JUDGMENT : Mr Justice Aikens : Commercial Court. 1st August 2008

1. This is an appeal pursuant to ***section 69*** of the ***Arbitration Act 1996,*** with the leave of Burton J, on a point of law raised by a Final Declaratory Award concerning the vessel "***REBORN".*** The vessel was chartered by the Claimants as owners ("the Owners") to the Defendants as charterers ("the Charterers") under a Gencon form of voyage charterparty dated 10 January 2003, ("the charterparty"), for the carriage of a cargo of cement from Chekka, Lebanon, to Algiers. In the arbitration the Owners claimed compensation for damage allegedly suffered by the vessel's hull as a result of contact with an underwater projection at the loading berth at Chekka.

2. The three distinguished maritime arbitrators, Mr Bruce Harris, Mr Mark Hamsher and Mr Michael Baker – Harber, were asked to make declaratory awards on four preliminary issues. This appeal concerns only the first of these issues, which relates to whether the Charterers were obliged, under the terms of the charterparty, to nominate a safe berth at the load port.

3. The relevant terms of the charterparty are set out in Box 10 and clause 1 of the standard terms of the 1994 revised form of Gencon charter, as amended by the parties. Also relevant is a typed additional clause 20. These clauses provide:

   (1) **In Box 10**: "Loading port or place (Cl.1) 1 BERTH CHEKKA – 27 FT SW PERMISSIBLE DRAFT

   (2) **Clause 1**: *The said Vessel shall … proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may ~~safely~~ get and lie always afloat …and being so loaded the Vessel shall proceed to the discharging port(s) or place(s) stated in Box 11 … or so near thereto as she may safely get and lie always afloat, and there deliver the cargo."*

   (3) **Clause 20**: "Owners guarantee and warrant that upon arrival of the vessel to and/or prior its departure from, loading or discharging ports (either in ballast condition prior to loading or laden prior discharging) the vessel including, inter alia the vessel's draft, shall fully comply with all restrictions whatsoever of the said ports (as applicable at relevant time) including their anchorages, berths and approaches and that they have satisfied themselves to their full satisfaction with and about the ports specifications and restrictions prior to entering into this Charter Party."

4. It will be noted that there is no express warranty by the Owners that either the port of Chekka or the loading berth there will be "safe".[1]

5. The arbitrators formulated the first of the four preliminary issues for decision in the following terms:
   "Was there to be implied in the charterparty a term that there was an absolute duty upon the Charterers to nominate a safe berth [at Chekka]?"

6. The arbitrators' answer to this question was: "No". In their Reasons, the arbitrators assumed (as they were invited to do) that there were several berths at Chekka to which the vessel could have been directed to load by the Charterers. The arbitrators made no findings of fact either about the process of nomination of the loading berth at Chekka by the Charterers or the events leading up to the alleged damage to the vessel. On the appeal I therefore have to deal with the issue on the same basis of fact - or lack of it.

7. The Owners' argument before the arbitrators was that because the Charterers had a choice of berths at the port to which they could send the vessel, this choice carried with it a warranty that the berth nominated by the Charterers within the named load port of Chekka would be safe. The arbitrators stated their conclusions on this issue concisely. They said:
   "Owners' approach had its attractions but it seemed to us to meet an insurmountable difficulty: their acceptance of the "port". A port is a place which a vessel must be able to safely reach and depart but it is also a place where a vessel must berth and load or discharge its cargo. The berths in the port are just as much a part of it as is, for example, the approach channel or the tugs or the pilotage service. All of them are constituent elements of the "port " which the Owners have agreed to accept. Given that the Owners had agreed to shoulder the risk of the named port we could see no basis for implying a term that the berths within it should fall into a different category. The fact that a particular berth had a unique hidden danger did not alter our view: the issue is all about the allocation of risk rather than consideration of the physical characteristics of each and every potential berth".

8. On this appeal I would formulate the issue as follows: [2] if a specific load port is named in a voyage charterparty and there are several possible berths within that port to which a vessel could be directed to load by the charterers and there is no express warranty in the charterparty of the "*safety*" of either the port or the berth to which the vessel is to be directed by the charterers, is the charterparty subject to an implied term that the charterers must nominate a "*safe*" berth at that load port?

