THE DEFINITION AND SCOPE OF THE SAFE PORT OBLIGATION UNDER CHARTERPARTY AGREEMENTS IN THE LIGHT OF ENGLISH COMMON LAW*

Çarter Sözleşmeleri Bakımından Cari olan Güvenli Liman Yükümlülüğünün İngiliz Mahkeme Kararları Işığında Tanımı ve Kapsamı

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ABSTRACT

Due to the increasing volume of trade, the world of shipping is changing faster than ever. Bigger, safer and smarter ships are built to carry more goods to remote corners of the Earth. However, challenging weather factors, poor physical conditions of some ports and changing political dynamics of the world raise safety concerns for ships. Thus, understanding the scope of the safe port obligation is important to allocate the risk between the owner and charterer when a ship sustains damage while entering, using or leaving a nominated port. Therefore, under a charterparty, the charterers have an obligation to order the ship to safe ports and places. Although safety is a question of fact, whether a port is safe for a particular vessel at a relevant time is a subjective test. Thus, the meaning of safety might change from time to time and ship to ship due to different factors. After reviewing the existing judicial literature on safe port obligation, this paper will explore its scope and how far it extends. Later, the limits and the nature of the safe port obligation will be covered to understand when the risk shifts from the charterer to the shipowner. Finally, the paper will cover the remedies available for the parties.

Keywords: Safe Port Obligation, Definition of Safety, Charterer's obligation

ÖZET

Dünyada hızla artmakta olan ticaret hacmi dolayısıyla, deniz taşımacılığına ilişkin kural ve uygulamalar her geçen gün değişmektedir. Dünyanın bir ucundan öteki ucuna taşınan ticari malların hacim ve kapasitesini artırabilmek adına daha büyük, daha güvenli ve daha teknolojik gemiler inşa edilmektedir. Buna karşılık, zorlu iklim koşulları, fiziksel koşullar anlamda yetersiz limanlar ve dünyada değişen politik dinamikler gemiler için güvenlik sorunlarını da beraberinde getirmektedir. Bu itibarla, çarter sözleşmeleri bakımından karşımıza çıkan güvenli liman yükümlülüğüne riayet, geminin limana girdiği, limanı kullandığı ve terk ettiği esnada uğradığı zararlara ilişkin sorumluluğun kime ait olduğunun tespiti bakımından son derece mühimdir. Bir limanın muayyen bir gemi ve zaman aralığı için güvenli olup olmadığı, somut olayın şartları

* We hereby declare that this article is not among the studies that require ethics committee approval.

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kapsamında, yani sübjektif olarak değerlendirilmesi gereken bir hususdur. Çalışmamızda evvela güvenli liman yükümlülüğüne dair mevcut mevzuat hükümleri değerlendirildikten sonra, söz konusu yükümlülüğün kapsamı üzerinde durulacaktır. Daha sonra, sorumluluğun hangi andan itibaren çartererdan gemi sahibine intikal ettiğinin daha iyi anlaşılabilmesi adına güvenli liman yükümlülüğünün hukuki mahiyeti ve sınırları ele alınacaktır. Son olarak, bu yükümlülüğe riayet edilmemesine bağlanan sonuçlar ortaya konulacaktır.

Anahtar Kelimeler: Güvenli Liman Yükümlülüğü, Güvenliğin Tanımı, Çartererın Yükümlülüğü

INTRODUCTION

As demand for international trade increases, the volume of sea trade is expanding. As a result, the safety of ports has become a lot more crucial than ever. Although ports are getting more efficient and safer with the new technical developments, not all ports have the means to eliminate potential risks in the sea trade. From the shipowners' perspective, it is understandable that they may require their ships to be ordered only to safe ports. Therefore, under a time or voyage charterparty, a charterer is likely to be under an express or implied obligation to order the ship to safe ports or places. Some standard time and voyage charter forms contain an express clause on the trading limits, such as the New York Produce Exchange Form (NYPE) or Asbatankvoy.[1] If there is no such an express clause, the courts may imply one, depending on the contractual nature of that particular charter. Nonetheless, the meaning of safety in relation to the safe port obligation is still evolving and under discussion due to its ambiguous and subjective nature. Recent political, economic, technological, or global health crises make the maritime industry reconsider the definition of safety once again after each news before sailing into the unknown. In fact, the consequences of ordering a ship to an unsafe port might be catastrophic. When such unfortunate incidences occur, parties are going to try to avoid liability for the loss suffered. Understanding the safe port obligation and the meaning of safety will enable the parties to allocate the risk or prevent it in the first place. Therefore, the purpose of this article is to examine the meaning of safety and the criteria used to evaluate the safety of a port while addressing the general exceptions and remedies available under a charterparty for the breach of the safe port obligation.

First and foremost, there is no doubt that the English Common Law has a dominant position in international trade and maritime law in general. It would not be an overstatement to say that the English courts set the course of the shipping industry. As a result, English law is used as the governing law in most maritime contracts. Thus, the judgments of the English courts lead the way and influence other courts and legislators both in common and civil law jurisdictions. It is not surprising that the safe port obligation is not frequently

[1] Clause 1(b) and clause 1(c) of NYPE 2015 and Clause 1 and clause 9 of Asbatankvoy.

reviewed in other jurisdictions. As a result, other jurisdictions did not develop as sophisticated definitions as the English common law in this area. For example, even in Norway, where the shipping business is well developed, the law has not evolved as much as English law. As a civil law jurisdiction with an extensive maritime background, the rules relating to the safe port obligation under the Norwegian Maritime Code looks insufficient and limited.[2] Therefore, the definition and scope of the safe port obligation will be examined under English law in this paper since most shipowners worldwide, including Turkey, continue to rely on English courts to make a decision on their issues.[3]

The rationale behind the requirement of safe port obligation is to ensure that the charterers order the ship only to safe ports. Inevitably the courts had to evaluate these charterparties to determine the meaning of safe port obligation under different circumstances and facts. It should be noted that the Honourable judges of England and Wales underlined the fact that the judicial decisions on the safe port obligation are applicable to all charterparties. In other words, while reviewing the safe port obligation, the courts used the same principles for both time and voyage charterparties. This is the reason why the article will do the same and evaluate the obligation under the time charterparty concept but occasionally reference cases on voyage charters as the English courts. In fact, the traditional definition of the obligation comes from a case on a voyage charter party, which will be discussed below.

The only difference is that the courts are more likely to imply such duty in the absence of an express clause due to the commercial realities under which both contracts are used. The nature of a time charterparty is such that the time charterer has the vessel placed at his disposal by the owner.[4] It is a contract for services, which requires the shipowner to act in accordance with the orders given by the charterer as to where the ship is going to load or discharge the cargo. As a result, the charterer is entitled to order the ship anywhere around the world subject to the contractual limits in the time charterparty. Therefore, in the time charterparty context, it is natural to imply such a safe port obligation in the absence of an express clause. On the other hand, the shipowner agrees to carry the charterer's cargo from the loading port to the discharge port under a

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2 The Norwegian Maritime Code (Act No. 39 of 1994) (https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88374)

3 Prof. Dr. M. Fehmi Ülgener, 'Zaman Çartererin Gemiyi Kullanma Yetkisi ve Bunun Sınırları' (Marmara Üniversitesi Hukuk Fakültesi, 1996) (https://www.ulgener.com/dosya/09.Guvenli_Liman_Ve_Rihtim.pdf).

4 Terence Coghlin, Terrence Coghlin, Andrew Baker, Andrew Baker, Julian Kenny, Julian Kenny, John Kimball, John Kimball, Tom Belknap, *Time Charters* (7th edn Informa Law from Routledge 2014), 7.2; See also Skibsaktieselskapet Snefonn, Skibaksjeselskapet Bergehus and Sig Bergesen D.Y. & Company v Kawasaki Kisen Kaisha Ltd (*The Berge Tasta*) [1975] 1 Lloyd's Rep 422 (Q.B.), 424.

voyage charterparty. Implying such obligation might be difficult with voyage charters because a voyage charter already specifies a loading and a discharge port. Hence, the charterer cannot order the ship to any other ports. When the voyage charterparty provides a range of named ports, implying safe port obligation might be unnecessary. If the owner agreed the named ports and did not require an express clause in the charterparty, it is reasonable to assume that the owner accepted the risk of unsafety.[5]

