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SAFE PORTS, JOINT INSURANCE & LIMITATION OF LIABILITY - THE "OCEAN VICTORY" IN THE UK SUPREME COURT 2017

The UK Supreme Court in May 2017 handed down its much anticipated judgment in the case of the total loss of the *Ocean Victory* at Kashima, Japan in 2006.

The facts

The *Ocean Victory* was a modern cape-size bulk carrier owned by Ocean Victory Maritime Inc. ("OVM"). The vessel was bareboat chartered by OVM on an amended BIMCO Barecon 1989 charter dated 8 June 2005 to Ocean Line Holdings Ltd. ("OLH"), which was a company within the same group. OLH time chartered the vessel to China National Chartering Co Ltd. ("Sinochart") on an amended NYPE form dated 2 August 2006. The vessel was sub-chartered by Sinochart for a time charter trip on an amended NYPE form dated 13 September 2006 to Daiichi Chuo Kisen Kaisha ("DCKK") of Japan. All o f the charters contained an undertaking by each of the charterers to trade the vessel between safe ports.

On 12/13 September 2006, DCKK ordered the vessel to load a cargo of iron ore at Saldanha Bay, South Africa for discharge at Kashima, Japan. The *Ocean Victory* arrived at Kashima on 20 October 2006 and berthed at the Sumitomo Metal Industries Raw Materials Quay, Kashima to discharge its cargo of iron ore. During the morning of 23 October, the discharge operations were suspended due to weather conditions associated with a low pressure and the vessel remained on the berth awaiting the resumption of discharge operations. Also during that morning the cape-size vessel, the Ellida Ace, berthed alongside the Raw Materials Quay.

On 24 October, on the basis of the forecasted weather conditions, the masters of the *Ellida Ace* and *Ocean Victory* decided to put to sea and so arrangements were made for tugs and pilots and the departures were scheduled for around midday. The weather conditions at Kashima deteriorated extremely rapidly and by 11 am the pilot advised the agents that it was unsafe to perform the pilotage services and the departures were suspended. At around 1200 hours, a severe northerly gale was affecting Kashima and the *Ocean Victory* was subjected to swells resulting in some of its mooring ropes breaking: the master requested tugs to keep the vessel alongside. Meanwhile, the *Ellida Ace* did not experience any problems with its mooring

ropes. The tug boats came alongside the *Ocean Victory*, the vessel was safely held alongside the berth and the mooring ropes were reset.

The pilot came onboard the *Ocean Victory* at about 2 pm and indicated to the master that since he had requested to leave port they should do so without delay. The *Ocean Victory* departed the berth with the assistance of tugs and the pilots and proceeded up the Kashima fairway dropping the pilot off in the fairway. The vessel continued up the Kashima fairway into a northerly gale. Unfortunately, when exiting the Kashima fairway the *Ocean Victory* came into contact with the northern end of the south breakwater and after further contact with the breakwater the vessel grounded off the shore. Meanwhile, the *Ellida Ace* which had departed the berth about 30 minutes afterwards, experienced difficulties navigating within the Kashima fairway and eventually grounded within the fairway.

Efforts were made to salvage the *Ocean Victory* without success and it subsequently broke-up and the wreck had to be removed. The SCOPIC liability in respect of the attempted salvage amounted to about USD 12m and the wreck removal expenses were about USD 34.5m.

Following the payment of USD 70m in respect of the hull claim, one of the hull underwriters, Gard, took an assignment of the rights of action of the OVM (registered owners) and OLH (the bareboat charterers). Proceedings were commenced by Gard in the UK Commercial Court against Sinochart alleging a breach of the safe port undertaking in the time charter. Sinochart, in turn, joined DCKK to the proceedings. Gard argued that OLH had incurred a liability to OVM in respect of the loss of the vessel of USD 88.5m and sought an indemnity in respect of this liability plus the liabilities for the SCOPIC expenses (USD 12m), wreck removal expenses (USD 34.5m) and damages for loss of hire. Sinochart also had claimed loss of hire from DCKK.

Sinochart /DCKK disputed that they were in breach of their safe port obligations and also submitted that Gard, standing in the position of OLH, could not claim an indemnity in respect of the liability to OVM for the loss of the vessel and that they were entitled to limit their liability for the damage to ship relying on the 1976 Convention for the Limitation of Liability for Maritime Claims.

