

**How are the courts approaching “abnormal occurrence” and "assumption of risks"
in the test for a safe port? (Gard v China National, the “Ocean Victory”)**

Steven Berry QC, Essex Court Chambers

8th February 2017

1. Context: the nature of the normal safe port warranty

- 1.1. Whatever the natural meaning of such words as “employed ... between safe ports” (in the old NYPE form) and “shall load and discharge at any safe place ... which shall be designated and procured by the Charterer” (in the old Asbatankvoy form), a safe port warranty is not a promise by the charterer that the port will be safe for the vessel when it arrives. That would make the charterer, or the charterer’s insurer, the insurer of abnormal and unexpected risks (**Evia no.2 [1983] 1 AC 736 at 757**).
- 1.2. Instead it is a promise, at the time of “nomination”, about the state of the port at that time (**Evia no.2 [1983] 1 AC 736 at 749, 757, 765**). In a time or demise charter this will be the time of the order. In a voyage charter permitting nomination from a range it will presumably be the time of nomination. In a voyage charter naming a port or ports it will presumably be the date of the charter.
- 1.3. Despite being a promise at and about the port at the time of nomination, it is a promise of “prospective” safety. It is that the state of the port *now* is such that “in all human probability” it *will be* safe when the vessel arrives (**Evia no.2 [1983] 1 AC 736 at 749, 757, 765**).
- 1.4. The complicated nature of the promise, which is not obvious from its actual wording, has side effects. Rules are required to allocate liability for events after nomination before the vessel arrives. There may be an obligation and a right to re-nominate a period time charter but not in a defined trip time charter or a voyage charter.

2. **The content of the warranty.**

- 2.1. The formulation in **Scrutton** following the **Evia no.2** (now in the 23rd ed., 2015, para. 9-015, p.167) is that “the port must be prospectively safe, ie. its characteristics both permanent and temporary, must be such that in the absence of some unexpected and abnormal event it will be safe for the ship at the time when she actually arrives there”.
- 2.2. This is partly derived from the **Eastern City** [1958] 2 Lloyd’s Rep 127, 131 “a place will not be safe unless, in the relevant period of time, the particular ship can reach it, remain in it and return from it without, in the absence of some abnormal occurrence, being exposed to danger”. “Event” and “occurrence” are in this context synonymous.
- 2.3. Two things at least are therefore necessary for breach of warranty. First, a dangerous characteristic (sometimes called a feature) of the port at the time of nomination; and, second, the absence of abnormal occurrence or event giving rise to the danger.
- 2.4. In terms of risk, the effect of the test is that the charterer is not responsible for unexpected or abnormal occurrences after nomination and is in this sense not the “insurer” of the ship.

3. **Gard v China National, the “Ocean Victory”: the facts**

- 3.1. The relevant charterparty was by demise and contained an undertaking by the charterer that the vessel would trade between safe ports [headnote]. The vessel was ordered to Kashima.
- 3.2. Kashima is a modern port in Japan with a first class safety record with a large volume of ships and no previous casualty of a similar nature: [2015] EWCA Civ 16, [2015] 1 Lloyd’s Reports 318 at [46].
- 3.3. It was exposed to “long waves” which might pose danger to a vessel at berth: [23] – [29]. Long waves were “infrequent” (“about two to three times a year”) and their incidence “unpredictable” [23], [26], [48(i)].
- 3.4. It was also exposed to occasional strong northerly winds which might prevent a vessel leaving berth: [33], [48]. The Judge had found these were “not unusual” [33]. The evidence was either 17 or 22 occasions in 24 years [33], [48(ii)].

- 3.5. The Judge found these were each features (or characteristics) of the port [42].
- 3.6. The Judge found it was “rare” but “at least foreseeable” for the two events to occur at the same time [42].
- 3.7. The vessel was in fact exposed to the two events at the same time and this caused the damage (there was an appeal on causation but the Court did not decide it).

4. **Restatement of the test in the Court of Appeal.**

- 4.1. It was common ground that if the damage was caused by an “abnormal occurrence” the charterer was not in breach [14]. “A charterer does not assume responsibility for unexpected and abnormal events which occur suddenly and which create conditions of unsafety after he has given the order to proceed to the relevant port”.
- 4.2. A charterer was only liable for “normal” characteristics or features of the port which create danger: [53], [54], [55]. The requirement for a dangerous characteristic or feature is now explicitly the opposite side of the coin to “abnormal occurrences”.
- 4.3. The question is therefore on which side of the dichotomy does the causative occurrence fall: “abnormal occurrence or normal characteristic of the port” [56].
- 4.4. “Normal” is an ordinary English word. Whether something is normal must be approached “realistically”. In this context a “normal characteristic” means or is synonymous with one that “occurred sufficiently frequently” so as to become a “characteristic of the port” [54]. This requires assessment of “past frequency” and “likelihood of it occurring again” [63].
- 4.5. Despite dicta of Mustill J in the **Mary Lou** (“sufficiently regular or at least foreseeable”), foreseeability alone is not enough [58], [59] (by reference to the examples of San Francisco and Syracuse).

