

ADMINISTRATIVE SHORTCOMINGS AND THEIR LEGAL IMPLICATIONS IN THE CONTEXT OF SAFE PORTS

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The concept of 'safe ports' continues to be an area of critical concern for charterers and shipowners. Traditionally viewed in light of the physical characteristics of the port in question, the modern approach taken by the courts often includes a detailed examination of administrative features of the port authority. In light of increased global security and health risks the recognised principles are under scrutiny. This paper examines the nature of the safe port obligation and analyses the important decisions dealing with administrative shortcomings. It contextualises the emerging issues and highlights the future implications for the law of safe ports.

1 Introduction

As more than 90 per cent of global trade is carried by sea there is little doubt that the safety of the ports at which the world's trading fleet call is of critical concern.¹ In a climate of increased security threats, the risk of contagious disease outbreaks and more heavily scrutinised port authorities, disputes are likely to increase in this area. Most charterparties contain a limitation on the charterer's right to nominate the ports at which the vessel will call: the charterer must only direct the vessel to 'safe ports'.² The test for whether or not a port is safe has been left to the common law. Although it is now well-established,³ there are a number of difficulties which to this date remain unresolved. The House of Lords has settled the question of when a port's safety must be adjudged.⁴ On the other hand, it is not entirely clear as to how closely the charterer's obligation resembles that of strict liability. Moreover, the relevance of the 'abnormal occurrence' exception appears to be gradually drifting afar.⁵ In the context of unsafety due to organisational deficiencies of port authorities these matters are crucial.

Administrative shortcomings and failures of port authorities may render a port unsafe. The law is, however, largely unsettled. It is clear that these issues are of increasing relevance to the law of safe ports. In the 2001 grounding of the *Regal Princess* in Cairns, the Australian Transport Safety Bureau (ATSB) examined the practice of permitting vessels into ports not designed to handle ships of that size.⁶ The report identified the immense pressure facing port authorities: 'There is...considerable commercial incentive, for those that benefit directly from the visit of cruise liners, to apply pressure to the approving authority to stretch the safety envelope.'⁷ It was recommended the port authority adopt a more objective method of determining a ship's suitability.⁸ Similarly, the reports into the groundings of the *ANL Excellence*⁹ in Moreton Bay and the *Pasha Bulker*¹⁰ in Newcastle emphasise that administrative shortcomings are arguably a commonality in marine

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¹ International Maritime Organisation, *International Shipping and World Trade: Facts and Figures* (Updated November 2008) 7.

² See, eg, NYPE (New York Produce Exchange) Form 93, clause 5: 'The vessel shall be employed in such lawful trades between safe ports and safe places...; Baltimore charterparty, clause 2: the vessel 'shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the Vessel can safely lie always safely afloat'. If the charterparty does not contain an express 'safe port' clause one may be implied: see Howard Bennett, 'Safe port clauses' in D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (2008) 47, 72-4.

³ See *Leeds Shipping Company Ltd v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127 ('*The Eastern City*') (CA).

⁴ See *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia) (No 2)* [1982] 2 Lloyd's Rep 307 ('*The Evia (No 2)*') (HL).

⁵ This exception operates to exempt the charterer from liability if the situation which renders a port unsafe is an entirely abnormal or extraneous occurrence.

⁶ Australian Transport Safety Bureau, *Independent investigation into the grounding of the British flag passenger ship, Regal Princess, in the Cairns harbour channel, Queensland on 16 March 2001* (September 2002) Marine Safety Investigation Report 166. The vessel was operating in the port with very little under keel clearance. When departing the port the vessel grounded but no significant damage or pollution was caused.

⁷ *Ibid* 16. A 1996 study revealed that the Cairns port generated approximately \$1.3 billion for the region and created jobs equivalent to 9% of the region's workforce.

⁸ *Ibid* 17.

⁹ Australian Transport Safety Bureau, *Independent investigation into the grounding of the Liberian registered container ship, ANL Excellence, in Moreton Bay, Queensland, 19 July 2002* (May 2003) Marine Safety Investigation Report 181. The vessel grounded while enroute from Point Cartwright, Queensland to the port of Brisbane while operating in reduced visibility. The pilot had ordered a course alteration too soon. The report identified shortcomings in the visibility of temporary marking buoys and was critical of the pilot's actions and procedures.

¹⁰ Australian Transport Safety Bureau, *Independent investigation into the grounding of the Panamanian registered bulk carrier, Pasha Bulker, on Nobbys Beach, Newcastle, New South Wales, 8 June 2007* (May 2008) Marine Occurrence Investigation 243 Final. The vessel grounded in gale-force conditions largely due to the incompetence of the master who ignored warning signs and did not control the vessel

incidents. The investigation into the *Pacific Adventurer* oil spill, now in its preliminary stages, will also examine the adequacy of warnings provided to the master.¹¹ The decided cases underscore the importance of these and other issues in determining whether or not a port is safe.

This paper examines the nature of the safe port obligation and critically analyses the decisions that have found ports to be unsafe because of administrative shortcomings. It then places the emerging issues in the context of these principles and highlights the future implications for the law of safe ports.

2 The emerging issues

It is undeniable that ports face unprecedented security risks in the current global environment.¹² The spread of contagious disease is also a major concern for governments. Not surprisingly the international community and governments throughout the world have reacted with measures that have significant consequences for ports and port authorities. The question of to what extent security and disease risks will render ports unsafe remains unsettled.¹³

In addition, the introduction of the International Safety Management Code (ISM) may have important consequences for the law of safe ports.¹⁴ The requirement for a Safety Management System (SMS);¹⁵ the shipowner's duty to ensure the master is properly qualified, fully conversant with the SMS, and given necessary support;¹⁶ and the requirement that the shipowner establish emergency procedures,¹⁷ are arguably relevant to whether or not dangers could be avoided by good navigation and seamanship and to the master's negligence. As the Code remains non-specific in nature it is difficult to determine with greater precision how it will affect the courts' analysis of these issues.¹⁸

These emerging issues may have important and far-reaching effects upon the way the safety of a port is assessed. Before embarking on an analysis of the law on safe ports and how it may treat these emerging issues it is necessary to examine the major security and health initiatives.

2.1 The International Ship and Port Facility Code (ISPS Code)

The ISPS Code entered into force on 1 July 2004 as an amendment to the International Convention for the Safety of Life at Sea 1974 (SOLAS).¹⁹ The Code, designed to protect ports and international shipping from terrorism, takes the approach that 'ensuring the security of ships and port facilities is basically a risk management activity'.²⁰ Under the Code Contracting Governments are required to ensure security information is

appropriately. The ATSB report found that Newcastle's Vessel Traffic Information Centre (VTIC) had given confusing and irrelevant advice. Masters had assumed the VTIC would advise them to leave anchorage if necessary. In addition the incident control system for the port was activated too late. Interestingly, the ATSB made note of safety improvements the port authority had made since the grounding (p 61).

¹¹ Australian Transport Safety Bureau, *Loss of containers from Pacific Adventurer off Cape Moreton, Queensland, 11 March 2009: Preliminary report* (April 2009) 4-5. The vessel lost 31 containers overboard in gale force conditions. The containers, which were carrying ammonium nitrate, pierced the vessel's bunker tanks resulting in the discharge of 270 tonnes of fuel oil into the sea.

¹² See especially Maritime Transport Committee, Organisation for Economic Cooperation and Development, *Security in Maritime Transport: Risk Factors and Economic Impact* (July 2003). See also 'IMO 2004: Focus on maritime security' [2004] (3) *IMO News* 13.

¹³ See further Lucienne Carasso Bulow, 'Charter Party Consequences of Maritime Security Initiatives' (2006) 37 *Journal of Maritime Law and Commerce* 79, 84.

¹⁴ *International Convention for the Safety of Life at Sea (SOLAS)*, opened for signature 1 November 1974, International Maritime Organisation (IMO), chapter IX (entered into force 25 May 1980; as amended by resolution MSC.99(73) accepted on 1 January 2002) (International Management Code for the Safe Operation of Ships and for Pollution Prevention) ('ISM Code'). See also Philip Anderson, *ISM Code: A practical guide to the legal and insurance implications* (1998). The Code entered into force on 1 July 1998.

¹⁵ ISM Code, [1.4].

¹⁶ ISM Code, [6].

¹⁷ ISM Code, [8].

¹⁸ For an interesting discussion of these issues see Elefterios Katarellos and Aristotelis Alexopoulos, 'The Master's Role in Relation to the Safety of the Port, particularly under the Concept of the ISM and the ISPS Codes' (Paper presented at the International Symposium on Maritime Safety, Security and Environmental Protection, Athens, Greece, 20-21 September 2007). For example, the authors suggest that the 'ISM Code has...altered considerably the Master's position' (at 3).

¹⁹ *International Convention for the Safety of Life at Sea (SOLAS)*, opened for signature 1 November 1974, International Maritime Organisation (IMO), chapter XI-2 (entered into force 25 May 1980; as amended by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974: 9 - 13 December 2002) ('ISPS Code'). Part A of the Code is mandatory and part B provides guidelines on compliance with part A.

²⁰ 'IMO 2004: Focus on maritime security' [2004] (3) *IMO News* 13, 16. See also Natalie Klein, 'Legal limitations on ensuring Australia's maritime security' [2006] 7(2) *Melbourne Journal of International Law* 306; Z. Oya Ozcayir, *Port State Control* (2nd ed, 2004) 96.

provided to port facilities and ships prior to entering a port and whilst in their territory.²¹ Three security levels apply.²² Additionally, ships and owners are required to establish ship security plans and act upon the security levels set by governments.²³ Moreover, a port facility security assessment must be undertaken and periodically reviewed.²⁴ This may culminate in the development of a port facility security plan,²⁵ and the appointment of a port facility security officer.²⁶

Aside from the physical threat to vessels there is now the very real possibility of substantial delays and refusal of entry:

Many port State control regimes have now tightened and the chance of detention, expulsion, or refusal of entry for vessels that are deemed to pose a risk has inevitably increased. This can have an enormous effect on a vessel's commercial viability...²⁷

As at early 2005 the International Maritime Organisation (IMO) reported that '94% of Contracting Governments to the SOLAS Convention [had] approved security plans for 97% of the declared port facilities'.²⁸ At the time this equated to over 9,600 ports. Australia has incorporated elements of the Code into its domestic maritime security law.²⁹

2.2 Contagious diseases

In the current global environment, controlling the spread of disease is a serious concern.³⁰ Contagious diseases are a serious threat to the crews of vessels, passengers and the countries they visit.³¹ The World Health Organisation's (WHO) International Health Regulations (IHR) are pertinent. Its purposes are to prevent, control and respond to the international spread of disease in a way which avoids disruption to trade and transport.³² Relevantly, the IHR requires State Parties to develop facilities to assess, notify and report events,³³ and requires them to ensure they are able to respond 'promptly and effectively to public health risks and public health emergencies of international concern'.³⁴ The IHR also sets down 'core capacity requirements' for designated

²¹ ISPS Code, Part A, 4 ('Responsibilities of Contracting Governments'). See further International Maritime Organisation, *Guidance relating to the implementation of SOLAS chapter XI-2 and the ISPS Code* (14 December 2004) MSC/Circ. 1132 <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10984/1132.pdf> at 1 June 2009.

²² The three security levels are (1) normal ('minimum appropriate protective security measures shall be maintained at all times'); (2) heightened ('appropriate additional protective measures shall be maintained for a period of time as a result of a heightened risk of a security incident'); and (3) exceptional ('further specific protective security measures shall be maintained for a limited period of time when a security incident is probable or imminent, although it may not be possible to identify the specific target'); ISPS Code, Part A, 2.9-2.11.

²³ ISPS Code, Part A, 6 ('Obligations of the Company') and 7 ('Ship security'). A port facility is also required to act upon the security levels set by governments: Part A, 14 ('Port facility security').

²⁴ ISPS Code, Part A, 15. Paragraph 15.5 provides that the assessment shall comprise, at least, the following elements: (1) identification and evaluation of important assets and infrastructure it is important to protect; (2) identification of possible threats to the assets and infrastructure and the likelihood of their occurrence, in order to establish and prioritize security measures; (3) identification, selection and prioritization of countermeasures and procedural changes and their level of effectiveness in reducing vulnerability; and (4) identification of weaknesses, including human factors, in the infrastructure, policies and procedures.

²⁵ ISPS Code, Part A, 16. Paragraph 16.3 states that the plan must address, for example, measures to prevent weapons or other dangerous substances from being introduced to the facility; procedures for responding to security threats; evacuation procedures; measures for security of cargo; and procedures for responding to ship security alerts.

²⁶ ISPS Code, Part A, 17.

²⁷ Julio Espin-Digon et al, *Lloyd's MIU Handbook of Maritime Security* (2008) 90.

²⁸ International Maritime Organisation, *Maritime Security on agenda as USCG Commandant visits IMO* (17 February 2005) International Maritime Organisation <http://www.imo.org/Newsroom/mainframe.asp?topic_id=892&doc_id=4714> at 25 May 2009.

²⁹ *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

³⁰ See especially *The World Health Report 2007: A Safer Future* (2007) World Health Organisation <http://www.who.int/whr/2007/whr07_en.pdf> at 1 June 2009; and generally the World Health Organisation's information relating to the outbreak of Influenza A (H1N1) ('swine flu') at World Health Organisation, *Influenza A (H1N1)* (2009) World Health Organisation: Epidemic and Pandemic Alert and Response <<http://www.who.int/csr/disease/swineflu/en/>> at 28 May 2009. Fidler and Gostin describe public health as a 'central governance challenge nationally and internationally in the 21st century' in David Fidler and Lawrence Gostin, 'The New International Health Regulations: An Historic Development for International Law and Public Health' (Spring 2006) *Independent* 85, 93.

³¹ See, eg, *Marine Orders Part 9: Health – Medical Fitness (Issue 5) 2001* (Cth), Part A, [1.2] ('The work environment of seafarers').

³² World Health Assembly, *Revision of the International Health Regulations*, WHA Res 58.3, 58th session, 8th plenary meeting, WHA Doc A58/VR/8, art 2 (entered into force 15 June 2007) ('IHR'). See also Lawrence Gostin, 'Revision of the World Health Organization's International Health Regulations' (2004) 291 *Journal of the American Medical Association* 2623.

³³ IHR, art 5.

³⁴ IHR, art 13.

ports.³⁵ If ports are ill-equipped to deal with potential outbreaks of disease the consequential losses and damages are impossible to define.

As at February 2008, 194 States were parties to the IHR.³⁶ Australian law now reflects the objectives of the Regulations.³⁷ The Act creates surveillance and information-sharing capabilities between the Commonwealth and States and Territories, and the WHO.

The question of whether a port is safe will ultimately turn to the common law for guidance and it is essential to identify the major aspects of the law.

3 Safe ports

It is well established that a safe port clause in a charterparty creates a promissory obligation: the charterer is under a duty to nominate a port that is safe for the vessel chartered. It is the better view that the safety of a port is a question of fact.³⁸ As long ago as *The Alhambra*, Brett LJ held that if a vessel was ordered to a port where it could not lie safely afloat from beginning to end she was not bound to go to that port.³⁹ Similarly, in *Ogden v Graham*, an order to a port that was closed by government order (and thus the vessel risked being confiscated if it entered the port) was a breach of the relevant charterparty.⁴⁰ In this sense the port was 'politically' unsafe. While earlier authorities remain relevant to the question of safety, a number of important cases have settled the general principles.⁴¹

3.1 *The Eastern City*

The vessel, the *Eastern City*, was chartered under a voyage charterparty to Morocco.⁴² The port of Mogador in Morocco required large vessels to anchor at a roadstead. However, as the trial judge found, there was no protection in this roadstead from a swell or wind coming from the west or south.⁴³ The anchorage was subject to high winds particularly from December to March. In late December, when the vessel was at anchorage, the master suspected its anchor was dragging and attempted to leave the port. The vessel subsequently grounded.

At first instance Pearson J held that the port of Mogador was unsafe for a vessel the size of the *Eastern City* in the winter season. While his Honour took into account evidence of three other vessels that experienced trouble in the port, Sellers LJ, who read the judgment of the Court of Appeal, found it unnecessary to rely on this evidence in this particular case.⁴⁴ It is Sellers LJ's formulation of the test for safe ports that is regarded as the seminal test:

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, it would probably meet all circumstances as a broad statement of the law.⁴⁵

³⁵ IHR, Part IV and Annex 1(B). These requirements are further discussed below at Part 5.1.

³⁶ World Health Organisation, *State Parties to the International Health Regulations (2005)* (2009) <http://www.who.int/ihr/legal_issues/states_parties/en/index.html> at 1 June 2009.

³⁷ *National Health Security Act 2007* (Cth). See also Joint Standing Committee on Treaties, House of Representatives, *Report 77: Treaties tabled on 20 June 2006 and 8 August 2006* (September 2006) 32. The Committee noted that legislative changes would be required to enable better communication between State, Territory and the Commonwealth governments and the implementation of border protection measures.

³⁸ See the discussion below in section III(2)(b). See especially *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd (The Stork)* [1955] 1 Lloyd's Rep 349, 373 (Morris LJ) ('*The Stork*').

³⁹ (1881) LR 6 P.D. 68 (CA).

⁴⁰ (1861) 121 E.R. 901.

⁴¹ See *Transoceanic Petroleum Carriers v Cook Industries Ltd (The Mary Lou)* [1981] 2 Lloyd's Rep 272, 276 (Comm Ct, Mustill J) ('*The Mary Lou*'). Mustill J argued that safe port cases cannot be solved simply by reference to *The Eastern City* and nothing else. However, the earlier authorities, according to his Honour, are now no longer as important.

⁴² *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA). The charterparty provided that 'the vessel shall proceed to one or two safe ports in Morocco or so near thereto as she may safely get and lie always afloat'.

⁴³ *Leeds Shipping Company Ltd v Societe Francaise Bunge (The Eastern City)* [1957] 2 Lloyd's Rep 153, 158 (Pearson J).

⁴⁴ The Court of Appeal was constituted by Hodson, Romer and Sellers LJ sitting with two nautical assessors.

⁴⁵ *The Eastern City* [1958] 2 Lloyd's Rep 127, 131. Sellers LJ also added:

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 on a vessel in accordance with good seamanship.

The Court of Appeal found that the vital factors of unsafety were ‘the lack of reliable holding capacity for an anchor in the anchorage area, the lack of shelter and the liability to the sudden onset of high wind which could not be predicted and which might quickly cause an anchor to drag’.⁴⁶

The Court then dealt with the question of whether the owners should be barred from recovering damages because the master voluntarily ran the risks inherent to the port – *volenti non fit injuria*.⁴⁷ To this end Sellers LJ adopted a subjective test of the master’s actual knowledge: there was no evidence ‘that the master had received any special warning of unusual danger and had deliberately ignored it’.⁴⁸ The fact that the master had anticipated the danger but had been unable to react appropriately due to the difficulty and danger involved in the manoeuvre meant that he had not voluntarily assumed any risk. Morris LJ identified in *The Stork* that it is not the duty of the master and ship-owner to constantly doubt the validity of an order to a particular port. The owner and master need not seek ‘information extending beyond that ordinarily available to a reasonable and prudent ship’s master’.⁴⁹

The evidence established that the master had not been negligent and the Court considered that he had acted in accordance with good seamanship. Seamanship is relevant to both the question of unsafety generally (‘without...being exposed to danger which cannot be avoided by good navigation and seamanship’) as well as the question of negligence. The Court concluded that the damage to the vessel was caused by the charterer’s breach of the safe port obligation in the charterparty.⁵⁰

3.2 *The Evia (No 2)*

It is critical to establish at what point in time the question of the port’s safety should be determined. This issue remained unresolved until the House of Lords’ decision in *The Evia (No 2)*.⁵¹ The Court held that the question of safety must be considered prospectively at the time the order to proceed to the port is given. Prior to this decision some cases had decided that a breach could occur at any time after nomination up to the time damage was suffered.⁵²

Pursuant to a time charterparty, in mid-March 1980 the charterers ordered the *Evia* to load cement in Cuba for carriage to Basrah, Iraq.⁵³ Although the vessel arrived at Basrah on 1 July, she was unable to berth until 20 August due to congestion. Discharge was completed on 22 September by which time large-scale hostilities had broken out between Iran and Iraq and the vessel was unable to depart for nearly six months. The owners claimed that the charterers had nominated an unsafe port and they were liable for the whole of the hire for the remainder of the charter. In defence, the charterers claimed that they were not in breach of the safe port warranty and that the charter had been frustrated. The owners countered that the charterer could not rely upon frustration as it was self-induced by reason of the nomination of an unsafe port. The case rested upon whether or not the port was in fact unsafe. The issue of frustration will not be dealt with.

Contrary to the decision of Robert Goff J at first instance, both the Court of Appeal (by majority)⁵⁴ and the House of Lords (unanimously)⁵⁵ held that the port was safe for the vessel. In the Court of Appeal, Lord Denning MR insisted that the port be safe in its ‘set-up’.⁵⁶ His Lordship decided that the port was inherently safe and the outbreak of war was a completely abnormal and extraneous occurrence which could not render the port unsafe.

⁴⁶ Ibid 136.

⁴⁷ ‘To a willing person, no injury is done’.

⁴⁸ *The Eastern City* [1958] 2 Lloyd’s Rep 127, 136.

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

⁵⁰ The charterers also submitted that a non-performance clause in the charterparty limited the damages available to the owners. Clause 13 of the charterparty provided: ‘Indemnity for non-performance of this charterparty, proved damages, not exceeding estimated amount of freight.’ The Court held that the clause did not extend to damages for a breach of contract.

⁵¹ *The Evia (No 2)* [1982] 2 Lloyd’s Rep 307.

⁵² See, eg, *The Mary Lou* [1981] 2 Lloyd’s Rep 272 (Mustill J); *NV Stoomv Maats v Nippon Yusen Kaisha (The Pendrecht)* [1980] 2 Lloyd’s Rep 56 (Parker J).

⁵³ The charterparty, in the Baltimore form, provided: ‘The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports’.

⁵⁴ [1982] 1 Lloyd’s Rep 334 (Lord Denning MR and Shaw LJ, Ackner LJ dissenting as to the safety of the port).

⁵⁵ [1982] 2 Lloyd’s Rep 307 (Lords Diplock, Elwyn-Jones, Keith, Roskill and Brandon).

⁵⁶ [1982] 1 Lloyd’s Rep 334, 338. Sir Sebgag Shaw agreed with the judgment of Lord Denning MR and added some comments of his own.

3.2.1 The House of Lords

The House of Lords took the opportunity to unequivocally accept Sellers LJ's definition of a safe port. Importantly, Lord Roskill, who delivered the leading judgment, held that the safe port warranty in charterparties was not an absolute continuing promise of safety.⁵⁷ The port must be prospectively safe at the time the charterer gives the order to proceed there; however, this does not mean that the port must be actually safe at that time.⁵⁸ His Lordship's examination of prior authorities revealed that the vast majority of cases had suggested a similar approach. For example, Donaldson J in *The Hermine* stated that '[t]he point of the warranty is that it speaks from the date of nomination, but it speaks about the anticipated state of the port when the vessel arrives.'⁵⁹ This is in direct contradiction to Mustill J's judgment in *The Mary Lou* where his Honour rejected the contention that the breach occurred only at the moment of nomination.⁶⁰ It was this part of Mustill J's decision that Robert Goff J, at first instance, followed. It is obvious from Lord Roskill's speech that an absolute and continuing promise of safety would render ineffective the abnormal occurrence exception to the safe port warranty. This would be contrary to *The Eastern City's* definition of a safe port.

3.2.2 Problems with the House of Lords' decision

Two recurring problems in applying the House of Lords' test have been establishing what questions need to be asked and whether or not the charterer's actual knowledge is relevant.⁶¹ As to the latter, the better view is that in identifying the conditions of unsafety, 'the court is to have regard to all the surrounding facts and circumstances relevant to the safety of the port which were prevailing at the time of nomination.'⁶² This necessarily ignores the charterer's actual knowledge. The answer is important in the context of administrative shortcomings because if, for instance, a foreseeability test is adopted it may be difficult or even impossible to attribute knowledge of the internal workings of a port authority to the charterer. The problem, as one astute writer points out, is that 'nowhere in [Lord Roskill's] speech did the learned Law Lord allude to the concept of 'foreseeability'.⁶³ This is not the case, as *The Saga Cob* demonstrates, if the charterer's obligation is to exercise due diligence.⁶⁴

Although not directly relevant to ordinary safe port clauses, the decision in *The Saga Cob* is useful as it examined the possibility of a foreseeability-based approach. While the trial judge had clearly advocated such a test,⁶⁵ Parker LJ, who read the judgment of the Court of Appeal, was less enthusiastic. In that case a vessel was time chartered on the Shelltime 3 form. The vessel was ordered to proceed to Massawa, Ethiopia where she was attacked by guerrillas. There was a clear history of attacks, for example, only two months before the order to proceed to the port was given two vessels were attacked by guerrillas 65 miles south of Massawa. The Ethiopian Navy was also engaged to defend the local waters. In holding that the port was safe for the vessel, Parker LJ highlighted some shortcomings of the foreseeability approach:

If [the fact that it was foreseeable an attack *could* occur at the port or on the approach to it] were enough it would seem to follow that, if there were a seaborne guerilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept.⁶⁶

⁵⁷ Lords Elwyn-Jones, Keith and Brandon agreed with Lord Roskill. Lord Diplock similarly agreed and added some comments of his own. [1982] 2 Lloyd's Rep 307, 315.

⁵⁹ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1978] 2 Lloyd's Rep 37, 47.

⁶⁰ *The Mary Lou* [1981] 2 Lloyd's Rep 272, 278. Lord Diplock in *The Evia (No 2)* [1982] 2 Lloyd's Rep 307, 310 labelled Mustill J's approach a 'heresy'.

⁶¹ In David Chong Gek Sian, 'Revisiting the Safe Port' (1992) *Singapore Journal of Legal Studies* 79, 97 the learned author proposes two questions: first, what was the source of the prospective safety? and secondly, was it that source of unsafety or another and different source which led to the delay, damage or loss of the chartered vessel?

⁶² *Ibid.* This conclusion is evident through an analysis of the administrative shortcomings that are capable of rendering a port unsafe. See the cases analysed below in Part 4.

⁶³ *Ibid.* 82.

⁶⁴ *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1992] 2 Lloyd's Rep 545 ('*The Saga Cob*'). The safe port clause provided that the charterers were under an obligation to 'exercise due diligence to ensure that the vessel is only employed between and at safe ports'.

⁶⁵ *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1991] 2 Lloyd's Rep 398 (Judge Diamond QC). His Honour held that the port was unsafe. This decision was subsequently reversed by the Court of Appeal consisting of Parker, Balcombe and Woolf LJ in [1992] 2 Lloyd's Rep 545.

⁶⁶ *The Saga Cob* [1992] 2 Lloyd's Rep 545, 551.

Two cases where foreseeability appears to have been considered do not expressly accept the principle.⁶⁷ It should also be noted that both cases predated *The Evia (No 2)*. Therefore, their relevance in interpreting the House of Lords' judgment is somewhat limited.⁶⁸ Nevertheless Parker LJ arguably advocated an analysis of safety that looks to the charterer's actual knowledge. In relation to precautions taken by the Ethiopian government his Lordship stated: 'Just as charterers are entitled to assume that vessels entering a port will be properly handled so also it appears to us they must be entitled to assume that a safety system will be properly carried out.'⁶⁹

It is unclear whether this statement was intended to be limited to due diligence clauses. Its potential implications in cases involving administrative shortcomings cannot be understated. It may be that charterers escape liability where they can show an adequate safety system existed regardless of whether or not it is working (so long as it is not blatantly unworkable). At least two authors have argued that the charterer's actual knowledge, or what the charterer ought to know, is relevant.⁷⁰

Overall, the more favourable approach appears to be the 'absolute knowledge approach', which '[attributes] to the charterer knowledge of all facts pertaining to the safety of the nominated port and on the basis of these facts, the expectation or prediction of safety is to be formed.'⁷¹ This follows from Sir Owen Dixon's observation in *Reardon Smith Line*: 'If the safety of the port is in doubt, it seems better to suppose that the charterer must bear the responsibility of his choice, if it is a wrong one'.⁷² The conclusion is supported by a number of cases dealing with administrative shortcomings which rely upon evidence of events subsequent to the loss or damage.⁷³ Unless an absolute knowledge approach is adopted the admissibility of this evidence would be questionable.

3.2.3 The charterer's secondary obligation

Lord Roskill considered that a time charterer is obliged to react to events which occur after nomination and which 'had made or will make the nominated port unsafe.'⁷⁴ The circumstances which, subsequent to the initial nomination, render the port unsafe can occur in two ways. Either the circumstance arises while the vessel is proceeding to the port, or it arises after the vessel has entered the port. In relation to the former, Lord Roskill held that the charterer would come under a 'secondary obligation' to cancel his original order and nominate another port which is prospectively safe.⁷⁵ In the second situation the nature of the charterer's obligation depends on whether or not an order to depart from the port forthwith would protect or save the vessel from danger. If it would not the charterer would not be under a secondary obligation.⁷⁶

Lord Diplock, while agreeing substantially with the judgment of Lord Roskill, preferred to view this secondary obligation as the original promise of prospective safety merely continuing. On this analysis the duty to issue fresh orders where an instance of unsafety arose would continue until the vessel could no longer comply with

⁶⁷ The cases are noted in Chong Gek Sian, above n 61, 82-3. See *Reardon Smith Line v Australian Wheat Board* [1956] AC 266, 284: Lord Somervell stated 'There was discussion in the argument 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. The point does not arise here and it is unnecessary to decide it.' See also *Vardinoyannis v The Egyptian General Petroleum Corp (The Evaggelos TH)* [1971] 2 Lloyd's Rep 200, 206 where Donaldson J stated, 'In judging the safety of a port at the stage of nomination and arrival, account must, of course, be taken of reasonably foreseeable changes in conditions. A port which is only safe in fair weather is not safe.'

⁶⁸ One case after *The Evia (No 2)* did mention foreseeability in passing. In *The Count*, Toulson J formulated the test as 'barring unforeseeable future events': [2008] 1 Lloyd's Rep 72, [22] (Comm Ct). However, it is submitted that this analysis is incorrect. Moreover, it did not detract from his Honour's conclusion that the port was unsafe due to administrative shortcomings which in all probability would not have been foreseen by the charterer. See the discussion below in Part 4.4.

⁶⁹ *The Saga Cob* [1992] 2 Lloyd's Rep 545, 550.

⁷⁰ See, eg, Charles Baker and Paul David, 'The Politically Unsafe Port' [1986] *Lloyd's Maritime and Commercial Law Quarterly* 112.

⁷¹ Chong Gek Sian, above n 61, 93. In a later article, Baker (referred to in above n 70) appears to concur with the analysis of Chong Gek Sian: see Charles Baker, 'The safe port/berth obligation and employment and indemnity clauses' [1988] *Lloyd's Maritime and Commercial Law Quarterly* 43, 45. The learned author points out the difficulty in advocating a foreseeability-based approach when this was not at all alluded to by the House of Lords in *The Evia (No 2)*.

