

# The Master's Role in Relation to the Safety of the Port, particularly under the Concept of the ISM and the ISPS Codes

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## Abstract

*Over the last years safety issues have been acknowledged as very important operating factors in the shipping industry, being introduced and partly implemented, especially after the application of the ISM and ISPS codes. Nowadays, safety levels are focused on ship safety and security, particularly when the ship is entering, using and leaving a seaport without sustaining damages.*

*A ship can be exposed to potential dangers and this is a matter that troubles ship-owners, charterers and harbour masters from the technical and operational point of view. A port could be characterized as 'unsafe' owing to physical causes, political occurrences and organizational risks. Under these conditions, courts generally recognize that the master will often find himself in a dilemma and give him the right to choose between the loss of earnings and the safety of the ship.*

*In this paper we will develop a model of decision-making based on master's actions, the use of which may offer us forecasting as to the safety and security levels of the port. These predictions will have an impact on the legal and economic obligations of the contact.*

## Keywords

Port Safety, Model for Decision-Making, Master's Role, Security levels

## 1. Introduction: What Constitutes a "Safe Port"

In a time charter<sup>1</sup> one of the charterer's obligations is to send the ship only to ports which, at the time the order is given, are prospectively safe. The definition of a "safe port" was given by Judge Sellers in a relevant case: '[A] port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be

avoided by good navigation and seamanship...'.<sup>2</sup>

Safety is a question of fact, but the criteria which have to be applied in determining whether a port is a "safe port" are matters of law. Concern is focused on the type of vessel involved, the work that must be done and the conditions pertaining in the port at the relevant time. The charterer may be in breach of contract despite his lack of knowledge as to unsafety of the port or berth. The ship owner is entitled to damages if the master has reasonably obeyed charterer's orders and consequently the ship was either lost or damaged as a result of the port's unsafety<sup>2</sup>.

Moreover, there is not usually any duty on the ship owner or master to check the safety of the nominated port before proceeding to it. But this does not mean that the master can enter ports that are obviously unsafe and then charge the charterer with damage done<sup>3</sup>. On the contrary, the ship owner or the master may refuse an order to an unsafe port because: (a) it is not according to the terms of the contract and (b) by proceeding to an unsafe port, would take the ship outside the limits within which the ship owner agreed she should be employed.

In case the master discovers the unsafety of the port only at some stage of the voyage, after having obeyed the charterer's order, he should refuse to enter that port or, if already within it, leave that port<sup>4</sup>. If the master proves to be negligent in his decisions, then the charterer is not liable for damages<sup>5</sup>. The master is frequently placed in a dilemma and the question is whether he acted reasonably. If this be true, even though acting mistakenly, in the situation confronting him, it is unlikely that his actions will be held to have been the effective cause of the damage. But, if the sole and only cause of damage is the failure of the master and crew to exhibit the standard of navigation and seamanship expected of them, then the port is safe.

If the master has fears or doubts about the safety of the port but eventually decides to enter it or remain in it, damage which is then caused to the vessel may yet be regarded as the natural and probable result of charterer's order, particularly when master's fears have been allayed by the charterer or his agent.

Where war risk-type situations apply, firstly the charterer is making a forecast promise that when the ship reaches the nominated port, it will be safe. The second obligation arises when the port becomes unsafe after the nomination has been made but before the ship reaches it, the charterer must make a fresh nomination

of an alternative safe port and send the ship to it. If the ship has already reached the originally designated port and it then becomes unsafe, the charterer has a residual obligation to order it out, if there still remains opportunity to do so.

## 2. Port Safety: Codification and Analysis

A port is considered to be unsafe for three broad general reasons:

- Physical features
- Political happenings
- Organizational risks<sup>6</sup>.

Table 1 attempts to codify the most important elements of port safety in order to extract all the necessary points related to the master's role in making critical decisions.

From the practical point of view<sup>7</sup>, when the charterer has the right to nominate a port, whether under a time charter or a voyage charter, he is under an implied obligation to nominate a safe port. In the majority of charter parties this implied term is accompanied by an express term to the same effect. Nevertheless, the majority of legal cases are concerned with the safety of the vessel while in the port itself, so the master's role is extremely important to make the appropriate and right decisions (Wilford *et al*, 1995).

