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SEAVIEW
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JOURNAL OF THE INSTITUTE OF SEATRANSPORT

Untrue NUC Shall Not Discharge the Liability under COLREGS

蘇伊士運河安全情況

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ICSHK (Institute of Chartered Shipbrokers, Hong Kong Branch) Column - Development of Institute of Chartered Shipbrokers, Hong Kong Branch (ICSHK)

Y.K. Chan

ICSHK established a relationship with the Institute of Seatransport over 10 years ago. The first cooperation was to set up this ICSHK Column in "Seaview" magazine. The initiative was to offer a platform for our members to contribute their articles for sharing their experience and knowledge with other professionals in the shipping industry. Our relationship continues in the training programmes, namely (i) the diploma/certificate course organized by the Institute of Seatransport with the School of Continuing and Professional Education ("SCOPE") of City University of Hong Kong and (ii) ICS Study Group formed by us partnering with the Institute of Seatransport, Hong Kong Logistics Management Staff Association, Hong Kong Seamen's Union and subsequently the CY Tung International Centre for Maritime Studies of the Polytechnic University of Hong Kong ("PolyU"). The venue for the Study Group was initially at the office of the Hong Kong Seamen's Union and later at the PolyU campus.

We support the diploma/certificate course (i) above by assigning our members to teach the subjects relating to chartering business. The purpose of our ICS Study Group (ii) above is not only to guide practitioner-students preparing for the ICS Professional Qualifying Examination through tutorials and group discussions, but also to offer an opportunity to those parties who are interested in broadening their shipping knowledge.

To echo the Hong Kong SAR Government's support to strengthen Hong Kong as an international maritime centre, we have been giving scholarships to the Department of Logistics and Maritime Studies of PolyU and the Hong Kong Community College of PolyU in past years as a gesture of encouragement to young talents as successors in our shipping industry. We have met and contributed our views to the government appointed consultants for a study to enhance Hong Kong further as an international maritime centre. We are earnestly waiting for the publication of the report* for our follow up. In the meantime, the Maritime Industry Council ("MIC") of the government has released its new initiatives effective 1st April 2014 to support the professional training of in-service practitioners in the maritime sector under the Maritime and Aviation Training Fund. ICS is one of the potential organizations for its support on reimbursement of examination fees to

successful candidates. MIC also appeals to the shipping industry for offering summer internship to young students so as to enable them to gain exposure and experience before their graduation from universities. All of us in the industry should give full support.

As mentioned above, we have collaborated with other institutes/ associations in maritime training programmes. We have further expanded the network for our members by organizing evening talks, as a part of our continuing professional development programme, with certificate of attendance (on request). We have successfully applied to The Hong Kong Law Society for CPD points for the last talk on "Ship Lease Finance" delivered by Mr. Jonathan Silver of Howse Williams Bowers on 28th February 2014. We shall organize another evening talk given by Prof. Anselmo Reyes on "Some Thoughts on Making Arbitration More Affordable" in June 2014. It will be jointly organized with Asia Pacific Regional Office of the Hague Conference on Private International Law and Hong Kong Institute of Arbitrators. All of our functions are open to all practitioners in shipping and shipping-related industries free of charge. You will receive our circulars in due course. Our aim is to provide an opportunity for sharing knowledge, exchanging views on the topical issues and networking among different disciplines. We would like to do more as far as our resources allow.

We are glad to see the success of the delegation organized by Hong Kong Maritime Forum to visit Shanghai in March 2013 to promote the Hong Kong maritime industry and investigate any possible win-win cooperation between the two cities. We support the workshop series on "Interdisciplinary Maritime Practice" introduced jointly by the Institute of Seatransport and Hong Kong Logistics Management Staff Association. We also participate in other events arranged by the Nautical Institute, Hong Kong and Young Professionals in Shipping Network. We help circulating their notices of functions to our members. We consider that it is a good sign of collaboration among the professional bodies.

ICS reached its 100-year landmark in 2011. Our branch had a very successful Golden Jubilee Reception held on 29th October 2013 with participation of senior government officials and prominent figures in the shipping industry. We are grateful to those sponsors in recognition of our 50-year services in the community.

Further to ICS's agreement made with the Professional Qualification Authority of Ministry of Transport in China, we hope that we could contact our members working in Shanghai for more activities in training and networking there. Recently, we have developed a training programme in cooperation with Taiwan International Ports Corporation. It commenced in

the middle of April 2014. By such arrangements, we could also further help our members to promote their shipping services to the Mainland China and Taiwan.

We learned from "TradeWinds" on 4th April 2014 that some 330 students sat for ICS examinations in Athens this year while we had around 80 students in Hong Kong. It indicates that the young generations in Greece are so enthusiastic to gain knowledge in a hope to acquire the internationally recognized status of being ICS members. We need to exert more effort to encourage the younger generation in Hong Kong to join our industry and ICS.

We organize two rounds of "ICS Study Group" lectures and tutorials each Branch year. The second round was completed at the end of March for 6 most popular subjects, namely "Introduction to Shipping & Shipping Business", "Dry Cargo Chartering", "Legal Principles in Shipping Business", "Ship Operations and Management", "Ship Sale and Purchase" and "Economics of Sea Transport and International Trade" focusing on Professional Qualifying Examinations starting from 7th April 2014. Iris Mak (Vice-Chairman), Anand Sharma (Hon. Secretary), Jimmy Ng (Education Officer), Ole Kraft, Manson Cheung (Examination Officer) and I were the tutors. We wish all the candidates a great success in the examinations.

We wish to mention that our Branch members comprise not only shipbrokers as indicated in the ICS's name but also accountants, lawyers, marine surveyors, marine insurance brokers, seafarers, academics and other professionals working for shipowning, shipmanagement and ship agency. It reflects ICS's mission of "Promoting professionalism in commercial shipping worldwide".

We sponsor and support Noble Group for its annual event of "Noble Sixes Cricket Fiesta". We have a young member soccer team to participate in "Pacific Basin Sixes" match every year. We always encourage our young member group to work with its counterparts of other professional bodies for joint events.

Our Vice-chairman Iris Mak sits on the Logistics Industry Working Committee for the Recognition of Prior Learning Mechanism. She has been appointed as a member of MIC. We believe that she can work closely with other MIC members in particular Dr. Jimmy Ng (also ICSHK Education Officer) and Mr. P.C. So (Chairman of Institute of Seatransport) representing our partner associations to help further promote the industry.

The SCOPE course of "Professional Diploma in Shipping and Logistics Management" has been scheduled to commence on 3rd July 2014. We hope that

it is eligible to be included on the list of approved course under the Maritime and Aviation Training fund of MIC.

As "Seaview" is widely distributed in the community locally and abroad, we are pleased that this brief article can let other professionals know more about ICSHK's works for its members and the community and its development in Hong Kong and greater China.

** Note: The final report and executive summary for the Consultancy Study on Enhancing Hong Kong's Position as an International Maritime Centre was released by MIC on 16th April 2014. They can be viewed on MIC's website (http://www.mic.gov.hk/eng/whatnew/index.htm)*

(Y.K. Chan: Chairman of Institute of Chartered Shipbrokers, Hong Kong Branch)

Untrue NUC Shall Not Discharge the Liability under COLREGS

Xu Congbao / Qiu Yuhao

The Shenzhen MSA had recently completed their investigation into a major collision happened in early 2012, in which a container vessel ran into another drifting container vessel causing serious property damage.

The MSA has come to a conclusion that vessels displaying "Not Under Command" (NUC) but in fact capable of navigation was responsible to take active avoidance measures, failing of which she shall take up part of the responsibility for the collision.

It was alleged that at the time before collision, one of the colliding vessels was not making way through water and was displaying "Not Under Command" (NUC) status on AIS, thus shall enjoy the privilege under Rule 18(a)(i). However the investigation found that the drifting vessel did not have engine breakdown or otherwise making her unable to maneouvre. In fact she had arrived about 10 hours ahead of ETA and the Master decided to drift in order to adjust the arrival time.

Similar practice has become more commonly seen, especially outside those congested ports. Some of these vessels set the AIS navigation status on NUC, even where the vessel is fully capable of navigation. Such practice may cause risk to the surrounding traffic and place other vessels into danger.

The Shenzhen MSA found that according to Rule 3(f), "the term *vessel not under command* means a vessel which through some exceptional circumstance is unable to maneouvre as required by these Rules and is therefore unable to keep out of the way of another vessel. Main engine breakdown may well be such an exceptional circumstance. But waiting for berthing schedule shall by no means be considered as such circumstance to render a vessel unable to maneouvre. Therefore drifting vessel is not a vessel not under command; rather as a power driven vessel "not at anchor, or made fast to the shore, or aground", she is a vessel *underway* provided by Rule 3(i).