⁷² *Reardon Smith Line v Australian Wheat Board* [1953-54] 91 CLR 233, 244. Although Sir Owen Dixon was in the minority in that case his Honour's judgment was upheld on appeal to the Privy Council in [1956] AC 266.

⁷³ See the analysis below in Part 4 and in particular *Maintop Shipping Company Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* [2003] 2 Lloyd's Rep 655 ('*The Marinicki*'); *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980); *The Adamastos* SMA 3416 (Arb. at N.Y. 1998).

⁷⁴ *The Evia (No 2)* [1982] 2 Lloyd's Rep 307, 319.

⁷⁵ *Ibid* 320.

⁷⁶ *Ibid*.

the fresh order.⁷⁷ The secondary obligation has an important effect upon abnormal occurrences. As Lord Diplock concluded:

...if an occurrence which at the time of the original order could properly be regarded as abnormal has actually occurred and has rendered the port prospectively unsafe, the charterer could not rely upon the exception of 'abnormal occurrence'.⁷⁸

Despite this consequence Lord Roskill's reasoning is compelling – the safe port clause requires the 'time charterer to do all that he can effectively do to protect the ship from the new danger in the port'.⁷⁹ Therefore, it would seem that the secondary obligation extends to all dangers of which the charterer is aware.⁸⁰ It has also been suggested that 'constructive knowledge should suffice as a charterer that is negligent in informing itself about a port it has nominated is failing to do all it effectively can to safeguard the chartered vessel'.⁸¹ This has not yet been considered by the courts.

On the facts at hand, Lord Roskill held that the secondary obligation did not arise since the outbreak of war did not occur until after the vessel had entered Basrah, and 'an order to leave the port and proceed to another port could not have been effective'.⁸² The House of Lords declined to consider whether the secondary obligation could be imposed upon charterers under a voyage charterparty.⁸³

In *The Lucille*, the facts of which are similar to *The Evia (No 2)*, a time chartered vessel was ordered to proceed to Basrah prior to the outbreak of war.⁸⁴ Unlike the *Evia*, however, the *Lucille* was specifically ordered to proceed to Basrah on 20 September 1980, after the congestion had settled. By this time it was clear that the port was unsafe given that in the two weeks leading up to that date air and ground force activity had noticeably increased and some attacks had occurred. Although the case could be, and was, decided on the basis that this direction was an order to a port that was not prospectively safe, as Kerr LJ surmised:

...even if there had then been no fresh order, as found by the arbitrators, but merely a failure to countermand the previous order given when the vessel left [the previous port], the charterers would still have been in breach of the secondary obligation stated by Lord Roskill.⁸⁵

4 Administrative shortcomings

It is now established that administrative shortcomings, failures in port systems and deficiencies in the set-up of a port may render a port unsafe. In *The Mary Lou*, Mustill J identified that:

a port may have geographical, climatic or other characteristics which entail that it will be safe if, but only if, a particular system for securing its safety remains effectively in operation... Such a port will be safe if the system works properly, and unsafe if it does not.⁸⁶

Bennett illustrates the value to the law in recognising administrative shortcomings. He points out that in a number of instances a port may be considered unsafe but for the presence of systems that eliminate or mitigate the risks. For example, 'a port where the navigation channels are prone to silting up resulting in an inadequate, and therefore unsafe, natural depth of water may through regular dredging enjoy an adequate depth'.⁸⁷ A number of decisions have considered the effect of administrative shortcomings on the safety of a port.

⁷⁷ Ibid 310.

⁷⁸ Ibid.

⁷⁹ Ibid 320.

⁸⁰ See further Michael Wilford, Terence Coghlin and John Kimball, *Time Charters* (5th ed, 2003) 205: the authors considered that it was more consistent with Lord Roskill's description of the secondary obligation 'if it arises only where the charterers become aware of the fact that a state of unsafety has arisen.'

⁸¹ Bennett, above n 2, 63.

⁸² *The Evia (No 2)* [1982] 2 Lloyd's Rep 307, 320.

⁸³ See further Wilford, Coghlin and Kimball, above n 80, 204; Bennett, above n 2 also contains a useful summary of the difficulty in applying the secondary obligation to voyage charterparties (at 63-4).

⁸⁴ *Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1984] 1 Lloyd's Rep 244 (CA) ('*The Lucille*').

⁸⁵ Ibid 249.

⁸⁶ *The Mary Lou* [1981] 2 Lloyd's Rep 272, 277.

⁸⁷ Bennett, above n 2, 53. Bennett also provides another example of a port that is unsafe because of hostile forces but becomes safe through 'appropriate military countermeasures'. The author refers to *Islander Shipping Enterprises S.A. v Empresa Maritima del Estado S.A. (The Khian Sea)* [1979] 1 Lloyd's Rep 545 ('*The Khian Sea*') and *The Saga Cob* [1992] 2 Lloyd's Rep 545 as authorities for each of these examples respectively.

4.1 *The Marinicki*

The Marinicki has been cited for the proposition that administrative shortcomings may render a port unsafe.⁸⁸ On an amended NYPE form the charterers chartered the vessel, the *Marinicki*, for ‘one Timecharter trip via safe port(s)...intention Bulk Wheat from Vancouver to Indonesia’. On an occasion prior to berthing at the port of Jakarta the vessel sustained serious bottom damage. The owners claimed that there was an obstruction in the channel leading to the port which caused the damage. The charterers alleged that the damage occurred elsewhere. The deputy judge, Miss Belinda Bucknall QC, found that the damage had occurred in the channel leading to the port.

In order for the owners to succeed in their claim they were required to establish that ‘(1) the vessel was damaged by an underwater obstruction in the dredged channel and (2) that the port was unsafe in a material respect at the time when the [charterers] ordered the vessel to proceed to Jakarta.’⁸⁹ As the owners could not establish exactly when the object came to rest in the channel they could not prove that the port was prospectively unsafe at the time of nomination. The deputy judge then considered whether the port was unsafe ‘because there was no proper system in place to check and/or monitor the safety of the channel to the port and/or to warn traffic using the channel of any such danger as might exist.’⁹⁰

Miss Bucknall QC identified a number of shortcomings in the port authority: there was no immediate investigation by the port authority either after the master’s VHF radio call or after his written report; no warning was given to other users of the port indicating the possibility that an obstruction may exist in the channel; and the port authority’s subsequent actions were defensive rather than proactive. In addition, after receiving the sounding that showed the possibility of an obstruction in the channel the port authority dismissed it; its excuse was that it did not want to waste money and had disbelieved the master’s report. It was found that there was a ‘very unsatisfactory regime prevailing in the port administration in relation to the safety of vessels using the dredged channel.’⁹¹

These subsequent events exemplified a ‘laxity in the hierarchy of the port.’⁹² Despite the legitimacy of such evidence having been questioned by Gatehouse J in *The Chemical Venture*,⁹³ as one author argues, ‘[t]he question at issue is whether a nominated port is safe to be visited by the chartered vessel as at the time when the visit takes place. That factual evaluation is logically assisted as much by subsequent as by prior events.’⁹⁴

Evidence of this nature is not always necessary as the decision in *The Khian Sea* demonstrates.

4.2 *The Khian Sea*

A charterparty on the NYPE form provided that cargo or cargoes could be laden or discharged at any port ‘provided the vessel can safely lie always afloat at any time of tide’.⁹⁵ The vessel, the *Khian Sea*, arrived at the port of Valparaiso in Chile during May 1973, a port which was susceptible to strong winds and swells at this time of the year. In the early hours of the morning a red light was displayed at the port warning of impending bad weather. The award found that no prior notice had been given to the master.⁹⁶ The master acted quickly in preparing the vessel for departure but was prevented by the presence of the two other vessels which were blocking the *Khian Sea*’s path. Severe ranging damage was sustained due to the vessel contacting with the pier. The arbitrator found that the berth was unsafe for the vessel and that this unsafety was the proximate cause of the damage to the vessel.

⁸⁸ *The Marinicki* [2003] 2 Lloyd’s Rep 655 (Adm Ct). See, eg, Martin Davies and Anthony Dickey, *Shipping Law* (3rd ed, 2004) 372.

⁸⁹ *The Marinicki* [2003] 2 Lloyd’s Rep 655, 656.

⁹⁰ *Ibid* 669.

⁹¹ *Ibid*. This regime was found to be a long-standing one.

⁹² *Ibid* 670.

⁹³ *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyd’s Rep 508, 518: Gatehouse J suggested that prior to the decision in *The Saga Cob*, ‘one might have thought...subsequent events would not be relevant’.

⁹⁴ Bennett, above n 2, 58. See generally *The Saga Cob* [1992] 2 Lloyd’s Rep 545. A further discussion is provided below under *The Adamastos* decision (Part 4.5).

⁹⁵ *The Khian Sea* [1979] 1 Lloyd’s Rep 545, 546 (CA).

⁹⁶ *The Khian Sea* [1977] 2 Lloyd’s Rep 439 (Comm Ct): the first instance judgment sets out the arbitrator’s award at 440-42.

At first instance, Donaldson J noted that when adverse weather conditions occurred at the port vessels may have to leave in order to avoid damage. 'In order to do so, vessels need (a) a pilot, (b) a tug and (c) unencumbered water in the immediate vicinity of the berth in order to have freedom to manoeuvre.'⁹⁷ The charterers submitted that the presence of the two vessels impeding the *Khian Sea*'s path was an abnormal occurrence. Donaldson J rejected this argument and held that in the absence of a system 'to ensure that vessels using the berth would have adequate searoom if they had to leave in a hurry' the berth was plainly unsafe.⁹⁸ It was this statement that drew express support from Stephenson LJ in the Court of Appeal.⁹⁹ His Honour also noted that the red light was a 'bad weather warning system'.¹⁰⁰ The charterers appealed.