The courts generally recognize that, in situations where a port is safe or unsafe, the master is in a dilemma and will often give him the benefit of the doubt that the choice lies between the loss of freight or a scratch to the paintwork<sup>8</sup>. Normally, the master on receiving the information about the nominated port, will be unaware of the potential dangers and, in any event, he has the right to presume that the charterer has fulfilled his obligation by nominating a safe port.

Based on the information received from table 1, it is obvious that five critical phases (including the stage of negotiations), from the legal point of view, relate to the port safety and must be examined:

- During negotiations for the chartered voyage. From the beginning it is discussed that the shipowner agrees to let his vessel for a period of time stating the size, speed and on board quantities of bunkers. The charterer states the time and port of delivery within the trading limits and has the obligation to send the vessel only to good and safe ports. In voyage charters usually the loading and/or discharging port/ports are known, unless a geographical area is mentioned where the port of delivery is to be found.
- At the time the contract is signed. In this phase the port or ports of loading and/or discharging are examined for call, use and depart in safety. If the port or ports are characterized as "prospectively" safe, then the charterparty is signed and becomes valid.
- In the approaches to the port. Of essence is the period when the vessel is either approaching or entering the port area.

- The time within the port area. At this point safety levels relate to the period when the vessel is loading or unloading cargo.
- Time to depart. It is important that the port remains safe at all respects when the vessel is leaving from it.

It is obvious that the charterer is liable in case he orders the vessel to go to an unsafe port and consequently the vessel suffers damage. However, this is subject to possible questions of remoteness or *novus actus interveniens*, i.e. (Hill, 1998) if the master, although knowing that the port was unsafe insisted on proceeding to it and the vessel was damaged. The test is: *Did the master act reasonably in going there? If he acted unreasonably, the charterer is not liable.*

## 3. Obligations and Remedies for Safe Ports

When a situation arises that need for an alternative nomination, and during the fresh nomination the port must be prospectively safe, it is reasonable that this becomes easier in time charters where the vessel has been chartered for a specified period of time. In voyage charters the position is quite different. The agreement is for chartering a ship for a voyage between specified ports. So no substitutions may be permitted and the shipowner could rescind further performance of the contract in the event of the breach of the safe port undertaking<sup>8</sup>.

*Claims for breach of contract* in respect of the safe port warranty, will be limited by the rules of causation and remoteness of damage but might take possible forms:

- Against physical damages to the vessel.
- The shipowner may seek to recover the costs of avoiding the dangers, i.e. extra costs incurred for tugs or lightering the vessel etc.
- Damages for detention of the vessel when she is trapped in the port for an unusual period. The delay must be such as to frustrate the adventure.

One last issue that needs clarity is the continuing guarantee of the safety of the port during the period it is to be used. In past cases it has been ruled that there is an equitable allocation of risk, the shipowner undertakes for a specified period of time to comply with charterer's orders in return for a guarantee from the charterer to use the vessel only between safe ports<sup>9</sup>. The opposite view suggested that the obligation which was limited to a warranty that the nominated port of discharge is safe at the time of nomination and may be expected to remain safe from the moment of a vessel's arrival until her departure. This links the obligation to the characteristics of the port at the time of nomination, irrespective of the knowledge of the charterer.

This dilemma was finally resolved in the case of *Evia No2* (Aistle, 1996). It was affirmed that the charterer would be liable for the prevailing characteristics of the port even if he was not aware of those, but on the other hand he would not have to accept responsibility for

abnormal and unexpected events. The solution to this problem is to place (only in time charters) on the charterer a secondary obligation, in such circumstances, to cancel the original nomination and order the ship out of the danger. In case the ship is inside the port, this obligation will arise only when it is still possible for the vessel to leave<sup>10</sup>.

#### 4. The Contribution of the ISM and the ISPS Codes

It must be mentioned that, the charterer in order to escape liability, frequently supports the view that although the port is unsafe, the damage to the vessel was caused solely by or contributed to by the *negligence of the master and crew*. It may be stated that the master should have seen the danger for himself and refused to enter the port. But the master is found in a dilemma mainly because of the initial breach of contract by the charterer (as to the unsafe port), and it has to be examined in determining the effective cause. If the master acts *reasonably*, even though *mistakenly*, in the situation confronting him it is unlikely that his actions will be held to have caused the damage<sup>11</sup>.

Where the master has fears about the safety of the port but eventually decides to enter it, or remain in it, damage caused to the ship may yet be regarded as the natural and probable result of charterer's order and thus caused by it. This is emphasized when the master's fears have been allayed by the charterer or his agent.

