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Déjà Vu – Safe Port/Berth Warranties and Lessons From the Iran-Iraq War

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The conflict that has recently broken out in the Middle East has given rise to numerous issues for the shipping and international trade sectors. We have covered several of those issues already in our articles on refusing transit through the Strait of Hormuz, *force majeure* and material adverse change and when conflict frustrates a contract. Another such issue is how the warranties as to the safety of ports and/or berths routinely found in charterparties may operate in this context.

While the current situation is certainly dramatic, it is not unprecedented as far as the shipping industry is concerned. There is a wealth of authority on safe port warranties. In particular, conflicts in the 1980s and early 1990s, most especially the Iran-Iraq War, gave rise to many decided cases that shed light on the current situation. This article examines some of those cases.

The Basics

A full discussion of safe port/berth warranties is well beyond the scope of this article. However, it is useful to have in mind the lodestar in any discussion of the issue, which is the definition of a safe port given by Sellers LJ in *The Eastern City* (as approved by the UK Supreme Court in *The Ocean Victory*):

> "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."

While the test is easy to state, it can be complex to apply, as the cases discussed below demonstrate.

Timing Is All

Two cases with ostensibly similar facts, *The Evia (No.2)* and *The Lucille*, demonstrate the importance of timing when assessing whether or not a safe port warranty has been breached.

Both cases concerned vessels that were ordered to Basrah, Iraq. In the case of *The Evia*, the relevant orders were given in mid-March 1980, under a charterparty concluded in November 1979.

In the case of *The Lucille*, the relevant orders were given in September 1980, under a charterparty concluded in July 1980. Both vessels became trapped in the Shatt-al-Arab following the outbreak of war between Iran and Iraq.

Despite the apparent similarities of the two cases, they gave rise to different results on the question of whether or not the safe port warranties in the charterparties had been breached. The charterers in *The Evia* were found (ultimately by the House of Lords) not to have breached the safe port warranty in that case and thus not to be liable to the owners of the vessel. Conversely, the charterers of *The Lucille* were found liable to the vessel's owners.

The difference between the two cases was one of timing. As the House of Lords made clear in *The Evia (No.2)*, the obligation on charterers under a safe port warranty is prospective in nature; the promise made as to the safety of the port has to be fulfilled at the time the order to proceed to a particular port is given. It is not an absolute or continuing promise (although there is potentially a secondary obligation in circumstances where a port becomes unsafe after the order is given).

The order for *The Evia* to go to Basrah was given around six months before the outbreak of full-scale war between Iran and Iraq, on 22 September 1980. The outbreak of the war was, in that context, an abnormal occurrence and accordingly there was no breach of the safe port warranty. In *The Lucille*, by contrast, the order was given on 20 September 1980, just two days before the outbreak of war and the closure of the Shatt-al-Arab. In that context, the outbreak of the war was not an abnormal occurrence and so the charterers were in breach of the warranty.

It follows from the above that owners and charterers considering their position in relation to orders for a vessel to proceed to a port affected by the current hostilities in the Middle East will need to look not just at the factual situation at the port in question (or in the approaches to and from that port), but also at the timing of the relevant orders.

Port v. Berth

Time charters commonly contain warranties as to the safety of the ports to which a vessel will be ordered. In voyage charters, however, it is often the case that the warranty of safety is given in respect of the berth(s) to be used by the vessel, not the port itself. The rationale for this is that, where a voyage charter expressly names the loading or discharge ports, the owners can satisfy themselves as to the safety of those ports ahead of time.

This distinction was of critical importance in *The A.J.P. Priti*. The vessel in that case was chartered, on the Gencon form, to carry a cargo of bagged urea from Dammam to a selection of three named Iranian ports.

This was in 1983, during the Iran-Iraq war. In the event, the vessel was ordered to discharge at Bandar Khomeini. While sailing northward in convoy, towards Bandar Khomeini, the vessel was struck by an Iraqi missile and severely damaged.

