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**UNSAFE PORTS:
abnormal occurrences and the
insurance solution.**

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Unsafe Ports: abnormal occurrences

- Basic warranty
- Practical terms – types of dispute
- Key protection for owner in engaging in charterers' employment
- Expansive nature of unsafety:
 - marine risks
 - political and non marine risks, risks to crew.

Unsafe Ports: abnormal occurrences

“The Eastern City” [1958] 2 Lloyd’s Rep

- “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.”



Unsafe Ports: abnormal occurrences

Generally, requirements:

- Danger...
- In entering/using/leaving...
- At the material time

but without:

- Poor seamanship/negligent navigation (causation); and
- “abnormal occurrence”



Unsafe Ports: abnormal occurrences

“Abnormal occurrence”:

- Objective of this requirement? Elusive-
 - “...it is not easy to find a turn of phrase which accurately expresses the notion” (Mustill J in “The Mary Lou” [1981] 2 Lloyd's Rep 272)
- Also consider:
 - Temporary dangers
 - “prevailing characteristics” / “normal characteristics”
 - Quality or attributes of the port (Teare J “The Ocean Victory” [2013] EWHC 2199)
 - Isolated, abnormal or extraneous occurrence [Evia no. 2 [1982] 1 Lloyd’s Rep – Lord Denning]

Unsafe Ports: abnormal occurrences


Issues that can arise

- Incidents/ occurrences vs. persistent physical factors
- Change of circumstances (e.g. war) or sudden action
- Size of the port
- Foreseeability and charterers' knowledge
- Combination of factors



Unsafe Ports: abnormal occurrences

“The Ocean Victory” [2015] EWCA Civ.16

- Cape size vessel
 - Discharging iron ore at Kashima, one of Japan’s largest ports
 - OV left port following communications in relation to weather
 - Encountered severe gale in fairway to add to swell (resultant long waves) which prompted departure
 - Grounds/breaks up, total loss and claim in excess of US\$130 million
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Unsafe Ports: abnormal occurrences

The decisions:

1. High Court:

- Port unsafe

2. Court of Appeal:


- No breach of safe port warranty

3. Supreme Court:

- ?
- 


Unsafe Ports: abnormal occurrences

Considerations

- Modern/large port with first class safety record
 - Large volume of ships and “major industrial entities using it”
 - Since 1971 5,316 cape size vessels had safely called without incident
 - No ship had broken free from her moorings
 - No accident in the fairway
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Unsafe Ports: abnormal occurrences

Material characteristics

- Long waves affected the berths at Kashima 2–3 times a year
 - Gale force winds from northerly/north-easterly quadrant making the fairway unnavigable occurred about once a year
 - No relationship between the two events
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Unsafe Ports: abnormal occurrences

The position following the Judgments

- First instance – each of long waves and gales are characteristic ,so port unsafe
- Court of Appeal rejects this approach in favour of the “unitary question”, focussing on “critical combination”
- Court of Appeal rejects the notion that theoretically foreseeable event can be a characteristic



The recoverability issue

- Although not strictly necessary, the “recoverability issue” prefaced by “we should decide it”
 - Court of Appeal decides losses unrecoverable due to interaction of Barecon terms and time charter terms
 - The BTB fallacy
 - Not a problem caused by subrogation/assignment, but rather the insurance provisions in the bareboat charter
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The recoverability issue

- The charters
 - Head demise/ bareboat charter on Barecon 89 : OVM to OLH
 - Two sub charters on standard period /tc terms: OLH to Sinochart; Sinochart to Daiichi
- Terms of the charters
 - Safe port warranties in all – NB demise charterer warranted the safety of the port
 - Standard Barecon insurance terms headed “insurance and repairs”
 - Clause 12 option taken – charterers to insure against marine, war and P&I risks in joint names of owners and charterers

The recoverability issue


- Charterers' argument: clause 12 constituted a complete code:
 - “guilty” party pays insurance premia, should not be exposed (see Lord Roskill in “The Evia No 2”)
 - Co-insurance bars rights to subrogation (e.g. Mark Rowlands-v-Berni Inns [1986] QB 211)
- Court of Appeal: reviewed the authorities and charterers' arguments effectively prevailed
- Thus, owner has no right against demise charterer, who then has no loss to pass down the chain ...even if a “technicality”.
- Bareboat parties had agreed to “an insurance funded result” (at least as between themselves!)

To conclude

(1) Abnormal occurrences

- Still subtle question; but at least we can say ...
- ...if combination is unlikely, that will be “abnormal” – the “unitary question”

(2) The insurance solution

- In the case of co-insurances, subrogation rights will not arise: party in breach might well not suffer loss preventing claim under any relevant sub-contract
 - Consider therefore in co- insurance contracts whether either the parties’ insurer, or other contracting party, is prepared to live with this outcome
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Thank you



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