In the Court of Appeal, Lord Denning MR recognised that there were unsatisfactory administrative features of the port. Specifically, the port's safety system effectively shut down at night. Notwithstanding these shortcomings, as his Lordship quite rightly noted, this was not the cause of the damage; the real cause was the two vessels which made it impossible to move the *Khian Sea*. In analysing the present state of the law, Lord Denning MR acknowledged that the fact that a port may require vessels to leave does not necessarily make it unsafe.¹⁰¹ His Lordship added:

...the following requirements must be satisfied when a vessel has to leave its berth. First, there must be an adequate weather forecasting system. Secondly, there must be adequate availability of pilots and tugs. Thirdly, there must be adequate searoom to manoeuvre. And, fourthly, there must be an adequate system for ensuring that the searoom and room for manoeuvre is always available.¹⁰²

Even though the forecasting system was not perfect, it was adequate. Nonetheless the port at Valparaiso fell short of meeting the latter two requirements and was therefore unsafe.¹⁰³ Unlike other decisions involving physical aspects of the port such as buoys and markers, ensuring the availability of sufficient sea room is arguably a matter more directly associated with the policies, procedures and personnel within the port authority.

Furthermore, it appears that the reason Donaldson J was able to dispose of the abnormal occurrence argument so simply was due to the port being 'conditionally safe'.¹⁰⁴ According to his Honour, in the absence of a proper system it was irrelevant whether this failure was an extraneous or abnormal occurrence. It is submitted that this reasoning indicates that a failure to ensure appropriate systems are in place will rarely, if at all, be considered an abnormal occurrence. The effect of an isolated failure within an otherwise good system is somewhat unclear although it is likely that it also will not constitute an abnormal occurrence.¹⁰⁵ The threshold requirement is that the abnormal occurrence must not arise out of the qualities or attributes of the port itself.¹⁰⁶ In *The Mary Lou*, Mustill J considered that the qualities or attributes of the port referred to the conditions that made the system

⁹⁷ *Ibid* 443.

⁹⁸ *Ibid* 443-4.

⁹⁹ *The Khian Sea* [1979] 1 Lloyd's Rep 545, 547-8.

¹⁰⁰ *The Khian Sea* [1977] 2 Lloyd's Rep 439, 443.

¹⁰¹ *The Khian Sea* [1979] 1 Lloyd's Rep 545, 547 where Lord Denning MR approved Pearson J's statement at first instance in *The Eastern City* [1957] 2 Lloyd's Rep 153, 172:

I think theoretically it is possible for a port to be safe even though ships have to leave it in certain states of the weather, provided that all the operations of entering it, going out of it, re-entering it, loading and going out again, can be safely performed, and provided also that there is no appreciable danger of a ship being trapped by the sudden onset of bad weather.

¹⁰² *Ibid* 547.

¹⁰³ Stephenson LJ only added some comments in support of Donaldson J's judgment but otherwise agreed with Lord Denning MR. Shaw LJ agreed that the appeal should be dismissed.

¹⁰⁴ [1977] 2 Lloyd's Rep 439, 443-4. In the Court of Appeal, Stephenson LJ agreed with Donaldson J's conclusion: [1979] 1 Lloyd's Rep 545, 547-8. Lord Denning MR and Shaw LJ did not deal with the point.

¹⁰⁵ In *The Mary Lou* [1981] 2 Lloyd's Rep 272 a vessel grounded in the Mississippi River due to an inaccuracy in the maximum drafts provided to mariners. Mustill J held that the port was unsafe:

The channel was in a state in which it could not be navigated without undue risk, unless those in charge of visiting ships had reliable information from which they could calculate the drafts upon which it was safe to leave. In place of detailed information, the pilots furnished a series of recommended drafts upon which shipmasters reasonably relied. In this particular instance, for reasons unknown, the system failed. This may have been an isolated failure, but the conditions which made it necessary to have a reliable system in the first place were not transient, nor, as the arbitrators have found were they wholly exceptional or wholly unpredictable...the dangers of the navigable channel were such as to amount to a characteristic of the port' (at 283, emphasis added)

¹⁰⁶ See generally Wilford, Coghlin and Kimball, above n 80, 200; and *The Evia (No 2)* [1982] 2 Lloyd's Rep 307, 317 where Lord Roskill referred to a port being 'inherently unsafe'.

necessary.¹⁰⁷ If this is correct it would be impossible to rely on the abnormal occurrence exception in almost all cases involving administrative shortcomings.¹⁰⁸ It is also unlikely that inherent failures in the port administration will constitute a mere 'temporary danger' because they are generally not 'known or evident dangers which temporarily delay the ship'.¹⁰⁹

The Court of Appeal in *The Khian Sea* established the importance of ensuring a proper weather warning system is in place at a port. However, the earlier case of *The Dagmar* emphasises that this duty may be widened in certain circumstances.

4.3 *The Dagmar*

The charterers were required pursuant to a clause in a Baltime charterparty agreement to direct the vessel, the *Dagmar*, to safe ports.¹¹⁰ The vessel was ordered to Cape Chat, Quebec where she commenced loading without incident. Two days later, while the *Dagmar* was still berthed, the force of the wind and seas increased causing the vessel to ground in her berth. The owners claimed that the port was unsafe for the vessel. In their pleadings, the owners alleged, amongst other things, that dangerous conditions could arise suddenly and without warning; that once such conditions had arisen it was hazardous if not impossible for a vessel to safely depart the port; and that there were no tugs available to assist.¹¹¹

Mocatta J found that there was an adequate weather forecasting system based not far from the port. Furthermore, the facts were distinguishable from *The Eastern City* as the port was not a place where winds could arise suddenly without warning. Notwithstanding these findings, Mocatta J concluded that the port was unsafe for the vessel because the master and crew were not in receipt of the weather broadcast. The master had requested his agents get the forecast for him but they failed to do so. Unless such broadcasts were received there would have been a constant and unreasonable burden on the master to have the vessel at a state of readiness to depart throughout the entire operation.¹¹²

The Dagmar establishes that a port authority must not only ensure a sufficient weather forecasting and reporting system is in place, but it must also make certain that mariners are in receipt of them.¹¹³ There does appear to be a qualification. A port authority would only come under this duty if it would be burdensome for the crew themselves to obtain the relevant forecasts. Mocatta J held that this burden would fall upon the charterers but only if it were a 'relatively simple' matter for them. His Honour neatly summarised:

...unless a vessel of approaching the *Dagmar*'s size ordered to load at Cape Chat (or a place similar thereto) is specifically warned that (a) she will receive no weather information from the shore and must rely upon her own resources for obtaining weather forecasts; and (b) is also warned that in strong winds and seas the place is unsafe for her to remain in, such place is unsafe...¹¹⁴

The charterers had given the second warning but Mocatta J was satisfied that the failure to give the first warning was sufficient to render the port unsafe. In the absence of any negligence on the master's part this was the cause of the damage suffered by the vessel.

¹⁰⁷ [1981] 2 Lloyd's Rep 272, 283. Support for this is arguably found in *The Lucille* where Kerr LJ, who read the judgment of the Court of Appeal, agreed with the judge at first instance (Bingham J) that the hostilities could not be an 'intervening event' because they were no more than a 'mere worsening of the situation': [1984] 1 Lloyd's Rep 244, 250. See also Lord Denning MR in *The Evia (No 2)* [1982] 1 Lloyd's Rep 334 (CA): his Lordship stated that the abnormal occurrence must be 'unconnected with the set-up of the port' (at 338).

¹⁰⁸ One learned author has indeed suggested that the role of the 'abnormal occurrence' is 'now of reduced significance': Chong Gek Sian, above n 61, 113.

¹⁰⁹ Wilford, Coghlin and Kimball, above n 80, 194.

¹¹⁰ *Tage Berglund v Montoro Shipping Corporation Ltd (The Dagmar)* [1968] 2 Lloyd's Rep 563 ('*The Dagmar*') (Comm Ct, Mocatta J sitting with a nautical assessor). Clause 2 of the charterparty provided: 'The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat or safe aground where vessels of similar size and draft are accustomed to lie in safety'.

¹¹¹ *Ibid* 570.

¹¹² *Ibid* 586.

¹¹³ It should be noted that Mocatta J held that it was the duty of the charterers to make arrangements for the warnings to be passed on to the master. His Honour also held that the charterers had failed to indicate to the master that it was his responsibility to keep a wireless watch. However, it is submitted that this could equally apply to port authorities, subject of course, to the qualification outlined. See further Wilford, Coghlin and Kimball, above n 80, 198.

¹¹⁴ *The Dagmar* [1968] 2 Lloyd's Rep 563, 586.

4.4 The Count

In a more recent decision, the Commercial Court held that a port was unsafe where buoys were out of position and there was no adequate system for monitoring changes in the channel.¹¹⁵ The vessel, the *Count*, was voyage chartered to Beira on the east coast of Africa.¹¹⁶ Upon arrival she was delayed by two other vessels. The first grounded in the channel on the day the *Count* tendered her notice of readiness delaying her for approximately six days. The second grounded in the same spot only a day after the first vessel had completed discharge operations. This further delay meant the *Count* was unable to depart until 13 July 2004 having been ready on 9 July. The owners claimed their loss from the delay caused by the blockage of the channel on the basis that this loss resulted from a breach of the safe port warranty.¹¹⁷

The claim was referred to arbitration. The arbitrators considered the circumstances of the two groundings and held that 'the groundings were not caused by navigational error, but rather by misalignment of the buoys, and that the misalignment resulted from poor monitoring of the channel rather than from recent bad weather.'¹¹⁸

The port, according to the arbitrators, was clearly unsafe between the dates in which the *Count* visited it. They also held that the port was prospectively unsafe at the time the charterers nominated it because they considered it highly unlikely that the buoys were correctly positioned at that time.¹¹⁹ The arbitrators rejected *The Hermine*,¹²⁰ which the charterers relied on in arguing that the vessels that ran aground represented only temporary obstacles. That case was concerned with the length of delay required for a temporary obstacle to render a port unsafe and not with unsafe characteristics of the port itself.¹²¹ The charterers appealed.

The charterers argued that the port could not be unsafe because, apart from the delay, the vessel entered and departed the port in safety. They also disagreed that *The Hermine* was distinguishable. The owners contended that the relevant considerations were the misalignment of buoys and the absence of an adequate system to monitor changes in the channel. According to the owners this was sufficient to render the port prospectively unsafe. Toulson J outlined the general principles relating to safe ports¹²² and identified the principles established by *SS Knutsford Ltd v Tillmans & Co*¹²³ and *The Hermine*:

A port will not lack the characteristics of a safe port merely because some delay, insufficient to frustrate the adventure, may be caused to the vessel in her attempt to reach, use and leave the port, by some temporary evidence obstruction or hazard...That is different from the situation where the characteristics of the port at the time of the nomination are such as to create a continuous risk of danger.¹²⁴

Toulson J agreed with the arbitrators' decision and concluded that their finding that the port was unsafe was based on characteristics of the port which were not temporary.¹²⁵

The Count highlights the value of evidence of administrative shortcomings. It is trite law that the question of a port's safety must be determined with respect to the particular vessel.¹²⁶ However, it would appear from *The Count* that in some safe port cases evidence of administrative shortcomings is largely independent of the particular vessel. Administrative shortcomings affect the characteristics of the port as a whole.¹²⁷ Indeed Toulson J equated the facts of the case with that of a war zone where a delay had been caused by another vessel

¹¹⁵ *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count)* [2008] 1 Lloyd's Rep 72 ('*The Count*').