9. In their award the arbitrators correctly noted that there is no direct authority on this particular issue. The question of when precisely a "*safe port*" or "*safe berth*" warranty should be implied in a voyage charterparty has been the subject of debate in the text – books and amongst shipping lawyers for many years. The present question is therefore of interest and perhaps importance to the shipping industry. I was assisted at the hearing of the appeal by very helpful written and oral submissions from Mr David Bailey QC on behalf of the Owners and Mr Stewart

[1] I will set out below the nature of the "safe port" or "safe berth" warranty if one is given in a charterparty.

[2] This formulation is very slightly different from that set out at paragraph 7 of the Claimants' Arbitration Claim Form seeking leave to appeal the arbitrators' award, but I think that it puts the point in slightly more precise terms than those originally set out, without altering the nature of the question of law posed.

Buckingham on behalf of the Charterers. In view of the fact that this is a point on which there is no direct authority and its possible general interest to the industry, I decided to reserve judgment.

A. The general legal background

10. Traditionally, voyage charterparties have been divided into *"port"* or *"berth"* charters. The difference is usually significant for the purposes of deciding when a vessel is an *"arrived ship"* for the purposes of calculating laytime and demurrage. [3] In the present case, counsel agree that the charterparty is a "berth charter". The significance of that for the present case concerns the right of the Charterer to nominate a berth to which the vessel must go to load or discharge cargo.

11. In the present case, no specific berth is identified in the charterparty to which the vessel is to go to load the cargo of cement at Chekka. It was common ground that when a berth charterparty does not originally identify a specific berth to which the vessel is to proceed, whether to load or discharge,[4] the charterer has an implied right and obligation to nominate a specific berth and give orders to the master accordingly. The master is, generally, obliged to obey that order.[5] When the charterer nominates a specific berth, that berth or place has to be treated as if it had originally been written into the charterparty. This nomination is an election, as opposed to a selection. In other words, the charterer cannot change the nomination of the berth chosen without the agreement of the shipowners.[6] In my view this is of significance in the present case.

12. The other background legal principles to note concern the nature of the "*safe port*" or "*safe berth*" warranty in voyage charterparties and the rationale for the warranty. When there is an express "*warranty of safety*" in a voyage charterparty, whether it be of a port or a berth, the nature of the warranty by the charterer is that the port or berth will be "*prospectively safe*" at the time that the nomination is made.[7] Broadly speaking, a port or berth is "*prospectively safe*" if, during the relevant period of time when she should be doing so, the vessel can reach, remain at and depart from the port/berth without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship. Where a charterer has given a warranty of the safety of the berth or port in a voyage charter, it is not entitled to nominate a berth or port that is not safe in the sense described above. If the charterer does so, the owner would not be obliged to obey an order to proceed to an unsafe berth or port.[8]

13. The rationale for a warranty of safety in a voyage charterparty was given in a famous passage of a dissenting judgment of Sir Owen Dixon CJ in the case of ***Reardon Smith Line Ltd v Australian Wheat Board (the "Houston City"),***[9] which was subsequently approved generally on an appeal to the Privy Council in that case[10] and by the Court of Appeal in ***Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd (the "Stork")***.[11]

14. In ***the "Houston City"*** case the voyage charter provided that the vessel would proceed as ordered by the charterers to *"…one or two safe ports in Western Australia, or so near thereto as she may safely get…"*. The vessel had proceeded to Geraldtown, as ordered by the charterers, berthed and then sustained damage during gales to her starboard quarter by ranging at the berth, because she could not be hauled off the berth through lack of a hauling off buoy. In analysing the reason for a warranty of safety, Dixon CJ pointed out that it is the charterers' responsibility to provide a cargo at the load port and to identify the port and place at which the cargo is to be delivered. The charterparty may or may not identify the exact place at which the cargo is to be supplied or delivered. If it does "*…then the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place, then, subject to excepted perils his liability to have his ship there is definite*".

