

SAFE PORT PROMISE BY CHARTERERS: RETHINKING OUTSTANDING COMPLICATIONS

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1 Introduction

The modern law governing charterparties has long been sophisticated. At the heart of these intricacies lies a charterer's safe port promise. A charterparty allows for the charterer's otherwise unfettered right to exploit the earning capacity of the vessel,¹ subject however to the doctrine of safe port. The doctrine places a limitation on the charterers to not pursue financial interest at the expense of the safety of the vessel and its crew and thereby expose the shipowner to financial loss. This is of paramount importance to the shipowner because the contract of affreightment, be it voyage or time charter-party, dictates that masters and all crew members are to comply with the charterer's orders, as long as the orders are given in compliance with the charter-party.² Lamentably, as Roskill LJ has put, 'this concept should be simple, but unfortunately its very simplicity has led to a multitude of decisions which at one time raised considerable doubt as to the exact meaning and extent of the promise of safety.'³

The classic definition of a charterer's promise of safety, as laid down in *The Eastern City*, is 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.⁴

Whilst the Court has made every effort to elucidate the scope of the promise, the current state of law leaves much to be desired. The paper is dedicated to revealing uncertainties and deficiencies of the current law governing safe port promise and proposing appropriate changes, if any. The writer attempts, in the first part, to clarify the definition and the extent of safe port promise. In the second part, through an examination of the tests for assessing safety of the port and abnormal occurrence as an exception outside the scope of charterer's safe port promise, the writer analyses outstanding complications of the prevailing law. Then, the writer puts forward suggestions to address the uncertainties. The paper concludes with the writer's predictions of the future developments of safe port promise.

2 Safe Port Promise: What does it Entail?

2.1 Safe Port 'Warranty'

The safe port 'promise' is customarily referred to as a 'warranty' in judgments.⁵ Peculiar the term 'warranty' may seem, it means no more than a contractual promise.⁶ The term, as with the so-called warranty of seaworthiness, is used as a matter of convenience. It is to be distinguished from an expression of the legal consequences of breach or a term in the nature of a marine insurance warranty.⁷ Despite the historic and vast usage of the term, such use, as Lord Roskill cautioned, is inaccurate and potentially misleading.⁸ For the purpose of the paper, the charterer's 'warranty' as to the safety of the port will be referred to as 'promise'.

* LLB (City University of Hong Kong). The author wishes to acknowledge Dr. Poomintr Sooksripaisarnkit, Lecturer in Maritime Law, Australian Maritime College, University of Tasmania, for his unfailing support and invaluable advice on earlier drafts.

¹ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638, 652 (House of Lords, Hobhouse LJ).

² *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyd's Rep 212, 214 (Court of Appeal).

³ *Ibid* (Roskill LJ).

⁴ *Leeds Shipping Co Ltd v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127, 131 (Court of Appeal, Sellers LJ).

⁵ See for example *Vardinoyannis v The Egyptian General Petroleum Corp (The Evaggelos Th)* [1971] 2 Lloyd's Rep 200, 205 (Queen's Bench, Donaldson J); *The Hermine* [1979] 1 Lloyd's Rep 212, 215 (Roskill LJ).

⁶ D. Rhidian Thomas, 'The Safe Port Promise of Charterers from the Perspective of the English Common Law', (2006) 18 *Singapore Academy of Law Journal* 597, 597-8.

⁷ *Marine Insurance Act 1906* (UK) c 41, s 33(3) provides that:

'A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.'; See additionally an elaboration on the nature of warranty in *The Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd's Rep 191 (House of Lords).

⁸ *Kodros Shipping Corporation of Monrovia v Empresa Cubana De Fletes (The Evia (No.2))* [1983] 1 AC 736, 765 (House of Lords).

2.2 How Is Safe Port Promise Created?

Time charters often expressly provide that the vessel shall only be employed between safe ports. This may not be the case for voyage charterparties since they are drafted with a voyage between named ports in mind. Be that as it may, it is open to parties engaged in voyage charterparties to expressly endorse such a term.⁹ It is also commonplace for some standard form charterparties to expressly incorporate safe port clauses.¹⁰

The position with regard to implied safe port promise is less straightforward.¹¹ The courts may find for an implied safe port obligation under certain circumstances, but such implication has to be tested by the standard criteria under general contract law for implication of terms.¹² The dictum by Lord Clarke of Stone-cum-Ebony citing Cooke on *Voyage Charters* is of reference, which reads,

In principle, the more extensive the liberty, the greater the necessity to imply a warranty; conversely, the more specific the information given in the charter to the owner about the intended port or place, the more reasonable it is to conclude that he has satisfied himself as to safety, or that he is prepared to take the risk that it is unsafe.¹³

Therefore, a safe port promise will usually be implied in circumstances where ports are appointed in compliance with voyage orders given by time charterers; and where ports are appointed from a range of ports listed in the voyage charterparty. Conversely, an implied safe port promise will hardly be extended to cover ports expressly named in a charter and agreed to. Nonetheless, in majority of the charters, the need for such an implied term is obviated by the express term to the same effect.¹⁴

2.3 The Ambit Of The Promise

The safe port promise of the charterer extends to guarantee safety of the vessel from risks of whatever type. The risks can largely be categorized into three types, which include the most frequently encountered risk of physical damage to the vessel, for instance an inadequate depth of water, an absence of a safe anchorage given the weather conditions to which the port is subject. Secondly, risks having a political origin, for instance the imposition of a blockade or the outbreak of hostilities and thirdly, organizational risks arising from faulty administration by the port authorities.¹⁵

The safe port promise, however, only goes so far as to encompass characteristics of the nominated port, but not any unexpected, abnormal occurrence. The dividing line between the two is thin, which will be further discussed below. The overriding question is whether the port is ‘inherently safe’¹⁶ or safe ‘in relation to its inherent and intrinsic attributes.’¹⁷ This distinction is crucial as a charterer will not be liable for a breach of safe port promise unless the loss or damage to the vessel results from some hazards which have become features or characteristics of the port.

