

IS THERE A SAFE PORT IN THE ARABIAN GULF?

Peter J. Murray
Sinclair Roche, Hong Kong

IS THERE A SAFE PORT IN THE ARABIAN GULF?

Attacks on shipping in the Arabian Gulf have become so commonplace recently that newspaper reportage is usually relegated to the inside pages. Although the conflict in the Gulf began in September 1980, attacks on merchant vessels first occurred only in April 1984. In 1987 there were a total of 165 attacks, 86 by Iraq and 79 by Iran. The 1987 tally represents slightly more than half of the total attacks that have occurred in the conflict. For this year there has been a 55% increase in the number of casualties compared to the same period last year.

The Guidance Notes issued by the British General Council of Shipping provide detailed advice on preventive measures that should be taken by vessels in the Gulf such as those relating to navigational practice (only use the radar for occasional sweeps) and fire fighting (steps to be taken if you find an unexploded missile on board!). No doubt the advice is based on data collected from the hundreds of vessels that have run the gauntlet of missiles and mines; some of which have had the misfortune to be hit or attacked. It is interesting to note that very few have become total losses. The statistics also include a number of vessels hit more than once.

To consider the topic for today's discussion we must return to the events leading up to September 1980 when relations between Iran and Iraq deteriorated into outright war. You might expect that the simple answer to the title of today's discussion is "no", there are no safe ports in the Gulf. And, if you were now being addressed by a salvor or ship's master you would probably be given that answer together with all the grim details of what makes the ports unsafe. However a lawyer, when asked the question is there a safe port in the Gulf, is likely to say "yes" (with of course a few qualifications, provisos and exceptions!).

I am going to deal with the development of some English cases, which all started in arbitration, to show how a Gulf port can be safe and that it is not a contradiction in terms and hopefully not a lawyer's ruse. It is interesting

to note that as at the end of May this year, there was no reported New York arbitration award on the subject.

The first and major repercussion on the shipping industry resulted from the closure of the Shatt al Arab.

A short geography lesson first. The Shatt al Arab is formed by the confluence of the rivers Tigris and the Euphrates and a bar severely limits the draughts of incoming vessels which can proceed as far north as Basrah, the principal Iraqi port on the west bank and the principal Iranian ports of Khorremshahr and Abadan on the lower east bank.

Relations between the countries have never been good. Control of the Shatt al Arab had been a source of conflict for more than 400 years. The political events which led to the closure included the expulsion of Khomeini from Iraq in 1978 at the request of the Shah, the latter's overthrow and the institution of an Islamic Republic in Iran in 1979. Matters were brought to a head when on 17th September 1980, the Iraqi President abrogated the 1975 Border Treaty which among other matters had allowed vessels bound for Iranian ports to fly the Iranian flag, take Iranian pilots and pay Iranian dues. Iraqis now proclaimed exclusive control of the Shatt.

The 17th September abrogation so far as the Iraqis were concerned restored the pre-1975 situation where all vessels had to fly the Iraqi flag and follow Iraqi orders. Given the sentiment of those in power in Iran, it was hardly likely they were going to take the action lying down. From about 20th September merchant vessels were fired upon by Iranian forces. Within two days the Shatt was closed to navigation; approximately 100 vessels were eventually trapped including most of the Iraqi navy. On the following day the Iraqi forces launched a major invasion of Iran and the view at the time was that the Iraqis would be able to secure at least the Iranian territory along the Shatt within days. This proved to be wrong and despite attempts by the UN envoy, the late Mr Olaf Palme and the Red Cross to arrange safe passage for the vessels trapped in the Shatt, they remain there to this day. It may be worth

investing in the shares of selected salvage companies in the hope that one of them secures the wreck removal contract if and when it is ever awarded. I wonder whether the P & I Clubs will have to foot the bill.

Needless to say the predicament faced by many owners and their underwriters caused by the September turn of events, prompted them to consider all possible rights of action against charterers. Likewise, charterers were seeking to terminate their obligations under charters, most frequently on the grounds of frustration. Of primary interest to us today is the ground put forward by the owners which if successful effectively would make the charterers liable for the loss of the vessel. The most well known of the cases deciding the point is the "EVIA" (No. 2) which found its way to the House of Lords in July 1982. I shall refer to the case simply as the "EVIA" ([1982] 2 Lloyd's Rep. 307). The case is of special interest to lawyers since the Lords took the opportunity to make what by their standards could be regarded as a stinging attack on the Judges of the Commercial Court. Even Lloyd's Law Reports were attacked, apparently for reporting too many first instance decisions!