15. Dixon CJ then considered the case where the charterer cannot (or does not) identify, at the time the charter is concluded, the place where the cargo is to be loaded or discharged. In that case:

> *"…the shipowner must agree to submit his ship to the charterer's orders…..When the charter limits the choice to safe ports or safe berths, the purpose is to impose upon the charterer the necessity of doing in the interests of the ship what the shipowner would have done if the charterer had been prepared to nominate to him a port of loading or discharge at the time of proposing the charter, namely, avoiding an unsafe port. The fulfilment of the duty or naming the port of loading is inseparably connected with the fulfilment of the duty of providing the cargo."*[12]

3 See the examples of what might be a "port" or "berth" charter set out in the judgment of Donaldson J, as he then was in ***Nea Tyhi Maritime Co Ltd of Piraeus v Compagnie Griniere SA of Zurich (the "Finix")*** [1975] 2 Lloyd's Rept 415 at 422. The reasoning and decision in the case were implicitly overruled by the House of Lords' decision in ***Aldeberan Compania Maritima SA v Aussenhandel AG Zurich (the "Darrah")*** [1977] AC 157, but it does not detract from the "port" or "berth" charter analysis.

4 A precise berth would be, eg. "No 1 berth, North Side D Basin, New Port, Buenos Aires": cf. ***Venizelos ANE of Athens v Societe Commerciale de Cereales et Financiere SA of Zurich: the "Prometheus"*** [1974] 1 Lloyd's Rep 350 at 355.

5 ***The Felix*** (1868) LR 2 A&E 273 at 280 per Sir Robert Phillimore. The precise basis on which the master must obey will depend on the exact terms of the charterparty.

6 ***Tapscott v Balfour*** (1872) LR 8 CP 46 at 52; ***Tharsis Sulphur and Copper Company Limited v Morel Brothers & Co*** [1891] 2QB 647 at 650; ***Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*** [1962] 1 QB 42 at pp 90, 91 and 115. It can be an election in the case of a port charter as well per Mocatta J in ***Venizelos ANE of Athens v Societe Commerciale de Cereales et Financiere SA of Zurich (the "Prometheus")*** [1974] 1 Lloyd's Rep 350 at 355.

7 If the port or berth is identified in the charter, this means the port or berth is "prospectively safe" when the charter is made. Otherwise the warranty is as at the time when the nomination is given, which will usually be when the order is made by the charterer or on its behalf.

8 For voyage charters see eg: ***Compania Naviera Maropan v Bowaters (the "Houston City")*** [1955] 2 QB 68; ***Atkins International HA v Islamic Republic of Iran Shipping Lines (the "AJP PRITI")*** [1987] 2 Lloyd's Rep 37 at 42 per Bingham LJ.

9 [1954] 2 Lloyd's List Reports 148 at 153.

10 [1956] AC 266.

11 [1955] 2 QB 68.

12 *Ibid*. at page 153.

16. That was a case of an express warranty of the safety of the port in the charterparty. Other cases have considered the position when there is no express warranty of safety of the port in the charterparty. Two general points about implication of a warranty of safety may be made before considering the arguments of the parties on the particular wording of the present charterparty.

17. First, the test by which to decide whether a warranty of safety should be implied at all into the voyage charter must be the generally applicable one of *"necessity*". In considering whether the implied term passes this test it is useful to apply the "*business efficacy"* or "*officious bystander*" test as an aid to this task, bearing in mind always the express terms of the charterparty.[13]

18. Secondly, in general the courts will consider the following factors when deciding whether to imply a warranty of "*prospective safety"* in a voyage charterparty, where none is expressed: (a) Does the charter provide for the ship to go a named port or berth or to one of a number of named ports or berths? If so it is less likely that a warranty of safety will be implied. (b) Does the charter provide for the ship to go to a port or berth to be nominated out of a range of ports or berths? If so, it is more likely that a warranty of safety will be implied.[14] (c) Whether there should be an implied term as to safety at all and, if so, the precise formulation and the effect of the term to be implied may depend on the other terms in the charter itself.[15] Even if a warranty of safety is not to be implied into a voyage charterparty, the charterer is probably nonetheless under an implied obligation not to nominate an "impossible" port or berth.[16]

B. The submissions of the parties.

19. For the Owners, Mr Bailey made five submissions. First, he submitted that this charterparty was subject to an implied term to select (not elect) and nominate a berth at the load port of Chekka. Secondly, this was a choice between unnamed and previously unidentified berths. Thirdly, as a matter of general principle (and subject to any express terms of the charterparty to the contrary), the selection of a berth by the charterer out of a choice of a number of berths carried with it a promise to the shipowner that the selected berth would be "prospectively safe". Fourthly, the existence of this implied warranty of the prospective safety of the berth depended upon the existence of the charterers' choice as to where to load which it is given by the terms of the charter. However, it does not depend on how large the choice is; a choice of one out of two is enough.