The safe port promise of a charterer also includes safe passage to and from the port, so that a vessel may safely ‘reach it, use it and return from it’.¹⁸ This entails prevention of vessel from risks such as ice en route preventing access to the port,¹⁹ or exceptionally risks at the open sea.²⁰ Distance from the port to the alleged risks is irrelevant. Nevertheless, according to Devlin J in *Grace v General SN Co*, ‘it is obvious in point of fact that the more remote

⁹ See for examples the amended Gencon form in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531 (Court of Appeal), *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd’s Rep 37 (Court of Appeal).

¹⁰ See for example standard form charterparties, *Baltimex 1939*, cl. 2 (lines 33-8); *NYPE 93*, cl. 5 (lines 70-6).

¹¹ Stephen Girvin, *Carriage of Goods by Sea* (2nd ed, OUP, 2011) para 21.24.

¹² A term may be implied under certain circumstances, for instance by the custom of a locality or by the usage of a particular trade in *Hutton v Warren* (1836) 1 M&W 460; or for giving business efficacy to the agreement in *The Moorcock* (1889) 14 PD 64 (Court of Appeal); or when parties, undoubtedly must have intended this term to form part of the contract in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592; or when it must be necessary to imply such term in *Liverpool City Council v Irwin* [1976] UKHL 1 (House of Lords); subject to the limitation that an implied term cannot be contrary to the express term, see *Lynch v Thorne* [1956] 1 WLR 303 (Court of Appeal).

¹³ *Ibid* 646 [28] citing Julian Cooke and others, *Voyage Charters* (3rd ed, Informa, 2007) para 5.32.

¹⁴ John F. Wilson, *Carriage of Goods by Sea* (7th ed, Pearson Education, 2010) 25-7.

¹⁵ *Ibid*.

¹⁶ *The Evia (No.2)* [1983] 1 AC 736, 765 (Roskill LJ).

¹⁷ *The Evia (No.2)* [1982] 1 Lloyd’s Rep 334, 342 (Sir Sebgag Shaw).

¹⁸ *The Eastern City* [1958] 2 Lloyd’s Rep 127, 131 (Court of Appeal, Sellers LJ).

¹⁹ *Grace v General SN Co* [1950] 2 KB 383.

²⁰ *Palace Shipping Co v Gans SS Line* [1916] 1 KB 138.

it is from the port, the less likely it is to interfere with the safety of the voyage.’²¹ Hence, the charterer’s safe port promise has wide coverage and breach of which attracts dire consequences.

2.4 Consequences For Breaking Safe Port Promise

Considerable uncertainties have arisen over the characterization of term for a safe port promise, whether it is one of condition, warranty or innominate term of the contract. Nonetheless, the preferred view is that breach of a safe port promise absolutely sounds in considerable damages. The characterization is immaterial since additional remedies are hardly sought in reality.²²

At common law, the implied safe port promise by the charterer to the shipowner is an absolute one.²³ In other words, if it turns out that the port is unsafe and consequently the vessel suffers loss or prejudice, the charterer is absolutely liable. No excuses may be further entertained. Express safe port promise, if not otherwise qualified will as well be construed as absolute.²⁴ However, absolute liabilities may be qualified by incorporating a due diligence clause into the charterparty. An example of such clause can be seen in clause 4 of Shellvoy 6 form, which provides that ‘charterers shall exercise due diligence to order the vessel only to ports and berths which are safe for the vessel.’ Due diligence would mean ‘reasonable care’, determined objectively unless the case arises from political unsafety, in which case the test is ‘necessarily subjective’.²⁵ In case of the charterers’ failure to exercise reasonable care in nominating a safe port where due diligence clause is involved, the charterer will similarly be liable for damages regarding consequences of its breach.²⁶

As of now, the law governing a charterer’s safe port promise may strike many for its complexities, however, at the end of the day, it all comes down to a matter of risk allocation between shipowners and charterers.

2.5 A Risk Allocation For Shipowners And Charterers

The question of whether a port is ‘safe’ is often said to be a question of fact turning on the circumstances of each case.²⁷ However, it is not as straightforward as that. Often, the question of safety ‘involves a process of assessment of potentials risks and the extent to which theoretically possible risks in fact bear upon the nominated port.’²⁸ For example, the determination of whether an anchorage is safe can be considered only if the weather and maritime conditions are taken into account. Likewise, evaluation of safety from an armed attack cannot be completed without assessing the degree of threat.²⁹

Additionally, the question of safety does not depend upon the assessment of the risk alone, but also upon the risk involved in the overall set-up of the port and whether any countermeasure is in place to counter the risks posed. Accordingly, a port is not necessarily unsafe because it is prone to occasional storm so long as adequate weather forecasts and organization of the port are in place as preventive measures.³⁰

Not only is a proper assessment of safety crucial for charterers to avoid potential dire consequences discussed above, modern risk allocation and management between shipowners and charterers, and their respective insurers dictate that tests for ascertaining what lies within and beyond the scope of safe port promise be unambiguous. Lamentedly, the following section elaborates on why the current tests fall short.

3 Fulfilling Safe Port Promises: Tests Fraught with Uncertainties?

The safe port formulation was devised far back in *The Eastern City* in the 1950s.³¹ Deplorably, even after the passing of more than half a century, the ambit of the charterer’s safe port promise and the exception of abnormal

²¹ *Grace* [1950] 2 KB 383, 391 (Devlin J).

²² *Ibid.*

²³ *The Hermine* [1978] 2 Lloyd’s Rep 37 (Donaldson J); *Lensen Shipping Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 52 LI LR 141, 148 (Court of Appeal, Greer LJ).

²⁴ Thomas, above n 6, 602.

²⁵ *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The Saga Cob)* [1992] 2 Lloyd’s Rep 545, 551 (Court of Appeal, Parker LJ).

²⁶ Francesco Berlingieri, ‘Safe Ports and Berths’ in Terence Coghlin and others (eds), *Time Charters* (7th ed, Informa, 2014) para 10.54.

²⁷ *Compania Naviera Maropan v Bowaters (The Stork)* [1955] 2 QB 68,105 (Queen’s Bench, Morris LJ).

²⁸ Howard Bennett, ‘Safe port clauses’ in D. Rhidian Thomas (ed), *Legal issues relating to time charterparties* (Informa, 2008) para 4.21.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *The Eastern City* [1958] 2 Lloyd’s Rep 127, 131 (Court of Appeal, Sellers LJ).

occurrence are still a far cry from being clear. This can be attributable to two main sources of uncertainties, firstly concerning the assessment of safety of the port and secondly regarding the notion of abnormal occurrence, which is particularly so after the Court of Appeal's fresh interpretation in *The Ocean Victory* in 2015.³²

3.1 The Assessment Of Safety: Beseet With Ambiguities?

3.1.1 Clarifying The Timing For Assessing The Safety Of The Port

Until the case of *The Evia (No.2)*, debates arose as to when the safety of the port should be assessed. One strand of legal opinion regarded charterers' undertaking as an absolute continuing promise of safety from all events save 'abnormal occurrence'.³³

This dictum, nonetheless, was rejected outright by the House of Lords in *The Evia (No.2)*.³⁴ *The Evia* was time-chartered on a Baltime form, which contains the safe port clause.³⁵ In March 1980, *The Evia* was directed to the port of Basrah and completed discharged on September 22. Nevertheless, on that day large scale hostilities had broken out and no ship was able to leave the waterway since.³⁶ Ultimately, the House of Lords ruled in favour of the charterer.³⁷ On the question of the assessment of safety, Lord Roskill laid down the test of prospective safety:

...the charterer's contractual promise must, I think, relate to the characteristics of the port or place in question and in my view means that *when the order is given* that port or place is *prospectively safe* for the ship to get to, stay at, so far as necessary and in due course, leave.³⁸

The House of Lords rejected the contention that the charterer's safe port promise constitutes an absolute continuing promise. Lord Diplock even went to the extent of depicting such proposition as a 'heresy'.³⁹ On the facts of the case, since Basrah had been prospectively safe at the time of nomination by the charterers, the hostilities between Iran and Iraq, which had arisen after her arrival, was unexpected and abnormal. Accordingly, the said circumstances lie beyond the scope of charterer's safe port promise. It is submitted that the case was rightly decided, as a charterer's undertaking cannot be expected to extend to an event beyond a charterer's contemplation, having regard to all relevant facts at the time of nomination. Whilst 'justice of the situation was clearly on the charterer's side', the test of prospective safety is susceptible to the criticism of 'straining construction to achieve justice', which has undesirable effects of plunging the assessment of safety into uncertainty.⁴⁰

3.1.2 The Test Of Prospective Safety: Straining Construction To Achieve Justice?

The Evia (No.2) propounded the notion of 'prospective safety of the port'. A question naturally arises, which is whether the prospective safety assessment requires subsequent unsafe conditions affecting the port appointed to be 'reasonably foreseeable' to the charterer at the time of nomination.⁴¹

The court's position in light of the issue is, with respect, ambivalent. To start off, nowhere in the judgment of *The Evia (No.2)* is there support for the idea of reasonable foreseeability to be applied in the consideration of prospective safety.⁴² In *The Erechthion*,⁴³ Staughton J (as he then was) declined to comment on the arbitrators' interpretation of *The Evia (No.2)*.⁴⁴ The arbitrators reasoned that a test of foreseeability must now be applied to the charterer's assessment of safety in fulfilling its safe port promise as a result of the House of Lords' decision in *The Evia (No.2)*. Upon their finding that 'reasonable enquiry by the Charterers would there not have detected it (the unsafety conditions)', the charterers were held not liable for the damage.⁴⁵

³² *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2015] EWCA Civ 16 (Court of Appeal).

³³ *Ibid* 277.

³⁴ *The Evia (No.2)* [1983] 1 AC 736, 763 (Roskill LJ).

³⁵ *Ibid* 750.

³⁶ *Ibid*.

³⁷ *Ibid* 763.

³⁸ *Ibid* 757 (Roskill LJ) (emphasis added).

³⁹ *Ibid* 750 (Diplock LJ).

⁴⁰ Charles Baker and Paul David, 'The Politically Unsafe Port', (1986) *Lloyd's Maritime and Commercial Law Quarterly* 112, 128.

⁴¹ David Chong Gek Sian, 'Revisiting the Safe Port', (1992) *Singapore Journal of Legal Studies* 79, 81-2.

⁴² Charles Baker, 'The Safe Port/Berth Obligation and Employment and Indemnity Clauses', (1988) *Lloyd's Maritime and Commercial Law Quarterly* 43, 45.

⁴³ *New A Line v Erechthion Shipping Co SA (The 'Erechthion')* [1987] 2 Lloyd's Rep 180 (Queen's Bench).

⁴⁴ *Ibid* 183 (Staughton J).

⁴⁵ *Ibid*.

At the other end of the spectrum, in *The Sage Cob*, Diamond J applied ‘foreseeability’ in the assessment of whether at the time of nomination the port was prospectively safe. *The Sage Cob* was on a time charter. Clause 3 of the charterparty provided: ‘Charterers shall exercise *due diligence* to ensure that the vessel is only employed between and at safe ports ... where she can always lie afloat.’⁴⁶ *The Sage Cob* came under attack by Eritrean guerillas while at the Ethiopian port of Massawa.⁴⁷ The plaintiff brought an action against the charterers for the substantial damage to the vessel.⁴⁸ Hence, the issue that the Court had to consider was, where an order was given by the charterer to direct the vessel to Massawa, whether the port was prospectively safe for *The Sage Cob* to get at, stay and leave.⁴⁹

Diamond J subscribed to the view that the correct approach is whether there was ‘a foreseeable risk’ on the date of nomination of port that the vessel might be exposed to attack by the Eritrean guerillas. If the risk is foreseeable, then his Lordship considered that such risk constituted a characteristic of the port and accordingly the port would be prospectively unsafe.⁵⁰ Although Diamond J did not enunciate whether the test of foreseeability is to be viewed from the perspective of a reasonable person, it appears to be what was intended.⁵¹ A closer scrutiny of Diamond J’s reasoning reveals the close analogy he drew between the test of prospective safety and the test of ‘reasonable foreseeability’.

However, if reasonable foreseeability is employed, it has the consequence of qualifying an absolute contractual obligation of safety and blurring the distinction between charterer’s qualified obligation under a due diligence clause and a supposedly unqualified safe port promise. It is to be noted that the due diligence clause was involved in *The Sage Cob* and Diamond J additionally advocated the application of ‘reasonable foreseeability’ for the test of prospective safety alone.⁵² In construing the due diligence clause, Diamond J contemplated that the due diligence clause ‘draws a distinction between a warranty of safety and the obligation to exercise due diligence’ and urged that full effect must be given to the qualification.⁵³

Deplorably, his own judgment fails to draw such a distinction. The said problematic dictum provides that

... a charterer will not commit any breach of the due diligence obligation if he orders a vessel to a port which is found to be prospectively unsafe in fact but which neither the charterer nor anyone for whom the charterer is responsible either *knew or ought to have known* to be prospectively unsafe.⁵⁴

Here, a charterer would not breach any due diligence obligation if he did not know or ‘ought not to have known’ of the unsafety, which is synonymous with whether charterer can ‘reasonably foresee’. In case reasonable foreseeability is employed as the test for prospective safety for the unqualified safe port promise, an astute reader will identify at once that a similar, if not the same standard is employed by Diamond J for the supposedly qualified safe port promise under due diligence clause.⁵⁵ Consequently, it is questionable whether Diamond J intended for the test of reasonable foreseeability to be applied to the test of prospective safety as he advocated in the earlier part of his judgment⁵⁶ or to the application of due diligence obligation.

In addition, Diamond J’s formulation of reasonable foreseeability to be applied to the assessment of prospective safety is somewhat at odds with Parker LJ’s dictum in the Court of Appeal, which provides that events occurring subsequently are relevant to the question of whether Massawa was a safe port.⁵⁷ In assessing prospective safety, Parker LJ took into account events subsequent to the alleged attack to *The Sage Cob* on September 7 1988. These include there being no further attack of any kind on shipping thereafter until January/ February 1990, and war risk underwriters requiring additional premiums in respect of vessels operating off the coast of Ethiopia until January 1990.⁵⁸ If reasonable foreseeability is employed to assess prospective safety, it is difficult to see how the use of subsequent events in the same assessment can be reconciled. The reason being the use of reasonable foreseeability

⁴⁶ *The Sage Cob* [1991] 2 Lloyd’s Rep 398, 399 (emphasis added).

⁴⁷ *Ibid* 400.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* 406 (Diamond J).

⁵¹ Chong, above n 41, 84.

⁵² *The Sage Cob* [1991] 2 Lloyd’s Rep 398 (QB).

⁵³ *Ibid* 408 (Diamond J).

⁵⁴ *Ibid* (emphasis added).

⁵⁵ Chong, above n 41, 94-6.

⁵⁶ *The Sage Cob* [1991] 2 Lloyd’s Rep 398, 406 (Diamond J).

⁵⁷ *The Sage Cob* [1992] 2 Lloyd’s Rep 545, 551 (Parker LJ).

⁵⁸ *Ibid* 550 (Parker LJ).

encompasses foresight and naturally precludes any possibility of the application of subsequent events to the same question, which involves hindsight and retrospection.

Assuming that the test of reasonable foreseeability follows the test of prospective safety, the next difficulty that arises is whether the state of knowledge will be objectively assessed from the perspective of a reasonable charterer or a port master. The test of reasonable foreseeability, as Baker and David aver, 'presumably refers to the expectations of a reasonably well-informed charterer and must contemplate more than purely hypothetical risks.'⁵⁹ Contrarily, Wolff J in an Australian case *Reardon Smith Line v. Australian Wheat Board* expressed doubt as to whether the charterer's knowledge is material in considering whether a 'safe wharf as ordered' constitutes a safe port promise.⁶⁰

The judgment delivered by Parker LJ sitting at the Court of Appeal in *The Saga Cob* further muddied the water. Upon the finding that the port of Massawa was prospectively safe despite an attack on the vessel by Eritrean guerrillas, Parker LJ commented that a port will not be regarded as unsafe 'unless the political risk is sufficient for a reasonable shipowner or master to decline to send his vessel there'.⁶¹ This part of the judgment was received with skepticism by Gatehouse J in *The Chemical Venture*, who doubted whether the established test of prospective safety in *Evia (No.2)* needed modification or evidence to be called from a reasonable shipowner or master.⁶²

If prospective safety is assessed from the perspective of a port-master, there is the apparent merit of the port-master being more acquainted and up to date with port information and set-ups. Hence, charterers would be expected to consult a port master before nomination of a particular port. On the other hand, while the contractual obligation remains with the charterer, it is preposterous that a charterer would otherwise be liable for a state of knowledge held by a person not in his shoes.⁶³ Nevertheless, it may be argued that the distinction between the two different perspectives is of little significance in this day and age where 'significant amount of information about the ports of the world is available to charterers from accessible sources'.⁶⁴ As of now, the legal position remains regrettably unclear and the prolonged debates are expected to continue.

The above examination of the test of prospective safety reveals that even after three decades of the House of Lords' pronouncement in *The Evia (No.2)*, uncertainties still exist as to whether the test of prospective safety necessitates the application of reasonable foreseeability and if so, from whose perspective. Provided that the test has compelling bearings on the charterer's accurate assessment of port safety, and *a fortiori*, the determination of liabilities between the shipowner and the charterer in case of losses, the prevailing uncertainties are plainly unacceptable.

Whilst the charterer has to shoulder the blame for its erroneous assessment in appointing prospectively unsafe ports, a charterer's safe port promise, recalling *The Eastern City* formulation, does not extend to some abnormal occurrence or dangers which cannot be avoided by good navigation and seamanship.⁶⁵ Attention should now be turned to another realm of uncertainties revolving abnormal occurrence as an exception to a charterer's safe port promise.

3.2 Ascertaining The Boundaries Of Safe Port Promise: Uncertainties Involving Abnormal Occurrence

The notion of abnormal occurrence is mysterious as few cases have dealt with the concept and 'it is not easy to find a turn of phrase which accurately expresses the notion'.⁶⁶ In 2015, the Court of Appeal in *The Ocean Victory* made a ground-breaking attempt to clarify the notion. The Court considered whether the rarity of the combination of two risks could constitute 'abnormal occurrence'.⁶⁷ Whilst the attempt is to be applauded, uncertainties involving the notion remain unresolved. Before turning to the uncertainties, the meaning of abnormal occurrence should first be ascertained.

⁵⁹ Baker and David, above n 40, 118.

⁶⁰ *Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* [1953] W.A.L.R. 25, 33 (Supreme Court of Western Australia, Wolff J).

⁶¹ *The Saga Cob* [1992] 2 Lloyd's Rep 545, 551 (Court of Appeal, Parker LJ).

⁶² *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep 508, 519 (Queen's Bench).

⁶³ Chong, above n 41, 86.

⁶⁴ Thomas, above n 6, 605.

⁶⁵ *The Eastern City* [1958] 2 Lloyd's Rep 127, 131 (Court of Appeal, Sellers LJ).

⁶⁶ *The Mary Lou* [1981] 2 Lloyd's Rep 272, 278 (Mustill J).

⁶⁷ The case is to be analyzed in detail below.

3.2.1 Meaning Of Abnormal Occurrence

The classic definition of *The Eastern City*, to reiterate, highlights that abnormal occurrence is excluded from the charterer's safe port promise.⁶⁸ Be that as it may, this is merely a broad statement of the law. Since the Court found the charterer to be in breach of the safe port promise,⁶⁹ the Court did not elaborate on the notion of abnormal occurrence.⁷⁰

The subsequent case, *The Mary Lou* sheds more light on the matter.⁷¹ According to Mustill J, abnormal occurrence encompasses accidents which are due to misfortunes but not the direct consequence of the charterer's order to the port. Mustill J then gave the example of a storm of unprecedented violence catching the ship in the nominated port and driving her ashore.⁷² Here, the choice of port is merely an indirect cause of the loss, for the ship would have escaped loss if she had been ordered to some other port. Nevertheless, it is not the direct cause, for the choice of port does not involve a choice by the charterer of the risks of this unexpected event.⁷³ Accordingly, Mustill J held that

The loss is not recoverable unless events of the type and magnitude are *sufficiently regular* or at least *foreseeable* to say that the risk of their occurrence is an 'attribute' or 'characteristic' of the port. Or it may be said that 'abnormal' or 'casual' events do not found a claim.⁷⁴

Until *The Ocean Victory*, cases subsequent to *The Mary Lou* have not re-examined the definition of abnormal occurrence. That being said, subsequent cases including *The Evia (No.2)*,⁷⁵ *The Lucille*⁷⁶ and *The Saga Cob*⁷⁷ do offer valuable insights as to how the aforementioned principles are applied.

3.2.2 Application Of Abnormal Occurrence

The facts of *The Evia (No.2)* do not require reiteration.⁷⁸ In that case, although abnormal occurrence was not contested by both parties, as it may be recalled that both parties debated the existence of frustration of the charterparty,⁷⁹ the decision was underpinned by the Court's finding of abnormal occurrence. Lord Roskill took the view that

I cannot think that ... some *unexpected and abnormal event* thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial.⁸⁰

In view of these principles, Lord Roskill held that since the port of Basrah was prospectively safe at the time of nomination, and that the unsafety that arose after *The Evia*'s arrival was due to an unexpected and abnormal event, namely the hostilities between Iran and Iraq, the charterers had not breached its safe port promise.⁸¹ Since it has previously been discussed that *The Evia (No.2)* had corrected the erroneous view of the charterer's promise of safety being a continuing guarantee of the port's safety,⁸² it is therefore useful to examine whether the development of the notion of abnormal occurrence would in any way be affected. In particular, it would be of great assistance to compare and contrast *The Lucille*⁸³ and *The Saga Cob*.⁸⁴

⁶⁸ *The Eastern City* [1958] 2 Lloyd's Rep 127, 131 (Court of Appeal, Sellers LJ).

⁶⁹ *Ibid* 130.

⁷⁰ *Ibid* 144.

⁷¹ *The Mary Lou* [1981] 2 Lloyd's Rep 272, 283.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid* (emphasis added).

⁷⁵ *The Evia (No.2)* [1983] 1 AC 736.

⁷⁶ *Uni-Ocean Lines Pte Ltd v C- Trade SA (The Lucille)* [1984] 1 Lloyd's Rep 244 (Court of Appeal).

⁷⁷ *The Saga Cob* [1992] 2 Lloyd's Rep 545.

⁷⁸ *The Evia (No.2)* [1983] 1 AC 736.

⁷⁹ *Ibid* 746.

⁸⁰ *Ibid* 757 (Lord Roskill) (emphasis added).

⁸¹ *Ibid* 763 (Lord Roskill).

⁸² See discussion in 3.1.1.

⁸³ *The Lucille* [1984] 1 Lloyd's Rep 244 (Court of Appeal).

⁸⁴ *The Saga Cob* [1992] 2 Lloyd's Rep 545.

The Lucille was similar in time sequence with *The Evia (No.2)*. The vessel was ordered to proceed to the port of Basrah.⁸⁵ Upon the completion of discharge of the cargo, the vessel was unable to leave because like *The Evia*, she was trapped in the waterway by the war between Iran and Iraq.⁸⁶ The question that the Court was invited to consider was whether the subsequent trapping of the vessel was to be treated as an ‘abnormal occurrence’.

The arbitrators held in the affirmative and found that the charterers were not in breach of their safe port promise.⁸⁷ It is of interest to consider the opinion by the dissenting arbitrator, Mr. Selwyn, which was endorsed on appeal. He accorded ‘abnormal occurrence’ its natural and ordinary meaning, with ‘abnormal’ taken to mean ‘deviating from the ordinary rule or type’ or ‘contrary to rule or system’.⁸⁸ He opined that from ancient sieges to modern times, it had been a cardinal rule that tactics of war had been to deprive the enemy of supply by blockading and destroying his ports. Given that wars necessarily followed sieges and blockades, going to Basrah ‘with every chance of being blockaded’ and going to a port ‘where out of the blue and without warning the port is attacked’ was to be distinguished.⁸⁹ The Court of Appeal upheld this as the correct approach and found that the subsequent trapping fell under the former category. Consequently, it did not constitute an abnormal occurrence.⁹⁰