I shall consider today the effect of the "EVIA" decision on the law relating to safe ports, at first thought to be a dramatic departure from the approach of earlier cases, but perhaps not such a departure after all. The "EVIA" decision is also known for Lord Roskill's very clear statement on the effect of charterers being bound to pay the war risk premium. I shall briefly consider that. Finally, I shall be considering a case involving a safe berth warranty but where parties with knowledge that hostilities were going on were able to insert specially worded clauses to cover eventualities within the contemplation of the parties.

THE LAW PRE-"EVIA"

The most widely quoted definition of a safe port is that of Sellers L.J. in the "EASTERN CITY" [1958] 2 Lloyd's Rep. 127 at 131.

"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...."

Through a series of cases the obligation of charterers in relation to the safety of the port was considered to be in the nature of a continuing absolute warranty of safety, subject only to some subsequent "abnormal occurrence" which made the port unsafe during the vessel's stay. The fact situation that we are primarily concerned with today is where the port becomes unsafe after nomination. There are many cases dealing with unsafety where it is a permanent feature of the port. The cases we consider today reflect a contest between owners and charterers as to who should be responsible where the port becomes unsafe once the vessel is on her way or has already arrived in the port later to be found unsafe.

The Judgment of Mustill J in the "MARY LOU" [1981] 2 Lloyd's Rep. 272 is a good example of the continuing warranty theory and indeed it was that judgment singled out by both Lord Diplock and Lord Roskill in the "EVIA" decision for particular criticism. Incidentally, both had previously practised at the Shipping Bar.

The "MARY LOU" concerned a claim by her owners against charterers as a result of damage suffered by the vessel when she grounded in the Southwest Pass as she was proceeding out of the Mississippi River to the open sea. The Southwest Pass is a scoured and dredged channel, the depth of which depends on various factors including the time of the year, the strength of the current of the river and the dredging activity of the local authority. Mustill J. held that given the departure draught of "MARY LOU", the port was not safe for her at the particular time of departure. Although there was a system for providing Masters with a series of recommended draughts, on this particular occasion the system had broken down.

The question that Mustill J had to decide was at what time the warranty should relate; at the time the nomination was made, the time of visiting the port or

both. He concluded that it had to be not only at the time of giving the order but also the time when the vessel was using the port. He quoted Donaldson J. (as he then was) in the "HERMINE" [1978] 2 Lloyd's Rep. 37. Donaldson J. stated:

"The point of the warranty is that it speaks from the date of nomination, it speaks about the anticipated state of the port when the vessel arrives. The Charterer's sole right under a contract in the terms of this charter-party is to nominate a safe port and, in nominating a port under the charter-party, he impliedly warrants that it is a safe port. The Charterer undertakes that, in the absence of some abnormal occurrence, the vessel will be able, at the relevant times, to reach, use and leave the port without being exposed to dangers which cannot be avoided by good navigation and seamanship. The warranty is absolute, but contained within itself the qualification in relation to abnormal occurrences."

In the "HERMINE", Donaldson J. had to decide whether there had been a breach of the express warranty of safety where she had encountered delay due to lack of water and the blockage of the exit channel by a grounded vessel. Both conditions had developed after the initial order to the port. Donaldson J. held that the charterers were in breach of the express warranty. The warranty was absolute and the occurrence was not abnormal.

Returning to the "MARY LOU" proceeding through Southwest Pass, Mustill J. considered the statement by Donaldson J. to support the view that under an express warranty of safety, the question of safety is to be judged at the time when the vessel is using the port and not solely at the time of the order. So, to relate his view to the finding of fact in the "MARY LOU", even though at the moment of nomination the port of New Orleans was safe, in that a system was in operation to advise Masters of the draught restriction in the Southwest Pass, since that system broke down whilst the vessel was actually in New Orleans and thereafter proceeding out to sea, the charterers were liable to the owners. The port of New Orleans was unsafe.

As we will see below, it seems to be that the finding Lord Roskill found most objection to was that the warranty was absolute; in my view not only because of the apparent lack of legal authority but also due to a different view as to the extent charterers should be the insurers of owners in respect of damage suffered in a port.

