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Law Column -

INCE ADVISES ON A PRECEDENT CASE - ENFORCING AGREEMENT NOT TO TRADE VESSELS IN SCRAP SALES

英士在英國高等法院贏得最終禁制令並立先例 - 用禁令執行特定船舶買賣合同中的買方契諾

Chris Kidd / Rosita Lau / Ben Moon / Simon Cheng
Ince & Co 英士律師行

In the case of a contract for sale of a ship where there is an express term to the effect that the ship is "sold for demolition only", is the seller entitled to obtain an injunction to restrain the buyer from further operating this ship in breach of the express term of the agreement? Previously, there was no direct English legal precedent on this point. Ince's team of lawyers was instructed by the plaintiff shipowner to act on such case, where with the joint effort of our team in Hong Kong, London and barristers in England, it successfully obtained final injunction for the plantiff from the English High Court, which has recently made it clear that such injunction can be obtained to enforce agreements not to trade vessels sold only for demolition when a buyer ignores the agreement and trades the vessels after the sale. Recovering damages is however more difficult.

對於「被售船舶僅供拆卸」的船舶買賣合同中，如果買方不遵守約定從而營運船舶，賣方是否可以向法庭申請禁制令？此前，英國法並無此先例。近期，英士的律師團隊受原告船東的指示處理了一宗此類案件，在英士香港團隊，倫敦團隊，以及英國御用大律師與原告的共同不懈努力下，終於成功為原告在英國高等法院取得了最終禁制令 , 法院在最新出爐的判決中明確判定：如果在船舶買賣合同下，買方忽視「被售船舶僅供拆卸而在買得船舶後不得營運該船舶」的約定，並在獲得該船舶後營運該船舶，則賣方可從法院獲得禁制令以強制執行上述約定。 然而，賣方卻較難據此從買方獲得損害賠償。

This sets a historical precedent for such cases and makes an important contribution to the development of international maritime law and points the way for future shipping markets in these areas.

這為此類案件開創了歷史先例，為國際海商法的發展作出了重要的貢獻，也為今後的航運市場在上述領域內指明瞭方向。

Priyanka Shipping Limited v Glory Bulk Carriers Pte Ltd [2019] EWHC 2804 (Comm)

Glory sold the Capesize bulk carrier, *CSK Glory*, to Priyanka for demolition. Priyanka guaranteed that they would not trade the vessel further nor sell the vessel to a third party for any purpose other than demolition. After delivery, however, the price of scrap fell, freight and charter rates for Capesize vessels rose dramatically. Priyanka began trading the vessel despite Glory declining to give permission to do so.

Glory 公司將一條好望角型散貨船「CSK Glory」輪出售給 Priyanka 公司為其拆卸之用。 Priyanka 公司在船舶買賣合同下承諾，買該船舶只為拆掉它，而不會營運該船舶，也不會將該船舶再出售給第三人。 在交船後，拆船市場價格下跌，而好望角型船舶的運費及租金卻迅速上升。在此情況下，儘管 Glory 公司明確反對，Priyanka 公司卻執意營運該船舶。

Glory sought an injunction from the High Court in London to enforce the negative covenant to prevent further trading, and damages.

Glory 公司隨後在倫敦向英國高等法院申請禁制令，以執行上述否定契諾（negative covenant）來禁止買方繼續營運涉案船舶，並向買方索取賠償。

Priyanka did not dispute that it was in breach of the sale agreement but asserted that the breach was immaterial because it would cause Glory no recoverable loss and that an injunction should be refused.

Priyanka 公司並不否認其確實違反了買賣合同，但卻堅稱該種違約是不重要的，因為它並未造成 Glory 公司遭受任何可以索賠的損失，據此認為法庭應拒絕賣方上述的禁制令申請。

Injunction
禁制令

The High Court decided that this was an appropriate case where the Court could grant a final injunction to enforce the negative undertaking not to trade the vessel.

英國高等法院最終判定，在此案中法院發出最終禁制令是恰當的，以此來強制執行買方就有關「不營運買入的船舶」的否定（會營運船舶）契諾（negative undertaking）。

There were three obvious and undisputed breaches of the negative covenant not to trade the vessel the third of which concerned a third fixture concluded very shortly before the commencement of the trial in the knowledge that a final injunction was being sought. This being so, the ordinary position was that Glory was entitled to an injunction. It was for the buyer to satisfy the Court that an injunction should not be granted, where it would be unconscionable or oppressive for an injunction to be granted and where, in the exercise of the Court's discretion, an injunction should be refused. Similarly, if the question was whether the Court should award damages in lieu of an injunction, it was for Priyanka to show that it would be oppressive not to do so. However, Priyanka came nowhere near surmounting this hurdle.

本案中買方一共 3 次違反了那個否定（會營運船舶）的契諾，這 3 次違約是明顯且無爭議性的。 其中，第三次違約行為（訂立了第三份航次租約）就發生在開庭前的很短時間內，而當時買方已經知曉賣方正在向法庭申請最終禁制令。 在此情況下，一般來說，法律便認為 Glory 公司（賣方）有權獲得禁制令。 如買方不同意，則由買方向法庭證明該禁制令是不合情理或具有壓迫性的（unconscionable and oppressive），並證明在法庭擁有酌情權的情況下，法庭應拒絕發出禁制令。 同樣地，如果問題是法院應否判予損害賠償以

代替發出禁制令，則應當由 Priyanka 公司證明不判予損害賠償是具有壓迫性的。 但是，在此案中 Priyanka 公司遠遠未能符合上述的舉證要求。

Glory had a commercial interest which could be protected by an injunction. Priyanka's breaches were deliberate and not inadvertent. The conclusion of a third fixture, very shortly before the hearing, was regarded as "cynical". Priyanka only had itself to blame for any difficulties caused by an injunction preventing further trading in circumstances where they chose to conclude the third fixture less than a day before the hearing. The financial consequences of an injunction would not be so extraordinary as to be unconscionable or oppressive. A bad bargain was not enough to relieve a party from the terms it had agreed voluntarily and there was no good reason to allow Priyanka to load a further cargo nor award damages in lieu of an injunction to enable Priyanka to do so.

Glory 公司擁有可以由一份禁制令保護的商業利益。 買方 Priyanka 公司的違約是「故意而非不經意的」（deliberate and not inadvertent）。 買方在就快要開庭前還為涉案船舶訂立了第三份航次租約，這一行為是「明目張膽而毫無顧忌」（cynical）的。 對於一份禁止 Priyanka 公司繼續營運該船舶的禁制令所可能導致其在開庭前不到一天時間內急忙訂立的第三份租約而因此陷入的困境，他們只能去責怪他們自己。 禁制令給他們帶來的財務後果不會太過分以至於不合情理或具有壓迫性。 一個不好的交易（bad bargain）並不能令交易的一方從其自願達成的協議中抽身，因此沒有好的理由允許 Priyanka 公司繼續裝貨上涉案船舶，也沒有理由以判予賣方損害賠償代替對買方出具禁制令從而讓買方能這樣違約。

Damages
損害賠償

The general principle of damages is that they are restitutionary in nature – to compensate an injured party and put it in the same position as if the contract had been performed, not punish a contract breaker nor deprive the wrongdoer of profit. Here, however, Glory had sold the vessel and had no right or ability to profit from the vessel's use. Glory, instead, asserted that it had lost the value of its right by which Priyanka guaranteed not to trade the vessel and sought "negotiating damages" to reflect the notional bargain of a reasonable release fee for the relinquishing that valuable right.

有關損害賠償法律的一般原則是：損害賠償的目的是復原性的，即是將受害方置於如同合同已經被履行後其本應處於的地位；而並非為了懲罰違約的一方，也不是為了剝奪違約方獲得的商業利潤。 在本案中，Glory 公司將船舶出售給買方後，再無權使用該船舶，也不能憑藉該船舶獲利。 Glory 公司因此堅稱其應得到另一種形式的賠償責任，即 Priyanka 公司向其保證了其不會在買入該船舶後再營運該船舶，與之相對應的是 Glory 公司本來應當享有相應的權利，而現在 Glory 公司的這種權利被侵害， 所以應獲得賠償。 假設 Glory 公司與 Priyanka 公司再行商議，要使 Glory 公司放棄該等權利，其應當獲得合理的「棄權費」（release fee）。 因此 Glory 公司索賠的是「協商性損失」（「negotiating damages」）【即，通過假設性的協商本應獲得卻沒有獲得的棄權費（譯者注）】。

The judge observed that the availability of damages or otherwise in such circumstances was recently comprehensively reviewed by the Supreme Court in *One Step (Support) Ltd v Morris-Garner [2018] 2 WLR 1353*. The judge's analysis of *One Step*, however, indicated that negotiating damages were not available for breaches of any contractual right but only where "the defendant has taken something for which the claimant was entitled to require payment" as it was put by Lord Reed in *One Step*.

法官留意到，此類情形及該種損失在最近的在英國最高院的 *One Step (Support) Ltd v Morris-Garner [2018] 2 WLR 1353* 一案中已經被法庭詳細地考慮過。 法官在經過對 *One Step* 案的分析後認為，協商性損失只適用于「當被告奪取了原告某物，而原告是有權因此向被告要求就該行為支付價款」的情形（Lord Reed 法官在 *One Step* 一案中如是表述）， 而不適用於所有合同性權利被違反的情況。

The judge concluded that Priyanka's breaches "did not involve [Priyanka] taking or using something in which the Seller had an interest, a valuable asset, for which the Seller was entitled to require payment" because Glory had no proprietary or financial interest in the vessel once it had been sold. The judge, therefore, decided that the nature of the Glory's right was more analogous to a non-compete obligation for which, the Supreme Court in *One Step*, decided, negotiating damages were not available.

法官最終認定，Priyanka 公司的違約行為「並不涉及到【Priyanka 公司】奪取或使用了賣方【Glory 公司】享有利益的有價值的財產，從而使賣方有權向買方要求付款」的情形，因為一旦船舶被出售，Glory 公司對於船舶就不再享有財產權或經濟上的利益。 因此，法官認為本案中 Glory 公司的權利類似于「不予競爭義務」（non-compete obligation），根據英國最高院對 *One Step* 一案的判決，在此情形下協商性損失不適用。Priyanka 公司並沒有就最終禁制令上訴。

Glory was therefore entitled only to nominal damages in respect of the first two voyages but this did not extend to any future breaches because the judge had no knowledge of the effect that such breaches might have on Glory. It was not the Court's function to assist a party to commit a deliberate breach of contract. Leave to appeal has however been granted on the damages in respect of the first two voyages. Priyanka did not appeal against the final injunction.

據此，Glory 公司只能就涉案船舶先前的兩個航次獲得金額不大的賠償（nominal damages），但賠償不能延伸到買方的任何將來的違約，因為法官不知道買方這些將來的違約會對 Glory 公司會造成什麼後果。 法庭的功能並不是說明當事人去故意違約。 然而，法官批准了針對先前兩個航次的損害賠償的上訴權。

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International Maritime Organization (IMO) 2020

Lau Hiu Yan

Starting from January 1, 2020, the regulations of IMO 2020 will be officially implemented. Under this regulation, the IMO has set a limitation for Sulphur in fuel oil used on board ships of 0.50% m/m. In other words, our ships need to stop using high Sulphur fuel oil as we try to become a green logistics company. To comply with IMO 2020 in the coming year, here is a plan to comply with the regulations using three actions, with an aim to protect our planet and our company and to prevent climate change.

First of all, using Liquefied Natural Gas is the easiest action for complying with the regulations. Marine Gasoil (MGO), Low Sulphur Fuel Oil (LSFO), Ultra-Low Sulphur Fuel Oil (ULSFO) and Liquefied Natural Gas (LNG) are four common cleaner marine fuels. According to Marine in Sight (2019), LSFO has above 0.10% Sulphur but complies with a 0.50% Sulphur limit; ULSFO has a maximum 0.10% Sulphur content; MGO has a maximum Sulphur content of 0.10% mass, and 0.50% mass; and LNG has the smallest proportion with almost zero Sulphur. In light of the smallest Sulphur content ULSFO has in Heavy Fuel Oil (HFO), the price of ULSFO is around USD$550 per Metric Tonne, compared with LNG, it cost averages US$ 4.30 per million British thermal units (MMBtu). From this data, we can see that LNG is the best fuel option with the lowest cost and lowest Sulphur content, which is the best substitute for using original fuel oil. Besides LNG contributing the smallest emissions to the environment, Total Marine Fuels Global Solutions mentions that LNG's particulate emanations result in a decrease of up to 21% of Greenhouse Gas (GHG) emissions Well-to-Wake (WtW) when contrasted with current, typical marine fuels. This will contribute to a decrease in the impact of climate change and help fulfill our social responsibility. LNG has a long history and stable development to date and is not an up-and-coming product for marine fuel. It's wide usage in different industries means that the supply of LNG is sufficient and its maturity can stabilize the market price and it is much safer than using new clean marine fuel such as ULSFO since the risk of using LNG is very low.

Moreover, some of our ships should install scrubber systems to reduce Sulphur emissions, especially for older vessels. Regarding World Maritime Affairs, the scrubber is a framework that utilizes water to wash Sulphur dioxide (SO2) gases from primary and auxiliary engines and boilers. There are three types wet scrubbers: closed-loop, open loop, and hybrid type. The difference between the first two types of the scrubber is the alkalinity of seawater, and hybrid type is a combination to the two scrubber types. The hybrid type scrubber is the best choice for installing a scrubber system because of its effectiveness and economic advantages. The expense of installing and operating a scrubber is between USD 3-6 million depending upon

the size of the vessels engines and amount of off-hire losses during drydock to retrofit the scrubber system, plus the regular costs for annual maintenance and buying MGO for operating the scrubber while cruising in waters with low alkalinity. In the short term, it seems the fixed cost of using a scrubber is relatively high. However, the estimated life of a scrubber is 10 years, and the cost and demand for HFO will decline since it can't be used as marine fuel after 2020. Also, Wilhelmsen Insights mentions that using older vessels results in less payback time for speculation of the scrubber establishment since the lower maintenance cost and higher effectiveness in contrast with using very older vessels. Also, Ara Barsamian Lee Curcio's research noticed that the Payback and Return On Investment (ROI) of the scrubber is based on the daily fuel consumption, and show that using a Post Panamax Container ship with daily fuel consumption of 300 t/d, results in a payback time of 0.1 year. Hence, utilizing scrubbers is significantly more conservative than changing to new clean fuel. From this data, it concluded we should retrofit scrubbers on older large vessels that have sufficient space for adding the scrubber and, with the integrated repair and maintenance fee (for scrubber and ship) relatively low, the average cost will drop eventually.

