The Safe-Berth Warranty and Its Critics

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I. INTRODUCTION: THE FORGOTTEN ANCHOR

On November 26, 2004, the oil tanker ATHOS I traveled up the Delaware River on its way to an asphalt refinery in Paulsboro, New Jersey. As the tanker neared the refinery, neither the tanker’s crew nor the refinery operator knew that an abandoned anchor lay on the river bottom directly in the tanker’s path. Oblivious to the danger below, the tanker’s crew steered the ATHOS I toward the refinery, when suddenly the tanker allided with the anchor and began gushing oil into the river.1

The tanker’s owner, Frescati Shipping Company, Limited (Frescati), was designated the “responsible party” under the Oil Pollution Act of 1990 (OPA) and initially held responsible for approximately $180 million in cleanup costs and damages. Frescati cooperated with authorities and as a result was reimbursed about $88 million from the federal

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government’s trust fund under OPA. In January 2005, Frescati filed a petition for limitation of liability in the United States District Court for the Eastern District of Pennsylvania. The terminal operator, CITGO Asphalt Refining Company (CARCO), which had chartered the ATHOS I to deliver oil to its refinery, asserted a claim in the limitation action for the value of its lost oil cargo. Frescati counterclaimed against CARCO for its unreimbursed cleanup costs.\(^2\)

Before the accident, Frescati had time-chartered the ATHOS I to a tanker pool, Star Tankers, which in turn voyage-chartered the tanker to CARCO.\(^3\) CARCO’s voyage charterparty contained a so-called safe-berth clause, which provided that the tanker would proceed to a port named by the charterer “or so near thereunto as she may safely get (always afloat).”\(^4\) In the limitation action, In re Frescati Shipping Co., Frescati argued that CARCO had breached its contractual duty to send the vessel to a safe port and should therefore be held responsible for the resulting damage. However, the district court held that Frescati was not a third-party beneficiary of the charterparty between Star Tankers and CARCO. More importantly, the district court held that the safe-berth clause imposed on the charterer only a duty to use due diligence in selecting a safe port, which the district court concluded CARCO had done.\(^5\) Frescati appealed.

The United States Court of Appeals for the Third Circuit reversed the district court and held that Frescati was a third-party beneficiary of the charterparty’s safe-berth clause. On the crucial issue of the charterer’s duty, however, the appellate court confronted one of the most significant circuit splits in maritime law.\(^6\) The United States Court of Appeals for the Second Circuit has long held that a safe-berth clause in a time or voyage charterparty constitutes an express warranty by the charterer that the named port will be safe.\(^7\) However, commentators strongly criticized the Second Circuit’s warranty interpretation as illogical and unfair.\(^8\) Following the commentators, the United States

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\(^2\) Id. at 193, 195, 2013 AMC at 1530-31, 1533.
\(^3\) Id. at 190-91, 2013 AMC at 1526-27.
\(^4\) Id at 191, 2013 AMC at 1527.
\(^5\) Id at 195, 2013 AMC at 1534.
\(^6\) See id. at 197-202, 2013 AMC at 1537-45.
\(^8\) See, e.g., GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 4-4, at 204-07 (2d ed. 1975) (“[T]here is no reason, in policy or in interpretation, for holding the charterer liable for ship’s damage, on the basis of the safe-port and safe-berth clauses.”); J. Bond
Court of Appeals for the Fifth Circuit rejected the Second Circuit’s position and held that a safe-berth clause imposes on the charterer no more than a duty to use due diligence to select a safe port. The resulting circuit split means that two vessels sailing under identical charterparties could suffer damage under identical circumstances and either the charterer or the owner would be liable depending on whether the action was brought in New York or New Orleans.

The Frescati Shipping case focused attention on this long-standing circuit split, framing the legal issue with facts that read like a law school exam. In this case, neither the owner nor the charterer had any reason to know about the condition that made the port unsafe. Due diligence by the charterer would not have prevented the accident. Therefore, liability turned on the allocation of risk under the charterparty.

In the end, the Third Circuit adopted the Second Circuit’s position that a safe-berth clause constitutes an express warranty, leaving CARCO responsible for the cleanup costs. However, because the district court had failed to set forth its findings of fact as required, the appellate court remanded the case. In the meantime, CARCO sought review by the United States Supreme Court.

This Comment defends the safe-berth warranty from its critics and argues that the Fifth Circuit should reverse course and adopt the safe-berth warranty. Part II provides an overview of the safe-berth warranty, unpacking the definition of a safe port and cataloging the defenses and mitigating doctrines that may allow the charterer to escape liability. Part III discusses how courts in England and the United States have applied the safe-berth warranty in a variety of situations that highlight different aspects of the warranty. Part IV surveys criticisms of the safe-berth warranty and explains why the Fifth Circuit rejected the warranty. Finally, Part V argues that the criticisms leveled against the safe-berth warranty fail and urges the Fifth Circuit to restore uniformity by adopting the safe-berth warranty.

