The Ocean Victory – Was it simply an abnormal occurrence?

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Introduction

On 10 May 2017 the Supreme Court of the United Kingdom pronounced a remarkable judgment[1] that the total loss casualty of the M/V "Ocean Victory" on 24 October 2006 at Kashima, Japan, was attributable to an "abnormal occurrence" within the definition of safe port undertaking in the time charter party governed by English law and therefore her time charterers were not liable to her owners or bareboat charterers for her loss and associated costs.

This judgment endorsed its preceding judgment by the Court of Appeal[2] which had reversed its further preceding judgment at first instance by the High Court (Teare J. at Commercial Court)[3] and is perhaps one of the most important judgments about the interpretation or application of contractual safe port undertaking in the charter party in this century, in particular the concept of "abnormal occurrence" within the classic definition of "safe port", which exempts the charterers from their liability under English law[4]. The judgment held, in so far as the critical combination of two events which caused the casualty, *i.e*. (i) the danger at Kashima Fairway due to strong waves when the Vessel was leaving the port and (ii) the danger at Raw Materials Quay where she had berthed due to long waves, was rare, such combination and thus the casualty was abnormal, even if each of these two events could respectively be regarded as arising from the characteristics of the port. In other words it said the abnormality does not necessarily require that the cause of the casualty was irrelevant to the characteristics of the port. As the preceding judgments under the courts below had attracted much attention from the shipping communities worldwide, both legally and commercially, so this highest court judgment had the same impact.

It is not the purpose of this paper, however, to add another comment on the interpretation

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1 [2017] UKSC 35

2 [2015] EWCA Civ 16, [2015] 1 Lloyd's Rep. 381

3 [2013] EWHC 2199 (Comm), [2014] 1 Lloyd's Rep. 59

4 "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", per Seller LJ at *Leeds Shipping* v. *Société Française Bunge (The Eastern City)* [1958] 2 Lloyd's Rep. 127 at 131 (emphasis in *italic* added by the author)

or application of "abnormal occurrence" under English law. I am neither an English solicitor nor barrister. This bulletin would not also be an appropriate place for such comment. The writer, a Japanese lawyer, rather believes that it would in fact be regretful for most Japanese shipping interests, if this case, or this casualty exactly speaking, will *only* be remembered in the future as a casualty taking place in a Japanese port which had fallen into the dangerous conditions for a large size ocean-going vessel (Capesize) calling there, albeit temporarily and quite as a rare case, and thus regarded as an "abnormal occurrence". It is particularly so because there had been different analyses of the cause of this casualty in two lines of inquiries or litigation processes in the country where the accident did take place before the trial Judge at first instance in London (Teare J.) made his findings and his findings have become the binding basis of all arguments at upper courts there. One purpose of this paper is to record and introduce the summary of such different analyses in Japan mainly for non-Japanese readers of this unique bulletin, with the hope that many people will agree that there can be multiple findings and analyses of the cause of a casualty that may well lead to totally different resolutions of disputes between the relevant parties. Another is to present a thankfully hypothetical but very difficult case of concurrent litigations in two jurisdictions the results of which are contradictory each other.

Basic Timelines of the Casualty

Before discussing various analyses of the cause, we need to know the basic facts of the casualty. The following is a partial extract from the opening paragraphs of the Court of Appeal judgment with minimum editorial changes:

> The Ocean Victory was a Capesize bulk carrier which went aground at the port of Kashima in Japan on 24th October 2006; she subsequently broke up and became a total loss in December of that year. … On 12th or 13th September 2006 (depending upon the time zone), the charterers ordered the vessel to Saldanha Bay in South Africa to load a cargo of iron ore for carriage to Kashima in Japan. She arrived at Kashima on 20th October and berthed at the Raw Materials Quay. She began discharging her cargo but that had to stop on 23rd October due to strong winds and heavy rain. Thereafter the situation rapidly deteriorated; there was a considerable swell (as a result of a phenomenon known as long waves) affecting the vessel's berth at the Raw Materials Quay and high winds rising to Force 9 on the Beaufort Scale. In circumstances which we [the Court of Appeal] will have to examine, on 24th October the Master decided to leave the berth for open water, but lost control of the vessel while leaving the port and the vessel was driven back onto the breakwater wall, and subsequently became a total loss.

