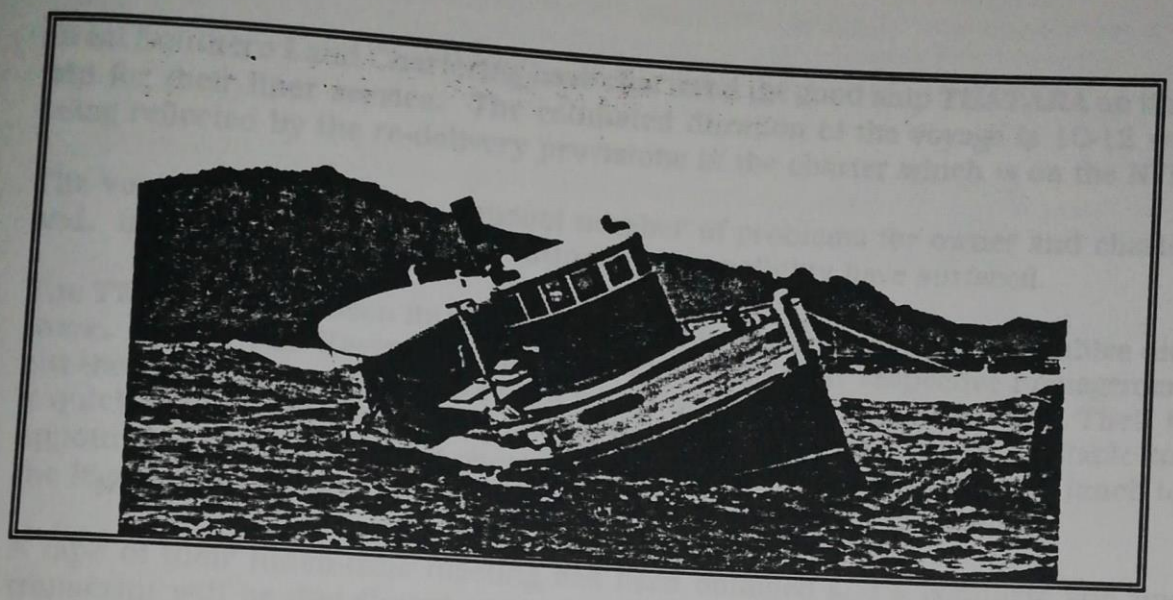
UNSAFE PORTS

*Paul David
Julian Long



A tale of simple shipping folk navigating a perilous course through unsafe and anomalous areas of the law on safe ports

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* Paul David is a partner and Julian Long is a staff solicitor with Russell McVeagh McKenzie Bartleet & Co (Auckland). Both practice in Russell McVeagh's shipping speciality. This presentation is a "local" version of the presentation given by Mr Charles Baker of Herbert Smith, London (Solicitors) and Mr David at the International Congress of Maritime Arbitrators in Hong Kong earlier this year. The presenters acknowledge the significant contribution of Mr Baker.

DRAMATIS PERSONAE

Trevor - Post-fixture manager, Long White Cloud Shipping Limited, owners of m/v ***TUATARA***

Kevin - Claims manager, Great Southern Land Chartering Limited, time charterers.

THE FACTS

Great Southern Land Chartering have chartered the good ship ***TUATARA*** on time charter trip for their liner service. The estimated duration of the voyage is 10-12 weeks, this being reflected by the re-delivery provisions in the charter which is on the NYPE form.

The voyage gave rise to an unusual number of problems for owner and charterer alike and, inevitably, disputes as to ultimate responsibility have surfaced.

The ***TUATARA*** has been finally redelivered but, as we shall see, her troubles did not end there. Trevor and Kevin are under pressure from their respective management to sort out the series of expensive disasters which occurred during the voyage. Their hopes for a quick arbitration have been dashed because no arbitrators are available to take an appointment for a hearing at short notice. They have agreed to meet for lunch to identify the legal issues involved and try to settle as many of them as possible.

A tape of their lunch-time meeting has been obtained and a complete and unabridged transcript will be distributed at the beginning of the conference session at which their discussion will be re-enacted.

DIALOGUE

Trevor: *How nice to see you,Kevin! Sit down - have a drink*

Kevin: Thanks - er, something on the rocks, I think . . .

Trevor: *Now that's pretty appropriate in the circumstances!*

Kevin: *(laughs)* Yes, Absolutely!

