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Court reconciles court jurisdiction and arbitration agreements *Melford Capital Partners (Holdings) LLP and others v. Frederick Digby* [2021] EWHC 872 (Ch)

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The Court has stayed a counterclaim against two claimants, finding that the counterclaim against the first claimant was subject to an exclusive jurisdiction clause in favour of the Guernsey courts, and the counterclaim against the second claimant was within the scope of an LCIA arbitration agreement. In so doing, the Court had to decide whether the arbitration agreement was inoperative because of the presence in the contract of an exclusive jurisdiction clause in favour of the English courts, and whether the right to invoke the arbitration agreement had been waived by the issue of the English proceedings. The answer to both questions was no.

The proceedings concerned a partnership dispute in a real estate investment business. The first claimant (Holdings), a Guernsey partnership governed by a limited liability partnership agreement (Holdings LLPA), and the second claimant (MCP), an English partnership also governed by a limited liability partnership agreement (MCP LLPA), purported to expel the defendant (FD) from those partnerships.

The Holdings LLPA was governed by Guernsey law and contained an exclusive jurisdiction clause in favour of the Guernsey courts. The MCP LLPA was governed by English law and contained both an exclusive English jurisdiction clause

in favour of the English courts and an LCIA arbitration clause in the following terms:

"27.2. The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.

28. Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause".

The claimants excluded FD from the partnerships and got an injunction from the English Court restraining him from, among other things, using confidential information or calling a meeting of investors. FD was also required to return a laptop. The claimants then filed particulars of claim for breach of confidence, injunctions in similar terms to those obtained on an interim basis and damages. FD filed a defence and counterclaim, alleging among other things that he had not been validly expelled, that he had not breached confidence and had full right to access the documents in question. Holdings and MCP both sought

to challenge the English Court's jurisdiction in respect of the counterclaims. They argued that FD's counterclaim against Holdings was subject to the Guernsey Court jurisdiction clause and that the counterclaim against MCP fell within the scope of the LCIA arbitration agreement.

Holdings then issued proceedings in the Guernsey courts under the Holdings LLPA, seeking a declaration that FD was no longer a member of Holdings. Holdings and MCP also commenced LCIA arbitration proceedings against DF under the MCP LLPA seeking relief in relation to FD's membership of MCP and the mechanism by which his share in MCP was to be bought out following his expulsion.

The Court considered:

- Whether FD should be held to the Guernsey jurisdiction clause and the LCIA arbitration agreement to have disputes litigated in Guernsey or by arbitration, respectively.
- If FD should be prevented from continuing with the counterclaim brought in response to the proceedings issued by the claimants in the English Court.

The Court found in favour of the claimants. The English courts will uphold a jurisdiction agreement and keep the parties to their bargain unless strong reason is shown otherwise. Further, the law's policy of upholding arbitration agreements

provides a strong impetus not to read a concurrent provision for English court jurisdiction as removing disputes from the scope of an arbitration agreement. Rather, the court jurisdiction clause should be interpreted as vesting the English Court with supervisory jurisdiction over the arbitration and a residual jurisdiction if the parties were to dispense with arbitration.

The Court stated that the scope of the English proceedings initiated by the claimants was limited. The injunctions sought were interlocutory in character and it was unlikely that the issue of the confidential nature of the documents in question would justify continued litigation. The counterclaim sought to widen the dispute and the matters raised in the counterclaim fell within the arbitration agreement or the Guernsey court jurisdiction clause. By issuing the English proceedings in order to obtain urgent injunctive relief, the claimants had not waived their right to rely on the Guernsey jurisdiction clause or the arbitration agreement. On the facts also, there had been no submission by the claimants to the English Court's jurisdiction in relation to the counterclaim. The Court added that to litigate the matters raised in the counterclaim in the English Court risked an undesirable fragmentation of the proceedings. Accordingly, Holdings was entitled to a stay of the counterclaim against it. There was no strong reason why the Guernsey jurisdiction clause should not be enforced.

Further, the LCIA arbitration agreement was not inoperative and the Court would give effect to it. The wording of the arbitration agreement was broad in scope and extended to the matters raised in the counterclaim. The Court should not disregard a clause designed to ensure that sophisticated business people, engaged in the business of investment funds, could resolve their disputes by arbitration as provided for in their principal commercial agreement. The Court rejected an argument that the counterclaim could not be a “matter” for the purposes of s. 9 Arbitration Act 1996. In addition, the fact that Holdings and MCP had brought the limited and targeted injunction proceedings did not prevent them from relying on s.9. There had not been any waiver of the right to invoke the LCIA arbitration agreement, nor had there been a clear and unequivocal election to submit to the jurisdiction of the English Court. No steps in the counterclaim proceedings had been taken. The English Court jurisdiction clause would, as necessary, be given effect to by means of the English Court's supervisory jurisdiction over an arbitration initiated under the LCIA arbitration agreement. In conclusion, the counterclaim against MCP should be stayed.

Comment

The judgment provides a helpful review of the English authorities relating to interpretation of dispute resolution clauses that contain both an arbitration agreement and a choice of court clause. The decision

also contains a useful reminder that a counterclaim can be an independent “matter”, for the purposes of section 9(1) AA 1996.