Furthermore, the engine system of LNG-powered ships should improve in the future. As the study of G. Rutkowski introduced waste heat recovery (WHR), a system that the utilization of warm vitality that would somehow, or another be moved to the earth to achieve a helpful capacity. Although the investment cost is high, it's a cost-efficient method and environmentally, and it brings returns in the long term. Since WHR is an eco-friendly system, it may attract more customers who are concerned with social responsibility and low impact on climate change, who will finally choose our company, considering our company as a green logistics company.

My recommendation for the plan is to install scrubbers for older vessels while the quantity of LNG-powered ships increases gradually. A complete installation of scrubber needs at least one year to finish which included from supplier selection to redesign the area of the ship to procurement and testing. As a result, in the first year, we should focus on using LNG as our fuel to maintain the operation of the ships and will not be affected by the new regulation. After the retrofit of scrubber finished, then we will consume HFO and MGO for those container ships. At the same time, we are going to use the WHR system to purchase LNG-powered ships to replace the residual value of vessels with scrubber equals to zero. This plan is the most beneficial with lower risk and cost, it not only complies with IMO 2020 but also facilitating the impact of our company, avoids the increases in operating cost and tries our best to make a profit under the restrictions.

(Lau Hiu Yan:
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香港航運七十年

劉冀良

..... 續上期

1. 大陸改革開放

改革開放的基本國策定下後，大陸的進出口出現了持續的大幅增長，但數量仍不夠直接開通幹線班輪，貨櫃班輪巨頭們並未將其運力調往中國大陸港口，而大陸的港口建設一下子也沒有跟上外貿發展的需求，令大型貨櫃船難以直接掛靠大陸港口。

香港恰好位於東西海上貿易航線上的優越地理位置（令船舶偏航成本較小）、天然深水良港的條件以及經過十多年貨櫃化發展，當時已經擁有現代化的貨櫃碼頭（第 1-5 號碼頭）和配套設施，香港事實上已經成為亞歐、亞美、南北貨櫃班輪航線上的重要樞紐港口。在這種背景下，香港迅速成為中國大陸最主要的中轉港。幾乎所有對外開放港口都直接或間接開通了往來香港的貨櫃班輪航線。翻開那幾年《香港船務週刊》的船期表，香港和內地之間的中小型貨櫃班輪幾乎是遍地開花。

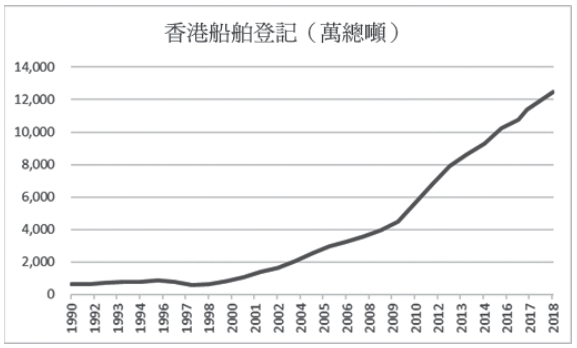
繁忙的港口、巨大的中轉貨量，令香港的貨櫃吞吐量曾經在 1987 年 -1989 年、1992 年 -1997 年、1999 年 -2004 年達到世界第一的位置。這一切給香港的現場航運服務業帶來了巨大的商機。最大的得益者就是貨櫃裝卸和堆場業（CY + CFS），香港的貨櫃碼頭成了世界上最繁忙，也是最昂貴的碼頭之一。

圖四：中流作業（來源：網絡）

由於需求旺盛，從上世紀八十年代末開始港英政府迅速批出了第 6-9 號碼頭。儘管如此，來港的貨櫃船還是太多，於是又出現了香港特色的中流裝卸作業，也即船舶來港裝卸貨不靠碼頭，而是在帶浮筒甚至拋錨的狀態下進行裝卸作業，貨櫃卸下後由駁船從船邊運走，再卸至岸上堆場，或者相反方向的操作。

以貨櫃船為主的各種訪港船舶帶動了一系列的現場航運服務產業，香港呈現出一片繁忙的景象。彼時幾乎每個船舶代理的家裡都會安裝一部傳真機，為的是踏准零點給海事處發傳真申請浮筒，正常辦公時間就別想申請到浮筒，浮筒的位置也有好壞，看代理申請的時間了。如果申請不到浮筒，船舶就要在錨地進行裝卸貨作業了，而不是所有船都可以在錨地作業。

除了訪港船舶帶來的現場航運服務業的這番好景外，大陸改革開放所產生的效應已經滲透到船東業，中國內地的船東開始通過香港在境外買船，船舶註冊選擇開放登記。由於香港船舶註冊也是開放登記的，加上語言和價格上的優勢，所以越來越多的大陸船東選擇了香港船舶註冊。



圖五；香港船舶登記（來源：香港海事處）

大陸船東選擇香港船舶註冊給香港的高端航運服務業帶來了新的需求，甚至惠及會計師行和商業銀行。即便是在香港成立的是單船 SPV 公司，也要聘請香港會計師核數、報稅以及提供其他秘書服務。由於大陸外匯管制的緣故，大陸船東往往會在香港銀行開立帳戶，作為收支外匯之用。

由於大陸在許多航運專業領域有各種限制，大陸船東一開始多數是到香港尋求所需要的服務，香港的航運專業服務公司也積極響應這種需求，紛紛在內地城市開辦聯絡處，將業務的觸角伸向大陸。至此，香港已經全方位成為進軍大陸市場的橋樑。這種生意模式給香港帶來的好處是，雖然業務實際在大陸操作，但業務的結算全部在香港進行。

然而，好運不會總眷顧某個地方，三十年河東，三十年河西，歷史的機遇往往就這樣悄然發生改變，而在這種改變發生前，甚至發生後相當長一段時間並不被人們重視。

一、 上海的崛起

早在 1997 年前中國大陸港口城市就在國務院的部署下開始了建設國際航運中心的探索。國務院在 1995 年做出了建設上海國際航運中心的決策，國家“十一五”規劃綱要也提出要建設上海、天津、大連等國際航運中心。

2009 年 4 月國務院頒佈了“國務院關於推進上海加快發展現代服務業和先進製造業建設國際金融中心和國際航運中心的意見”，也即國務院 19 號文件，於是一場轟轟烈烈的上海國際航運中心建設正式拉開了序幕。航運除了上海、天津和大連之外，廣州、廈門、舟山、寧波、青島等港口城市也紛紛加入到航運中心的競爭行列中來。

上海國際航運中心的建設思路自然是根據 19 號文件的精神展開的，19 號文件對上海國際航運中心建設的目標和任務也作了明確的定義：

> “到 2020 年，基本建成航運資源高度集聚、航運服務功能健全、航運市場環境優良、現代物流服務高效，具有全球航運資源配置能力的國際航運中心；基本形成以上海為中心、以江浙為兩翼，以長江流域為腹地，與國內其他港口合理分工、緊密協作的國際航運樞紐港；基本形成規模化、集約化、快捷高效、結構優化的現代化港口集疏運體系，以及國際航空樞紐港，實現多種運輸方式一體化發展；基本形成服務優質、功能完備的現代航運服務體系，營造便捷、高效、安全、法治的口岸環境和現代國際航運服務環境，增強國際航運資源整合能力，提高綜合競爭力和服務能力。…優化現代航運集疏運體系。適應區域經濟一體化要求，在繼續加強港口基礎設施建設基礎上，整合長三角港口資源，形成分工合作、優勢互補、競爭有序的港口格局，增強港口綜合競爭能力。加快洋山深水港區等基礎設施建設，擴大港口吞吐能力。推進內河航道、鐵路和

空港設施建設，優化運輸資源配置，適當增加高速公路通道，大力發展中遠程航空運輸，增強綜合運輸能力。促進與內河航運的聯動發展，充分利用長江黃金水道，加快江海直達船型的研發和推廣，從船舶技術和安全管理方面採取措施，推動洋山深水港區的江海直達，大力發展水水中轉。充分發揮上海蘆潮港集裝箱中心站及鐵路通道作用，做好洋山深水港區鐵路上島規劃研究，逐步提高鐵水聯運比例。”

顯然，文件對港口及其配套設施的建設規定的既明確又詳細，完全可以照章辦事。但對航運資源的集聚、市場軟環境的改善、現代化航運服務體系只提到了目標，未提及措施與路徑。正因如此，上海近十年來在硬件建設方面取得了顯著的成就，連續十年雄踞世界第一貨櫃大港的地位。上海港的貨櫃處理能力為什麼能從學習香港到超越香港？上海扼守長江口，香港據守珠江口，地理位置具有相似之處；上海周圍有南通、太倉、寧波和舟山的競爭港口，香港周邊則有深圳、廣州的強力競爭，可以說滬港兩地所處的競爭環境也相差不大。然而，上海在與周邊港口的競爭中脫穎而出，成為名副其實長江口的龍頭；同時，江浙二省在兩翼上的補充和錯位競爭進一步加強了長三角地區作為貨物樞紐港口群的地位。比如，寧波 - 舟山港的乾散貨中轉能力大幅度提升了長三角港口群接納大型散貨船的能力，同時刺激了各種江海直達二程船型的發展；舟山港船用保稅油政策先試先行讓它成為中國最大加油港，彌補了上海港的短板，增強了長三角港口群的綜合競爭力。長三角港口群一流的裝卸和集疏運體系為船舶和貨物提供了優質和高效的港口服務，自然而然地帶動了現場航運服務的需求。經過十年的積累，上海已經具備了現場航運服務所需的各種供應商和人才，不僅能夠彌補長三角其他港口的不足，而且也開始帶動當地人才的培養和集聚。

貨運能力的大幅度提升導致訪港船舶數量的大幅度增加，訪港船舶數量的增加必然導致對現場航運服務業的需求增加。2009 年上海國際航運中心建設剛剛開始的那年我寫了一篇題為《香港的航運地位保得住嗎》的文章，文章認為上海建設國際航運中心暫時不會對香港高端航運服務業產生顯著影響。但是，由於現場航運服務業受地域影響，來上海的船隻必然需要在上海本地尋求服務，即使有些服務一開始會從香港請人飛來上海做，但遲早會被上海本地公司取代，香港不可避免地要受到上海的影響。長三角地區的物流發展早在 20 世紀 90 年代就開始影響世界物流的流向，已經對香港的貨櫃處理量以及訪港船舶數量產生了衝擊。由於上海國際航運中心建設主要還是圍繞港口及其集疏運體系，所以隨著上海港的貨物集散能力的提高，其經濟腹地已經擴展到整個長江流域和江浙二省。這種情況下，現場航運服務業不可避免地受到上海的影響。香港不應執著於此類航運服務業與上海的競爭，也不要糾結於港口貨櫃處理量在全球的排位，有些過錯一旦形成局面在短期內是無法扭轉的。所以，香港應該揚長避短，繼續改善營商環境，採取積極、系統、有效的航運產業政策來培育新興高端航運服務業。

令人惋惜的是，香港並沒有做什麼。據“航運界”網 2018 年的一篇《報導》稱，“特區政府正在認真考慮今年 5 月份金融發展局提出的一份發展建議報告。該報告稱，香港迫切需要吸引更多的大型航運公司來香港發展，而不僅僅是註冊噸位的增加。該局建議政府將船舶租賃管理和相關服務公司的利得稅減半，使相關公司的優惠稅率不高於 8.25%。”

香港政府一路都有出臺振興香港航運的政策，但這類孤零零不成體系的政策很難奏效。香港的稅已經夠低了，該來的已經來了，沒來的是因為稅收太高嗎？眾所周知，註冊在開放登記國家或地區的船舶交了固定的噸稅和其他雜費後，從事國際航運的收入本來就免稅，而管理這些船舶的管理船東（真正船東）一般都是以管理人或代理人的面目出現。因為管理人和船東本質上是同一個人，所以管理人想收多少管理費就收多少管理費，財務上做到“持平”就無需繳納公司利得稅。它們來不來香港和你香港的公司利得稅高低並沒有多大的關係。如果說政策針對的對象是第三方船舶管理公司，那麼它們更關心的它們的委托方在哪裡，也即市場在哪裡它們就會在哪裡。上海的稅遠遠高於香港，可這些第三方船管公司為什麼還是趨之若鶩呢？

其實，香港還是有吸引船公司的地方的，比如它和大陸簽訂有避免雙重徵稅的協定，這張牌是完全可以打的，只是不能孤零零地甩張牌出去，需要做成一個“同花順”方可顯現出威力。

二、 葵涌碼頭壟斷市場結構造成的後果

香港的貨櫃裝卸為什麼會從 2004 年世界第一大港一路退步到 2018 年的第七位，而且比第八位的青島並沒有高出多少，相信 2019 年香港排到第八名甚至更下並無懸念？中國大陸的港口發展，導致物流格局發生改變是一方面的原因。另一個與之密切相關的原因是，香港的裝卸、儲存成本居高不下，逼使大陸其他港口，尤其是珠三角港口另起爐灶。

香港已經具備了一流的港口通關效率，而且港口的政府收費也不高，這一點至今大陸港口仍然無法超越。試想，如果香港的中轉成本很低，華南地區的貨櫃物流格局可能就不是如今這樣了。是什麼原因造成了香港的貨櫃裝卸費奇高呢？

我們先簡單回顧一下香港葵青貨櫃碼頭的發展歷史。香港的貨櫃碼頭分為葵涌和青衣兩個區域，總共 24 個泊位中葵涌占 18 個、青衣占 6 個。葵涌碼頭全部在 1997 回歸前啟用，回歸後啟用的南北九號碼頭均坐落在青衣。在全部 24 個泊位中，和黃集團旗下的香港國際貨櫃碼頭（HIT）占了 12 個（還不包括和中遠海運集團聯營的八號碼頭），也即 50%，回歸前所占份額更高達 56%。另一家碼頭營運商現代貨箱碼頭 (MTL) 占了 7 個泊位，也即 29% 的份額；但 1997 回歸前僅占 3 個泊位，也即 17% 的份額。

貨櫃碼頭（由北至南排列）

貨箱碼頭[3]	經營者	水深（米）	泊位	碼頭長度（米）	岸吊	面積（平方米）	處理量（乾標準箱）	啟用年份
葵涌泊位								
五號碼頭（CT5）	現代貨箱碼頭[4]	14	1		6			1988
一號碼頭（CT1）	現代貨箱碼頭	14	1		4			1972
二號碼頭（CT2）	現代貨箱碼頭	14	1		4			1972
三號碼頭（CT3）	迪拜港貨櫃碼頭[5]	14	1	305	4	167,000	> 1,200	1972
四號碼頭（CT4）	香港國際貨櫃碼頭[6]	12.5	3		8			1976
六號碼頭（CT6）	香港國際貨櫃碼頭	12.5-15.5	3		11			1989
七號碼頭（CT7）	香港國際貨櫃碼頭	15.5	4		15			1990
八號碼頭（東）（CT8E）	中遠-國際貨櫃碼頭[7]	15.5	2	640	9	300,000	1,800	1993
八號碼頭（西）（CT8W）	亞洲貨櫃碼頭[8]	15.5	2	740	8	285,000	> 2,000	1993
青衣泊位								
九號碼頭（北）（CT9N）	香港國際貨櫃碼頭	15.5	2	700	9	190,000	> 2,600 (N&S)	2003
九號碼頭（南）（CT9S）	現代貨箱碼頭	15.5	4	1,240	16	490,000		2003

表一：香港貨櫃碼頭（來源維基百科）

顯然，HIT 擁有壟斷定價權，尤其在 1997 年前壟斷地位更高。港英政府採取了所謂的“觸發點機制”，也即只有當現有設施預計將會達到充分使用的情況下，才會批准興建新的貨櫃碼頭。此舉造成了求大於供的效果是明顯的，保障碼頭營運商的利益只是港英政府的一個說法，實際造成壟斷地位有利於港英政府把爛泥地賣出個好價錢。

港英政府採取招標的方式批地，一個外來投資者只能根據碼頭現行的裝卸費率測算投標價格，出價太高必然導致將來營運時入不敷出，貿然提價若是得不到相鄰碼頭的響應只會招致損失。但具有壟斷地位的商家握有市場的定價權，它就可以開出更高的投標價，中標以後可以來一個整體提價，其他碼頭營運商必然跟隨。

在九號碼頭的招標方式上雖然改用了協議招標，HIT 不能再用價高者得這張王牌，港英政府還是把碼頭的主要部分協商給了 MTL——葵青碼頭第二大營運商，充其量減弱了 HIT 的壟斷的地位，根本無法改變香港貨櫃碼頭寡頭壟斷的市場格局。

回歸後的特區政府似乎沉浸在 1999-2004 香港作為世界第一大貨櫃港的喜悅中，沒有重視 1990 年中央開放開發上海浦東將對上海帶來如何巨大的能量，沒有居安思危去思考香港貨櫃裝卸業的結構性問題將會導致什麼後果，而灰犀牛正在慢慢地靠近——上海洋山港一期碼頭於 2005 年 12 月 10 日開始啟用。

香港高企的貨櫃裝卸費（至今仍然是中國港口中最高的，大約是上海的三倍）最終導致全國各港紛紛自行發展貨櫃裝卸，分薄了香港的貨櫃吞吐量，來港的船舶數量驟減，香港的裝卸以及其他現場航運服務業備受打擊。與船舶和貨物相關的現場航運服務需求驟減，生意慘淡。甚至連繁華一時的上環電船碼頭也變得門可羅雀，筆者曾經在香港街頭看到一位以前的電船調度經理竟然在街頭做起了“咕喱”（Coolie），情景令人唏噓。

三、 老天留給香港最後的機會

回歸以後雖然各種機構、團體也常有向特區政府建言獻策，但往往偏重某個微觀的問題或者反映某些現象，並沒有給特區政府提出一個整體的航運中心優化方案，或者說一個系統性的航運產業政策。在香港的好運期和大陸改革開放的初期，自由放任的經濟政策也許是最好的。但回歸以後形勢發生了很大的變化，尤其面臨新加坡在高端航運服務業方面的競爭和來自大陸港口的貨櫃物流上的競爭，香港依然如故的自由放任政策令香港航運的綜合競爭力顯著下降。

按理說，憑借香港與內地城市的制度差異，香港本應在高端航運服務業方面在回歸以後與大陸產生更緊密的合作關係。但是，陸港合作始終停留在香港人常說的“有姿勢、冇實際”狀態上，用一句大陸的俗話說就是找不到“抓手”。

十年來上海的高端航運服務業在航運中心建設的政策推動下取得了一定的發展，從無到有、從少到多、從小到大，但發展速度也不令人滿意。舉個例子說，將近十年來上海在航運市場指數和航運衍生品交易方面做出了不懈的努力，但是受制於制度和政策限制仍然步履蹉跎，至今仍在探索中。相比之下，香港擁有如此寬鬆自由的經濟體制和成熟的衍生品交易體系，卻鮮見這方面的陸港合作。

除了制度和政策限制外，大陸幾個航運中心競爭城市針對航運服務業的產業政策同樣也存在缺乏系統性、務實性的問

題，所以未能對航運服務業起到積極的推動、整體優化和強化的作用，尤其高端航運服務業的發育程度完全沒有達到與中國巨大的市場體量相稱的速度和成熟度。

這也許是老天留給香港航運的最後機會。憑借比大陸具有絕對優勢的稅收制度、營商環境、外匯制度、金融環境、普通法的法律環境和現有的航運人才，香港沒理由不成為中國高端航運服務業的引領者、參與者和合作者。

(劉巽良：中國新造船價格指數有限公司董事兼總經理)

How Tomorrow's Regulation Affects Today's Strategy

William Fairclough

Shipping, it often seems, is constantly having to adjust to the latest set of environmental regulations. Whilst the industry should welcome efforts to improve standards and reduce the environmental impact of our daily operations on this fragile planet, staying at the forefront of regulatory changes can have a significant impact on day-to-day business. The challenges can be both short-term and long-term and can impact our strategy in fundamental ways.

The principal environmental challenges that lie ahead for all shipping companies stem from preparing for the myriad environmental regulations that are periodically being thrust upon the industry. Ballast Water Treatment legislation and the pending IMO 2020 regulations are both cases in point. Too often in shipping we have seen bad regulations introduced that mean being a first-mover can infer significant cost rather than any meaningful benefit. A good example is Ballast Water Treatment where the early equipment was expensive to install and often failed to meet all of the global regulations leading to expensive retrofits and in some cases the replacement of defunct equipment.

IMO 2020 has had its own challenges and from a commercial perspective it exacerbated a seasonally weaker period for earnings, particularly in the bulkcarrier sector, thanks to the significant increase in the price of compliant fuel after 1st January, 2020. Despite this, many of the doomsday scenarios in respect of bunker availability have proved largely unfounded and, notwithstanding the poor freight markets, the switchover period was largely smooth. Any hopes that the absorption of capacity in relation to vessels fitting scrubbers and the introduction of congestion and inefficiencies during the handover period would lead to a firmer chartering market were dramatically dashed by the emergence of Coronavirus, which has had a devastating – but hopefully short-term – impact on all shipping sectors thanks to widespread market disruption in China.

Continued volatility in the bulkcarrier and tanker markets looks assured, but at the same time there are serious regulatory challenges looming further down the road. From a long-term perspective, the real challenge for the industry lies in meeting stringent future carbon emission regulations that impose a reduction in carbon intensity

(i.e. carbon emitted on a vessel per mile basis) of 40% from 2008 levels by 2030 and an overall reduction in total carbon emissions for the shipping industry of 50% from 2008 levels by 2050 – equivalent to something like a 70% reduction on a per vessel basis given the increased number of vessels in circulation. These targets will present a tremendous challenge for the industry over the next few decades and could have profound implications on the design and type of vessels demanded and built by the industry going forward.

(William Fairclough: Managing Director of Wah Kwong Maritime Transport Holdings)

2017 年度中國五件海事審判典型案例港式簡要版

戴錫崑 / 李翊

中國最高人民法院於 2018 年 8 月，公佈了 2017 年度的十件海事審判的典型案例，[1] 這些案例不單是各不同類型案件的範例，具有指導性，可統一各地法院的判決，提高判決的質素，對從事中國海商法研究的人士，也甚具參考價值。

然而中國判決書的寫作模式，與香港的判決書甚為不同，對習慣後者的人而言，中式判決書並不易讀及理解。為此，編者把前五件海事典型案例，為香港讀者先加以「消化」，把案例改寫為比較符合香港讀者閱讀習慣的文字及格式，使更多人容易瞭解這些珍貴的典型案例。

1. 海上貨物運輸合同糾紛案：浙江隆達有限公司訴 A.P. 穆勒 - 馬士基有限公司

基本案情及判決

托運人從寧波出口一批不銹鋼產品至斯里蘭卡科倫坡港，交由承運人承運。當貨輪距離目的港不足 2 天時，貨代公司發現運錯目的地，乃要求承運人將貨物改港或者退運。承運人回覆無法安排改港，如需退運則需與目的港確認後才能回覆。

次日，貨代公司詢問貨物是否可以原船帶回。承運人回覆，貨物在目的港卸載後，需要由當時的收貨人在目的港清關後，再向當地海關申請退運。待海關批准後，才可以安排退運事宜。貨物到達目的港約 10 個月後，托運人向承運人發電郵表示，已按要求申請退運，隨後承運人告知涉案貨物已被拍賣。托運人乃向寧波海事法院提起訴訟，要求承運人賠償其貨物的損失。

一審法院駁回托運人的請求。二審法院改判承運人需賠償 50% 的貨物損失。

最高人民法院處理再審時，解釋合同法第 308 條的規定謂，海上貨物運輸合同的托運人享有請求變更合同的權利，同時也應遵循公平原則確定各方的權利和義務。如果變更運輸合同難以實現或者將嚴重影響承運人正常營運，承運人可以拒絕托運人改港或者退運的請求，但應當及時通知托運人不能執行的原因。

托運人在船舶到達目的港的兩三天前，提出改港或退運的要求，而此案是以國際班輪運輸，承運人無法配合該要求，是客觀合理的做法。一審的判決符合公平原則，應予以維持。托運人明知目的港無人提貨，而未採取措施處理，致使貨物被海關拍賣。其指責運送人未盡謹慎管貨義務，舉証不足。二審的判決缺乏事實依據，適用法律不當，應予糾正。

典型的意義

合同法第 308 條是否適用於海上貨物運輸合同，一直是理論研究與審判實務中爭議很大的問題。本案再審判決以案件的

事實為根據，並依據合同法之公平原則，合理平衡海上貨物運輸合同各方當事人之利益，確定了合同法第 308 條適用於海上貨物運輸合同的一般規則。這一判決，統一了相關糾紛的裁判尺度，為正在進行的海商法修訂工作提供了寶貴的司法經驗。

2. 船舶建造保險合同糾紛案：中國人民財產保險股份有限公司訴三福船舶工程有限公司

基本案情及判決

承建方與訂船方簽訂了造船合同。隨即，合同雙方又與設計方，簽訂了該船舶建造的技術規格書，約定船舶達到乾舷吃水 8.25 米時，載重噸大約為 16,900 噸。

承建方向保險人投保船舶建造險。保單第 3 條列明，保險責任範圍包括「保險船舶任何部分因設計錯誤而引起的損失」。第四條列明的除外責任，包括「建造合同規定的罰款以及由於拒收和其他原因造成的間接損失」。

涉案船舶基本建成前，進行的空船測試顯示：空船重量為 6,790 噸，吃水 8.25 米時，載重噸為 15,968.60 噸，比設計合同的約定少 931.40 噸。因此，合同雙方簽訂備忘錄，協商同意降價 286 萬美元。此後，承建方通過增加船舶乾舷吃水 0.2 米，將船舶載重噸增加至 16,593.90 噸，並向訂船方實際交付船舶。

承建方就上述降價損失，向保險人提出保險索賠被拒，遂提起訴訟。

一審認為承建方因船舶吃水設計錯誤，所遭受的經濟損失人民幣 18,038,878 元，屬於船舶建造險的承保範圍，判決保險人賠償該損失及其利息。二審基本同意一審判決意見，但認為一審判決沒有扣除保險單約定的免賠額人民幣 14 萬元，遂在此基礎上相應改判。保險人不服二審判決，向最高人民法院申請再審。

最高人民法院處理再審時，首先解釋了船舶在海商法中的定義。「船舶」，應指已基本上建設完成，且具有航海能力的船舶。船舶建造險所承保的船舶，是否屬於該法規定的船舶，需要根據其是否具有航海能力，分階段相應認定。

本案在承建方投保當時，造船材料尚未搬移到船臺上，遠未建成為海商法一般意義上的船舶，且在船舶建成前的建造與設計階段時，已發生保險事故。因此，發生保險事故時，是仍在建構中的船舶，既不是海商法中的船舶，也就不應該適用海商法中關於海上保險的規定。因此，一二審審理本案時，均適用法律錯誤。

其二、對於保險人的賠償責任，保險條款的規定為「本公司對保險船舶的下列損失、責任和費用，負責賠償」。通常的理解下，保險人的責任，應包括保險船舶有形的物理損害（損壞）和無形的經濟損失。

其三、保險責任範圍，應以造船合同、保險單和保險條款來確定。被保險人 (即承建方) 與訂船方，在造船合同約定之外另行協商賠償，該賠償已超出保險合同當事人訂立合同時的合理預期，保險人有權拒絕賠付。最高院乃改判保險人應賠償的金額減少為人民幣 5,640,640.45 元及其利息。

典型的意義

航運和保險業都特別關注船舶建造險的法律適用、保險條款的解釋，以及船舶設計錯誤、損失賠償數額認定等，一系列比較複雜的法律適用和海事專門技術問題，本案對此等問題提供了一個示範性的案例。

3. 海上貨物運輸合同糾紛案：海德國際貨運代理有限公司訴英達華工貿有限公司

基本案情及判決

托運人委託貨代公司運輸照明設備一批至哥倫比亞。貨代公司簽發了一份無船承運人提單，記載了托運人及收貨人的公司名稱、裝貨港及卸貨港、運費到付、運輸方式為場到場（CY-CY）等資料。雖然托運人一直持有涉案的提單，且未收回全部貨款，但貨物已在卸貨港在無提單的情況下被提取。托運人乃以貨代公司為無船承運人，向其要求賠償貨物。貨代公司抗辯稱其並未向收貨人交付貨物，涉案貨物是因在卸貨港海關保稅倉庫超期存放，而被哥倫比亞海關依據法律規定作為棄貨處理，海德公司依法無需承擔責任。

一審以無船承運人對其抗辯，所提交的哥倫比亞稅務海關局相關文件，並非原件，也沒有辦理公証認証手續，故對其該等証據不予採信。判令無船承運人需承擔無單放貨的賠償責任。在二審期間，無船承運人補交經認証的哥倫比亞稅務海關局相關文件，証明其抗辯理由屬實，由二審改判免除其交付貨物的責任。

典型的意義

本案是典型的國際海上貨物運輸合同交付糾紛，尤其涉及法院依法審查採信外國証據問題。另一方面，本案具有國際貿易商業風險提示的意義。當外國買方未按時付款贖單時，賣方 (即本案的托運人) 也不能忽視自己為提單持有人的權利與義務，要及時在卸貨港採取適當的措施，保護貨物的權益，否則只會導致「錢貨兩空」。

4. 海上貨物運輸合同糾紛案：招商局物流集團有限公司訴以星綜合航運有限公司、索爾特化工有限公司

基本案情及判決

航運公司與物流公司簽訂了一份訂艙協議，約定物流公司以航運公司為其進出口貨物的運輸承運人。並約定若貨物在目的港無人提取時，由航運公司代為處理該貨物，而所造成的一切責任，由物流公司及托運人負連帶責任。

有一批貨物托運人獲發指示提單，而貨物運抵目的港後，沒有收貨人持正本提單提貨。最後貨物在目的港被銷毀，航運公司為此支付了銷毀費用、堆存費、裝卸費等。航運公司訴請物流公司及托運人負連帶責任，賠付銷毀貨物的各項費用。

一審法院判令物流公司，需支付銷毀貨物的各項費用。二審法院認為物流公司雖非該批貨物的托運人，但必須依照訂艙協議向航運公司負責，賠付銷毀貨物的各項費用。法院並解釋海商法第 87 及 88 條的承運人留置權，為承運人主張債權的方式之一，承運人行使留置權與否，不是其向托運人索賠的前置條件。

典型的意義

本案是典型的目的港無人提貨，引起的海上貨物運輸合同糾紛。本案明確了在目的港無人提貨，而使承運人受損時的責任主體。承運人有基於貨物運輸合同關係，可向合同相對方的托運人主張權利。

5. 船舶碰撞損害責任糾紛案：力鵬船運有限公司等訴中海發展股份有限公司

基本案情及判決

甲公司擁有甲船，而乙公司擁有乙船。甲乙兩船發生碰撞，致甲船船體右傾，又因艙內集裝箱繫固不當而發生倒塌，致使船體右傾增大。甲船再被拖輪從左側頂推往淺水區而擱淺，最終導致沉沒。

海事部門的調查報告中，認定乙船負主要責任，而甲船負次要責任。

甲公司及甲船保險人訴請，判乙船負80% 的事故賠償責任，並以乙船的海事賠償責任的限制基金中優先受償。乙船抗辯認為甲船的沉沒，碰撞事故並非是主因。

一審法院認定在碰撞方面，乙輪負60% 責任，而甲船負 40% 責任。但甲船的沉與其集裝箱繫固不當有關，甲船應負60%，而乙船負 40% 責任。海事賠償責任的限制基金，應先相互抵銷，然後受償。

雙方均提起上訴，二審法院認定，在碰撞及沉沒方面，乙船負 60% 責任，而甲船負 40%。

乙船申請再審。最高院認定甲船的艙內集裝箱繫固不當，是該船沉沒的主因。因此，維持一審的判決，即甲船對其沉沒要承擔 60% 責任，而乙船隻負 40% 責任。

典型的意義

本案船舶碰撞部分，涉及大量航海、船舶駕駛、貨物配載、集裝箱繫固等專業而複雜的証據，法院經過充分的論証，找出甲船沉沒的主因。此處理方式既符合技術規範，也符合法律的相關規定。

至於海事賠償責任的限制基金方面，法院在認定雙方的損失及責任後，根據「先抵銷，後受償」的原則彌定賠償，這是符合海商法的規定。

1. 全文請參見中國最高人民法院官網 http://www.court.gov.cn/zixun-xiangqing-111541.html

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AA TALK

HULL INSURANCE CLAUSES - Insured Perils (I)

Raymond Wong

(As noted in Issue 122 the Editor of this column advised he would visit ITC-Hulls 1/10/83 with the assistance of the book "ITC HULLS 1.10.83" which was written by Mr. D. John Wilson who kindly allowed the Editor copyright on his book for any future editions.)

Clause 6 PERILS

6.1 This insurance covers loss of or damage to the subject-matter insured caused by

6.1.1 perils of the sea rivers lakes or other navigable waters

6.1.2 fire, explosion

6.1.3 violent theft by persons from outside the Vessel

6.1.4 jettison

6.1.5 piracy

6.1.6 breakdown of or accident to nuclear installations or reactors

6.1.7 contact with aircraft or similar objects, or objects falling therefrom, land conveyance, dock or harbour equipment or installation

6.1.8 earthquake volcanic eruption or lightning.

6.2 This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1 accidents in loading discharging or shifting cargo or fuel

6.2.2 bursting of boilers breakage of shafts or any latent defect in the machinery or hull

6.2.3 negligence of Master Officers Crew or Pilots

6.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.5 barratry of Master Officers or Crew, provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

6.3 Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause 6 should they hold shares in the Vessel.

6.1.1 Perils of the seas rivers lakes or other navigable waters

Of all the risks covered by the policy, *'perils of the seas'* is by far the most important, and, for the purpose of the present Analysis, the term covers all such casualties as:

A. Heavy weather (storm, hurricane, typhoon, or by whatever other local name such weather is called)

B. Strandings and groundings

C. Collisions with other ships

D. Contact with piers, wharves, and floating or submerged objects

E. Fortuitous incursion of seawater, etc.

Reference is made to Rule of Construction No. 7 from the Marine Insurance Act, 1906, which states that:

"The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

On the definition "ordinary acts of the wind and waves", it is held in the *"Miss Jay Jay" (1985)* that:

"the principal object of the definition is to rule out losses resulting from wear and tear. The word "ordinary" attaches to "action", not to "wind and waves".

Ordinary wear and tear to the ship is not covered, nor does the term cover every accident or casualty which may happen to the ship on the sea. It must be a peril "of" the sea, i.e. something peculiar to or which, essentially, can happen only at sea. To emphasize the point by contrast, fire is not a peril of the sea because it is not peculiar to the sea and takes precisely the same form when it occurs on land.

Perils of ... rivers, lake, or other navigable waters

We have just mentioned that "perils of the seas" comprises only perils peculiar to the seas and, to avoid any possible suggestion that, for instance, a stranding or collision in a river, lake or other navigable water was not covered by the policy, the words presently under discussion were added for the first time when these clauses were revised in 1983.

6.1.2 Fire, explosion

Unlike some expressions in the policy wording, the term "fire" can be readily understood even by a layman. Nevertheless, occasions will arise when some precise definition may be required and the following may be found helpful:

"Burning accompanied by light or flame or incandescence" *(Dreyfus & Co. v. Tempus Shipping Co. (1931)*

At this stage it may be worth mentioning the legal case of *"The Knight of St. Michael" (1898)* in which a ship carrying a cargo of coal from Australia to South America was obliged to put into a port of refuge when her cargo of coal became heated, though it was never in a state of actual combustion. Some of the

cargo was sold in the port of refuge and it was held that the shipowner was entitled to recover the freight he lost thereby on the grounds that, though not actually a loss by fire, which used to be included in the old SG Policy form: "all other perils, losses and misfortunes".

The 1983 policy includes no such words as "all other perils, losses and misfortunes", but it had been publicly stated on a number of occasions that the omission of these words was not intended to reduce the cover offered by the previous policy wording. One must assume, therefore, that cover still exists under the term "fire" for such risks.

In similar fashion, damage caused by smoke, or by water or other means used to extinguish or minimize the effects of a fire, would also be recoverable as a loss by fire. An example of such a loss is provided by the case of *Symington & Co. v. Union Insurance Society of Canton (1928)*, which concerned a cargo of cork awaiting shipment and lying on the jetty in the port of Algeciras. When a fire broke out on the jetty, and in order to prevent the fire spreading, the local authorities jettisoned part of the cork into the sea, and the loss of cargo was held to be recoverable.

Assuming that a fire has occurred, the assured is not obliged to show the reason for, or why, the fire broke out. In 9 cases out of 10, fires are the result of negligence or carelessness but, as stated in Section 55 (2) (a) of the Marine Insurance Act, 1906:

"The insurer ... is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew",

if the insurer wishes to deny liability for loss or damage caused by fire, the onus is upon him to show that the fire:

A. Was caused or attributed to the wilful misconduct of the assured (e.g. arson, or the deliberate setting fire to the property by the owners), or that it ...

B. Arose from a risk excluded by the policy, e.g. war, or strikes etc.

It is worth noting, however, that although the underwriters of the particular cargo which self-ignited can avoid liability under the terms of their policy, other cargo which is damaged by the conflagration - or the ship - can still claim from their own underwriters on the grounds that, insofar as they were concerned, the fire was accidental.

Explosion

A dictionary definition of this term is as follows:

"The action of going off with a loud noise under the influence of suddenly developed internal energy of a boiler, bomb, gun etc."

In the case of *Commonwealth Smelting Ltd. v. Guardian Royal Exchange Assurance (1984)* it was concluded that the word "explosion" in a policy of insurance

denoted "an event that is violent, noisy and caused by a very rapid chemical or nuclear reaction, or the bursting out of gas or vapour under pressure".

It matters not whether the explosion occurs on board the insured vessel, or whether it occurs on shore, on another vessel, or elsewhere; damage caused by any explosion is recoverable under the policy, provided only that the explosion was not caused by a risk excluded by the policy, e.g. war, or strikes, or by the wilful misconduct of the assured himself etc.

6.1.3 Violent theft by persons from outside the vessel

One of the named perils in the old SG Policy form was "thieves", and Rule for Construction No.9 in the Marine Insurance Act, 1906 states that:

"The term 'thieves' does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers" (a risk for which the Master and/or the Shipowners were deemed responsible).

The 1983 policy wording incorporates the idea from the Rule of Construction that theft can be committed only by people other than the crew or passengers.

The introductory word "violent" was probably included to give effect to the legal case of *La Fabrique de Produits Chimiques S. A. v. Large (1923)*, where it was held that the term "thieves" refers only to what is termed "assailing thieves", i.e. robbery with violence. It must also be noted, however, that the degree of violence required to constitute theft is not particularly great. It is not necessary that the thieves should exercise violence against the watchmen or crew in order to gain entry; it is probably sufficient if they merely break a window or padlock in order to gain entry.

Although this clause 6.1.3 covers only theft by persons from outside the vessel, it should be noted that if, for instance, the crew stole the compass or any other part of the ship's equipment, this would constitute a loss by "barratry", dealt with under 6.2.5.

Please see notes below on Clause 6.1.5.

6.1.4 Jettison

This is the throwing overboard of cargo and/or ship's equipment, and it most frequently occurs when the ship has run aground and needs to be lightened in order to refloat. As such, the loss will probably be admissible as general average and shared by ship and other cargo interests, but the assured has a direct claim on the policy for the whole of his loss caused by the jettison in the first instance, *Dickinson v. Jardine (1868)*.

More for the sake of interest, mention may be made of the very ancient law case of *Butler v. Wildman (1820)*, in which the master of a vessel jettisoned a quantity of silver dollars in order to prevent them falling into the hands of an enemy then attacking the ship. This loss was held to be recoverable under the policy thereon.

6.1.5 Piracy

Every schoolboy thinks he knows exactly what is a pirate, but additional qualifications are provided by Rule of Construction No.8 of the Marine Insurance Act:

"The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore"

and this would be based on the first two of the following legal cases:

Naylor v. Palmer (1854), where Chinese emigrants on a voyage from China to South America murdered the master and part of the crew and forcibly took possession of the ship.

Nesbitt v. Lushington (1792), where in the time of the Irish famines, a band of hungry peasants forcibly boarded a vessel loaded with corn and ran the vessel ashore and compelled the master to sell them the corn at a low price.

Republic of Bolivia v. Indemnity Mutual Marine Insurance Co. (1908), where cargo destined for the Bolivian government troops was seized by an organized expedition trying to overthrow the Bolivian government. This was held not to be piracy on the grounds that the whole essence of piracy is that it is a crime committed for private, as contrasted with public, ends. A pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder at sea, and not necessarily in places beyond the jurisdiction of a State. *Athens Maritime Enterprises Corp. v. Hellenic Mutual (1982)*

For a number of years prior to the 1983 I. T. C. Hulls Clauses, "piracy" was treated as a war risk and excluded by the terms of the F. C. & S. Clause, but because it can be said that it overlaps with "violent theft" in 6.1.3, piracy has returned to the marine cover. However, following large number of vessels captured by pirates in recent years, to avoid disputes between marine hull and war risk covers as to whether the claim is due to pirates or terrorists, a Violent Theft, Piracy and Barratry Exclusion clause for use with the hull clauses was introduced in October 2005 which excludes not only piracy from the marine policy but also violent theft and barratry of the Master, Officers and Crew, which risks can then be included in the war risk cover.

6.1.6 Breakdown of or accident to nuclear installation or reactors

No explanation is thought to be necessary other than, perhaps, to stress that it is only the consequential loss or damage, e.g. contamination of the vessel by radioactive material, resulting from the breakdown of or accident to the nuclear installation etc. which is covered, and not necessarily the damage to the nuclear installation or reactor itself.

6.1.7 Contact with aircraft or similar objects, or objects falling therefrom, land conveyance, dock or harbour equipment or installation

In the case of *Polpen Shipping Co., Ltd. v. Commercial Union Assurance., Co., Ltd. (1943)* it was held that a collision with a flying boat did not constitute a collision with another ship or vessel in terms of the Collision Clause (See Clause 8), and

to remove any doubt whether damage to the insured vessel by such a contact was covered, the present wording was introduced and extended with the years, now covering even space machines, etc.

It may also be remarked that whilst the striking of a pier or wharf, etc. by the vessel constitutes a peril of the sea as mentioned in 6.1.1 above, this present 6.1.7 covers damage sustained when the vessel is in a passive role and struck by, e.g. a moving or falling dock crane, or land conveyance, etc. It would also cover, for instance, damage sustained by a vessel falling over in a drydock.

6.1.8 Earthquake volcanic eruption or lightning

No explanation is thought to be necessary other than, perhaps, to suggest an example that the cost of cleaning the vessel covered in volcanic dust (which would constitute damage) would be covered under this clause.

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IN BRIEF

Lectures & Workshops on Practical Aspects of Hull Insurance Claims (MATF-funded course on the "pre-approved" list (maritime-related) under ProTERS) – a series of four 1-day courses, organised by the Institute in conjunction with Asia Maritime Adjusting (Hong Kong)

Both Course 1 and Course 2 have each been awarded 6 CPD points by the Law Society. However, in light of the prevailing situation and following precautionary measures against the coronavirus, we have deferred the remaining 2 courses until further notice:

- Course 3 – Total Loss & Sue & Labour Charges
- Course 4 – Collision Liability

(Raymond T C Wong: Average Adjuster)

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