However, the advent of the ISM Code has, apart from other issues<sup>12</sup> (Theotokas and Alexopoulos, 1998), altered considerably the Master's position. Indeed, the master shall continue to have authority and responsibility to make decisions (article 5) and must be offered the necessary support to do so (article 6.1.3.). Also, he must be fully conversant with the company's SMS (article 6.1.2.) although the company should ensure that all personnel are familiar with their duties (article 6.3.). Though, the ISM code does not explain what would be the **decision support system** that will allow **masters to make decisions** with respect to safety and pollution prevention<sup>13</sup> (Goulielmos, 1998).

Since the ISM code's primary aim is to establish an international standard for the safe management and operation of ships, and for prevention of marine pollution, suffice to say that its interest extends to the safety of the ports and the potential hazards that threaten the vessel.

Figure 1 presents a Safety Management System (SMS) indicating the procedures to respond to emergency situations on board, to ensure that non-conformities, accidents and hazardous situations are reported to the company and at later stage taking corrective actions, to ensure that the ship is well maintained by identifying equipment and technical systems, and to execute internal safety audits.

In the open market, many shipowners seek for early compliance with the ISM Code for competition reasons, while the charterers, particularly in the oil trade, will possibly extend their enquiries to the integrity of the

shipowner's SMS measuring them against the provisions of the code itself. They may also press for the inclusion of express warranties not only that valid DOCs and SMCs are in existence but also that the vessel has an SMS complying with the code.

Now, a related clause is inserted in charterparties, this way responding to the commercial consequences of the code: "[D]uring the currency of this charterparty, the owners shall procure that both the vessel and the company shall comply with the requirements of the ISM code. Upon request the owners shall provide a copy of the relevant DOC and SMC to the charterers...".

The ISPS code lays down procedures to be adopted by port and flag states to safeguard the future of the shipping industry by protecting people, ships and ports mainly from terrorist attacks (Alexopoulos et al, 2005). The code applies to all commercial vessels, mobile offshore units and port facilities. Also, the code built its scope on a *strong partnership between ship and port* to deter and detect acts threatening security before they develop into a problem. The ISM code, although the SMS deals with different issues, through the emergency response procedures can show a common discipline (Makenzy undated).

From the diagram in Figure 2 it is obvious that the master could be appointed as the ship security officer. If he is a different person, the shipping company issues a statement that the master's authority overrides the SSO's decisions. The CSO and the SSO are appointed for each ship. The PFSO's duties and responsibilities combine those of the CSO and the SSO<sup>14</sup>.

The ISPS code introduces three main characteristics. The first one deals with all stages of the voyage, i.e. prior to entering the port, whilst in a port, so it is the vessel's responsibility to comply with the requirements for the security levels set. Secondly, it refers to the professional judgment of the master in taking decisions to maintain the security levels of the vessel. Thirdly, it refers to the responsibility of the port in terms of security levels that may affect the vessel.

Both the ISM and the ISPS codes are usually mentioned during the negotiations, before the deal is closed. In the pre-chartering period, the charterer demands for the insertion of related clauses.

#### 5. Developing a Tool for Decision-Making

This model is designed in such a way to lead to two clear assumptions: whether it is a safe port or unsafe port.

Dependent on the information presented in Table 1, we have created in Figure 3, a *flow diagram* describing all necessary phases and critical success factors that a prudent master must be aware of, follow the appropriate steps and make the right decision with the assistance of a *dynamic library*. The latter contains the abstracts of all relevant law cases that can be traced by key words from top to bottom, i.e. type of charterparty (voyage, time, demise, c.o.a.), type of ports (loading, discharging, refuge, bunkering), position of the vessel in relation to

time (reach the port, stay or use the port, depart from the port), type of court (Kings/Queens Bench Division, Court of Appeal, House of Lords). In addition, the library includes all data concerning the relevant international conventions and the obligatory codes (i.e. ISM, ISPS etc.) and she can be updated by their future amendments. The important phases are presented below:

**(i) Before signing the contract:** The charterer is not obliged to consider the ship owner's convenience when selecting the port, provided it is within the indicated range. The charterer warrants that the port is safe. The ship owner can refuse a nominated port if he is aware that the port is inherently unsafe<sup>16</sup>.