Some more information may need to be added:
The contractual chain was from the registered owners to the bareboat charterers (in the same group) and to the head time charterers in China, and then to the sub time charterers in Japan, who were the operator of the Vessel. As recorded in the judgments, she was employed for a voyage to carry iron ore from South Africa to Japan for the cargo receivers in Kashima.
The Master decided to leave the berth around 1000 in the morning at the suggestion (the meaning of which was much debated though) of the sub charterer's local master mariner representative. Arrangements for departure such as pilot, tugs and signals at noon were made but cancelled shortly before noon by the decision of the pilot because of temporary severe deterioration of the weather at that time. Re-arrangements were made and the Vessel departed around 1425, though the Master stated in London litigation that he had not been told this re-arrangement in advance and misunderstood that he was ordered to leave.
The place where the Vessel collided with the breakwater was in the northern end of a passage called Kashima Fairway, the only way-out from the Raw Materials Quay to the open sea. The first contact with the breakwater took place around 1519. The track of her route from the berth to there is illustrated in a chart in the judgment of Yokohama Marine Accident Inquiry Agency explained below. See the attached chart.

Governmental Inquiries in Japan

Immediately after the casualty, two lines of governmental investigations were put into operation in Japan. One was criminal investigation by the Japan Coast Guard. It was basically to pursue criminal liability of relevant individuals, if any. The details of such investigation for this casualty are not in public but nobody appears to have been prosecuted in the end[5].
Another was administrative inquiry proceeding by the then District Marine Accident Inquiry Agency (MAIA) in accordance with Act on Marine Accident Inquiry. Generally speaking, this proceeding had dual purposes; one was to investigate the cause of accident; another was to make disciplinary action against a negligent Japanese license holder, if appropriate[6]. District MAIA set up a tribunal consisted of 1 or 3 judge(s) to make the decision; Officers from Marine Accident Investigators' Office (MAIO) acted as prosecutor or plaintiff; an allegedly negligent Japanese license holder (typically master of a Japanese

[5] "Investigation of Maritime Crimes in 2006 (Final Data)", Press Release by the Japan Coast Guard on 14 March 2007

[6] MAIA has been re-organized with the new name of Marine Accident Inquiry Tribunal (MAIT) by amendments of relevant Acts in 2008. The primary function of investigating the cause of the accident is now undertaken by another organization called Japan Transport Safety Board (JTSB) and MAIT focuses on disciplinary actions. The relevant proceeding of this casualty was under the law before these amendments.

ship caused the accident), called Examinee, was the accused or defendant individual; and a designated person or corporation as concerned regarding a marine accident in question ("DPC") had a unique status of quasi-defendant who was to receive recommendation to prevent future accidents, if appropriate. The hearings by District MAIA were open to public and an Examinee or DPC could be represented by defense counsels called Marine Counsellors, who were either lawyers or master mariners. The final decision by District MAIA was also open to public, and subject to review first by High MAIA in Tokyo and then by the judicial court, if appealed by an Examinee. But a DPC could not make an appeal.

In this casualty, the Master of the Vessel did not have the Japanese license and thus no Examinee was called. Instead Yokohama District MAIO designated the Master of the Vessel (Panamanian license holder) and the sub time charterers' local master mariner representative in Kashima as DPCs on 28 March 2007.

After a couple of hearings[7], Yokohama District MAIA handed down its judgment on 11 March 2008[8]. It concluded that the casualty was caused by the fact that the Master failed to make sufficient analysis of weather information and consider an option to take refuge at open sea when a developing low pressure system was approaching and did not take an immediate measure to take refuge from rough weather when the storm warning at sea (maximum wind speed at 50knots) for the nearby area was issued at 0900 JST by Yokohama Navtex[9]. After analyzing the weather conditions and various forecasts preceding to the storm warning at 0900, MAIA considered that the Master should have started to consider an option to leave the quay as early as at 0600 when he received the preceding gale warning and should have made a decision to leave the quay as early as at 0900 when he could know upgraded warning, *i.e.* the storm warning, without waiting for the suggestion by the sub time charterers' local representative. Yokohama District MAIA issued a recommendation to the Master.