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Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 868-69 (1975) ("[T]he courts are placing an undeserved burden on the charterer in holding him to a warrantor’s liability.").


12. *Id* at 196-97, 2013 AMC 1535-37.

II. AN OVERVIEW OF THE SAFE-BERTH WARRANTY

In a time or voyage charterparty, the charterer pays for the commercial disposition of the vessel, while the owner maintains “possession, management, and control of his ship.”

Time and voyage charterparties commonly provide, in addition to other standard terms, that the charterer will send the vessel to a port or berth where she will “safely lie, always afloat.” The majority view, in both England and the United States, is that these words constitute an express warranty by the charterer that it will send the vessel to a safe port.

If the vessel is damaged because of an unsafe condition at the port named by the charterer, the charterer breaches the warranty and becomes liable to the owner for the damage. Under this view, it does not matter whether the charterer exercised due diligence in selecting the port and investigating its safety. This interpretation of the standard clause is called the “safe-berth warranty,” or sometimes the “safe-port warranty.”

A. The Definition of a Safe Port

The classic definition of “safe port” appears in an English case, Leeds Shipping Co. v. Societe Francaise Bunge (The Eastern City). In The Eastern City, Lord Justice Sellers held that a port is safe when “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...


15. A “port” is a place where the vessel can enter, load or unload, and leave; a “berth” is the specific place within the port where the vessel loads or unloads. See Smith, supra note 8, at 861. For simplicity, this Comment uses the terms “port” and “berth” interchangeably.


18. This Comment uses the term “safe-berth warranty” to refer generally to the charterer’s duty to send the vessel to a safe port and use the vessel in a safe berth. The charterer’s duty to send the vessel to a safe port extends to specific docks, wharves, and other places within that port. EDER ET AL., supra note 17, ¶¶ 10.84-85, at 220-21. However, the reverse is not necessarily true. See Atkins Int’l H.A. v. Islamic Republic of Iran Shipping Lines (The A.P.J. Priti), [1987] 2 Lloyd’s Rep. 37 (C.A.). In that case, the Court of Appeal held that the charterer did not breach its specific promise to furnish a safe berth by sending the vessel to an unsafe port.

cannot be avoided by good navigation and seamanship."²²⁰ This definition has several components. First, the port must be safe for the particular ship that is the subject of the charter. In other words, safety is a relative concept and relates to the particular vessel and its mission. A port may be safe for one vessel and cargo and unsafe for another. Second, the ship must be able to reach, use, and leave the port safely. Therefore, not only the port but also the areas around the port must be safe to enable the vessel to enter and leave without being exposed to danger. Third, the port will not be unsafe because of the occurrence of some abnormal condition. In other words, the charterer will not be held liable for the consequences of an unforeseeable event that temporarily renders an otherwise acceptable port unsafe. Finally, the port will not be unsafe because of dangers that could be avoided by good navigation and seamanship. The master and crew must take reasonable measures to protect the ship, and the charterer will not be held liable where those measures could have prevented the damage.²¹

B. Defenses and Mitigating Doctrines

Although the charterer’s liability under the safe-berth warranty is absolute in the sense that it does not depend on fault, various defenses and mitigating doctrines may allow the charterer to avoid or limit its liability under the safe-berth warranty. These include, first, avoidability by good navigation and seamanship; second, acceptance of a named port by the master with knowledge of an unsafe condition; and finally, intervening negligence by the master. These defenses and mitigating doctrines soften the harshness of the strict liability imposed by the safe-berth warranty.

First, a potentially dangerous condition does not render a port unsafe if the danger could be avoided by good navigation and seamanship.²² "The test is whether in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the port or berth."²³ For example, in Roman Bernard Ltd. v. Marine Trading Ltd., the arbitrators found that Puerto Isabel, Nicaragua, an open roadstead port, was not unsafe even though it was exposed to the elements, but that the master, under these circumstances, was obligated to secure the vessel and keep it ready to leave in case of

²⁰. Id. at 131.
²¹. See COGHLIN ET AL., supra note 17, ¶ 10.20-.48, at 201-08.
²². See id. ¶ 10.146-.157, at 230-32.
²³. Id. ¶ 10.146, at 230.
bad weather. In other words, the port was not unsafe because its potentially dangerous exposure to the elements could be ameliorated by the master’s taking reasonable measures. On this basis, the arbitrators found that the owner, not the charterer, was liable when the vessel broke away in bad weather and grounded on the beach.

