

IUMI 2017
TOKYO



Unsafe Ports: Implications of the
English Supreme Court Judgment:
The Ocean Victory



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2017 TOKYO
September 17-20

The Topics

- *The Ocean Victory*
- Why is it of interest?
- What was decided?
- Should we be worried?



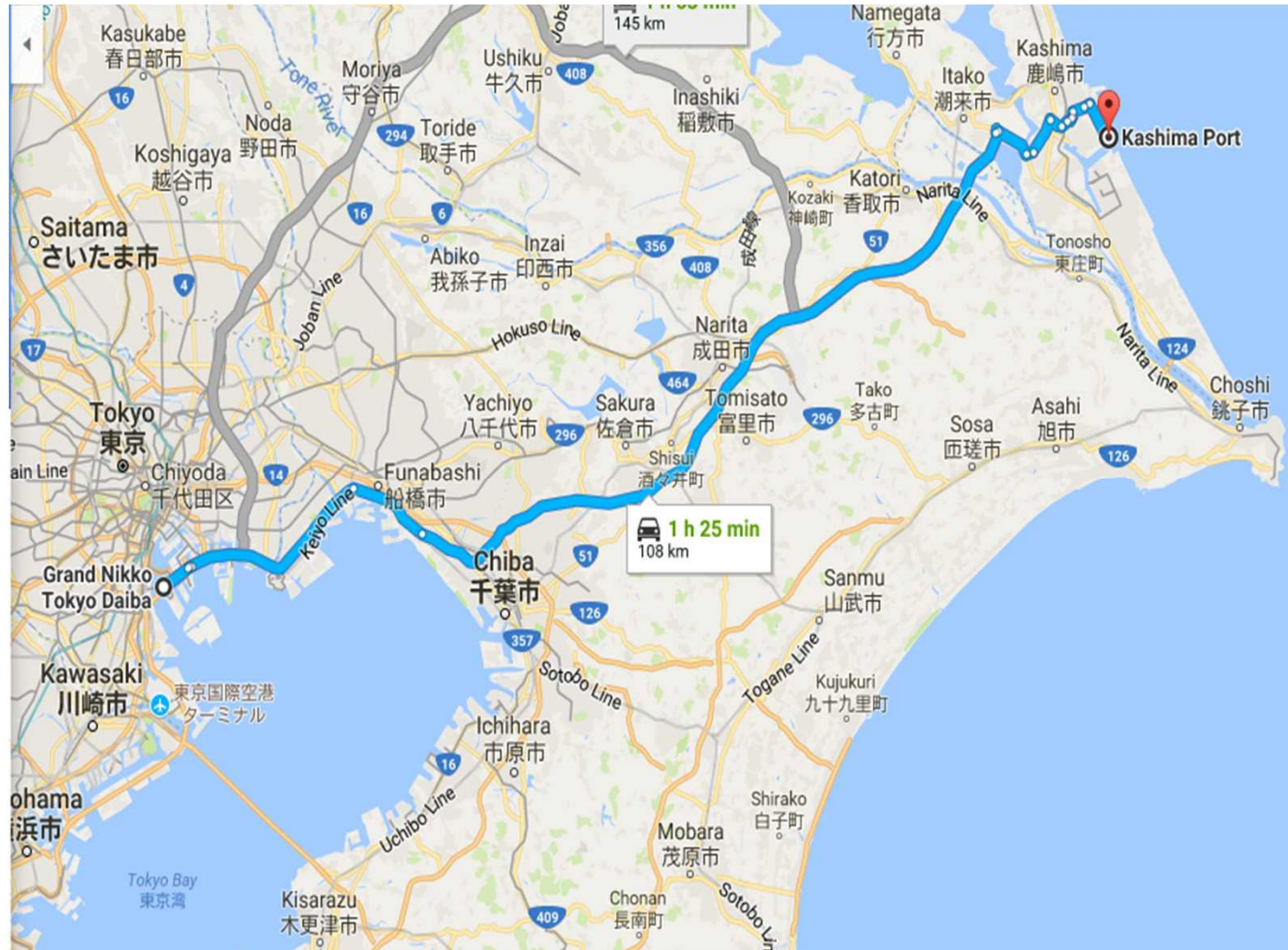
Why is it of interest?

