

A presentation by

HILL DICKINSON



ANTI-ORAL VARIATION CLAUSES

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ANTI-ORAL VARIATION CLAUSES

Entire Agreement – which may only be varied in writing

Globe Motors v TRW - the Court of Appeal held that based on the fundamental principle of freedom of contract an “anti-oral variation” making one contract would not in principle prevent the parties from making a new contract varying the first contract by oral agreement or by conduct

An oral agreement or the conduct of the parties to a contract containing an anti-oral variation clause may give rise to a separate and independent contract which, in substance, has the effect of varying the written contract

MWB Business v Rock Advertising - the Court of Appeal supported the Globe Motors decision, those who make a contract may unmake it; the clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived

How to overcome - difficult question and maybe expressly providing that that authority to vary has been excluded.

SAFE PORTS

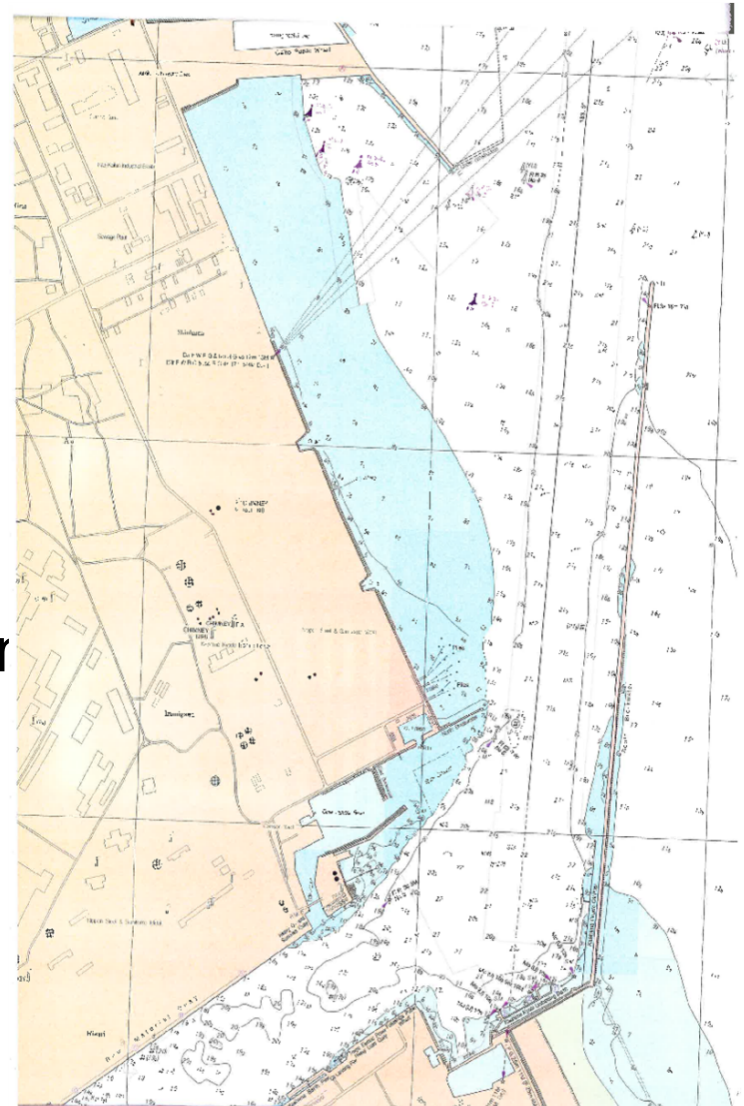
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Safe Ports – Ocean Victory

- Agreed value of the vessel (US\$88.5m)
- SCOPIC expenses (US\$12m)
- Wreck removal expenses (US\$34.5m)
- Loss of hire (US\$2.7m)

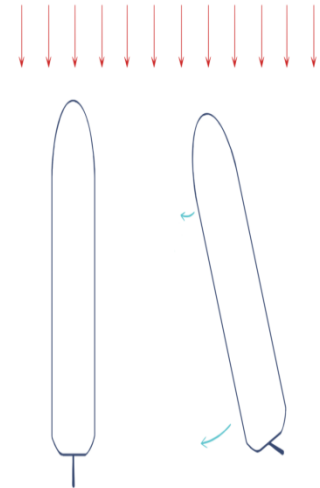
KASHIMA

- Modern purpose built port
- Exposed to the North
- Subject to long waves
- No previous breakaway or accident
- Warnings in Admiralty Pilot