Given visibility was restricted, the two vessel, both power-driven vessels underway, shall act in accordance with Rule 19 and shall not have the privilege under Rule 18(i). Moreover, under Rule 35, the making way vessel as a power-driven vessel making way shall sound at intervals of not more than 2 minutes one prolonged blast, which she did; and the drifting vessel, being a "power driven vessel underway but stopped and making no way through water" shall sound at intervals of not more than 2 minutes two prolonged blasts in succession with an interval of about 2

seconds between them, which she had failed to comply. In fact, the drifting vessel had not emitted any sound signal until immediately before the collision.

This accident should sound an alarm over all those ship officers, as well as the shipowners and managers. It is not a legitimate conduct to display NUC signals while drifting off ports waiting for berth without the exceptional circumstance rendering the vessel unable to maneouvre. Drifting but capable vessels must act in accordance with the rules of a power-driven vessel underway, and drift in safe waters.

(Xu Congbao
Qiu Yuhao : Associates of Wang Jing & Co.)

分析馬來西亞航空意外（MH370）對海運發展的影響

Joseph Lau / Ken Chow

馬來西亞航空公司（下稱馬航）於1972年10月1日開始營運，從2007年起，馬航被譽為五星級航空公司，其服務及安全水平達致國際水平。2014年3月8日，馬航MH370號班機（代碼共享中國南方航空CZ748號班機），共有239人，該機於凌晨0:43離開吉隆坡國際機場M號航站樓，原計劃於上午6:30抵達北京首都國際機場。該航班由一架波音777-200ER航機（註冊編號：9M-MRO）執行飛行任務。但MH370起飛兩小時後，其跡蹟在雷達中消失，並與馬來西亞吉隆坡（梳邦）航空管制中心失去聯絡。

MH370號班機意外發生經過總括如下：

2014年3月8日

- 00：41 — MH370從吉隆坡起飛，原訂於6時30分降落北京。
- 01：20 — 航班在胡志明管制區和管制部門失去通訊聯繫。
- 07：24 — 馬航於失聯6小時候後，正式啟動緊急行動搜救。
- 11：10 — 馬航公佈乘客信息，航班上共運載239人，包括153位中國人，38位大馬人和12位其他國籍人士。

2014年3月9日

來自多國的援軍（美國、中國、越南、泰國、新加坡、菲律賓等）已陸續前往懷疑墜機地區進行搜救工作，直至2014年3月19日還未發現到任何的失聯客機的殘骸等物件。美國聯邦調查局（FBI）也派人協助調查關於假護照登機一事。

2014年3月15日

馬來西亞總理納吉布出面召開記者會證實該起事故屬於人為造成，班機於凌晨先後關閉班機共兩個雷達，包含正副機師、乘務員、乘客皆被列為調查對象，並說明飛機可能航經地點包含泰國以北至哈薩克，南至印尼、印度洋，並且公佈軍方雷達曾於失聯當日（3月8日）上午08:11偵測到班機訊息。

2014年3月24日

- 馬來西亞總理納吉布宣佈該班機墜毀於南印度洋，飛機內所有人員全部遇難。

除了本文提到的空難外，海難亦時有發生。從前，海運的發展規模小，經常發生海難。海難發生原因眾多，但總的說來主要是人為與自然因素兩大類。人為因素中，導致海難可能並非本意。例如駕駛人

員由於疏忽大意、不按程序操作而使船隻偏離航線，進入危險區域或是與其他船隻碰撞；管理人員使船隻超載、運載本不該運輸的違規貨物；技術人員由於沒有及時檢查、更換老舊、破損設備而導致船隻出現動力、通訊設施故障，導致嚴重經濟損失及大量人命傷亡。

從 1865 年 4 月 28 日到 2012 年 10 月 1 日為止，全球總共錄得 46 次嚴重海難事故。例如：Titanic (1912 年 4 月 14 日)、Estonia (1994 年 9 月 28 日)、Lamma IV (2012 年 10 月 1 日)。

馬航 MH370 的意外啟示海運提高安全，船隻需要定期維修及檢查；與此同時，船員必需接受知識上的培訓、心理質素的輔導、定期身體檢查，這樣，船員可以保持最高的質素運作船隻。在科技上，必需確保通訊設施 24 小時運作，以便作出實時船隻的追蹤及提供海上救援的工作。從前是使用 CQD，現在會使用 SOS。再者，多個政府及國際海運組織務必訂下監管機制及安全條例，從而確保海上航道安全。

檢討馬航 MH370 的意外，海運科技發展可以為全球交通安全作出重大的貢獻及突破研究的發展。利用海運尖端的技術、多國的援軍（美國、中國、越南、泰國、新加坡、菲律賓等）委派船艦、天文數學的奇材，從而偵測到與黑盒一樣的脈衝訊號，為人類史上最艱難的搜尋任務。

(Joseph Lau : Division of Business, Hong Kong Community College, The Hong Kong Polytechnic University)

(Ken Chow : Parakou Shipping Company Limited)

Is it typical for dangerous cargo cases occurred in the near sea of China be decided in foreign courts?

Owen Tang

I. Introduction

During the first three decades after Mainland China established its *Open Door Policy* in 1978, many Western multinationals (mostly from the U.S. and Western Europe) set up manufacturing facilities in Mainland China to take advantage of its abundant labor resources and favorable environmental regulations. These facilities were mostly organized as joint ventures with a certain percentage of Chinese ownership, and they were independently registered under PRC authority. Many of these plants were producing substances of a hazardous nature, which were then shipped back to their foreign parent companies for further processing. Since the sea carriage of these dangerous cargoes was likely to involve a foreign shipper, the injured shipowner or carrier might have the option to sue the shipper in a foreign court even if the actual accident occurred off the coast of Mainland China. In this paper, the author submits that it is not a rare exception for dangerous cargo cases occurring near China to end up in foreign courts, and it is helpful for shipping professionals who engage in China trade to be familiar with the foreign Carriage of Goods by Sea laws.

Chem One, Ltd. v. M/V Rickmers Genoa was a dangerous cargo case reported in American Maritime Cases (*2012 A.M.C. 2986*). The case represents a commonly encountered sea carriage of dangerous cargo scenario happening in the ocean near Mainland China, but ending up in foreign court.

II. Facts

In *Rickmers Genoa*, a U.S. multinational parent corporation created its manufacturing facilities in Tianjin, China during the late 1990s. It produced a substance called magnesium desulphurization reagent (SS–89), which is used in steelmaking and is designed to remove sulphur and make the steel less brittle. SS-89 consists of approximately 89% magnesium, and magnesium agents will liberate hydrogen gas when in contact with water, especially sea or salt water. Hydrogen gas is flammable and susceptible to exploding.

On January 25, 2005, the U.S. parent corporation sent it's Tianjin plant a purchase order for 600 metric tons of SS–89, C.I.F. Baltimore. The Tianjin plant then contracted with a Non–Vessel Owning Common Carrier ("NVOCC") to transport the 600 metric tons of SS–89 from the Tianjin plant to Xingang port (天津新港), where the vessel was docked. In the bill of lading issued by the NVOCC, it identified the Tianjin plant as the shipper and "To Order of Shipper" as the consignee.

The NVOCC then contracted with the owner of M/V Rickmers Genoa, and used the vessel to carry the SS–89 from China to New Jersey, USA.

The Tianjin plant neither informed the carrier about the risks associated with transporting SS–89 by sea nor provided the carrier a *Material Safety Data Sheet ("MSDS")* prepared by the parent corporation, which provided that SS–89 poses "unusual fire and explosion hazards" and should be kept dry and away from water and moisture.

The vessel collided with another vessel in foggy weather in the Yellow Sea. The collision caused sea water to enter the cargo hold of M/V Genoa and caused the magnesium substances in the SS-89 to liberate hydrogen gas. Hydrogen gas caused the eventual explosion of the vessel about four hours after the collision. The shipowner sued the Tianjin plant and its U.S. parent corporation in New York Federal Court. One of the grounds for the lawsuit was based on the on the ground of strict liability under *Carriage of Goods by Sea Act (COGSA).*

III. Whether a U.S. Federal Court has the admiralty subject matter jurisdiction to hear a dangerous cargo carriage case where the collision occurred in the Yellow Sea?

The New York Federal Court held that the Complaint invoked U.S. admiralty subject matter jurisdiction. The alleged facts supporting the subject matter jurisdiction included: (a) the cargo loss and damage occurred aboard a vessel, (b) the vessel was serving as a common carrier of merchandise on the high seas, and (c) the injuries alleged in the Complaint occurred on navigable waters and arose from a traditional maritime activity. The court of first instance cited two cases in it's support. They are: *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 674–75 (1982) and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 534 (1995).

Accordingly, the judge held that the U.S. Federal Court has admiralty subject matter jurisdiction to hear the case.

IV. Whether the parent corporation is subject to strict liability under *Carriage of Goods by Sea Act (COGSA)*?

A) At the Court of First Instance Level whether the parent corporation is a "shipper" under *COGSA § 4(6)*?

At the court of first instance level, the judge first considered whether the parent corporation was a "shipper" under *COGSA § 4(6)*, which provides: *"Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."*

The parent corporation argued that *COGSA § 4(6)* should not be applicable to a cargo buyer, and that it was acting solely as a cargo buyer for the entire carriage transaction. Since *COGSA* does not define "shipper," the judge adopted the principle illustrated in *Senator Linie*[1] that U.S. Courts of Appeal have tended to interpret *COGSA* according to its plain meaning.

The judge pointed out that in a plain language interpretation, the term "*COGSA* shipper" is whomever the carrier contracted with, as evidenced by their bill of lading. The plain language interpretation favors the parent corporation because it acted as a third-party buyer, and never contracted with a carrier.

During the arguments in the court of first instance, the shipowner urged the court to disregard the plain meaning of the term "shipper" and instead use the definition in the *Shipping Act of 1984* (the "Shipping Act")[2] - a definition which includes consignees.[3]

In reply, the judge opined that the "Statutory Exegesis Rule" required the court to consider the statutory context when interpreting identical terms. The judge cited *Atl. Cleaners & Dyers* [4], a case which held that if "the scope of the legislative power exercised in one statute is broader than that exercised in another", then it may be judicially unwise to assign the same meaning to identical words used in different statutes.

The judge reasoned that the *Shipping Act* serves wider objectives than that of *COGSA*. The two primary goals of the *Shipping Act* are: (1) to provide antitrust immunity to ocean carriers who form Shipping Conferences and (2) to create new tools for shipper-interests to obtain better services and lower rates from carriers.[5] In addition, the *Shipping Act* is administered by the Federal Maritime Commission, which is tasked with reviewing shipping agreements so as to regulate rates and services offered to the shipper market. Other purposes of the Act also include regulating common carriage of goods and providing an efficient economic transportation system.[6] The judge believed that with this context in its legislative goals, it was necessary for the U.S. Congress to define "shipper" broadly in the *Shipping Act*.

By its very nature, the *Shipping Act* was not legislated for governing maritime parties' rights and liabilities in civil litigation. As a general rule, therefore, a plaintiff may not sue under the *Shipping Act* unless and until he has lodged a complaint with the Federal Maritime Commission and an investigation has been concluded.[7] And even then, such plaintiff may only sue for injunctive relief in accordance with a Federal Maritime Commission investigation.[8]

On the other hand, *COGSA* does affect maritime parties' rights and liabilities for purposes of civil litigation. For example, by acknowledging the fact that carriers historically have exercised dominant bargaining power, *COGSA* invalidates carriers' onerous limited-liability provisions in their bills of lading.[9]

Unlike the *Shipping Act*, *COGSA* provides no textual support for broadening the plain meaning of the term "shipper" to include non-contracting third-parties. The text of *COGSA* does not even mention buyers or consignees, let alone *"the person for whose account the ocean transportation of cargo is provided"* or *"the person to whom delivery is to be made."*[10]

The judge then pointed out that the parent corporation did not contract with the shipowner or the carrier, and it was a mere consignee. On the other hand, the Tianjin plant, through the NVOCC, contracted with the shipowner and carrier. Therefore, only the Tianjin plant would qualify as a *COGSA* shipper. For these reasons, the judge concluded that *COGSA* imposes rights and obligations on the Tianjin plant, but not on the parent corporation. Accordingly, the judge dismissed shipowner's *COGSA* claim against the parent corporation.

Because the judge concluded that the parent corporation is not a "*COGSA* shipper", the judge decided that it would not be necessary for him to investigate the mindset of the carrier, that is: Whether the carrier has consent with knowledge about the nature and character of SS–89 under *COGSA § 4(6)*?

B) At the Appellate Level

The Court of Appeals' decision includes an analysis of whether the carrier had knowledge about the nature and character of SS–89. The decision was referred to *Contship's* finding that a carrier was precluded from invoking strict liability if the carrier: (a) knows that a cargo poses a danger and requires special handling or stowage, and (b) nevertheless exposes the cargo to the general condition that triggers the known danger.[11] The court would apply this preclusion regardless of whether the carrier was aware of the precise characteristics of the cargo.

(i) Whether the carrier has the knowledge about the nature and character of SS–89 under COGSA § 4(6)?

On appeal, the carrier reminded the court to look at the three facts that were helpful to prove the carrier didn't possess the relevant knowledge, they are: (a) the parent corporation never declared that the cargo was "dangerous" within the meaning of the *International Maritime Dangerous Goods ("IMDG") Code*. (b) the Carrier was never provided with a *Material Safety Data Sheet ("MSDS")* that identifying the SS–89 as dangerous, and (c) the parent corporation affirmatively certified that the SS–89 was not a cargo to which the *IMDG Code* applied.

The Court of Appeals, adopted the principle illustrated in *Senator Linie* and pointed out that the legal investigation to determine strict liability under *COGSA § 4(6)* turns on whether the carrier knows about the dangerous nature of its cargo, not whether or how the shipper conveys that information. In *Senator Linie, the court decided that "it is the carrier's knowledge of the goods' dangerous nature, not the shipper's, that conditions shipper liability".*[12] Therefore, the Court of Appeals concluded

that a *COGSA* strict liability claim does not require a shipper to use any particular method, whether by *MSDS* or otherwise, to inform a carrier of the dangerous properties of its cargo.

The Court of Appeals believed the relevant facts are those that look to the knowledge of the carrier, such as: (a) the parent corporation did give the carrier a *U.S. Harmonized Tariff Schedule ("HTS") Code*, which identifies the cargo of SS–89 as a magnesium-based substance, and (b) the ship master also made testimony that he knew magnesium would emit highly flammable hydrogen when exposed to water.

When analyzing the ship master's testimony, the Court of Appeals pointed out that the master acquired the knowledge of "magnesium, plus seawater, means hydrogen," from his *"own background information"*. This indicated that the knowledge was not obtained after the collision.

As a result, the Court of Appeals opined that the facts did establish that the carrier was on notice that the SS–89 cargo contained magnesium and that flammable hydrogen would be released if it came in contact with water.

(ii) Whether the carrier places SS–89 in a condition which triggers the known danger?

The carrier argued that he did not intentionally expose the SS–89 to the condition triggering the danger, i.e., water. Such exposure was the result of an accidental collision with another vessel. The court decided that the argument was without merit for the following reasons.

When the carrier agreed to carry a cargo of magnesium-based substance on a sea voyage, with the knowledge that a chemical reaction would emit flammable hydrogen if the magnesium were exposed to any of the water in the vast ocean surrounding the ship; the carrier still decided to stow the SS–89 below deck in an enclosed cargo hold. The carrier also testified that *"the dangerous accumulation of hydrogen from the reaction of the water and magnesium could have been avoided entirely if it had stowed the SS–89 on deck where hydrogen could "dissipate harmlessly into the atmosphere."*

In its final conclusion, the Court of Appeals held that carrier's strict liability claims based on *COGSA § 4(6)* must fail as a matter of law because: (a) the carrier knew that the SS–89 cargo would react with water to produce flammable hydrogen, and (b) the carrier nevertheless stowed that cargo in a hold susceptible to flooding in the event of a collision from which resulting hydrogen could not escape.

Conclusion

An interesting question arises as to whether shipping professionals mainly engaged in transporting cargoes of hazardous substances from China to foreign countries need to know about foreign Carriage of Goods by Sea Law. The huge foreign direct investments in manufacturing facilities of the chemical sector in China suggest a positive answer. The lessons of

M/V Rickmers Genoa are:

1) The injured shipowner faces difficulty to establishing the U.S. parent corporation consignee as "a *COGSA* shipper" for it did not contract with the carrier.