Second, the master’s acceptance of a named port with knowledge of an unsafe condition may constitute a waiver of the safe-berth warranty. In Tweedie Trading Co. v. New York & Boston Dyewood Co., the charter was for a steamer to load a cargo of wood at Rosario on the Parana River in Argentina. The parties knew that water levels on the river would limit the amount of wood the steamer could take on, and the charterparty provided that the charterer would send the vessel to “ports of loading and discharge where [the] steamer can always safely lie afloat; lighterage, if any, to be at expense and risk of [the charterer].” The charterparty also provided that the vessel could load additional cargo at its option. The master elected to do so, but later, as the river fell, the master asked the charterer to pay for lighters to make sure the vessel could pass safely over a bar on the river. The Second Circuit approved the charterer’s refusal to pay and held that by accepting the loading port with knowledge of local conditions, the master had assumed the risk of getting the vessel to and from the loading port.

Finally, the master’s intervening negligence may relieve the charterer of liability. However, courts are reluctant to second-guess the master’s judgment, and the standard for intervening negligence may be difficult for the charterer to meet. As one court explained: “It is not enough that the course followed by the captain entails some foreseeable risk of harm. . . . To constitute an intervening act of negligence, the course followed by the captain must entail an unreasonable risk.” This burden is not insurmountable, however. For example, in Slebent Shipping Co. v. Associated Transport Line, LLC, the arbitrators agreed that the port was unsafe, but a majority found that the master’s conduct was “so egregiously negligent and unseamanlike” so as to shift blame

24. In re Arbitration Between Roman Bernard Ltd. & Marine Trading Ltd. (The Roman Bernard), SMA Award No. 1202, at 1, 9 (1978) (Berg, Nichols & Nisi, Arbs.).
25. Id. at 9-10.
27. 127 F. 278, 279 (2d Cir. 1903) (internal quotation marks omitted).
28. Id.
29. Id. at 280.
30. See COGHLIN ET AL., supra note 17, ¶¶ 10.166-.172, at 233-34.
from the charterer to the owner. Finally, even in cases in which the master’s negligence is less serious, courts and arbitrators may allocate damages in proportion to the parties’ fault under the Supreme Court’s decision in *United States v. Reliable Transfer Co.*

Together, these defenses and mitigating doctrines moderate the effects of the safe-berth warranty’s strict liability and more precisely allocate risk between the owner and the charterer. The charterer will not be liable under the warranty where the master could have avoided the danger, where the master accepts the port with knowledge of a dangerous condition, or where the charterer names an unsafe port but the master’s intervening negligence actually causes the damage.

### III. The Safe-Berth Warranty in English and American Law

Courts in England and the United States generally agree that a standard safe-berth clause constitutes an express warranty by the charterer that the named port will be safe. These courts developed the warranty in a series of decisions that set forth the charterer’s responsibility under the warranty.

#### A. The Safe-Berth Warranty in the English Courts

English courts treat the standard safe-berth clause as a warranty by the charterer that the named port or berth will be safe. The charterer’s obligation is absolute, without regard to fault. In English law, the warranty means both that the master may refuse the charterer’s order to go to an unsafe port and that if the master accepts the charterer’s order, the owner may hold the charterer liable for damages caused by the port’s unsafe condition. The interpretation of the clause in English law is important because charterparties are commonly governed by English law, and as a result, that law has been influential on the American law of charterparties.

Several cases serve to illustrate the nature and function of the safe-berth warranty in English law. In *Reardon Smith Line Ltd. v. Australian Wheat Board*, the Privy Council held that a charterer was liable for


34. See EDER ET AL., supra note 17, ¶ 9-009, at 150.

35. See COGLIN ET AL., supra note 17, ¶ 10.52, at 210.

damage sustained by a vessel in its berth. The wharf where the vessel docked was missing fenders and buoys, and a storm slammed the unprotected vessel against the wharf. The court construed the standard safe-berth clause as “an undertaking by the charterers to nominate a safe port.” Moreover, the court concluded that this was the most reasonable construction based on the nature of the underlying contract. Because the charterer is allowed to send the vessel to a port of his choosing, the court reasoned, “It seems natural that he should give at any rate some undertaking as to its safety, and that the owners should be entitled to rely on the place nominated being safe.” Finally, the court held that if the charterer breaches this contractual obligation by nominating an unsafe port, it should be liable to the owner for the resulting damages, subject to the ordinary limitations on contract damages.

Another aspect of safety was clarified in Kodros Shipping Corp. v. Empresa Cubana de Fletes. That case involved a cargo ship trapped in the Shatt al-Arab waterway during the Iran-Iraq War. The court held that the safe-berth warranty, although absolute, was not breached because the unsafe condition arose after the charterer’s order had been given. As Lord Roskill explained, the charterer’s safe-berth warranty “means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave.” In other words, the charterer’s obligation to name a safe port arises when the order is given but does not continue until the ship has left. Therefore, whether the obligation is breached depends on the state of affairs at the time the order is given.