20. Lastly, Mr Bailey submitted that the express terms in this charterparty, including the fact that the load port is named, did not negate the existence of the implied warranty as to safety, but limited the nature of the implied warranty. He accepted that, by agreeing specifically to Chekka as the named load port, the Owners assumed the risk of the port being unsafe. However, this was consistent with the Charterers assuming the risk of the (unique) unsafety of any berth that they nominated. In his submission the warranty given by the Charterers concerned only the safety of the specific berth nominated; that is the unique features of that particular berth, rather than any features which that berth shares with some or all other berths at Chekka, or any features which apply to the port as a whole.[17]

21. Mr Bailey emphasised that the sheet anchor of his submissions is the fact that the charterparty gives the charterer the right to choose one berth out of any number of potential berths for loading at Chekka. In permitting the charterer to identify and nominate a berth, the shipowner has handed to the charterer a degree of control over where the vessel will go. So the shipowner loses control over the safety of the vessel to that extent. Accordingly, it is necessary, to give the charterparty business efficacy, that there should be an implied term in it that any berth nominated by the charterer within Chekka, should be "prospectively safe", to the extent indicated.

22. Mr Buckingham, for the charterers, made three main submissions. First, he submitted that, given the rationale for the warranty of safety, as set out in the dissenting judgment of Dixon CJ in ***the "Houston City"***,[18] the shipowner's agreement to the named port of Chekka, without any warranty of safety, precluded the implication of any term as to the safety of a berth nominated within that port. Secondly, as this is a berth charter, the nomination of the load berth by the charterer acts as an election. That means that the berth is treated as having been written into the charter as from the outset. It is as if the shipowner had specifically chosen it. Therefore there is no room for an implied term as to the safety of that retrospectively identified berth. Thirdly, the shipowners cannot demonstrate that, using the "officious bystander test", it is obvious that the parties intended that there should be a term as to the safety of the berth nominated by the charterers.

23. In this regard, Mr Buckingham pointed to the warranty given by the Owners at the end of the third paragraph of additional clause 20 of the charterparty. As already noted, this is to the effect that the Owners have "*satisfied themselves to their full satisfaction (sic) with and about the ports specifications and restrictions prior to entering into this Charterparty"*. He submitted that this showed that the shipowners were taking on all risks in relation to the port of Chekka including all risks relating to all berths within it to which the vessel might be directed by the

[13] ***Atkins International HA v Islamic Republic of Iran Shipping Lines (the "APJ Priti")*** [1987] 2 Lloyd's Rep 37 at 42 per Bingham LJ; ***Aegean Sea Traders Corporation v Repsol Petroleo SA (the "Aegean Sea")*** [1998] 2 Lloyd's Rep 39 at 65 per Thomas J.

[14] *Scrutton on Charterparties* 21st Ed. (2008) at Article 69, page 119 – 120.

[15] ***Aegean Sea Traders Corporation v Repsol Petroleo SA (the "Aegean Sea")*** [1998] 2 Lloyd's Rep 39 at 68 per Thomas J.

[16] ***Reardon Smith Line v Ministry of Agriculture*** [1962] 1 QB 42 at 109, 110 per Willmer LJ ; *the "Aegean Sea" (supra)* at 67 per Thomas J.

[17] He relied upon the statement of Bingham LJ in ***Atkins International HA v Islamic Republic of Iran Shipping Lines (the "AJP Priti")*** [1987] 2 Lloyd's Rep 37 at 42, distinguishing risks affecting the port as a whole or all the berths in it and those unique to the nominated berth. In that case the charter provided for "one safe berth, [at an identified port]".

