Unsafe Ports

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Simon Kverndal QC – Quadrant Chambers
Capt. Kevin Richardson – IHMA President
Philippa Langton – Thomas Miller Defence Ltd.
Kieron Moore – Thomas Miller Defence Ltd.
David Handley – Clyde & Co.

Venue: Thomas Miller & Co., 90 Fenchurch Street, London, EC3

Wednesday 15th April 2015
**Introduction**

The question of whether a port is safe or unsafe for a visiting ship can sometimes prove a matter of legal controversy, with a number of landmark cases arising over the years. It is topical today, notably because of the *Ocean Victory* case and subsequent Appeal which illustrated many significant elements, but also because of the practical consequences of the scale economies taking place in the shipping industry, with ship sizes increasing rapidly, in some cases faster than the ports are able to accommodate them. This is a “classic” issue where the law is inextricably linked with matters of practical ship-handling, authority, experience and judgement.

**Issues for discussion:**

The changing realities of marine risk; discussion of and lessons from the *Ocean Victory* and other safe/unsafe port judgements. The role and responsibilities of charterers and owners, harbourmasters and shipmasters amid the changing circumstances of scale economies and operating pressures.

- What changes can make a safe port unsafe?
- What a shipmaster needs to consider when entering and leaving port.
- What a charterer needs to bear in mind when relating to the master in issues of safe navigation.
- Is case law, established in a more leisurely age of smaller ships appropriate amid 21st century pressures with ever-larger ships in every category and the need to arrive on time?
- Is there a need for new tests and definitions that are appropriate for present-day circumstances?

**Part A**

The “Ocean Victory” and the Test of “Abnormal Occurrence”  
Simon Kverndal QC

**Part B**

Unsafe Ports....A Harbour Masters Perspective!  
Capt. Kevin Richardson

**Part C**

Unsafe Port Claims – A P & I and Defence Perspective  
Philippa Langton

**Part D**

David Handley

**Part E**

Curricula Vitae

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Part A

The “Ocean Victory” and the Test of “Abnormal Occurrence”
(Power-point presentation and a written paper)

Simon Kverndal QC
The OCEAN VICTORY and the test of
“Abnormal Occurrence”
LSLC
15 April 2015
Simon Kverndal QC
Introduction

The Stork and The Eastern City – a diamond jubilee celebration?

Still fit for purpose?
Port unsafety – the main risk types

- Grounding – banks, bars, rocks, submerged objects
- Meteorological/natural risks – storms, swell, ice, earthquakes, volcanoes, tsunamis
- Berth characteristics – fendering, air draft, water draft, obstructions and configuration
- Port set-up – berthing procedures, tugs, pilotage arrangements and personnel
- Health – epidemics, fever etc.
- Political – war, terrorism
“Abnormal occurrence”

- Decision in The Ocean Victory
- Discussion in case law prior to OV:
  - The Evia (No.2) – CA and HL
  - The Mary Lou – Mustill J
  - The Saga Cob – CA (but no shipping LJJ)
  - The Lucille
Ocean Victory - facts

- OV discharging at Kashima. Weather worsened to Bft9 gusting 10. “Long waves” (i.e. with a period of 30 secs to 5 mins & worsening) threatened the security of her moorings

- OV left berth under pilotage and ran into force 11 winds in the fairway. Lost steerage and driven onto a breakwater. Salvage attempts unsuccessful and she broke up some months later.
Ocean Victory – decision on abnormal occurrence

- Teare J: port was unsafe because of possible coincidence of long waves and severe NW gale. Both were “characteristics”.

- CA: J should have asked unitary question – whether the simultaneous coincidence was an abnormal occurrence or normal characteristic. “Only one conclusion” – event was an abnormal occurrence.
(1) What is correct approach to port unsafety where loss results from concurrent causes?

(2) If loss is caused by something which is not a normal characteristic does this mean that it is a case of abnormal occurrence?
(1) Concurrent causes

• Where is the justification – and analysis - for saying that Teare J is wrong?

• Is the ‘unitary question’ approach appropriate where you have two equally potent causes which are generically quite different?

• Suggest: unitary question was the right approach for OV, but that does not mean that it is always the right approach
(2) The test of ‘Not a normal characteristic’

- CA nowhere expressly defines the test of “abnormal occurrence” – Teare J is ‘wrong’, but what is ‘right’?
- Strong hints by CA that ‘not a normal characteristic’ is correct test: i.e. that, given past history, the event was unexpected
- Problems!
  - Does unprecedented = abnormal? [No!]
  - Foreseeability does have a place (see auths)
Does the OV change anything?

- Probably not (unless you are counsel for Charterers)
- What sort of precedent is it? No more than guidance:
- **Sometimes (but not always):**
  - Right to ask a unitary question
  - Right to focus particularly on past history
  - Right to focus less on foreseeability
Conclusions

• The “abnormal occurrence” exception -
  • Is a necessary one but probably incapable of precise definition
  • Is unlikely to provide the answer to the real issues concerning liability for port unsafety in the 21st century
THE “OCEAN VICTORY” AND THE TEST OF “ABNORMAL OCCURRENCE”

Introductory

1. In *The Stork*, Singleton LJ asked counsel the meaning of the duty to nominate a safe loading place. Everyone in this room asked the same question would repeat or recite the words of Sellers LJ in *The Eastern City*. It is that we know when a port (or loading place) is not safe …

   “the … 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 can be avoided by the exercise of good navigation and seamanship.”

2. It may be hard to remember that when *The Stork* was decided it was still moot whether a charterer had to pay damages for nominating an unsafe port. Yet also in that decision Morris LJ came up with a legal test which, with a little refinement two years later has – so it seems – withstood the tests of time and of lawyers without number trying to gloss and tweak and reinterpret it. 25 years on from *The Eastern City* and the HL – Lords Diplock, Roskill and Brandon indeed - were enthusiastically endorsing the test in *The Evia (No.2)*. Lord Mustill was always critical of the reporting of unsafe port cases on the basis that they could tell us nothing new.

3. We (and Judges too) should remember that it is a one size fits all test, covering (or not covering) (and I am going to do my best with the following list) –

   - Grounding risks – on banks, bars, rocks and submerged objects
   - Meteorological/natural risks – storms, swell, ice, earthquakes, volcanoes, tsunamis
   - Berth characteristics – fendering, air draft, water draft, obstructions and configuration
   - Port set-up – berthing procedures, tugs, pilotage arrangements and personnel
   - Health – epidemics and fever and their consequences, particularly quarantine
   - Political – war, terrorism

And we (and Judges too) should remember – and this is now a particularly apposite question – that it could involve one or two or more of these causes. And it has to cover
period time charters, time charter trips and voyage charters (unless, in the last named, the port or berth is named and the word “safe” has not been added). It also has to be remembered – indeed cast in stone – that the test is not fault based but merely a question of allocating risk between the parties for the consequences of particular events. Questions of fault – master’s or pilot’s negligence – come secondly and subsidiarily and should be kept analytically distinct from the primary issue.

4. However clearly rung their Lordships’ endorsements may have been, a seminar like this one should keep the test under the spotlight. Does it still work for today’s ports and berths in all those situations and scenarios – and if it does not work perfectly does it work well enough? Does it provide for a fair, sensible and reasonable allocation of risk between owners and charterers and their insurers? Are there any better ideas? Of course, the standard safe port/berth obligations in both time and voyage charters are only default positions: parties – or more particularly, parties as directed by their liability insurers – are always free to negotiate a different regime of risk and responsibility.

5. The Ocean Victory decision prompts us to focus attention on the “abnormal occurrence’ aspect of the test, an aspect which for present purposes arises not at the stage when an owner is considering whether or not to comply with orders by a charterer to go to a particular port but in the circumstance where the ship has gone to that place and damage results. In the case of the OV it was Kashima and well-nigh US$140m. The decision also focuses on another very interesting question: whether the terms of the demise charter prevent any recovery for breach of the safe port warranty. That question is not within the scope of this paper and this seminar and must wait another day.

Abnormal occurrence

6. “Abnormal occurrence” has received very little discussion in the case law but there are, I regret, quite a few throwaway lines, some of which may confuse rather than clarify when one is trying to understand these two words in the special context of Sellers LJ’s test. Thus we have:
Lord Denning in *The Evia (No.2)* –

“On the other hand, if the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated, abnormal or extraneous occurrence – unconnected with the set-up – then the charterer is not in breach of his warranty. Such as when a competent berthing-master makes for once a mistake, or when the vessel is run into by another vessel, or a fire spreads across to her, or when a hurricane strikes unawares. The charterer is not liable for damage so caused.”

Lord Diplock in *The Evia (No.2)* in a throwaway line which now resonates in the OV –

“... it is not surprising that disputes should arise as to whether damage sustained by a particular vessel in a particular port on a particular occasion was caused by an abnormal occurrence rather than resulting from some normal characteristic of the particular port at the particular time of year.”