Finally, Kodros Shipping also provides an example of so-called political unsafety. Most unsafe conditions involve physical obstructions, dangerous geography, or the lack of appropriate facilities or equipment. A port can also be considered unsafe because of a political situation or state of war that prevents the vessel from safely entering, staying, or leaving. However, “a political risk will normally only be

37. [1956] A.C. 266 (P.C.) 284 (appeal taken from Austl.).
38. Id at 277.
39. Id at 279.
40. Id.
41. Id.
43. See id. at 311-12.
44. Id. at 315 (emphasis added).
45. See EDER ET AL., supra note 17, ¶ 9-013, at 151.
46. See COGHLIN ET AL., supra note 17, ¶¶ 10.17-19, at 200-01.
47. See EDER ET AL., supra note 17, ¶ 9-019, at 153.
sufficient to render a port prospectively unsafe if the risk is such that a reasonable master or shipowner would decline to send his vessel there.\textsuperscript{48}

B. The Safe-Berth Warranty in the Second Circuit

In a series of cases, the Second Circuit articulated the doctrine that a safe-berth clause constitutes an express warranty by the charterer that the berth it selects will be safe.\textsuperscript{49} In \textit{Cities Service Transportation Co. v. Gulf Refining Co.}, the chartered vessel went aground while loading in Paraguaná, Venezuela, after the port captain, who was an employee of the charterer, had assured the master that there was enough water to load the vessel safely.\textsuperscript{50} The Second Circuit affirmed the district court’s decision holding the charterer liable. The circuit court added in dictum that even if the port captain had not made any assurance to the master, “the charter party was itself an express assurance, on which the master was entitled to rely, that at the berth ‘indicated’ the ship would be able to lie ‘always afloat.’”\textsuperscript{51} Although this statement was not necessary to the court’s decision, it paved the way for future rulings interpreting the safe-berth clause as a warranty.

In \textit{Park Steamship Co. v. Cities Service Oil Co.}, the charterer twice ordered the vessel to anchor in Hingham Bay near Boston for lightering, and both times the vessel ran aground.\textsuperscript{52} The Second Circuit held the charterer liable for the resulting damage even though a pilot hired by the vessel had chosen the exact spot in the bay where the vessel anchored.\textsuperscript{53} Judge Swan explained that under the terms of the charterparty, “the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer’s acceptance of the risk of its choice.”\textsuperscript{54} Thus, the charterer was liable without regard to fault.

The leading Second Circuit case is \textit{Venore Transportation Co. v. Oswego Shipping Corp.}\textsuperscript{55} Oswego Shipping Corporation had time-chartered a cargo vessel, which it in turn voyage-chartered to Banco do

\textsuperscript{48} Id.
\textsuperscript{49} Several commentators offer critical discussion of the development of the safe-berth warranty in the Second Circuit. See, e.g., Hartman, supra note 10, at 541-42; Smith, supra note 8, at 864-65.
\textsuperscript{50} 79 F.2d 521, 521, 1935 AMC 1513, 1513 (2d Cir. 1935) (per curiam), aff’g 9 F. Supp. 963 (S.D.N.Y. 1934).
\textsuperscript{51} Id.
\textsuperscript{52} 188 F.2d 804, 805, 1951 AMC 851, 852 (2d Cir. 1951).
\textsuperscript{53} Id. at 805-06, 1951 AMC at 852-54.
\textsuperscript{54} Id. at 806, 1951 AMC at 854.
\textsuperscript{55} 498 F.2d 469, 1974 AMC 827 (2d Cir. 1974).
Brasil. Banco do Brasil’s voyage charter contained a safe-berth clause. The vessel sailed to Salvador, Brazil, where the charterer’s representatives joined her. While the vessel was docking, the master noticed that one of the pontoons used to protect the vessel from striking the concrete pier was missing. Still, the charterer’s representatives assured the master that the berth was safe. Weather conditions deteriorated, however, and the vessel was slammed against the pier repeatedly. Eventually the master succeeded in getting the vessel out of its berth, but the hull was badly damaged.56 The Second Circuit held the voyage charterer responsible for the damage because it had breached its safe-berth warranty, reasoning that the charterer “had an express obligation to provide a completely safe berth, an obligation which was nondelegable.”57 By providing an unsafe berth, the court held, the charterer breached its warranty.58

IV. THE BACKLASH AGAINST THE SAFE-BERTH WARRANTY

Although the safe-berth warranty is now well established in both English and American law, commentators have long condemned the warranty view as illogical and unfair. They argue that the warranty view fails to account for the positions of the parties, that it puts an unfair burden on the charterer, and that the allocation of risk under the warranty encourages the master to take unreasonable risks. They also argue that the safe-berth warranty makes an unwise departure from earlier jurisprudence, which held the charterer to a negligence standard. In support of this position, they cite early authorities that appear to contradict the warranty view. The Fifth Circuit responded to these criticisms in Orduna S.A. v. Zen-Noh Grain Corp., rejecting the Second Circuit’s warranty view in favor of a more forgiving standard of due diligence for the charterer.59

