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SEAVIEW

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Law Column-

英國最高法院就仲裁員的披露義務作出重要判決

**Building Sustainable Internship and Career
Development in Maritime Industry**



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304/305 Oberoi Chamber II,
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E-Mail: mumbai@vallesfleet.com

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Valles Steamship Co., Ltd.
Shanghai Representative Office
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查詢：

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香港特別行政區政府海事處
香港中環統一碼頭道 38 號海港政府大樓 3 樓
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海外銀行大廈 14 樓 1407 室

香港郵政總局信箱 6081 號

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Correspondence Address：Rm.1407, 14/F, OTB Building, 259-265, Des Voeux Road, C. Sheung Wan, H.K.
G.P.O. Box 6081, Hong Kong

Telephone：(852) 2581 0003
Fax：(852) 2581 0004
Website：www.seatransport.org
E-mail：info@seatransport.org

承印：鴻潤印刷公司

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地址：香港九龍旺角西海庭道 8 號
富榮花園 12 座 7 樓 K 室

Address：7K, Block 12, Charming Garden, 8 Hoi Ting Road,
Mongkok West, Kowloon, Hong Kong.

電話：(852) 2552 7008

Telephone：(852) 2552 7008

傳真：(852) 2552 6384

Fax：(852) 2552 6384

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E-mail：hungyuenprinting@gmail.com

Building Sustainable Internship and Career Development in Maritime Industry

Yui-yip Lau / Joseph Chi-ho SO / Chau T.C.

Start from the early 1970s, the maritime industry played a vital role in international trading activities. In the past few decades, the maritime industry has been recognized as one of the four main economic pillars of Hong Kong. In general, there is a wide range of occupational areas within the maritime industry; for instance, marine insurance, port, terminal, container shipping, ship brokers, mid-stream operations, bulk shipping, ship management, ship building, to name but a few.

In order to keep the world wide competitiveness of Hong Kong's maritime industry there is an urgent demand for providing comprehensive maritime education. Numerous higher education institutions deliver various maritime education programs ranging from diploma programs to doctoral degree programs. Nevertheless, such programs contain some weakness (i.e., scope of area and course design) and may not meet the employers' (i.e., business firms and government) expectations. Indeed, some researchers have identified professional education as an effective way to improve productivity in

the changing global environment. Recently, there has been considerable growth in "practice-based" and "professional" programs which have appeared in higher education institutions and which focus on non-academic learning style and apprentice methods.

To overcome a pitfall, the authors conducted a large scale Quality Enhancement Support Scheme (QESS) project. The project aimed to build up sustainable internship and global perspective on career development for our students. The maritime industry is one of our target current students in this project. As such, we generate five main elements to create the constructive framework. The five main elements include knowledge improvement, career marketability, professional skills improvement, relationship in workplace, and self-actualisation. To this end, we organized a series of activities in different phrases. One hundred training workshops were delivered to equip students with practical skills and knowledge, such as job-hunting skills, communication skills, software skills and work attitudes. Thirty-four talks and

sharing sessions by professionals covering business operations, corporate culture and employers' expectations were conducted to give students a holistic picture of the industries concerned. There were eighteen local company visits and 2 tours with 14 of them overseas. It is encouraging to see that students agreed that the project activities brought positive impacts on their career and all-round development, and they were willing to recommend the activities to others.

Through this project, we can offer quality programs, including both academic and career-related, that meet the changing needs of our community and prepare graduates to pursue further study or career development. Also, we provide all-round development opportunities to nurture creativity, active learning, critical thinking, self-confidence, a positive attitude, and a sense of responsibility of the students. In addition, the students can benefit from different channels including workshops, handbooks, and online tools. We not only strengthen our internship program, but also widen our students' global outlook. We can foster the students to achieve dual academic and professional qualifications. Furthermore, we can provide a guidance and role model for the other higher education institutions in professional education development. In the long term, it can help the employers conduct a

better recruitment exercises and attract the younger generation to join the industry.

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(Yui-yip Lau :

Division of Business and Hospitality Management, College of Professional and Continuing Education, The Hong Kong Polytechnic University

Joseph Chi-ho SO :

Division of Science, Engineering and Health Studies, College of Professional and Continuing Education, The Hong Kong Polytechnic University

Chau T.C.:

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8 Wong Chuk Hang Road, Wong Chuk Hang,
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Tel : (852) 2522 5171

Fax:(852) 2845 9307

香港黃竹坑道 8 號

South Island Place

30 樓 3002-04 室

電話 : (852) 2522 5171

傳真 : (852) 2845 9307

2020 年 11 月 27 日，英國最高法院就 Halliburton Company 訴 Chubb Bermuda Insurance Ltd [2020] UKSC 48 案作出重要判決，這項判決首次確認了仲裁員的法定披露義務以及基於偏見解除仲裁員任命的評判標準等，在國際仲裁界引發了廣泛關注。

背景事實

本案起源於 2010 年墨西哥灣漏油事件引發的一系列責任險保險理賠。2010 年，BP 租用的“Deepwater Horizon”深海鑽油平臺發生井噴並爆炸，導致嚴重漏油和人員傷亡。美國政府起訴 BP 及其在該鑽井活動中的承包商 Halliburton 和 Transocean。最終美國法院判定 BP 承擔事故責任 67%、Transocean 30%、Halliburton 3%。Halliburton 最終以約計 11 億美金的金額和解，隨後在責任險保單下向保險人 Chubb 提出理賠請求。同樣，Transocean 也與原告和解後向其責任險保險人（包括 Chubb）提出理賠請求。Chubb 基於和解不合理等理由拒絕賠付 Halliburton 和 Transocean。因此，Halliburton 和 Chubb，Transocean 和 Chubb，分別在其各自的保險合同下產生糾紛並訴諸倫敦仲裁（以下簡稱為“Halliburton/Chubb 仲裁”和“Transocean/Chubb 仲裁”）。

在 Halliburton/Chubb 仲裁下，雙方各自指定的仲裁員無法就第三位仲裁員（也是仲裁庭主席）的人選達成一致。英國高等法院最終指定了 Mr Kenneth Rokison QC 擔任第三位仲裁員，而 Mr Rokison 是 Chubb 提名的人選。

在 Halliburton/Chubb 仲裁期間，Mr Rokison 又接受了 Chubb 在 Transocean/Chubb 仲裁下的指定擔任仲裁員，但 Mr Rokison 沒有將該任命告知 Halliburton。隨後，在 Transocean 訴另一保險人的保險索賠爭議中（以下簡稱為“Transocean/Insurer X 仲裁”），Mr Rokison 也被指定為仲裁員，同樣，Mr Rokison 也沒有將該指定披露給 Halliburton。三起仲裁均由墨西哥灣漏油事件引發。

爭議

Halliburton 發現 Mr Rokison 在 Transocean/Chubb 仲裁和 Transocean/Insurer X 仲裁中也擔任仲裁員後，根據《1996 年英國仲裁法》第 24(1)(a) 條向英國高等法院申請解除 Mr Rokison 在 Halliburton/Chubb 仲裁中的任命，理由是“存在事實導致 Mr Rokison 的中立性被合理質疑”。英國高院和上訴院均駁回了 Halliburton 的請求，Halliburton 上訴至最高法院。

原審下 Chubb 和涉案仲裁的三位仲裁員被列為共同被告，但僅有 Chubb 在最高院提交了答辯。由於本案對英國乃至整個國際仲裁界意義深遠，最高法院在審理時還聽取了如下仲裁機構作為訴訟加入人（intervener）的陳述：（1）國際商會國際仲裁院（“ICC”）、（2）倫敦國際仲裁院（“LCIA”）、（3）英國特許仲裁員協會（“CIArb”）、（4）倫敦海事仲裁員協會（“LMAA”）和（5）穀物與飼料貿易協會（“GAFTA”）。

終審判決及理由

A. 仲裁員有保持公正和中立的義務

最高院首先強調，根據《1996 年英國仲裁法》第 33 條，仲裁員有絕對的義務保持公正和中立。**仲裁員不僅實際上要是中立的，他 / 她也必須客觀表現得中立。**判斷標準是一個公正且知情的旁觀者，在瞭解相關事實後，是否認為仲裁員確有可能存有偏見。簡言之，是從一個虛擬的擁有同樣背景信息的客觀第三人的角度來判斷，而不考察涉案仲裁當事方實際的主觀認知。

此外，無論是當事方自行指定的仲裁員，還是第三位仲裁員，無論該第三位仲裁員是前兩名仲裁員指定的還是仲裁機構或法院指定的，所有仲裁員的中立義務及評判標準相同。

B. 仲裁員有法定的披露義務

為體現中立，仲裁員通常會事先披露可能給當事方帶來疑慮的事項，由當事方自行考慮反對或接受對他 / 她的任命。最高院同意上訴院的觀點，明確表示這種披露不單是一個良好習慣，更是一項源自《1996 年英國仲裁法》第 33 條的法定義務。**仲裁員有法定義務披露：會或可能會致使一個公正且知情的旁觀者，在瞭解相關事實後，認為仲裁員確有可能存有偏見的事實或情況。**

一個仲裁員在多個仲裁中接受任命，這些仲裁涉及同一爭議或有某些重疊，並且這些仲裁有且僅有一個共同的當事方的現象被最高院簡稱為“多重任命”。這種多重任命是否屬於法定應披露的“事實或情況”呢？最高院認為，一個客觀的旁觀者會考慮相關合同、事實和行業慣例，具

體情況具體分析，但一般來說，**除非當事方有相反的約定或者行業記憶體在相反的慣例和共識，仲裁員通常應當披露多重任命的事實。**

LMAA 和 GAFTA 指出，在航運和大宗商品領域，一個仲裁員經常會在同一事故引發的多起仲裁下擔任仲裁員，例如同一租約或貿易鏈條下基於同一事實或法律問題的糾紛。造成這一普遍現象的重要原因是在這些特定的專業領域，瞭解相關法律和市場的仲裁員人選有限，並且某些仲裁規則（例如 LMAA 的規則）有時鼓勵合併審理以更快地解決糾紛。相應的，這些領域的參與者應當合理預見其指定的仲裁員可能在同一事故的其他案件中也擔任仲裁員，即便該事實沒有被披露，並且不會因此質疑仲裁員的公正性和中立性。LMAA 和 GAFTA 認為法院沒有必要在這些領域對仲裁員施加這一法定披露義務。最高院認可這一慣例和共識在航運、大宗商品貿易以及再保險等仲裁中確實存在。因此，在這些領域，多重任命的事實通常無需披露。相反，該現象在 ICC、LCIA 和 CIArb 仲裁中比較少見，因此更有可能構成法定應披露的“事實或情況”。

本案爭議焦點是 Mr Rokison 是否應該在 Halliburton/Chubb 仲裁中披露其在之後的 Transocean/Chubb 仲裁中接受任命的事實。兩個爭議都是墨西哥灣漏油事件引發的，都是關於百慕大格式的責任險保險合同下被保險人與協力廠商達成和解後保險人的賠付義務。最高院同意，因為不知曉 Mr Rokison 在 Transocean/Chubb 仲裁中的任命，Halliburton 無法衡量 Mr Rokison 的公正性是否受到影響及受到多大程度的影響，也沒有機會應對；Chubb 可以在兩起仲裁中與 Mr Rokison 溝通，但 Halliburton 沒有同等機會；Mr Rokison 可能在 Transocean/Chubb 仲裁中聽取一些證

據和答辯，潛意識下影響他在 Halliburton/Chubb 仲裁中的判斷；Chubb 可能率先知曉 Mr Rokison 對某些證據和答辯的態度，繼而在 Halliburton/Chubb 仲裁中調整策略；在接受 Transocean/Chubb 仲裁任命時，兩個仲裁下的爭議有多大程度的重疊是不清楚的，因此，在當時看來，Mr Rokison 確實有產生偏見的可能。另外很重要的一點是，最高法院認為在百慕大格式保險仲裁領域，並不存在類似 LMAA 和 GAFTA 仲裁裡的行業慣例和共識，作為仲裁申請人的被保險人不會經常參與此類仲裁，但作為被申請人的保險公司可能經常參與此類仲裁。因此，在接受 Transocean/Chubb 仲裁任命時，Mr Rokison 有法定義務將該任命披露給 Halliburton，而 Mr Rokison 違反了這一法定義務。

C. 履行披露義務可以不與仲裁保密性相衝突

私密性是仲裁的重要特徵之一。當出現多重任命時，若仲裁員所需要進行的披露觸及應被保密的資訊，則其在披露前應當尋求被披露仲裁的當事方的許可，若該當事方不同意披露，則仲裁員應當拒絕後一仲裁的任命，從而在保障仲裁保密性的同時履行披露義務。

最高法院認為，在接受 Transocean/Chubb 仲裁任命時，Mr Rokison 本可以在不需要獲得 Transocean 和 Chubb 明確許可（也不違反仲裁保密性）的情況下向 Halliburton 籠統地披露與 Transocean/Chubb 仲裁有關的如下事實：（a）共同當事方是 Chubb，（b）Mr Rokison 會成為當事方指定的仲裁員或是法院 / 仲裁機構指定的仲裁員，以及（c）爭議起源於同一事故。但如果這種籠統的披露不足夠或者 Halliburton 要求更多的資訊來判斷是接受還是反對 Mr Rokison 在 Transocean/Chubb

仲裁中的任命，那麼 Mr Rokison 必須取得 Transocean 和 Chubb 的明確許可，否則應拒絕後一仲裁的任命。

D. 違反法定披露義務並不必然導致解除任命

Halliburton 申請解除 Mr Rokison 的任命依據的是《1996 年英國仲裁法》第 24(1)(a) 條，即：存在事實導致仲裁員的中立性被合理質疑。**最高法院認為，客觀判斷是否可能存在偏見的時間點是法院對解除仲裁員任命的申請進行開庭審理之時。**

雖然仲裁員一旦獲悉應披露的事實或情況，法定披露義務即產生並持續，但到庭審時，情況可能會發生變化，各個仲裁可能會進展到不同階段，仲裁員可能給出了合理解釋，這些變化和進展可能加重也可能減輕違反披露義務的後果。本案中，Mr Rokison 並沒有被解除任命，因為在一審開庭時：

- 英國法下仲裁員有沒有法定披露義務是不明確的；
- Transocean/Chubb 仲裁任命發生在 Halliburton/Chubb 仲裁任命的六個月之後，Transocean/Insurer X 仲裁任命發生在 Halliburton/Chubb 仲裁任命的一年之後，因此，當時看來，Halliburton 的案件更可能先完結，擔心權益受損的更應該是 Transocean；
- Halliburton 在知曉存在多種任命後已經在仲裁中表達了擔憂，而 Mr Rokison 也解釋說自己疏忽了，但 Transocean/Chubb 仲裁和 Transocean/Insurer X 仲裁很可能會通過審理一個先決問題而徹底解決（這個先決問題僅涉及對保單的解釋、且仲裁員在審

理該先決問題時所聽取的證據也僅限於雙方訂立保險合同時的情況），如果先決問題上保險人勝訴，仲裁庭就不再需要對 Transocean 的和解是否合理以及保險人是否應當賠付這些問題進行審理和裁決，也就是說這三個仲裁不會有任何重疊。Mr Rokison 甚至提議過，如果後兩個仲裁的先決問題上保險人敗訴（也就是說後兩個仲裁會進入更實質性的審理），他會自行辭去後兩個仲裁的任命；

- Halliburton 沒有對 Mr Rokison 的解釋提出質疑；並且
- Mr Rokison 沒有在本案中獲得不當的商業利益。

綜合上述事實，最高院認為，在一審開庭時所呈現的事實並不構成對 Mr Rokison 中立性的合理質疑。因此，Halliburton 關於解除 Mr Rokison 任命的上訴最終被駁回。

最高院也指出，如果某一應披露而未披露的事實足夠嚴重，未披露這一行為本身就足以讓法庭解除仲裁員的任命。如果某一應披露而未披露的事實雖然在當初看似嚴重，但事後綜合各種情況來看並不能得出該仲裁員可能存在偏見的結論，那麼，法庭雖然不會解除仲裁員的任命，但可能會要求仲裁員承擔申請解除仲裁員任命但未能成功的那方的部分或全部費用及其自身抗辯產生的費用，因此這種違反法定披露義務的行為也不是沒有懲罰後果的。

評論

本案的積極意義在於清晰地界定了仲裁員的披露義務，強調和鞏固了英國法下對仲裁員客觀、中立、公正的高標準要求。雖然在本案中 LMAA 和 GAFTA 闡述了在

這些領域內“多重任命”的慣例性存在和普遍接受度（且最高院對此也表示認可），但總體上法院還是認為仲裁員在面臨多重任命時一般應當進行披露，以確保當事方有充分和公平的機會來評估是否同意對該仲裁員的任命。

當然，業界也有一些對本案的質疑，主要是針對法院認為判斷仲裁員是否可能存在偏見的時間點是對解除任命的申請進行審理時，而不是仲裁員接受該仲裁任命時。這意味著，即便在接受委任時存在應披露而未披露的情況（也即仲裁員違反了法定披露義務），但如果最終不構成偏見，該仲裁員也未必被解除任命。但總體來看，相信法院認為採取“一刀切”的方式並不合理，綜合評估是否可能存在偏見的做法從全域來看可能更公平。同時，如上所述，在法律明確了法定披露義務的情況下（且面臨著被質疑和承擔申請方費用的後果），這本身就足以讓仲裁員對於自己的披露義務慎之又慎。

相信本案之後，英國乃至整個國際仲裁界的仲裁員都會更加謹慎對待自己的披露義務，畢竟要證明相關領域有類似 LMAA 和 GAFTA 仲裁中多重任命的行業慣例並非易事。當事方也會更加關注仲裁員是否中立、是否合理履行其披露義務，從而共同推動國際仲裁作為一個日益重要的爭議解決機制的中立、可靠和公正。

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5 commonly misunderstood concepts in shipping

Edward Cheng

Review the following statements and see if they are correct:

1. A liner ship is the same as a container ship.
2. A Captain is the same as a Master.
3. A full set of original Bs/L means 3 original Bs/L
4. The unit of NRT is a metric ton
5. A vessel's ETA Shanghai is 2400 LT on 3rd May

Believe it or not, the answers to the above 5 statements are incorrect!

Is it correct to say a liner ship is the same as a container ship?

A liner ship refers to a vessel that operates on fixed schedules and fixed routes. A container ship is a ship specially designed to carry containers only. You may say a majority of container ships operate as liners but you cannot say a liner ship is the same as a container ship. In fact, other types of ships, such as, breakbulk ships and passenger ships can operate as liners, too.

Is it correct to say a Captain is the same as a Master?

Both Captain and Master can be translated as 船長 in Chinese. However, in English, they have different meanings. Captain is the qualification while Master is the rank. The one who has the qualification of Captain may not be the Master of a vessel but the Master of a vessel must possess the qualification of Captain.

In our field, when Mr. Chan has the qualification of Captain, we will call him Capt. Chan as a respect to him and usually his name card will show his name as Capt. Chan, too.

A Master has the authority to sign the original B/L while a Captain does not. That is the reason why sometimes you see 'As agent on behalf of Master Capt. XXX' in the signature box of a B/L.

Is it correct to say a full set of original Bs/L means 3 original Bs/L?

As you may know, when we issue 3 original Bs/L (as one set), we only need to present one of those at the discharge port for taking delivery of the cargo. Have you

ever thought about why we still have to issue 3 original Bs/L as one set? In the past, we issued 3 original Bs/L mainly because the postal service was not reliable and we wanted to mail 3 original Bs/L separately to make sure at least one of them safely reached the discharge port. However, with relatively reliable courier services nowadays, to issue 3 original Bs/L as one set is not necessary. We can say it is just a kind of customary practice to do so only.

As a matter of fact, it depends on how many original Bs/L under the same B/L number was/were issued and released. The usual number of full set Bs/L is three, but it could be one, two, four or even more which depends on the shipper's requirement.

Is it correct to say the unit of NRT is a metric ton?

Don't be misled by the word 'ton' when we talk about the NRT (Net Registered Ton). It is a just a figure representing the total volume of all the enclosed freight earning spaces of the vessel per 100 cubic feet. That is to say, if the NRT of a vessel is 5,000, then the total volume of all the enclosed freight earning spaces of the vessel is 500,000 cubic feet. In other words, actually the NRT has no unit. When you see the NRT in the ITC (International Tonnage Certificate), it shows the figure only without any unit.

Is it correct to say a vessel's ETA Shanghai is 2400 LT on 3rd May?

When we express the time in 24-hour system, we cannot use '2400' as 12:00 pm. We need to express it as '0000' instead. Basically, it is wrong when we say 'ETA 2400/3'. We should express it as '0000/4'.

It is a quite common misunderstanding.

(Edward Cheng :

*Chief Representative (Hong Kong Region)
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每年二至四月，香港及其鄰近海域都是常籠罩著霞霧，毛毛細雨，空氣潮濕，令人有點納悶的感覺。這便是所謂黃梅時節，煙雨迷濛了。有個時候，我曾有機會欣賞到大嶼山上有連綿不斷的煙霞和稀薄的霧，分層地圍繞著鳳凰山，由海上遠眺，簡直就像人間仙境；這樣的美景，可以把心中納悶的感覺一掃而空。大自然的美，我也無法像古人似地用詩詞來形容，只能銘記於腦海中，享受回憶的陶醉。

無論煙霞也好，霞霧也好，它們除了有美好的一面外，也還有一大缺點——視野模糊，它能妨礙人類的眼睛，使視距受到限制。因此，從事航海的人員會視霞霧為敵人，小心應付，以策安全。

霞霧的分別

霞和霧，一眼看上去並沒有什麼分別，因為它們的產生方法都是相同的。當空氣達到飽和的程度，而且繼續冷卻，而達到低於露點溫度時，含在空氣中的水汽便會凝結成小水點，懸浮於空中。在高空中的，稱之為雲；在近地面的，稱之為霧。霞霧的分別，在於稀薄和濃密之分。在氣象學上，它們被界定如下：

- (a) 霧 (FOG)：當視程少於 1000 米時，稱之為霧；
- (b) 霞 (MIST)：霞是稍為稀薄的霧，視程介於 1000 至 2000 米之間。

在某些環境下，視程受限制與霞相似，這種情況的產生和空氣中的水汽無關，而主要是由沙塵、煙屑、或鹽粒散佈於空氣中而形成的，這稱作霾 (HAZE)。一般人也叫作霞，但不同於上述 (b) 的霞。霾常在波斯灣，紅海，阿丁灣等地區出現。大多數地方的工業區，也都會出現霾。

霧的種類

(一) 輻射霧 (RADIATION FOG)

晚間當陸地輻射降溫，此時與陸地表面接觸的空氣也因而降溫。若溫度低於露點溫度時，空氣中的水汽便會釋放而凝成小水點，飄浮在低層空氣中而形成輻射霧。輻射霧只直接產生在陸地上，如果風向和風力適宜，它便會隨風移往海上，所以沿岸一帶的海面就會受到輻射霧影響。日間，因受到陽光照射而升溫，霧就會消散。

(二) 平流霧 (ADVECTION FOG)

大多數發生於海上；當和暖的熱帶海洋空氣流過寒冷的海面而降溫，當低於露點溫度，空氣中的水汽便不可能再被容納，而釋放出來凝結成小水點，飄浮在近海面而形成平流霧。若風速增強或風向有較大角度改變時，可使平流霧消散。在海上多是這些霧。

(三) 煙霞或蒸發霧 (SEA SMOKE OR ARCTIC SMOKE OR STEAM FOG)

多產生於海上；當非常寒冷（例如冰源上的空氣）的空氣流過暖和的海面時，與海面接觸的空氣因而受熱，並且吸收了水汽而向上升往上升層較為寒冷的空氣層，水汽便凝結成小水點，肉眼可以看見它們像蒸氣或煙一樣地在水面向上升，這就是煙霞或蒸發霧。風向改變或風力增強，都可使煙霞消散。

(四) 降水霧 (PRECIPITATION FOG)

其產生過程與平流霧大致相同，不過它最常出現於氣旋區（低壓）的錮囚鋒近低壓中心處。範圍不超過50浬，有多產生於暖鋒線前，隨風飄移。這種霧是隨降水（下雨）同來的霧，所以稱為降水霧。