- Large recovery action by H&M against a Time Charterer alleging unsafe port
- Clarifies a key element of the unsafe port test (the “**abnormal occurrence**” point)
- Confirms the law on Charterers limiting their liability (the “**limitation point**”)
- Introduces a potential concern about the viability of recovery actions where there is a bareboat charterparty (the “**insurance point**”)

Kashima



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19.09.2017

The Facts

- Modern capesize bulk carrier (2005 build)
- 24 October 2006
- Discharging at Kashima Port, Japan
- Long waves made it unsafe to remain at the berth
- Master decided to leave the port
- Strong northerly gales made it difficult to leave the port

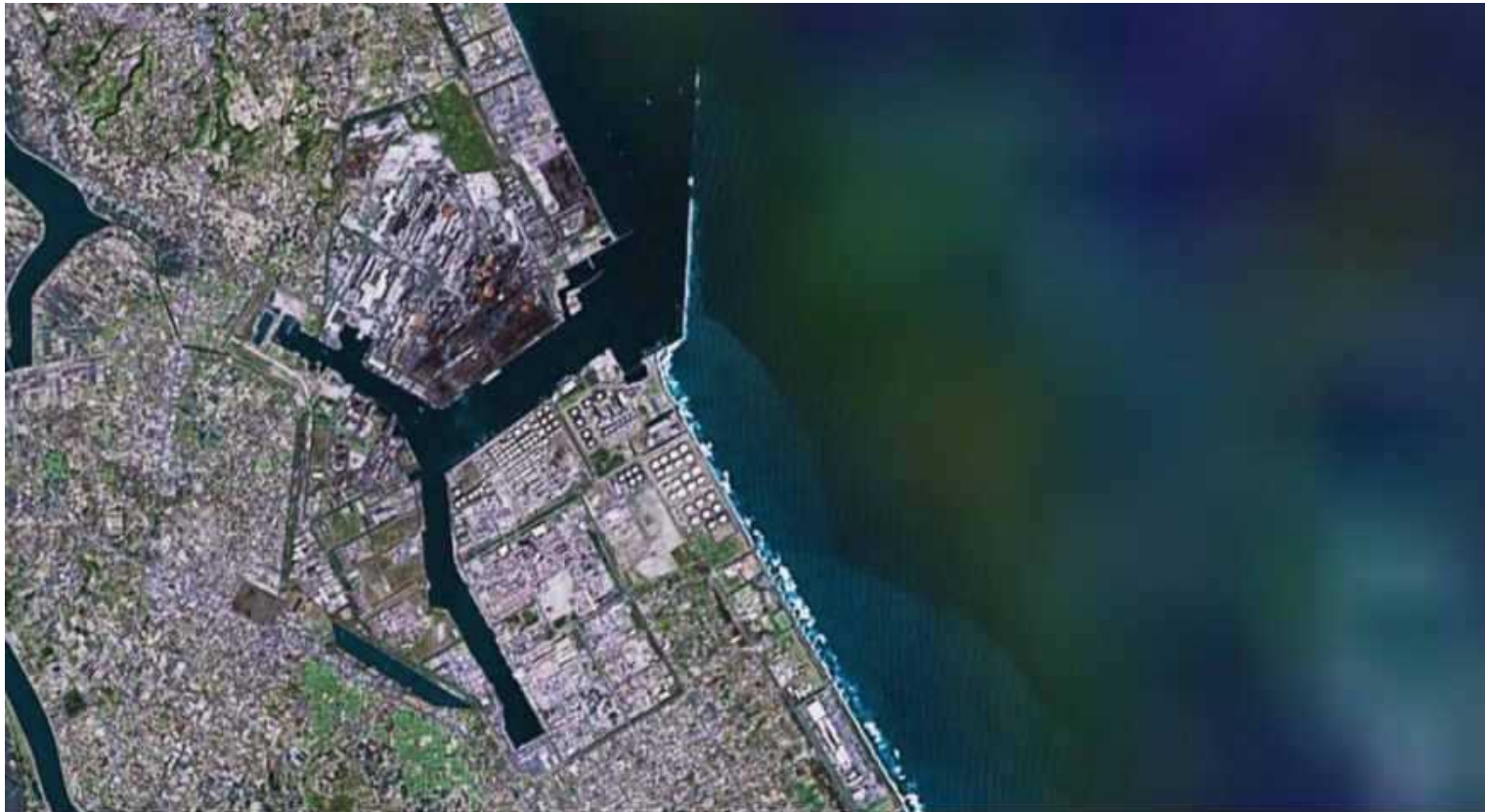


The Facts

- Trouble exiting the fairway
- Collided with the breakwater
- Grounded and broke up



Kashima Port



Grounding & Total Loss



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The Facts

- Broke up on 26 December 2006
- Owners/Bareboat Charterers (through H&M insurers) sued Charterers
- Claims US\$ 150 million
- High Court / Court of Appeal
- Supreme Court



Unsafe Port Claim

- C/Ps contained a safe port warranty
- A port will not be unsafe, unless the particular ship:
 - Can reach it, use it and return from it
 - In the absence of some **abnormal occurrence**
 - Without being exposed to a danger which cannot be avoided by good navigation and seamanship

(The Eastern City)

The Cause

- Vulnerability of berth to swell from long waves
- Vulnerability of the fairway to northerly gales
- Concurrence of these two events caused the casualty
- Was the concurrence of these two events an “abnormal occurrence”?

Abnormal Occurrence



- Not a term of art
- Rare or unexpected vs normal
- Two foreseeable features occurred
- Not the nature of individual component features but the nature of the event in the round
- San Francisco earthquake!

Implications



- Supreme Court allays concerns: a 35 year freak event was held “abnormal”
- Rare or unexpected for that time vs normal for the particular port for the particular visit
- Evidential evaluation of the history of the port
- Common sense analysis

The Limitation Point



- *The CMA Djakarta [2004]*
- Charterers cannot limit for loss of vessel and consequential losses arising from loss of vessel
- Wording of LLMC clear that not envisaged Charterers can limit for this category of claims

Implications

- Law is unchanged
- Unfair on Charterers? Perhaps
- Charterers be aware
- Charterers' liability insurers be aware
- H&M insurers be aware