A. Criticism of the Safe-Berth Warranty

Despite its widespread acceptance, the safe-berth warranty has attracted strong criticism from commentators. In their influential treatise on maritime law, Professors Grant Gilmore and Charles Black argue that courts should abandon the safe-berth warranty and instead impose on the

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56. Id. at 470-71, 1974 AMC at 828-30.
57. Id. at 472, 1974 AMC at 832.
58. Id. at 472-73, 1974 AMC at 832.
Gilmore and Black make three policy arguments against the safe-berth warranty. First, between the charterer and the master, the master is in the better position to evaluate the port’s safety based on his nautical expertise and his knowledge of the vessel’s characteristics. The charterer, by contrast, may know nothing about the vessel except its carrying capacity and has selected the port for commercial reasons. Moreover, the master knows that the charterer’s only interest in the port is commercial and therefore has no reason to assume that the charterer has investigated the port’s safety. In this situation, it makes no sense to hold the charterer responsible for the master’s taking the vessel into an unsafe port. Second, safe-berth clauses excuse the master from following the charterer’s order to take the vessel into an unsafe port or berth. Indeed, “[t]he very purpose of the clauses is to free him of this obligation.”61 Because the master has no obligation to follow an order to take the vessel into an unsafe port, that order cannot properly be regarded as the cause of any damage to the vessel. Finally, the vessel is probably already insured against damage under a hull policy.62 For these reasons, Gilmore and Black conclude, “[T]here is no reason, in policy or in interpretation, for holding the charterer liable for ship’s damage, on the basis of the safe-port and safe-berth clauses.”63

In addition to presenting policy arguments, Gilmore and Black also argue that a nineteenth-century Supreme Court decision contradicts the warranty view. In Atkins v. Fibre Disintegrating Co., Judge Erastus Benedict of the United States District Court for the Eastern District of New York held that a charterer was not liable for damage to a vessel after the vessel hit a reef leaving Port Morant, Jamaica.64 The charterparty gave the charterer the right to send the vessel to Kingston followed by “a second safe port” to be named later. When the charterer instructed the master to take the vessel to Port Morant, the charterer told the master that the port was safe. Judge Benedict rejected the owner’s argument that the charterer’s representations as to the port’s safety “amounted to a warranty” and held the owner liable for the damage.65 The case was appealed on a jurisdictional issue, but the Supreme Court approved Judge

60. See GILMORE & BLACK, supra note 8, at 202-07.
61. Id. at 204-05.
62. Id.
63. Id. at 205.
64. 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 600), rev’d, 2 F. Cas. 80 (C.C.E.D.N.Y. 1870) (No. 602), rev’d sub nom. Atkins v. Disintegrating Co., 85 U.S. (18 Wall.) 272 (1873).
65. Id. at 78-80.
Benedict’s holding on the merits. Professors Gilmore and Black argue that by adopting the district court’s reasoning, the Supreme Court implicitly rejected the safe-berth warranty “in a case not since overruled or weakened in that Court.” Therefore, they conclude, lower courts are bound by precedent to reject the safe-berth warranty.

Commentators, including Gilmore and Black and others, have pointed to Atkins and other early cases as evidence that courts historically held the charterer to a negligence standard. In addition to Atkins, several commentators cite Hastorf v. O’Brien, a Second Circuit decision. The chartered vessel in Hastorf sank after it allided with a log sticking up from the bottom of the Hudson River. The court held that the charterers discharged their duty because they had been reasonably prudent in making the berth safe and that only “extraordinary precautions” would have avoided the accident. Therefore, the charterer was not liable. The critics argue that this case, among others, shows that even in the Second Circuit, the cradle of the safe-berth warranty in the United States, courts traditionally held the charterer to a negligence standard. On this view, the modern warranty interpretation marks an unwise departure from the earlier jurisprudence.

Commentators also agree with Professors Gilmore and Black’s policy arguments. One commentator argues that the warranty interpretation puts “an undeserved burden on the charterer.” This commentator expands on Gilmore and Black’s argument that the safe-berth warranty fails to recognize that the master on the scene is in the best position to avoid damage. The cases applying the warranty view ignore this reality and, as a result, encourage the master to take unreasonable risks. “The role of the master should not be subordinated to the extent presently done, since in many cases this leads to the master’s gambling at the charterer’s risk.” Finally, a leading Scandinavian maritime lawyer performs a comparative study of safe-berth rules and likewise concludes