Lord Roskill (and Lord Brandon) in *The Evia (No.2)* –

“But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if, in spite of them, 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 make the charterer liable …

Before *The Evia (No.2)* we have Mustill J in *The Mary Lou* (he was overturned on another point but no one doubted this passage) and I have emboldened the particular section where he in effect has a stab at defining “abnormal occurrence” –

“... The abnormal nature of the occurrence which causes the loss is also relevant in a different way in that it bears upon the question whether there is a breach of the warranty, if the ship does comply with the order, and suffers damage in the port. The mere happening of the casualty does not necessarily imply a breach: for the warranty does not involve a guarantee that a properly navigated ship will in all circumstances be free from danger in the port. Certain accidents are due to misfortunes which are not the direct consequence of the order to the port. For example, if a storm of unprecedented violence catches the ship in the nominated port and drives her ashore, the choice of port is an indirect cause of the loss, for the ship would have escaped loss if she had been ordered to some other port. But 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. In this context also it is not easy to find a turn of phrase which accurately expresses the notion. It may be said 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.

...

What is to my mind clear is that the word is not intended to filter out all states of affairs which could be said, if the whole history of the port were regarded, to have been out of the ordinary. Changed circumstances may make a port unsafe if the new circumstances can be regarded as an attribute of the port. This is most clearly demonstrated by The Houston City, *sup.* A hauling-off buoy and a waling piece had been missing from the berth for some months. It was taken for granted in all Courts, including the Privy Council, that these defects were such as to make the port unsafe: yet they were not permanent, and there was no suggestion that they had ever happened before. The port was unsafe, not because it was prone to suffer this kind of defect - as the port of Mogador was held unsafe in *The Eastern City* because it was prone to suffer weather conditions which might trap the ship in the confined harbour - but because the defects were of sufficiently long standing to be, for the time being, a characteristic of the port.”

And lastly we have the CA in *The Saga Cob* in 1992 (NB – no shipping judges on the panel), in a case concerned with war risks (guerrilla attack). The CA in the OV [53] found this case “illuminating” because it “emphasises that the fact that an event (in that case a guerrilla attack) was theoretically foreseeable did not make it a “normal characteristic” of the port” and they cited a passage which reviewed the risks of guerrilla attack and concluded –

“In such circumstances, to say that such an attack or even the risk of such an attack was a normal characteristic of the port, is in our view impossible.”

**The Ocean Victory**

7. I will assume familiarity with the facts and the decision of the OV, but in brief:

(1) OV was discharging at Kashima when the weather worsened to force 9 gusting 10. Shortly before completing discharge “long waves” (i.e. with a period of 30 secs to 5 mins) threatened the security of her moorings and were predicted to worsen.
(2) She left the berth under pilotage and ran into force 11 winds in the fairway\(^1\). She lost steerage and was driven onto a breakwater. Salvage attempts were unsuccessful and she broke up some months later.

[I was appointed sole arbitrator in the LOF salvage more than 8 years ago; it settled the day before the hearing two years later. I remember thinking that it had all the hallmarks of a classic unsafe port dispute]

8. As you are all no doubt aware Teare J held that Kashima was unsafe because of the possible coincidence of two events: swell from the long waves which might – and in the case of OV did - force a vessel to leave berth and secondly a very severe NW gale which meant a vessel might not safely leave the port. Teare J held that these were both “characteristics or features of the port”, that the concurrence of these features was “at least foreseeable” and therefore not an “abnormal occurrence” and that the port was therefore unsafe.

9. CA held [55] that Teare J was wrong (in particular) because he failed to ask a unitary question, viz whether the simultaneous coincidence of the two critical features of “long waves” swell (which meant that the vessel might have to leave the berth) and a very severe northwesterly gale (which meant that she could not safely exit the port) -

“... was an abnormal occurrence or a normal characteristic of the port of Kashima”

10. Two questions arise from this:

(1) What is the correct approach to port unsafety where the loss has resulted from concurrent causes?

(2) If the loss is caused by something which is not a normal characteristic of the port does this mean that it is a case of abnormal occurrence?

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\(^1\) A causation issue arose as to whether the loss of the vessel was caused by port unsafety or the Master’s “wrong” decision to leave the port: Teare J held that it was; the CA expressed no views on the issue.
Concurrent causes

11. The CA was uncompromisingly critical of Teare J’s approach of analysing the two features separately rather than as a “critical combination”. His analysis was wrong because he failed to ask a unitary question, whether the simultaneous coincidence was an abnormal occurrence or a normal characteristic. But why was he wrong? None of the CA’s citations from the case law refer to asking a unitary question and there is no analysis of this approach in the CA’s judgement. Does modern risk analysis permit us to say that the critical combination of two risks is so unlikely, abnormal indeed, that we need be less careful about guarding against it? Is it correct to consider that two not unexpected and not abnormal events amount, when they occur at the same time, to an abnormal occurrence? What if you have an accident caused by the combination of a not unexpected event and a feature of the port which is sub-optimal but has never led to any previous accidents? – is that an abnormal occurrence? In short why is it right in principle to ask a unitary question and wrong to do otherwise?

12. The CA may be right but I am not wholly convinced and it may well be that our experts in this seminar will give us some risk scenarios which will illuminate.

Abnormal occurrence = ‘Not a normal characteristic’?

13. Although the CA [15] recognised that the question “what, as a matter of law, was the correct test for an abnormal occurrence” was one that they had to answer, there is no paragraph of the judgement in which they definitively set out their test. Instead they explain that Teare J applied the wrong test and in doing so they give an indication of what the right test might be, namely something which is not a normal characteristic of the port. But nowhere do we see that “normal characteristic” test considered and explained – unless it be in the criticism of Teare J such as the following:

“The error of the Judge … was … to use minimum foreseeability, without more, as some sort of litmus test for establishing whether an event was a
characteristic of a port, without having any regard to significant factors such as the actual evidence relating to the past history of the port, the frequency (if any) of the event, the degree of foreseeability of the critical combination and the very severe nature of the storm on the casualty date. In doing so, the judge departed from the orthodox and practical approach of [Mustill, Diplock, Roskill] … to the question of whether an event was abnormal, which necessarily includes an examination of the past history of the port and whether, in that evidential context, the event was unexpected.”

14. The trouble with the CA’s “test” is that it focuses on past occurrences in order to identify what are normal characteristics. But what about a defect in a new jetty, or new and badly thought out berthing procedures, or an uncharted rock that no one had ever hit before, or a case of ebola coming to light in the port just after berthing, or a merely temporary reduction in water depth or air height, or the hurricane envisaged by Lord Denning or – it may be said – the typhoon at Kashima which had never happened but was sufficiently in contemplation that there was a procedure in place to warn vessels to leave before the onset of such a typhoon? Are these features precluded from being normal characteristics of the port because they don’t feature in any “past history”? I think the answer is clearly NO and in my view to say that ship accidents caused in unprecedented circumstances are therefore “abnormal occurrences” is nothing short of heresy. To answer otherwise would be to relieve charterers of the risk of the ‘accident waiting to happen’.

**Does the OV change anything?**

15. Obviously it does not change the EC test. But does it introduce a new gloss? Are we now simply to ask, with regard to damage caused by that plethora of scenarios that I have mentioned earlier, whether it arose by reason of a normal characteristic of the port?

16. If so, is it right? In my view it is not and the better view is to go back to the old authorities – to *The Mary Lou, The Evia (No.2), The Lucille* to name the best – to identify the correct approach.
17. We need to consider the nature of the “abnormal occurrence” exception: like Master’s negligence it is a ‘get out of jail free’ card for charterers. In the latter case, it is not the characteristics of the port or berth which cause the damage but the Master’s negligence in navigation or management of his vessel. In the former case, it is that what has happened can be characterised – in Lord Roskill’s words in *The Evia (No.2)* – as “an unexpected and abnormal event thereafter [i.e. after the order to go there] which creates conditions of unsafety where conditions of safety had previously existed”. As Lord Roskill observed, it is only fair for the vessel’s insurers to meet those risks.

18. The real danger here is to equate “abnormal occurrence” with anything which is not a “normal characteristic or attribute of the port”. That is a possible reading of the CA. In my view it cannot be right as a single test: it is no more than a useful guide for certain types of port accident. The correct analysis is, in my view, to be found in Lord Denning’s judgement in *The Evia (No.2)* and Mustill J’s judgement in *The Mary Lou*: a mix of foreseeability, consideration of past events, analysis of port set-up and attributes (man-made, meteorological, hydrographical) and location (proximity to political, environmental and societal features).

19. And the real problem is that in a charter party context ranging from long period time charter to a named “safe” port voyage charter, with ever increasing ship size and value and potential liabilities, and with the wide variety and multiplicity of port accident scenarios, that the exception of “abnormal occurrence” is simply too vague, indeed indefinable, to establish the clear boundaries of risk that the parties to a charter and their liability insurers expect.

SIMON KVERNDAL QC
Quadrant Chambers, London
April 2015
Part B

Unsafe Ports....A Harbour Masters Perspective!
(Power-point presentation and a written paper)

Capt. Kevin Richardson
Unsafe Ports......a Harbour Masters Perspective!

CAPTAIN KEVIN RICHARDSON
PRESIDENT
INTERNATIONAL HARBOUR MASTERS ASSOCIATION (IHMA)
Unsafe Ports.......a Harbour Masters Perspective!