The sub time charterers' local representative at the hearings criticized the navigation by the Master after departure and argued that his negligent navigation *was* the cause of the casualty, but the judgment replied that it was impossible to judge whether navigation at the relevant time was good or bad as it was difficult to analyze the complex situation at the

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[7] Both the Master and the local representative were represented by their respective defense counsels. But the Master never appeared before the tribunal in person eventually, though his statements before Yokohama District MAIO were presented as evidence.

[8] This was once accessible at http://www.maia.or.jp/pdf/19yh020.pdf but it appears to have gone.

[9] Navtex (navigation telex) is international automated broadcast service for delivery of navigational and meteorological warnings and forecasts, as well as urgent maritime safety information to ships at sea. The relevant information is receivable by a special telecommunication device for receiving them. The source of such information is weather forecasting authorities of relevant coastal countries – the Japan Meteorological Agency (JMA) in case of Japan.

way-out from Kashima Fairway when she became uncontrollable. As there existed no Examinee in this proceeding, the appeal to High MAIA (second instance proceeding) and then to the judicial court could not be and was not made.

Multiple Civil Litigations in Japan

After the judgment of Yokohama District MAIA, there have been multiple civil litigations in Tokyo District Court. Interestingly, it was started by the Japanese Government. The Government, being the owner of the southern breakwater at Kashima damaged by the Vessel due to collision, commenced an action against the bareboat charterers of the Vessel in September 2009 to claim damages by vicarious liability for tort committed by the Master. They at first wanted to rely on the Yokohama District MAIA judgment, though they were not legally binding. The sub time charterer then also sued the bareboat charterer of the Vessel in February 2010 to claim damages by tort (and by reason of unjust enrichment) in respect of loss of bunkers on board, being their property at the relevant time. In response, the assignee underwriters of the owners of the Vessel (the owners' side) sued the Japanese Government in April 2010 to claim damages for loss of the Vessel on the ground that the loss was caused by the defect in the placement and administration of Kashima port by the Government under State Redress Act. In contrast with London litigation, the owners' side's argument about defects of Kashima did not focus on the "critical combination" of (i) the danger at Kashima Fairway due to strong wind and (ii) the danger at Raw Materials Quay due to long waves but merely set out various physical features of the port in general terms. Former two actions were consolidated but the third action by the owners' side was not consolidated and proceeded alone.

Tokyo District Court at first instance rendered their judgement on the first two actions on 20 June 2013[10], shortly before the first instance judgment in London by Teare J. on 30 July in the same year. The Court effectively overturned the conclusion of Yokohama District MAIA and rejected the Master's negligence in his delayed decision to leave the berth but instead found his negligence in another aspect. It found that the casualty was caused by the loss of maneuverability of the Vessel due to prolonged continuous hard rudder negligently taken by the Master at critical several minutes near the way-out from Kashima Fairway and eventual substantial loss of her speed, in breach of an established principle of navigation in rough weather that finely adjusted small angle rudders should be successively adopted to maintain speed (which was of vital importance in that situation) and timely respond to ever changing effects by wind and waves. According to the judgment, there was no good reason for the Master to deviate from this established principle at that time.

[10] (2016) 1418 *Hanrei Times* 305

Appeal to Tokyo High Court (appellate court) was made but dismissed on 17 July 2014. Tokyo High Court approved the findings of the first instance court[11]. Further appeal to the Supreme Court was made but again dismissed on 6 March 2015. The Supreme Court held this is not an appropriate case to allow appeal under the procedural rules and refused to revisit the merits[12].

As to the third action commenced by the owners' side against the Government under State Redress Act, in which they alleged various defective characteristics of the port (but not the critical combination advanced in London), did not reach the stage of judgment. Reportedly the owners' side withdrew the action in August 2013, shortly after the first instance judgment in London in the previous month.

Possible Backgrounds of Contradictory Findings

When the first instance judgment of Tokyo District Court was given in June 2013, the sub time charterers, not surprisingly, tried to draw it to the attention of Teare J. The Judge mentioned it in postscript paragraphs of his judgment. But he refused to change the conclusion he had reached after reviewing evidence before him, namely, the prolonged continuous hard rudder by the Master could not be criticized since the Master had had the fear of being driven onto the breakwater and/or the shore on the opposite. He rather held that the cause of the accident was basically caused by (i) the danger for a Capesize vessel at the way-out from Kashima Fairway at the time where the wind at Beaufort 9 was observed on one hand, and (ii) the danger for her to stay at Raw Materials Quay due to long waves on the other hand, and eventual unsafety of the port at that time represented by combination of these two dangers. As to the former danger, he found that it even required some luck, beyond good navigational skill for a Capesize ship to sail out through the way-out from Kashima Fairway at that time. As to the difference of findings from Tokyo findings, he said his conclusion was based on extensive factual and expert evidence and examinations of the Master and experts before him, none of whom gave evidence in Tokyo.