66. See Atkins, 85 U.S. (18 Wall.) at 299 (“In regard to the merits . . . we have found no reason to dissent from the views of the learned district judge by whom the case was heard. However full might be our discussion, we should announce the same conclusions.”).
67. GILMORE & BLACK, supra note 8, at 205.
68. See Hartman, supra note 10, at 539-41; Smith, supra note 8, at 862-63.
69. 173 F. 346, 347 (2d. Cir. 1909).
70. Id.
71. Id. at 347-48.
72. See Hartman, supra note 10, at 539-41 (citing Atkins and Hastorf to show that courts traditionally held the charterer to a negligence standard); Smith, supra note 8, at 862-63 (same).
73. Smith, supra note 8, at 868.
74. Id.
that policy factors weigh against imposing strict liability on the charterer.\footnote{See Jan Ramberg, Unsafe Ports and Berths § 17, at 118-21 (1967) (“It is submitted than an evaluation of the arguments pro et contra does not lead to a strict liability for the charterer.”).}

In sum, the commentators argue that the safe-berth warranty is wrong as a matter of policy and unsupported by earlier authorities. The charterer should not bear the risk when the master is in a better position to prevent the damage. Moreover, the master can already refuse to enter an unsafe port, and therefore the charterer should not be liable for his decision to enter one. Finally, relieving the master of any liability will encourage the master to take risks with the vessel. The earlier cases sensibly avoided these problems by holding the charterer to a negligence standard.

**B. The Fifth Circuit’s Rejection of the Safe-Berth Warranty**

In *Orduna*, the Fifth Circuit followed the commentators and took a strong stand against the Second Circuit’s warranty view.\footnote{913 F.2d 1149, 1991 AMC 346 (5th Cir. 1990).} In that case, part of a grain elevator fell and damaged a vessel while it was unloading on the Mississippi River, and the vessel’s owner sued the voyage charterers, among others. The district court held that by agreeing to the charterparty’s safe-berth clause, the charterer warranted the safety of the berth it selected and therefore was liable without regard to fault. The Fifth Circuit reversed and followed several commentators in rejecting the warranty view.\footnote{Id. at 1151, 1155-57, 1991 AMC at 347, 354-56.} In particular, the Fifth Circuit was persuaded by Professors Gilmore and Black’s policy arguments regarding the safe-berth warranty.\footnote{Id. at 1156, 1991 AMC at 354 (citing Gilmore & Black, supra note 8, ¶ 4-4, at 204-06).}

The Fifth Circuit agreed with the commentators “that no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects,” noting that some district courts had also begun to doubt the warranty view.\footnote{Id. at 1157, 1991 AMC at 356.} The court also relied on the Supreme Court’s approval of Judge Benedict’s decision in *Atkins* to conclude that the Fifth Circuit was bound by precedent to apply a due-diligence standard.\footnote{Id. at 1156-57, 1991 AMC at 355-56 (citing Atkins v. Disintegrating Co., 85 U.S. (18 Wall.) 272, 299 (1873)).} Finally, like the commentators, the court was concerned that the safe-berth warranty “could discourage the master on the scene from
using his best judgment in determining the safety of the berth.”

Therefore, the Fifth Circuit held that by agreeing to a safe-berth clause, a charterer does not warrant the safety of a berth but instead promises only to use due diligence to select a safe berth. This decision set up the circuit split that continues today.

V. A DEFENSE OF THE SAFE-BERTH WARRANTY

The commentators argue—and the Fifth Circuit, in *Orduna*, agreed—that the safe-berth warranty is unfair and inefficient and that earlier precedents support applying a standard of reasonable care. However, the arguments against the safe-berth warranty fail for three reasons. First, whatever their force, policy arguments are beside the point because the meaning of a safe-berth clause is an ordinary matter of contract interpretation. Second, even if policy considerations were relevant to this question of interpretation, the arguments against the safe-berth warranty ignore commercial reality. Finally, for various reasons, the earlier precedents cited in support of a due-diligence standard are inapplicable.

First, and most fundamentally, the policy arguments against the safe-berth warranty are irrelevant because the safe-berth warranty is a matter of contract. The commentators argue that the safe-berth warranty is “inconsonant with the positions of the parties” and that it imposes “an undeserved burden on the charterer.” These arguments are driven by policy considerations regarding the proper allocation of risk. In a sense, this is appropriate, because the purpose of the clause is to allocate the risk of an unsafe berth between the owner and the charterer. However, these arguments are misplaced because the meaning of a safe-berth clause is not a matter of policy but rather an ordinary matter of contract interpretation.