In *The APJ Priti*,[6] for example, the charter allowed the charterer to carry urea from Damman, a port in the Saudia Arabian, to one of three ports in the Persian Gulf at the time of war between Iran and Iraq. The charter provided an express obligation to nominate a safe berth at one of the three named ports. However, there was no such clause for the safe port obligation. The vessel was hit by a missile on the approach to Bandar Khomeini, the nominated port. As a result, the Court had to decide whether the charterer had an obligation to nominate a safe port. In the Court of Appeal, Lord Justice Bingham underlined the difference between time and voyage charters.[7] In time charters, the owner could not know where the vessel might go during the period of the charter. Therefore, it makes good commercial sense for the charterers to promise that they would not order the vessel to any port that was prospectively unsafe when the order was given. However, in this case, the voyage charter allowed the charterer to nominate one of three ports in the Persian Gulf, which was already in a hostile area. Thus, the court held that there is no ground for implying a safe port obligation because the omission of the express clause might well have been deliberate and because such an implied term was not necessary for the business efficacy of the charter.[8] On the other hand, when a charter provides a range of unnamed ports, implying such obligation is possible depending on the terms of the charter in any particular case.[9]

Since the courts are trying the understand the scope of a contractual obligation, it is understandable that they look at the factual matrix with business common sense rather than illustrating the obligation as a distinct

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5 Julian Cooke, Tim Young, Michael Ashcroft, Andrew Taylor, John Kimball, David Martowski, LeRoy Lambert, Michael Sturley, *Voyage Charters* (4th edn. Informa Law from Routledge 2014), 5.36; See also Ward Chris, "*Unsafe berths and implied terms reborn*" (2010) LMCLQ 489.

6 Atkins International H.A. v. Islamic Republic of Iran Shipping Lines (*The A.P.J. Priti*) [1987] 2 Lloyd's Rep. 37 (C.A.).

7 The A.P.J. Priti [1987] 2 Lloyd's Rep. 37 (C.A.), p. 41.

8 *Ibid*, p. 42; For further discussions on contractual interpretation and implied term: Wood v Capita Insurance Services Ltd [2017] UKSC 24, Arnold v Britton [2015] UKSC 36, and Marks & Spencer v BNP Paribas [2015] UKSC 72. The English courts are likely to imply a term if it gives business efficacy to that contract and makes commercial sense.

9 Cooke, paragraph 5.38; See also Aegean Sea Traders Corp v Repsol Petroleo SA (*The Aegean Sea*) [1998] 2 Lloyd's Rep. 39 (QB), p. 68.

and formal one for time and voyage charterparty. The only purpose of safe port clauses is to ensure that the ship is only ordered to safe places. In other words, the meaning of safe port obligation is the same for every charterparty agreement, provided that either it is expressly stated within the contract, or it can be implied to make commercial sense.

1. Meaning of Safety

What constitutes a safe port is a subjective test, which depends on a lot of different factors. However, the definition of safe port obligation is the same for time or voyage charters regardless of whether it is an express or implied obligation. The standard definition of a safe port is provided by the Court of Appeal in *The Eastern City*, a case based on a voyage charterparty. However above-mentioned, the definition is applicable for both time and voyage charters. Lord Justice Sellars stated that: "*If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship*."[10] Therefore, whether a port is safe for a particular vessel at a relevant time is a subjective test and depends on the circumstances of each case. The English courts are likely to give broader meaning to the definition of ports due to commercial and practical reasons, which will be examined below. However, before moving on to the definition of safety, it is important to underline that safe port obligation includes the safety of docks, wharves, berths and other places within the port to which the ship is directed.[11]

In Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.,[12] the ship was time chartered, which contained a clause reading as follows: "*Steamer to be employed in lawful trades for the conveyance of lawful merchandise between good and safe ports or places within the following limits… where she can lie safely always afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety*." The Court of Appeal stated that it was the intention of the parties, although not expressed in the words, that the vessel should be employed not only between safe ports but also between safe berths with similar qualifications.[13]

Thanks to the rich shipping history of the English common law jurisdiction, English courts had the chance to evaluate the meaning of port and safety under different circumstances since 19th century. In general, the risks considered

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10 Leeds Shipping Co Ltd v Societe Francaise Bunge (*The Eastern City*) [1958] 2 Lloyd's Rep 127 (C.A.), p. 131.

11 Compania Naviera Maropan S.A. v Bowater's Lloyd Pulp and Paper Mills, Ltd (*The Stork*) [1955] 1 Lloyd's Rep 349, p. 350.