The Lucille is to be contrasted with *The Saga Cob*, which seems to fall under the latter scenario of ‘where out of the blue and without warning the port is attacked’. *The Saga Cob* was ordered to the port of Massawa. When the vessel was anchored, it was attacked by Eritrean guerillas.⁹¹ The issue was whether the loss was caused by abnormal occurrence such that charterers can be shielded from liabilities. Similar to *The Lucille*, the Court in *The Saga Cob* took into account the foreseeability of the concerned occurrence which had brought about the loss. Specifically, the Court considered the fact that a guerilla attack might take place anywhere at any time and by any means could not render a seaborne attack foreseeable. Otherwise, sporadic guerilla or terrorist activity on land, a feature common to many ports would accordingly render the ports unsafe.⁹² On the facts of the case, since the previous similar attack dated back to three months ago and that there was no further occurrence of similar accidents after the concerned guerilla attack in the next four months, the Court held that the concerned guerilla attack was an abnormal occurrence.⁹³

Comparing *The Lucille* and *The Saga Cob*, although outcomes of the two cases are diametrically opposite, both cases had drawn references from factors laid down in *The Mary Lou* in identifying abnormal occurrence. As it may be recalled from *The Mary Lou*, ‘the loss is not recoverable unless events of the type are sufficiently regular or at least foreseeable to say that the risk of their occurrence is an ‘attribute’ or ‘characteristic’ of the port.’⁹⁴ The foreseeability of a blockade following the Iran-Iraq war was a factor taken into account in *The Lucille* in considering whether the subsequent trapping of the vessel constituted abnormal occurrence. Similarly, *The Saga Cob* included the foreseeability of the occurrence of the guerilla attack and the regularity of the said attack, namely similar occurrence immediately before and after the loss in the same equation. As these two later decisions are consistent with the general principles of abnormal occurrence laid down in *The Mary Lou*, this illustrates that the development of abnormal occurrence has not changed much since *The Evia (No.2)*.⁹⁵

3.2.3 The Ocean Victory: Revamping The Notion Of Abnormal Occurrence?

It is not until *The Ocean Victory* that uncertainties involving the notion came to light, some clarified, some unresolved.⁹⁶ Unlike the previous cases, the risk in *The Ocean Victory* was not one of political origin. In 2006, *The Ocean Victory* attempted to leave the port of Kashima, Japan, in a gale. When sailing from the port, the vessel ran aground.⁹⁷ All the charter-party and sub-charter-party had incorporated an express safe port promise by the charterer(s) that the vessel shall be employed only between safe ports.⁹⁸ In light of the casualties, the hull underwriters, as assignees of the owners under the bareboat charter, claimed against the time charterers for damages arising from the total loss of the vessel and related costs.⁹⁹

⁸⁵ *The Lucille* [1984] 1 Lloyd’s Rep 244, 245.

⁸⁶ *Ibid* 247.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* 250.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* 250-1.

⁹¹ *The Saga Cob* [1991] 2 Lloyd’s Rep 398, 400.

⁹² *The Saga Cob* [1992] 2 Lloyd’s Rep 545, 550-1.

⁹³ *Ibid* 551.

⁹⁴ *The Mary Lou* [1981] 2 Lloyd’s Rep 272, 278-9.

⁹⁵ *The Evia (No.2)* [1983] 1 AC 736.

⁹⁶ *The Ocean Victory* [2015] EWCA Civ 16.

⁹⁷ *Ibid* [2].

⁹⁸ *Ibid*.

⁹⁹ *Ibid* [4].

The determination of liabilities turns upon the question of whether there had been a breach of the safe port promise by the charterers. Both parties had accepted that if the loss of vessel was brought about by an abnormal occurrence, then the charterers would not be in breach.¹⁰⁰ Thus, it is incumbent upon the Court to decide upon the correct test for abnormal occurrence, particularly when the situation is complicated by the loss of *The Ocean Victory* being attributable to a combination of two weather conditions, namely long waves and a severe northerly gale.¹⁰¹

At first instance, Teare J had held the port to be prospectively unsafe because neither long waves nor the gale could individually be regarded as abnormal occurrence.¹⁰² His Lordship held that

...it may well be a *rare event for these two events to occur at the same time* but nobody at the port could, I consider, be surprised if they did... Long waves were clearly a feature of the port and low pressure systems generating the gale force winds cannot, in my judgment be regarded as abnormal.¹⁰³

This approach was rejected on appeal. The Court of Appeal was of the view that it was erroneous for Teare J to address the respective constituent elements of the combination separately.¹⁰⁴ In other words, it was wrong for him to consider each component on its own and upon the finding that the occurrence of the individual element is common, come to the conclusion that a combination of these elements constitutes characteristics of the port.¹⁰⁵

Instead, the Court of Appeal put forward the appropriate test: the unitary question. When faced with concurrent factors, the judge should ask whether the simultaneous coincidence of the two critical features, in this case, the long waves and the gale force winds, could be said to be an abnormal occurrence.¹⁰⁶ The possibility of simultaneous occurrence of the combination, based on Teare J's findings at first instance, was 'rare' and thus the Court of Appeal concluded that it constituted an abnormal occurrence.¹⁰⁷

It is suggested that the decision is correctly decided, for it is contrary to common sense if the rare, simultaneous occurrence of long waves and northerly gale can constitute normal characteristics of the port, which requires sufficient foreseeability and regularity. In addition, although 'each event in isolation might be sufficiently foreseeable and regular... each event in isolation would not have led to the casualty'.¹⁰⁸ Never before has the court examined the application of abnormal occurrence in the situation of a simultaneous occurrence of a combination of factors. *The Ocean Victory's* ground-breaking attempt as such is to be applauded. Be that as it may, *The Ocean Victory* presents new challenges that the unitary question may fall short of answering.

Simply put, the writer envisages scenarios in which the loss of the vessel may be attributable to a combination of two factors, but each contributes differently to the loss. That is to say, one factor contributes more than the other. In that case, would it still be right to ask the unitary question if the two factors are of different proportions in terms of their contributions to the loss? Consider also the opposite case of *The Ocean Victory*, where there is an accident caused by 'the combination of a not unexpected event' but two individual features of the port which have never led to any previous accident, would the unitary question still apply?¹⁰⁹ While the unitary question is suited to the scenario in *The Ocean Victory*, chances are that the same approach may not be applicable to the other. When those situations emerge, the court will again be tested on what ought to be the appropriate approach to the concurrent occurrence of a combination of factors. In other words, whether the unitary question can be of further application in subsequent cases.