Admiralty Pilot/Port Entry

- At the outward part of the fairway there is frequently a heavy swell
- In bad weather breaking seas overrun the breakwater causing it to be totally obscure on radar screens
- During periods of northerly swell the entry channel is fully exposed. Vessels at low speed generally have difficulty in steering



24 October 2016

- Beaufort 8-10 <250m visibility
- 11.50 the ship's agent informed the master of the postponement of the shifting though not of the revised time for departure 15:00
- 13:00 ranging – stern breast parts/chafing
- 13.19 master emails two lines broken requested “tug to push my ship asap”
- 14.00 Pilot boarded for unberthing. Master was surprised – not expected
- The pilot informed Master the vessel must leave the port for safety reasons

The final voyage

- In ballast
- Aware it would be very dangerous to shift off-shore but with tugs berth “relatively secure”.
- No (written) passage plan (short time/unprepared)
- No parallel indexing – i.e. GPS only. No real time awareness.
- Positions not marked on chart
- Unexpectedly (by Master) pilot disembarks in remaining tug
- 15:00 7k commences zigzag passage losing speed each turn
- 15:18 speed <1k heading 51° falling off engines put astern – collides with end of breakwater

The Eastern City [1958] 2 Lloyd's Rep 127

A port will not be safe unless the vessel 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

Characteristics:

The Evia (2) [1982] 2LLR 307

Charterers only warrant that the qualities and attributes of the port itself do not make it unsafe and they are not responsible for damage to the ship which is unrelated to the prevailing characteristics of the particular port:

If the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated abnormal extraneous occurrence unconnected with the set-up, the charterer is not in breach of the safe port warranty.



Teare's Characteristic

Strong winds from the North and long waves once every 35 years.

“...a real, as opposed to a fanciful, risk that long waves might occur at the same time as ...gale force northerly winds...”

“It may well be a rare event for these two events to occur at the same time but nobody at the port could, I consider, be surprised if they did.”

“...Even if the concurrent occurrence of those events is a rare event in the history of the port such an event flows from the characteristics or features of the port...”

Teare J

- No effective system in place to ensure vessels left safely before weather conditions made it dangerous
- A reasonably competent Master would be unable to take the vessel out in the conditions which were experienced
- Port unsafe



Post Casualty

- 24.10.06 Ellida Ace leaves Kashima (after Ocean Victory) weather conditions less severe, but still grounds
- Owners held liable by Japanese Government for damage to breakwater
- Remedial measures being taken by extending northern breakdown
- System in place to ensure vessels leave where forecast of high waves/winds
- Appeals to Court of Appeal and Supreme Court

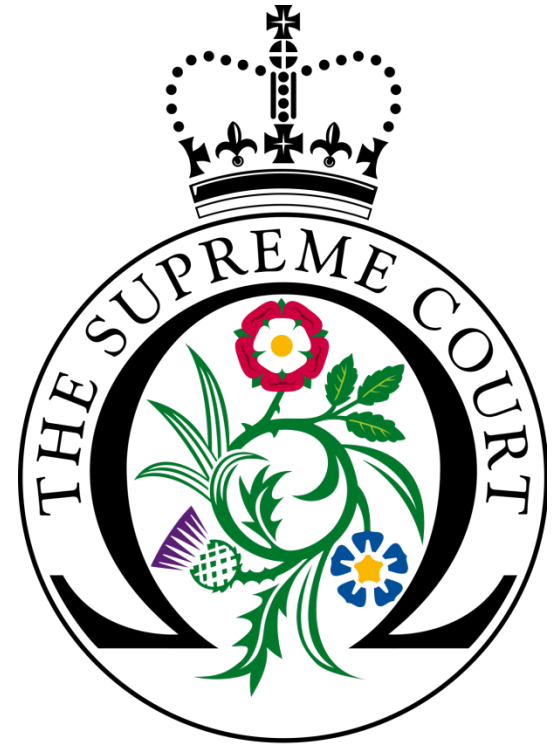
Court of Appeal

- Theoretical foreseeability does not make it a characteristic
- It did not follow that the concurrent occurrence of wind/waves was a characteristic
- Appeal allowed – Kashima not unsafe



