lloyd’s Rep 127 at 131.

These questions constituted the second part of the present work. The answers to these issues can be found in the groundbreaking *The Evia No. 2* case. There it was established that the breach of the warranty lies in giving the order to proceed to a port. As about the time when the safety of the port should be estimated, the time of the nomination of the port is of the vital importance. Precisely, at the time of nomination the charterer has to estimate the prospective safety of the port. Thus, the prospective safety is seen of a vital importance for estimating whether the charterer has fulfilled his contractual obligation towards the safe port on the moment of nomination.

Though the term “prospective safety” was introduced by the Lord Roskill in the *Evia No. 2*, the mentioned *decisino contatins* no specification on how it should be determined. There are two positions found in the legal literature: the first is that the prospective safety should be estimated in accordance with the test of foreseeability; the second approach is that the prospective safety is a matter of actual fact since it relates to the actual state of the port at the time when the vessel would approach the nominated port. In other words, the estimation of the prospective safety is a prediction made by the charterer on the basis of factual determination.

The third issue addressed in the present paper related to the safe port warranty as it operates in the voyage charterparty agreements. Precisely, it has been questioned whether the notions on the primary and secondary obligation to nominate a safe port could operate in context of voyage charterer. It has been concluded that whereas the primary obligation to nominate the port is practically the same, provided that the voyage charterer has a right to nominate under the contract, the existence of the secondary obligation is put in doubt. This is explained by the fact that the nomination of the port in the voyage charterparty has an irrevocable and restrospective effect, meaning that once the nomination of the port is made, it is treated as a binding term that existed from the moment of the contract was signed. Hence, it logically follows that no-renomination of the port cannot be done within the same agreement, unless the other clauses of it, such as ice or war clauses, give a charterer such discretion.

Overall, it should be noted that the issues of safe port warranty present a great interest, but yet have not formed a subject of any deep legal evaluation neither in academic works nor in the case law. This work has made an attempt to fill in this gap.

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