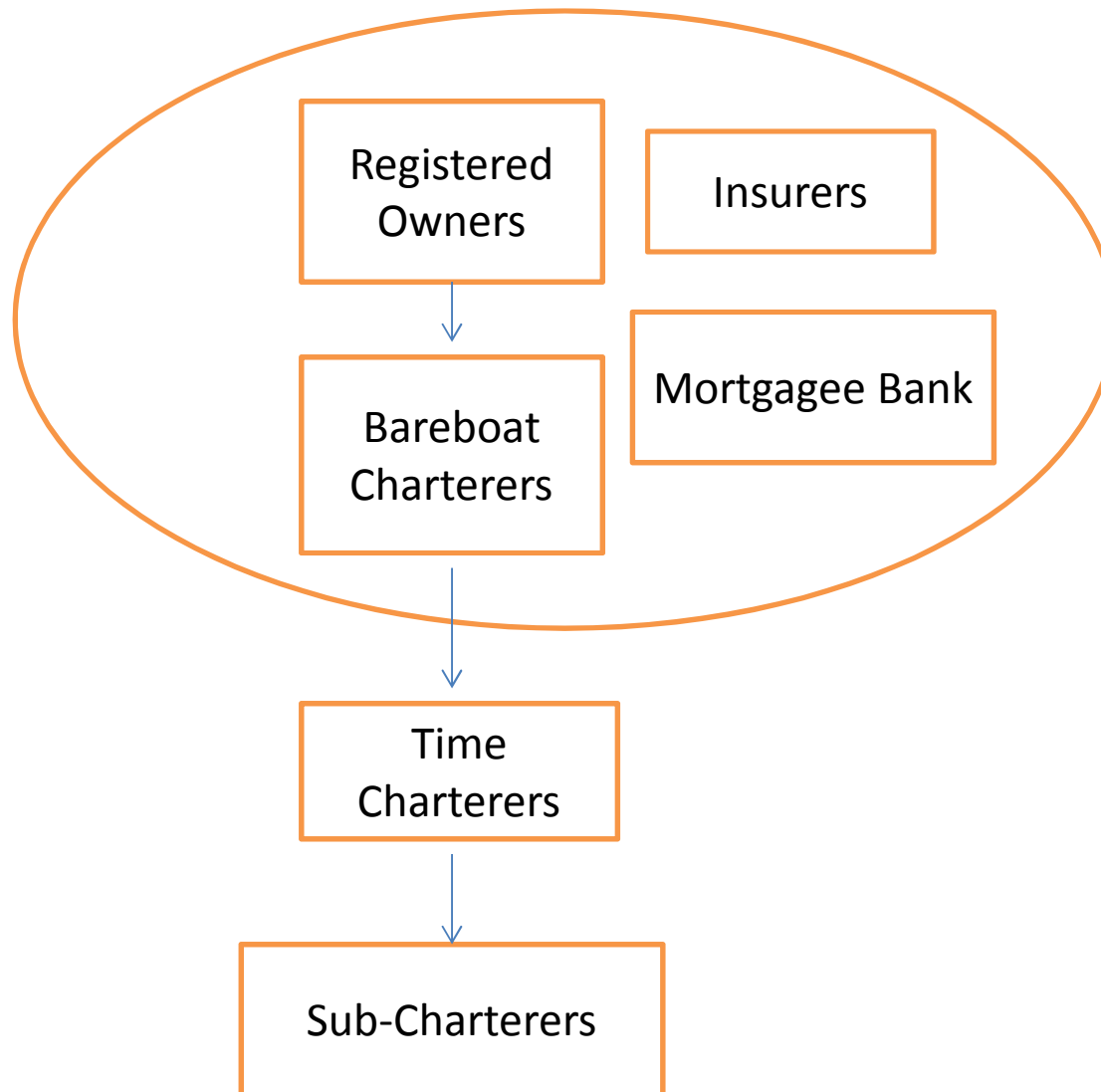


The Insurance Point



- Assumption: Kashima was unsafe
- Under Barecon '89, Owners and Bareboat Charterers (BBC) jointly insure, BBC pay premium
- Express provisions about how total loss insurance proceeds are to be applied
- Can Insurers/Owners/BBC claim against the Time Charterers if T/Cs were in breach of the safe port warranty?