At the time when Mustill J handed down his decision in January 1981 the cases on the subject could be considered generally in favour of the owners' position. Although it was recognised, the exception of abnormal occurrence was not proven to the satisfaction of the Court in a number of cases involving various fact situations. It was very much an issue of fact and one which experienced commercial arbitrators were most suited for. Ironically, Mustill J had quoted Lord Roskill in the "MARY LOU" decision for the proposition that most unsafe port cases could be regarded as turning solely on issues of fact, there being no longer any need to examine the earlier cases to discover the general principles to be applied.

THE "EVIA"

Then came the "EVIA", commencing with the arbitration award in March 1981 and ending up with the House of Lords decision in July 1982. Bearing in mind that there was a first instance decision and Court of Appeal decision in between, there can be no criticism for undue delay.

The "EVIA" was one of the cases that came out of the closure of the Shatt al Arab on 23rd September 1980. Unfortunately for her owners she had just completed discharge of her cargo at Basrah, the Iraqi port the day before; she never got out. In fact "EVIA" with all the other vessels trapped in the Shatt are still there to this day as noted in Lloyd's Register. The entry in Lloyd's reads "delayed in Shatt Al Arab - Surveys overdue 6/80." It was the more unfortunate for her owners since she first arrived at the mouth of the Shatt on 1st July and had been delayed in berthing for nearly two months due to congestion. A number of other vessels found themselves in the same

position.

Looking at the case from the charterers point of view, they had ordered her there in March at the time of completion of loading in Cuba. So, with nomination in March, the arrival at the mouth of the Shatt in July and completion of discharge in September, the question arose: was Basrah unsafe bearing in mind that it had become physically unsafe on 22nd September?

The "EVIA" was chartered on a Baltime form for a period of 18 months. Clause 2 provided:-

"2. The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports ..."

The dispute was arbitrated and the owners claim for hire and other sums failed, although at that stage the issue of unsafe port was not of major significance. The charterers for their part were alleging frustration.

In proceeding through the Courts, initially on appeal by the owners, the safe port issue became the most important for consideration. If the owners were able to establish a breach of the safe port warranty, the frustration argument of the charterers was bound to fail.

The decisions reached reflect the difference of approach and result. The first instance Judge, Robert Goff J. (as he then was) decided the charterers were in breach of a continuing obligation that the port would be safe ([1981] 1 Lloyd's Rep. 613). He further held that the outbreak of war was not an abnormal occurrence. The Court of Appeal disagreed. They said there was an abnormal occurrence so the charterers were not liable ([1982] 1 Lloyd's Rep 334). As Lord Denning put it "...the Iran/Iraq war rendered the port unsafe, but this unsafeness was not a breach of the warranty of a "safe port"" (at page 339). However, the Court of Appeal did support the view that the obligation was a continuing and absolute one. This of course coincided with the previous decisions in the "MARY LOU" and the "HERMINE".

On the face of it the House of Lords took a very different view to the extent that a new test was formulated, in essence limiting the charterers' initial obligation to ensuring the prospective safety of the port at the time of nomination. Clearly, on the facts of the "EVIA", back in March 1980 when charterers gave orders to sail to Basrah, the port was safe. An immediate effect of the decision must have been to dash the hopes of owners of other trapped vessels and their underwriters in holding charterers responsible and the question became one of deciding when the charter was frustrated.

Although Lord Diplock, who delivered the much shorter of the two speeches, accused the Commercial Court Judges such as Mustill J in the "MARY LOU" of heresy (basing judgments on non-existent precedent) I have come to the conclusion that the "EVIA" has simply restated earlier principles including those stated in the "MARY LOU", although with admittedly a different emphasis and one exception that I refer to below:

Lord Roskill delivered the full judgment. He held:

"The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, 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 ... 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 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 making the charterer liable for any resulting loss or damage, physical or financial." (at page 315)

I have little doubt that when this decision was first became known in those jurisdictions where English law provides an unofficial back-up to local

maritime law, dictionaries would have been consulted for the definition of "prospective".

Having consulted mine I find the short definition of "prospective" is that it is concerned with or applying to the future only and that its antonym is retrospective. There is no magic in the word. Donaldson J. in the "HERMINE" said very much the same thing using a different word when he referred to the "anticipated" state of the port.

In applying this test to the facts of the case, Lord Roskill was very easily able to come to the decision that Basrah was prospectively safe at the time of nomination since the unsafety arose after her arrival. This initial test was very much against the owner's position. (If Mustill J had had his say he may have said it was unsafe but then allowed the charterer to argue abnormal occurrence.) Furthermore, the charterer's task of satisfying the test became easier the longer the time taken for the vessel to reach the discharge port after the time of nomination.