2) When the injured shipowner brings a strict liability claim based on *COGSA § 4(6)*, the U.S. law will focus less on evidences concerning the conduct of the shipper, and more on the knowledge and conduct of the carrier. Such as whether the ship master knows about the dangerous nature of the cargoes and whether the ship stows the cargoes in a safe location according to its nature.

3) The ship's master has to maintain a reasonably skeptic mindset even if the shipper does not declare the cargo as dangerous according to the International Maritime Dangerous Goods *("IMDG") Code*. The inquiry should not stop even if the shipper affirmatively certifies that the cargo is not a type in which the *IMDG Code* would apply.

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1 *Senator Linie GMBH & Co. KG v. Sunway Line, Inc., 291 F.3d 145, 169 (2d Cir.2002)*

2 *Currently, the Shipping Act was codified in United State Code (U.S.C.) §§ 40101–41309.*

3 *According to the Shipping Act § 40102(22), the term 'shipper' means:*

(A) a cargo owner;

(B) the person for whose account the ocean transportation of cargo is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract."

4 *Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)*

5 *Peter A. Friedmann & John A. Devierno, The Shipping Act of 1984: The Shift from Government Regulation to Shipper "Regulation", 15 J. Mar. L. & Com. 311, 313–14, 320 (1984).*

6 *Ibid., at 327–28.*

7 *See 46 U.S.C. § 41306(a).*

8 *46 U.S.C. § 41306(c).*

9 *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer (1995), 515 U.S. 528 at 543–44.*

10 *46 U.S.C. § 40102(22).*

11 *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74, 77 (2d Cir.2006).

12 *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 154 (2d Cir.2002)

(Owen Tang: Instructor in Law, Department of Logistics, HK Polytechnic University.)

蘇伊士運河安全情況

MAST

2013 年 8 月 31 日，一艘巴拿馬旗集裝箱船 Cosco Asia 在通過蘇伊士運河途中受到伊斯蘭武裝分子襲擊。兩枚火箭推進式手榴彈從岸邊射出並擊中該船，幸運的是船舶並沒有受到太大損壞。據報導，置於頂層的一個集裝箱被擊中，靠近起居艙的艙口也受到了損壞。9 月 5 日，一個自稱為 al-Furqan 的組織發佈了一段視頻並聲稱對這啟事件負責，視頻內容正是 Cosco Asia 受到襲擊的畫面。資料顯示這是一個在埃及 Sinai 地區及 Cairo、Suez 和 Ismailia 市區活動的激進組織。

雖然被公佈的視頻畫面素質很低，但也能清楚看到兩名男子對該船發動襲擊的案發過程。通過觀察這兩名男子的舉止，軍事專家認為他們並沒有接受過任何軍事訓練，而且在這次事件上也沒有具體的破壞目標。兩名男子的意圖可能僅僅是想顯示他們有能力輕鬆避開運河周圍的安保措施，只要獲得合適的武器，他們還能執行更嚴重的襲擊活動。不過專家認為，這只是一啟相當業餘的襲擊事件，兩名男子未經過培訓或做好充分準備，而且他們背後的組織規模小、資源有限、經驗缺乏。

據報導，這啟事件的案發地點位於 Port Said 和 Ismailia 之間，河道相對狹窄。蘇伊士運河多個河段只有 300 米寬，因此船舶只能單向流動。此外，運河每天有三班固定時間的護航編隊。像 al-Furqan 這樣的激進組織只要知道護航編隊的時間表，就可預先策劃並輕鬆發動襲擊。運河某些河段，船舶位於河道中間時離兩岸只有 150 米左右距離，大部分輕武器或小型重武器的最大有效射程都能達到這個距離。出於上述情況，在蘇伊士運河航行的船舶面臨著來自岸上的襲擊風險。

與事件有關的三名男性疑犯已被埃及當局逮捕，但官方沒有透露這幾名男子的相關信息，也沒有證實他們是否確實發動了這啟襲擊。

蘇伊士運河的脆弱性

蘇伊士運河對激進組織來說具有莫大的吸引力。這條運河是世界上最重要的航道之一，2012 年共有 17,225 艘船舶使用這條運河，運載了超過 7 億 4 千萬噸貨物。如果蘇伊士運河因為恐怖襲擊而遭到關閉，那麼世界經濟必然會受到重大影響。若船舶以 16 節的速度從遠東行駛至法國馬賽，繞好望角比經蘇伊士運河要增加兩周左右的航行時間。運費上漲必然會導致物品價格上漲。此外，蘇伊士運河還是重要的原油交通樞紐站，2012 年共有 1 億 3 千 8 百萬噸石油經過蘇伊士運河運往世界各地，關閉運河還會使石油價格飆高。

除了經濟層面的影響，造成運河關閉的恐怖事件必然會受到廣泛報導，與事件有關的激進組織也會極大地增加曝光率，並利用這樣的襲擊事件向全世界宣示自身具備攻擊重要基礎設施的效率和能力。

埃及軍方作為這個國家權力的最高行使者，一直深知蘇伊士運河的戰略地位。這條運河為埃及創造了巨大的經濟價值，每年為國家帶來 50 億美金的收入，相當於 10% 的財政收入。

每當埃及出現安全或政治危機，埃及軍方都會立即調派軍隊、裝甲部隊和空軍鎮守運河以確保運河完全受控。埃及軍方在這方面從來沒有失手過。得益於這些行動，每次埃及經歷危機導致社會動盪不堪時，蘇伊士運河仍然能夠維持正常運作。例如，2013 年埃及曾發生數啟針對總統 Mohamed Morsi 的遊行抗議，雖然部分抗議活動發生在港務局總部門前，但運河的日常運作並未受到任何影響。

蘇伊士運河有多個河段特別容易被堵塞。特別是 Ras El Ish 至 El Ballah、El Firdan 至 Ismailia、Gebel Maryam 至 Deversoir、和 Shandur 至 Port Tewfiq 之間河段，是蘇伊士運河最狹窄的河段。如果船舶在這裡沉沒或被鑿沉，必然會造成嚴重堵塞。

在 Port Said 的蘇伊士運河入口處、蘇伊士運河集裝箱碼頭（SCCT）和 Port Tewfik 發動快艇炸彈襲擊可以取得最好效果。雖然這樣的事情不太可能發生，但即使船舶在上述區域被炸彈擊沉，運河也不會被堵塞。再說，與運河狹窄河段相比，在這些區域清理船舶殘骸相對更加容易。最後，駐守在運河入口處的軍隊和海軍基地也進一步降低了在這些區域發生襲擊的風險。

若要堵塞蘇伊士運河，破壞蘇伊士運河大橋或 El Ferdan 鐵路大橋也能達到目的。不過，由於這些橋樑受到埃及軍隊鎮守，激進組織想要在橋上裝置足以毀壞整座橋樑的炸彈而不引起軍方的注意是幾乎不可能實現的事情。事實上，蘇伊士運河是世界上軍事化程度最高的其中一個地區，因此激進組織很難在這裡發動襲擊。

其實，與上文提到的各種襲擊事件相比，船舶面臨的更大威脅來自於 Port Said 和 Suez 的錨地、以及 Lake Timsah 和 Great Bitter Lake 的等待區錨地潛在的船載自爆炸彈襲擊。下文將介紹這種襲擊的可行性。

2013 年 10 月前後，伊斯蘭激進組織在 Sinai 地區發起了數啟針對當地軍隊和員警的襲擊。2013 年 10 月 19 日，位於 Ismailia 市的埃及情報中心受到汽車炸彈襲擊。事件表明雖然埃及國內的安全措施有所提高，但伊斯蘭激進組織仍然有能力發動重大恐怖襲擊。如果這些激進組織成功破壞運河邊上的任何一個雷達站，導致船舶監控系統受到影響，那麼運河的交通很有可能會被迫中止。

加沙和利比亞都存在武器偷運問題，激進組織可以從這些地方獲得更先進、殺傷力更大的武器，從而對文中提及的對象發動更重大的襲擊。雖然如此，埃及軍方並不會坐以待斃，他們意識到保護運河的重要性，因為這不僅僅是為了守住自己的名聲，更是為了保護國家的經濟命脈。

(下期待續 …)

(本文由航運界網站提供。MAST 全稱是：Maritime Asset Security and Training Ltd。MAST 是一家著名的海事安保業公司，專門針對廣泛安全問題為商船和遊艇提供專家級安保服務，MAST 擁有全球性基礎設施，在馬爾他、英國、德國、美國、吉布提、阿曼、斯里蘭卡、尼日利亞和中國設有辦公室。)

Response from the Editor

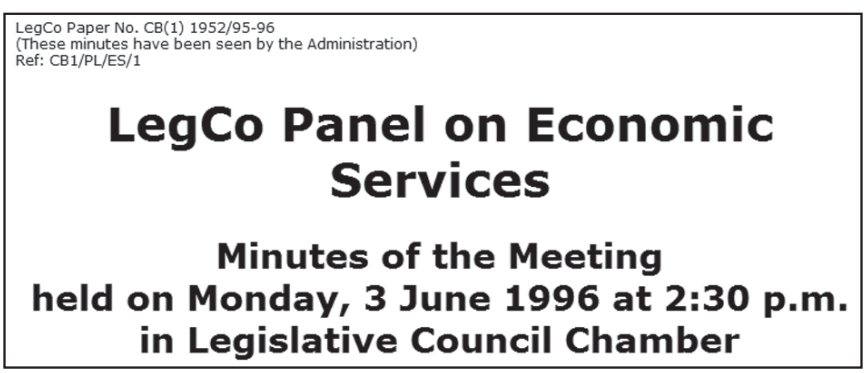
Since 'A Letter to Editor' is published in No. 105 Spring issue of 2014, the authors of the article "An Economic Study of Mid-Stream Operations in Hong Kong" have given feed back and response to the Editor, which is reproduced as under.

Dear Seaview Editor,

I wrote the article *"An Economic Study of Mid-Stream Operations in Hong Kong"* from a historical perspective and using historical information collected from Government report. To answer the three questions raised from the member's comments, I hereby provided the source of the various government reports as following:

First question: *Where the notion of "triad" culture is coming from?*

The "triad" element was mentioned in a government document issued in June 3, 1996 as below:


LegCo Paper No. CB(1) 1952/95-96
(These minutes have been seen by the Administration)
Ref: CB1/PL/ES/1

LegCo Panel on Economic Services

Minutes of the Meeting held on Monday, 3 June 1996 at 2:30 p.m. in Legislative Council Chamber

The document can be assessed from: http://www.legco.gov.hk/yr95-96/english/panels/es/minutes/es030696.htm

Under the heading ***"Criminality in PCWAs"***, Mr Ian Dale (Director of Marine) said that while the proposed tendering system itself might not solve the problem completely, *"it would reduce the opportunities for criminal elements to derive illegal profits through extortions."* *On the extent of criminality in PCWAs,* Mr M W Horner (Acting Assistant Commissioner of Police) *informed that there was no evidence of widespread triad activities in PCWAs, though there were "plenty of anecdotal evidence of extortions for years".*

In the section, Mr Horner further said that *"The Police was of the view that the existing system was susceptible to monopolisation of berthing spaces backed by strong-arm tactics, and supported the Marine Department's proposed reform which would reduce the opportunities for extortions."*

In addition, a reporter from South China Morning Post, after reading the Reform, also used the expression "triad-controlled PCWAs" in his report which was published in May 25, 1998 as below:

South China Morning Post
Make every day matter
TUE Apr 22, 2014 Updated: 2:09pm

EDUCATION POST
SET YOUR COURSE FOR LIFE @ educationpost.com.hk

HONG KONG'S LEA
EDUCATION WEBS
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News | Business | Comment | Lifestyle | Sport | Property

Home › Hong Kong ›

Trending English Schools Foundation
Malaysia Airlines flight 370

Reform seen leading to closure of PCWAs

WONG JOON SAN

PUBLISHED : Monday, 25 May, 1998, 12:00am
UPDATED : Monday, 25 May, 1998, 12:00am

The Government intends the new River Trade Terminal (RTT) to replace public cargo working areas (PCWAs), according to a shipping executive.

Chu Kong Shipping Development Co managing director Jacky Huang Jianji said that by changing the rules governing PCWAs, the Government 'was in fact preparing a legal basis for [their] eventual abolition'.

Although PCWAs had the advantages of lower cost and lower charges compared with the RTT, a new tender system introduced by the Government would make it more expensive to use them.

The Marine Department's PCWA reforms in January, apparently a step towards privatisation of the triad-controlled PCWAs, had

Second question: *Whether PCWA (Public Cargo Working Areas) is or is not the major terminals for MSO?*

In the article, I didn't investigate or express the opinion that PCWA is or is not the major terminals for MSO.

Third question: *Where is the practice of regulating the mooring of vessels of permitted berth width coming from?*

The information is based on a report issued from Director of Audit (Report No. 59 – Chapter 9) from Audit Commission (http://www.aud.gov.hk). The date of the report was issued in 26 October 2012.

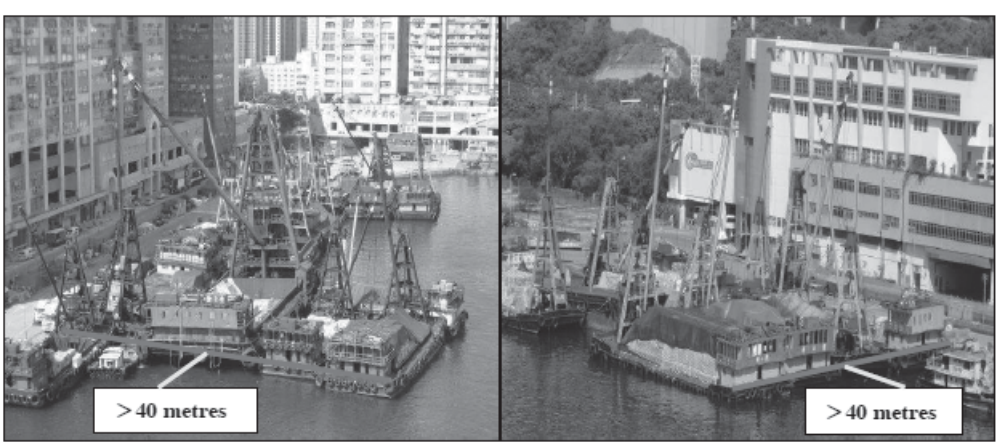
The report can be assessed from: (http://www.aud.gov.hk/pdf_e/e59ch09.pdf)

The part I wrote in the paper & the picture attached can be traced from this report:

(a) ***Mooring of vessels exceeded the permitted berth width.*** In September 2011, staff of Chai Wan PCWA sought the Senior Marine Officer's advice on an operator's request to moor a vessel that would exceed the permitted berth width of 40 metres. Upon the Senior Marine Officer's instruction, the operator was allowed to moor a vessel not exceeding 50 metres in November 2011. In a site visit to Chai Wan PCWA on 19 July 2012, Audit found that some operators had moored multi-tiers of vessels exceeding the permitted berth width of 40 metres (see Photographs 1 and 2) without the MD's prior approval. As the licence/permit conditions are important for regulating the use of the PCWA berths/operation areas, any relaxation should be well justified on a case-by-case basis. The MD needs to put in place proper control procedures (setting out the level of approving authority and the approving criteria) to guard against any misuse/malpractice;

Photographs 1 and 2

Multi-tiers of vessels which exceeded the permitted berth width



Source: Photographs taken by Audit on 19 July 2012 at Chai Wan PCWA

Law Column - MARPOL ANNEX V: an update on amendments relating to disposal of cargo residues

Michael Volikas / Olivia Murray

In July 2011, by resolution MEPC.201(62), the Marine Environment Protection Committee ("MEPC") adopted certain amendments to MARPOL Annex V. Those amendments entered into force on 1 January 2013, causing a certain amount of concern within the shipping and international trade community as to their practical implications. This article is intended to address certain of those concerns, some of which have been considered by the IMO, and to clarify certain aspects of the amendments in relation to the disposal of cargo residues.

Background to and scope of the amendments

Annex V is primarily directed at prohibiting the disposal of garbage at sea and, when it first came into force in 1988, its main focus was to reduce the disposal at sea of plastics, such as drinking water bottles and synthetic nets, by cruise ships and fishing vessels.

Under previous versions of Annex V, disposal of garbage at sea was generally permitted (with certain exceptions and conditions), provided it was disposed of far enough from the nearest land. The new regime sets out a blanket prohibition such that disposal of all garbage at sea is now prohibited, except as otherwise provided in Annex V.

The definition of *"Garbage"* includes *"Cargo Residues"*, which are defined as *"the remnants of any cargo which are not covered by other Annexes to the present convention..."*

Accordingly, Annex V applies to the disposal of any cargo residue of any dry bulk cargo/commodity that is not an oil, a noxious liquid or carried in packaged form (as covered by Annexes I, II and III and defined therein).