¹¹⁶ The charterparty provided: 'The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the charterer, provided the vessel can proceed thereto, lie at, and depart therefrom always lie safely afloat...'

¹¹⁷ *The Count* [2008] 1 Lloyd's Rep 72, [4].

¹¹⁸ *Ibid* [12].

¹¹⁹ *Ibid* [13].

¹²⁰ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep 212 (CA).

¹²¹ *The Count* [2008] 1 Lloyd's Rep 72, [14].

¹²² *Ibid* [22]. However, as noted in above n 68, it is submitted that Toulson J incorrectly stated the law as 'barring unforeseeable future events'. In any event this is probably irrelevant as it did not appear to impinge upon his Honour's conclusion.

¹²³ [1908] 2 KB 385 (CA).

¹²⁴ *The Count* [2008] 1 Lloyd's Rep 72, [22].

¹²⁵ *Ibid* [30].

¹²⁶ See, eg, *Brostrom v Dreyfus* (1932) 44 Ll.L.Rep 136.

¹²⁷ Recall *The Count* [2008] 1 Lloyd's Rep 72, [22] where Toulson J refers to a 'continuous risk of danger.'

being sunk in the hostilities.¹²⁸ Of course, that is not to say that the particular vessel's characteristics will be irrelevant to the question of the master's negligence.¹²⁹

4.5 Arbitration decisions

Many New York arbitration decisions present further insight into the way these principles have been applied in practice.¹³⁰

4.5.1 *The Eastern Eagle*

The *Eastern Eagle* provides an example of a totally deficient port system and port authority.¹³¹ Under a charterparty agreement on the NYPE form the vessel, *Eastern Eagle*, was ordered to Macapa on the Amazon River.¹³² The master and officers safely entered the port on a carefully plotted route. However, while proceeding outbound on an identical but reversed route the vessel grounded. The owners claimed that the damage was a result of the charterer's breach of the safe port obligation. The arbitrators were also asked to decide whether the owners were justified in refusing to send the vessel to the same port after the grounding.

Due to a lack of evidence as to damages the panel declined to rule as to whether or not there had been a breach of the charterparty. Nevertheless, in unanimously deciding that the owners were justified in refusing to send the vessel back to Macapa, the panel necessarily considered the safety of the port. It was found that the navigational charts of the area were inaccurate and that no accurate charts were available; that what navigational aids that did exist in the approaches to the port were 'insufficient in number and functionally inadequate'; there were no buoy markers; and there was no competent pilotage 'because no one really [knew] the varying depths of water in the approaches to Macapa.'¹³³ For these reasons the port was unsafe.

4.5.2 *The Aristagelos*

In *The Aristagelos* a vessel was chartered on the NYPE form and ordered to proceed to the port of Rimouski, Canada.¹³⁴ On the outbound leg and in the channel leading to the port the vessel grounded twice. The owners claimed, amongst other things, that the charterers had breached the charterparty by sending the vessel to an unsafe port.¹³⁵ The panel was under no doubt the port was unsafe for the vessel.

Notwithstanding that the insufficiency of water in the channel contributed significantly to the panel's decision, administrative shortcomings of the port authority were considered. The lack of navigational aids and inadequate pilotage and towage, as well as the fact the charted soundings were two years old, were key considerations. The panel also took account of subsequent events: '...dredging of the channel and its approaches and placement of new buoys and repositioning of existing buoys were all undertaken shortly after this grounding took place in an effort to improve the safety of the port.'¹³⁶

4.5.3 *The Star B*

¹²⁸ Ibid [32].

¹²⁹ For example, in the case of misalignment of buoys it is arguable that a competent master, if equipped with GPS, would have sufficient information to doubt the navigation aids in the port and should stand off until further information can be ascertained.

¹³⁰ The American decisions employ the same test of a safe port as that espoused in *The Eastern City*. For an interesting examination on the law of safe ports in the United States see Peter G Hartman, 'Safe port/berth clauses: warranty or due diligence?' (1996-1997) 21 *Tulane Maritime Law Journal* 537; and Wilford, Coghlin and Kimball, above n 80, 215-25.

¹³¹ *The Eastern Eagle* 1971 AMC 236 (Arb. at N.Y. 1970).

¹³² The vessel was chartered on an NYPE form which relevantly provided that the vessel was chartered 'for a period of eighteen months, one month more or less, in Charterers' option, to be employed in lawful trades between safe port and/or ports in world wide trade within Institute Warranties limits'.

¹³³ *The Eastern Eagle* 1971 AMC 236 (Arb. at N.Y. 1970), p 2.

¹³⁴ *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980). The charterparty relevantly provided for 'one Timecharter Trip via safe port (s) in/out geographic rotation via East Coast Canada or in Charterers' option, via Great Lakes and East Coast Canada to UX-Continent, Le Havre Hamburg Range. Vessel to be always afloat, always within I.W.L. within below mentioned trading limits'.

¹³⁵ The panel also heard evidence that the vessel had been misdescribed by the owner but the question of the port's safety was argued strenuously by both parties.

¹³⁶ *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980), p 5.

A port authority must clearly indicate to users of its port what navigational deficiencies are present. In *The Star B* the vessel went aground in the port of Boca Chica in the Dominican Republic.¹³⁷ The owner alleged that the grounding was caused by the charterer's breach of the safe port warranty and pointed to deficiencies in the entrance buoys, the range markers, the charts and navigation guides, and the pilot.¹³⁸ In defence, the charterer denied the nomination of an unsafe port and alleged negligence on the part of the master. The panel unanimously found the port was unsafe but the majority denied the owner's claim on the basis that the master's actions were 'so egregiously negligent and unseamanlike that they overcame any safe port deficiencies and led directly to the vessel's grounding.'¹³⁹

The Star B still serves as an important illustration of a port authority's duty with respect to charts and navigational publications.¹⁴⁰ The deficiencies in the port of Boca Chica included a missing buoy at the entrance to the port, unmarked buoys, and range markers that were not properly maintained and were unlighted. The available charts did not indicate that the buoy was missing and 'failed to depict the proper relative positions of the buoys.'¹⁴¹ Other navigational publications including the Notices to Mariners failed to note that the buoy was missing. The panel also found that the pilot was unlicensed and had no formal training in handling vessels of the size of the *Star B*.¹⁴² Despite these deficiencies a number of nautical publications and a chart warned mariners that 'lights and buoys are unreliable in the Dominican Republic and should not be relied upon.'¹⁴³ The panel held that the port was unsafe notwithstanding these 'precautionary advices'. The fact that the local charts and publications made reference to navigational aids that did not exist or were not as depicted, in addition to the pilot's incompetency, heavily influenced the panel's decision.

As indicated above, the master's negligence in *The Star B* led the panel to deny the owner's claim. The panel opined that a competent master, once aware that the charts he was in possession of were inaccurate, would have remained a safe distance offshore until the vessel's position could be ascertained and a safe approach determined.¹⁴⁴

4.5.4 *The Adamastos*

The vessel, *Adamastos*, chartered under a Timenav form of charterparty, was ordered to proceed to the Argentinean port of Necochea.¹⁴⁵ The port was one of three major grain exporting ports in the country. As the panel majority found, there was a great deal of publicly available information about the port.¹⁴⁶ Upon arrival the vessel anchored approximately three miles from the breakwater. Dangerous weather eventuated and in spite of the master's efforts to manoeuvre the vessel safely from danger she drifted toward the shore and grounded.¹⁴⁷ The owner argued that because of the suddenness which the storms could strike it was 'imperative that port data and port systems, weather services and other relevant port and berth information be furnished vessels at anchor so they may be on a heightened alert.'¹⁴⁸ There were two weather broadcasts made the day prior to the grounding although whether or not they were received by the *Adamastos* was disputed.

The panel, by majority, found that the port was a safe port. It should be noted at the outset that the panel was unimpressed with the actions of the owners. Documents, including the vessel's official records, were incomplete, some relevant documents had mysteriously gone missing and the owner had refused the charterer

¹³⁷ *The Star B* SMA 3813 (Arb. at N.Y. 2003). The charterparty was on an amended NYPE form.

¹³⁸ *Ibid* p 2.

¹³⁹ *Ibid* p 3: there was a partial dissent by a single arbitrator as to the decision that the master's negligence was the sole cause of the damage suffered (see pp 4-6).

¹⁴⁰ The case also demonstrates the importance of a port authority ensuring the port is physically safe. For a further example see *The Thekos* SMA 2405 (Arb. at N.Y. 1987) where a berth was found to be unsafe for the vessel because 'there was a lack of mooring buoys and a insufficiency of protective fenders to protect the ship's hull from the concrete dock when berthing and surging during periods of moderate to normal swell' (at p 4).

¹⁴¹ *The Star B* SMA 3813 (Arb. at N.Y. 2003), p 2.

¹⁴² *Ibid*.

¹⁴³ *Ibid* p 3.

¹⁴⁴ *Ibid*.

¹⁴⁵ *The Adamastos* SMA 3416 (Arb. at N.Y. 1998): the time charterparty provided that the vessel was to perform a transatlantic voyage always 'via safe port(s), safe berth(s), safe anchorage(s), in/out geographical rotation always within I.W.L. and below mentioned trading limits'.

¹⁴⁶ *Ibid* p 2: these publications included *The South American Pilot Volume I* and the *Guide to Port Entry*.

¹⁴⁷ The vessel grounded on 4 April 1990. Proceedings commenced in 1992 and evidentiary hearings followed in 1995-6. The panel's decision was handed down in 1998.