[18] ***Reardon Smith Line Ltd v Australian Wheat Board*** [1954] 2 Lloyd's List Law Reports 148 at 153, supra.

charterers.[19] He also pointed to the fact that in clause 1 of the Gencon standard terms, the clause had been modified by the parties, so as to delete the word "*safely*" in the phrase *"or so near thereto as she may ~~safely~~ get and lie always afloat…."*. Mr Buckingham submitted that this also indicated a clear intention against any implied agreement between the parties that the charterers undertook to warrant the safety of the vessel within the port at all.[20]

C. Analysis and conclusions

24. Because there is no authority directly in point on the issue of whether a "*safe berth"* warranty is to be implied in circumstances where a specific load port is named in a berth (voyage) charterparty, the question must be approached from first principles. I must obviously bear in mind the various decisions that have been made over the years on "*safe port/berth*" warranties and berth charterparties.

25. In the absence of an express warranty of the safety of either the port of Chekka as a whole or any berth nominated by the Charterers within Chekka, the burden lies on the Owners to demonstrate that one must be implied because it is "necessary" or to give the charterparty "*business efficacy*". Given the way that Mr Bailey has (quite rightly) put his case, this means that the Owners must demonstrate that although the Owners accept that they take the risk of dangers that affect the port as a whole or all the berths within it, nonetheless it is necessary to imply a term in the charterparty that the Charterers promise that any berth which they nominate will be "*prospectively safe*" with regard to dangers that are unique to that berth.

26. In my view, this is a classic case where an officious bystander would get different answers from the two parties to the contract if he asked the question: "do the charterers give a warranty that any berth that they nominate in Chekka is to be prospectively safe at the moment that they nominate it?". The Owners would doubtless say "*yes",* but the Charterers would, with the same certainty, say "*no".*

27. Equally, in my view, there is no need, in terms of "business efficacy", to imply a warranty by the Charterers that the berth nominated by them will be "prospectively safe" as to its unique features. This is for several reasons.

28. First, the Owners have agreed to load the vessel at the identified port, Chekka. Anyone reading this charterparty will know that the vessel will have to go to one of the berths nominated by the Charterers within the port, which can accommodate a vessel with a salt water draft of 27 feet maximum.[21] Moreover, by clause 20 of the charterparty, the Owners guaranteed and warranted that they will have *"satisfied themselves to their full satisfaction (sic) with and about the ports specifications and restrictions prior to entering upon this Charter Party"*. Those two express provisions indicate, in my view, that the Owners agree that they would either investigate that port or take the risk of any dangers getting to it, using it (ie. loading at a berth as nominated within it) and departing from it.

29. Secondly, the only *"choice*" that the Charterers have is to nominate a specific load berth within the identified load port of Chekka. I accept that this leaves it to the Charterers to choose and nominate the load berth. Once it is nominated it is treated as having been identified in the charterparty at the outset. In these circumstances the Owners are accepting that the Charterers have the right to elect a berth of their choice, with only one limitation, which is that a vessel of 27 feet salt water draft can berth there. A nomination of a berth which could not accommodate the vessel with a maximum salt water draft of 27 feet would be a bad one, because it would be an "*impossible"* berth.

30. Thirdly, there is considerable significance in the guarantee and warranty that the Owners have given the Charterers in the first part of clause 20 of the charterparty when read with the amended wording of clause 1 of the standard Gencon clauses, where the parties have crossed out the word "safely" in the phrase "…*or so near thereto as she can ~~safely~~ get and lie always afloat"*. These two provisions together mean that the Owners have undertaken that the vessel will proceed to the nominated berth in Chekka or so near thereto as she may get and lie afloat and load the cargo. This obligation on the Owners is not contingent on the vessel's safety. This is quite unlike those charterparties where the Charterer has the right to nominate a port out of a large range of unidentified ports,[22] where the courts have held that it would be unreasonable to expect the owners to do all the research to ensure that their vessel will be safe at the particular port out of the range that the charterer specifies and nominates.