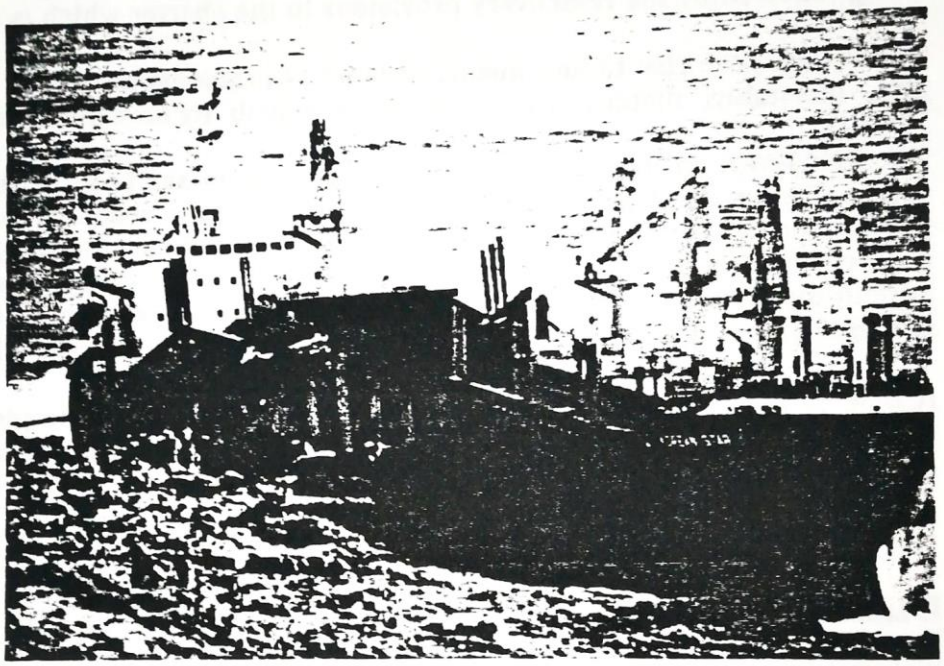
Trevor: *Well, let's get this business out of the way so that we can both enjoy lunch - no point in spoiling a business lunch with too much business! Now, let's look at the facts.*

This trip charter got off to an unpromising start when the ***TUATARA*** *ran aground entering that small Malaysian port, Teluk Intan. Fortunately, the bottom was soft mud, but owners incurred huge costs hiring tugs and divers and arranging for lightening and re-loading, not to mention the time off-hire waiting for tugs to arrive. The ship's draughts were well within the chartered depths.*

Would you mind telling me why you won't reimburse us these expenses?

Kevin: The port is in a river. The navigation channel occasionally silts up, a fact of which the Master was well aware. We checked the port out beforehand, and learnt that soundings are taken every week, and any necessary dredging carried out, by a well-known dredging company.

Trevor: *That doesn't alter the fact that on the day in question there was an unchartered high spot in the channel which was unsafe for our ship.*



Kevin: We spoke to the dredging company. The man on duty, Mr Emmerman, was their most experienced operator. He can't explain how the high spot came to be missed when they took soundings four days before the grounding. Surely you are not suggesting that this port, which is used by hundreds of ships every year, is "unsafe", just because this normally very competent individual made an uncharacteristic error?

Trevor: *As owners, all we care about is that the ports you order our Master to sail to are safe on the day the ship goes there, while she stays there and on the day she leaves. The port can be unsafe for the rest of the year for all I care. The fact is that a channel with insufficient water (which we are told is efficiently dredged) is not safe. In fact, it would have been less of a hazard if you hadn't told the Master how superbly dredged it was, since then he would have proceeded much more cautiously.*

To audience

So who is right? Is a port contractually "unsafe", simply because a normally competent individual makes a mistake?

In ***The EVIA (No.2)***[1] in the Court of Appeal Lord Denning MR said that if an adequate and well-organised system or "set-up" exists at the port, but a normally reliable individual falls ill suddenly, or makes an uncharacteristic error, with the result that the safe system breaks down momentarily, charterers will not be liable.

In ***The MARY LOU***[2] Mustill J agreed that the grounding of the vessel, when drawing less than the maximum draught recommended by the pilots' office, may well have been an isolated, even non-negligent, failure in an otherwise safe system operated by the pilots.

However, he added:

> ".... the dangers of the navigable channel were such as to amount to a characteristic of the port which would make it unsafe .... unless the system was actually operating effectively at the relevant time. On this occasion it was not."