To which parties does Annex V apply and what are their obligations?

Regulation 2 (Application) of Annex V provides that *"the provisions of this Annex shall apply to all ships"* and the primary focus of Annex V is, therefore, on the vessel's compliance. Accordingly, every vessel's owners, operators and crew should ensure that the vessel complies with Annex V and takes every precaution to avoid discharging any garbage at sea other than in accordance with the exceptions set out in Annex V.

In this regard, in addition to the general prohibition on disposal of garbage at sea, Annex V also sets out three positive obligations which apply depending upon the size/tonnage of the vessel in question. These are as follows:

a. Regulation 10.1.1: every ship of 12m or more in length and fixed/floating platforms must display placards to notify the crew and passengers of the discharge requirements of regulations 3-6 of Annex V;

b. Regulation 10.2: every ship of 100 gross tonnage or above must carry a garbage management plan, which the crew follow and which meets the specified criteria; and

c. Regulation 10.3: every ship of 400 gross tonnage or above must carry a Garbage Record Book, in the form specified in the appendix to Annex V, and ensure that it records the information stipulated in Regulation 10.3.1-4.

Annex V contains no specific terms applicable either to shippers or time/voyage charterers, but this does not necessarily mean that a charterer or shipper could never have any liability in respect of a breach of Annex V.

In this regard, paragraph 3.4 of the 2012 IMO Guidelines for the implementation of Annex V (the "Guidelines") does provide that *"solid bulk cargoes should be classified and declared by the shipper as to whether or not they are harmful to the marine environment"* ("HME"). However, because the Guidelines are non-mandatory, it seems as though a breach of the Guidelines would not amount to a violation of either the Convention or Annex V and therefore not render a shipper liable if it did not provide such a declaration.

Nevertheless, it seems to us that, if a master were to discharge cargo residue at sea in good faith, in reliance on a shipper's declaration that it was not HME, and it then transpired that the cargo residue was HME and that the declaration had been fraudulently or negligently given by the shipper, then the possibility that the relevant authorities might seek to prosecute the shipper cannot be ruled out.

Permitted disposal of cargo residues

Regulation 4.1.3 of Annex V states that discharge at sea of *"cargo residues that cannot be recovered using commonly available methods for unloading"* can take place at sea provided that:

1. this happens at least 12 nautical miles from the nearest land (and not within a special area); and

2. the discharge contains no substances that are harmful to the marine environment. It should be noted, however, that this only applies to cargo residues *"that cannot be recovered using commonly available methods for unloading"* (our emphasis), such that the amount of any cargo residue to be disposed of at sea should be minimised.

In this regard, the Guidelines state that ports, terminals and ship operators should consider cargo loading, unloading and on board handling practices in order to minimise production of cargo residues. Every effort should be made, therefore, to ensure that as much of the cargo as possible is unloaded in port.

What substances will be considered harmful to the marine environment ("HME") for the purposes of Annex V?

The term *"harmful to the marine environment"* is not defined in Annex V itself, but guidance as to what constitutes an HME substance is set out in the Guidelines.

Paragraph 3.2 of the Guidelines states that cargo residues will be considered HME if they are solid bulk substances that meet the seven parameters that are set out in paragraphs 3.2.1-3.2.7of the Guidelines. These parameters are based on the fourth revised edition of the UN Globally Harmonised System ("GHS") 2011.

The difficulty for those in the industry is that there is no list of solid bulk cargoes or assessment of individual cargoes that are HME, in relation to compliance with Annex V for the discharge of solid bulk cargo residues. As a result, there is no easily accessible reference source to which owners/charterers/shippers/masters/ operators or any other party can refer in order to assess whether or not a given cargo residue is HME.

The IMO has recognised that there are certain "challenges" in classifying solid bulk cargoes and with the discharge of the associated residues. It has issued a circular (MEPC.1/Circ.791) stating that, for a transitional period (from 1 January 2013 to 31 December 2014), competent governmental authorities should accept provisional classifications.

However, such provisional classification is only permitted where reliable data as to four of the listed criteria is not available and where such provisional classification is based on the other three criteria (namely acute aquatic toxicity, chronic aquatic toxicity and the plastic/ polymer/rubber content of that cargo). There is no exception in relation to aquatic toxicity (whether acute or chronic) or the plastic/polymer/rubber content, for which it appears all cargoes must be tested.

It is also unclear whether, if one laboratory tests a particular type of bulk cargo and determines that it is not harmful to the marine environment, other parties will be entitled to rely upon that determination in dealing with other cargoes of the same commodity.

Much may depend upon the nature of the cargo in question. If the cargo is of a standard nature, such that there is little/no variation in chemical make-up between cargoes, then we anticipate that, once it has been tested in accordance with the criteria specified in paragraph 3.2 of the Guidelines, that determination as to whether or not that cargo is HME ought to hold good for all cargoes of the same type.

The position will be more complex, however, where the chemical composition of a type of cargo varies widely from consignment to consignment, or where cargoes are blended so as to produce a new substance, or where a cargo that would generally be considered as non-harmful contains a tiny proportion of a substance that might be considered harmful.

In those circumstances, we anticipate that it may be necessary to sample and test individual cargoes and, where a product is to be blended, test both the blended product and any by-product (including the waste resulting from any tank washings) in accordance with the specified criteria. In doing so, it should be borne in mind that a cargo may react with seawater such that it becomes harmful on contact with the sea, although we anticipate that this possibility is likely to be covered by the tests for chronic and acute aquatic toxicity.

IMO's Marine Environment Protection Committee addresses Industry Concerns

Since the amendments to Annex V regarding cargo residues came into force, a number of concerns have been raised by the shipping and trade community, both in relation to the classification of cargoes as HME or non-HME and in respect of the inadequacy of the existing port reception facilities for disposal of HME garbage (which is not permitted to be disposed of at sea).

Certain of these concerns were initially addressed at the 65th Session of the Marine Environment Protection Committee (MEPC)[1] at which the MEPC:

1. adopted amendments to the 2012 Guidelines for the implementation of MARPOL Annex V, to add references to E-waste generated on board such as electronic cards, gadgets, equipment, computers, printer cartridges, etc.;

2 approved draft amendments to the form of Garbage Record Book under MARPOL Annex V, to update the Record of Garbage Discharges, for circulation, with a view to adoption at the 66th session of the MEPC; and

3. approved an MEPC circular[2] on adequate port reception facilities for cargoes declared as HME under MARPOL Annex V, which agrees that, until 31 December 2015, cargo hold washwater from holds previously containing solid bulk cargoes classified as HME, may be discharged outside special areas under specific conditions. This is prompted by the recognition that *"as a result of the difficulties experienced by shippers, consequential problems are being experienced by shipowners and operators in obtaining HME declarations and, when cargoes have been classified as HME, finding adequate reception facilities at receiving terminals"*. The circular also urges Parties to MARPOL Annex V to ensure the provision of adequate facilities at ports and terminals for the reception of solid bulk cargo residues, including those contained in washwater and that, in the absence of such facilities, terminals should facilitate the discharge of all solid bulk cargo residues ashore, including hold sweepings.

The MEPC has recently considered MARPOL Annex V at its 66th Session[3] and, in particular, the draft amendments concerning the Garbage Record Book mentioned above. A number of delegations suggested:

- that there were perceived discrepancies between the text of the Convention and the proposed form of the Garbage Record Book.

- that the Garbage Record Book should be amended to cater for recording the disposal of residues of solid bulk cargo, in particular when those cargo residues are classified as harmful to the marine environment.

The Committee therefore agreed to postpone consideration of adoption of the draft amendments to MEPC 67[4] pending further comments from interested member states and international organisations.

Practical guidance

As will be apparent from the above, the practical implications of the new rules are still being considered by the IMO and its member states and there is still some way to go in ironing out the detail. A number of practical questions arise including: who carries out any testing to determine whether a particular substance is considered harmful or not; whether the test result is centrally registered in some way and accessible to other parties; whether it is accepted as applicable to other similar cargoes; and whether it carries any particular status, if, for example, it supports the view that a substance is harmless, but a different view is taken by authorities in another part of the world. There is currently no indication as to whether the UN will seek to publish a comprehensive list of substances for the purposes of establishing whether or not a particular cargo is HME for the purposes of Annex V. It is possible that an official list will be developed by the IMO in the period ahead, as the practical implications of the new Annex V become more widely appreciated.