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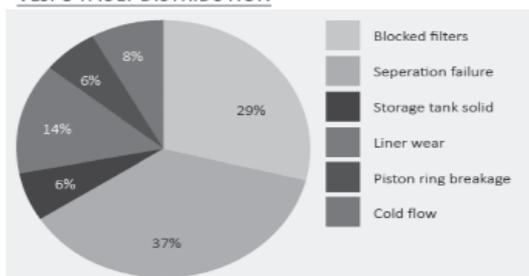
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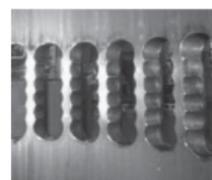
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UNDERSTANDING IMO'S LATEST EMISSION CONTROL MEASURES

** CARBON INTENSITY INDICATOR **

Harshvardhan Bhavne

While the International Maritime Organization (IMO) is expected to adopt an Annual Efficiency Rating (AER) mechanism for reducing CO2 emissions by shipping, we find that this measure may not only be ineffective, but may even result in an increase in emissions for the same cargo transportation work done.

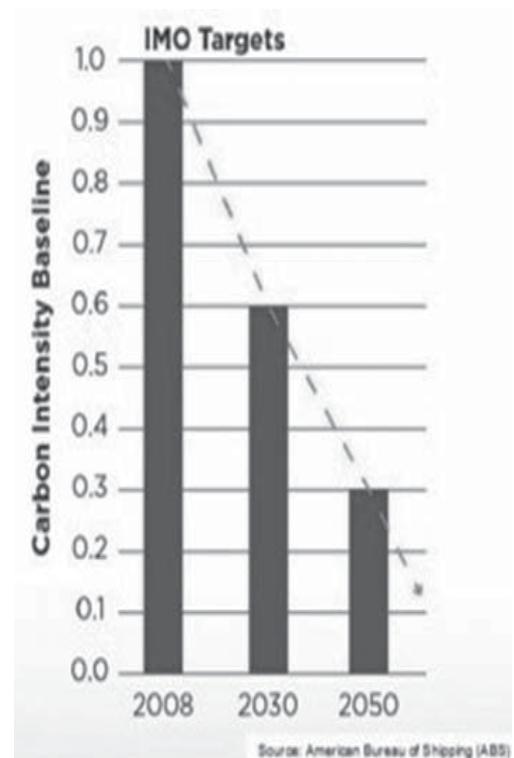
IMO has set ambitious targets to reduce carbon dioxide (CO2) emissions compared to 2008 levels:

- 40% reduction in CO2 emissions per transport work by 2030
- 70% reduction in CO2 emissions per transport work by 2050
- 50% reduction in total annual GHG emissions from international shipping by 2050

Transport work is taken to mean cargo volume carried multiplied by distance over which the cargo is carried, while CO2 emissions are a direct multiple of fuel consumed.

Over the last few years, two methods have been proposed to achieve this reduction and both are likely to be adopted within 2021 to be implemented in 2023. These are CII (Carbon Intensity Indicator) and EEXI (Energy Efficiency for Existing Ships).

In June 2021, IMO is expected to choose the Annual Efficiency Rating (AER) as the metric for carbon intensity to measure carbon emissions per transport work. AER uses the ship's deadweight capacity multiplied by miles travelled as a proxy for transport work, whereas the Energy Efficiency Operational Indicator (EEOI) (the industry-standard carbon intensity indicator until now) is based on actual transport work (actual cargo volume carried multiplied by miles travelled).



How will CII (AER) work?

If, as expected, IMO chooses the AER as the metric for carbon intensity, carbon intensity is calculated as the fuel consumed by the ship multiplied by a constant C divided by the total miles travelled by the ship, multiplied by the cargo carrying capacity (deadweight) of the ship.

For a ship with deadweight D which consumed X tons of fuel throughout a year and steamed for N miles in the year, the actual CII achieved in that year will be calculated as:

$$\text{CII} = (X \times C) / (D \times N)$$

For fuel oil, the constant C is 3.114 x 10⁶grams CO₂ emission per ton fuel consumed.

This will be compared against the estimated CII for the same size of ship in 2008. 2008 emission levels for ships have been estimated as a function of the ship's deadweight tonnage (the ship's cargo carrying capacity). For bulk carriers less than 279,000 deadweight, this is estimated as:

$$6014 \times \text{dwt} - 0.626$$

So a bulk carrier of 70,000mt dwt is assessed as having a CII of 5.57 (6014 x 70000⁻0.626) in 2008 and would need to achieve a CII of 3.34 in 2030 (which would be calculated by the actual fuel consumption and actual steamed miles in 2030) to meet the target of reduction of 40% over 2008 CII

The reduction is to be phased in from 2023, with expected targets tightening from about 23% reduction in 2023 to 40% reduction in 2030. The exact targets are yet to be decided.

However, practically, these reductions may not materialize considering the following factors:

A. Ballast voyages (voyages without cargo):

The CII (AER) calculation only takes into account the cargo carrying capacity of the ship and not the actual cargo carried by the ship.

In reality, many ships (bulk carriers, tankers, etc.) do not carry cargo all the time, as they have to proceed to their next loading port after the last cargo is discharged. These are called ballast voyages.

Let us consider two bulk carriers of 70,000mt deadweight. Both ships steamed for 250 days in the year consuming similar fuel (say 20 tons per day x 250 days = 5000 tons of fuel) and did similar speeds (say 10 knots x 24 hours x 250 days = 60,000 miles).

The CII of both ships would be 3.71, which means that both ships were equally efficient for the same transport work.

However, if ship A was loaded for 80% of these voyages (as the operator was able to load cargoes closer to the ship's last discharge ports) while ship B was loaded only 50% of the time (say going back to the same load port every time), then in practice ship B was less efficient. However, this is not reflected in CII (AER) metrics.

Moreover, empty ships can do more speed for the same fuel consumption. So when we consider the above two ships with a 0.5 knot higher speed when without load, the AER of the ship which sailed empty longer is lower.

	Ship A	Ship B
Deadweight	70,000	70,000
Steaming days	250	250
Loaded %age	80%	50%
Loaded days	200	125
Loaded speed	10	10
Loaded distance	48000	30000
Loaded fuel consumption per day	20	20
Loaded fuel consumption total	4000	2500
Ballast days	50	125
Ballast speed	10.5	10.5
Ballast distance	12600	31500
Ballast fuel consumption per day	20	20
Ballast fuel consumption total	1000	2500
Total distance	60600	61500
Total fuel consumption	5000	5000
CII	3.67	3.62

Thus, applying AER, the less efficient ship, which carried less cargo, actually fares better than the ship which carried more cargo in the year.

Taken to the extreme, this means that two ships carrying cargo one way each (say one ship carrying cement from China to Australia and returning empty while the other ship carries iron ore from Australia to China and returns empty) will be considered more efficient individually than a single ship carrying both cargoes back to back.

If other means to meet the CII target are not effective, ship owners may insist that their ships conduct a minimum number of ballast steaming days to meet their CII (AER) targets.

B. Maximising of cargo lift

As we have mentioned earlier, a ship carrying less cargo consumes less fuel than when she carries cargo to her full capacity.

A ship which is loaded to 80% of its cargo capacity would consume roughly 90% of the fully loaded fuel consumption.

If other means to meet the CII (AER) target are not effective, ship owners may insist on restricting the cargo volume loaded their ships in order to meet their CII (AER) targets.

C. Time at anchor

Ships often spend time at anchor after arriving at port whether loaded or empty until their berth is available. Berths are allotted to ships on first-come-first-served basis, hence the ship must arrive at a port, declare her arrival and then wait until earlier ships berth and complete their cargo operations. These anchorage periods can extend up to several weeks depending on congestion in the port. The waiting ship may be loaded (waiting to discharge cargo) or empty (waiting to load).

As the ship is not moving, the fuel consumption is very low when at anchor. Our 70,000mt ship may consume only 1.5 tons per day at anchor. However, this period does not add any distance to the CII calculations, and prolonged periods at anchor would cause an exponential rise in the CII. Let us consider two similar ships performing the same voyages, but one ship stays at anchor while the other continues steaming unproductively around the port waiting for her turn to berth. So while ship A spends 35 days at anchor and burns 1.5mt fuel per day while adding no miles, ship B spends those 35 days steaming around the port (28 days additional loaded steaming and 7 days' additional ballast steaming), consuming 20 tons of fuel per day but adding unproductive distance covered.

A ship which carries the same amount of cargo between the same ports, but continues moving instead of remaining stationary, achieves better CII despite actually consuming more fuel than a ship which arrives port, drops anchor and waits her turn for berthing

	Ship A anchored 35 days, waiting 28 days in loaded condition and 7 days in ballast	Ship B did not anchor, but steamed after arrival, 28 days extra in loaded condition and 7 days in ballast
Deadweight	70,000	70,000
Steaming days	250	285
Loaded %age	80%	80%
Loaded days	200	228
Loaded speed	10	10
Loaded distance	48000	54720
Loaded fuel consumption per day	20	20
Loaded fuel consumption total	4000	4560
Ballast days	50	57
Ballast speed	10.5	10.5
Ballast distance	12600	14364
Ballast fuel consumption per day	20	20
Ballast fuel consumption total	1000	1140
Total distance	60600	69084
Days at port	80	80
Consumption per day in port	2.5	2.5
Total port consumption	200	200
Days at anchor	35	0
Consumption at anchor	1.5	1.5
Total anchor consumption	52.5	0
Total fuel consumption	5252.5	5900
CII	3.86	3.80

If other means to meet the CII target are not effective, ship owners may insist on steaming aimlessly instead of waiting at anchor in order for their ships to meet their targets.

In summation, in order to meet their CII targets under an AER-based mechanism, ship owners may feel compelled to adopt measures that actually reduce efficiency and increase fuel consumption for the same cargo carried.

For container ships, assessing actual cargo carriage is challenging, while they rarely are without cargo or spending time at anchor. Hence, The CII (AER) method is likely to be more effective for container trade.

For ships like bulk carriers, the EEOI index could be used to measure CII as an alternative to AER. EEOI uses actual cargo carried instead of cargo capacity for the calculations and would incentivize ship owners to be more efficient by reducing unproductive ballast steaming and steaming without loading to full capacity. For these vessels, EEOI would be more appropriate and more effective to achieve actual emission intensity reductions.

IMO is likely to choose the AER method because it lacks the necessary historical cargo data (which has not been disclosable under mandatory IMO and

EU data collection schemes) with which to calculate the EEOI carbon intensity for the 2008 baseline year. We hope this will change.

(Harshvardhan Bhave: Director – Fleet, with Pacific Basin Shipping, Hong Kong.)

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【Key words: shipping, ship management, maritime laws, legal responsibility】

Having confronted risks of legal litigation in relation to maritime trade, ship's managers should comprehend content of legal responsibility associated in shipping operation, and put risk control in place with mariners, to protect all stakeholders' interests, so that the industry can bring forward professionally in long run. This article does not aim for discussion of legality of maritime laws, but focus on how ship's managers should pay attention in their practice legally in ship management.

應當充分認識船舶運行中存在一系列與海上交易相關的法律風險性，需要在船舶管理中加強管控，以保護與船舶產業利益相關者，使行業可以長足發展。本文不在於專門討論海商法，而是從船舶管理的角度說說與船舶管理有關的法律問題。

除了船舶必須保持合規利商以外，船舶資產運行還有高成本價值高，涉及龐長的產業鏈和眾多利益相關方的特點，當發生海上和港口事故，船舶繞航或停滯狀態，出現貨損貨差時就會發生一系列複雜的糾紛和利益責任的追索，如：海事求償索賠，保險和共同海損理賠，港口國和船旗國的行政或刑事處罰等等。更具有風險

的是海運欺詐，通過海上運輸的提單與合同環節，交易對手非法侵佔承運貨物、租金運費、燃料和其他有價值資產物資。這裡涉及了海商法、各國與船舶有關的民事、行政和環境保護等法律框架下的法律責任；涉及國際刑事責任。具體說有以下幾類：

- 船東承運人的法律責任：（包括原船東，船舶管理人，光船租船人等）履行運輸合同和租約的法律責任；船東支付港使費、燃料、船員工資和船舶供應費用的責任；船東投保、索保理賠的法律責任；船舶保管和送達交付貨物的法律責任；船舶污染環境的法律責任；船舶碰撞協力廠商財產的法律責任；共同海損的法律責任；船舶救助救濟法律責任；船東履行船員僱傭合同，特別是在新冠疫情下安排船員更換的法律責任
- 船舶管理人代理的法律責任：遵守國際公約、安全管理船舶、合法僱傭船員和服務船東的法律責任
- 船舶承租人的法律責任：托運安全貨物，安全使用船舶和按時支付運費租金的法律責任
- 保險人和被保險人的法律責任：對非除外條件下的船舶資產損失和人命傷害的保險理賠的法律責任，被保險人遵守受保條件和及時知會保險人船舶行險的狀況。

海商由於船舶的流動性，形成了一種特有的法律保全求償的機制，這就是通過海事仲裁或法院申請滯留船舶，申請人只要遵守所在港口法律訴訟的程式和提供一定擔保就可以由法院發出滯留令，船東只要能夠提供訴訟所要求的擔保即可釋放船舶。這一機制的便利可操作性，在一定程度上保障了海商契約的有效履行，服務和財產交易的信用；同時也成為被告的船舶方特有的法律風險。相類似，船方也具有貨物留置權，保障從貨方收取海上運輸費用。

許多當事人的海商和海事的各種各樣的實踐內容豐富了海商的法律實踐。當出現相關利益方的利益在船舶運行中受損，就會出現民事和刑事責任認定，保險權益認定，並進行相應的求償，在認定中往往出現法律糾紛，產生仲裁和訴訟。這是船舶資產運行和貨物運輸過程中經常發生的。應該看到船舶運行法律風險之管轄權和適用法及其複雜，涉案標的可能及其巨大，牽涉到租船合同，運輸合同，船舶服務，船員僱傭和外派合同，裝卸港或涉事港（即包括其他原因掛靠的港口如加油，換船員）代理契約，還有國際公約，船旗國和港口國法律，船級社規定等眾多相關法律因素，具體到法律技術手段還包括如何行使正確的證據固定，訴訟保全，司法程式，調解 / 仲裁 / 庭審 等，而且英美法和大陸法系的判決結果可能有較大的區別。作為船舶管理人熟悉此類海商的法律實踐是非常重要的。

為了規避船舶運行的法律風險，最大限度地保護船東的利益，同時又合理地顧及相關利益方，特別是客戶（租家和貨方）和關鍵供應商的利益，這是實行有效管理的船東應該做到的。以下是一些與船舶管理有關的關鍵性法律問題：

1，關於海商合規管理

確保船舶的適航性和適貨性

保持和證實船舶的適航性是最為關鍵的法律責任，如前述，船舶管理人需要運用船舶安全管理體系，減少和消除船舶常規的適航性缺陷，如：證書失效，船舶結構和設備重大缺陷，人員涉及重大故意違法行為和存在違反安全管理體系的嚴重不符合項等。並有良好的體系檔管理記錄來證實船舶的適航性，即滿足國際公約足額配置適任船員，船舶主要機械設備和應急裝置正常。一旦船舶被證實處於不適航狀態，並從第一抵達港口擅自開航，船舶就失去合法經營的基礎，任何法律責任將是無限的，就有失去保險和有限責任豁免的可能。

ISM 規則規定了船東必須保障在船舶緊急應變情況下船長的絕對決定權力，在船舶緊急應變中船東不得干擾和強制船長做出救險、逃生、求助和棄船的最後決定，否則船東將失去法律上的免責條件，這是保持船舶適航的重要法律要點。

保持船舶的適貨性是履行運輸合同和租約的最為基本的條件。與上同理，船舶管理人需要維護和保養船舶運輸的場所和設備，保證船舶運行成本消耗正常，使船舶能夠安全和及時地將貨物完整送達交付於目的港口。送達交付貨物是承運人最基本的法律責任，各國商海法普遍約束船方履行這個核心的義務，在貨損貨差、無提單交付貨物等情況下給予貨方相應的求償權利。

確保船舶運輸合法貨物和適合保險條件

所承運貨物必須合規合法（非走私、違禁和受國際制裁的貨物），可安全承運

（不會對船舶、同船承運貨物、環境和人員產生危害），同時需要貨物和船舶可能航行的區域符合海上保險和金融的除外條件，這是海商合規中需要審核處理的另一個關鍵問題。航東和船舶管理人設立貨物管理崗位協同法務部門，即時審核船舶攬貨內容，進行相關的海商風險控制，同時船長必須做好現場把關工作（集裝箱班輪公司是箱管部門），不承載經過專業判斷非安全、不明辨和無海關手續的貨物。

確保海商交易對手的信用評估

海商交易對手的信用審核也是規避法律風險的重要步驟，海上運輸特性造成客戶（租家）和供應商（代理）的遙距性，需要進行法律身份確認，考核判斷交易對手租船和提供運輸服務經驗與能力，並在運輸合同中根據情況增減防範風險的相關條款。海商信用的大資料（往往由海商律師和保險人積累此類資料），交易對手提供信用和財務記錄，船東交叉評估和主流經紀人圈的推薦是判斷交易對手的重要參考依據。

確保遵守航運制裁合規政策

制裁是指對於特定地區、特定實體或個人的限制及 / 或禁止。一般來說，制裁的目的是維持或恢復國際秩序，保障和平與地區安全。美國，聯合國，中國，英國，歐盟以及許多其他機關以及司法管轄區已經實施過制裁。例如，在目前的國際形勢下，美國制裁以其執行嚴厲，適用廣泛的特點而最為人熟知。

遵守制裁的行為可能會對相關企業或個人造成民事和刑事處罰，由於航運業具有極強的國際化特點，其受到國際經濟制裁的衝擊更會體現在多個方面。由於海

上運輸參與的法律主體眾多，涉及船東、經營人、承租人、托運人、收貨人以及各類代理人，如果其中存在被列入制裁名單的個人或者實體，有可能導致其他方被制裁。因此，有關方應該提前做好盡職調查，瞭解交易各方的背景，確保交易安全。此外，制裁措施往往包括對某些特定貨物運輸的禁止，如果船舶裝運了這些貨物則會有被制裁的風險。例如聯合國對朝鮮的制裁措施就包括禁止運輸朝鮮煤炭，違反了該措施的船舶將會列入黑名單，註銷船籍，且任何國家港口不得接受該船入港，甚至會員國有權對該船採取凍結措施。就此，確保船舶運輸符合制裁合規也是必要的，相關航運企業、代理應及時建立企業內部的合規準則，瞭解制裁制度並對其交易相對方、相關船隊進行全面盡職調查以及持續監控。

2，船舶管理人的代理責任

作為船舶管理人，如果不直接受雇於船東或承租人，就是獨立於船舶運輸商業利益之外的協力廠商，法理上屬於一種商業代理人，即不能替代船東處理未授權事務和必須在管理服務中盡職盡責的法律責任，又要在安全管理上負有國際公約規定的、須認證的完全管理責任。船舶管理人需要在任何涉及海商交易的場合，明示自己的代理地位，無非授權的資產和商務處置權力。

一般情況下，船東與船舶管理人有專門的船舶管理合同，約定對船東如何報告船舶狀況和成本開支等情況。但更為重要但是船舶動態的知會通情，這是代理責任非常重要的一環，船長和船舶管理人必須適時報告和知會船東和航運公司經營與商務部門有關船舶動態，商務處理，船舶運行和事故險情等重要事項。保持與海商風

險有關的良好的記錄和證據，協助船東規避法律風險。保險合同一般有七天內報告出險情況的受保責任義務；船舶碰撞和船舶救助有報告附近港口國家的法律責任；貨物損壞和滅失、海上共同海損和船舶救助型繞航有提供海事聲明報告責任。

船舶管理人僱傭船員也是代理行為，法律上的雇主是船東，管理人使用船東的預算費用全額支付船員工資，不得代理過失拖欠船員工資。同樣，管理人代理安排船舶保險，應盡職保持船舶保險條件，不得代理過失，在船東費用足額支付情況下拖欠保險費用。

船舶管理人的公司董事要避免直接涉及船舶操作和經營管理失誤行為，致使船舶失去在海商實踐中通常由於船員疏忽造成損失而享有的免責或有限責任條件。

鑒於目前新冠疫情的全球趨勢，與疫情相關的船舶管理風險也是現在需要特別注意之處。作為直接管理負責人，船舶管理人應當確保公司岸基與船舶的溝通聯繫，落實各項防控措施，全面加強疫情防控工作。此外，管理人也應及時掌握新冠肺炎疫情期間船舶到達港口的疫情防控要求和措施實施，加強與船舶計畫靠泊港口口岸部門的溝通聯繫，盡力確保衛生免予控制證書 (SSCEC) 以及其他各國頒發的出入境衛生檢疫證書有效並保存在船。

同時，船舶管理人也應及時解決船舶、船員疫情防控中遇到的各種問題，例如各國海關拒絕入境導致的船舶滯留以及更換船員等問題。制定船員換班和船舶航行計畫，及時安排船員換班指導，確保船員換班在滿足換班地疫情防控要求的前提下，安全、穩妥地進行。

3，船舶運輸契約中的船舶管理責任

程租

貨方托運貨物、按承運貨物數量支付運費，船方承運和交付貨物。航次租船可以是整船租賃，也可是船舶航次的艙位租賃，契約的基本法律要點是相似的。航次租船契約執行中對船方來說有如下運行風險：

- 航行區域，靠泊港口和泊位的安全性：影響船舶安全航行和受載的環境條件，如水深，風流情況和系泊條件，船長有權拒絕船舶進入不安全區域。
- 受載貨物的不安全因素：危險品貨物，易變質，易液化，易燃爆貨物，需要發貨人申報明示，船長可能拒裝不符合安全標準（水分、化學性質、不當包裝）的危害性貨物。
- 錯失受載期，早於受載期達到裝貨港，等待時間不計滯期；晚於受載期到達，貨方承租人可以取消航次租船，造成航次計畫落空。
- 航次的時間成本風險：航次租船運輸收入一般按承運貨物數量計算，但航次成本是按照航次時間佔用和日耗燃料與港口使費計算的，出現成本結構上的錯位。海商實踐中以確定的裝卸率計算船舶在港滯期，得到滯期費補償。但往往如何計算滯期費用和現場記錄證據是出現法律糾紛的地方。
- 船舶備艙適貨：掃艙洗艙是船舶完成備艙適貨是關鍵部分，通過裝貨前貨艙檢驗，確認船舶適裝，如果驗艙沒有通過，船舶將視為未遞交裝卸準備通知。極端的情況是船況船貌差，使得船舶多次無法通過貨艙檢驗，被取消運輸合同。

- 運費收支：對租約項下的提單，採取見款放單，以提單釋放與否確保運費收取，或者控制船舶在卸港卸貨或放貨交付，以留置貨物擔保運費的支付。但實踐中常見法律風險，如：運費未收不能卸貨造成船舶滯期，或代理不當放棄貨物留置造成運費無法回收等。滯期費視為運費的一部分，裝港滯期與運費一起支付，容易糾紛和拖欠的是卸港滯期費，需要通過商海信用管理來解決。
- 提單簽發：簽發時間應常規按時，先貨後單就能夠控制風險，盡可能排除預借和倒簽提單的做法，因為提單涉及包括貿易貨主和銀行在內的協力廠商法律主體的權益，不按時簽單得不到法律保護。船方出現在租家保函下無單放貨，也會致使法律風險敞口。

降低這些風險的方法主要是控制法律風險和良好的船舶管理，即租約條件前置阻擋風險，與租約執行的環節控制。

期租

船東出租人配置船員與船舶裝備，出租船舶的使用時間，租方按租用時間支付船舶租金和使用船舶產生的變動成本（燃料和港使費用）並在合同約束範圍內承運貨物和旅客。期租船契約執行中對船方來說有如下運行風險：

- 租金的扣除：原則上由於船東出租人原因（包括船員）造成船舶不適航和不適貨，如船舶的起貨設備故障和貨艙不適裝，船舶因機械故障滯航和PSC檢查被滯留等情況，船舶運輸功能缺失，承租人可以按照缺失實際發生的時間扣除租金。容易發生法律糾紛的是對船舶運輸功能缺失和對承租人使用影響的認定。
- 租金支付：海商慣例為15天提前支付下一15天的租金，單航次期租的情況有所不同，可能根據航次長短有時間上的增減。承租人未支付租金脫租造成租約中止糾紛，或者承租人未受到運費要求出租人停止卸貨留置貨物並連帶影響租金支付，特別是出租人在船舶已受載（部分或全部）的情況下脫租，迫使原船東在簽發提單情況下必須履行承運人職責完成運輸航次交付貨物，或卸載貨物中止租約，造船法律風險損失。
- 租約中止：通常按租約正常中止，在約定的時間和允許的海域裡退還出租人船舶，如果有自然航次未完成，可要求合理展期。但是在租期中發生承租人強制提前還船是法律糾紛高發之處，一是還船行為是否違約，二是對租約失效條件（通常有船舶不適航，船長不執行租家指令）的認定。
- 除外條件：除外條件通常是出租人為保護船舶利益或按照保險要求設置的對貨物和航區的除外約定，如有些貨物裝載會增加船舶的損耗和維護成本，有些航區不符合船舶保險和融資條件。船舶管理人有責任監督船舶租用的除外條件的限制，遇到除外條件，船長可以拒絕執行租家航次指令，或要求承租人向出租人申請免除。在攬貨實際情況下希望裝載除外貨物或航行至除外航區，需要向出租人書面認可，有時需要增加租金或支付額外保險費用。
- 交還船條件和燃料管理，交還船的時間地點即是雙方事先約定的，又是承租人調度計畫安排的。交還船時都需要測量船舶在船剩餘燃料，交還船差額大於零，出租人可在尾期租金中扣

除多餘燃料款（油價通常需要事先約定），反之需要支付差額。租船期間船長需要監管承租人安排的燃料供應，所加重輕油料必須符合技術與租約標準，並封存樣品保持記錄，以備燃料有問題發生法律糾紛。

光租

光船租賃是出租人提供船舶出租、收取租金，承租人支付租金，配置、管理和使用船舶。光租船的契約形式相對簡單，佔有權和使用權完全出讓，船東僅為財產和融資的業主，法律風險核心是如何保障原船東監管資產，通過特檢約定要求承租人正常維護船舶資產，同時必須在船舶註冊機構登記光租狀態。

提單

提單項下的運輸往往產生在班輪公司提供的集裝箱和滾裝運輸形式下，這時船貨雙方通常無明示租約，提單則具有貨物收據、物權憑證和運輸契約證明的三大功能，由於簽發提單發生在裝貨完成以後，提單背面條款是船方事先單獨規定，不符合契約合同全部要素，故有國際《海牙-維斯堡》規則來平衡承運人與托運人的權利義務。儘管如此，在海商習慣上提單仍是日後處理運輸中各種問題的依據。一個單船就擁有上萬箱位的承運人面對成千上萬的托運人，其商業優勢和法律強勢地位是明顯的，如果發生糾紛，托運人一般不會獨自與承運人對簿公堂，通常由貨物保險人參與認定法律責任和求償，同時一旦發生由於貨物引起的海上風險，承運人也往往無法得到托運人的相應賠償，還是需要船舶保險承擔風險損失。因此，不能忽視承運人管理海上運輸的責任，其中最大的問題是如果管理千百個箱子的正確申報（重量、貨物性質和收貨人）資料正確，以便保障貨物的安全積載和運輸和交貨管理問題。

由於提單是海商貿易中有價證券業務流程中非常重要的環節，信用證結匯和貨物交付，涉及協力廠商利益（收貨人和銀行等），承運人在這個問題上管理不善，十分容易產生法律糾紛。因此，需要特別嚴格控制無租約條件下使用提單的風險要點，如提單的簽發時間，電放和無單放貨等。嚴格控制提單上申報的貨物重量和貨物內容。

4，法律責任中的船員因素

實踐中，船長和船員的行為很大程度上會影響租船合同糾紛中責任的承擔，主要有三類，即：（1）沒有按照行業的商業和技術習慣做法工作，未履行仲裁和法庭認定的默認責任；（2）違反租約條款中明示約定的船方責任與義務；（3）不安全操縱船舶和操作貨物的裝卸、堆存和保管，存在船舶不適航、不適貨和船員不適任的嫌疑。具體舉例如下：

- 船長未及時準確報告船舶動態，產生滯期或船舶錯過受載期。
- 大副未適當使用大副收據批註，使得貨損貨差糾紛中無證據爭執保護船舶利益
- 船長未能拒收已判斷不適合安全承運的貨物，產生船舶安全風險或貨物損壞。
- 船員未盡貨物在船保管的責任，造成貨物污染和損害。
- 船員未竟查檢船舶燃料供應的品質，產生劣質燃油機損事故。

- 船長採用不合理的繞航，或在惡劣天氣中航行未按照氣象導航指引產生航速油耗糾紛。
- 船舶使用過期海圖造成觸礁擱淺、損壞海底電纜等事故，使船舶不能取得共同海損分攤。
- 在船舶遇到險情，產生船舶財產和貨物損壞時未及時正確地記錄現場情況和發佈海事聲明。帶來時候求償救濟和保險理賠的困難。
- 等等。

船舶管理不當產生的法律責任，許多與第一線的船員的安全和商務的風險意識不強，出現了執行船舶租約中的缺陷和未竟責任，這是船舶管理人應該避免的。

5，船舶風險免責

海商實踐中一般接受承運船舶的海上風險性質，存在由於海上自然因素，承運人雇員和船員的疏忽，存在由於不可抗力造成對船舶資產和承運貨物損害，或運輸交貨的滯期等，因此存在船舶的有限責任或免責的習慣做法，船舶賠償的範圍和程度得到控制，以鼓勵船東從業。但是也有一系列管理不善或特殊法規的情況，存在船舶免責失效的可能，不受海商法律保護。這是船舶管理人必須加以注意的，例如：

- 船舶被證明處於不適航狀態，
- 船舶無證航行
- 船東和管理人公司的董事涉及營運中的失誤

- 在美國沿岸船舶油污責任
- 船長和船員參與海運欺詐行為
- 保險除外條件
- 船東被證明參與故意違法行為

最後的話

瞭解國際海商的法律實踐的內容，懂得海商交易規則和慣常做法，進一步瞭解基於普通法和海商法的仲裁和法律訴訟的一些基本要點，可以幫助船舶管理人和船長在海商航海實踐中做好以下工作：

海商合規
租約執行
證據收集
規範操作

船舶管理人有完全的船舶管理責任，需要在海商實踐中盡職保護船東利益，體現服務的專業能力，熟悉船舶運輸契約，商務條件和保障船舶的適航性和適貨性是非常重要的。尤其是在船舶工作第一線的船員來掌握船舶運行中涉及的方方面面的法律責任，有行業習慣做法的合理責任，有合同約定的，也有法規和公約規定的約束，將會促進提高船舶風險防範意識和管理水準，當糾紛和風險情況出現時，船員不僅能夠盡職幫助船東控制損害程度和範圍，而且可以收集有利證據，並固化之，以保護船東利益和船舶的海上安全和貨物運輸安全。

附錄：

國際上有波羅的海交易所提供標準租約和提單格式。提單的背書有五大公共條款值得關注：

首要條款：海牙 - 維斯堡規則大於提單條款，承運人對裝貨前和卸貨後或承運人轉移後的貨物損失免責

共同海損：船貨各方分攤為了共同安全產生的有意地、合理地採取措施產生的成本。

新傑森條款：船方過失仍可分享共同海損

互有過失條款：碰撞損害對本船貨物免責，如因它船賠償本船貨物造成的分攤費用可贖回

喜馬拉雅條款：承運人享受的免責條款適用於承運人的雇員和代理人。

(葛依東：上海海事大學客座教授
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An online seminar was delivered to the members of the The Chartered Institute of Logistics and Transport in Hong Kong on May 18 2021.

This seminar was about the grounding incident of the container ship M.V. “Ever Given” in the Suez Canal. It was divided into 3 parts. The first part introduced the background of the incident and few nautical terms whilst the other two parts discussed the possible cause(s) of this grounding incident and the duties and financial liability of a ship’s pilot.

Part I

Between March 23 and 29, 2021 the Suez Canal was blocked after the accidental grounding of M.V. “Ever Given”, a Golden Class 20,000 TEU container ship, on the morning of March 23 at about 0744 local time. The 400-metre-long (1,300 ft) vessel was buffeted by strong winds and ended up wedging itself across the waterway, bow and stern stuck in the canal bank, which prevented other vessels from passing through that part of the Suez Canal.

The Suez Canal is one of the world's busiest trade routes and the obstruction had a significant negative impact on trade between Europe and Asia and the Middle East. On March 28, at least 369 ships were queuing to pass through the canal. This delayed an estimated \$9.6 billion worth of

trade. On March 29, M.V. “Ever Given” was re-floated and moved to the Great Bitter Lake for technical inspection, The Suez Canal Authorities allowed shipping to resume from 19:00 LT (17:00 UTC) on March 29.