4 Safe Port Promise: More than Mere Empty Promises

As such, the following suggestions are put forward as solutions to the aforementioned issues. It is hoped that safe port promises by the charterer may thereby be honoured rather than evaded as empty promises.

4.1 The Test Of Prospective Safety: The Proper Construction

¹⁰⁰ Ibid [14].

¹⁰¹ Ibid [15].

¹⁰² *The Ocean Victory* [2013] EWHC 2199 [134].

¹⁰³ Ibid [127] (Teare J) (emphasis added).

¹⁰⁴ *The Ocean Victory* [2015] EWCA Civ 16 [55]-[6].

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid [63]-[4].

¹⁰⁸ Paul Todd, 'Safe port issues', (2015) *Lloyd's Maritime and Commercial Law Quarterly* 265, 271.

¹⁰⁹ Simon Kverndal QC, 'The 'Ocean Victory' and The Test of 'Abnormal Occurrence'' (Paper presented at the Maritime Business Forum on Unsafe Ports, London Shipping Law Centre, 15 April 2015) para 11.

Returning to the confusion over the test of prospective safety, on a proper construction, the silence on the applicability of reasonable foreseeability to the test of prospective safety in the *The Evia (No. 2)* may well have been deliberate.¹¹⁰ In the judgment delivered by Lord Roskill, there is no indication as to the knowledge standard required of a charterer. The only closest expression to a knowledge requirement is the use of ‘in all human probability’. The relevant judgment goes,

It is clearly at that point of time when that order is given that that contractual promise to the charterer regarding the safety of that intended port or place must be fulfilled. But that contractual promise cannot mean that the port or place must be safe when that order is given, for were that so, a charterer could not legitimately give orders to go to an ice-bound port which he and the owner both knew *in all human probability* would be ice-free by the time that vessel reached it.¹¹¹

Indeed, the phrase appears no more than an expression modifying the test of prospective safety and the phrase may be re-formulated, as suggested by an academic commentator, as follows:

...an elaboration of the proposition that the charterer is to nominate a prospectively safe port but the charterer is not responsible for damage, delay or loss which occurs to the vessel as a result of abnormal occurrence, i.e. an occurrence which was not, *in all human probability*, expected to occur.¹¹²

It has been argued previously that that to apply reasonable foreseeability in the test of prospective safety would overly strain construction.¹¹³ It is to be recalled that the Court of Appeal in *The Saga Cob* contemplates the consideration of events subsequent to the loss in the test of prospective safety, which precludes the application of foresight and that to equate reasonable foreseeability with prospective safety would blur the distinction between the unqualified, absolute safe port promise and the qualified safe port promise under an express due diligence clause. Accordingly, it is plainly undesirable for the sake of clarity of the law that the test of reasonable foreseeability be employed in assessing prospective safety of a port. The discussion of whether such foresight should be from a charterer or port master’s perspective is therefore rendered unnecessary.

Additionally, since the phrase ‘in all human’s probability’ is nothing more than a modification of the prospective safety test, the preferred view is for the charterer to take into account all the surrounding facts and circumstances relevant to the safety of the port which were prevailing at the time of nomination.¹¹⁴ The writer suggests that the said phrase should not stand in the way of the charterer in conducting an all-encompassing enquiry regarding the prospective safety of a port at the time of nomination.¹¹⁵ Here, unlike the reasonable foreseeability test, events subsequent to the alleged loss are permitted to be taken into the consideration of the test of prospective safety, so long as the said event or characteristic was apparent at the time of port nomination. The test is also in line with the corrected view that the charterer’s safe port promise does not constitute an absolute continuing promise, but only extends to circumstances of which it was aware at the time of port nomination.

4.2 Abnormal Occurrence: The Way Forward

Until *The Ocean Victory*, the notion of abnormal occurrence has not been applied significantly. The limited application of the notion of abnormal occurrence may be due to the close proximity between the test of prospective safety and the notion. The said problem was revealed in the *Ocean Victory* in which the Court of Appeal pronounced that

... a similarly realistic approach has in our view to be adopted to the determination of the essentially factual question whether the event giving rise to the particular casualty is to be characterized as an ‘*abnormal occurrence*’ or as *resulting from some ‘normal’ characteristic of the particular port at the particular time of year.*¹¹⁶

At first glance, the quoted paragraph may be passed without remarks. However, a closer look reveals that the Court of Appeal has equated abnormal occurrence with the opposite of characteristics of the port, and the opposite of abnormal occurrence with characteristic of the port. This problem appears to have stemmed from *The Mary*

¹¹⁰ *The Evia (No.2)* [1983] 1 AC 736, 757.

¹¹¹ *Ibid* (Roskill LJ) (emphasis added).

¹¹² Chong, above n 41, 88 (emphasis added).

¹¹³ Baker, above n 42, 45.

¹¹⁴ Alexander McKinnon, ‘Administrative Shortcomings and Their Legal Implications in the Context of Safe Ports’, (2009) 23 Australian & New Zealand Maritime Law Journal 186, 191; Chong, above n 41, 89.

¹¹⁵ *Ibid*.

¹¹⁶ *The Ocean Victory* [2015] EWCA Civ 16 [53] (emphasis added).

Lou,¹¹⁷ where it was held that only losses of the type and magnitude which are sufficiently regular or at least foreseeable would constitute attributes or characteristics of the port. Alternatively, 'it may be said that 'abnormal' or 'casual' events do not found a claim.'¹¹⁸ Mustill J had by this suggested that an event was abnormal if not characteristic of the nominated port.