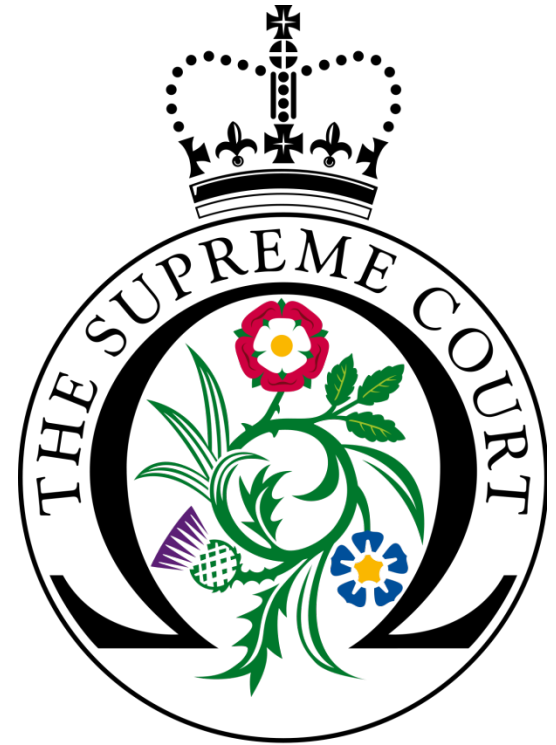
Safe Port Supreme Court

The owners are responsible for loss caused by a danger which is avoidable by ordinary good navigation and seamanship by their master and crew



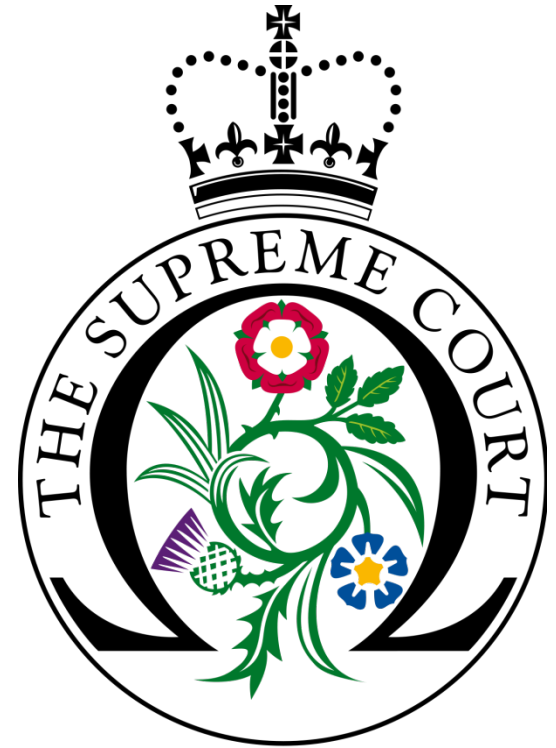
Safe Port Supreme Court

The charterers are responsible for loss caused by a danger which was or should have been predictable as normal for the particular ship at the particular time when the ship would be at the nominated port and was not avoidable by ordinary good seamanship



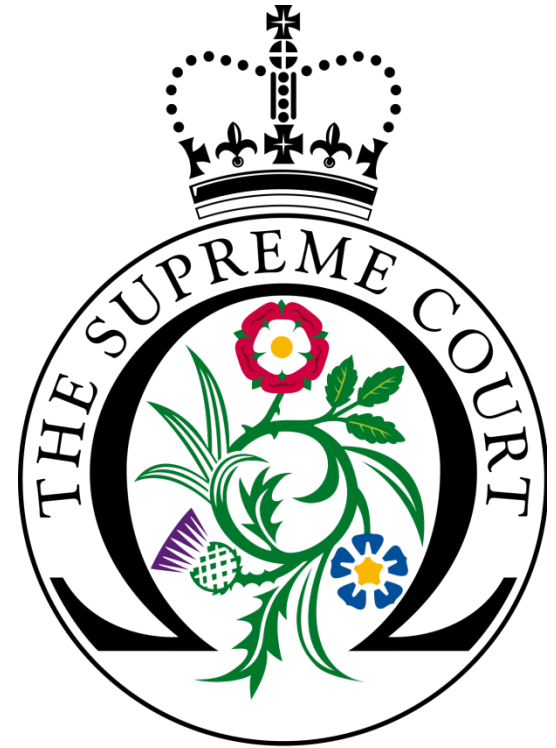
Safe Port Supreme Court

The owners (and ultimately their hull insurers) are responsible for loss caused by a danger due to “an abnormal occurrence”.