In July 2013, after a lengthy trial of nearly 5 weeks, the Commercial Court, in a judgment given by Teare J., held that the time charterers - in breach of their undertaking - had ordered the *Ocean Victory* to an unsafe port and were liable for the losses claimed.

In reaching this decision, Teare J. found, amongst other things, that the danger facing the *Ocean Victory* on 24 October was related to two of the characteristics of Kashima; the vulnerability of the Raw Materials Quay to long swells (making it necessary for vessels to leave the port) and the vulnerability of the Kashima fairway to northerly gales caused by low pressure systems (making it unsafe for cape-size vessels to transit the Kashima fairway). Teare J. found that it may have been rare for long swells and a northerly gale to occur at the same time at Kashima, but no-one in Kashima should be surprised if they did. He also found that

the northerly gale affecting Kashima on 24 October 2006 may well have been one of the most severe storms to have affected the port in terms of its severity, rapidity of development and duration. He concluded, however, that the characteristics of the port giving rise to the danger were not rare and even if the concurrence of these two features (long swells and northerly gales) was rare in the history of the port nevertheless since they flowed from the characteristics of the port the port was unsafe.

The Court of Appeal in 2015 allowed the time charterers' appeals finding that the conditions experienced at Kashima on 24 October 2006 were an abnormal occurrence and so the charterers were not in breach of their safe port undertaking. The Court of Appeal also decided that the effect of the terms of the bareboat charter were to prevent Gard claiming from the time charterers for the loss of the vessel.

In 2016, the Supreme Court heard Gard's appeals in respect of the breach of the safe port undertaking (abnormal occurrence) and whether a claim could be made for the loss of the vessel and the charterers' cross-appeal that the claims for damage to the vessel could be limited under the 1976 Convention on Limitation of Liability for Maritime Claims (the "1976 Convention"), as enacted under the UK Merchant Shipping Act 1995.

Safe port (abnormal occurrence)

The Supreme Court unanimously, in the leading judgment given by Lord Clarke, held that the charterers were not in breach of their safe port undertaking and the conditions at the port of Kashima on 24 October 2006 amounted to an abnormal occurrence.

The Supreme Court repeated that the correct legal test was that in *The Eastern City* [1958] and the date for judging whether the charterers were in breach of their safe port undertaking is the date on which they nominated the port (*The Evia (No. 2)* [1983]). It was emphasised that the charterers' promise is a prediction of safety when the ship will be at the port and which assumes normality when the ship arrives at the nominated port. The correct legal test requires looking at (1) what are the normal characteristics of the port; and (2) when the ship is at the port was the incident caused by the normal characteristics or an abnormal occurrence? The Supreme Court accepted that the expression "*abnormal occurrence*" was to be given its ordinary meaning – it was something well-removed from the normal – it was an event that was rare or unexpected. A theoretically foreseeable event is not sufficient to be a normal characteristic of the port otherwise the mere foreseeability of an event could lead to wholly unreal and impractical results and the legal test was not a test of reasonable foreseeability. The correct approach was to ask if the event causing the incident was normal or abnormal. It was necessary to look at the reality of the situation against the history of the port and ask if the event was normal or unexpected.

The Supreme Court agreed with the Court of Appeal's conclusion that in deciding whether critical combination of long swells and northerly gale affecting Kashima was a normal

characteristic of the port or an abnormal occurrence the judge should have looked at the past frequency of such events occurring and the likelihood of it happening again as well as the exceptional nature of the storm affecting Kashima on 24 October and that the correct conclusion on the evidence was that the conditions affecting the port on 24 October were abnormal.

As a postscript, the Supreme Court commented that a failure by the Kashima port authorities to carry out a risk assessment and put in place a proper system to deal with the two conditions might be relevant in some cases but the question was still whether the event causing the incident was abnormal or not.

Loss of the vessel claim – joint insurance

Gard claimed against the time charterers for an indemnity in respect of the liability of OLH to OVM for the loss of the vessel. The question in the appeal was whether the insurance provisions of the bareboat charter precluded the right of the registered owners and the subrogated hull insurers from claiming against the bareboat charterers for the loss of the vessel.