Until these practical issues have been worked out in clearer detail, it is not easy to give practical legal guidance with as much clarity or certainty as is desirable, but, in the meantime, we consider it better to err on the side of caution regarding the classification and disposal of any cargo residue and, if in doubt, to discharge at appropriate discharge facilities ashore, rather than at sea.

We appreciate that disposal ashore costs money and is not always an available option. In those circumstances, we hope that the following 'pointers' may be of assistance:

1. ITOPF has published a helpful advisory note in relation to the disposal of bulk cargo tank washwater and cargo declarations under MARPOL Annex V.[5] This provides advice on how to classify cargoes as HME (or not) and includes a flow diagram illustrating an example of how to gather data required for HME classification. The note also suggests that Port State authorities[6] should be able to compare declarations and clarify any specific requests or queries.

2. GESAMP (the Joint Group of Experts on the Scientific Aspects of Marine

Environmental Protection) publishes a list of certain products/minerals that are carried by ships, with a profile for each one that indicates whether or not it is considered *"hazardous"* to the marine environment. These profiles are not comprehensive for the purposes of establishing whether the listed products are HME pursuant to Annex V: the parameters for which GESAMP tests are conducted do not correspond precisely with the criteria set out in Paragraph 3.2 of the Guidelines and, in addition, the list of substances covered by GESAMP is not comprehensive and certain products (such as petcoke) are missing from the list. However, they do cover some of the UN GHS criteria specified in paragraph 3.2 of the Guidelines, and we suggest that the GESAMP list would be a good starting point when assessing whether or not a particular type of cargo is HME.

3. Any analysis relied upon ought to have been undertaken by a laboratory of international standing/repute, with the experience and equipment to properly analyse samples of the cargo in question in accordance with the specified UN GHS criteria. In this regard, we are aware that the issue of accurate testing has previously arisen in relation to cargoes of substances such as nickel ore, where mining companies/shippers have produced certificates as to a cargo's transportable moisture limit in circumstances where the local laboratories in question have not had the correct equipment accurately to test for such characteristics.

4. The amount of any cargo residue to be disposed of at sea should be minimised and every effort made to ensure that as much as possible of the cargo is unloaded at port. Otherwise, we can only recommend that those concerned use their best efforts to establish whether any cargo residue is or would be considered harmful by reference to the UN GHS criteria specified in the Guidelines and that, in case of doubt, advice be sought from ITOPF or other appropriate sources of technical expertise.

1. *Held from 13-17 May 2013*

2. *MEPC.1/Circ.810*

3. *Held from 31 March – 4 April 2014. See the Report of the Session at MEPC 66/21.*

4. *To be held from 13 – 17 October 2014.*

5. *This was published in April 2013 and can be found at: http://www.itopf.co.uk/information-services/publications/papers/documents/IMSBCDeclarationAdvisoryNote_002.pdf*

6. *See the list at BC.1/circ 66: http://www.imo.org/blast/blastDataHelper.asp?data_id=25143&filename=66.pdf*

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2008 年以來國際乾散貨運輸市場簡要回顧 (1)

王守仁

1. 2008 年以來波羅的海綜合運費指數 (BDI) 回顧

自 2008 年金融危機爆發後，國際乾散貨運輸市場變動可以用“極其劇烈”來形容。起初由於國際貿易大幅萎縮，被喻為衡量全球經濟景氣度指標的 BDI 指數從 11793 點跳水至 663 點。2009 年，在中國 4 萬億投資計畫的刺激下，大宗商品進口激增，BDI 指數也由此反彈到 4000 點以上的水準。然而，這也給了散貨運輸“市場復蘇”的錯覺，並帶動大批新船在 2010 年下水，從而再次壓垮乾散貨運輸市場。2010 年全年 BDI 指數平均值為 2758 點，但自該年 5 月達到 3838 點的高點之後，便一直處於下行的通道。

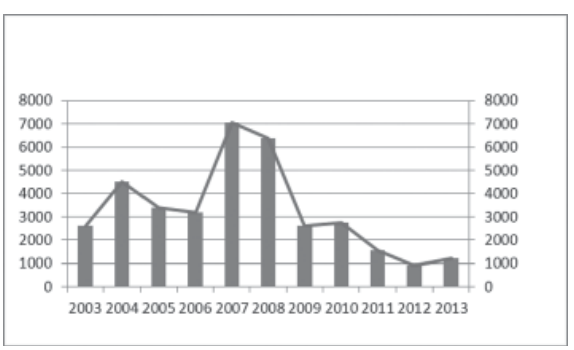

圖 1：2003-2013 年國際乾散貨運輸市場波羅的海的海綜合運價指數（BDI 指數）均值走勢

BDI 指數在 2011 年全年平均值為 1549 點。雖然在 9 月和 10 月出現了小幅的反彈，分別達到 1840 點和 2036 點，也只有 2008 年歷史最高點 11612 點的 1/6，而且也遠遠低於歷史的平均水準。2011 年 1 月 4 日至 2011 年 9 月 1 日，BDI 指數始終在 1043-1693 點之間徘徊。但這輪下行走勢至 2011 年 9 月 2 日升至 1740 點，而至 10 月 14 日更上升至 2173 點，創下自 2010 年 12 月 8 日以來的新高。2011 年乾散貨市場低迷持續時間之長，超過了 2008 年底的海運危機，其中佔主導的好望角型船（即海岬型船）日租金，在 2010 年 12 月後進入下滑走勢，2011 年上半年有長達近百天的時間低於一萬美元，而且租金水準與巴拿馬型船及靈便型船形成嚴重的倒掛，市場低迷程度可見一斑。同時，巴拿馬型船運價也處於虧損狀態。2011 年 11 月 1 日倫敦航運投資者服務公司 (Freight Investor Services) 的資料顯示，11 月交割的好望角型船期貨合約成交均價為 20000 美元 / 日，12 月合約則大幅下跌至 16500 美元 / 日，較現貨市場租價低了 35%。

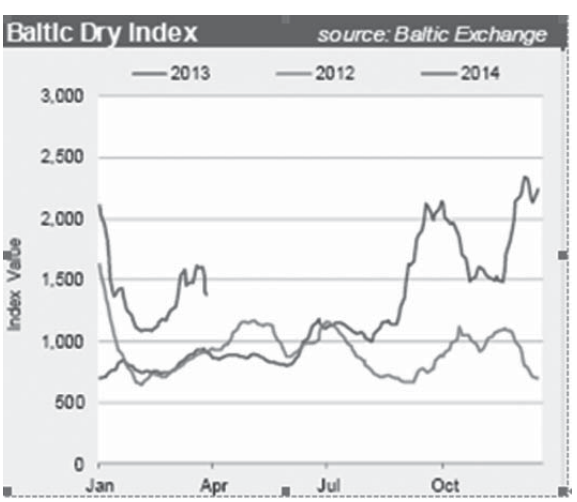

圖 2：2012-2014 年國際乾散貨運輸市場波羅的海的海綜合運價指數（BDI）走勢（資料來源：Howe Robinson and Co., Ltd. 2014-3-28）

2012 年 BDI 指數全年平均值為 920 點，較 2011 年平均值 1549 點下跌

40.6%，為該指數設立以來最為低迷的時期。20 多年來，BDI 指數全年平均值只有兩年下過 1000 點，1998 年的 945 點，還有就是 2012 年。2012 年全年，BDI 指數持續處於低位運行，整體維持在 650 ～ 1100 點的窄幅區間內，和歷史上的大幅波動不可同日而語，並且長時間處於千點之下。2012 年 1 月 17 日，BDI 指數該年首次跌破 1000 點，之後持續徘徊在 1000 點之下，雖然 10 月中曾升破 1000 點，但 11 月初又跌破 1000 點。截止至 2012 年 12 月 24 日（2012 年最後一個指數發佈日），BDI 指數已連續下跌 18 個交易日，至 699 點。持續的低位運行將中國航運業帶入深度低迷的谷底。