12 [1935] 52 Lloyd's Rep. 141 (CA)

13 *Ibid*, p. 149.

by the courts while examining the safety of a port can be divided into two categories as the risks related to the physical and non-physical characteristics of the port.

a. Risks Related to the Physical Characteristics of the Port

A port might be safe for one type of vessel but not for another due to the physical characteristics of the port, such as not having a sufficient manoeuvring room, swell or not having sufficient tugs or warning mechanisms.[14] Therefore, these characteristics might be geographical, meteorological, or structural. The test provided in the classic definition of a safe port states that the port must be safe for the particular ship chartered.

One of the most common problems related to commercial ports is that most of them are initially not built to operate for mega-ships. They may need to adapt to accommodate more ships due to increasing demand in international trade. However, ports may not be able to expand their infrastructure if there is no space available for extension. Then, they may rely on other mechanisms such as tug or pilotage services to make the port safe for bigger ships. For example, in *The Sagoland*,[15] a large ship was ordered to Londonderry. She was the largest ship ever to go there. The water way to this port was so narrow that the ship was unable to enter without tugs. However, no tugs were available at Londonderry. The owners claimed the expense of obtaining the tugs because the charterer breached the safe port obligation. The judge confirmed that the cost was recoverable because the port was unsafe for this ship. It was underlined that the port is perfectly safe for most of the ships but not for the ship in question.[16] On the other hand, a port will not be unsafe just because the ship needs assistance or tugs. If the tugs were available, the master's obligations to exercise good navigation and seamanship would require making use of them. In such a case, the charterer would have the burden of these expenses. In other words, the charterers would not be in breach of their safe port obligation, but they would be liable for the cost incurred. On the other hand, if the quality of the services provided by the pilot or tug services is inadequate, this might make the port unsafe.

Another element of the test is that the port must be safe for the particular ship in the relevant period of time. The relevant time means the entire period of time during which the ship is using the port from the moment of entry to the

14 *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA); Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar), [1968] 2 Lloyd's Rep. 563 (QB); Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen), [1988] 1 Lloyd's Rep. 500.

15 Axel Brostrom & Son v. Louis Dreyfus & Co. (1932) 38 Com. Cas. 79 (KB).

16 *Ibid*, p. 137.

time of departure.[17] The definition of the relevant period of time is broad enough to include the approaches to a port or leaving it. For example, in *The Sussex Oak*[18] the vessel was time chartered under the Baltime form and was ordered to Hamburg in January. The vessel encountered ice both on the approach to the port and on the return voyage and suffered damage. The Court held that "*… there is a breach of Clause 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety*."[19] This judgment is important because of two reasons. Firstly, it shows that the definition of a port is not limited to a particular vicinity or place. Instead, the court gave broader meaning to ensure safety in approach and departure for commercial and practical reasons. Secondly, the judgment provides a time frame in which the port must be safe. Once the ship reaches the port, the port must be safe in terms of its physical characteristics for the particular ship to use it at the relevant time. However, the port does not have to be safe for uninterrupted use, provided that she can leave in safety when the port becomes dangerous.

It is common practice for large vessels to wait in the open sea during certain weather conditions because it is safer for ships to face the strong wind or waves in the open sea rather than being in a port. In *The Eastern City*, the ship was chartered from one or two safe ports in Morocco to one safe port in Japan. Shortly after the arrival of the ship to the nominated port, the wind got stronger and started dragging the anchor. The master decided to move to the open sea. However, the vessel was blown against the rocks and sustained damage. The defendant alleged that the cause of the grounding was the voluntary assumption of risk by the master and his negligent navigation. The Court of Appeal held that the port was unsafe due to the lack of reliable holding ground in the anchorage area and high winds.[20] In the judgment of Queen's Bench Division, Justice Pearson stated that *"... a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that the imminence of such weather conditions will be recognized in time and that the*

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17 Transoceanic Petroleum Carriers v. Cook Industries Inc (*The Mary Lou*) [1981] 2 Lloyds Rep 272 (QB), p. 277.

18 Grace v. General Steam Navigation (*The Sussex Oak*) (1949) 83 Ll.L.Rep. 297 (KB).

19 *Ibid*, page 304; See also Unitramp v. Garnac Grain Co. Inc. (*The Hermine*) [1979] 1 Lloyd's Rep. 212 (CA).

20 *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA), p. 136.

ship will be able to leave the port safely."[21] In other words, the fact that the ship had to leave the port due to weather conditions does not make the port unsafe. In practice, there are mechanisms in some ports providing an adequate warning for ships to leave the port on time. However, not having such mechanisms to enable the ships to leave the port under such circumstances will make a port unsafe.