Themes for this presentation:
- About IHMA
- Harbour Masters Powers, the legal perspective
- Marine Safety Management Systems and the H/Ms role
- How do port users find out whether a port is safe or not?
- Weather
- Commercial Pressures
- Summary
Unsafe Ports.....a Harbour Masters Perspective!

- What is the International Harbour Masters Association?
  - An international association of Professional Harbour Masters
  - Global representation – over 200 members in 40 countries
  - Not for profit organisation
  - Non Government Consultative status at IMO
  - Works closely with other maritime organisations (IMPA; IALA; NI; BIMCO; PIANC) on specific projects of mutual interest (e.g. ports of refuge; ship and port equipment)
Unsafe ports....a Harbour Masters perspective!

What skills and knowledge do our members have?
- Most have specific marine qualifications and experience
- Many have been port customers in a previous career
- They manage risk every day
- They are the custodians of a ports Safety Management System (SMS)
- Through IHMA they have access to a network of global H/M contacts
- Their business is managing port safety
- They are a key manager in the ports management structure
- Their performance is directly linked to a ports performance
Unsafe ports……a Harbour Masters perspective!

In summary;

- The Harbour Master is the leading marine professional in a port and is responsible for the ports marine safety management system.
- He/she is risk averse and expert in managing marine risks.
- The H/M is also increasingly commercially aware and instrumental in ensuring a port operates efficiently but above all safely.
Unsafe ports.....a Harbour Masters perspective!

- Accidents continue to happen in ports!
- Some of them are serious and result in loss of life

No port is completely 100% guaranteed safe!
......but does that mean ports are inherently unsafe?
Unsafe ports....a Harbour Masters perspective!
Unsafe ports...a Harbour Masters perspective!

- All ports are different
- All ports contain hazards
- All hazards have associated risks
- How well the risks associated with hazards are managed in a particular port has a direct bearing on that port's safety
- Who is the person responsible for identifying the hazards and managing the associated risks to an acceptable (ALARP) level?

- ....................The Harbour Master!
Unsafe ports.....a Harbour Masters perspective!

- ....and here he is!
The Harbour Masters Powers:

- In the UK the H/Ms powers are defined in various legislation and documents:
- The Harbours, Docks, Piers and Clauses Act contains several references to the role and powers of the H/M:
- Clause 52
  The harbour master may give directions for all or any of the following purposes
  For regulating the time at which and manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, pier and within the prescribed limit, if any, and its position, mooring or unmooring, placing and removing whilst therein;
The Marine Navigation Act 2013 created a new power for ports to make Harbour Directions.
The H.D.P&C Act talks about Special Directions.
PMSC defines the difference between General Directions & Special Directions.
All are available to the H/M for managing safety... but not all ports have the power to make General Directions hence the new power to apply to make Harbour Directions.
General/Harbour Directions are made by the port authority and enforced by the H/M.
Special Directions can be made and enforced by the H/M but are specific to vessels and are short term.
Unsafe ports....a Harbour Masters perspective!

- Ports may have their own individual Harbour/Port Act which also define the powers of, role and responsibilities of the H/M:

In the UK examples would include:
- Dover Harbour Act 1963
- Belfast Harbour Act

Internationally:
- Maritime Transport Act (New Zealand)
- Port Authorities Act (Australia)
Unsafe ports….a Harbour Masters perspective

- Bye-laws
  - In the UK most are hopelessly out of date
  - Penalties are equally ancient and arcane
  - The time taken to make new ones is measured in years
  - Most ports prefer to make General or Harbour Directions as this is quicker and easier
  - Government recommend going the GD route if the port has the powers available and has made it easier for ports to apply for power to make Harbour Directions
Unsafe ports.....a Harbour Masters perspective!

- The UK Port Marine Safety Code:
  - A code of practice.......not law!
  - Probably the most important code in terms of port safety
  - Arose from the ashes of the Sea Empress disaster in Milford Haven
  - Introduced in 2002 ...all Statutory Port Authorities should comply
  - Introduced the concept of a Safety Management System(SMS) containing Hazard; Marine Risk Assessment; defined powers; competent persons;
  - Ports required to submit a ‘statement of compliance’ to MCA every 3 years
  - MCA is the enforcement authority
Unsafe ports....a Harbour Masters perspective!

- The PMSC defines the role of Harbour Master:

  ‘The harbour master has day to day responsibility for the safe operation of navigation and other marine activities in the harbour and its approaches. The post holder must be competent and a suitably qualified person, with sufficient experience for the role. They must also be competent to undertake other relevant duties, in relation to Health and Safety at Work and Merchant Shipping Legislation’

In my experience this definition fits the role of H/M around the world
Unsafe ports....a Harbour Masters perspective!

- The Safety Management System is the key to a ‘safe port’
  - Identify the hazards and the risks they pose
  - Review current controls
  - Decide if current controls reduce the risk to an acceptable level
  - If not........do something about it........if OK keep it under review
  - Learn from incidents...whether or not they occur in your port
  - Employ competent people in key safety roles
  - Have the SMS independently audited
  - The above PMSC model is a pretty good template for all ports globally
So who determines that a port is safe to use?

- Owner? Charterer? Agent? Master? Harbour Master? All or some?
- Owner/Master to determine that the ‘safe port clause’ can be achieved at the draft required for the tonnage to be loaded
- Passage planning is from berth to berth
Unsafe ports.....a Harbour Masters perspective!

- How does the owner/Master get the information necessary to make this important decision?
  - Lots of information from lots of sources
  - Time consuming
  - Variable in quality
  - Not always current
  - Difficult to access

IHMA has recognised this and in partnership with the UK Hydrographic Office is trying to address the issue via an initiative called AVANTI
Unsafe ports....a Harbour Masters perspective!

- AVANTI - Access to Validated Nautical Information
  - Web based application for ease of updates and ease of access
  - Contains all relevant information in one place to make a validated decision about port access and entry criteria
  - Language is consistent and definitions common
  - Is maintained up to date on a daily basis by the H/M
  - Currently in its 3rd iteration and on trial in Ports of Rotterdam, Gothenburg and Marseilles
  - Will be rolled out to marine industry worldwide in 2016
Unsafe ports......a Harbour Masters perspective!

- Standard publications still available and should not be ignored:
  - Ports of the World; Admiralty Tide Tables; List of Lights; List of Radio Signals; Admiralty Pilot; Charts; Notices to Mariners....all these contain relevant information
  - But how up to date is the information?
  - How long does it take to collate it all?
  - Does it tell you anything about the safety culture in a port?

AVANTI will deliver all of this information in one place at the click of a mouse button
Unsafe ports......a Harbour Masters perspective!

- ......and now the weather forecast.......  
  - We have heard already about the ‘Ocean Victory’ accident where weather was a prime cause of the casualty  
  - Weather information/forecasting is now high tech, more available than ever before and more accurate than ever before  
  - Weather should NOT take a port by surprise  
  - Ports have a duty of care to be environmentally aware and prevailing weather conditions are just one of those environmental factors  
  - The weather cannot be controlled......but it can be anticipated and its effect on port safety planned for  
  - It is just another known hazard with associated risks to be managed to an acceptable level (ALARP)
Unsafe ports..... a Harbour Masters perspective

The weather:

- Many ports have established weather limits for the port overall and various parts of the port including berths.
- They are not arrived at arbitrarily but are the product of consultation, examination of incidents and weather records and climate/wave modelling.
- Once agreed these are published and made available to port users (Usually by Harbour or General Directions).
- It's not rocket science!......get the relevant people together and hammer out the criteria;
- Decisions about access in marginal weather always more difficult.
- Dynamic risk assessment.
- H/Ms decision final.
Unsafe ports.....a Harbour Masters perspective!

- **Commercial pressures:**
  - All ports exist to facilitate trade...more trade....more business...more success
  - Ports need to be successful to maintain facilities and services and to invest for the future
  - Safety of Navigation is high on the list for investment......or it should be!
  - Safe ports have good reputations and thrive.......unsafe ports get poor reputations which if not addressed will potentially cripple the business

Safety is good for business
Unsafe ports.....a Harbour Masters perspective!

- Commercial pressures:
  - Nevertheless commercial pressures do exist....and most of the time this is normal and healthy
  - Sadly it is the case that on some occasions, unreasonable pressure is brought to bear.......on the port but particularly on the Harbour Master
  - Sources can be Masters ( over confident of their abilities or themselves under pressure from a charterer); agents; the port authority itself; even politicians!
  - Such pressures are a fact of life but in all cases they should never result in risk taking
  - Ports compete for business but this should not cloud sound, sensible, risk based judgements when it comes to port safety
Unsafe ports…a Harbour Masters perspective!

Summary:
- Port Users should have access to validated, up to date information to help them decide on a ports safety
- The H/M is the port professional responsible for a ports SMS
- Various powers are available to the H/M to act on safety issues
- Any ports SMS should be the subject of wide consultation with existing and potential port users
- The weather cannot be controlled….but is impact can be minimised
- Commercial pressure is a fact of life…..work with it but do not give in to unreasonable pressure
- Masters and Harbour Masters should mutually respect each others profession and role and work closely together to improve port safety
Unsafe ports.....a Harbour Masters perspective!

