Shipping

January 2015

"ABNORMAL OCCURRENCE" CLARIFIED IN THE *OCEAN VICTORY* COURT OF APPEAL DECISION

The surprising and somewhat controversial finding in the first instance judgment of the *OCEAN VICTORY*[1] that Kashima Port, a modern and sophisticated port with a first-class safety record, was unsafe was overturned on 22 January 2015 in a judgment handed down by the English Court of Appeal.

Facts

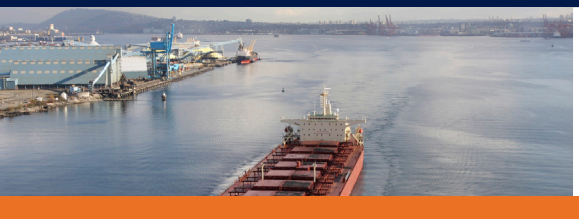
In September 2006, the *OCEAN VICTORY*, a Capesize bulk carrier was ordered by her charterers to discharge her cargo of iron ore loaded from Saldanha Bay, South Africa at Kashima in Japan. On arrival at Kashima, the vessel berthed at the Raw Materials Quay and began discharging her cargo, but had to stop due to strong winds and heavy rain. The situation then deteriorated rapidly: the berth was affected by considerable swell caused by long waves and high winds of up to Force 9 on the Beaufort Scale. On 24 October, in circumstances which were much debated at the first instance hearing, the Master decided to leave the berth for open water, but lost control of the vessel while leaving the port and was driven back onto the breakwater wall, becoming a total loss subsequently.

A claim in excess of US$135 million was brought against the time charterers (and passed down the line to sub-charterers) for breach of the safe port warranty contained in the respective charters. The claim was in fact brought by the subrogated hull insurers of the vessel, who had taken an assignment of the owners' and the demise charterers' rights in respect of the grounding and the total loss of the vessel.

At first instance

The charterers raised three main defences. First, they denied that the port was unsafe on the basis that the conditions experienced at the port on 24 October were an abnormal occurrence. Second, even if the port was unsafe, the cause of the loss was the Master's negligent navigation and/or his navigational decision to leave the port, not the unsafety of the port. Thirdly, they relied on a clause in the demise charter which provided for joint insurance which they argued excluded any

1 [2013] EWHC 2199 (Comm)



right of recovery (by way of subrogation or otherwise) by the owners against the demise charterers. Accordingly, the demise charterers, being under no liability to owners, had no liability to pass down the chartering chain to charterers as they had themselves not suffered any loss.

At first instance, Teare J found that Kashima port was unsafe because it did not have a safe system to make sure that vessels needing to leave the port due to these weather conditions (which he rejected as being an "abnormal occurrence") could do so safely, and that safe navigation out of the port required more than good navigation and seamanship. He accordingly held that there had been a breach of the safe port warranty. He also rejected charterers' causation argument and their contention based on the insurance arrangement in the demise charter.

On appeal

The charterers were granted permission to appeal on three points:

1. Whether there had been a breach of the safe port warranty ("the safe port issue").
2. Whether the Master's navigational decision to put to sea in extreme conditions, rather than to stay at the berth broke the chain of causation ("the causation issue").
3. Whether, on the true construction of the terms of the demise charter, the demise charterers, who had insured the vessel at their expense, had any liability to the owners in respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty ("the recoverability issue").

In relation to the "safe port issue", the Court of Appeal allowed the appeal and concluded that the conditions which affected Kashima on 24 October were an "abnormal occurrence". Hence, there was no breach by the charterers of the safe port warranty.

In this case, the abnormal occurrence relied upon by the charterers was the combination of two features of the port on 24 October, namely (i) such severe swell from long waves that it was dangerous for a vessel to remain at her berth; and (ii) such severe gale force winds from the northerly/northeasterly direction in the exit fairway so as to make navigation of the fairway dangerous or impossible for Capesize vessels ("the critical combination").

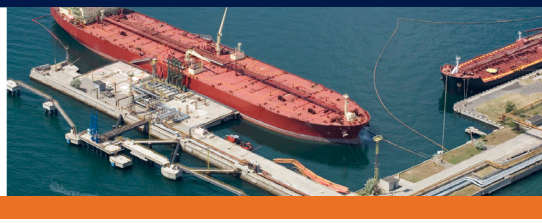
Instead of looking at the individual features of the critical combination separately and deciding whether each of these features could be said to be rare or the attributes/characteristics of the port, the Court of Appeal agreed with the charterers that the critical question to consider was whether the *"simultaneous coincidence"* of these two critical features was an abnormal occurrence or a normal characteristic of the port. Was it an unexpected event for Capesize vessels calling at Kashima to find it necessary to leave the berth due to danger from a long-wave swell at the very time when it was dangerous to transit the fairway? The Court also clarified the approach to be adopted when considering whether or not an event is an "abnormal occurrence", that is, *"realistically and having regard to whether the event had occurred sufficiently frequently so as to become a characteristic of the port"*. In other words, evidence relating to the past frequency and regularity of the features occurring in combination, and the likelihood of them occurring again must be evaluated.

