**The Supreme Court’s Decision in “*The Ocean Victory*”: Joint Insurance, Subrogation and Liability**

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## Introduction

The Supreme Court’s decision in Gard Marine and Energy Limited v China National Chartering Co (“The Ocean Victory”) [2017] 1 WLR 1793 marked an important development in the ability of jointly insured parties to raise claims against third parties on the basis of alleged liabilities to each other. By a majority of 3:2, the Court found that one jointly insured party owed no liability to the other for a loss covered by the joint insurance policy (rejecting a finding that an underlying liability was owed but discharged by the joint insurance), with the effect that the jointly insured parties could not pass on any such liability to third parties.

## Relevant facts and contractual terms

The Ocean Victory (“the Vessel”) was demise chartered by its owners, Ocean Victory Maritime Inc (“the Owners”) to Ocean Line Holdings Ltd (“the Demise Charterers”). The Demise Charterers time chartered the Vessel to China National Chartering Co Ltd (“Sinochart”), who in turn sub-chartered the Vessel to Daiichi Chuo Kisen Kaisha (“Daiichi”).

Each of the three charterparties contained an undertaking to trade the Vessel only between safe ports. In the charterparty between the Owners and the Demise Charterers, the safe port undertaking was contained in clause 29.

On 24 October 2006, following discharge operations directed by Daiichi, the Vessel grounded in the port of Kashima, Japan, and became a total loss. The grounding was caused by a combination of extreme swell and a severe northerly gale, each of which was a known attribute of the port but which occurred rarely in combination.

The charterparty between the Owners and the Demise Charterers was on the Barecon 89 form as amended. This form required the parties to choose between provisions for insurance set out in clauses 12 and 13, respectively. The parties chose to include clause 12, which stated relevantly:

“*(a) During the charter period the vessel shall be kept insured by the charterers at their expense against marine, war and protection and indemnity risks in such form as the owners shall in writing approve, which approval shall not be unreasonably withheld. Such marine, war and P & I insurances shall be arranged by the charterers to protect the interests of both the owners and the charterers and mortgagees (if any), and the charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the owners and the charterers as their interests may appear. …*

*(c) Should the vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of clause 12, all insurance payments for such loss shall be paid to the mortgagee, if any, in the manner described in the deed(s) of covenant, who shall distribute the moneys between themselves, the owners and the charterers according to their respective interests.*”

Clause 13, which was struck out, was materially the same except for two differences. First, the Owners would be responsible for insuring the Vessel against marine and war risks, whereas the Demise Charterers would be responsible for P&I insurance. Secondly, clause 13 contained a provision that “*The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the vessel or her machinery or appurtenances covered by such insurance*”.

## SUMMARY OF THE dispute

The claim was brought against Sinochart and Daiichi by one of the Vessel’s hull insurers at the time of her loss (“Gard”), who had taken assignment of the rights of the Owners and Demise Charterers.

This article does not deal with two of the three issues in dispute, which were as follows. First, the parties disagreed on whether there had been a breach of the safe port undertaking. Secondly, the parties disagreed on whether the defendants were each entitled to limit their liability pursuant to article 2.1 of the Convention on Limitation of Liability for Maritime Claims 1976 (as enacted by section 185 of and Schedule 7 to the Merchant Shipping Act 1995).

The third issue in dispute, which is the focus of this article, was whether, assuming there had been a breach of the safe port undertaking, the provisions for joint insurance in clause 12 of the Barecon 89 form excluded the Demise Charterers’ liability to the Owners in respect of losses covered by that insurance, in turn precluding any claim by the Demise Charterers against Sinochart and Daiichi on the basis of any such liability.

At first instance, Teare J found in favour of Gard, concluding that there had been a breach of the safe port undertaking and that the losses were recoverable by Gard against Sinochart and Daiichi. The Court of Appeal allowed the defendants’ appeal, holding that: (i) there had been no breach of the safe port undertaking; and (ii) even if there had been such a breach, clause 12 of the Barecon 89 form meant that the Demise Charterers were not liable to the Owners and therefore could not pass on any liability to Sinochart and/or Daiichi. Gard appealed the Court of Appeal’s decision.

## The Supreme Court’s decision

Lord Clarke, with whom all other members of the Supreme Court agreed, found that there had been no breach of the safe port undertaking, given that the combination of the two weather events leading to the Vessel’s grounding was an “*abnormal occurrence*” within Kashima. This finding made it unnecessary for the Court to consider whether, had a breach occurred, clause 12 would have precluded the Demise Charterers’ liability to the Owners and therefore any resulting claim against Sinochart and Daiichi. However, given that this issue had been fully argued and was important for the interpretation of a widely used standard form, all members of the Court addressed it in individual judgments.