31. Fourthly, given the express terms of the charterparty, in particular the lack of an express warranty of the safety of the port, the deliberate amendment to the terms of clause 1 and the clear wording of the guarantee and warranty in additional clause 20, an implied warranty of safety would *"at best lie uneasily besides the express terms of the charter",* to use the phrase of Bingham LJ in ***the "APJ Priti".***[23] I would go further. In my view it would be plainly inconsistent with the express terms.

[19] It is to be noted, of course, that the charterers could only nominate a berth which could accommodate the vessel to a salt water draft of 27 feet: see box 10 of the charterparty. Any berth which could not so accommodate the vessel would, presumably, be regarded as an "impossible" berth.

[20] Mr Bailey and Mr Buckingham agreed that it was proper for me to take account of this deletion as an aid to the issue of whether there was an implied warranty or not.

[21] It is clear in my view that the provision in Box 10 of "27 FT SW permissible draft" is an undertaking by Owners that this will be the maximum draft of the vessel at the berth.

[22] Save as to the outer limits of the range, such as "Bordeaux – Hamburg range".

[23] [1987] 2 Lloyd's Rep 37 at 42.

32. Mr Bailey relied strongly on the decision of Donaldson J in ***Vardinoyannis v The Egyptian General Petroleum Corporation (the "Evaggelos Th.")***. [24] The tanker ***"Evaggelos Th."*** was time chartered in late 1968 by her owner for a period of 7 months for trading in the Red Sea and elsewhere. That was the year after the Six Days War between Israel and Egypt in 1967. Throughout 1967 there was military activity around the Suez Bay area. The charter provided that cargo would be loaded or discharged "*at any dock or at any wharf or place the charterers may direct, where the vessel can always lie safely afloat*".

33. At the end of the 7 month period, the time charter was renewed. In March 1969 the vessel carried a cargo of refined oil from Aden to Suez. There the vessel was shelled and became a constructive total loss. The shipowners sued the charterers for the loss of the tanker, asserting (amongst other arguments) that they could recover damages for breach of an implied obligation of the charterers not to employ the vessel otherwise than between safe places.

34. Donaldson J considered the case of a time charterparty where the charterer is given the right to nominate the loading or discharging place, but there is no express qualification as to the safety of such a place. He said:[25]
"*…if I were faced with a simple charter which provided that the vessel was only to go to such port or place within a specified range as might be nominated by the charterer and there load a cargo, I should have no hesitation in implying a qualification that the port or place had to be safe. I should make this implication because common sense and business efficacy require it in cases in which the shipowner surrenders to the charter the right to choose where his ship shall go, and because I think that this is in accordance with the weight of authority*".

35. However, Donaldson J concluded that even if there was a warranty by the charterers in this case not to employ the vessel otherwise than between safe places, that warranty only applied to the nominated port of discharge at the time of nomination. He held that the warranty was limited to an undertaking that the nominated port of discharge may be expected to remain safe from the moment of the vessel's arrival until her departure.[26] On that basis, the charterers could not be in breach because there was no finding of fact that the discharge port (Suez) was unsafe either on nomination or when the vessel arrived there.

36. In my view the decision in the "***Evaggelos Th."*** does not assist Mr Bailey because it is distinguishable from the present case. First, it was a time charter, where the intention was to employ the vessel for several months and between different, unidentified ports. Secondly, in contrast to the present charter, the time charter in that case specifically provided that the charterers were to direct the vessel to *"…any dock or ….wharf or place…where the vessel can always lie safely afloat"*. Thirdly, in the present case the shipowner did not surrender to the charterer the right to choose where the ship would go so far as the load port was concerned; it was specifically agreed between the parties. Moreover, in the present case, the shipowners gave an express warranty and guarantee about their knowledge of the ports restrictions and specifications, which must include the berths within the port. Fourthly, Donaldson J found that, even if there had been an implied term as he suggested, there was no breach because of the timing of the unsafety of the port of Suez. So his statements about implying a safe port/berth warranty were *obiter*.

37. Mr Bailey also relied on statements of Thomas J in ***the "Aegean Sea"***.[27] In that case there was a voyage charter between the owners of the ***"Aegean Sea"*** and the voyage charterers, Repsol Oil International Ltd, ("ROIL"), on the Asbatankvoy form. It provided for the carriage of a cargo of crude oil to "one or two safe ports EUROPEAN MEDITERRANEAN". Clause 9 of the charter stipulated that the vessel "*shall …discharge at any safe place or wharf…which shall be designated and procured by the charterer, provided the Vessel can proceed thereto, lie and depart therefrom always safely afloat…*".