The same approach was followed in *The Evia (No.2)*,¹¹⁹ and is the most illustrative in *The Saga Cob*,¹²⁰ where Diamond J puts that

If the particular risk amounts to an abnormal occurrence then it would **usually** follow that it does not constitute a characteristic of the port and so does not render the port prospectively unsafe. This is because, **in the ordinary way**, 'abnormal occurrence' is the opposite side of the coin to something which is a characteristic of the port.¹²¹

Indeed, Diamond J in *The Saga Cob* commented that there is no longer any special significance in the expression 'abnormal occurrence'.¹²² His Lordship remarked that if the court concludes that one of the characteristics of the port gives rise to a source of prospective unsafety, then it is basically not open to the charterers to argue otherwise that such risk is unexpected and abnormal.¹²³ In light of the above, 'abnormal occurrence' may hence be derived as the port being prospectively safe, but the loss was caused by some unexpected, abnormal event.¹²⁴ As a result, the test of abnormal occurrence is of 'reduced significance'.¹²⁵

By the expressions 'usually' and 'in the ordinary way', Diamond J still leaves some room where an abnormal occurrence may not be the exact opposite of characteristics of the port. However, this is absent from subsequent authorities. This is problematic in that it potentially denies the concept of abnormal occurrence of any substantive significance. 'Since the charterer's promise of safety is confined to the characteristics of the nominated port, events that are not so characteristic are *ex hypothesi* outwith its scope'.¹²⁶ Provided that the definition of safe port promise by a charterer was made clear in *The Eastern City* to exclude abnormal occurrence, equating the notion of abnormal occurrence with the opposite of port characteristics would mean to reiterate the definition of safe port promise, thereby depriving the notion of any meaning.¹²⁷

Worse still, such a reading may have the danger of weaving the test of prospective safety and the test of abnormal occurrence into a single test.¹²⁸ When a port is found to be prospectively unsafe, then the test of abnormal occurrence basically have no application. By the same token, when a port is found to be prospectively safe, then the loss will be brought about by some kind of abnormal occurrences. This logic is flawed for the test of abnormal occurrence, based on the formulation in *The Eastern City* was intended to provide the charterer an additional protection as an exception outside the scope of its safety promise.¹²⁹ To equate the two tests would be to overwrite the limitation imposed by Sellers LJ on a charterer's safe port promise, which may potentially subject the charterers to abuse.

A review of the current legal position regarding the notion of abnormal occurrence reveals new challenges presented by *The Ocean Victory*,¹³⁰ particularly the inadequacies of the newly formulated unitary question in dealing with potential scenarios of simultaneous occurrence of a combination of factors. The same case also exposes the age-old problem of courts in treating abnormal occurrence as the antithesis of characteristics of port. Certainty, which is of paramount importance to the risk allocation between charterer and shipowner, thereby requires that solutions to the aforementioned issues be spelled out.

The proper assessment of the safety promise of the charterer accordingly should be two-fold, firstly, whether the port is prospectively safe. If it is, the risk may *probably* be characterized as abnormal. If it is not, *normally* abnormal occurrence has no application. Care must be taken to avoid jumping to the conclusion either way. It is suggested that it is necessary notwithstanding any conclusion reached at the first stage to consider still secondly,

¹¹⁷ *The Mary Lou* [1981] 2 Lloyd's Rep 272.

¹¹⁸ *Ibid* 278 (Mustill J).

¹¹⁹ *The Evia (No.2)* [1983] 1 AC 736.

¹²⁰ *The Saga Cob* [1991] 2 Lloyd's Rep 398.

¹²¹ *Ibid* 405 (Diamond J) (emphasis added).

¹²² *Ibid*.

¹²³ *Ibid*.

¹²⁴ Chong, above n 41, 110.

¹²⁵ *Ibid* 113.

¹²⁶ Bennett, above n 28, para 4.32

¹²⁷ *Ibid*, para 4.29.

¹²⁸ Kverndal, above n 109, paras 13-8.

¹²⁹ Bennett, above n 28, para 4.29.

¹³⁰ *The Ocean Victory* [2015] EWCA Civ 16.

whether the risk can be categorized as an abnormal occurrence. Other than affording the charterer an additional protection from liabilities, this is important because ‘beyond the notion that a risk may be inherently abnormal, it is also possible for the manifestations or consequences of a characteristic risk to be abnormal’.¹³¹ For instance, it may be a characteristic of a port to be vulnerable to unexpected gales, but on a particular occasion, the occurrence of gale may be so ferocious that it generates severe consequences and can be qualified as an abnormal occurrence on this occasion alone. Moreover, abnormal occurrence may also subsequently recur to the extent that it becomes a characteristic of the port.¹³² Therefore, the distinction between characteristics of port and abnormal risks is thin and entails complex questions of fact and degree. At the end of the day, there is no hard and fast rule to ascertaining whether a risk is an abnormal occurrence.

In spite of the fact that ‘abnormal would appear to be the antithesis of normal’,¹³³ when determining liabilities between shipowners and charterers per the two-limb test submitted above, the court should also take into account factors laid down in *The Mary Lou*, including foreseeability and regularity of risk, and factors such as port set-up and attributes.¹³⁴ In such a case, it is suggested that the interests of both parties can be best attended to and that the notion of abnormal occurrence will be accorded true effects.

5 Conclusion

More than half a century since *The Eastern City* propounded the seminal definition for a charterer’s safe port promise, the modern world has still stumbled over the assessment of safety and the ascertainment of the notion of abnormal occurrence. In face of these two outstanding sources of uncertainties, the writer advocates against the use of reasonable foreseeability in the test of prospective safety. The writer also suggests that it is high time for the newly formulated unitary question be considered for further application when the loss of the vessel comes down to a simultaneous occurrence of a combination of factors. Caution must also be exercised to avoid the consideration of abnormal occurrence from entering the equation of characteristics of the port or vice versa. Through revealing areas of uncertainties and proposing related solutions revolving the charterer’s safe port promise, it is hoped that the doctrine of safe port will be made simpler, as it was once intended to be.¹³⁵ In light of the prevailing complications, the writer invites attention to revisit issues in this area. In particular, the writer looks forward to how the wiser heads sitting in the Supreme Court of *The Ocean Victory* will untangle the twisted knots of safe port promise.¹³⁶

¹³¹ Thomas, above n 6, 616.

¹³² *Ibid.*

¹³³ *Ibid.* 615.

¹³⁴ Kverndal, above n 109, para 18; *The Mary Lou* [1981] 2 Lloyd’s Rep 272, 278-9.

¹³⁵ *The Hermine* [1979] 1 Lloyd’s Rep 212, 214 (Roskill LJ).

¹³⁶ The Supreme Court, Case details: *Gard Marine and Energy Limited (Appellant) v China National Chartering Co Ltd and another (Respondents)* (2016) Judicial Committee of The Privy Council <<https://www.supremecourt.uk/cases/uksc-2015-0037.html>> at 28 December 2016.