Thank you for your attention.

Questions?
Unsafe Ports…….a Harbour Masters perspective!

1.0 Introduction:

1.1 Ask any Harbour Master whether or not his port is safe or unsafe and I can almost guarantee what his or her response will be! Of course my port is safe!

1.2 However, accidents continue to happen in ports, some of them are extremely serious and result in loss of life and severe damage to the ports infrastructure. A recent example would be the tragic events in Genoa where the cargo vessel ‘Jolly Nero’ was in allision with the port control tower which collapsed into the harbour with the loss of 7 lives. No doubt the Harbour Master of the port of Genoa thought his port was “safe” before this tragedy was visited upon him.

1.3 The truth is of course that no port is completely 100% guaranteed safe! Does that mean all ports worldwide are therefore unsafe? I do not believe so but I would contend that some are safer than others! It all depends on how the hazards that present in any particular port are managed. All ports have hazards, some natural and some manufactured and all hazards have associated risks. Only when all the risks associated with all of the hazards have been assessed and managed to an acceptable level, can a port reasonably use the term “safe”. Who is the person responsible for identifying the hazards and managing the associated risks? The Harbour Master!

1.4 So how does a port user, a ship owner, charterer, ship Master, make an objective judgement of a ports safety before committing a vessel to load or discharge a cargo?

Most of the answers to that question involve the role and responsibilities of the Harbour Master.

2.0 The legal context:

The Harbour Masters role and responsibilities is defined in many pieces of legislation but principle amongst these are:

2.1 The Harbours, Docks, Piers and Clauses Act 1847

52 The harbour master may give directions for all or any of the following purposes (that is to say,)

For regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, pier, and within the prescribed limit, if any, and its position, mooring or unmooring, placing and removing, whilst therein;

For regulating the position in which any vessel shall take in or discharge its cargo or any part thereof, or shall take in or land its passengers, or shall take in or deliver ballast within or on the harbour, dock or pier;

For regulating the manner in which any vessel entering the harbour or dock or coming to the pier shall be dismantled, as well as for the safety of such vessel as for preventing injury to other vessels and to the harbour, dock or pier and the moorings thereof;

For removing unserviceable vessels and other obstructions from the harbour, dock or pier and keeping the same clear..................

53 Penalty on Shipmasters for not complying with directions of the harbour master
The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master, made in conformity with this and the special Act; and any master of a vessel who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction shall be liable to a penalty not exceeding level 2 on the standard scale;

56 Harbour Master may remove wrecks;

83 Byelaws may be made for all or any of the purposes herein named.

The undertakers (the port authority) may from time to time make such byelaws as they shall think fit for all or any of the following purposes; (that is to say,)

For regulating the use of the harbour, dock or pier:

For regulating the exercise of the several powers vested in the harbour master:

For regulating the admission of vessels into or near the harbour, dock, or pier, and their removal out of and from the same, and for the good order and government of such vessels whilst within the harbour, dock, or at or near the pier:

……..and so on!

2.2 Individual Harbour/Port Acts

2.3 Many ports in the UK and internationally have their own individual Port Act which also defines the role and responsibilities of the Harbour Master

e.g. Dover Harbour Act 1963

Port of London Authority Act

Belfast Harbour Act

Maritime Transport Act (New Zealand)

Port Authorities Act (Australia)

2.4 Port Marine Safety Code:

Note that this is a Code, not legislation. Compliance is voluntary. The code was born out of the disaster in Milford Haven, Wales, when the oil tanker Sea Empress went aground on rocks in the harbour resulting in widespread oil pollution.

2.4.1 The code was introduced in 2002 and all statutory port authorities are supposed to comply with it.

2.4.2 The Code is enforced by the Maritime Coast Guard Agency (MCA). The MCA are supposed to inspect a minimum of 8 ports per year to check compliance with the Code. Port authorities are required to submit a “Statement of Compliance” to the MCA every three years.

2.4.3 The MCA struggles to meet the required minimum 8 inspections and in reality is only able to be reactive in enforcing the code (i.e. they will largely inspect after an incident has occurred in a port)
2.4.4 Compliance with the code is patchy both in terms of the actual number of SHAs providing Statements of Compliance and the quality the compliance itself;

2.5 The PMSC defines the role of the Duty Holder (the Harbour Authority) as follows:

2.5.1 Review and be aware of their existing powers based on local and national legislation;

2.5.2 Comply with the duties and powers under existing legislation as appropriate;

2.5.3 Ensure all risks are formally assessed and as low as reasonably practicable in accordance with good practice;

2.5.4 Operate and effective marine safety management system (SMS) which has been developed after consultation and uses formal risk assessment;

2.5.5 Use competent people (i.e. trained, qualified and experienced) in positions of responsibility for safety of navigation

2.5.6 Monitor, review and audit the marine SMS on a regular basis – an independent designated person has a key role in providing assurance for the duty holder;

2.5.7 Publish a safety plan showing how the standards in the code will be met and a report assessing the performance against the plan;

2.5.8 Comply with directions from the GLA and supply information and returns as required;

2.6 In terms of a port user in the UK seeking reassurance about a ports safety; they could do worse than validate as far as they possibly can a ports compliance with the PMSC. Ports are required to publish their compliance statements, policies and procedures and if you look hard enough you will find them……….or not!

2.7 The PMSC defines the role of the Harbour Master:

2.7.1 The Harbour Master has day to day responsibility for the safe operation of navigation and other marine activities in the harbour and its approaches. The post holder must be competent and a suitably qualified person, with sufficient experience for the role. They must also be competent to undertake other relevant duties, in relation to Health and Safety at Work and Merchant Shipping Legislation.

The H/M has powers of direction to regulate the time and manner of ships entry to, departure from and movement within the harbour waters, and related marine safety purposes

The H/M ensures the co-ordination and regulation of all vessels within the harbour and its approaches.

2.7.2 In carrying out this role the H/M may delegate the powers of H/M to other marine staff but such delegations must be clear, formal and must not obscure the accountability of the authority and its board members.

A typical example would be the H/M delegating the powers of regulating vessels movements into, out of and intra port, to the VTS officers.
2.8 Dangerous vessels:

2.8.1 The H/M may give directions prohibiting the entry into, or requiring removal from, the harbour of any vessel if, in his opinion, the condition of that vessel, or the nature or condition of anything it contains, is such that its presence in the harbour might involve a grave and imminent danger to the safety of persons or property or risk that the vessel may, by sinking or foundering in the harbour, prevent or seriously prejudice the use of the harbour by other vessels.

2.9 General Directions, Harbour Directions and Special Directions:

2.9.1 The H.D.P&C Act refers to “powers of direction” open to the Harbour Master. These are “special directions and are given for the purpose of giving specific directions to specific vessels for specific movements. They are not for setting general rules but relate to specific vessels – or in an emergency to a class of vessels – on particular occasions.

2.9.2 Some harbour authorities (but not all) have powers through their local enabling legislation to make General Directions to regulate the safe movement and berthing of ships. These are in addition to the H/Ms powers of “special direction”. The power is exercisable by the port authority itself, although they are for the H/M to enforce. General Directions may only be made after port users have been consulted.

2.9.3 The Marine Navigation Act 2013 created a new power of Harbour Directions, similar to general directions in that they can be used to regulate safe navigation and safe mooring. They must also be consulted upon and this power must be designated by the appropriate Government minister.

Note: None of the Harbour Masters powers allow him to usurp the ship masters responsibilities i.e. it is the ships Master who has the responsibility to navigate and operate his ship safely and in accordance with international law.

3.0 Who determines a port is safe?

3.1 When a vessel is stemmed for a particular port, who is responsible for determining that this port is safe for the vessel to use? Is it the Owner? Is it the charterer? Is it the agent? Is it the ships Master? Is it the Harbour Master? Is it all of them?

3.2 Once a vessel owner accepts a charter it is the owner’s responsibility to determine that the “safe port clause” can be achieved at the draft required for the tonnage to be loaded. This puts the onus on the owner/Master to ensure in his/her passage planning that the vessel can safely enter the port or named berth within that port. Remember that passage planning is from berth to berth, not from pilot station to Pilot station!

3.3 In order to make this very important decision the owner/Master can take the charterer’s word (in my view a risky option) or they can research for and assimilate relevant information about the port in order to make a validated decision. The problem is that the proliferation of information about ports is not consistent worldwide and variable in quality. Is it up to date? Just getting access to accurate and up to date port information is sometimes difficult and time consuming. It should not be and the IHMA is trying to do something about it through its AVANTI initiative. AVANTI stands for Access to Validated Port Information and is a web based application developed in partnership with the UK Hydrographic Office. The latest version of AVANTI is currently being thoroughly tested via a series of trials in the ports of Rotterdam, Gothenburg and Marseilles. It will be rolled out to other international ports next year. Put simply AVANTI aims to bring consistency to the table when an owner/Master is looking for and at port information. Presentation should be consistent, access to it
should be easy, terminology should be consistent and there should be evidence of how up to date the information is. The Harbour Master plays a key role in ensuring that the information about his port is accurate and the latest available.