While the shipping industry is heading towards having unmanned vessels and fully autonomous commercial ports, there is an additional risk that needs to be evaluated under the safe port obligation. There is an increase in the number of ports reporting cyber-attacks due to the high level of digitisation.[22] Therefore, cyber risks have become a safety concern related to the physical characteristics of the ports. Due to the heavy reliance on digital systems, cyber-attacks can make a port unsafe for a ship to reach, use and return from it. Therefore, a cyberattack may render a port unsafe. The existing legal framework is broad enough to provide guidance in relation to cyber risks. An analogy might be drawn with the situation where a port is unsafe due to an insufficient amount of tug or a lack of warning systems. Hence, if a port is exposed to cyber-attacks due to an inadequate cyber security system, it can render the port unsafe.

b. Risks Related to Non-Physical Characteristics of the Port

The definition of safety is wide enough to cover more than the physical characteristics of the port. One of the earliest examples of such a wide interpretation of safety was provided in Ogden v. Graham,[23] where the defendants chartered a ship to proceed from England to a safe port in Chilli. The charterer named Carrisal Bajo as the port of discharge and directed the ship to that port. However, at that time, the port was already closed by order of the Chilian government. As a result, the ship was confiscated for some time. The court had to decide whether the charterer was liable to the shipowner in damages for sending the ship to an unsafe port. In fact, the port was physically accessible for the ship. However, the ship would not be able to proceed without being confiscated by the government of the place. Thus, the court held that the port was not safe within the meaning of the charterparty due to the political situation. It is important to note that the political risks might include outright warfare, blockade, civil unrest, politically inspired retaliation against vessels of a specific flag such as embargo and terrorism.[24] These political risks are becoming a lot more common due to

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21 *The Eastern City* [1957] 2 Lloyd's Rep. 153, p. 172.

22 Mayank Suri, "*Autonomous Ships and the Proximate Cause Conundrum - A Maritime And Insurance Law Tango"* (2020) 51 Journal of Maritime Law & Commerce 163.

23 (1861) 1 B. & S. 773. (QB).

24 Charles GCH Baker and Paul David, 'The politically unsafe port' [1986] LMCLQ 112; See also Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter) (2006) 703 LMLN 1.

the international nature of the maritime trade. Especially in a world divided by political incentives, the owners need to make sure that their vessels are not trading in the ports of a hostile state. Otherwise, their ships may not suffer physical loss, but they might be at risk of being seized.

Considering the nature of the maritime business, some of these dangers and risks might cause serious delays while trying to avoid danger.[25] However, it does not automatically make a port unsafe. The question is how long the delay must be to render a port unsafe. Here we have another subjective test. The delay must be sufficient enough to frustrate the contract. Since the charterer takes the risk of delay in a time charterparty, the issue of delay is especially important for a voyage charterparty. In *The Hermine*,[26] the ship was chartered on the Baltimore Grain Form C to load a full cargo of soya at Destrehan on the Mississippi. After the loading was completed, the ship was delayed as a result of various factors, including severe fog, which had been restricting navigation and the grounding of other vessels, blocking the pass. As a result, the ship encountered delays. The court held that the delay would only make a port unsafe if the delay was a frustrating delay and not just a commercially unacceptable delay.[27] In other words, the courts will look at the time of danger and the duration of the contract and will decide whether it is a frustrating delay or not. Typically, a frustrating delay is a delay that is so great that it deprives the party substantially of what they intended to receive under the contract.

The question of frustrating delay and safe port have become popular during the recent pandemic. With the increasing number of preventive measures, ships experienced delays due to health and safety reasons, including quarantine requirements. They even faced the danger of being banned from travelling to certain areas if they were to visit one of the ports affected by the pandemic. In theory, a contagious disease may render a port unsafe, but there is a high threshold hold.[28] In the context of delays due to the recent pandemic, it is difficult to prove that the time spent in quarantine at a port will be sufficient enough to rely on a frustrating delay, especially in the time charterparty context.

Therefore, the meaning of safety is interpreted more than the physical conditions of a port or damage caused to a ship. Understanding the scope of safe port obligation is important to understand how to allocate the risk between the owner and charterer. However, there are two important thresholds in the classic

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25 Paul Todd, "*Laytime, demurrage and implied safety obligations*" (2012) 8 Journal of Business Law 668-682, p. 674.