38. In fact the vessel was ordered to discharge her cargo of crude oil at La Coruña, North West Spain. Whilst the vessel was proceeding to the berth in poor weather at night she grounded on the Torre de Hercules rocks, broke in two and exploded. The vessel was lost and also most of her cargo, doing widespread environmental damage. The shipowners claimed damages for the loss of the ship against the charterers, ROIL, under the charterparty (in an arbitration). They also claimed against Repsol Petroleo SA ("Repsol"), which had bought the cargo from ROIL and who, (so it was contended by the shipowners), had become the lawful holders of the bills of lading. The shipowners contended that the bills of lading contained an implied term entitling the lawful holder to nominate a port for discharge in Spain and also an implied warranty that the port so nominated would be "prospectively safe", which had been broken.

39. The judgment of Thomas J dealt with many issues, most of which are not relevant for this case. On the bill of lading issues, he concluded that Repsol had not become a "*lawful holder*" of the bills of lading under the ***Carriage of Goods by Sea Act 1992***. Therefore there were no contractual rights and obligations between Repsol and the shipowners under the bills of lading. He also held that the bills of lading holder did not have a right to nominate the discharge port. Thomas J also considered the issue of whether there was an implied warranty of safety in the bills of lading, which he dealt with at pages 67 to 68 of the report.

40. The judge identified the issue for decision as being "*whether any term should be implied in a voyage charter where there is a range of unnamed ports and where there is no express warranty of safety, in contradistinction to voyage charterparties where there is in such standard forms such as Norgrain and Asbatankvoy…*". Thomas J referred to the

[24] [1971] 2 Lloyd's Rep 200.
[25] At page 204 of the report.
[26] Page 205 of the report.
[27] [1998] 2 Lloyd's Rep 39.

"Evaggelos Th" [28] and also ***Compania Naviera Maropan S/A v Bowater's Pulp and Paper Mills Ltd (the "Stork").***[29] He also referred to the text book "***Voyage Charters***", by Julian Cooke and others,[30] in which the authors submit that in the case of a voyage charter where the charterer has the right to nominate a port from a range of unnamed ports that "*…the court would imply a warranty as to safety and, a fortiori, the charterer will be under an obligation not to nominate a port which is impossible*". [31]

41. The judgment continues: [32]

"*Although there is much to be said for this view, I do not think that one can conclude in general that a term as to safety will always be implied into voyage charter-parties where there is an unspecified range of ports. The issue as to whether a term should be implied as to safety and the extent of the obligation may turn on the specific terms of the charter*".

42. I respectfully adopt Thomas J's caution. In the present case, as I have already indicated, I think that the express wording of the charterparty is crucial to the question of whether there is an implied warranty of safety of the berths at Chekka. They lead to the conclusion that there is no such term in the present case. However, in agreement with the reasoning of Thomas J,[33] I would be prepared to accept that even if there is no implied warranty that the berth nominated will be prospectively safe, there will be an implied warranty that the berth nominated must be one that it is possible for the vessel to reach.

43. **Conclusion.** I have concluded that there is no implied warranty of the safety of the berth at Chekka as nominated by the Charterers in this case. The only obligation upon the Charterers would be not to nominate an "impossible" berth, eg. one at which the vessel could not lie afloat on a 27 foot salt water draft. It follows that the arbitrators did not err in law and so this appeal must be dismissed.

Mr David Bailey QC (instructed by Jackson Parton, Solicitors, London) for the Claimant
Mr Stewart Buckingham (instructed by Clyde & Co, Solicitors, London) for the Defendant

28 [1971] 2 Lloyd's Rep 200
29 [1955] QB 68
30 This was the first edition, published in 1993. It is now in its third edition, published in 2007.
31 Page 73 of the first edition of *Voyage Charters*.
32 Page 68 of the report.
33 See page 67 of the report in *the* "***Aegean Sea***".