3.4 There are of course the standard publications: Ports of the World; Admiralty Pilots; List of Lights; Charts; Tide tables etc. etc. All of these technical publications are relevant and should not be ignored but how much better would it be to have all of this information about the port available in one place at the click of a mouse button? AVANTI will deliver this. Using standard publications can establish a lot of basic information about a port but it does not tell you anything about the culture of a port.

3.5 There is also the duty of conservancy. Harbour Masters must ensure that published depths are maintained and that channels and hazards are properly marked in accordance with international standards.

4.0 Weather:

4.1. We have heard already about the Ocean Victory case in which weather was a prime cause of the casualty. Weather forecasting is today, highly technical, easily accessible and usually very accurate? In short, weather should not be a surprise element in ports. Ports have a duty to be very aware of the environmental factors that may impact upon safety in ports and prevailing weather conditions are just one of those factors. It is but another potential hazard with associated risks to be managed down to an acceptable level?

4.2 Many ports have now established and published weather criteria which make it clear what the weather limits are for safe navigation in ports and even for the closure of a port. The weather limits for the closure of the Port of Dover for example are a consistent wind speed of 55knots. This limit was not arbitrarily plucked out of the ether but was the product of consultation between port users and particularly the ferry Masters who utilise that port 24/7 for 365 days of each year. They are highly skilled and highly qualified and yet they were able to sit down with the Harbour Master and agree a justifiable weather limit for closure of the port.

4.3 In marginal weather conditions it is usually the Pilot and the Master who discuss and agree whether the risks of entering a port in the prevailing conditions are justified. Again, a dynamic risk assessment process is utilised. In the event of disagreement (a rare thing in my experience) the Harbour Master may be called upon to make the decision. Again in my view it is a brave Harbour Master who would overrule the views of the professional pilot. The pilot is a professional marine technician and is one of the risk reduction resources utilised by the H/M in minimising navigational hazards. If the H/M has confidence in his pilots then he/she should back them 100%.

5.0 Commercial Pressures:

5.1 All ports exist to facilitate trade. The more trade they facilitate the more likely they are to be a successful business. Ports are businesses and they exist to make money, either for the nation, the shareholders; the local government or the stakeholders. Ports need money to maintain their infrastructure and develop it by investing wisely. Safety of navigation is high on the list for investment. Why? A safe port will be successful; an unsafe port will not!

5.2 Nevertheless in my wide contact with Harbour Masters around the globe I have heard some sad tales of commercial pressure being applied to both ship Masters and Harbour Masters to take unreasonable risks when deciding on safe navigation.
5.3 Such pressures should always be resisted. Sadly there are cases where they are not and risks have been taken...sometimes with disastrous results.

5.4 Pressure can come from a number of sources: The ship’s Master who insists that he can navigate his vessel into a port without the use of tugs as advised by the pilot; The business development manager who agrees to accommodate a large cruise liner to ensure a lucrative 2 year contract for the operators vessels but overlooks the Harbour Masters maximum vessel length limitation, established by solid risk assessment process; The Charterer who exerts unreasonable pressure on a Master to get into port because the schedule will suffer as a result of the delay; the agent who tries to bully the pilot into sailing early despite adverse weather conditions. All of these pressures exist and continue to be applied. They should be resisted and the Harbour Master has a key role to play in doing so.

5.5 The Harbour Master is these days a key member of the ports business management team. He is just as keen to see the port develop and prosper as the port owner/operator. The difference is that he must be risk averse. He will be expected to account for his decisions and most H/Ms will be only too happy to do so.

5.6 However, the pressures should not be underestimated. When a well known busy south coast ferry port is closed for any length of time for whatever reason it is not very long before a call comes in from Government to politely enquire how long it’s going to be before the port is open again. Such is that ports strategic importance.

5.7 I suspect that many ports around the world experience such commercial or indeed political pressure and the Harbour Master is right in the middle of it!

5.8 Finally, spare a thought for the smaller port where the Harbour Master is also the Chief executive? On the one hand the wearing his C/Exec hat he wants to maximise the business but on the other hand he is custodian of the ports Safety Management system? This conflict of interests is not easily resolved!

6.0 Conclusion:

6.1 Operating an unsafe port is extremely bad for business. Even a poor reputation for safety in a port will adversely affect the business to such an extent that the business may fail. It is in any ports interests to invest in safety because ultimately a safe port will be a successful port.

6.2 The level of investment in safety must be clearly justified and based upon sound risk assessment and cost benefit analysis.

6.3 The H/M is responsible for the Marine Safety Management system and he/she should not take on any role that puts him/her in conflict with this core responsibility.

6.4 The H/M must provide information that is clear and easily accessible to port users to reasonably allow them to satisfy themselves that the port is safe.

6.5 The SMS should be consistently reviewed following any incident and as a matter of routine.

6.6 The SMS should be independently audited from time to time (the PMSC states every 3 years).

6.7 Harbour Masters should engage with their customers and consult with them on matters relating to marine port safety.

6.8 Commercial pressure should never compromise safety.
6.9 The H/M and the ship Master should mutually respect each other’s professional role and work together to promote, maintain and enhance port safety.

Kevin Richardson
President
International Harbour Masters Association
12/4/15
Part C

Unsafe Port Claims – A P & I and Defence Perspective
(Power-point presentation and a written paper)

Philippa Langton
Unsafe port claims
A P&I and Defence perspective

Philippa Langton, Senior Claims Executive
Club experience

- Increasing number of cases
- Owners’ v. charterers’ perspective
- Potential for very high value claims
Potentially high value claims

- Repair costs
- Cargo loss or damage
- Berth/dock damage claims
- Detention
- Loss of hire
- Salvage
- Pollution
Potentially high value claims

E.g. OCEAN VICTORY
Claim $137.7 million
- Loss of the ship: $88.5 million
- Wreck removal: $34.5 million
- SCOPIC: $12 million
- Loss of hire: $2.7 million
Potentially high legal costs

- Subjective arguments
- Fact sensitive
- In-depth legal argument
- Expert opinion
- High evidential burden
- Technical evidence
- Witness statements
- Litigation risk
Case management

- Appoint a good team:
  - Local correspondents
  - experts
  - Lawyers
- Carry out comprehensive evidence collection early on
  - Physical safety of the port
  - Conduct of the master/pilot
Insurance interests

- Shipowners:
  - P&I cover
    - cargo
    - dock damage
    - pollution
    - wreck removal
  - Hull insurance
    - damage to ship
    - salvage
    - GA
  - Loss of hire insurance
  - Defence
    - legal costs
    - cost liabilities
Shipowner’s insurance - example:

**Cover:**
- Hull deductible: $250,000
- P&I deductible: $50,000
- No loss of hire insurance
- Defence

**Claims:**
- Hull $50 million
- P&I: $30 million
- Loss of hire: $3 million

- Total claims: $83 million
- Total uninsured/non-P&I exposure: $3.25 million
- Defence can cover about 3.9% of legal costs
Insurance interests

- Charterers:
  - P&I
    - Same risks as owner’s P&I
  - DTH
    - Liability to owners for damage to the ship, salvage, GA etc
- Defence
  - Legal costs
  - Cost liabilities
- Charterers’ insurance

- Not poolable – individual
  Club takes the hit

- Fixed limit (CSL)?

- Charterer uninsured
  in excess of fixed limit

- Will the Charterer and their insurer be good for the claim?
Typical protective clause:

“Owners guarantee that the vessel shall during the currency of the charterparty be fully insured with an International Group P&I Club or “A” rated insurer.”
Case examples

- Physical damage
  - static
  - transiting
Case examples

- Physical damage
- Arab Spring / Yemen
Case examples

- Physical damage
- Arab Spring / Yemen
- Piracy
Case examples

- Physical damage
- Arab Spring / Yemen
- Piracy
- Disasters – e.g. Fukushima
Case examples

- Physical damage
- Arab Spring / Yemen
- Piracy
- Fukushima
- Deepwater Horizon
Case examples

- Physical damage
- Arab Spring / Yemen
- Piracy
- Fukushima
- Deepwater Horizon
- SARS / Ebola
Conclusions ........
Thank you
Any questions?

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UNSAFE PORT CLAIMS
A P&I AND DEFENCE PERSPECTIVE

Introduction

1. Whilst the other panellists have contributed interesting discussions on some of the legal and technical issues arising out of unsafe port claims, I shall focus on the insurance issues that underlie and drive such claims. I shall also give an insight into the practical issues that are relevant to a Club case handler when handling such claims and share some of our unsafe port experiences.

2. In the past year, the UK P&I and Defence Clubs have seen well over 100 unsafe port cases and enquiries, with a clear increase year on year. The increase in enquiries may be driven by a desire by shipowner and charterer Members to minimize their exposure, particularly given the drop in hire rates since 2008. The recent OCEAN VICTORY decision is not expected to quell that trend since questions will remain as to what is an unsafe port; it has perhaps increased the scope for a charterer to avoid liability under an unsafe port warranty.