**(ii) When the contract is made:** The right to nominate a safe port is a clause (express term) included in the contract. In the absence of such a clause the common law implies an obligation (implied term) to the same effect<sup>16</sup>. The charterer's obligations regarding the safety of the port are primarily related to the *moment when the order is given*. At that moment the port must be *prospectively safe*, and in the absence of unexpected events, it will be safe for the ship at the time when she actually arrives there. This requirement does not entail that the port must be safe at that particular moment but merely that it will be safe on arrival.

**(iii) Approaching the port:** The ship must be able to reach the port in safety<sup>17</sup>. As per Devlin J.<sup>18</sup> "it is essential that the danger must be linked with the use of the nominated port, because it is obvious in point of fact that the more remote it is from the port, the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage which he orders must be one which *an ordinary prudent and skillful master can find a way of making in safety*". In most situations the master is unaware of potential dangers and he presumes that the charterer has, in fact, nominated a safe port. As a result, on arrival at the port, if he discovers any hazards that the render the port unsafe, he is still entitled to refuse to enter<sup>19</sup>.

**(iv) Using the port:** Most cases examine the issue of the safety of the vessel while in the port itself. In point of fact the obligation refers to the safety of the port *at the time it is to be used* rather than to its safety at the time of nomination. The port must be physically safe in its location, size and layout for the particular ship to use at the relevant time, having regard to both its natural and artificial aspects. In situations where the vessel, being inside the port and facing dangers, i.e. outbreak of hostilities, the charterer must give a new order and send the vessel outside the port limits only if she can escape danger or further damage.

**(v) Departing from the port:** The port will not be safe if the ship is endangered when leaving from it. However, it has not yet been clear how far the warranty of safety extends after the vessel has left the port.

During the last three phases, the master (and/or the owner) and the charterer may refer to the charterparty clauses, particularly those addressing issues such as the application of an *SMS that extends to the safety of the vessel, the ship security plan and the port security plan that affect their security levels*.

Additionally, the model includes *specific factors* that affect the safety of the port.

- The relevant period of time. It is clear that it covers the whole period during which the vessel is using the port from the moment of entry to the time of departure (Wilson, 1998). Under certain conditions it may cover risks encountered in the approaches to the port.
- The abnormal occurrences. The requirements that the event shall be unexpected and abnormal are cumulative. An event may be highly abnormal, and yet, if in the special circumstances it is to be expected, the charterer will be in breach if he does not give a fresh order for another port<sup>20</sup> (Scrutton, 1984).
- Political risks. A port will be unsafe if, apart from natural and physical causes, there is danger to ship and cargo in proceeding to and entering and using the port from political causes, i.e. the presence of a blockade or the outbreak of hostilities.
- Dangers that the master may avoid. The safety of the port should be viewed with relation to a vessel properly manned and equipped, and navigated and handled without negligence and in accordance with good seamanship (Payne and Ivamy, 1989). A port is not safe if more than ordinary prudence and skill is needed to avoid exposure to danger there.

The above characteristics could be named as **Critical Success Factors** that contribute to the safety of the adventure and the performance of the contract. They are examined throughout the whole period, from the time the contract is made, and at the duration of the contract in respect of the safe reach, use and depart of the nominated port, in case claims arise.

## 6. Conclusions

The model can be implemented by decision-makers at the head-office and by the master or any other person appointed by him aboard. Also, the charterers may find it an acceptable source of information to protect their own interests. Finally, port administrators may examine all responsibilities that emerge when a vessel is entering the port area and keep in close co-operation with master and charterer. The model is useful every time a vessel is approaching, using and departing from the port. The model's advantages can be summarized below:

1. Assisting in making appropriate decisions in relation to the safety levels.
2. Clarifying responsibilities between shipowner and charterer and between port authorities, master and charterer.

3. Allocating responsibilities in the internal working environment, between company and ships.
4. Improving safety levels through the acknowledgement of specific issues and the exercise of duties of all persons involved.
5. Minimizing ship accidents and reducing the operational costs of the company (insurance premiums indemnifications etc.).

## 7. Notes

<sup>1</sup> The ship owner is more in need of protection from a safe port promise in a time charter, in accordance with which he may be required to go to ports worldwide, than in voyage charters with named or listed loading and discharging ports.

<sup>2</sup> See the *Terneuzen* [1935] 52 LLR 141.

<sup>3</sup> See the *Kanchenjuga* [1987] 2 LR 509, and the *Stork* [1955] 1 LR 349.

<sup>4</sup> See the *Terneuzen* [1935] 52 LLR 141.