The Insurance Point



The Insurance Point



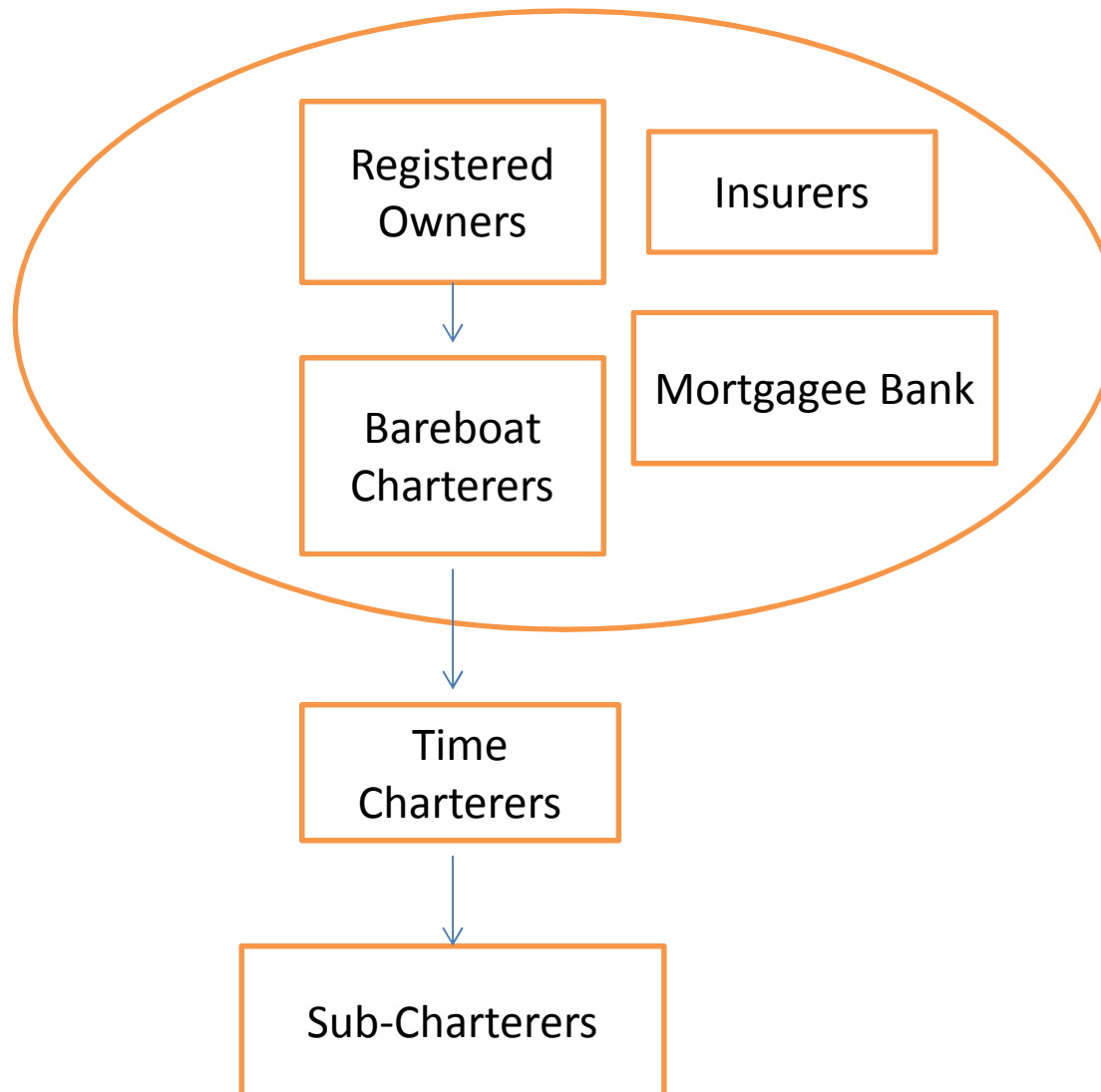
- Owners and BBC are named joint assured
- Under BB C/P, for a total loss, Owners must look exclusively to the insurance (not BBC)
- BBC has no liability to pass on to Time Charterers – insurers/assignees have no greater right

The Insurance Point



- “Complete code”
- No fault scheme of responsibility and insurance for a hull loss under Barecon '89
- Clear intent
- There can be no claim down the C/P chain, no liability exists

The Insurance Point



Implications



- Barecon '89 – no right of recourse down the C/P line for total loss claims!
- Only total loss (not P&I, loss of use)
- Point turns on the construction
- Court itself outlined other options
 - As bailee
 - Contract: principle of transferred loss
 - Construction: express clause
- Court affirming a strong principle – rather than closing the door to C/P claims

Conclusions

- Abnormal occurrence: some helpful clarity
- Limitation: confirms current position
- Insurance: problematic, requires a workaround



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