¹⁴⁸ *Ibid*.

and its representatives permission to board the vessel following the grounding. The panel found that there was sufficient information to place the master and crew on alert. Specifically, the *South American Pilot* book, which the master had read, described in detail dangerous weather patterns affecting the port. Weather transmissions which would have further alerted the master to the impending storm were available.¹⁴⁹ *The Adamastos* was therefore decided on the basis that the danger could have been avoided by good navigation and seamanship.¹⁵⁰

A single arbitrator dissented and found that the port was unsafe. The arbitrator took account of three subsequent groundings caused by a severe storm and the port authority's response: 'The most telling factors on Necochea as an unsafe port in 1990 are the significant port safety improvements made following these additional groundings.'¹⁵¹ Safety practices at the port changed and a new publication was produced recommending vessels anchor at least five miles from the port. The arbitrator also disagreed that there was sufficient information available to mariners. He indicated, correctly it is submitted, that when storms of severe intensity are expected a port authority must do more than provide mere forecasts.¹⁵² The port authority, subsequent to the groundings, did change its bad weather warnings to include an instruction for vessels to leave the port.

Regardless of whether or not the majority decision is preferred, *The Adamastos* does demonstrate the types of warnings relevant to the determination of a port's safety. The minority position rests heavily upon the admissibility of subsequent events. At least in this case it seems highly useful to the question of safety. It is suggested that this evidence would not be prejudicial because its purpose is to illuminate pre-existing problems. If, on the other hand, this was the only evidence available it is arguable that admitting such evidence could have negative consequences. A port authority may avoid improving systems following incidents in order to prevent the port being labelled unsafe.¹⁵³

4.5.5 *The Nautilus*

As Lord Denning MR has pointed out, in some circumstances a port will require competent pilotage and towage in order to be considered safe.¹⁵⁴ *The Nautilus* concerned the safety of a berth at the port of Manzanillo, Mexico.¹⁵⁵ *The Nautilus* was chartered under a voyage charterparty on the Gencon form.¹⁵⁶ Between 3 and 20 September 1984 discharge proceeded normally but on the afternoon of 20 September the master began monitoring the progress of Hurricane Olivia. Later that evening the weather conditions deteriorated and the master contacted the local agent to arrange pilots and tugs to move the vessel to anchorage. It is noteworthy that while the Sailing Directions described the port as one which provided a tug and pilotage service, there were no tugs available at that time and the only pilot was engaged elsewhere.¹⁵⁷ That night the vessel struck the quay numerous times causing damage.¹⁵⁸

First, the panel dealt with the charterer's submission that the safe port/berth clause in the Gencon form of charterparty was different to the NYPE form and, therefore, that a different test should apply. The panel agreed that the clauses were dissimilar but held that 'the lack of similarity does not detract from the breadth of [the charterer's] undertaking.'¹⁵⁹ In dealing with the question of safety, the panel identified the port's history of physical damage to ships. This was caused by surging alongside unprotected berths. It was also found that there was a lack of searoom for manoeuvring in the port. In *The Nautilus's* case, however, the clear cause of damage was the lack of pilotage and tugs, which rendered the port unsafe: '[t]he Panel is of the unanimous opinion that the Master acted reasonably and that the reason the Vessel was unable to leave the berth and avoid the ranging damage was the unavailability of a pilot and tug.'¹⁶⁰

¹⁴⁹ Ibid p 8.

¹⁵⁰ Ibid p 9.

¹⁵¹ Ibid p 10.

¹⁵² Ibid p 11.

¹⁵³ The consequences of this are not insignificant. See, eg, *Towerfield v Workington Harbour and Dock Board* [1951] AC 112 where the House of Lords held that a port authority was liable in negligence for failing to advise users of its port that certain charts and documents were inaccurate.

¹⁵⁴ *The Khian Sea* [1979] 1 Lloyd's Rep 545, 547.

¹⁵⁵ *The Nautilus* SMA 2622 (Arb. at N.Y. 1990).

¹⁵⁶ The relevant safe port/berth clause in the charterparty provided: 'Charterers by themselves to ship, and being so loaded, the vessel shall proceed to one (1) safe berth, one (1) safe port out of Mazatlan or Manzanillo, port in Charterer's option'.

¹⁵⁷ *The Nautilus* SMA 2622 (Arb. at N.Y. 1990), p 7.

¹⁵⁸ When cargo operations resumed some days later and when weather conditions again deteriorated the master requested assistance.

Although the pilot was available at this time the tug was not. Additional damage was incurred.

¹⁵⁹ *The Nautilus* SMA 2622 (Arb. at N.Y. 1990), p 7.

¹⁶⁰ Ibid p 8.

During the hurricane season it was ‘inexcusable for the port to operate without a full complement of pilots on duty’.¹⁶¹ Although the charterer had argued that the master was negligent in not moving the vessel himself, the panel pointed to pilotage having been mandated by the Sailing Directions.¹⁶²

5 Application to the emerging issues

5.1 Security

Although not yet judicially considered, it has been suggested that designation of a port as subject to a level 3 security threat will not automatically render it unsafe.¹⁶³ It is submitted that, in theory, this analysis is correct. On the other hand, it is certainly the case that a port under a high (level 3) security threat is more likely to be unsafe.¹⁶⁴ The Code suggests that this level should be ‘an exceptional measure applying only when there is credible information that a security incident is probable or imminent.’¹⁶⁵ There are, however, two problems with such a conclusion. The first problem lies in the Contracting Government’s obligation to issue appropriate instructions and security-related information to ships and port facilities that may be affected.¹⁶⁶ It is difficult to see how a port that complies with all instructions and otherwise has in place effective security measures could be considered unsafe.¹⁶⁷ In this sense it is also probable that a port authority not compliant with the Code will pose a greater security risk to vessels. But this is not a forgone conclusion and an assessment of the ‘likelihood of the risk in question materialising and impacting upon the...vessel’ is critical.¹⁶⁸

Secondly, the effect of the decision in *The Saga Cob* is uncertain. It is to be recalled that in that case the Court of Appeal decided that a port was not unsafe even where there was a threat of a guerrilla attack.¹⁶⁹ The *ratio decidendi* rested upon the necessary inference that if one port in Ethiopia was unsafe because of a foreseeable risk of a guerrilla attack then all ports in the country would be unsafe. The court did not accept this.¹⁷⁰ Applying this reasoning, it may not be enough for a national terrorist threat (or indeed any non-specific threat) to render a particular port unsafe. In contrast, it may be that the role of an abnormal occurrence is further reduced by the warning systems that now exist.

The ISPS Code places an onus upon port authorities to ensure procedures and systems are in place to respond to such threats.¹⁷¹ The ship is also under an obligation to have a security plan. Therefore there is now, arguably, a higher burden upon masters and shipowners in terms of minimising security risks.¹⁷² Consequently a rigorous analysis of the master’s and owner’s actions will be necessary before a conclusion is drawn as to the port’s safety.

¹⁶¹ Ibid.

¹⁶² For another case dealing with insufficiency of tugs see *Palm Shipping Inc v Vitol SA (The Universal Monarch)* [1988] 2 Lloyd’s Rep 483 (Comm Ct, Gatehouse J).

¹⁶³ Bennett, above n 2, 53. A level 3 security threat is the highest level under the ISPS Code.

¹⁶⁴ See, eg, *The Nautilus SMA 2622* (Arb. at N.Y. 1990) where it was inexcusable to not be fully prepared/equipped during the hurricane season (see above Part 4.5).

¹⁶⁵ ISPS Code, Part B, 4.9.

¹⁶⁶ ISPS Code, Part A, 4.2. This information is to be provided ‘as necessary’.

¹⁶⁷ This will necessarily involved an analysis of the effectiveness of the particular system. For example, as *The Dagmar* [1968] 2 Lloyd’s Rep 563 demonstrates, in some circumstances it may not be enough for the port authority to have systems in place. In some circumstances the port authority must undertake measures to ensure crews are fully aware of and in receipt of the forecasts (or, as the case may be, security advices). See above Part 4.3.

¹⁶⁸ Bennett, above n 2, 56. The learned author discusses this ‘threshold of risk’ question in detail at 55-8.

¹⁶⁹ See above Part 3.2.2.

¹⁷⁰ [1992] 2 Lloyd’s Rep 545, 550-1 (Parker LJ). At 551 his Lordship concluded: ‘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 to decline to send or sail his vessel there.’

¹⁷¹ But note that an adequate system will be irrelevant if ships cannot respond appropriately to warnings and advices: see, eg, *The Khian Sea* [1979] 1 Lloyd’s Rep 545 (Part 4.2 above).

¹⁷² This can be contrasted with Mankabady’s 1974 statement:

The increasing powers of port authorities have greatly affected the position of the master and have introduced new dimensions with regard to safety measures. Safety conditions should not be limited to hazards in the approaches to the port but should be extended to cover the essential services required by the shipping industry. In brief, the powers of port authorities are increasing while the powers of the master are decreasing.

S. Mankabady, ‘The Concept of Safe Port’ (1974) 5 *Journal of Maritime Law and Commerce* 633, 642-3. See further Katarelou and Alexopoulos, above n 18, 3: the ISPS Code ‘refers to the professional judgment of the master in taking decisions to maintain the security levels of the vessel.’

Some cases have examined ‘political risks’ and their effect upon the safety of ports.¹⁷³ In *Palace Shipping v Gans Line*, waters around Great Britain and Ireland were declared by the German Government to be a military area and threats were made to hostile merchant ships.¹⁷⁴ Sankey J referred to the evidence of very few vessels having actually come under attack and held that the port was safe.¹⁷⁵ This case demonstrates that the safety of a port is a ‘question of fact and degree’ and, without doubt, it is a relative concept.¹⁷⁶

Tribunals of fact will need to ensure that their deliberations do not venture into second-guessing the government’s security level selection. Their focus will be directed toward the port facility’s response and pre-existing procedures and systems. It must not be forgotten that even in the absence of appropriate government security warnings port authorities must maintain a secure port. Given the risks associated with containerised cargo this is an area of specific concern for authorities and ports must develop measures to deal with these risks.¹⁷⁷ The decisions show a growing emphasis on the value of ‘post-fact evidence’ when entertaining arguments as to administrative shortcomings. It is suggested that due to the admissibility of this evidence, either port authorities will improve their systems or they will consciously control their actions after an incident in order to appear ‘administratively competent’.¹⁷⁸ The latter could have disastrous consequences for the overall security of ports.

5.2 Contagious diseases

Bennett suggests that ‘[o]utbreaks of SARS and the possibility of the H5N1 influenza virus acquiring the capacity of human-to-human transmission have raised the prospect of a port being rendered unsafe by reason of contagious disease.’¹⁷⁹ At least in countries that have implemented the IHR it will be relevant to considering whether or not the port was safe. Notwithstanding the WHO’s requirements, controlling the spread of contagious disease, like terrorism, is an international concern and ports must ensure they have the capacity to control outbreaks regardless of their government’s policies. The core capacity requirements¹⁸⁰ are separated into two distinct areas: capacities necessary at all times and capacities for responding to public health emergencies of international concern.¹⁸¹ While all the circumstances will be relevant, the IHRs do provide useful guidance on the types of capacities ports should have.