It appears to me that the findings of Teare J. were most importantly relying on the basic finding that the way-out from Kashima Fairway had been, already in general terms, "dangerous" for a Capesize vessel when the wind at Beaufort 9 was observed, before perusing the appropriateness of the Master's specific maneuvering at the relevant time.

[11] Under the Civil Code of Procedure ("CCP") in Japan, there is no restriction for reasons to appeal to the High Court. The parties are allowed to submit further pleadings and evidence.

[12] Under CCP, appeal to the Supreme Court may be allowed only in limited circumstances, *e.g.* where there is an important issue in the construction of statutes and regulations. A mistake in findings of facts cannot *per se* be a ground for appeal.

This was deduced from opinions by expert mariners before him (who may not have much experience of navigating in Kashima). Under such basis, the Judge probably considered the allegedly mistaken navigation by the Master, even if any, should be accepted in so far as he had some excuses for not complying with the established navigation principle in rough weather.

In contrast, Tokyo judgment put more weight on evidence by different masters. It was revealed from the owners' side evidence that the masters of two sister ships of the owners were both had critical opinions to the Master's navigation of prolonged continuous hard rudder in breach of the established navigation principle in rough weather. Surely it must be a grave matter that the Master's own colleagues did criticize his navigation. As to the expert evidence, a senior local pilot in Kashima, former master mariner of ocean-going vessels, among others, gave written evidence and his testimony in Yokohama District MAIA was relied on in Tokyo too. He did not agree that Kashima Fairway at that time was dangerous but said the Master's navigation in breach of established principle was rather regretted. In other words Tokyo judgments must have accepted that the conditions of Kashima Fairway at that time was not so dangerous as to require more than good navigational skill. The judgment admitted, in so far as the Master had navigated in accordance with the principle of successive small angle rudders and stopped hard rudder earlier to maintain speed, the Vessel would have passed out the way-out to the open sea safely — and it found his unjustifiable prolonged continuous hard rudder leading to the loss of vital element (speed) *was* the cause.

As Teare J. pointed out, the Master did not appear in Tokyo proceeding, as well as in Yokohama District MAIA, though his statements were included in written evidence. In Japan, his personal absence with representation by lawyers only might have had certain implicit impacts. In London in contrast, he eventually appeared in London Courtroom's TV screen from China before the Judge as well as before all interested parties, after several years' absence.

Another point to note may be that the sub charterers at first instance in London were obliged to pursue both the negligent navigation by the Master as the cause and the abnormal occurrence in safe port undertakings. They may not be logically in sharp conflict, but it may certainly have looked inconsistent to advance these two at the same time. Is it a mistaken guess that the second line of arguments might have become more persuasive, possibly ironically, since the first line of arguments was forced to abandon at a lower level?

Conclusion

Of course it is neither appropriate nor productive to discuss which was correct or more

persuasive. Different courts or judges may well reach different judgments in the same set of facts explained by technically different evidence, in particular, different expert opinions giving different evaluations in the same facts. Having said that, it is to be noted that, should the English Court have eventually reached a different conclusion, *i.e*. if the time charterers had been held liable for the bareboat charterers because of the unsafety of the port, that would have been difficult to reconcile with another conclusion from the Japanese judgments that the casualty was attributable to the negligence of the user of the same port. Under the current legal scheme, there is no certain way to ensure the avoidance of such an undesirable situation, unless all the disputes worldwide are to be litigated in one forum. Nor anyone can present a superb prescription to solve this difficult situation should it really have taken place. The only hope of the author is therefore that this case, or this casualty, will not merely be remembered to be an abnormal occurrence in Kashima according to English law perspective, but also be remembered to be a normal negligent navigation case according to another authentic and fully considered decision in the forum where the accident did take place.

Source: Judgment of Yokohama District MAIA on 11 March 2008