So just to summarise the difference in approaches, pre-"EVIA" the owners were able to rely upon the Court's finding that the charterers gave a continuing warranty that the port would be safe and such warranty would apply to events arising after the giving of the order. The new test by Lord Roskill was that you simply had to look at the time when the order was given and if at that time the port was as a fact prospectively safe for when the vessel was to arrive there, charterers would not be in breach if the port later became unsafe.

I must say at this stage I see little difference between what I call the pre-"EVIA" and "EVIA" positions apart from emphasis and possibly onus of proving the case. With pre-"EVIA" we have an absolute warranty tempered by abnormal occurrence, with "EVIA" we have a warranty for future safety based on the state of knowledge at the time of nomination. State of knowledge at that time is not expected to take account of abnormal occurrences. Why not the same result? I think in the cases we have considered the real difference lay

in that the early pre-"EVIA" decisions paid little regard to the abnormal occurrence defence of charterers. Lord Diplock in the "EVIA" was concerned that the exception based on abnormal occurrence was at risk of disappearing altogether. The charterer would be the owners' insurer too often. I think the sentiment of the House of Lords was firmly in favour of the "EVIA" charterers on this occasion and charterers in politically unsafe port cases generally.

Curiously however and perhaps fortunately for the owner's position generally in unsafe port cases, the House of Lords did impose a secondary obligation on the charterers which could in certain circumstances provide a remedy to the owners. That secondary obligation is to give fresh orders to nominate another port if the nominated port becomes actually or prospectively unsafe at a later stage or indeed to order the vessel out of the port if it becomes unsafe after arrival.

This secondary obligation would not arise if it was not possible for the Master to physically carry out the order. So, on the facts of the "EVIA" case, charterers had no difficulty in showing that it was impossible for them to satisfy the secondary obligation; the opportunity never arose since the vessel was already trapped when the unsafety arose. At least for the "EVIA", Basrah was safe.

The House of Lords' decision has been criticised on various grounds but one wonders whether the secondary obligation imposed on charterers may in some cases operate to protect the owners. Pre-"EVIA" the secondary obligation had not been formulated, so if charterers could prove the exception of abnormal occurrence they did not have the added hurdle of showing they had no opportunity to countermand the order to the Master.

That raises the question, did the House of Lords impose an obligation on the charterers that was not there before? To take an example: a vessel is ordered to a port where an uprising unexpectedly occurs as the vessel is about to enter the port. Pre-"EVIA", it is arguable that the charterers could allow

the vessel to berth and then rely upon abnormal occurrence. Post-"EVIA", charterers would have to show that they did not have the opportunity to comply with the secondary obligation; that is to order the vessel elsewhere. I suspect it is going to take some time to sort out what secondary obligations are the responsibility of charterers, although an attempt has been made in the "LUCILLE" to which I will refer in a moment.

In my view the test whether a port is prospectively safe is the same as that to be applied in deciding whether the port is actually safe. These are questions of fact and the charterer's personal view of the matter is irrelevant. Does the test of foreseeability arise when considering the secondary obligation?

POST-"EVIA"

The first case to consider the House of Lords' Judgment of "EVIA", including whether the secondary obligation includes the test of foreseeability, was the Court of Appeal in the "LUCILLE" ([1983] 1 Lloyd's Rep 387). That case involved a vessel which had been let to charterers on a one trip time charter on a NYPE form. She was carrying cement from Constantza to Basrah and unlike the "EVIA" it was not until 20th September that the charterers (after a long delay at the Shatt anchorage) ordered her to Basrah (the "EVIA" had been there since 20th August). The arbitrators found that Basrah was an unsafe port at the time the order was given for "LUCILLE" to proceed. However, the umpire found as a fact that the events in the Shatt amounted to an abnormal occurrence resulting in the charterers having no liability. Interestingly enough the arbitrator appointed by the owners considered the closure of the Shatt not to be an abnormal occurrence, the reason being that a cardinal rule when waging war is to deprive the enemy of its ports by, among other measures, blockade. So in that arbitrator's view looking at history at large, the occurrence was foreseeable and not abnormal - but how many charterers know their history?