On the evidence, the Court of Appeal found that the combination of both long wave swell and northerly gales was not regular or even occasional. In fact, Teare J had himself found that *"the concurrent occurrence of those events was rare"*. The storm that affected Kashima on 24 October was also of an exceptional nature in terms of its rapid development, duration and severity, all of which led the Court to conclude that the conditions experienced at Kashima that day were an "abnormal occurrence".

Given their finding that Kashima port was not unsafe, the Court of Appeal felt it was unnecessary to rule on the "causation issue" and the "recoverability issue". However, in relation to the latter, the Court went on to decide the point on the basis it raises an important issue of principle in relation to the construction of the relevant charterparties.

The clause in question was clause 12 of the demise charter which was on the BARECON 89 form. This obliged the demise charterers to effect (and pay for) marine and war risks insurance in respect of the vessel. The Court found that in cases where parties agree to take joint insurance or are co-insureds, or where the insurance was paid for by one party for the benefit of both parties, there is now no doubt that such an agreement is likely to be construed as being an agreement to insure for the parties' joint benefit. This will normally mean that the parties have agreed on an insurance solution without any rights of subrogation. Therefore, the prima facie position where a contract requires a party to that contract to insure would be that the parties have agreed to look to the insurers for indemnification rather than to each other. On this basis, insurers cannot subrogate the innocent party's





Instead of looking at the individual features of the critical combination separately and deciding whether each of these features could be said to be rare or the attributes/characteristics of the port, the Court of Appeal agreed with the charterers that the critical question to consider was whether the *"simultaneous coincidence"* of these two critical features was an abnormal occurrence or a normal characteristic of the port.

JEAN KOH, PARTNER

rights against the co-insured or the guilty party who paid for the insurance.

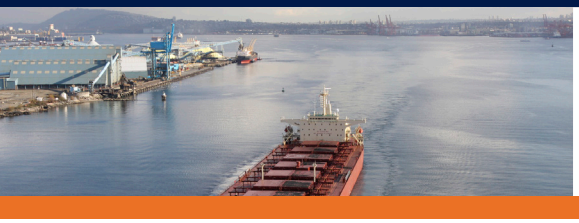
Here, the parties had agreed in clause 12 that they were to be insured in joint names, which insurance was to be paid for by the demise charterers. On this basis, the Court construed the clause as excluding a right of recovery by the owners from the demise charterers in respect of the insured losses, which accordingly precluded any rights of subrogation by the insurers against the demise charterers. The parties intended there to be an insurance-funded result in the event of loss or damage to the vessel by marine risks. Effectively, once the insurance monies were paid out, liability between the parties was discharged.

Comment

This will be a welcomed decision for charterers and charterers' liability insurers. The first instance judgment had set a worryingly high bar to defend an unsafe port claim on the grounds of "abnormal occurrence" which resulted in a modern and sophisticated port being found to be unsafe due to conditions which were in reality unprecedented. There had never, in the port's 35 year history, been a previous casualty of a similar nature. No ship had ever broken free from her moorings at the port; nor had there ever been an accident in the fairway when vessels were departing. With the Court of Appeal guidance on the approach to be adopted when considering whether an event is an "abnormal occurrence", charterers and their insurers can now feel more assured that their warranty of safety will not impose on them responsibility for unexpected and abnormal events – these will remain the responsibility of the owners and their hull insurers.

The effect of the Court of Appeal's construction of the insurance arrangement clause in the demise charter will also be felt positively for those charterers and sub-charterers who are in a chain of charterparties where there is a demise charterer who has agreed to pay for the insurance for the joint benefit of themselves and the owners. Effectively, they will get a "free ride" in the event of a breach of the safe port warranty, although there is still the possibility of a direct claim in tort (or bailment) from the owners.

This appeal decision may be subject to further appeal to the Supreme Court, so the issues may not yet have reached their final conclusion.



For more information, please contact the author of this Briefing:

Jean Koh
Partner, London
T: +44 (0)20 7264 8227
E: jean.koh@hfw.com

HFW's London office is part of an international network of 13 offices in 11 countries. For further information about shipping related issues in other jurisdictions, please contact:

Paul Dean
Partner, London
T: +44 (0)20 7264 8363
E: paul.dean@hfw.com

Guillaume Brajeux
Partner, Paris
T: +33 1 44 94 40 50
E: guillaume.brajeux@hfw.com

Jeremy Davies
Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Dimitri Vassos
Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Simon Cartwright
Partner, Dubai
T: 971 4 423 0520
E: simon.cartwright@hfw.com

Nick Poynder
Partner, Shanghai
T: +86 21 2080 1001
E: nicholas.poynder@hfw.com

Paul Hatzer
Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

Paul Apostolis
Partner, Singapore
T: +65 6411 5343
E: paul.apostolis@hfw.com

Gavin Vallely
Partner, Melbourne
T: +61 (0)3 8601 4523
E: gavin.vallely@hfw.com

Nic van der Reyden
Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

Hazel Brewer
Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Jeremy Shebson
Partner, São Paulo
T: +55 (11) 3179 2903
E: jeremy.shebson@hfw.com

Lawyers for international commerce hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth