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JOURNAL OF THE INSTITUTE OF SEATRANSPORT

**Diplomatic Crisis of Qatar:
Possible Legal Implications to Shipping Industry**

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兩岸三地航運物流研討會 2017

海運學會 (香港) 主辦

海運協會 (深圳) 及中華航運學會 (台灣) 協辦

主題 – 開創兩岸三地合作契機

1. 日期：2017 年 11 月 20 日 (星期一)
2. 時間：上午 9 時至下午 5 時 (繼後晚宴)
3. 地點：香港跑馬地黃泥涌道 188 號 紀利華木球會
4. 費用：$1,000/ 位 (包括研討會入場費，午，晚宴，論文集 , 紀念品)

「兩岸三地航運物流研討會」是在香港、深圳、台北三個城市輪流舉行，以增加、增進兩岸三地航運學會及同行業之間的瞭解、友誼、交流和合作，促進兩岸三地航運業的可持續發展。經過多年的舉辦，研討會已得到各方的肯定，並在當地政府和業界享有一定的影響力；本屆由本會主辦。本會榮幸邀請到香港特別行政區政府政務司司長張建宗先生 , 大紫荊勳章 , GBS, JP 作為主禮嘉賓，澈臨主持開幕。

細節請參考本會網頁，並逕向秘書處報名，踴躍參加。

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THEME **Breaking New Grounds in Cross-Strait Co-operations**

Date : 20 November 2017 (Monday)
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Three shipping/maritime related institutions in Hong Kong, Shenzhen and Taipei take turn to organize the Cross-Strait Conference (the Conference). The Conference promotes the understanding, friendship, exchange and co-operations among the institutions and participants for the eventual enhancement of the continuing development of the shipping/maritime industries. The Conference earns its recognition from the local governments and the industries in these regions. The Institute of Seatransport will host the Conference this year and have the honour to invite Mr. CHEUNG Kin Chung, Matthew, GBM, GBS, JP Chief Secretary for Administration of the Hong Kong Special Administrative Region Government as the guest of honour to inaugurate the Conference.

For details, please refer to the news announced on the Institute's website. Do not miss your opportunity.

Diplomatic Crisis of Qatar: Possible Legal Implications to Shipping Industry

Owen Tang / Brian Sun

A. Introduction

On June 05, 2017, the United Arab Emirates (UAE), Saudi Arabia, Bahrain, Yemen, the eastern based government in Libya, the Maldives and Egypt announced their intention to cut land, air and sea transport links with Qatar. Such a diplomatic crisis may create a major concern for the shipping industry in the region.

Qatar has a major role in some specific sections of the global economy. Qatar is the world's largest exporter of liquefied natural gas. The Qatar Investment Authority holds large stakes in important western companies such as Volkswagen and Barclays, and has major invested interests in Harrods department store and the Shard (London's tallest building).

Before the crisis, the UAE had been Qatar's sixth largest trading partner, and the decision to suspend sea transport between the two nations would certainly cause panic for ocean carriers operating on both sides.

The UAE's Port of Fujairah has issued a notice prohibiting all vessels destined to or arriving from Qatar ports (regardless of their flag) from calling at its port or offshore anchorage. As the Port of Fujairah is the main bunkering point in the region, this decision obviously impacts ocean carriers operating in this region in terms of costs and delays. An article published in Tradewinds entitled "OSV Sector faces Fallout from Qatar Crisis" (June 08, 2017)[1] predicted that offshore vessel operators could be among those shipping companies likely to suffer from the diplomatic crisis surrounding Qatar, as Qatar has a significant offshore oil and gas sector, with many foreign flagged OSVs employed there.

One day after the June 05 decision, DP World issued a notice prohibiting the following vessels from calling at any DP World port or anchorage in the UAE region:

- all vessels owned by Qatar or flying its flag;
- all vessels going to/coming from Qatar as last/next port of call (irrespective of flag);
- all vessels loading/discharging cargo destined to/from Qatar.

In addition, Saudi Arabia has announced that Qatar flagged/owned vessels will not be allowed to enter Saudi waters. Bahrain has also prohibited vessels moving from and to Qatar from calling at its ports. Egypt has banned Qatar-flagged ships but allows access to the Suez Canal.

The Qatar political crisis may also affect the ordinary course of shipping payments. On June 09, 2017, the UAE government published Resolution No. 18 of 2017 which listed 59 individuals and 12 Qatar-linked entities ['specially designated nationals' (SDNs)] as terrorist individuals and organizations. However, the Central Banks in the UAE, Bahrain, Saudi Arabia and Egypt have stopped dealing with the Qatar Riyal. Besides, the Saudi Arabian Monetary Agency has told banks in Saudi Arabia not to process payments denominated in Qatar riyals. Therefore, there may be expected delays relate to shipping payments involving UAE financial institutions.

This paper aims to provide a brief overview about the possible legal issues concern with shipping industry that may be caused by this diplomatic crisis.