The Court of Appeal of course had to find against the arbitrators because

there had been no consideration by them of the secondary obligation on the charterers, namely to give a fresh order to countermand the previous order given when the vessel left Constantza. On the basis that the charterers had been in breach in having to countermand the order, the question then arose whether there was a foreseeable risk that the vessel might become trapped or was the trapping of the vessel too remote to be treated as a consequence flowing from the charterer's breach. The Court of Appeal decided the trapping was nothing other than a worsening of the situation and so to be treated as a consequence of the charterer's breach. The trapping of the vessel was foreseeable.

The issue of foreseeability is a difficult concept to apply in this context. Are we supposed to consider it from the stance of the reasonably well-informed charterer? Is a charterer with local knowledge expected to exercise a greater degree of foreseeability than a charterer working out of an office on the other side of the world? If it is foreseeable for the charterers, is it not foreseeable for the owners, and does that raise the issue of waiver? If we look at the exact words of Lord Roskill they do not suggest to me that the concept of foreseeability arises. If as a fact the port becomes unsafe and it is possible for the ship to avoid the new danger by leaving the port or diverting before arrival, the charterer must give a fresh order. I see those as questions of fact and do not depend on what was in the mind of the charterer or a reasonably well-informed charterer. I do not think that the "prospective safety" theory of Lord Roskill is watered down at the secondary obligation stage.

The first major case therefore to apply the "EVIA" judgment had the effect of finding against the charterers on the secondary obligation, perhaps a strange result given the fact that at least from the owner's point of view, there may have been concern that doing away with the absolute warranty would have provided charterers with greater protection. Without the need to comply with the secondary obligation, the charterers could have avoided liability on the abnormal occurrence exception.

Before leaving the "EVIA" decision on the safe port issue, there are two further aspects to note; the short point first. The charterparty concerned was on a Baltime time charter form and the House of Lords stressed the fact that the charterers could always redirect the vessel if it became unsafe after the initial order. The Court however would make no such comparison with voyage charters, giving the reason that under a voyage charter the port in question forms the basis of the contract. The fact remains that even under a time charter complying with an order given by the charterer under the secondary obligation will very often cause problems to the owners under the bills of lading. True to say that most bills of lading have scope of voyage clauses permitting the right to deviate in limited circumstances, but in many ports of the world receivers who find their cargo discharged in another port are not interested in the fine print on the reverse side of the bill of lading. The owners have to weigh up which is the lesser of the two evils.

THE "EVIA" AND THE WAR RISK CLAUSE

Finally on the "EVIA", one very interesting aspect of the decision was that even if charterers had been found in breach of the safe port warranty, they would have still escaped all liability to the owners. The alternative defence arose from an express right in the owners to refuse to order the vessel into a war zone. If however, the order was carried out, additional war risk premium would be for charterers' account. Lord Roskill referred to the particular clause in question as a complete code so that breach of the safe port warranty in clause 2 became irrelevant (at page 321).

Lord Roskill was able to reach that decision by considering the exact rights and obligations under the relevant clause. His interpretation coincided with what he considered to be the sensible result. He could not accept the situation where on the one hand the charterer was obliged to pay the premium and on the other hand face a suit by hull underwriters for the loss of the vessel, if charterers were otherwise found to be in breach of the safe port warranty.

Lord Denning in the Court of Appeal "EVIA" decision stated the point even more strongly:

"If they (loss or damage to the vessel) are to be borne by the shipowners, he will have to insure against them. If by the charterers, let them insure." (page 339)

Since the shipowners insured, they had to bear the risk and that precluded any subrogated claim against the charterers. Lord Denning thought that the most fair result, since charterers bear the risk of delay. That is fine as far as it goes, but what happens when the charterer successfully pleads frustration and the owners are left with their total loss. The blunt result of the "EVIA" on this point was that charterers are immune from their own breach, I assume no matter how blatant.

The charterers of the "CONCORDIA FJORD" sought to rely upon the complete code argument when owners sought damages resulting from the vessel being badly damaged by a Napalm rocket in Beirut in 1978. I should add that the "CONCORDIA FJORD" came before the Court in December 1983, after the "EVIA"'s House of Lords decision ([1984] 1 Lloyd's Rep 385). For some reason her passage through the Courts was longer.

Unfortunately for the charterers, the arbitrator and then Bingham J. (as he then was) in the Commercial Court distinguished the wording of the clause with the wording in the "EVIA" charter. The distinction drawn is logical but whilst Lord Roskill sympathised with the "EVIA" charterers, I suspect the "CONCORDIA FJORD" arbitrator and possibly also the Judge considered common sense should find in favour of the owners. The arbitrator put it this way:

"... I am not aware of any principle exempting charterers from liability for their breaches of contract merely on the ground that they have directly or indirectly provided the funds whereby the owners insured themselves against such damage" (at page 387).