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

27 *Ibid*, p. 220.

28 Howard Bennett; Julia Dias; Stephen Girvin; Stephen Hofmeyr; Simon Kerr; Alexander MacDonald; Peter MacDonald Eggers; Richard Sarll, *Carver on Charterparties*, (2nd Sweet & Maxwell 2020), 4-038.

definition of a safe port. What causes the unsafety should not be an abnormal occurrence and cannot be avoided by good navigation and seamanship. In other words, if a port becomes unsafe due to abnormal occurrences, or a loss is suffered due to the negligence of the master, then the charterers are not liable for breach of safe port obligation.

2. Exceptions to the Obligation

a. Abnormal Occurrences

What is an abnormal occurrence is a fact sensitive question that must be decided according to the circumstances of the particular case.[29] Thus, what is abnormal will change depending on the particular port. In early cases, the court defined an abnormal occurrence as an event that is not related to the characteristics of the port.[30] However, the definition of safety is not limited with such characteristics. Abovementioned, a port might be unsafe due to political reasons too. Therefore, if there is a sudden and unexpected coup, it would be an abnormal occurrence.[31] However, if such political crises are normal for the particular port, then it might be an unsafe port as explained above.

In *The Evia (No 2)*,[32] the vessel was ordered to Basrah. War broke out between Iran and Iraq and as a result the vessel was trapped after the discharge. The question was whether the outbreak of war was a characteristic of the port or an abnormal occurrence. If it was an abnormal occurrence, then the charterer did not breach its obligation. The Court of Appeal held that the outbreak of war was not connected with the port's characteristics, so it was an abnormal occurrence. Therefore, the charterers were not in breach of their obligation. In other words, if the vessel had been hit by fire, the owners would have had to bear the damage themselves and recover from their insurers. They could not have recovered it from the charterers.[33]

Later, in the House of Lords, Lord Roskill stated that *"... since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after the Evia's arrival and was due to an unexpected and abnormal event, there was at the former time no breach of clause 2 by the respondents..."*[34] Lord Roskill's statement indicates that the obligation of the charterers arises at the time they

29 Rhidian Thomas, "*The Safe Port Promise of Charterers from the Perspective of the English Common Law*" (2006) 18 The Singapore Academy of Law Journal 597, p. 615.

30 *The Mary Lou* [1981] 2 Lloyd's Rep 272 (QB), p. 278; See also Richard Aikens, "*Lord Mustill and Maritime Law*" (2017) LMCLQ 349-359.

31 Paul Todd, *Principles of the Carriage of Goods by Sea* (1st edn Routledge 2015), p. 221.

32 Kodros Shipping Corporation v Empresa Cubana De Fletes (*The Evia 2*) [1982] 1 Lloyd's Rep 334 (CA).

33 *Ibid*, p. 339.

34 [1982] 2 Lloyd's Rep. 307 (HL), p. 319.

give the order. Furthermore, when the instructions were given, the charterer's obligation is to nominate a port that is prospectively safe. Therefore, the port does not need to be safe at the time the order is given as long as it will be safe for the ship by the time she arrives.[35]

The definition of abnormal occurrence recently examined by the Supreme Court in Gard v China National (*The Ocean Victory*),[36] where the court had to consider whether the combination of long waves and severe northerly winds were an abnormal occurrence at the port of Kashima in Japan. The ship was ordered to carry iron ore from Saldahna Bay to Kashima. It is a very frequently used and highly efficient port. The ship had to stop discharging due to heavy rain and strong wind. The weather reports warned of high seas, heavy rain, gales and storm surge. The master decided to leave the berth but lost control of the ship while leaving the port due to the strong northerly wind and grounded. Later, she became a total loss. The owner and the demise charterer claimed that the port was unsafe. However, the charterer said the port was safe, but these occurrences were abnormal. It is also important to note that such occurrences never happened at the same time since the construction of the port.