B. Impacts on Contracts of Carriage

(1) Sanctions Clause

Shippers who have contracted to carry cargo to or from Qatar need to check the written terms listed in the bill of lading and charterparty. In some contracts of carriage, there are provisions specifically dealing with the parties' obligations in situations when cargoes are prevented from being shipped or delivered by government actions. For example, the "BIMCO Sanctions Clause For Time Charterparties" sets out the rights and obligations for ship owners and time charterers in the event the contract is affected by 'any sanction or prohibition imposed by any State, Supranational or International Governmental Organisation'.

Originally the inclusion of the clause was prompted by the Iranian sanctions regime. Affected parties should check whether the specific wordings of these clauses may be wide enough to embrace the prohibition imposed by the current Qatar crisis.

The related parties should check their contracts to see whether they are entitled to deliver the cargo to a destination other than the destination originally agreed when there is a "blockade" (Conwartime and Conwarvoy 2013); if yes, they have to check whether they have cover from the P&I Club to carry the cargo to the revised destination.

(2) Liberty to Deviate

The contractual right to deliver the cargo to a destination other than the destination originally agreed is closely related to the "liberty to deviate". For vessels destined for Qatar ports but calling at UAE or other affected ports en route, the parties should check whether they may allow deviation to a different port under the contracts of carriage.

Most bills of lading and contracts of carriage have incorporated the Hague or Hague Visby Rules. The Rules deal with the matter of deviation in Article IV Rule 4 which states:

> "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss of damage resulting therefrom".

Contracts of carriage which incorporate the Hague or Hague Visby Rules will therefore be entitled to deviate vessels to deal with the restrictions that have been put in place, but only to the extent that the deviation is 'reasonable'. Whether a deviation is reasonable will depend upon the exact circumstances in which the deviation is made.

(3) Defence of Claims and the Hague / Hague Visby Rules

Most bills of lading and contracts of carriage incorporate the Hague or Hague Visby Rules. Article IV of the Hague Rules and the Hague Visby Rules provides that:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from- ...(g) Act or restraint of princes, rulers or people, or seizure under legal process...(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of the this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage..."

Article IV may offer a defence to the ocean carriers if the cargo interests bring a claim against them as a result of the restrictions that have been put in place.

(4) Force Majeure Clause

Under English law a contractual party can also rely on a force majeure event if it is expressed in the contract. Some standard forms (e.g. Sugar Charterparty 1999) contain force majeure provisions. Whether a party can rely on a force majeure clause will depend on the wording of the clause.

Under UAE law (the position is similar in other Gulf countries) the UAE Civil Code does not define a 'force majeure event', it is generally accepted to mean events that are unforeseeable and impossible to avoid. Will delays to supply chains constitute a force majeure event? Careful analysis must be given to 1) whether the contract has a force majeure clause or a material adverse change provision, and 2) whether such provisions adequately capture the current event.

(5) Frustration

Frustration is an English law concept which allows parties to walk away from a contract if the circumstance has made it effectively impossible to perform the contract. The claiming party must show that the circumstances have fundamentally changed the performance obligations originally contemplated in the contract, and further performance under the contract is impossible, illegal or radically different from the contract originally contemplated by the parties. Under the current crisis in Qatar, the issue is whether it is a frustrating event if a vessel cannot get close to the nominated port at all, which seems to be the effect of the measures announced by the UAE, Saudi Arabia and Bahrain.

Increase in costs alone are unlikely to frustrate an ocean carriage contract; for example, the claiming parties are unlikely to argue frustration of the charterparty by merely showing that the vessel is unable to call in Fujairah for bunkering and this results in a delay or additional expense.

When dealing with a charterparty, relevant cases related to frustration have considered factors such as: (1) the length of the delay as against the period of the charter; and (2) the extent of the permitted trading as against the areas affected by subsequent events. Typically, the charterparty may not be frustrated if another route is available, i.e. delivery to another port and onward transportation by road/rail to the original destination port. Under the current Qatar crisis, the claiming parties may argue that the transport blockade of Qatar by the Gulf states involved land, air and sea transport links, which make alternative means of transport to Qatar difficult to achieve.

C. Conclusion

This paper gives a brief overview about the possible legal issues concern with shipping industry that may be caused by the Qatar diplomatic crisis from five legal aspects: (1) sanctions clause, (2) liberty to deviate, (3) defence of claims under the Hague / Hague Visby Rules, (4) Force Majeure clause, and (5) frustration. There are only a handful of vessels or tankers with the Qatar flag, but by not allowing direct sailing to and from/between Qatar and Fujairah has put shipping companies and charterers in a legal quandary. The port of Khor al Fakkan is about 5 miles from Fujairah, and ships are transiting to the port of Khor al Fakkan (also part of the UAE); however, there is uncertainty whether the port has issued a similar note restricting direct sailing to and from Qatar ports.

Bunkering is a major source of revenue for the UAE and by not allowing ships embarking from Qatar to bunker at Fujariah will hurt its hub status. Researchers predicted that ocean carriers may charge a higher freight rate because if not allowed to bunker at Fujairah, they have to load bunker fuel in Singapore.

Acknowledgement:

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1. *www.tradewindsnews.com/offshore/.../osv-sector-faces-fallout-from-qatari-crisis.*

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ICSHK Column -
A few words from a veteran ship broker

P. C. Li

Shipping has been the only career throughout my 40 years of working. I was hired by a shipping company to work as a documentation clerk at the age of 18 where during peak times each individual needed to daily prepare more than 200 sets of shipping documents by typewriter. Perhaps because I was an outstanding typist, a few years later I was transferred to work as the assistant to the senior person in ship chartering and sale and purchase matters.

It was a time when the company was actively involved in buying second hand ships for our principals in Mainland China. Because of the business opportunity, the office was swamped with S&P brokers every working day. My senior met the closing brokers and left the others to me.

I was really glad to be given this chance and was impressed on how important and helpful the brokers were. Not only did they provide useful market intelligence, they also helped us in decision making, bargaining on behalf of us in the deal and sorting troubles if anything went wrong. In a lot of ways, we looked to them for answers whenever there was a query or problem. I was young and treated them as my idols, hoping one day I could be as capable as them.

It was in the spring of 1983 that my wish came true and I was hired by a broking house to work as their sale and purchase broker. My first broking employment turned out to be a disaster and lasted less than two weeks. After that I was unemployed for nearly 6 months. Of course, the incidence dealt a big blow to me but, on the other hand, it gave me time for better preparation of my first ICS examination.

I got the chance to start again that summer as a broker for chartering business. I am sure those of my age still have vivid memories of how chaotic the market was in the early 1980's. For the post war era until then, the market treated ship owners like pampered children with a safe environment for their investments. Shipping was a gentlemen's game where words and names were worth millions. With such a good long period of stable times, the only market change a ship owner could perhaps think of is how much more money their ships were worth. Competition amongst owners centered on who was more successful in expanding their fleet the fastest. It was hard to believe the market would change against ship owners. But it did happen and the critical mass subtly shifted to the other side as the market was in a melt down.

Ship owners were caught unprepared and they woke up one day to find ships in over-supply, prices falling, long term employment unavailable and income shrinking. The once firmly rooted business ethnic was replaced by tricks and excuses and the once taken-for-granted proper fulfillment replaced by a series of defaults, even by some of the most reputable names. Most owners believed the adversity was only temporary and that sunshine would come after the rainstorm. Some were even more aggressive and took the recession as an investment opportunity and therefore ordered more new buildings. As time went by, owners found their feet dragged deeper and deeper in the mud until it became clear that the market had changed beyond the point of no return. The deepest memory of mine for that period is of some oil tankers built with turbine engines which were never used to carry a single drop of oil in their life. They were sent straight into lay-up berths from the building yard and some years later to demolition.

It was amidst such market conditions that I did my first fixture with a local charterer with whom I had little knowledge. Though I kept my fingers crossed that everything would go fine, the brutal reality happened just the opposite. In the end, freight was never paid and the owners had to complete the whole voyage at their own cost. To my regret, there are a few such painful incidences which happened in my life and most of them were in time charter fixtures.

I expect other brokers would agree with my observation that passion is the main element which makes us love this job and be proud of it. Though frustration and disappointment occur at times: subject fails, negotiations fall apart, cancelling date missed, force majeure, engine brake down, new government policies; there are also times filled with joy and satisfaction: fixture come as a gift, advice taken and proved to be beneficial, dispute settled through our efforts, etc.

It was back in the early 1990's when I happened to be in an informal debate about whether there was any future for shipbrokers. Some pessimists held the view that brokers would become dispensable with the development of technology and that their future was gloomy. Others believed that brokers would always have a role to play and therefore would never be eliminated. If we found a principal sitting there and asked for their opinion, I believe they would have said that a genuine good broker is always welcome. Yes, the question is about quality brokers but where and how can we get them? In my opinion, broking skills are not taught in the classroom but learned in the real business environment through experience and practice. In fact, principals have a role to play to make a good broker. I recalled one European broker I met in my early years who told me he started his career as a coffee boy in a London based broking house and was given chance to serve some local owners after coming to HK. It was

actually the owners who gave him the shipping knowledge and the chance to grow. There must be more than one such example from those days and the beneficial results are obvious. Nowadays, we have a group of young talented people offering themselves to serve in the shipping industry but who are waiting to be groomed. If we say some element needs to be developed to revive the shipping scene in HK, I believe we should look to this group for answers. Personally, I believe the key of revival hinges upon finding of a new niche market that needs creative ideas to kick start. I am optimistic that the young group will achieve this if they are given a fair chance to grow and play more important role. I look forward to seeing the young talents we are talking about now become a large group of young professionals a couple years later.

(Mr. P. C. Li – FICS
Farenco 1974-1983, HK Chartering 1983-1986, Wallem Shipbroking 1986-1997, P.C. Li Shipbrokers 1997-2014, Now retired.)

港澳渡輪的回顧（1517-1999 年）

留金騰 / 劉銳業 / 余祺燁

最近香港及澳門業界不斷提到港澳基建和經濟產業的發展，港珠澳大橋及廣深港高鐵即將落成，將會為港澳渡輪發展帶來沖擊，港澳渡輪在珠江三角洲的定位仍是未知之數。毫無疑問，港澳渡輪促使了珠江三角洲及鄰近地區的發展及連貫性。為了探究港澳渡輪的歷史，筆者近日親身到訪澳門歷史檔案館，進行編理重要文件檔案，這些文件檔案為本文提供珍貴資料及研究方向，作為下篇文章 - 港澳渡輪與地區近代發展埋下伏筆。

從前，澳門是中國南方邊陲小漁港，然而其於航運史上有重要的地位。自 16 世紀以來，澳門便擔當著中國的門戶，為西方人來華貿易的港口，黃鴻釗於《澳門史》一書中將澳門發展分為四個時期：1. 泊口貿易時期（1517-1557 年）；2. 居留貿易時期（1557-1849 年）；3. 殖民統治時期（1849-1987 年）；4. 回歸過渡時期（1987-1999 年）。[1] 以上各個時期，渡輪都在澳門與鄰近地區起著非常重要的作用，利用水道把人和貨往內地或於港澳之間運送。自 1912 年，澳門土地面積 11.6 平方公里大幅擴張至 29.2 平方公里。從過去澳門半島、氹仔島及路環三部份組成的格局，演變為目前澳門半島和路氹填海區組成的二元格局。[2]

十九世紀初，隨著英國佔領香港，港澳之間便開拓了新的路線，兩地以貨運為主，多採用俗稱「大眼雞」的帆船，客貨相兼，其後才有火輪行駛兩地。由於英人在鴉片戰爭勝利後 (1842 年)，銳意經營香港，大興土木。建築工人、建築材料和糧食等，都由澳門運往香港，是故兩地交通十分頻繁。

第一艘行走港澳的輪船，是既載客也載鴉片煙的「皇后號」。這艘輪船的航線由英資渣甸洋行於 1852 年開始經營，而該洋行自 19 世紀 50 至 80 年代期間，幾乎控制了全部往來港澳的客輪。[3] 到 1888 年，由港、澳商人合資成立了省港澳輪船公司，才打破了渣甸洋行的壟斷。該公司承辦的貨客權，自 1930 年起由香港華人領袖何東承辦。[4] 該公司用「瑞安」和「瑞泰」兩艘姊妹輪船行駛港澳航線。「瑞泰」每天上午八時往澳，下午兩時返港；星期日上午九時三十分往澳，下午四時三十分返港。「瑞安」則每天下午五時三十分往澳，翌日凌晨三時返港； 星期日停航。[5] 每天上、下午各有兩班定期對開的輪船，已為港澳兩地居民帶來不少便利。到了 1930 年代，經營澳門賭場的泰興公司亦加入港澳航線的競爭，並有三艘輪船投入服務。此外，中興輪船公司亦於此時開辦往來港澳航線，[6] 使港澳水上交通更形頻繁。

二次世界大戰後，港澳兩地的貨運交通有進一步發展。至於港澳之間的客運發展則更為蓬勃。據統計資料顯示，1982年至1985年港澳航綫的客運量分別為8,083,341、8,238,145、8,942,164、9,235,227人次，佔澳門港口總出入人次九成五以上，[7] 可見循水路至澳門的旅客，大多由香港出發，即使是內地旅客，近年也仍多在香港的碼頭往來澳門。即使內地與澳門增加了不少航線，直至2015年，來往港澳的客輪班次仍佔進出澳門客輪班次約八成。[8] 自1985年開始，港澳水上客運交通工具更形先進，波音噴射水翼船、飛翔船、飛翼船、雙體船、快速客輪先後投入服務。從澳門往來上環港澳碼頭的水翼船，每30分鐘各對開一班，快速客輪則每天至少開5至6班。由此觀之，港澳客運航綫十分繁忙，並為旅客帶來不少便利。截至90年代，澳門有三家公司承辦港澳客運航綫服務。它們是遠東船務公司、港澳飛翼船公司及油麻地小輪有限公司。

對於澳門，渡輪在眾多對外交通工具中扮演一個重要的地位，它見證了澳門的歷史發展，同時為澳門帶來繁榮。至今，雖然只有噴射飛航和金光飛航兩間公司提供港澳之間的渡輪服務，然而其服務仍然頻繁，除了有原本的上環到外港碼頭、尖沙咀到外港碼頭的往返路線外，還有屯門到外港碼頭、氹仔到上環、氹仔到尖沙咀、外港碼頭到香港國際機場，以及氹仔到香港國際機場的往返路線。這些路線大多每三十分鐘一班，實在大大方便了港澳、內地及外國過境旅客，促進港澳與內地的交流，也發展了港澳兩地的旅遊業，更促成澳門發展成為東方拉斯維加斯。與此同時，渡輪促進了港澳居民工作、學習及社交各方面的往來。

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2. *何偉傑：《澳門賭城以外的文化內涵》，香港城市大學出版社，2011。*

3. *王超、林明等：〈澳門航運史之客運篇〉，收於陳子良編：《澳門百業：培正學生歷史報告選集(修訂版)》，澳門：培正史地學會，1998-2001，第二冊，第5頁。*

4. *〈省港澳輪船公司之承辦貨客權已由何東承批辦理〉，《華僑日報》，1930年6月26日。*

5. *〈省港澳輪船公司、太古洋行輪船每日往來省港時間一覽表〉，《香港工商日報》，1935年3月22日。*

6. *〈中興輪船航行港澳〉，《華僑日報》，1930年9月20日。*

7. 統計暨普查司：《統計年鑑》，澳門：統計暨普查司，1986， 第 278 頁。

8. 統計暨普查局：《統計年鑑》，澳門：統計暨普查局，2016， 第 207 頁。

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Law Column - 3 ships, 2 collisions and 1 judgment

Richard Oakley / Rory Macfarlane / Harry Hirst

On 2 June the Hong Kong Admiralty Court handed down judgment in a case involving two collisions which happened within three minutes of each other.

The two collisions occurred in the early morning of 14 May 2011, in Chinese waters in the precautionary area between the East Lamma Traffic Separation Scheme (TSS) and the Dangan Shuidao TSS, and involved two outbound container ships from Hong Kong - the MCC JAKARTA and the TS SINGAPORE - and a west bound container ship -the XIN NAN TAI 77 -heading for the Pearl River Delta. The first collision was between the MCC JAKARTA and the XIN NAN TAI 77, and the second collision was between the MCC JAKARTA and the TS SINGAPORE.

This is thought to be only the second time a civil case involving collisions at sea has progressed to a full liability trial in Hong Kong, the last time being in 2011 (The He Da 98 [2011] 5 HKLRD 126). This case raised some interesting issues, both on the law and on matters of procedure.

The interesting issues on the law included whether, as the two collisions were so close together in time, they should be treated as one collision or as two separate collisions for the purposes of apportioning liability; the application in particular, of the overtaking rule (MCC JAKARTA was overtaking the TS SINGAPORE at the time), the crossing rules (XIN NAN TAI 77 was on a crossing course with both MCC JAKARTA and TS SINGAPORE), and Rule 10 (the three ships were all navigating in or near the terminations of a TSS); and, of course, the degree to which each ship was at fault for the collisions and how liability should be apportioned between them.

The interesting issues on matters of procedure included how the parties various collision actions should be consolidated and, with two separate collisions, to ensure the liability trials were heard concurrently; and the appointment and role of the Nautical Assessor in collision cases in Hong Kong.

Most of these issues were resolved by the parties with the assistance of the Court before the actual trial. By the time of the trial it had been agreed that the two collisions should be considered separately; and that the TS SINGAPORE was not at fault in any way for the first collision, but was 5% to blame for the second collision. At the trial the Court was required to

determine therefore, how the liability of the MCC JAKARTA and the XIN NAN TAI 77 should be apportioned for both the first and second collisions. In doing so, the Court was greatly assisted by the provision of "real time" evidence in the form of electronic replays of the Hong Kong Marine Department's Vessel Traffic Service port radar and radio systems, and the vessels' own voyage data recorders; the witness evidence from the Masters of these two ships; and by the Nautical Assessor.

In a carefully reasoned and clearly written judgment, the Court concluded that the MCC JAKARTA was 20% and the XIN NAN TAI 77 was 80% to blame for the first collision; and that their collective liability (95%) for the second collision should be apportioned as between them in the same (80/20) proportions. Very helpfully, the Court added a postscript to the judgment on the role of the Nautical Assessor and the usual directions the Court will make in this regard for the benefit of parties involved in future collision cases in Hong Kong.

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Environmental liabilities a question of motive

Richards Hogg Lindley

The liability aspect of environmental costs falls traditionally within the ambit of P&I cover. However, there can be situations whereby such costs can be recovered as either general average (GA) or particular average (PA) from property insurers. This article will consider the topic from a GA point of view.

Historical development

The question of whether third party liabilities could be considered as GA came before the English Courts in 1915. The case, Austin Friars Steam Shipping Co. v. Spillers and Bakers, concerned a steamer which ran aground and was then refloated. Tugs assisted her into nearby docks and during this manoeuvre she twice made contact with the lock gates. This consequence was anticipated by both the master and pilot owing to the narrow entrance to the docks. The Court of Appeal confirmed that the liability to the lock/pier owners ($800,000 at current prices) could be allowed as GA, because it was foreseen as a natural consequence of the GA act performed for the common safety. At the time, the York-Antwerp Rules (YAR) did not include any general principles concerning third party liabilities. In Australian Coastal Shipping Commission v. Green (1971) the Court of Appeal considered whether third party liabilities that arose out of engaging tugs were admissible in GA. The court held that liabilities that might naturally have been contemplated as a direct consequence of the GA act (signing a towage contract) satisfied Rule C and could be allowed in GA. The fact that the GA loss was in the form of a liability rather than a sacrifice / expenditure was not in itself considered to prevent recovery in GA.

Applying the principles – a simple example

A loaded tanker has run aground. As part of the salvage operation the tanks are pressurized. As would be reasonably anticipated, the operation results in an escape of oil. Under YAR 1974, the additional costs of cleanup and liabilities arising from the escape from the pressurization are allowable in GA together with the value of the escaped oil itself. However, the YAR 1994 (Rule C) explicitly excludes liabilities in respect of damage to the environment in consequence of the escape or release of pollutant substances. Therefore, only the cost of the quantity of sacrificed oil would be allowed under YAR 1994. Obviously, identifying such quantities is a challenge in itself.

Taking refuge

Fortunately, the most common pollution related costs encountered involve prevention rather than clean up. Typically, these arise as a condition of entry into a port of refuge whereby owners must

undertake measures to avoid oil pollution, such as the provision of booms. The costs associated with entering a port of refuge (when for the common safety) are broadly allowable as GA under Rule X(a). However, since there is a simultaneous risk of oil pollution, it could be argued that the costs of providing booms should fall solely on owners, or their P&I Club. Where the oil booms are purely precautionary most average adjusters would be minded to charge the full costs to GA. However, where there is already a leak, the position is much less clear and will be dependent on the facts of each case.

Clearer waters

The position under the YAR 1994 rules is clarified through the inclusion of wording under Rule XI (d) which provides for (the extremely limited) circumstances where anti-pollution measures may be allowed as GA. These include those incurred as a condition of entering a port.

Littoral liabilities

As can be seen, including environmental liabilities themselves in GA is a controversial issue. As the "Exxon Valdez" demonstrated, such liabilities can exceed the property values by many times and litigation can last for years. Property insurers feel such allowances in GA mean that they are being exposed to pollution liabilities through a "back door". However, liability insurers (usually P&I Clubs) are of the view that if something is benefiting property then property insurers should be paying. In most cases a pragmatic compromise is required to balance the competing interests. The advent of YAR 1994 successfully helps achieve this.

Points to note

- There are specific provisions in the YAR 1994, Rule XI (d), which provide for anti-pollution measures to be allowed as GA, but these are extremely limited.

- Despite the limitations in the 1994 Rules, these may be preferable when deciding between the versions because these give clear guidance on what can and cannot be allowed as general average.

(Richards Hogg Lindley: Average Adjusters and Marine Claims Consultants)

買舊船時要注意的事項

陳任權 / 朱志統

舊船買賣的其中一項困難就是資料不齊全，但如果能跟足下列注意事項，則應可以減少很多錯漏。

(一) 審查 (船級社記錄 Class Record) :

在未去看實船時，應該清楚賣家提供原始船級記錄 (從新船交船開始至今) 查看此記錄的目的是 :

1) 知道船是在那一個國家及那一家船廠製造 (從此可得知該船的“船級社”及入籍規範 – 審查圖紙及監造的質量；可得知該船廠的製造質量和 ITP(船廠與船級及船東代表的協議有關 Inspection，Test Plan / Program for all Part of Welds of Hull / Outfit / Pipes) 等以及各種設備的安裝及調試要求和程序。此 ITP 至為重要，因為它可反映出此船製造的標準 !) 另外也可瞭解此船廠對鋼鐵的處理 (例如打砂至 SA2.5) 標準及油漆效果如何 (包括 PSPC 的執行狀況) 因為“它”會直接影響到該船的壽命和價值 。

2) 該船在交船後在營運期間所發生的一切都有船級記錄 : 例如 a. CSM，CSH (但是大部份船東不做 CSH, 只做 Annual Insp.) b. Docking Survey (包括 Draw of Tail shaft，Renewal of Stern Seals 及 Wear -down 記錄，Alignment 等等)。c. Accidents – 無論是船體，輪機，撞船等事故的描述和修理及鐵板換新的範圍都有詳細記錄。

3) 該船何時換船級或轉換船東及買 / 賣船等都有記錄。(從什麼船級變成什麼船級及公司的轉換都可以反映出該船管理和維修保養情況而幫助買家做選擇而決定留來自用或轉賣。

4) 掛旗國 : 掛什麼國家的旗，可以大致反映船東對船舶保養維修的態度。

(二) 實體看船

1) 船體 : 在碼頭或交通艇或在塢內，查看船穀有沒有變形、凹 / 凸狀況、各種環形或垂直的肋骨 (Framings) 有沒有彎曲，變形或扭曲。

2) 船底或船旁，有否嚴重的陰影 (Indented or Indented heavily)

3) 水下部份有否斑點腐蝕 (Pitting) 特別是在各壓載水柜內和吸口處，有較深的 Pitting，特別是油船 !!!

4) 電纜 : 注意有否大量換過的電纜和電線。(如隨船“看船”，則可用手去摸摸有沒有溫度 (指有沒有正常溫高) 及要注意主配電板有沒有“單眼仔” (即短路指示燈亮了 !。)

5) 住宿房間 : 各種狀況是否正常。冷氣或供暖或供風情況、風量情況、公共衛生情況 (特別是廁所); 照明情況 ; 通用報警情況 ;

6) 駕駛台 : 各種設備 (Instruments / Installations) 工作情況及效果要弄清楚。幾乎所有航海儀器多數可以在看船時請船員啟動查看。 特別一提的是 Smoke detector 是否正常運作。