5. **Application of the test to the facts**

- 5.1. The Court, overruling the Judge, held that the combination of long waves and northerly winds was the cause, and that was not a normal characteristic of the port but was an abnormal occurrence [55] – [64].

5.2. Important factors were:

5.2.1. The relevant occurrence was the “critical combination” of the two occurrences, not the two components in isolation [42], [55], [56];

5.2.2. That combination was “rare” [42], [62].

5.2.3. The casualty was “remarkable” and “unprecedented” [46];

5.2.4. There was no evidence of lack of “surprise”, or recognition of “clear risk” at the port [60].

6. **Practical considerations in view of the “Ocean Victory”**

6.1. It is necessary to define the causative occurrence. Careful definition of the causative occurrence (whether a single event or combination of events) is needed in order to analyse its frequency.

6.2. It is necessary to do a frequency analysis on the causative occurrences. If “rare” (let alone unprecedented) there will very probably be no breach of warranty, at least if there is a long history at the port. In practical terms this will often be difficult for an owner and its insurers.

6.3. Otherwise there is little guidance on what degree of “past frequency” is required. The Court did not overrule the Judge’s conclusions that the long waves and strong northerly winds were themselves in isolation normal and thus characteristics of the port [42], [49(ii)(a)], [62]. Perhaps 3 times a year, or 17 or 22 times in 24 years, is sufficiently frequent.

6.4. It is necessary to check for precedents for the casualty. If unprecedented, at least if there is a long history at the port of the same type of vessel, breach is unlikely. But one precedent, or few precedents, may be insufficient, even in the absence of corrective action, if “rare”.

6.5. It is necessary to investigate the expectations and reactions of those familiar with the port. Were they “surprised” by or *per contra* did they recognise a “clear risk” of the occurrence ? The Court was keen to overrule the Judge’s factual findings that “nobody at the port could ... be surprised” by and “there must have been a clear risk” [60]. Again, in practical terms, this will often be difficult for an owner and its insurers.

7. **Merits of the decision on the safe port test**

7.1. The simplest, clearest and natural interpretation of the usual safe port warranty is a continuing warranty that the port will be safe, with the result that the warranty is broken if the ship is damaged by any “feature” or combination of features of the port, whether usual, abnormal or not. But it is too late to change the law on this.

7.2. The curious nature of the safe port warranty necessarily implies some form of carve out for “abnormal occurrences”. This encourages factual disputes and legal costs. The approach of the Court of Appeal, calling for frequency analyses, investigation of precedent, and investigation of the expectations at the port, exacerbates this.

7.3. The tendency to require that the causative occurrence be frequent, preceded and recognised goes some way to turning the safe port warranty into an obligation of due diligence by the charterer. Tanker time charters (eg. Shelltime 4) commonly contain an express warranty of due diligence only. The courts may be assimilating the two different forms of warranty.

8. **Exclusion of liability by clauses requiring marine risks insurance**

8.1. The Court of Appeal also held that clause 12 of the Barecon 89 [70], by which the charterers agreed to keep the vessel insured against marine risks (to protect the interests of both owners and charterers and in joint names) was an exclusion of liability for any breach of the safe port warranty.

8.2. The principle seems to be “*the prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other. That will be all the more so if it is agreed that the insurance is to be in the joint names for the parties’ joint interests*” [83].

8.3. Tanker time charterparties commonly expressly require hull insurance (eg. the Shelltime 4). Dry time charters often do so in more general terms: eg. clause 1 of the NYPE provides “*The owners ... shall pay for the insurance of the vessel*”.

8.4. On the basis of the **Ocean Victory** it is arguable that any such clause is an exclusion of liability for any breach of the express safe port warranty, whether or not the insurance is to protect the parties’ joint interests, and whether or not in joint names. Are hull policies rated on this basis ?

9. **The Supreme Court**

9.1. The Supreme Court heard argument on the appeal from 1st to 3rd November 2016 inclusive.

9.2. As of 7th February 2017 it had not given judgment nor indicated publically when it will do so.