At the first instance, the court stated that the danger faced by the Ocean Victory flowed from two characteristics of the port. It might be a rare event for those two events to occur at the same time but there is no meteorological reason why they should not occur at the same time.[37] It was also stated that neither of these conditions on its own rendered the port unsafe. The Court of Appeal, however, overturned the first instance judgment and stated that the court had to considered whether the simultaneous coincidence of the two features was an abnormal occurrence or a normal characteristic of the port.[38] In the Court of Appeal, Justice Longmore stated that the concurrent occurrence of those events was rare according to the evidence relating to the past frequency of such events occurring. As a result, the court held that the event was an abnormal occurrence and so the charterers were not in breach of the safe port obligation.[39] Later, the Supreme Court upheld the Court of Appeal decision.

b. Good Navigation and Seamanship

The last limp of the safety test is whether a danger is avoidable by ordinary good navigation and seamanship. It can be used as a defence by the charterer to avoid liability. Most of the ports have hazards for the ships due to

35 For further discussion: B. J. Davenport, "*Unsafe Ports Again*" (1993) Lloyd's Maritime and Commercial Law Quarterly 150.
36 [2017] 1 Lloyd's Rep. 521; [2017] UKSC 35.
37 [2013] EWHC 2199 (QB), p. 127.
38 [2015] EWCA Civ 16; [2015] 1 Lloyd's Rep. 381, [55]- [56].
39 *Ibid,* [63].

different characteristics futures. However, they are also likely to have various preventive measures and warning mechanisms to make the port safe for ships. The definition of the safe port underlines that a port only becomes unsafe if the danger cannot be avoided by good navigation and seamanship. In other words, the owner and master cannot avoid responsibility for the consequences of those risks that a competent master could have avoided. The loss suffered as a result of such dangers cannot be attributed to the charterers.[40] Thus, the charterer would not be in breach of its safe port obligation, if the danger can be avoidable by ordinary care and skill. Following the classical definition of safe ports, Lord Justice Sellers recognised this reality, stating that *"Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimised by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship*."[41]

Therefore, if more than ordinary skill is required to avoid the danger, the port will not be safe.[42] However, it does not mean that the port will be automatically unsafe if the ship is damaged regardless of the fact that ordinary good navigation and seamanship were exercised. In *The Mary Lou*, the court confirmed this view and stated that *"... care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely, that the casualty was the result of simple bad luck*."[43] On the other hand, if it is established that the master acted so negligently that it broke the chain of causation between the charterer's order and damage, the charterer won't be liable for the damage.[44]

3. The Nature of the Obligation

In some sophisticated charterparties, such as Shalltime, the charterer's obligation is limited to one of due diligence.[45] However, the charterer's primary obligation is an absolute one at the common law, unless otherwise expressly stated as in Shalltime 4 form[46]. Therefore, the charterer will be strictly liable for

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40 St Vincent Shipping Co Ltd v Bock, Godeffroy & Co (The Helen Miller) [1980] 2 Lloyd's Rep 95.

41 *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA), p. 131.

42 Kristiansands Tankrederi A/S v. Standard Tankers (Bahamas) Ltd. (*The Polyglory*) [1977] 2 Lloyd's Rep. 353, p. 365.

43 *The Mary Lou* [1981] 2 Lloyd's Rep 272 (QB)

44 *Ibid,* p. 279; See also Charles GCH Baker, 'The safe port/berth obligation and employment and indemnity clauses' [1988] LMCLQ 43, p. 50.

45 Yvonne Baatz, *Maritime Law* (5th edn Informa Law 2021), p. 152.

46 Clause 4(c): "Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports,

damages suffered by the shipowner as a result of unsafety in the port subject to the limitations abovementioned. The test is whether the port is prospectively safe, not whether the port is reasonably safe. As a result, the charterers will be liable regardless of the fact that they were ignorant of the unsafety.

In *The Terneuzen*,[47] for example, the ship developed a list during loading. To correct that list, the master ordered deck cargo to be loaded on the starboard side of the vessel, but the ship still preserved her port list. Later, it was discovered that the ship had grounded. This was unexpected neither by the charterer nor the master. They were unaware of the unsafety of the berth. However, the Court of Appeal held that the charterers are liable for the damages.

A port might be safe when nominated. However, it might become actually or prospectively unsafe while the ship is sailing towards it or while the ship is in the port. It was established that the charterer's obligation of safety is not a continuing one. In *The Lucille*, [48] the ship was ordered to Basrah on the eve of the outbreak of war in September 1980. In the meantime, heavy fighting on land and sea was reported. It was clear that there was a warlike situation gradually worsening at the time of the charterers' orders. Later, the ship was fired upon by Iranian forces and sustained damage. The court evaluated a number of issues. In relation to the secondary obligation, Justice Bingham stated that when the nominated port becomes unsafe, the charterer will have a secondary obligation to nominate an alternative safe port. Nonetheless, the nature of this secondary obligation is unclear.