Because the safe-berth warranty is a matter of contract, the parties are free to bargain for a different allocation of risk, for example, by lessening the charterer’s duty. Indeed, some widely used charterparties specifically disclaim the safe-berth warranty and instead impose a duty of due diligence on the charterer. These clauses show that the parties

81. Id. at 1157, 1991 AMC at 356.
82. Id.
83. GILMORE & BLACK, supra note 8, at 204.
84. Smith, supra note 8, at 868.
85. See, e.g., Hartman, supra note 10, at 555 (“The question quickly focuses on what is the fair allocation of risk.”).
86. See, e.g., Shelltime 4 cl. 4 (1984), reprinted in 2C BENEDICT ON ADMIRALTY, supra note 16, at 17-134.1 (“Charterers do not warrant the safety of any place to which they order the vessel
can allocate the risk however they choose. The charterer can bargain for a lower standard, and the owner, in exchange for taking on a greater risk, will probably charge a higher rate of hire. While policy arguments may provide reasons for the parties to select one arrangement over another ex ante, they should not dissuade courts from giving effect to the parties’ selection ex post. In short, the courts should not attempt to make a bargain for the parties that the parties can make for themselves.

A safe-berth clause in a time or voyage charterparty is a contract term like any other, and there is no reason why that term should not be given its plain and ordinary meaning. If the charterer promises that it will take the vessel to a safe port and later breaches that promise, then the charterer should be held responsible for the consequences of its breach. Policy arguments, whatever their force, should not affect how courts interpret the charterer’s promise. It is for the markets, not the courts, to allocate the risk of an unsafe berth efficiently.

Second, even if policy arguments did bear on the question of interpretation, the arguments against the safe-berth warranty rest on flawed assumptions. For one thing, it is not necessarily true that the master knows more about the port than the charterer. The master may never have been to the port before, whereas the charterer may do business there regularly and have at least some knowledge of local conditions; it may even maintain an office or an agent at the port. While it is true that the master knows more about his vessel and its capabilities, it would be unfair to charge the master with knowledge of conditions at every port. The charterer selects the port, and therefore it is not unreasonable to expect that the charterer, in many cases, will know as much or more about the port than the master.

Further, treating the charterer as warrantor will not encourage the master to take unreasonable risks with the vessel. Even if the charterer warrants the port’s safety, under the accepted definition of a safe port, the charterer will not be held liable for dangers that could have been avoided by good navigation and seamanship. In addition, the master’s intervening negligence may shift liability to the owner. Therefore, even with the benefit of the safe-berth warranty, the master has every reason to be careful with the vessel. In any case, it is unrealistic to assume that the

and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.”). But see Ullises Shipping Corp. v. Fal Shipping Co. (The Greek Fighter), [2006] EWHC 1729 (Comm) (Eng.). In The Greek Fighter, an English court refused to give effect to a due-diligence clause in a charterparty form because the fixture recap contained an express warranty. Id. at [315]. A “fixture recap” is the final communication between the parties that encapsulates the terms of the charter. See Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121, 123, 1982 AMC 2321, 2324 (2d Cir. 1982).
master will gamble with the vessel’s safety when the master remains responsible to his employer, the vessel’s owner, for keeping the vessel safe.

Although the master can ignore the charterer’s order to take the vessel into an unsafe port, it does not follow that the charterer should escape liability for giving such an order when it results in damage to the vessel. In the course of performing the charter, the master should be able to rely on the charterer’s assurance without assuming responsibility for its correctness. The charterer has a contractual duty to send the vessel to a safe port, and the master should be able to navigate the vessel on the assumption that the charterer will perform under the contract. As one English judge put it, “If everything done under contract has to be scrutinized and tested by the other party before he can safely act upon it, many transactions might be seriously held up—in doubtful cases, perhaps indefinitely.”

In short, the master does not necessarily know more about the port than the charterer; the safe-berth warranty will not encourage the master to take unreasonable risks; and the fact that the master can refuse the charterer’s order to go to an unsafe port does not mean that the charterer should escape liability if the master follows the order. Therefore, even if policy arguments were relevant to how courts should interpret safe-berth clauses, the arguments against the safe-berth warranty do not withstand scrutiny.

Finally, the earlier cases that supposedly undermine the safe-berth warranty, including Atkins, are actually consistent with the majority view. In Atkins, Judge Benedict held that an owner was liable for damage caused by an unsafe port despite the fact that the charterer had told the master that the port was safe. Although the Supreme Court approved Judge Benedict’s decision on the merits, this case does not contradict the safe-berth warranty. Judge Benedict did not hold the owner liable because he held that the safe-berth clause in the charterparty failed to establish a warranty, but rather because he found that the master had waived the warranty by accepting the named port without objection.

When the charterer named the port, the master accepted his choice without objection. By accepting the charterer’s order, Judge Benedict

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89. Id. at 79.
reasoned, the master “waived the right to object” later. More­ver, the master did not just take the charterer’s word for it; he investigated the port himself and was satisfied “upon his own judgment” that it was safe. Thus, the master was not relying on the charterer’s assurances, but rather on his own sources and judgment regarding the port’s safety. Therefore, Judge Benedict did not hold that there was no safe-berth warranty; he held that the master waived the warranty by accepting the named port. For this reason, a leading treatise calls the Fifth Circuit’s reliance on Atkins “unfortunate.”