7) 機輪 / 舵機房等 ：

a) 盡可能翻查航行日誌及輪機日誌來翻查各種主、副舵機是否有失靈或事故！

b) 向船上大車索取並翻查主 / 副機的維修保養記錄 (Over Haul Records)
- 主 / 副機的 Running Hour 及吊缸保養日期。
- 檢查和記錄主副機各氣缸的 Wear Down 記錄。
- 主付機的各種 Bearings 拆檢日期和狀況。
- 主機各氣缸的 Wear Down 有否 ovality ，有否單邊磨損 (不正中 !! 是先天的或是經常裝貨偏中等影響 !!)
- 主機合時換活塞 / 氣缸 (War-Rate 是否正常 !!)
- 主機 Shaft 的 Alignment 包括尾軸的 Alignments.

c) Boiler : 船上大車有否做 Salinity 的試驗及記錄 有關爐管的損壞 / 換新的記錄等。

d) 壓載水和搬運燃油的系統 ：-
- Control System 是否正常運作，自動或手動。
- Valves 是否工作正常。可以開關不影響操作的閥門作為試驗。
- 到 Pipe Tunnel 去查看上述情況，並且查看其清潔情況。(如有水或有油，情況肯定有問題！)

8) Fire Pump + Emergency Fire Pump : 最好作運作試驗。

9) General and Fire Alarms : 運作試驗。

10) Water Ballast / Peak Tanks : - 如果船齡超過 12 年以上的話，則須查看該船第三個“Special Survey” 的鋼板及肋骨的測厚記錄 (甚至自己要帶上測厚儀進行抽查，否則很快要換鋼板 !!) 及早通知船東開孔入內查看銹蝕程度。

(本文由陳任權供稿，朱志統整理)

AA TALK

Triple Collision
Claim under the Collision Liability Clause

Raymond Wong

Old law cases

The report on a case recently handed down by the Hong Kong Admiralty Court concerning two collisions involving three ships, has prompted the Editor to refer to the notes he made on a couple of interesting triple collision cases he studied whilst preparing for the examination of the British Association of Average Adjusters in late 1970's. They are:

France (William) Fenwick v. Merchants' Marine Insurance 1915

Whilst proceeding up the Seine, in an attempt to pass the "Rouen", the "Cornwood collided with the "Rouen" which then struck and seriously damaged the "Galatee" which was coming down the river at the time. The Owners of the "Cornwood" having been held liable for the damage to both the "Rouen" and the "Galatee", submitted claim against the Underwriters on the Policy under the Running Down Clause (now commonly known as the Collision Liability Clause). The Underwriters contended that the collision of the "Rouen" with the "Galatee" was not such a "consequence" of the collision between the "Cornwood" and the "Rouen" as to make them liable in terms of the policy.

The Court found for the plaintiffs, the Owners of the "Cornwood", the judge saying: "I think it sufficient to find that the forces put into operation by the negligent navigation of the "Cornwood" did in fact, not only cause a collision between herself and the "Rouen" but afterwards sent the "Rouen" into the "Galatee". Of course there must be a collision and in my judgment the collision between the "Rouen" and the "Galatee" was such a consequence of the collision between the "Cornwood" and the "Rouen" as makes the Underwriters liabile."

The case went to appeal which was dismissed, the Court holding that the collision between the "Rouen" and the "Galatee" was brought about by the collision between the "Cornwood" and the "Rouen".

Abadesa & Miraflores (Collision Liability) 1967

It was reported that the tanker "George Livanos" was following the tanker "Miraflores", both being inward bound in the River Scheldt. The other tanker "Abadesa" was outward bound. The "Miraflores" reduced speed to avoid a small coaster. As a result the "George Livanos"

closed to about half a mile astern. The "Miraflores" increased speed but a cross-current forced her towards mid-channel across the "Abadesa". Putting her engine full astern and letting her starboard anchor go, she sounded 2 of 4 short blasts of a local signal meaning: "Keep out of my way, I cannot manoeuvre.". The "Abadesa" put her engine full astern and let go her port anchor, but the 2 vessels collided. The "George Livanos" grounded while manoeuvring to avoid the "Miraflores".

It was submitted that "The liability of each vessel involved must be assessed by comparison of her fault with the fault of each of the other vessels involved individually, separately, and in no way conjunctively." The apportionment of fault was as follows.

Collision:

"Abadesa"	2/3rds to blame
"Miraflores"	1/3rd to blame

Grounding:

"Abadesa"	40% to blame
"Miraflores"	20% to blame
"George Livanos"	20% to blame

It was reported that the Underwriters on the "Abadesa" agreed to pay 3/4ths of the liability of the "Abadesa" to the "George Livanos", thereby accepting that such damage was a consequence of the collision on the facts presented.

Collision Liability Clause (previously known as the Running Down Clause)

The 3/4ths Collision Liability Clause under the Institute Time Clauses – Hulls 1/10/83 commonly incorporated in the policies of insurances on ship provides that:

8.1 The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reasons of the Assured becoming legally liable by way of damages for

8.1.1 loss of or damage to any other vessel or property on any other vessel

8.1.2 delay to or loss of use of any such other vessel or property thereon

8.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon, where such payment by the Assured is in consequence of the Vessel hereby insured coming into collision with any other vessel.

8.2 The indemnity provided by this Clause 8 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions:

8.2.1 Where the insured Vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 8 shall be calculated on the principle of cross-liabilities

as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

8.2.2 In no case shall the Underwriters' total liability under Clauses 8.1 and 8.2 exceed their proportionate part of three-fourths of the insured value of the Vessel hereby insured in respect of any one collision.