2013 全球乾散貨航運市場以“跌宕起伏”的態勢貫穿全年。BDI 指數 2013 年平均值約為 1206 點，較 2012 年年均值上升 31.1%。全球航運在寒潮中開局，國際乾散貨運輸一路走出了最典型的“前低後高”曲線。年初起，受新興經濟體經濟增長下行的影響，全球大宗商品需求總體疲軟，在鋼鐵企業低庫存策略改變了鐵礦石需求持續增長的格局下，鋼材、鐵礦石難以維持預期漲勢，而得益於夏季高溫用電量猛增刺激，煤炭等能源物資帶動了二季度運輸需求，增幅相對走高。從 BDI 指數各月均值來看，2013 年 1 月份，BDI 由月初的 698 點，最高升至 838 點，隨後一路下滑，月底收於 745 點；2 月份，運價低位盤整，BDI 基本在 735 和 750 之間低位波動；3 月份，在巴拿馬型船帶動下，BDI 有所反彈，由 800 點以下逐步攀升，最高至 935 點，較 2 月份環比上漲 4 成以上；4 月份，處於整理狀態的運價水準在 860 至 890 點區間內小幅振盪；5 月份，鐵礦石運輸一度相對活躍，但煤炭和糧食運輸表現較弱，市場總體表現低於預期，BDI 均值約在 850 點，較 4 月回落近 3%。下半年，受澳礦巨頭大舉出貨與黑德蘭港鐵礦石的價格優勢帶動，乾散貨市場表現出震盪向上突破的勢頭，創下了近 3 年來的高點。而中國沿海乾散貨市場走勢前低後高，總量止跌上漲，且季節性特徵和波動幅度明顯。6 月份，BDI 指數逆市暴漲，首次突破 2013 年以來 1000 點大關，月底最高收於 1179 點，形成了 2013 年以來的第一波高峰；在略作盤整後，9 月份，BDI 由月初 1139 點一路上揚，最高漲至 2113 點，上漲近千點，月底略有回落，但仍在 2000 點以上，月均值上漲 54% 以上。日租金大幅上漲的態勢在第四季度乾散貨運輸傳統旺季的支撐下，一路強勢走高，延續到年末。2013 年 12 月 12 日，BDI 指數攀升至 2337 點，創下了 2010 年以來的最高點。

(下期待續 …)

(本文根據中國對外貿易經濟合作企業協會王守仁先生 2014 年 4 月 10 日在香港理工大學物流與航運系萬邦曹文錦海事圖書館暨研究及發展中心的專題講座整理。)

(this paper is written by IMC-Frank Tsao Maritime Library and R&D Center based on a seminar by Mr. Shouren Wang, the associate director of the Chinese Shippers' Association)

Raymond T C Wong

Salvage Evidence

(Contents contributed by Mr. Clive Beesley, Legal and Claims Consultant of C Solution (Hong Kong) Limited)

When a casualty occurs it is important to have accurate and detailed records of events in order to properly deal with and minimise any claim for salvage. Such evidence should not cover the cause of the casualty itself, separately dealt with usually, but the times/dates/events of assistance offered, obtained and provided. This is necessary to analyse various considerations which apply under international law (and most salvage contracts) as highlighted in particular below:-

International Convention on Salvage, 1989
Article 13 - Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

   (a) the salved value of the vessel and other property;

   (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

   (c) the measure of success obtained by the salvor;

   (d) the nature and degree of the danger;

   (e) the skill and efforts of the salvors in salving the vessel, other property and life;

   (f) the time used and expenses and losses incurred by the salvors;

   (g) the risk of liability and other risks run by the salvors or their equipment;

   (h) the promptness of the services rendered;

   (i) the availability and use of vessels or other equipment intended for salvage operations;

   (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

Types of Evidence

Manual Records

The ship's senior personnel will obviously continue to use the log books of

the ship. It is often useful in addition for the Master or Chief Officer to start a Note Book (or computer record) and to make a careful entry of all relevant information - as below.

Electronic data (some examples)

Voyage Data Recorder (VDR)

Often immediately following a casualty the VDR of the ship is deactivated in order to preserve data leading up to the casualty itself. Where possible the VDR should be reactivated afresh, with a replacement memory card if available, in order to record events post casualty. Most VDR however overwrite data after 12 hours, so it may be necessary to keep downloading VDR data at regular intervals during a salvage operation. This depends on whether the ship is aground (VDR data not very useful) or being towed (VDR data more useful).

Automatic Identification System (AIS)

This data can also be useful and may be captured on VDR (as above). If the AIS data of a ship under tow is not available on board, it can usually be obtained by independent service providers at a cost. Such information is not always needed every time there is a salvage situation. Your advisors will guide you whether it is a good obtain to preserve/obtain such data.

Global Positioning System (GPS)

It is usually possible to recall the positions of a ship via GPS and this data can usually be downloaded or at least viewed and recalled manually.

Echo Sounding Device (ESD)

This device may be digital or in some instances the older paper trace variety. Obviously useful to determine the depth of water which a ship is in at any given time, particularly if being refloated in a difficult area.

(Different ships have a various range of electronic devices and the type of electronic evidence to preserve will vary from case to case. The above list is not exhaustive but rather shows several examples of evidence which might be useful. Seek advice if in doubt.)

Survey Reports

Surveyors sometimes attend on board during salvage operations and will make independent Reports (often to Hull & Machinery Underwriters or the P&I Club). The Surveyors will usually make up their own minds what information they need and are often dependent on the crew for such information. Surveyors will not normally interview witnesses or take statements regarding salvage services but they will ask for certain information. It is customary to cooperate with Surveyors in this respect.

Statements

In a significant or serious matter lawyers are often engaged to attend on board and take statements and gather evidence regarding salvage services performed. Owners will inform the Master in advance and arrange suitable (full) cooperation. The lawyer is there to help the Master and therefore Owners. This job

is an important one and can affect what Owners and their insurers may have to pay at the end of the day. The lawyers are likely to ask a series of questions dealing with each of these topics in some detail:-

1. Personal background details of a witness such as the Master of Chief Officer;

2. Number and nationality of crew;

3. Particulars of the ship;

4. Details of any cargo on board;

5. Last port departure condition details including bunkers on board as well as ballast arrangements;

6. Relevant navigation chart details;

7. Date and time of any distress message;

8. Position of ship when assistance requested:

9. Position of ship when assistance arrived on site;

10. Weather and tidal information;

11. Details of communications with Owners;

12. When and how first offered salvage assistance and by whom;

13. When and how salvage assistance was accepted/agreed;

14. Time(s) of arrival of salvage tug(s), equipment and personnel;

15. Steps initially taken by the Salvors;

16. What salvage plan was proposed;

17. If any efforts were taken by Salvors to protect or minimise environmental damage;

18. If Salvors were able to perform services properly and with a useful result;

19. The details of danger(s) faced by ship/cargo;

20. Skills displayed by the Salvors and detailed information of what Salvors actually did;

21. What period(s) of time Salvors were engaged;

22. If the salvage services exposed Salvors to any particular risks;

23. How prompt and efficient Salvors were.

Statement taking is a professional task and the ship's crew can be instrumental in assisting the statement taker to enhance the quality of the evidence obtained. It is always prudent to cooperate accordingly.

Seminars

- Talk by Prof. Anselmo Reyes on "Some Thoughts on Making Arbitration more Affordable" will be held at the Mariner's Club (11 Middle Road, Tsim Sha Tsui, Kowloon) on Tuesday, 10th June 2014 from 6:30 pm. The event is organized by The Institute of Chartered Shipbrokers

- A practical course in Marine Insurance will be organized by the Marine Insurance Club in the form of weekly evening classes extending over 4 months, August/November 2014. Details will shortly be released.

AAA Rules of Practice

At the annual general meeting of the UK Association of Average Adjusters, amendments to the following rules of practice were made and approved, which have now become probationary rules.

B1 Basis of Adjustment

In all cases the adjuster shall:

a) Give particulars in a prominent position in the adjustment of the clause or clauses contained in the charter party and/or bill of lading that relate to the adjustment of general average or, if no such clause or clauses exist, the law and practice obtaining at the place where the adventure ends.

b) Set out the facts that give rise to the general average.

c) Where the York-Antwerp Rules or similar apply, identify the lettered and/or numbered Rules that are relied upon in making the principal allowances in the adjustment.

A4 Duty of adjusters in respect of cost of repairs

1) That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent ship-owner would have taken if uninsured.

2) Where a claim for particular average arises and the Assured has elected to repair the vessel, the Assured is entitled to:

a) Recover the reasonable cost of repairs in terms of section 69(1) of the Marine Insurance Act 1906, irrespective of whether repairs are carried out before or after the expiry of the policy.

b) Defer repairs, subject to Class approval, to the first reasonable opportunity which is likely to be the next routine overhaul or dry-docking period. Any increase in the overall cost of repairs arising from deferment beyond the first reasonable opportunity will be for the account of the Assured.

(Editor: Raymond T C Wong
Average Adjuster)

香港船舶註冊處
HONG KONG SHIPPING REGISTRY

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  A world-class shipping register with a reputation for excellent quality and service
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