Similarly, in Hastorf, the Second Circuit held the charterer to a duty of reasonable care. However, the court in that case was not interpreting a safe-berth clause, but instead analyzing the charterer’s duty as a bailee under the common law. Other early cases cited by commentators similarly do not apply because those cases analyzed the charterer’s general duties under the common law rather than their contractual duties under safe-berth clauses. In fact, these cases do not say anything about how courts should interpret a charterer’s promise to send the vessel to a safe port. Whatever the charterer’s duty may be absent a safe-berth clause, once the charterer promises to send the vessel to a safe port, the charterer becomes liable for the port’s safety.

In sum, neither precedent nor policy justifies abandoning the safe-berth warranty. In an appropriate case, the Fifth Circuit should correct its mistake and restore uniformity by recognizing the safe-berth warranty.

VI. CONCLUSION: A MISSED OPPORTUNITY

On February 24, 2014, the Supreme Court denied certiorari in Frescati Shipping, leaving the circuit split in place. As of now, the Second and Third Circuits hold, along with the English courts, that a

90. Id.
91. Id.
92. COGHIN ET AL., supra note 17, ¶ 10.120, at 225 (“Contrary to the Fifth Circuit’s reading of Atkins, Judge Benedict found in that case that there was a safe berth warranty, but that it was waived by the master’s acceptance of the port without protest when he would have been entitled to refuse to enter the port.”).
94. See, e.g., Waldie v. Steers Sand & Gravel Corp., 151 F.2d 129, 130-31, 1945 AMC 872, 874-75 (2d Cir. 1945) (treating charterer as bailee); Cearly Bros. v. City of New York (The Roslyn), 93 F.2d 278, 280, 1937 AMC 1575, 1577-78 (2d Cir. 1937) (treating charterer as wharfinger); M.K.J. Tracy, Inc. v. Marks, Lissberger & Son, Inc., 283 F. 100, 102 (2d Cir. 1922) (treating charterer as consignee). Significantly, none of these cases involved contractual promises regarding a port’s safety. For more on the duties of wharfingers and other caretakers of vessels, see G. Hamp Uzzelle III, Liability of Wharfingers, Fleeters, and Bailees, 70 TUL. L. REV. 647 (1995).
safe-berth clause in a time or voyage charterparty constitutes an express warranty by the charterer that it will send the vessel to a safe port. At the same time, the Fifth Circuit’s contrary holding in *Orduna*—that safe-berth clauses impose no more than a duty on the charterer to use due diligence in selecting a safe port—binds courts in Mississippi, Louisiana, and Texas. As a result, the two principal maritime circuits remain divided on this commercially important issue.

Even for those who remain persuaded that the Fifth Circuit’s view is correct, it should be clear by now that the Supreme Court is not coming to the rescue. The circuit split has persisted for almost twenty-five years and in *Frescati Shipping* the Supreme Court declined perhaps its best vehicle for resolving the issue. Moreover, it is surely preferable at this time that there be a clear and consistent default rule, even if it is not the best rule, especially where the parties are free to negotiate a different arrangement. Conversely, continuing uncertainty and the prospect of litigation over widely used contract terms raises costs for all parties.

It must also be remembered that the interpretation of a safe-berth clause does not concern a matter of general policy but rather the meaning of a specific contract term agreed to by the parties. With this in mind, courts should not interpret the safe-berth clause by substituting their own judgment about the proper allocation of risk under the charter. Instead, they should establish clear expectations for the contracting parties so that they can fairly and efficiently allocate the risk of an unsafe berth between themselves. *Orduna* makes this more difficult by stoking uncertainty over how courts will interpret the standard safe-berth clause.

Finally, apart from concerns about uniformity, the *Orduna* decision is open to criticism on its merits. The policy arguments that motivated the Fifth Circuit’s holding in *Orduna* were misplaced, and the Fifth Circuit’s reading of the *Atkins* decision was flawed. Whatever their force, the policy arguments are simply irrelevant to the question of how courts should interpret the contractual term regarding port safety. The policy arguments made by the warranty’s critics may provide reasons for the parties to favor one arrangement over another, but they should not dissuade courts from according safe-berth clauses their natural and widely accepted meaning. Moreover, commentators who argue that the safe-berth warranty is a recent innovation are engaged in revisionist history. The earlier authorities do not undermine the safe-berth warranty, which in any event is now widely accepted outside the Fifth Circuit. The safe-berth warranty is well within the expectations of the commercially sophisticated owners and charterers who make up the market. Indeed, the only uncertainty now arises from the fact that the Fifth Circuit has
taken a position at odds with the rest of the English-speaking world. For these reasons, the Fifth Circuit should take the opportunity in an appropriate case to bring its interpretation of safe-berth clauses into line with that of other jurisdictions and adopt the safe-berth warranty.