In ***The SAGA COB***[3] the Court of Appeal, speaking of political risks, suggested that charterers are -

> "entitled to assume that a safety system will be properly carried out."

Perhaps the explanation for this divergence of view lies in distinguishing between two types of cases. The first is where a port possesses an unsafe feature - topographical, meteorological or political - whether permanent or only intermittent. Such ports are safe only if the safety system designed to neutralise the hazard actually works. The safety system may consist of correctly positioned navigation buoys, an accurate weather warning service, adequate tugs, etc.

In the other type of case the port's features are safe in themselves, but unsafely arises because an individual makes an error. For example, some one in the harbourmaster's office believes, wrongly, that the vessel's reported arrival draughts are in feet, whereas in fact they are in metres, the ship is ordered alongside a berth with insufficient depth.

In the first case, the port relapses into its original, unsafe condition because of the breakdown of the system on which its safety depended. The error in the second case, however, does not make the port in itself any more or less safe in a physical, meteorological or other respect. The only unsafe feature is the temporary operational abberation committed by the port officer. That would not normally be described as a feature of the port.

Of course, if the port officer in the second situation is habitually careless, such carelessness might become a feature of the port.

In our case, the failure to detect the high spot and either remove it or mark it with a warning buoy caused the port to revert to a state of unsafely.

Kevin: Come on Trevor, I don't see why charterers should have to pay the full amount of the claim. Our consultants say that the ***TUATARA*** was proceeding too fast and that if she hadn't developed an excessive "squat" she wouldn't have become so deeply stuck in the mud. I reckon that's at least contributory fault on your side.

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1 [1982] 1 Lloyd's Rep 334 (CA).

2 [1981] 2 Lloyd's Rep 272.

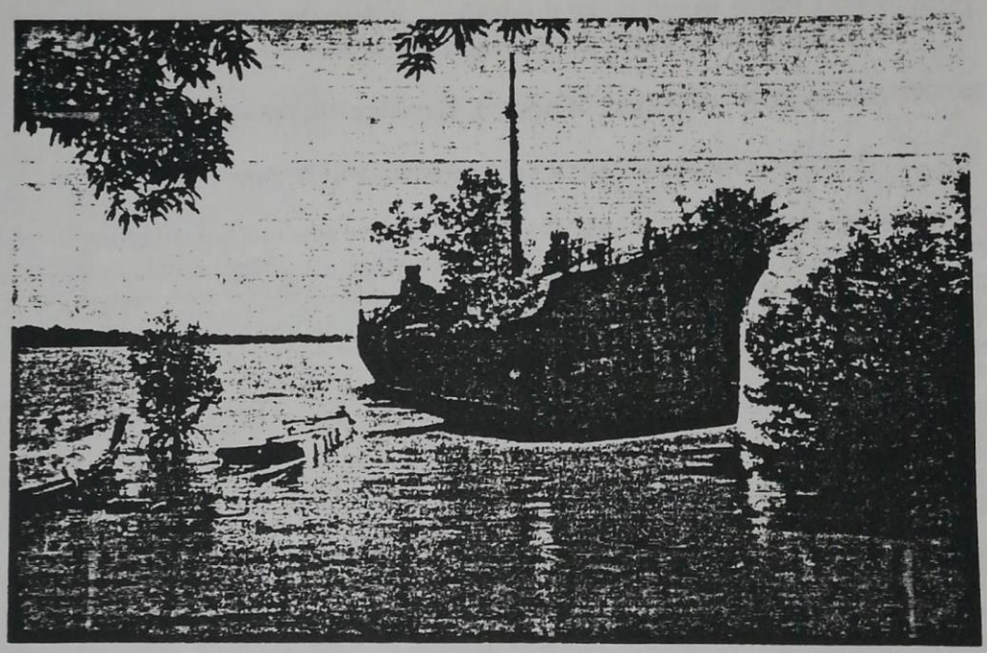
3 [1992] 2 Lloyd's Rep 545 (CA).

Trevor:

No good, I'm afraid, Kevin. That argument might work in the USA but it's not going to help you here unless you can show that the excessive squat was the dominant cause of the casualty. At best you can only say it might have made matters worse.

Kevin:

Alright, you can have the expenses resulting from the grounding incident. But there is no way we are going to pay your claim for the removal of excess growth on the vessel's hull which you say was due to the long wait at the Malaysian port. You are surely not saying that the port was unsafe because of the long delay?