The majority (consisting of Lords Mance, Toulson and Hodge) found that clause 12 meant that the Demise Charterers did not owe, and never could owe, a liability to the Owners for a breach of clause 29, meaning that they could not pass on any such liability to Sinochart or Daiichi. Lord Mance recited the well established principle that jointly insured parties cannot claim against each other in respect of insured losses (para 114). He considered it “*implausible*” that the Owners and Demise Charterers intended that, despite the joint insurance arrangement in clause 12, “*owners as against charterers* [would] *be able to reopen the scheme by claims of breach, exposing charterers to paying damages for the hull loss based on a different alleged value to that which owners and charterers had agreed between themselves*”, meaning that the parties “*must be taken to have accepted the value they agreed for insurance purposes as conclusive as between themselves*” (para 115). He specifically rejected the proposition, advanced by Gard, that “*liability exists in the first instance … but is then discharged to the extent of any recovery under the marine or war risks insurance taken out under clause 12*”, given that any “*sensible understanding*” of clause 12 was that its purpose was to “*cater comprehensively for responsibility for repairs and total loss*” rather than simply to satisfy the Demise Charterers’ liability (paras 120–122).

Lord Toulson found that the parties intended to create, through clause 12, an insurance fund which would be the sole avenue for making good the relevant loss. In his view, the inclusion of clause 29 was not intended to alter the effect of clause 12 by creating an independent right of action for breach of the safe port undertaking (paras 139, 141). He found that “[t]*he commercial purpose of maintaining joint insurance in such circumstances is not only to provide a fund to make good the loss but to avoid litigation*”, a purpose which was inconsistent with the possible existence of a liability owed by the Demise Charterers to the Owners in respect of an insured loss (para 142).

Both Lord Mance and Lord Toulson explained the express exclusion of the Demise Charterers’ liability to the Owners as being necessary in the context of clause 13 because the Owners were to be responsible for insuring against certain risks, but unnecessary in the context of clause 12 where the Demise Charterers were responsible for both marine and war risks and P&I insurance (paras 116, 135). They rejected the proposition that this discrepancy between the clauses revealed an intention not to exclude liability under clause 12.

Lord Sumption disagreed with the majority’s finding. He found that the principle that jointly insured parties cannot claim against each other in respect of insured losses, in all of the English cases dealing with it, had been determined only as regards the position between co-insureds, without considering the effect on claims by third-party wrongdoers (para 99). He highlighted that these authorities had not resolved (as they had not been required to address) whether a joint insurance policy excludes the parties’ liability to pay damages meaning that no liability can possibly exist, or alternatively that such a policy “*makes good any loss and thereby satisfies any liability to pay damages*”. While either position means no claim can exist between co-insureds, they have “*radically different consequences for claims against third parties*” based on asserted liabilities between jointly insured parties (para 100). In this case, Lord Sumption’s analysis of clause 12 led him to the conclusion that the joint insurance arrangement satisfied (without *a priori* excluding) the Demise Charterers’ liability to the Owners for a breach of clause 29. He found that “[i]*t follows that the demise charterer may claim over against a time charterer who is not party to the insurance or any of the contractual arrangements connected with it*” (para 102). He further found that the parties’ choice to insert clause 29 into the Barecon 89 form reflected that they “*must have intended that in relation to loss or damage arising from the unsafeness of ports, the liability of the charterers and the insurers would co-exist*” (para 105(1)). He also attached significance to the fact that the express exclusion of the Demise Charterers’ liability in clause 13 was absent in clause 12 (para 105(5)).

Lord Clarke agreed with the reasons provided by Lord Sumption. He additionally found that clause 12 did not clearly exclude the Demise Charterers’ liability for a breach of clause 29 and therefore, reading the charterparty as a whole, that liability must be found to be capable of subsisting.

## Analysis

As explained by Lord Sumption, the decision of the majority of the Supreme Court extended previous case law which had precluded jointly insured parties from seeking recovery as against each other in respect of insured losses. The majority’s finding that no liability ever exists between jointly insured parties in respect of insured losses (rather than such liability existing in the first place but being discharged by the joint insurance arrangement) means that jointly insured parties are now also precluded from pursuing recovery against third parties for any such liability.

It is significant that the majority’s decision was based on the single ground on which Gard based its claim against Sinochart and Daiichi: namely, that the Demise Charterers were liable to the Owners. The majority referred to alternative legal bases on which Gard could have advanced its claim, including that: (i) the Demise Charterers’ possessory title over the Vessel gave them a sufficient interest to be able to maintain a claim for the hull loss; and/or (ii) under the principle sometimes referred to as transferred loss, a contracting party can claim substantial damages for breach of contract where the loss is foreseeably suffered by a third party who has no direct claim against the defaulting party. The majority refrained from deciding whether a claim based on these other grounds might have yielded a different conclusion on the Demise Charterers’ ability to recover damages from Sinochart and/or Daiichi.

Already, it has become apparent that the Supreme Court’s decision surprised and disappointed some industry parties. BIMCO has amended the Barecon standard form to create an avenue of recovery by a charterer as against sub-charterers by expressly providing that any payment under a joint insurance policy towards an Owner’s loss “*shall be treated as satisfaction (but not exclusion or discharge) of the Charterers’ liability towards the Owners*”. It is difficult to see how a future court could find that parties to a contract on these revised terms intended that no liability would ever exist between them, rather than that (as Lord Sumption found) a liability *prima facie* existed but was discharged by the joint insurance arrangements.