He gave the example that under normal circumstances the owners would be using a portion of hire to pay hull and machinery insurance. It has never been suggested that charterers should escape liability for say a breach of a safe port warranty in the physical sense, simply because a portion of hire covered the hull and machinery premium. Why should there be any difference where the charterers actually pay the premium direct? No difference the arbitrator thought.

One very clear result of the decision in the "CONCORDIA FIORD" is that from the hull underwriter's point of view, the NYPE form is the far preferable. I often wonder to what extent underwriters pay any attention to the contractual terms upon which the carriage is written in assessing the prospects of exercising subrogated rights or indeed the risk itself. I suppose not very often, and yet on the risk side the contractual obligations imposed on an owner may be just as important in assessing the risk as the age of the vessel or the type of cargo carried. Perhaps such factors do not lend themselves very easily to a systematic approach. Possibly also there is a more commercial reason in that the real profits in the underwriting business are at the premium collecting stage rather than minimising claim payments under policies.

In any event Lord Roskill's judgment will make the Baltimora a very unfavourable charter for underwriters faced with a multi-million dollar total loss payment. There would seem to be no prospect whatsoever of any subrogated right recovery. The tighter the wording of the clause giving the owners the right to avoid a war zone or having the charterers pay the war risk premium, the more likely Lord Roskill's decision will have to be followed, and what if owners ignore their rights to countermand charterers' orders resulting in a total loss in a war zone; will underwriters have a legitimate complaint?

Of course there are situations where underwriters voluntarily give up their subrogated rights, for instance where there is a waiver of subrogation clause in the policy. The assured may not want the underwriters to be suing a sister or related company of the assured. But does the assured in that situation pay

more premium? I would have thought he should. Why should not the Balttime contracting owner pay more?

SPECIALLY-TAILORED CHARTERPARTIES

We have been considering so far disputes which have arisen on standard form charters. I would like now to turn briefly to one case, "A.P.J. PRITI", which involved a charterparty where an amended Gencon form was tailored to a particular voyage ([1987] 2 Lloyd's Rep. 37). The m.v. "A.P.J. PRITI" was chartered by the Islamic Republic of Iran Shipping Lines to load bagged urea at Damman for carriage to 1/2 safe berths Bandar Abbas, or Bushire or Bandar Khomeni in charterers option. All three ports are situated on the Iranian shores of the Gulf; all to the north of the Strait of Hormuz. Bandar Khomeni was the closest of the three to the border with Iraq, the main scene of the conflict. The vessel was ordered to Bandar Khomeni and while in convoy proceeding northward was severely damaged by a hostile missile attack. She was towed back to Bandar Bushire where she was discharged.

The initial dispute referred to arbitration related to a claim for demurrage by the owners, but subsequently the points of claim were amended to cover the question whether Bandar Khomeni was unsafe.

As I have said the charterparty had been tailored to suit the particular voyage. Rider clause 18 provided in part:

"18. It is understood by the parties hereto that currently there exists a state of war between Iran and Iraq which however does not currently affect the reasonable safety of the port of Bandar Abbas at the time of this fixture ..."

Another rider clause provided that charterers were to pay extra war risk hull and machinery insurance in case she was ordered to Bandar Khomeni (incidentally, the insurance was to be taken out with the Iranian Insurance Company). Likewise, the charterers paid for a crew war bonus if the vessel

was ordered to that port. The war risks clause ("Voywar 1950") were maintained in the Gencon form. There was no express safe port warranty in the charter nor did Counsel for the owners seek to argue that one should be implied since as Parker L.J. held "no such warranty could be necessary to give business efficacy to the charter-party or on the innocent by-stander or any other test." (at page 40).

Owners' Counsel had to argue that when the order to proceed to Bandar Khomeni was given, there had to be some berth at that port which in the relevant period of time the vessel could respectively reach, use, and return from, without, in the absence of some abnormal occurrence, being exposed to a danger which could not be avoided by good navigation and seamanship. This warranty was submitted to cover the whole of the approach voyage. The authority of the well known definition of Sellers L.J. in the "EASTERN CITY" was cited in support, where you will recall from the first part of this talk, reference was made to the vessel reaching and returning from the port without being exposed to danger.