3. Since we handle claims for both shipowners and charterers, under charterers’ P&I cover, we see cases from both perspectives. Both parties want clear boundaries of risk. Shipowners want to know that when they place their ship into the hands of their charterers, the charterparty will protect them from any damage incurred at an unsafe port. On the other hand, charterers cannot foresee every possible disaster that may befall the ship even at a well-run port, such as Kashima, and it would be unfair to place too high a burden of responsibility on them, effectively turning them into the ship’s insurers. The task typically faced by the English courts of striking a balance between the two commercial interests is undoubtedly not an easy one.
Potentially very high value claims

4. Unsafe port claims tend to place Club case handlers in a state of alert because of their unlimited potential for high legal costs and liabilities. I say unlimited because it is not possible for a charterer to limit its liability in respect of unsafe port claims.\(^1\)

5. Although we see our fair share of low-value claims in respect of such issues as broken mooring lines, unsafe port disputes have the potential to produce some of the largest cases in terms of legal expenditure. Although we see fairly few claims proceeding to court or arbitration, due to the difficulties of pursuing unsafe port claims, those that do result in a hearing tend to be very high in value.

6. A modern ship, particularly one laden with cargo, is likely to have a very high value and can represent a high risk. Following a casualty, the costs of repairing the ship may amount to only a small proportion of the losses. Additional liabilities might include claims from the owners of the berth; detention; loss of hire; and cargo loss or damage and the consequences thereof, such as interruption of the sale of goods chain. Salvage costs can often be significant and if there is pollution, then even a minor incident has the potential to produce very significant losses and liabilities.

7. As an example, one recent incident we have handled arising from the grounding of a fully-laden bulk carrier on an uncharted reef off Indonesia involved liabilities in the region of $45 million. Even that pales in comparison to the liabilities involved in the OCEAN VICTORY case. The claimant hull underwriters claimed $137.7 million from charterers, which comprised $88.5 million for the loss of the ship, wreck removal costs of $34.5 million, $12 million in SCOPIC costs and $2.7 million in lost hire.

\(^1\) In “THE AEGEAN SEA [1988] 2 Lloyd’s Rep, 39, it was held that the reference to “Charterer” in the definition of “Shipowner” under Article 1(2) of the 1976 Limitation Convention, did not entitle a charterer to limit its liability in respect of claims brought against it by a shipowner under a Charterparty).
8. Added to the potential liabilities involved, the legal costs of handling these claims can be extensive. Due to the subjectivity of the law on unsafe port and fact sensitivity of such cases, there is invariably scope for in-depth legal argument and divergent expert opinion, usually as to what the master should have done and whether any alleged intervening negligence was causative. Of all of the categories of claim, an unsafe port claim is likely to have one of the highest evidential burdens and can include the collection of evidence, preparation and analysis of detailed technical advice and drafting of voluminous witness statements.

9. Given all these factors, even with efficient and effective case management, the legal costs can end up in the high hundreds of thousands. There is also the inevitable litigation risk that the losing party will incur a double cost exposure, taking on the liability for the winner’s costs as well as its own.

Case management and evidential issues

10. Good case management is key to keeping costs from spiralling quickly out of control and to protecting the shipowner’s or charterer’s interests. Unsafe port cases often come into the Club “disguised”- starting out as a casualty, for example a grounding, with the question of port safety not materialising until later on when the immediate aftermath has been dealt with and the shipowners are looking for a way to recoup their losses. It is important that claims handlers are alive to the possibility of an unsafe port claim from the outset.

11. A strong team of experts, lawyers and correspondents should be appointed at the earliest opportunity. A good expert can make all the difference.

12. Unsafe port disputes largely turn on their facts which in turn rely on the underlying evidence for or against the contention of unsafety. Mere evidence of various facts is not enough. Unsafe port and berth cases bring into sharp focus the quality of the available evidence. Of the many types of cases with which we are involved, unsafe port and berth cases highlight most strongly the hazards of
litigation, when evidence at a hearing – especially oral evidence – fails to match previous expectations. A case runs the risk of being fundamentally undermined if there are discrepancies between the contemporaneous evidence given by those most closely connected to the incident.

13. Since the Club’s experience of unsafe port cases is largely focused on fighting the corner of the owner seeking recovery of losses from a charterer, the burden of proof will lie on the Member, as claimant, seeking to establish the unsafety of any particular port or berth. If the party carrying the burden of proof cannot prove their case because of an absence of evidence, then their case fails.

14. The evidential requirements will naturally vary from case to case and also depend upon whether the Club’s Member is a shipowner or charterer and the type of unsafe port case. In the cases that we have seen proceeding to a hearing, the tribunal has generally made an assessment of two specific areas. Firstly, the physical safety of the port or berth concerned (i.e. looking at issues such as dredging, the operation of navigational aids and the topography of any channel or river). Secondly, the conduct of the master and pilot to assess whether their actions in any way caused or contributed to the event (i.e. passage planning, reliance on the pilot, use of tugs, mooring arrangements, etc). Both areas usually require a substantial amount of investigative work and evidence (both factual and expert). The quality of the evidence in dealing with these issues is critical.

**Insurance interests**

15. In practice, unsafe port claims are often driven by the shipowner’s insurers who cover most of the costs and liabilities in the first instance and may then seek to recover them in the subrogated shoes of their assured from the charterer and its insurer.

16. The P&I Club will not cover all of the claims and liabilities that may arise. As with any casualty, there will be a number of interested insurers. Typically, agreement is reached with the other insurers on risk to share the costs pro rata to
their financial exposure and, in general, there is a degree of cooperation between them.

17. The shipowner will have P&I insurance in respect of any third party liabilities, such as pollution, wreck removal, dock damage, cargo loss or damage or personal injury. Damage to the ship, together with any salvage or GA liabilities, will be covered by the shipowner’s hull insurance together with appropriate contributions to GA by cargo interests. Any loss of hire or loss of use may be covered by loss of hire insurance. The shipowner will, of course, bear their deductibles in relation to all of these insurers. Defence insurance will cover legal fees, typically pro rata to the Member’s own financial exposure for uninsured non-P&I liabilities.

18. By way of example, a shipowner may place their hull insurance with a deductible of, say, $250,000. Following a casualty which includes P&I risks, they may be exposed to a P&I deductible of, say, $50,000. Assume for this example that the shipowner may not have bought loss of hire cover. If the shipowner faces claims such as $50 million for hull, $30 million for P&I and $3 million for loss of hire, the shipowner’s uninsured exposure is $3.25 million ($3 million for loss of hire and $250,000 for the hull deductible), or some 3.9% of the total exposure. An entry for Defence cover can respond pro rata for legal costs in such circumstances in respect of the shipowner’s financial exposure for uninsured losses.

19. Meanwhile, charterers similarly have P&I and Defence insurance. They will typically also have damage to hull (“DTH”) cover. This will respond to any claims passed down by shipowners (or their hull underwriters) in respect of damage to the ship, salvage, GA and other risks that are covered by the shipowner’s hull insurer in the first instance. The charterer typically will have access to P&I cover for the same P&I risks faced by the shipowner. Often, P&I insurers will offer DTH cover to charterer Members alongside P&I insurance.

20. However, the charterers’ cover is not poolable. In other words, liability for charterers’ risks will not be shared or pooled amongst the International Group clubs. Charterer’s cover is typically also subject to a fixed limit (unlike a
shipowner’s P&I cover which is effectively unlimited). Charterers will often have P&I and DTH cover with the same underwriter subject to a combined single limit (“CSL”), which will vary for each individual Member. Charterers will decide how much cover to purchase depending on factors such as the financial position of the charterer, the size, type and value of the ship, where it trades (for example, it might be subject to higher liabilities in the US) and whether the company is listed on the stock exchange (in which case, its shareholders may require the assurance of higher cover). In very general terms, we might expect charterers to purchase charterers’ cover with a CSL of anything from as low as $25 million up to several hundred million, with a CSL of about $100 million to $200 million being fairly average. Importantly, it is nowhere near as high as the practically unlimited cover available to shipowners.

21. The following diagram illustrates how the towers of P&I cover for owners and charterers can compare:

![Diagram showing comparison of P&I cover for owners and charterers]

22. So when liability falls on the charterer for a high value unsafe port incident, a charterer could be left uninsured in respect of liabilities over their agreed CSL.
The shipowner’s P&I Club may only be able to recover from the charterer up to the limit which is insured by the charterer’s insurer as, in practical terms, it may be the case that the charterer may be unable to pay the uninsured balance.

23. Say, for example, a charterer only has limited P&I and DTH cover up to a CSL of $75 million (which is not uncommon), then the shipowner’s, or more likely its insurer’s, recourse for a high value claim (which might easily be well in excess of that, as shown by the OCEAN VICTORY case) could be severely limited. The consequence would be that a shipowner’s insurer that has borne the costs of an incident in the first instance may be unable to make a full recovery even if unsafe port allegations are proven.