Trevor:
(grins feebly)

Well, maybe not unsafe. But I think another provision in the charter may help owners. I'll cover this when we discuss the problem with that Russian re-delivery port.

Kevin:
(scornfully)

We haven't got a **problem**,Trevor, we've got a **joke**. I mean, be serious, you're bringing an unsafe port claim when the ship:

- suffered no damage;
- was in complete safety at all times and cap it all;
- had already been re-delivered to you, with the result that the charter was no longer in existence during the period you are complaining about.

I'm surprised you don't include "hurt feelings" and "mermaid damage" while you're about it!

Trevor:
(smiles)

At first sight it may look strange, but that doesn't mean the claim's no good. At the last port the ship was to be re-delivered on dropping the outer harbour pilot. You could have chosen any safe port in the extensive re-delivery range, but you chose the only one in which ships became blocked by ice shortly after the vessel arrived.

Kevin:
(tensely)

Just a minute. It's true that a 5 kilometre section of river was impassable for 3 weeks because of ice, but that section was situated some 30 kilometres down river from the port. It was only blocked because the ice-breakers for that section were on strike. The strike was a completely unforeseeable, abnormal event. Anyway, none of this stopped the ship leaving port and being re-delivered under the charter after our last cargo was discharged.

Trevor:

The possibility of a strike may have been remote when you decided to choose the final port of call, but the Russian newspapers were talking about the threat of an imminent strike several days before the ***TUATARA*** *entered the river.*

To audience

Kevin has mentioned three possible answers to owners' claim. Let's take the last one first. Who agrees the re-delivery of the vessel around 10 hours before she met the ice and suffered delay gives charterers a complete answer to owners' claim that the port was unsafe? ***The EASTERN CITY***[4]

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4 [1958] 2 Lloyd's Rep 127 (CA).

Does it make any difference that the unsafe feature - impassable ice - which caused the problem here was 30 kilometres away from the port limits? ***Grace v General Steam Navigation;***[5] ***The HERMINE;***[6] ***The MARY LOU.***[7]

Thirdly, let us suppose that Kevin can show that the ice-breaker crews' strike was an utterly unexpected and unprecedented event. Will this allow charterers to rely on the exception of "abnormal occurrence" in Seller LJ's classic definition?

Trevor: *So you see, Kevin, sending our ship to a river port which becomes ice-bound due to the ice-breakers' refusal to operate must make the port unsafe. After all, I don't see that there is much difference between a port which is prone to ice, but lacks icebreakers, and a port which has icebreakers but with crews who don't work. I say this situation is the same (at least in law) as the problems we had in the Malaysian port. The safe "system" was not working when it should have.*

Kevin: I think the two situations are very different for two reasons. Vessels are not normally prevented from reaching or departing from that Russian port, so we did not breach Clause 25.[8]

Clause 25 sets out exhaustively what the parties' obligations are in respect of ice. As usual, it has been amended to provide that, if the ship does trade to ice-bound areas, charterers will pay any additional premium levied by hull insurers. The ice clause codifies all rights which owners are to have if the vessel suffers damage from ice. In other words, it overrides the safe port clause[9].

Trevor:
(exasperated) *This sounds like lawyers' rubbish to me. I don't read Clause 25 as exempting charterers from liabilities which might otherwise arise under other clauses. The fact that it obliges charterers to pay the cost of any extra insurance premiums in the event of owners agreeing to sail in areas prone to ice doesn't give charterers "carte blanche" to send the vessel to an unsafe port.*

Kevin: Well, I must admit that no one seems to have succeeded with this argument in the 12 years that have passed since

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5 [1950] 83 Lloyd's Rep 297.

6 [1979] 1 Lloyd's Rep 212 (CA).

7 Supra at note 2.

8 ***Limerick S S Co v Stott & Co*** [1921] 1 KB 568 (CA).

9 A similar argument failed in ***Grace v General Steam Navigation*** (supra), but see ***The EVIA (No 2)*** (supra).

Lord Roskill gave it his blessing in ***The EVIA (No. 2)***, despite several attempts.[10]

What do you say to the argument that no safe port promise applies since the Russian port is specifically named in the charter?

Trevor: (dismissively)

Yes, it's named, but solely for the purpose of defining the geographical limits of the re-delivery area. That's not an acceptance by owners that the port is necessarily safe, any more than any of the other ports in the nominated range.

To audience

In a London arbitration (18/86) reported in LMLN in 1986 it was held that the words:

> "via safe port or ports .... including Castellamare di Stabia ...."

meant that charterers made no promise as to the named port's safety.