The bareboat charter contained, amongst other things, at clause 9 an obligation on the bareboat charterers to carry out repairs and at clause 12 an obligation on the bareboat charterers to insure the vessel for marine risks for the joint interests of the registered owners and the bareboat charterers. Clause 12 further provided that in the event of the total loss of the vessel the insurance proceeds shall be paid to the mortgagees for distribution to the mortgagees, registered owners and the bareboat charterers according to their respective interests. Clause 13, which was an alternative insurance arrangement to those in clause 12, and provides for the registered owners to insure the vessel for their and charterers' joint interest and contained an express exclusion of the insurers' right to take subrogated actions against the bareboat charterers was deleted. Finally, the trading limits clause of the Barecon form was deleted and unusually there was a rider clause with a safe port undertaking by the bareboat charterers.

The Supreme Court, by a three to two majority, dismissed Gard's appeal holding that the wording of the amended BIMCO Barecon charter with its joint insurance provisions in clause 12 created an insurance-funded solution in the event of the total loss of the vessel and this had that the effect of making the hull insurance the sole route for the registered owners to recover from the bareboat charterers: since the insurance was the joint benefit of the assured there was no right of claim against each other. The result was that there was no liability on the bareboat charterer to the registered owners and thus there was no liability for which the bareboat charterer could, in turn, claim an indemnity from the time charterers in respect of the loss of the vessel.

The Supreme Court judges observed that Gard could have pursued their claim against the time charterers on some other legal basis, but declined to do so, and these alternative bases may have allowed for the recovery of loss of the vessel.

Lord Sumption (in the minority) made the point that the insurance law principle that where there were co-assureds the subrogated insurer cannot claim against one of the co-insured parties to recover insurance payments does not address the question of how this principle affects claims by the insurer against a third party who is outside of the joint insurance arrangements and why a claim against the third party was excluded. In Lord Sumption's view, the bareboat charterers were under a liability for the total loss of the ship as a result of breach of the safe port undertaking in clause 29 and the insurers were also liable under the hull policy. The bareboat charterers' liability for the loss of the vessel was not excluded. Moreover, the insurance payment by the insurers would satisfy the bareboat charterers' liability to the registered owners and the bareboat charterer would have a claim over against the time charterers to which the insurers would be subrogated.

Lord Clarke (also in the minority) agreed with the reasoning of Teare J. that where there was an express safe port warranty by the bareboat charterers and clause 12 of the bareboat charter did not contain an express exclusion of the right of subrogation, the effect was that bareboat charterer was liable to the registered owners for the breach of the safe port undertaking notwithstanding the joint insurance arrangements.

Limitation of liability

The Supreme Court unanimously dismissed the charterers' cross-appeal that they were entitled to limit liability for claims for the loss of the vessel and any consequential losses relying on the 1976 Convention and approved the earlier Court of Appeal decision in *The CMA Djakarta* [2005]. It was held that Article 2(1)(a) of the 1976 convention, where it provided for limitation in respect of claims for "*loss of or damage to property…in direct connexion with the operation of the ship",* did not include damage to the ship itself.

Conclusions

The Supreme Court's decision brings welcome clarity to the meaning to be given to the well-known expression "*abnormal occurrence*" in the context of the legal test for the safe ports and also the allocation of risk under the important safe port undertaking in charterparties. It also emphasises the importance of tribunals of fact carefully examining the historical evidence of characteristics of the port in question when reaching conclusions about whether the events leading to the incident were the result of the normal characteristics of the port or an abnormal event.

The Supreme Court's *obiter* majority decision relating to the claim for the loss of the vessel underlines the importance of examining the effect of joint insurance provisions in contracts and also the correct legal basis for pursuing claims against third parties for losses they have

caused. The widely-used BIMCO Barecon wording is currently under review and it is anticipated that the insurance provisions will be changed in an effort to allow the insurers of bareboat chartered vessel to pursue subrogated claims against third party charterers for damage caused to the vessel.

The *obiter* decision of the Supreme Court to uphold the earlier Court of Appeal decision in *The CMA Djakarta* not permitting charterers to limit their liability to Owners for loss or damage to a chartered vessel relying on the 1976 Limitation Convention brings finality to this important question, but possibly calls into question whether the 1976 Convention remains fit for purpose in the 21st century given the substantial risks posed to the diverse chartering interests in the event of serious damage to a chartered vessel.

This article is also published in the LMAA Law Review

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