(林傑：退休船長

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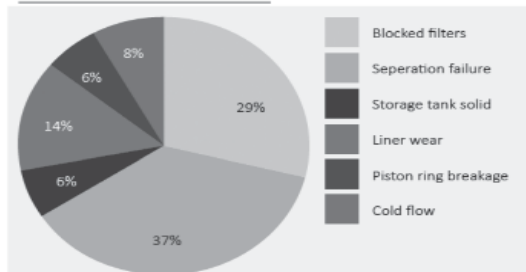
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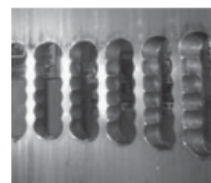
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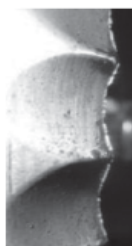
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Raymond Wong

(As noted in Issue 122 the Editor of this column advised that 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 has kindly allowed the Editor copyright on his book for any future editions.)

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This clause gives cover if the vessel is damaged or destroyed by a governmental authority in order to avoid or mitigate pollution hazard, for example: where a badly damaged oil tanker was ordered by the government authority to be sunk in deep water at sea rather than running the real risk of the vessel sinking and/or

spilling her cargo in a port or other place where damage by pollution would be great.

The act of government must flow directly from a casualty resulting in damage to the vessel, which is covered by the insurance and the Assured must have used his best endeavour to prevent or minimise damage to the environment or pollution hazard.

EXTENDED CONDITIONS

The perils covered by the Institute Time Clauses – Hulls 1/10/83 can be extended, subject to an additional premium, to additional perils provided by the Institute Additional Perils Clauses – Hulls 1/10/83:

INSTITUTE ADDITIONAL PERILS CLAUSES – HULLS 1/10/83

(For use only with the Institute Time Clauses – Hulls 1/10/93)

1. *In consideration of an additional premium this insurance is extended to cover*

1.1 *the cost of repairing or replacing*

1.1.1 *any boiler which burst or shaft which breaks*

1.1.2 any defective part which has caused loss or damage to the Vessel covered by Clause 6.2.2 or the Institute Time Clauses – Hulls 1/10/83,

1.2 loss of or damage to the Vessel caused by any accident or by negligence, incompetent or error of judgment of any person whatever.

2. Except as provided in 1.1.1 and 1.1.2 nothing in these Additional Perils Clauses shall allow any claim for the cost of repairing or replacing any part found to be defective as a result of a fault or error in design or construction and which has not caused loss of or damage to the Vessel.

3. The cover provided in Clause 1 is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers. Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause should they hold shares in the Vessel.

The first thing to note is that under the title appear the words:

(For use only with the Institute Time Clauses – Hulls 1/10/83)

What this means is that the clause is supplementary to – and not in substitution for – the cover granted in Sections 6.2 and 6.3 of the PERILS Clause in the I.T.C. Hulls 1/10/83, and those Sections will now remain in the overall cover and not be deleted.

ANALYSIS OF THE CLAUSE

1. In consideration of an additional premium ...

These words need no analysis, but the implication is clear: additional cover requires additional premium!

1.1 the cost of repairing or replacing

1.1.1 any boiler which burst or shaft which breaks

1.1.2 any defective part which has caused loss or damage to the Vessel covered by Clause 6.2.2 or the Institute Time Clauses – Hulls 1/10/83

Reference to the analysis of Clause 6.2.2 (on pages 21/25 of Issue 132) shows that that Clause in the I.T.C. Hulls covers only damage to other parts of the ship as the result of a

Bursting of a boiler,

Breakage of a shaft, or

Latent defect.

If a claim was to be substantiated in respect of the boiler or shaft itself, it was necessary to look for the cause of the boiler bursting or shaft breaking, and to see whether that cause was covered elsewhere in the I.T.C. Hulls policy (e.g. negligence of engineers, heavy weather, efforts to refloat after stranding etc.).

Under the terms of 1.1.1 of the Additional Perils Clauses there is cover, simpliciter, for the cost of repairing or replacing any boiler which bursts or shaft which breaks, and one is not required to demonstrate exactly what caused that event to happen. If Underwriters wish to deny liability, the onus is upon them to prove that the bursting or breakage resulted from a cause expressly excluded by the policy (e.g. war risks), or that there has been a want of due diligence by the assured etc. as provided in Section 3 of the clause.

It is worth noting the opinion of the editors of Arnould: Law of Marine Insurance and Average (19th Edition, paragraph 23-61) that “there is no necessity to construe the latent defect cover, or that in respect of breakage of shafts, as providing that the insurer is liable for ordinary wear and tear”, thus implying that the cover as provided by the Institute Additional Perils Clauses is subject to the statutory exclusion in section 55(c) of the Marine Insurance Act 1906, which states:

“Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear”.

There is a difference between the practice of average adjusters and the opinion of the editors of Arnould but it is submitted that in practical terms insurers have always accepted that breakage of shafts and bursting of boilers means that there is a claim whatever the cause of the breakage of shaft or bursting of boilers.