4. Remedies Available for Breach

If the charterer orders the ship to a prospectively unsafe port, what options does the owner have? An order to an unsafe port will be outside the contractual limits provided by charterparties. Thus, the owner is not obliged to send the ship to the nominated port if it is prospectively unsafe.[49] In fact, if the owner is aware of the danger but still chooses to proceed to the nominated port and suffers a loss, then he cannot ask for compensation for the loss.

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berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

47 Lensen Shipping v Anglo-Soviet Shipping (*The Terneuzen*) (1935) 52 Lloyd's Rep. 141 (CA).

48 Uni-Ocean Lines Pte. Ltd. v. C-Trade S.A. (*The Lucille*) [1984] 1 Lloyds Rep 244 (QB).

49 *The Stork* [1955] 1 Lloyd's Rep 349, p. 373.

In *The Kanchenjunga,*[50] the ship was sub-chartered for a single voyage from loading ports defined as 1/2 safe ports Arabian Gulf excluding Iran and Iraq but including Kharg, Lavan and Sirri Islands. She was ordered to load a cargo of crude oil at Kharg Island, which was not a prospectively safe port at the time of the nomination. The owner told the master to proceed to the unsafe port. Later, she had to proceed to a point of safety away from the island due to an air raid. The owner asked the charterer to nominate another port, which would be safe. However, the charterer insisted on their nomination. Justice Hobhouse stated that the owners had waived their right to treat Kharg Island as non-contractual because they were aware of the danger. However, they were entitled to damages under a war risks clause in the charter.

On the other hand, if the charterer insists on his invalid nomination, the charterer will be in a repudiatory breach of contract. As a result, the owner will be entitled to elect to terminate the contract and claim damages.[51] However, the owner must be careful because they might end up in a repudiatory breach if they elect to terminate when they do not have the right to terminate.

The damages for any breach of safe port obligation are limited by the rules of causation and remoteness.[52] Therefore, the charterer will be liable for all the damages suffered as a result of the breach. Furthermore, the owner is entitled to recover the cost of avoiding the danger. For example, in *The Inishboffin*,[53] one of the damages the owner claimed was for the cutting of the masts. The ship was loaded when she went through the canal, and her masts were just low enough to clear the bridge. However, after the discharge, the masts had to be cut in order to enable the vessel to leave the port. The court held that the costs were recoverable because it was to avoid the danger.

CONCLUSION

The definition of the safe port obligation has changed and extended over time. As the leading jurisdiction, the English courts adopted a flexible and practical approach when they deal with the definition of safety and how to imply such obligation if there is no express clause in a charterparty. The paper covered the framework provided by the existing legal literature, which seems wide enough to guide us in more recent risks, such as cyber-attacks, pandemics,

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50 Motor Oil Hellas *(*Corinth*)* Refineries SA v Shipping Corp of India (The *Kanchenjunga*) [1990] 1 Lloyd's Rep 391 (HL).

51 Yvonne Baatz, *Maritime Law* (5th edn Informa Law 2021), p. 155.

52 Reardon Smith Line Ltd. v. Australian Wheat Board (*The Houston City*) 1956 1 Lloyds Rep 1, p. 10.

53 Limerick Steamship Company, Ltd v W.H. Stott & Co Ltd (The Irishboffin) (1920) 5 Ll.l Rep 190; (1921) 7 Ll.l Rep 69.

or trade wars, which might affect the safety of ports. As it is suggested in the paper over and over again, defining the nature and scope of the safe port obligation is important to understand who will be liable when the ship suffers a loss due to the breach of the safe port obligation. This paper analysed what constitutes a safe port and the limits of the safe port obligation. It is established that the definition of safety is not just limited to the physical characteristics of a port but also includes other kinds of risks related to non-physical characteristics of the port, such as political and administrative risks or delays. However, what constitutes safe is a subjective test and depends on the facts of the case. Thus, the answer to that question might change from ship to ship and from time to time. Later, the nature of the obligation was discussed to understand the charterer's obligation. It was established that the charterer's obligation of safety is not a continuing one. Therefore, once the nominated port becomes unsafe, the charterer has a secondary obligation to nominate an alternative safe port. Finally, the remedies available for parties were discussed. It is clear that the safe port obligation is an absolute one. Therefore, the charterer will be strictly liable unless otherwise stated in the contract or the loss suffered is caused by one of the exceptions.

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