24. The situation may be further compounded if the charterer’s insurer itself is unable to cover the claim. This may be the case if the charterer’s insurer takes a coverage point, or if the charterer is not insured with an International Group club or an insurer which is financially strong enough to withstand many potentially large claims. It can also be harder to obtain security from a non-International Group club or insurer.

25. It is common for a charterer to stipulate that a shipowner should be insured with an International Group club or “A” rated insurer as a minimum. Typically, however, this obligation is not reciprocal. In the future, shipowners may want to examine their charterer’s insurance arrangements in greater detail to satisfy themselves that the charterer and its insurers would be able to weather potentially large unsafe port claims. An adequate level of cover is important, as is the solvency of the charterer’s insurer and the charterer itself.

Trends and topicality of claims

26. As to the types of unsafe port claims that we see, the vast majority concern physical damage to ships occurring either when static or in transit, as discussed above. In response, charterers will argue that the grounding was caused by the negligence of the master or pilot.
27. In terms of physical damage, the unsafe port cases experienced by the Club can, broadly speaking, be divided into two categories - those cases where the allegation of unsafety arises from:

   a. a “static” event, involving a dispute over safety arising when a ship is in port or at its berth, for example bad weather may have resulted in mooring ropes being broken or ranging damage occurring; or

   b. a “transiting” event, where an incident arises from a ship entering, leaving or proceeding to a particular port including approach passages, such as river transits.

28. In our experience, the quality of evidence in static claims is generally better at withstanding critical analysis by a court or tribunal because, in most cases, there are more independent witnesses available to confirm how the incident developed and evidence of the “event” is largely contemporaneous. Also the evidence is frequently uncontentious or at least, once established, relatively incontrovertible. There is often less likelihood of negligence being attributed to a third party (e.g. pilots), provided of course that basic ship safety procedures were in operation and the Master acted in a manner consistent with good seamanship e.g. ensuring adequate available draft.

29. Meanwhile, in most transiting cases, a pilot will be onboard and it is frequently more difficult to obtain contemporaneous evidence and evidence that is consistent between all involved. This evidential conflict may also be further complicated by any port authority investigation into the incident and any findings made. Despite being separate enquiries of fact which should be independent, the outcome of port authority investigations can have an influence upon subsequent court or arbitration hearings. The potential for evidential conflict between those most directly involved in any transiting incident imposes a greater onus upon the claimant. Investigations have to be thorough and the evidence gathered rigorously tested for consistency and veracity.
30. Tribunals and courts appear to consider transiting cases in a particularly critical light and, in our experience, there seems to be greater sympathy for a shipowner while the ship is static in port or berth. It may well be that the berth where the damage occurred was owned or operated by the charterer. Alternatively, the charterer has such a connection with the port or berth that it is considered that there is an element of control which was or should have been exercised by the charterer. In such a case a tribunal may well have greater sympathy for the master who may have been more reliant upon the charterer for the ship’s safety while at berth or in port. With transiting events, on the other hand, tribunals will generally perceive the master as having control over a ship’s safe passage. Greater weight seems to be imputed to the master’s conduct in this regard. Again, experience suggests that there have to be circumstances greatly out of the norm for that obligation to shift to the charterer.

31. There may also be commercial influences at work when considering cases within the transiting category. Many of the transiting unsafe port cases involve similar areas, such as the River Parana or the South West Pass of the Mississippi. The commercial reality is that these are the arteries to major trading hubs. There is a sense that courts or tribunals may consider trade to such ports as being exactly what a ship has been chartered to do. If that is the underlying thinking, it is unsurprising if they impute greater responsibility to the ship’s master for ensuring a safe passage. Placing the onus too heavily on the charterer may, in the mind of the tribunal, shift the navigational risk of the voyage to the charterer whereas it should rest – or so the argument would run - with the shipowner.

32. Tribunals generally appear to consider that although a master may be reliant upon navigational aids (e.g. marker buoys) he should have the skill to cope with most navigational issues that arise whether they are abnormal or not. In a number of the cases we have seen, although the tribunal has, in its award, raised concerns regarding the operation of the port or berth concerned, relating to such matters as the extent of dredging and the operation of buoys and their positioning, it has then gone on to find that any grounding was in fact predominantly caused by the
actions or inactions of the pilot and master - thereby breaking the chain of causation between any port deficiency and the loss. From such cases we get the sense that courts and tribunals generally require the shipowner to demonstrate an ever greater level of “unsafety”, so as to shift responsibility to the charterer.

33. An interesting feature of unsafe port cases is their tendency to move with the times. For example, as ship sizes increase, smaller ports may become unsafe for the larger ships that are using them. Economic flux means that some ports or berths may fall into disrepair and become unsafe during periods of hardship. Ever improving safety standards mean that ports that fail to keep up may fall into the realms of unsafety.

34. Significant international events, such as political unrest, state of war or natural disasters, also prompt unsafe port claims and each such event is usually accompanied by a wave of related disputes or queries from Members. A safe port can become an unsafe port extremely quickly and the Club is often the first “port of call” for shipowners querying whether they are entitled to refuse to follow charterer’s orders to proceed to an area that has, in their perception, suddenly become “unsafe” due to an intervening event. Equally, charterer Members frequently seek reassurance that their orders are legitimate and should be followed by their counterparts.

35. The charterer’s nomination will be invalid if the port is “unsafe” when the nomination is made. If a port becomes unsafe once validly nominated, then a time charterer may come under a secondary obligation to nominate a safe port. However, under a voyage charter, there is no such general obligation. Issues of frustration may then arise, but that is beyond the scope of this paper.

36. In terms of civil unrest and war, there are numerous historical examples of unsafe port cases. For example, the CHEMICAL VENTURE\(^2\) was severely damaged by a missile from an Iranian warplane at the outset of the Iran/Iraq war whilst in the

\(^2\) [1993] 1 Lloyd’s Rep, 508.
channel leading to Mina Al Ahmadi, Kuwait, in which three other tankers had been similarly attacked in the previous eleven days. An unsafe port claim ultimately failed because the shipowner was held to have waived its right to rely on an unsafe port warranty by agreeing to proceed there upon the payment of war bonuses. However, the court did consider the port to be prospectively unsafe when the charterers nominated it on the basis that Iranian air attacks were a normal characteristic of the approach voyage at the time. By contrast, in THE EVIA (No.2), when the ship was trapped at Basrah after arriving there just before war broke out, it was held that at the time of nomination, the port was not unsafe and the outbreak of war was not connected with the characteristics of the port but, rather was an isolated and abnormal occurrence.

37. In the SAGA COB, the Ethiopian port of Massawa was alleged to be rendered unsafe as a result of a spate of guerilla attacks. However, as an indication of the subjectivity of such questions, the English Commercial Court and the Court of Appeal disagreed on the point, with the latter deciding that the port was not unsafe, despite previous attacks having taken place on ships visiting the port. To say that the risk of such an attack was a normal characteristic of the port (making it unsafe) was impossible.

38. More recently, the Club has seen questions of port safety arising, for example, out of the civil unrest and political changes in Egypt, Libya and the Middle East that came to be known as the “Arab Spring”; the Russian incursions into the Ukraine and resulting affects on the strategic port of Sevastopol; and the current conflict in Yemen. Often, such issues will be dealt with by a war risks clause in the charterparty (specifically the Conwartime 2013 for time charterparties and the Voywar 2013 for voyage charters). These give the master an option to refuse to go to an area which, in his reasonable judgment, will expose the ship and crew to war risks or, alternatively, to proceed to a war risks area subject to an additional premium.

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3 [1982] 1 Lloyd's Rep 334
4 [1992] 2 Lloyd’s Rep, 398 and 545 (Court of Appeal)
39. Another fairly recent phenomenon that has provoked unsafe port cases is the increasing prevalence of piracy, focused in the Gulf of Aden and the West coast of Africa. We have seen various cases involving questions as to whether a port where there is a high risk of piracy is “unsafe”. Of course, the issue is often dealt with now by piracy clauses in the charterparty, which run along similar lines to the war risks clauses.

40. Following the explosion on the “Deepwater Horizon” rig 130 miles southeast of New Orleans in 2010 and the resulting oil pollution affecting the area around the rig, the Club received a number of queries as to whether affected ports in the Mississippi River might be unsafe. The advice generally given to Members was that although a port could be considered unsafe if the approaches to the port were covered with oil which could damage a ship or cause it to incur penalties, delays or fines, in most cases it would appear that damage could be avoided by an alternative safe route or the exercise of good seamanship. The US Coast Guard exercised strict control and monitoring of the commercial shipping channels, restricted some areas and installed cleaning stations. So it was considered unlikely that ports in the area would be held to be legally unsafe.

41. The following year, 2011, radiation leaks from the Fukushima nuclear plant provoked a number of unsafe port issues for shipowner Members who were understandably reluctant to send their ships to a radiation zone. Fears of contamination of ships and cargos lead to ports outside Japan imposing specific cleaning requirements, screening or even banning ships which had called at Japanese ports. Exclusion zones were imposed in the vicinity of the Fukushima plant, but all other ports outside the exclusion zone were declared safe by Japanese authorities, though there were potentially still risks of radioactivity. Questions arose as to whether shipowners could legitimately refuse orders to proceed to Japanese ports, on the basis of unsafe port provisions in charterparties, even where the ports were not closed. It is conceivable that a port could be unsafe because of a risk of radiation poisoning to the crew. It may also be that a port could be unsafe because of the risk of radiation affecting the ship itself. However, in light of the uncertainties in the law, few if any shipowners were willing to take
the risk of placing themselves in breach of their charterparty by refusing to proceed to these ports.