Identical comments apply to the cost of repairing or replacing any (latently) defective part, the only difference here being that the defective part must have caused consequential loss or damage to other parts of the vessel. The cost of repairing or replacing a defective part which fails (or is found) without causing consequential damage is not covered.

Clearly there is no doubt that the simpliciter cover afforded by the Institute Additional Perils Clauses is a valuable asset to an assured where the cause is obscure and cannot be pin-pointed with certainty.

Reverting to the “breakage of shaft”, one does encounter difficulties with the words in practice, which should be given a natural common sense meaning:

- 1) A “shaft” (e. g. tailshaft or crankshaft) revolves, and the word does not, for instance, comprise a connecting-rod, which transmits power by a different motion - see *Jackson v. Mumford* (1902).
- 2) What constitutes a “breakage” of a shaft has long been a subject of

controversy; the word is generally construed in such a manner that it is not necessary for the shaft to be severed into two separate pieces, but there must be something more than a mere hair-line fracture around the circumference of the shaft.

1.2 loss of or damage to the Vessel caused by any accident or ...

The two words “any accidents” are of extremely wide and all-embracing effect and they considerably enlarge the scope and cover of the policy. Prima facie, if any machinery (or other) part of the ship breaks or fails in service - with or without consequential damage – there will be strong grounds for a claim on underwriters. And the onus of proof will generally change: instead of the customary requirement that the assured should demonstrate the cause of the loss or damage claimed, the onus will now be upon underwriters to prove that they are not liable.

We must first define the word “accident”. There are probably dozens of definitions, one being: “An unlooked for mishap or natural event which is not expected or designed.”

To constitute an accident there must generally be some definite and specific event which occurred at a single moment in time, e.g. when:

I broke my leg,

the car crashed,

the propeller fell off, etc., etc.

There is an element of suddenness about an accident, even if its results may take some time to run their course, e.g. a continuing loss of blood after a shooting accident.

We stress the point of suddenness to contrast with the creeping or progressive type of damage which, although it may eventually result in an accident or breakdown, is not in itself “an accident”. Thus, if on taking out our lawn mower at the beginning of the summer season from its winter storage, we find it rusted and the engine corroded, this is not an accident. We may have omitted – by accident – to clean and grease the mower before that winter storage, but there is no “accident” until the mower seizes up, or explodes.

We have just introduced the expression “by accident”, which in everyday speech means “as opposed to intention (or appointment etc.)”, and which in marine insurance may occasionally be used to mean “as opposed to wear and tear”. However, the Institute Additional Perils Clauses does not state that it covers loss of or damage to vessel “by accident”, but “by any accident”. The word “any” we construe to mean “an (accident) – no matter which”.

To continue: if a person breaks his leg when skiing, he could say that, “I had a nasty accident – I broke my leg”, with the immediate inference that the broken leg was the sole accident. In fact, the broken leg was more than the result, and the real accident was the fall from slipping on ice or getting the ski stuck in heavy snow while moving fast.

This domestic example now needs translating into accidents on board ship and applied to the Institute Additional Perils Clauses.

Example 1

A connecting-rod breaks in service and causes severe damage to the main engine crankcase etc.

The connecting-rod is designed to last the normal life of the ship and if it breaks in service this must surely constitute “an accident” and the consequential damage to the crankcase be recoverable as being “caused by any accident”.

We turn now to the connecting-rod itself and, like the leg which has been extraordinarily well designed to last one’s lifetime, the mere fact that it has broken implies that some unusual and unexpected strain (an accident) has caused that breakage. There should, therefore, also be a claim on underwriters for the cost of replacing or repairing the connecting-rod, and the shipowner would not be expected to demonstrate the precise reason for the breakage. If underwriters wished to dispute liability, they should demonstrate that this arose from a peril specially excluded by the policy (e.g. war risks), or that the breakage was not an accident, or that the assured etc. had failed to exercise due diligence.

Example 2

A small water pipe corrodes internally and the corrosion eventually eats through

to the outer surface of the pipe and becomes a hole, through which a jet of water spurts onto an electric switchboard causing considerable damage.

For the sake of example, assume that the expected life of the pipe is 10 years and that the final breakthrough of the water occurred when the ship was:

A. 5 years old

B. 15 years old

A. The corrosion damage to the pipe is of a creeping or progressive nature, but on that day when the pressure of the water finally overcame and burst through the pipe, this we would regard as an accident. It would be totally unexpected of a pipe only half way through its expected lifespan.

The damage to the switchboard should be recoverable, therefore, as having been “caused by any accident”.

With regard to the pipe itself, it is not patently obvious that the corrosion was set up or initiated by some sudden “accident” and, if the cost of repairing or replacing the pipe was worth claiming, we would expect to investigate the cause of that corrosion.

B. If the holing of the pipe occurred when the ship was 15 years old, does the same dousing of the electric switchboard constitute damage “caused by any accident”?

If the pipe ought reasonably to have been replaced some years earlier, it is doubtful whether the eventual holing of the pipe could be considered as “an accident”. Obviously, there was some degree of chance that the holing occurred on a particular day and in a particular location, but it could hardly be described as “unexpected”. Only if it could be shown that the pipe was performing its proper function without trouble, and that the leakage occurred after the shock of a collision or violent heavy weather, would it be even possible to consider the damage to the switchboard as being “caused by any accident”.