The Court rejected those submissions since the only express provision was that at the time the order was given to proceed to a particular berth, that berth had to be prospectively safe. Since the charterers did not have to nominate the berth until the arrival of the vessel in the port, there could be no question of breach; she never reached there.

It is clear from the judgments of both Parker L.J. and Bingham L.J. that they considered it very important that owners knew what they were letting themselves in for, "plainly a charter in which war risks had been the subject of careful and specific consideration" (Bingham L.J. at page 41). Bingham L.J. even went so far to hold that if all the berths or the port itself was unsafe, the charterer would not have been in breach since the unsafety referred to must be particular to the berth nominated, not the port as a whole. The owners could not complain since they should not have agreed to the port in the first place or the Master should have exercised his rights under the war risks clause to have the charterers nominate another port.

This is yet another case where the Courts have taken particular note of the underlying commercial agreement in addition to the actual wording of the charterparty; also another instance of a safe berth or at least berth in the Gulf. Time will not permit me to deal with the many charterparties where the charterer's obligations have been limited by express wording to the use of best endeavours or the exercise of due diligence by the charterers. I would mention however, one interesting clause I have seen which made a real attempt to avoid argument in that the charterer was obliged to nominate an alternative safe loading port or cancel the voyage if the Japanese Shipowners' Association announced that Japanese flag vessels were not allowed to enter the Strait of Hormuz and/or Al-Jubail in Saudi Arabia. The owners found themselves in difficulty in October last year when the Master and his crew decided that even without an announcement from the JSA, there was no way that they were loading at Al-Jubail. A compromise was reached but charterers had been arguing that the clause in question was a complete code and the vessel had to load at Jubail for so long as there was no announcement from the JSA.

CONCLUSION

It may be that it is looking at the difference between the "EVIA" decision and the prior cases in a too broad a fashion, but it seems to me the real difference is that the risk of loss or damage to the vessel has shifted from the charterers to the owners in one particular situation, that is where a vessel finds herself in a port which has become unsafe subsequent to her arrival. This is of course is precisely the situation that occurred with the "EVIA". In the absence of abnormal occurrence, the pre-"EVIA" law would have found the charterers liable simply because the continuing absolute warranty of a safe port had been breached. Post-"EVIA", the charterers are only liable if they could have carried out their secondary obligation, namely ordered the vessel out of the port. If they can show that they could not do so, the risk lies with the owners.

The difficulty for owners is that they cannot always respond to an order to go

to a different port in a time charter as suggested by Lord Roskill in the "EVIA". There are always the cargo receivers waiting who are looking to the owners as the responsible party for delivery of the cargo at the designated port. If the owners have other vessels going to the port in question, they might prefer to run the risk of delay caused by political unrest rather than the much greater risk of having the vessel detained by the cargo receivers.

Without wishing to sound mercenary the Iran/Iraq war has provided a constant source of business for all sides of the maritime community. There are moves afoot to reduce the flow of that business although unfortunately not by bringing the conflict to an end. Both countries are using and further constructing pipelines to make sea carriage from the Gulf unnecessary. The Red Sea would become the main seaway exit although thinking of future business there has been comment made that the Iranians could repeat the mine laying exercise of four years ago (reportedly by using a Liberian ro ro vessel) in the constricted southern seaway leading up the Saudi Arabian coast to the Suez Canal (Petroleum Gazette 1988/1 page 15). Of course vessels carrying cargo into the Gulf including to Kuwait always run the risk of being detained for inspection for cargo.

The possibility of another Shatt al Arab blockade might be considered slight although the political situation in Panama must give rise to possibilities apart from closure of the Canal. In the overall context of owning or managing a vessel, there must be a host of other problems that have to be considered apart from the possibility of a vessel being detained due to political problems in a port of call. If the political risk is considered and the risk assessed, the more likely result might be additional freight or hire that should be paid by the charterer. The precise contractual obligations only have significance when the loss is suffered, as in the "EVIA". Remember that the right of the owners to allege breach of the safe port warranty only arose as an afterthought, perhaps more correctly the thought of the underwriters.

In conclusion, much to the dismay of owners and hull underwriters, and the relief of charterers, provided a vessel was in the Shatt prior to 21st

September 1980 Basrah was a safe port in the context of the safe port warranty. In answer to the question is there a safe port in the Gulf: yes, and one of them is Basrah!