<sup>5</sup> Sometimes express terms are included to the contract, i.e. ‘safely lie, always afloat’. This constitutes an express warranty of safe port and/or safe berth. It is a kind of assurance on which the master is entitled to rely.

<sup>6</sup> According to American law, if both master and charterer are at fault, damages may be divided proportionally. See the *Oceanic First* [1976] SMA 1054.

<sup>7</sup> Common practices have shown that, the implied obligation refers to the safety of the port at the *time it is to be used*, rather than to its safety at the *time of nomination*.

<sup>8</sup> See *American President Lines v. USA* [1968] AMC 830.

<sup>9</sup> However as Scrutton quotes, although in the past cases the normality or otherwise of an event was an essential element in deciding whether the port is unsafe, in the latest cases (see the *Evia No2*, HL) the importance of this factor is much reduced, if not entirely eliminated.

<sup>10</sup> Usually provisions are included in the contract to deal with such situations, i.e. “or as near as she can safely get”, which refers to discharging ports.

<sup>11</sup> Summary by Mustill J in the *Mary Lou* [1981] 2 Lloyd’s Rep 272.

<sup>12</sup> See also the *Lucille* [1983] 1 Lloyd’s Rep 387 and the *Concordia Fjord* [1984] 1 Lloyd’s Rep 385.

<sup>13</sup> See the *Stork* [1955] 1 Lloyd’s Rep 349 at p.363.

<sup>14</sup> According to SOLAS chapter XI-2, regulation 8, the master is not constrained by the company, the charterer or any other person involved from taking decisions based on his professional judgement to maintain the vessel’s security. He may deny access to persons or refuse to load any cargo.

<sup>15</sup> Its true purpose is to reduce the effects of human error both ashore and on board by applying quality management systems.

<sup>16</sup> Every shipping company is obliged to include in its SMS a statement regarding *Master’s Overriding Authority*, that is to say, he is the only person responsible to make decisions in respect of the safety of

vessel, crew and cargo and the protection of the marine environment.

<sup>17</sup> See the *Kanchenjuga* [1990] 1 Lloyd’s Rep 391.

<sup>18</sup> *Morris LJ in Compania Naviera Maropan v Bowaters* [1955] 2 QB 68 at p.105. It may be that the only limitation in such circumstances on the charterer’s freedom of choice is not to nominate an “impossible” port.

<sup>19</sup> Even for risks of hostile seizure or attack en route to the port nominated may make it unsafe. But the charterer does not guarantee absolute political safety.

<sup>20</sup> *Grace v General Steam Navigation (the Sussex Oak)* [1950] 2 KB at p.391.

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**Table 1: Codification of “Safe Port” Points and Clauses**

<b>Phases</b>	<b>Elements of Safety</b>	<b>Analyses</b>	<b>Relevant Law Cases</b>
Signature of the charterparty	Period of Time	<ul style="list-style-type: none"> <li>The prospective safety of the port is to be judged at the time of the chr’s order to it. So a port may be unsafe for the particular ship at all times or only at certain times.</li> <li>For weather reasons, if the ship must wait for a time before entering a port, it does not make the port unsafe.</li> </ul>	<p>Evia No2 [1982]</p> <p>Eastern City [1958]</p>
	Temporary Dangers	<ul style="list-style-type: none"> <li>Some temporary dangers would constitute an important element of unsafety when they are not known to the <b>master</b>, i.e. failure or absence of navigational aids.</li> </ul>	Mary Lou [1981]
	Delays	<ul style="list-style-type: none"> <li>If delays are of sufficient duration, may render port unsafe. If the <b>master</b> believes that the port is unsafe, he can discharge the goods at some other safe port.</li> <li>The criterion is the period of the obstruction danger compared with the duration of c/p and the shortness of the specific voyage.</li> </ul>	Sussex Oak [1950]
	Particular Ship	<ul style="list-style-type: none"> <li>The fact that the port is safe, for ships of different size or characteristics is not relevant. The port must be safe for the particular ship chartered, and even <b>laden</b> as she is at the relevant time, either in the physical or political sense.</li> </ul>	Sagoland [1932]
Safety of Approach	In the Approaches	<ul style="list-style-type: none"> <li>If the vessel is employed upon a voyage to a port which she cannot reach it, the port is unsafe. It is immaterial, in <b>point of law</b>, where the danger is located, though it is obvious, in <b>point of fact</b>, that the more remote it is from the port, the less likely it is to interfere with the safety of the voyage.</li> <li>The chr does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful <b>master</b> can find way of making in safety.</li> <li>Port is unsafe if the approach to it is such that the ship cannot reach it in safety without dismantling her structure or must lighten part of her cargo.</li> <li>The risk of hostile seizure or attack en route to nominated port may make it unsafe, but the risk must be real to deter a reasonable <b>master</b> from proceeding to the port. Chr cannot guarantee absolute political safety.</li> </ul>	<p>Alhambra [1881]</p> <p>Vandura [1899]</p> <p>Peerless [1914]</p> <p>Saga Cob [1992]</p>
Safety in Use	Port Infrastructure	<ul style="list-style-type: none"> <li>Port must be physically safe in its location, size and layout for the particular ship to use at the relevant time, having regard to both its natural and artificial aspects. The fact that it is safe to enter is not enough if the port may become unsafe for the ship to remain at.</li> <li>The port does not have to be safe for uninterrupted use, as long as ships can leave in safety when the port becomes dangerous. But the port will only be safe if the necessity to depart is <b>predictable</b> and the ship is able to take the required action in safety and in good time.</li> </ul>	<p>Saxon Queen [1913]</p> <p>Khian Sea [1979]</p>