There would not be a claim for the repairs to the pipe.

If the pipe had been subjected to severe tests by Classification or other expert surveyors at about the time of its normal renewal and passed “as good as new”, the position could be different, but there would still be no claim for the pipe.

To conclude these somewhat discursive remarks, in practice, most accidents do have known causes, and the claim for loss or damage is then based on that known cause, e.g. heavy weather, stranding, negligence etc. For claims purposes, therefore, the words “any accident” are likely to be used only when the cause of the loss or damage is obscure or unexplained.

1.2 loss of or damage to the Vessel caused by negligence, incompetent or error of judgment of any person whatever

Sections 6.2.3 and 6.2.4 of the PERILS Clause in the I.T.C. Hulls (see pages 21/26 of Issue 132) covered loss of or damage caused by: Negligence of:

Master Officers Crew or Pilots

Repairers or Charterers

This has been extended in the Institute Additional Perils Clauses to negligence of any person whatsoever and, additionally there is cover for loss of or damage caused by incompetence or error of judgement, also of any person whatsoever.

These latter terms may loosely be considered as alternative degrees of negligence. To be negligent, one must have a knowledge of what ought to be done – or ought not to be done – in a given set of circumstances. Incompetence implies a lack of that necessary knowledge or, possibly by illness or drunkenness etc., a loss of that knowledge or an inability to function properly. Thus, if without being instructed to do so, a newly joined engine-hand started up the main engine and it raced away and sustained considerable damage, this would be attributable to incompetence.

Error of judgement is, perhaps, a polite form of saying “mistake”, but

without negligence. In the case of *Jackson v. Mumford* (1902), the designer of a novel and ultra-fast naval vessel made an error of judgement in his design for the strength of a connecting-rod, with the result that it broke during trials and caused considerable consequential damage. It was held that the connecting-rod was not a shaft, and that weakness in design did not amount to a latent defect. However, under the present Institute Additional Perils Clauses, the consequential damage would be recoverable as being caused by “any accident” or by “error of judgement” of the designer. Nominally, the cost of replacing the connecting-rod would also be recoverable under 1.1.2. but as the original rod was clearly worthless except as scrap, it is suggested that there would be no claim for the cost of replacing the connecting-rod.

2. *Except as provided in 1.1.1 and 1.1.2 nothing in these Additional Perils Clauses shall allow any claim for the cost of repairing or replacing any part found to be defective as a result of a fault or error in design or construction and which has not caused loss of or damage to the Vessel.*

We find the wording in this Section 2 somewhat difficult to construe, but our free translation would be:

“Unless it relates to a:

boiler which bursts

shaft which breaks

(latently) defective part which has caused consequential damage to other parts of the ship,

no claim shall be allowed under this Clause for the cost of repairing or replacing any part which, before it has caused consequential damage to other parts of the ship, is found to be defective as a result of a fault or error in design or construction.”

The Section may have been designed to cater for a situation which occurred some years ago. The main engine bedplate of a certain engine produced in large numbers was found to be subject to a weakness in design, and a number of vessels developed cracks in a particular location. This defect could have had serious consequences – (complete main engine breakdowns) – and an examination of all the ships fitted with this particular engine was recommended and revealed that the majority had similar cracks in various stages of development.

Many claims were put before underwriters under various headings of the then Liner Negligence Clause, but only if the vessel actually suffered a main engine breakdown while in service at sea was the claim paid. No payments were made for the mere discovery of an incipient damage

Formal recognition of this type of situation now appears in Section 2 of the Institute Additional Perils Clauses.

It may be remarked that the connecting-rod in the *Jackson v. Mumford* case would not be excluded by this Section. The rod was defective as a result of a fault

or error in design, but it had broken and caused consequential damage to the vessel before it proved to be defective.

3. *The cover provided in Clause 1 is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers. Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause should they hold shares in the Vessel.*

Section 3 is the equivalent of the concluding words of Section 6.2 and the whole of Section 6.3 of the PERILS Clause in the I. T. C. Hulls. In addition, this Section confirms in its opening words that the cover is subject to all other terms, conditions and exclusions in the rest of the policy (i.e. and in particular, the Deductible).

In view of the exceptionally wide cover afforded by the Institute Additional Perils Clauses, the proviso concerning “want of due diligence by the Assured” etc. is particularly important to underwriters in respect of claim such as the Example 2B given above.

(Raymond T C Wong: Average Adjuster)



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Associates / Correspondents at:
Shanghai, Singapore, London, Jakarta, Taipei

Contact:
Raymond T.C. Wong 王德超
E. raymond.wong@averageadj.com
Alice Ou 歐彬
E. alice.ou@averageadj.com.cn



香港筲箕灣道68號西灣河中心9樓B室
Office B, 9/F., Sai Wan Ho Plaza, 68 Shau Kei Wan Road, Hong Kong
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