8.3 The Underwriters will also pay three-fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, with the prior written consent of the Underwriters.

Exclusions

8.4 Provided always that this Clause 8 shall in no case extend to any sum which the Assured shall pay for or in respect of

8.4.1 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever

8.4.2 any real or personal property or thing whatsoever except other vessels or property on other vessels

8.4.3 the cargo or other property on, or the engagements of, the insured Vessel

8.4.4 loss of life, personal injury or illness

8.4.5 pollution or contamination of any real or personal property or thing whatsoever (except other vessels with which the insured Vessel is in collision or property on such other vessels).

In practice, the remaining 1/4th of any sum or sums paid by the Assured within the terms of the clause is invariably covered by the vessel's entry in a Protection and Indemnity Association (commonly called P&I Club). Furthermore, the exclusions under the Clause 8.4 are liabilities customarily covered by the P&I Club.

It is however worth noting the construction of the following wording:

- "indemnify ... paid" – Underwriters are only liable when the Assured has paid.

- "legally liable by way of damages" – Liability must arise by way of tort and not by way of contract or statute, i.e. breach of duty (other than under contract) leading to liability for damages.

- "in consequence ... coming into collision ... another vessel" – There must be actual contact with another vessel.

- "indemnity ... in addition" – Claims arising under the clause are in addition to anything else recoverable even though the total amount payable exceeds the insured value.

- "Where ... both vessels are to blame ... unless the liability ... limited by law ... indemnity ... shall be calculated on the principle of cross liabilities" – The principle of cross liabilities is the method used for calculating the claim on the policy of insurance, there being however an important limitation, namely, when the liability of one or both vessels is limited by law.

For example

(By modifying a question suggested by Mr. D. John Wilson, a most distinguished average adjuster.) Vessel "A" was (a) insured on Hull & Machinery, etc. for $1,000,000 so valued, subject to the Institute Time Clauses – Hulls 1/10/83 with Deductible $30,000 and (b) entered on full conditions with an P&I Club. She was entering port when she collided in dense fog with the outward bound vessel "B". Both vessels sustained damages. Vessel "A" veered off "B" and struck and sank the barge "X" and the buoy moored thereto, and finally grounded causing damage to a submarine cable.

The liability for the collision and resulting damages was eventually determined on the basis of vessel "A" being 75% to blame and vessel "B" 25%, the damages amounting to a total of $1,200,000 being agreed as follows:

	Vessel "A"	Vessel "B"	Barge "X"	Buoy	Cable
Damage	$300,000	$130,000	$100,000	$10,000	$230,000
Demurrage	120,000	50,000			
Damage to Cargo	60,000		200,000		
	$480,000	$180,000	$300,000	$10,000	$230,000

Collision settlement

"A" is liable to "B" for 75% of $180,000		$135,000
"B" is liable to "A" for 25% of $420,000		105,000
Net, "A" is liable to "B" for		$ 30,000
"A" is also liable for 75% of damages to:		
Barge "X"	$100,000	75,000
Cargo in Barge "X"	$200,000	150,000
The Buoy	$ 10,000	7,500
Submarine Cable	$230,000	172,500
Total liabilities attaching to "A"		$435,000

"B" is liable for 25% of damages to:		
Cargo in "A"	$ 60,000	$ 15,000
Barge "X"	$ 100,000	25,000
Cargo in Barge "X"	$ 200,000	50,000
The Buoy	$ 10,000	2,500
Submarine Cable	$ 230,000	57,500
Total liabilities attaching to "B"		$150,000

Claim on H&M Policy

Particular Average		$300,000
Less: Recovery from "B"		75,000
		$225,000
Claim under 3/4ths Collision Liability Clause:		
Payments to: Vessel "B"	$ 135,000	
Barge "X"	75,000	
Cargo in Barge "X"	150,000	
	$ 360,000	
Whereof, 3/4ths		270,000
		$495,000
Deduct: Deductible		30,000
		$465,000

Claim on P&I Cover

Payments to: Vessel "B"	$ 135,000	
Barge "X"	75,000	
Cargo in Barge "X"	150,000	
	$ 360,000	
Whereof, 1/4th	$ 90,000	
Payments to: Buoy	7,500	
Submarine Cable	172,500	
	$ 270,000	

YORK-ANTWERP RULES 2016

Readers may have by now noted that the words underlined below under Rule 17 of the York-Antwerp Rules 1994 were omitted from the published text of the York-Antwerp Rules 2016 adopted in New York in May 2016.

York-Antwerp Rules 1994
Rule 17

To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Art.14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

York-Antwerp Rules 2016
Rule 17

(b) To these values shall be added the amount allowed as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average. *Where payment for salvage services has not been allowed as general average by reason of paragraph (b) of Rule VI,*

It has been submitted that the omission was by error and the missing words were not intended to be excluded in the New York discussion. It was suggested that the CMI Assembly would be asked in Genoa in September 2017 to rectify the position.

(Mr. Raymond T C Wong: Average Adjuster)

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