42. Similar questions have arisen as a result of severe infectious disease epidemics such as the SARS epidemic in the Far East in 2003. Severe infectious disease epidemics have also given rise to concerns for Members as to port safety. Examples include the impact of the SARS epidemic in the Far East in 2003 and, most recently, the severe outbreak of Ebola in West Africa. The latter has raised a lot of interest from Members in recent months and brought the question of unsafe port into sharp focus. Many shipowners enquired whether they could argue that the affected ports were unsafe at the height of the outbreak so as to give them a right to refuse to proceed there when ordered to do so by their charterers. However, given the factual circumstances in most cases, the view was generally taken that ports were unlikely to be unsafe based on the risk of infection alone. No ports were closed and the advice given by the World Health Organisation was that infection could be avoided if appropriate precautions are taken. There have, in fact, been few, if any, actual incidents of crew infection. A more certain danger, perhaps, associated with visiting an Ebola-affected port is black listing, since many countries have imposed restrictions or bans on ships coming from affected areas. However, there is little, if any, judicial guidance as to whether the risk of blacklisting would render a port unsafe.

43. Due to the concerns raised by shipowners in relation to Ebola, BIMCO have recently produced a new Infectious or Contagious Diseases Clause which gives the master the option to refuse to proceed to a port that he perceives, in his reasonable judgment, to pose a risk of exposure for the ship or its crew. However, in the absence of such a clause, the shipowner’s position is generally unclear.

44. These are just a few examples, giving a general flavour of the types of unsafe port issues that we come across on a regular basis.

Concluding remarks
45. From those cases in which we have been involved, a number of key lessons can be drawn. Fundamentally, disputes over port and berth safety are, and will remain for years to come, disputes largely over facts. The quality of the contemporaneous evidence is crucial. Our case experience has highlighted the fact that tribunals are reluctant to shift the “operational” responsibility from the owner to the charterer unless there are quite persuasive reasons for doing so. Transiting cases tend to require the highest standard of evidence.

46. In terms of the law on unsafe ports, clearly more clarity and certainty would be welcomed by shipowner and charterer Members alike. This might lead to a reduction in high value, high cost claims. It would also provide shipowners with much needed reassurance that they can rely upon safe port provisions in real life situations in which the safety of the ship and its crew is at risk.

47. The Ebola example shows the predicament that shipowners can be placed in when faced with a port that may be unsafe. It is one thing to pursue an unsafe port claim after damage has been incurred, but a different matter to use the unsafe port warranty as a preventative, rather than reactive, measure to avoid visiting a port that appears to be unsafe. The high burden of proving unsafety means that a port will often be perceived by a ship’s crew to be unsafe even though it may not be so in legal terms. This can be very frustrating and hard to comprehend for a shipowner and the crew. With the Ebola situation, we saw genuine fear held by ship’s crews when faced with the prospect of visiting a port such as Monrovia, yet their master had no choice but to take them there nonetheless.

48. The intention behind safe port warranties is to offer some protection to shipowners in such situations. Similarly, charterers want certainty as to what their exposure is likely to be under any safe port warranties they may give. However, the uncertain and subjective nature of the law on unsafe port means that the position is rarely clear cut. The risks to which a shipowner is exposed if he should get it wrong – of placing himself in repudiatory breach for disobeying legitimate orders and potentially giving the charterer the right to terminate the charter and claim damages at the charter rate for the balance of the charter period – are often too
high to take. Unfortunately, following the success of the OCEAN VICTORY appeal, it appears the poor master is likely to remain very much “on the horns of a dilemma” when faced with a potentially unsafe port.

Philippa Langton
Senior Claims Executive, UK P&I and Defence Club
April, 2015
Part D

David Handley

Oral Presentation
Part E

Curricula Vitae
Michael Grey MBE

Michael Grey is a columnist and correspondent and has been associated with the maritime industry for the whole of his working life. At sea for twelve years with the Port Line of London and the holder of a British Foreign Going Master’s certificate, he came ashore to work in the safety and technical department of the UK Chamber of Shipping, before moving into maritime journalism.

He has been Technical Editor of Shipbuilding and Shipping Record, Editor of both Fairplay International Shipping Weekly and Lloyd’s List, where he continues to write a weekly column. He is the London Correspondent of BIMCO and contributes to a large number of maritime publications in the UK and around the world. He is the author of a number of maritime books and broadcasts on shipping matters. He is a Fellow of the Nautical Institute, an Honorary Fellow of the Institute of Marine Engineering, Science and Technology and a Companion of the Royal Institution of Naval Architects. He is an Honorary Member of IFSMA. He lectures at the World Maritime University where he is an Honorary Fellow and the Greenwich Maritime Institute. He was made MBE in the Millennium Honours for services to maritime safety and was awarded the Merchant Navy Medal in 2008.
THE SPEAKERS

Simon Kverndal QC

Simon Kverndal QC is a leading maritime barrister and a member of Quadrant Chambers in London, specialising in charterparty, collision, salvage, offshore and shipbuilding/sale/finance disputes. As well as his principal practice as an advocate, he is frequently appointed as arbitrator (including Lloyds Open Form salvage, where he is one of the five panel arbitrators, and LMAA) and is a popular choice as mediator. He was appointed Queen’s Counsel in 2002 and is ranked as a ‘Leading Silk’ in the current editions of both Chambers UK and The Legal 500 directories. He is a supporting member of the London Maritime Arbitrators’ Association, a member of COMBAR and of the LCLCBA, on the Council of the London Shipping Law Centre and a senior Member of the Court of Assistants of the Worshipful Company of Shipwrights.

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Philippa Langton

Philippa is a senior claims executive at Thomas Miller, the Managers of the UK P&I and Defence Clubs. She previously practised maritime law at Ince & Co for 8 years, where she developed expertise in dry shipping cases, such as charterparty disputes and cargo claims, as well as admiralty issues, shipbuilding, trade and other commercial disputes.

Philippa has a particular interest in China and works closely with the Club’s Far Eastern members. She studied Mandarin Chinese as her undergraduate degree before studying law at postgraduate level and has spent a total of 5 years living, studying and working in Shanghai, Beijing and South East China.

Kieron Moore

Kieron Moore joined the UK Defence Club on 12 August 2013 and is now a member of the Defence Club management as Senior Director of Claims. Previously, Kieron was the Legal Director at the Standard P&I Club where he worked for some 17.5 years. Prior to that he qualified and worked as a solicitor at Clyde & Co for 3.5 years.

David Handley, Master Mariner - Solicitor, Clyde & Co

As a Master Mariner and a qualified solicitor, David advises clients on a range of shipping matters. Having spent 12 years at sea obtaining the rank of Chief Officer, he then came ashore and qualified as a lawyer and has also worked for an International Group P&I Club.

David advises clients on a broad range of legal issues including, Bills of Lading, charterparties, collisions, salvage, employment and personal injury. He has attended casualties involving a range of issues and has frequently been involved in both port and flag state investigations in different jurisdictions.

He has a particular interest in the regulatory aspect of shipping law and his academic research was focused on the criminalisation of seafarers and the impact that the Corporate Manslaughter and Homicide Act might have in shipping cases.

He also advises clients in a variety of dry shipping related areas especially focusing on those cases which carry a more technical element to the evidence.

David also advises clients on travel law related issues including the application of various European directives and has drafted policies and procedures for tour operators to comply with various regulations and requirements.
Kevin has over 40 year’s operational experience in the marine industry both ashore and afloat. He started his career as a deck apprentice in 1968 and spent 18 years deep sea in the reefer and container trades before coming ashore in 1986. He moved to Dover in 1987 (the year of the ‘great storm’ and the Herald of Free Enterprise disaster) and recently retired in March 2014 as Chief Harbour Master after 27 years in Dover. He was responsible for all aspects of marine compliance in the port of Dover, including safety of navigation and port security and the management of the marine environment. He maintains that the efficient management of safety, security and the environment have many similarities and overlaps and are absolutely essential and critical success factors in today’s ports industry.

**Education and professional status . . .**

- An independent Marine Consultant specialising in Port Safety and Port Security
- Course Director for the Lloyds Academy Harbour Masters Diploma
- Holds the following qualifications: Master Mariner (Class 1) Foreign Going Certificate of Competency; National Certificate in Occupational Safety and Health (NEBOSH); qualified ISO BS EN 9002 Auditor; Level 5 Oil Spill Management qualification; and a GMDSSS Certificate.
- An associate fellow of the Nautical Institute
- A past President of the UK Harbour Masters Association from 2006 to 2012 and still a member of UKHMA.
- The current President of the International Harbour Masters Association.
(Port of Dover is owned and operated by Dover Harbour Board)