	Local Warnings	<ul style="list-style-type: none"> <li>If it is necessary at the onset of adverse weather for ship to leave port, there must be arrangements to provide the <b>master</b> with adequate warning, but this will not suffice if the ship may nevertheless be trapped by lack of sea room necessary to do so.</li> </ul>	Dagmar [1968]
	Berthing / Mooring Facilities	<ul style="list-style-type: none"> <li>The safety of the port depends on the existence of efficient navigational aids (buoys, pilots, lights etc.). Priority is given to an <b>adequate system</b>, so an error by a competent individual will not make chr liable.</li> </ul>	Houston City [1956]
	Political Risks and unsafety	<ul style="list-style-type: none"> <li>When ship exposed to other than purely physical causes. Most common dangers are those of topography (shallows, sand banks) and exposure to certain weather conditions (high winds, swell, ice).</li> </ul>	Evaggelos T [1993]
Safety in Departure	When Leaving the Port	<ul style="list-style-type: none"> <li>The port is unsafe if ship is endangered in departing from it. It is not clear how far the warranty of safety extends after the ship has left the port.</li> </ul>	Hermine [1979]
	Abnormal Occurrences	<ul style="list-style-type: none"> <li>A port will be unsafe only if the danger flows from its own qualities and attributes. The formation of a test of whether a port is safe must assume normality (includes proper performance by those running an adequate safety system) and must therefore exclude danger from abnormal occurrences.</li> </ul>	Lucille [1984]
	Dangers Avoidable by Good Seamanship and Navigation	<ul style="list-style-type: none"> <li>Dangers originating from navigable waters are tides, currents, swells, banks, bars, revetments etc. If more than ordinary skill is required by <b>master</b> to avoid the dangers, then port is not safe.</li> </ul>	Polyglory [1977] Carnival [1994]

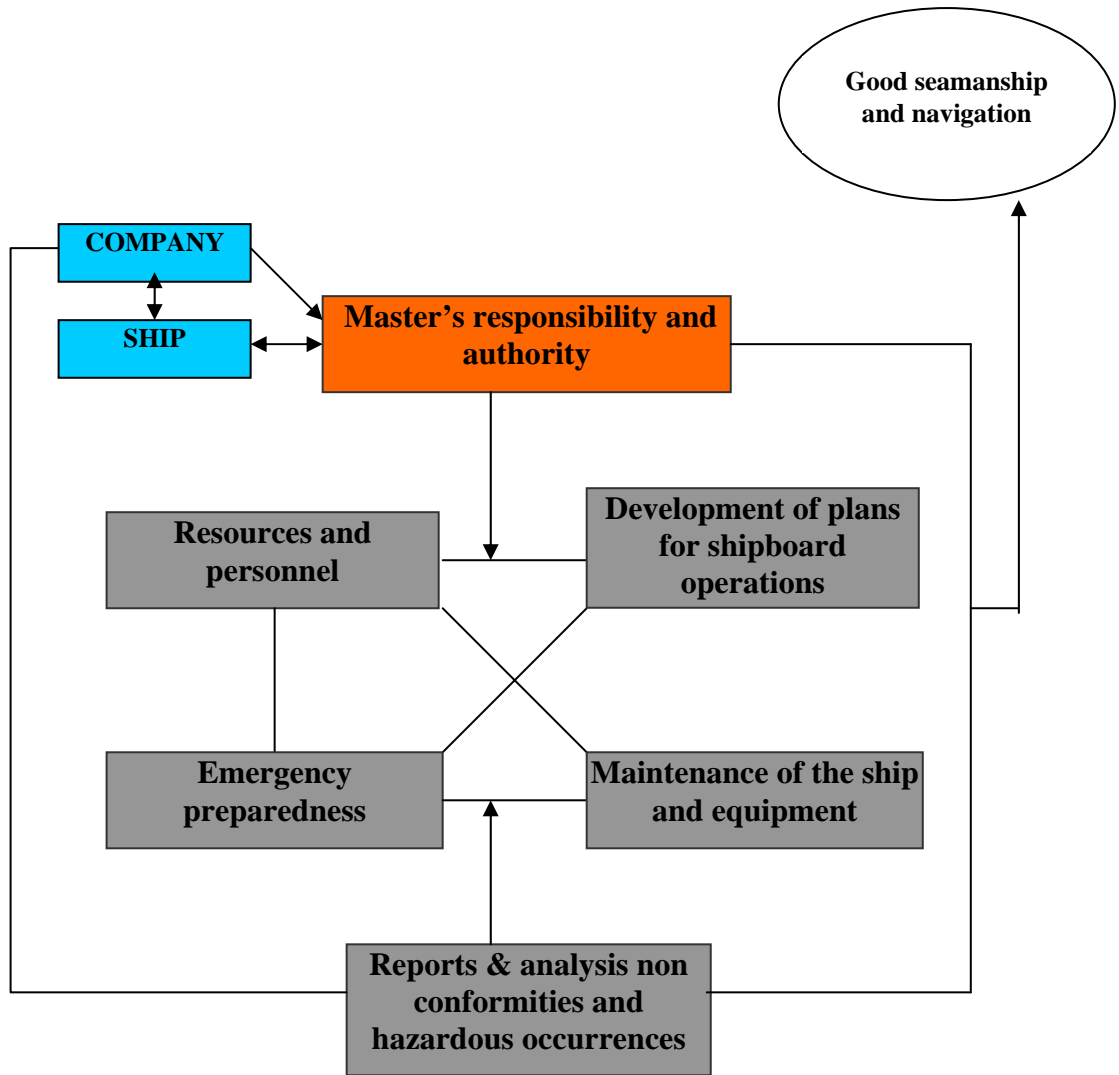
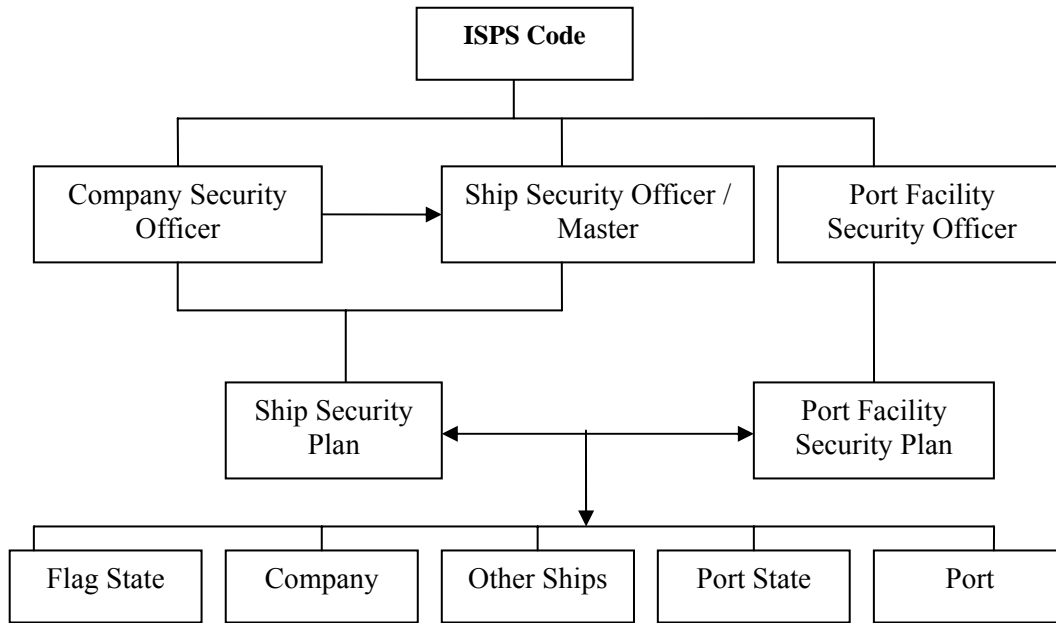