The warranty given in the charterparty referred only to the safety of the berths the vessel was to use, and not to the safety of the ports. The Court of Appeal rejected any implication of a safe port warranty. A safe berth warranty, without more, is only a warranty that the berth(s) to which the vessel is ordered will be free from risks not affecting the port as a whole (or all the berths in it).

It follows from this that the warranty does not extend to the approach to the port.

A contrast can be struck between *The A.J.P. Priti*, on the one hand, and the case of *The Chemical Venture*, on the other. *The Chemical Venture* also concerned a vessel struck by a missile while approaching a port – in that case by an Iranian missile while approaching the port of Mina Al Ahmadi, in Kuwait. The charterers in that case were found liable, because the warranty they had given was a safe port warranty, not just a safe berth warranty. It followed that the warranty extended to the approach to the port, which required passing through a relatively narrow channel, in which three other vessels had been attacked in the preceding 11 days.

The relevance of these cases is clear, particularly where owners are considering whether they are obliged to comply with orders requiring them to navigate areas (most obviously the Strait of Hormuz, but potentially others) of potential danger on the way to a particular port. The distance from the danger to the vessel and the port in question is also relevant in this context. It should be said, however, that owners may find the war risks clauses of their charterparty assist them, even where the safe port/berth warranties do not. We discussed such provisions in our article on war risk clauses.

The Degree of Risk

As the definition in *The Eastern City* makes clear, unsafety arising from an abnormal occurrence does not constitute a breach of the warranty of safety. A case that sheds light on what may be regarded as "abnormal" in this context is *The Saga Cob*.

The Saga Cob was time chartered and, in that context, ordered to load a cargo in Assab for carriage to Massawa. At the time, in 1988, both those ports were in Ethiopia (although they are now in Eritrea). While at anchor off Massawa, the vessel was attacked by guerillas from the Eritrean People's Liberation Front, wounding the master and causing significant damage to the vessel.

The owners claim against the charterers under the safe port warranty succeeded at first instance, but that decision was overturned by the Court of Appeal. The basis for the latter decision was that there had not been a sufficient history of similar attacks for the attack on the vessel to be regarded as anything other than an abnormal occurrence. There had been an attack on one other vessel, but that had been around three months earlier and around 65 miles away. The risk of such an attack could not be regarded as a normal characteristic of the port of Massawa.

Interestingly, the Court of Appeal rejected an argument that the fact that the Ethiopian government had instituted a system of convoys and escorts for vessels sailing between Assab and Massawa was itself an indicator of unsafety.

As the court said, "… the taking of precautions cannot be relied on to show that the port was unsafe." This would be very relevant if, as has been mooted, a system of convoys and escorts were to be established for vessels transiting the Strait of Hormuz.

More generally, the decision in *The Saga Cob* is particularly relevant in relation to ports that might conceivably be affected by the hostilities, but which are not "in the thick of it". An attack at the former type of port could well be regarded as an abnormal occurrence, but be regarded differently at the latter port.

Waiver and Estoppel

A final point illustrated by the cases discussed in this article is that owners can, if they are not careful, waive their rights under safe port/berth warranties or otherwise be estopped from relying on those rights. Two cases in particular come to mind.

In *The Kanchenjunga*, a vessel trading under a consecutive voyage charter was ordered to Kharg Island, Iran, during the Iran-Iraq War. While the vessel was at anchor, waiting to berth, the port was bombed by Iraqi forces. The master promptly departed the port and the owners called on the charterers to nominate a safe port. The charterers restated their orders for the vessel to load at Kharg. The master refused.

The House of Lords found that the owners' decision to go to Kharg in the first place and there to tender notice of readiness constituted a waiver by election; what the owners did was inconsistent with rejecting the charterers' orders (although they had not waived any right to claim damages).

A similar issue arose in *The Chemical Venture*, a case discussed above. In that case, while the charterers were found to be in breach of the safe port warranty, they escaped liability because the owners were found to have waived their right to contend that the charterers were in breach, or to be estopped from contending that. This was found to be the case based on what the owners said and did as a whole, despite the absence of any express waiver.

These cases illustrate the care parties, particularly owners, must take in both their actions and their communications in situations of this kind. Any words or actions that are not carefully thought through can have serious consequences.

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