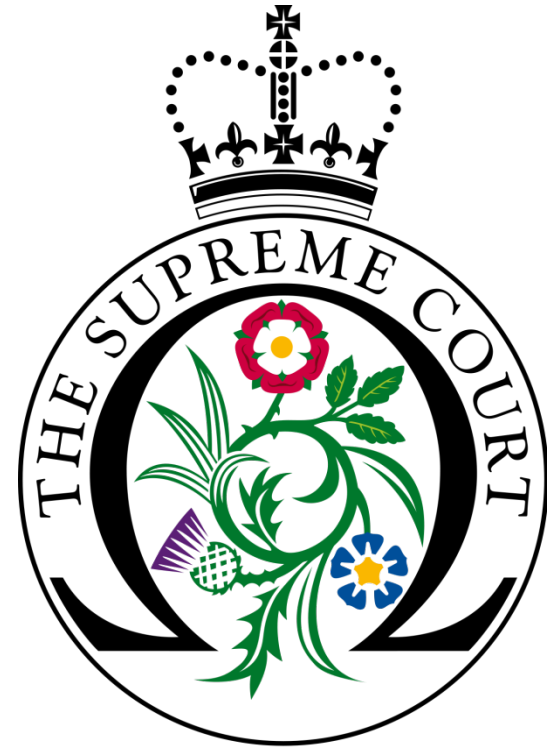
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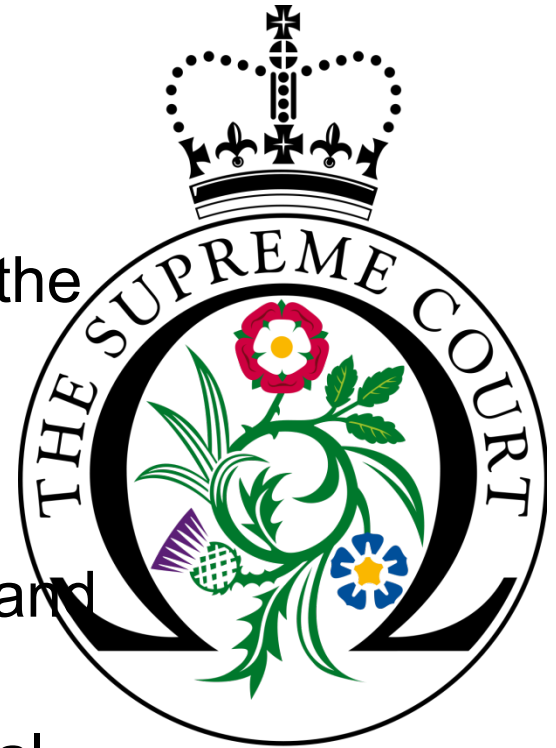
Safe Port Supreme Court

- “Abnormal” is something well removed from the normal. It is out of the ordinary course and unexpected. It is something which the notional charterer or owner would not have in mind



Safe Port Supreme Court

- Would a reasonable shipowner knowing the facts proceed to the nominated port
- If the answer is “yes unless there is an abnormal occurrence”, the port is prospectively safe for the particular ship and the promise is fulfilled
- If there is then a loss – was it an abnormal occurrence?



Per Lord Clarke

1. The date for judging breach of the safe port promise is the date of nomination of the port. A safe port promise is not a continuing warranty.
2. The promise is a prediction about safety when the ship arrives in the future.
3. Safe port disputes should be reasonably straightforward. Was the danger alleged an abnormal occurrence, that is something rare and unexpected, or was it something which was normal for the particular port for the particular ship's visit at the particular time of the year?

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