However, the phrase:

> "one safe port US Gulf .... understood New Orleans, Destrehan, Ama, Myrtle Grove, Reserve count as one port"

was used in the charter party in ***The HERMINE*** where it did not occur to anyone to doubt whether the safe port promise applied to Destrehan.

In ***The PRODUCT STAR***[11] owners refused to sail to Ruwais in the United Arab Emirates under a charter concluded when the Iran/Iraq war was in its sixth year. Ruwais was named in a charter party clause (dealing with insurance as one of several loadports). The Court had to consider whether owners were entitled to exercise the discretion granted by the war clause in the charter to refuse to proceed to a port they considered "dangerous". It was held that in the context of this charter, in which both parties accepted the existence of a certain degree of risk, owners could only exercise their discretion to refuse if they reasonably concluded that the risk of attack had increased since the date of the charter.

Kevin:

Sorry, Trevor, but you're forgetting the first point I mentioned about this clause. The ship didn't suffer any damage from the ice, since the Master decided (as he was entitled to) not to try to force the ice.

Trevor:

*Sure, she didn't suffer any **physical** damage, but we lost three weeks earnings waiting for the strike to end or the ice to melt. If I'm right that the Russian port was not a prospectively safe port **either** when nominated **or** by the time the ship sailed up-river, charterers were in breach. The delay to the ship was a direct consequence of that breach.*

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10 See for example ***The LUCILLE*** [1984] 1 Lloyd's Rep 244 (CA); ***The CONCORDIA FJORD*** [1984] 1 Lloyd's Rep 385.

11 [1993] 1 Lloyd's Rep 397 (CA).

Kevin: I can't dispute that, but ***The HERMINE*** case makes it clear that damages for delay resulting from unsafely of a port are not recoverable, unless the delay is long enough to frustrate the charter.

Trevor: *I thought no distinction was drawn in contract law between physical and economic damage. After all, if you had ordered us to load a cargo of minerals which turned out to be in danger of liquefying due to excess moisture content, that would be a breach of the dangerous cargo clause in the charter. If we had to spend time and expense fitting shifting boards or discharging the cargo, we'd recover for the delay and other "economic" losses, wouldn't we?*[12] *This is just more lawyers' nonsense.*

Kevin: But that's what the law is. ***The HERMINE*** was trapped for 30 days when the South West Pass silted up in 1974, but the Court of Appeal held that delay caused by an obstruction could only constitute unsafely if it was so long as to frustrate the charter.

Trevor: *(puzzled)* *Yet if the pilot had advised the Master to take the ship through the ice, and such advice was not clearly unreasonable, and some hull damage resulted, the* ***Grace v General Steam Navigation*** *case shows that owners could recover damages to cover repairs* ***and*** *any delay. You're saying that mere delay alone, though caused by unsafely, gives owners no rights ...*

Kevin: ... unless the delay is long enough to frustrate the charter.

Trevor: *But the charter had already come to an end before the delay even started! Also, if the facts had been slightly different and the ship had been unable to* ***reach*** *the port due to the ice, your nomination would have been invalid and you would have been obliged to designate a safe alternative port.*[13] *If you refused to do so promptly, that would be a wrongful repudiation of the charter.*

Kevin: Look, that's what ***The HERMINE*** case says. I don't pretend to understand it either.

Trevor: *I'm not quite finished, because owners also have the right to claim an indemnity, implied under Clause 8, in respect of all consequences of complying with charterers' orders as to the employment of the ship.*

Kevin: But our order to call at the Russian port wasn't the cause of the delay. The delay was caused by the strike.

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[12] Such losses were recovered in ***Micada v Texim*** [1968] 2 Lloyd's Rep 57.

[13] ***The EVIA (No.2).***

Trevor: *It's true that the order alone, without the intervention of the strike, would have caused no loss, but that would always be so and a claim to indemnity is not to be so easily evaded.*[14] *This is also the reason why you will have to pay us for the costs of removing the hull growth suffered in Malaysia.*[15]

Kevin: I thought when we fixed up this lunch that it wouldn't take more than a few minutes to sort these problems out. I'm afraid we'd better drink up and appoint those arbitrators *tout de suite!*

Trevor: *And talking of puddings, I see you haven't finished your creme brulée. Why not wash it down with one of their excellent ports?*

Kevin: Ports are not a subject I wish to discuss!

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