Figure 1: The ISM Code and Clauses with Indirect Impact on Safe Ports



**Figure 2: Security Responsibilities**

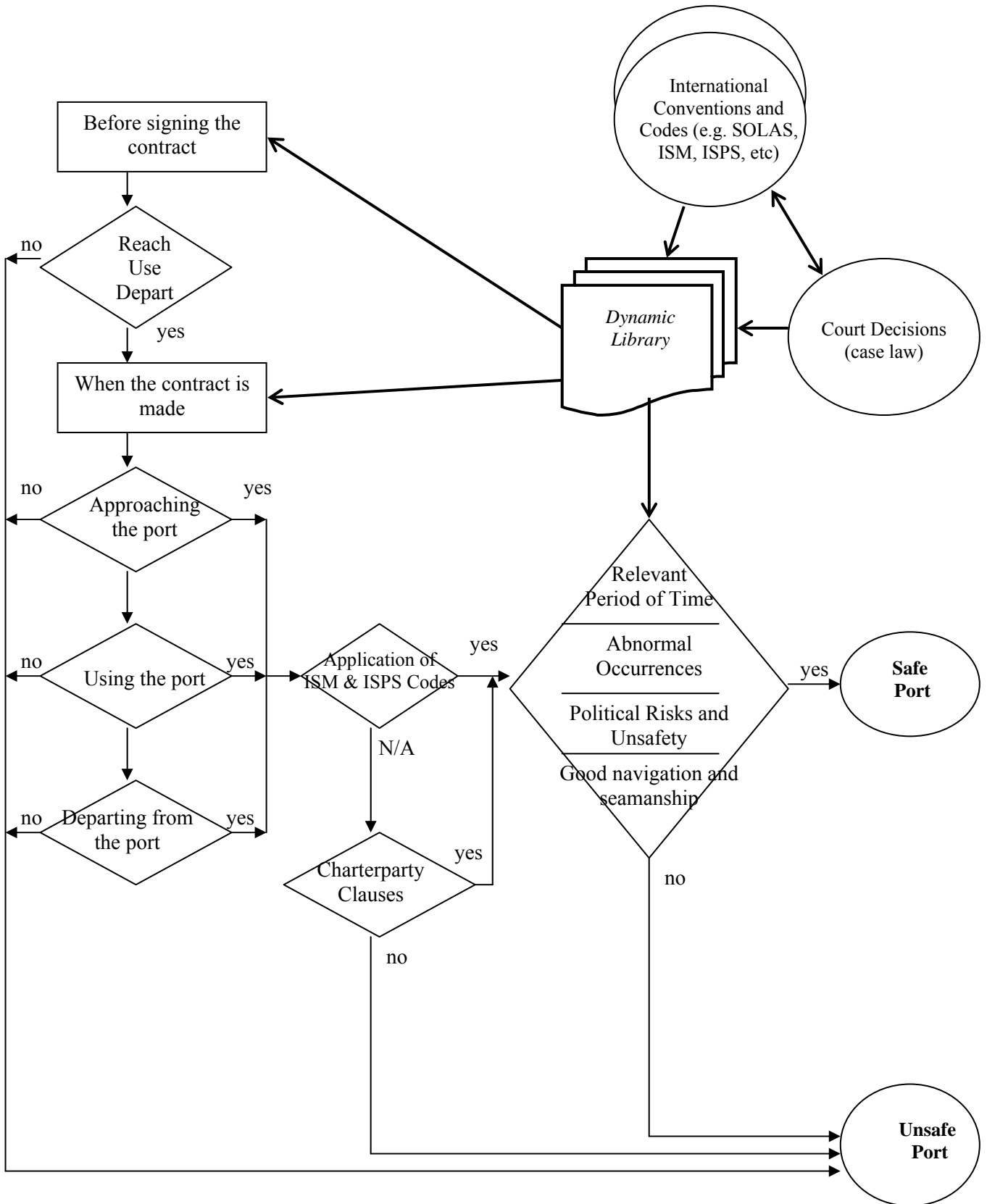


Figure 3: Modeling Criteria for Safe Ports