It is likely that where a disease outbreak is suspected a vessel may not be permitted to berth.¹⁸² Where this is an order from a government authority (as opposed to the port authority) it may not affect the safety of the port. However, if the port is closed or the port authority directs the vessel to quarantine itself the question of whether or not the delay renders the port unsafe may be relevant.¹⁸³ At the other end of the spectrum, even the temporary

¹⁷³ *Ogden v Graham* (1861) 121 E.R. 901 was referred to above in the introduction to Part 3.

¹⁷⁴ [1916] 1 KB 138.

¹⁷⁵ It is impossible to ignore Sankey J’s nationalistic pride in this case: ‘it is impossible to regard the results achieved as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine’ (at 142).

¹⁷⁶ [1916] 1 KB 138, 141. It should be noted that delays caused by the closure of ports or terrorist activity may also render a port unsafe if they are of sufficient duration. Analysis of this significant area of the law of safe ports is outside the scope of this paper. The discussion above in Part 4.4 relating to *The Count* [2008] 1 Lloyd’s Rep 72 identifies some aspects of the law. See further Wilford, Coghlin and Kimball, above n 80, 195; *SS Knutsford Ltd v Tillmans & Co* [1908] AC 406; *Unitramp v Garnac Grain (The Hermine)* [1979] 1 Lloyd’s Rep 212.

¹⁷⁷ See generally Bulow, above n 13.

¹⁷⁸ See further the discussion above at Part 4.5.4 and above n 153.

¹⁷⁹ Bennett, above n 2, 58.

¹⁸⁰ It is to be recalled that the core capacity requirements are found in the IHR, Part IV and Annex 1(B) (see above Part 2.2 in this paper).

¹⁸¹ For example, at all times the port must ensure it is able to provide medical and diagnostic facilities for ill travellers as well as means for inspecting cargo. During events constituting emergencies or events of international concern, ports must be able to, for example, provide emergency health facilities, establish and maintain a public health emergency and contingency plan, provide assessment and care for affected travellers (including facilities for isolation and treatment), control entry and exit points, and apply disinfectant measures to cargo, containers, baggage, etc.

¹⁸² This was certainly the case in the recent incident involving the *Dawn Princess* where a cruise ship was quarantined in Sydney Harbour as cases of ‘swine flu’ had been discovered on board. Another ship, the *Pacific Dawn*, was ordered to wait off the coast of Queensland after crew members developed flu-like symptoms. See, eg, Rebecca Richardson and Peter Hawkins, *Dawn Princess cruise ship stuck in swine flu scare* (25 May 2009) *The Sydney Morning Herald* <<http://www.smh.com.au/travel/travel-news/cruise-ship-stuck-in-swine-flu-scare-20090525-bjw.html>> at 28 May 2009; Barbara Miller, *Pacific Dawn diverted over swine flu fears* (27 May 2009) ABC Radio transcript <<http://www.abc.net.au/pm/content/2008/s2582489.htm>> at 28 May 2009.

¹⁸³ As indicated above it is not the role of this paper to examine in detail the effects of delay upon the law of safe ports save as to say that delays of sufficient duration may render a port unsafe. See above n 176.

incapacitation of a port's pilots may be disastrous for trade.¹⁸⁴ Ultimately the port authority may find itself in a difficult dilemma as over-cautiousness may not be looked upon favourably by international shippers.

It is almost incontrovertible that a port must have a sufficient system in place to cope with the threat contagious diseases pose. Quarantining a ship for a relatively short period of time is at least comparable to ordering a ship to depart the port during unsafe weather conditions.¹⁸⁵ This level of preparedness would likely be looked upon favourably by a tribunal of fact.¹⁸⁶ Naturally the outbreak of contagious disease is more difficult to forecast than weather and the courts may be inclined take account of this. Nevertheless, during events of international concern or emergency a stricter approach may be warranted.¹⁸⁷

It is unclear what role abnormal occurrences will play. In the case of an international health scare, such as the recent outbreak of Influenza A (H1N1 'swine flu'), it could be said that the risk of an outbreak is a characteristic of most, if not all, ports. To the contrary, it is possible to foresee circumstances which are completely out of the ordinary.¹⁸⁸ The difficulty for charterers relying on this exception will be arguing that the risk of an outbreak is not an inherent feature of the port. With the high level of customs control apparent in ports¹⁸⁹ and the IHR requirement to retain some degree of preparedness, arguably the risk of spread of disease is a characteristic of ports. Whatever the case, the systems employed by port authorities must be effective in reducing the risk of an outbreak. At this point in time there is little to suggest what this may specifically involve.

6 Conclusion

One of the most troubling features of the law of safe ports is to what extent the charterer's obligation resembles that of strict liability. Especially in the context of administrative shortcomings, the evidence that a tribunal of fact considers relevant was often never available to the charterers.¹⁹⁰ As Cadwallader maintains:

If it is a fact that the only besetting sin of many charterers in breach of their undertaking is an ignorance of their ports' infirmities this must be considered the price to be paid for a freedom of choice in determining those ports to which ships may safely come.¹⁹¹

It may be that this is the logical answer. The master or shipowner of a vessel is also unlikely to be aware of inherent misgivings in a port's administration. There is, of course, always the possibility where a master is aware of shortcomings that he may be negligent in allowing the vessel to proceed thereby giving rise to a *novus actus interveniens*.¹⁹² Similarly, the limits to which the abnormal occurrence exception is presently entwined are better appreciated in light of Cadwallader's sentiment. This is also the view that Bennett takes. He argues that the situation 'represents a contractual allocation of risk, flowing from the charterer's employment rights, that will be reflected in the shipowner's and charterer's respective insurance arrangements.'¹⁹³

The cases establish that administrative shortcomings, failures in port systems and deficiencies in the set-up of a port are all capable of rendering a port unsafe. In cases such as *The Marinicki*, evidence of administrative shortcomings has had the effect of finding a port unsafe where it would otherwise have been impossible to reach

¹⁸⁴ See especially *The Nautilus* SMA 2622 (Arb. at N.Y. 1990) (which considered the inadequacy of pilots); *The Khian Sea* [1979] 1 Lloyd's Rep 545 in above Part 4.

¹⁸⁵ See, eg, *The Dagmar* [1968] 2 Lloyd's Rep 563; *The Khian Sea* [1979] 1 Lloyd's Rep 545; *The Adamastos* SMA 3416 (Arb. at N.Y. 1998) all discussed in Part 4 above.

¹⁸⁶ See generally *The Marinicki* [2003] 2 Lloyd's Rep 655 above in Part 4.

¹⁸⁷ See *The Nautilus* SMA 2622 (Arb. at N.Y. 1990) above Part 4.5.5.

¹⁸⁸ As *The Evia (No 2)* [1982] 1 Lloyd's Rep 334 (CA); [1982] 2 Lloyd's Rep 307 (HL) demonstrates, there may be no evidence leading up to the event indicating that an outbreak is imminent. As the law presently stands, the only comparable abnormal occurrence was a war. Therefore, the question may be whether or not such an outbreak is comparable to the outbreak of a war.

¹⁸⁹ See generally Australian Customs Service, *Annual Report 2007-08* (2008).

¹⁹⁰ See, eg, *The Marinicki* [2003] 2 Lloyd's Rep 655 where the deputy judge took account of evidence after the damage occurred (above Part 4).

¹⁹¹ F.J.J. Cadwallader, 'An Englishman's Safe Port' (1971) 8 *San Diego Law Review* 639, 652.

¹⁹² An example may be where the master is put on notice prior to entering a port that the depth charts are inaccurate. If the master proceeds and the vessel sustains damage it is arguable that the master's negligence was the cause of the damage/loss: see, eg, *The Star B* SMA 3813 (Arb. at N.Y. 2003). Of course, the reasonableness of the master's actions will need to be considered in light of the dilemma he faces: if he refuses a legitimate order he will expose the owners to liability but if he proceeds the ship may be damaged or destroyed: see *The Stork* [1955] 1 Lloyd's Rep 349, 363 (Singleton LJ).

¹⁹³ Bennett, above n 2, 81.

such a conclusion.¹⁹⁴ The law also adequately reflects the environment in which ships operate. Cases have emphasised the need not only for an adequate warning system, but that a port authority understands and accommodates situations requiring vessels to vacate the port.¹⁹⁵ Furthermore, as the law presently stands it would seem that both the absence of a system and a failure in an otherwise good system are indistinguishable. This outcome sets a very high standard for port authorities. Nonetheless it is only fair that a port authority be expected to undertake its duties with precision and diligence – the success of international shipping depends on adequate and safe facilities at each end of the operation.

The ever-increasing threats of terrorism and outbreaks of disease pose new difficulties for the law of safe ports. The common law has enjoyed a relatively gradual development throughout the decades. However, as international and domestic regulation in these areas increase there is a need for a definitive pronouncement on the law. It is unclear what level of risk of a threat materialising will render a port unsafe.¹⁹⁶ Additionally, the inevitable problem in characterising these risks as inherent features of particular ports adds to the confusion.¹⁹⁷ Although the charterer's secondary obligation remains untested it may experience popularity in the near future because of the rate at which a security or contagious disease threat may materialise. As a result of all this uncertainty, the industry may well see a surge in the number of due diligence safe port clauses included in charterparties.¹⁹⁸ Alternatively, a process of consultation between the master and charterer may become more common and, potentially, a component of charterparties.

¹⁹⁴ Recall *The Marinicki* [2003] 2 Lloyd's Rep 655 where the owners could not establish exactly when the obstruction came to rest in the channel and therefore could not prove it was prospectively unsafe. See also *The Aristagelos* SMA 1423 (Arb. at N.Y. 1980). Both discussed in Part 4 above.

¹⁹⁵ See especially *The Khian Sea* [1979] 1 Lloyd's Rep 545 (above Part 4).

¹⁹⁶ See the discussion above in Part 3 and in particular *The Saga Cob* [1992] 2 Lloyd's Rep 545.

¹⁹⁷ A definitive pronouncement on the *The Evia (No 2)*'s effect upon the conclusion in *The Mary Lou* is required (see the discussion above in Part 4). See generally Chong Gek Sian, above n 61.

¹⁹⁸ Similar to the clause in *The Saga Cob* [1992] 2 Lloyd's Rep 545.