Some ship’s terms were introduced such as beam, length overall and draught denoting the width, length and immersed part of a ship’s hull. Freeboard and air draft were also explained: They represent the hull part and the height of the vessel above the waterline. For a ship at size of M.V. “Ever Given”, particular attention should be paid to its draft and the bank suction effect when the ship is navigating too close to the edge of the canal shore.

The size of M.V. “Ever Given” is enormous at a length of 400 meters, breadth of 59 meters and a draft of 15.7 meters. Measuring this container ship from the keel to the top mast, the height would be 60 meters; when it is compared to the height of Sydney Opera House at only 65 meters. Therefore, one can imagine a giant structure similar to the size of Sydney Opera House navigating along the narrow Suez Canal.

In addition, the deck containers were piled as much as 10 tiers high with each tier 8 feet tall. Together with the ship’s freeboard this formed a large sail area such that the navigation could be impaired due

to the influence of a strong side wind. The wind might have caused the ship to set uncontrollably across the narrow canal and run aground. The windage areas are the areas exposed to the wind. These are the areas of all ship structures and deck containers above the waterline.

For calculating the windage areas we need to know the wind forces acting on the vessel. The formula for wind force calculation on any structure is: Wind Force = Pressure x Areas exposed to the wind.

Part II

As ships in transit become bigger with larger windage areas, the margin for error when sailing through narrow waterways like the Suez Canal becomes much smaller. Larger ships displace more water and have less of a gap between the hull of the ship and the sides and bottom of the canal, increasing the squatting and bank effects and making the pilot's job even more difficult.

In general, steering a ship is more challenging than driving a car. Unlike the tires of a car that grip the surface of the road, a ship is afloat and has no brake as does a car. Ships are at the mercy of wind, currents and interaction in narrow water, not always moving in the direction they're pointed. Owing to the large momentum it is difficult to make corrections quickly when they veer off-course.

The causes of this incident are still under investigation by the Suez Canal and other Authorities, such as P&I Club and flag

state. One of the allegations was the strong side wind caused the ship to set towards the bank. A short video was displayed at the seminar showing the movement of M.V. "Ever Given" before grounding. The video showed that the container ship was influenced by the wind and the swinging of the bow between starboard and port side banks was observed shortly after it entered the canal. The speed of the ship was increased gradually to 13.7 knots. The Rules of Navigation in Suez Canal stipulates that the transit speed of a container ship is only 16 km/ hour or 8.6 knots.

The M.V. "Ever Given" was grossly over speeding before the grounding. It is possible the pilot increased the speed of M.V. "Ever Given" because the ship set too much to the port side of the canal bank due to strong wind. Increasing the speed might give quicker rudder response in turning the ship's head back to the centre of canal, as more water flowed past the rudder. However, when a big ship is navigating at relative high speeds in shallow and narrow waters, the large hull will induce greater squat and bank effect causing the vessel to veer off course and lose control. It is unclear whether a lull in the wind or human error or something else was at fault for the drift, but once that happened the bank effect became the final nail in the sandy coffin, pushing the bow of the ship towards the eastern shore while pulling the stern into the opposite bank.

Squat is a hydrodynamic phenomenon in which a vessel moving through shallow water creates an area of lowered pressure (due to Bernoulli's effect) causing the

ships draught to increase and touch the sea bottom. Squat effect results from a combination of (vertical) sinkage and a change of trim that may cause the vessel to dip dangerously towards the stern or towards the bow.

Squat will occur in particular when limited water space is found near the vessel. As water passes around the hull the flow speed increases to allow the same water mass to pass. This increased flow leads to negative pressure and downward vertical force. Squat affects a vessel when depth below keel is less than 10% of the vessel draft. The amount of squat generated will depend on the speed of the vessel. To reduce the effect of squat, the vessel needs to slow down.

The other consideration was the bank effect which becomes obvious when ship navigates near the shore. As ship is moving ahead at speed, an elliptical domain of high and low water pressure areas would be generated around the ship's hull. A bulge of positive pressure (expulsion) would be seen at the bow and another at the stern section. Conversely another large area of negative pressure (suction) at the mid-section of a ship would exist at the same time. So when a ship approach at angle to the shore or bank and at speed, the high pressure area at the bow would act as a cushion and push the ship's forward away. This ship to shore interaction would cause the bow of the ship to veer off to the other side uncontrollably. The effect of this veer force would be in proportion to the speed of the ship. To reduce the bank effect, the ship also needs to slow down.

In the case of M.V. "Ever Given", the ship approached the port side shore bank at relatively high speed. The ship to shore interaction caused the bow to veer uncontrollably to starboard and the bow grounded on the other side of the canal bank.

There are some technical considerations as to whether a bow thruster could alleviate the situation. Yet a bow thruster loses its effectiveness as a ship's speed increases. Depending on the hull and thrust tunnel design, thrust effectiveness can be lost at speed between 2 and 5 knots.

Dropping an anchor could also act as an emergency measure to prevent a grounding. This might be done if there were crew standing by at the forward anchor station. Use of anchor has been widely employed not only for securing the ship's position in coastal water but also in an emergency to help turn, stop or reduce the speed of a moving ship. Tug escorts are another consideration for the safe transit of this mega ship.

In conclusion, strong winds can cause undesirable set and side movement to large ships. In this case over speeding (13.7 knots) in Suez Canal could cause squat and bank effect. Followings are suggestions to prevent future re-occurrences:

- Local weather forecast on the possible encounter period of high winds (e.g. during hours of dawn or dusk)

- Arrange convoy for Mega ship transits – to set a transit window period with minimal high wind probability
- Provide a tug escort during the Mega ship's transit
- Ship's crew to standby anchor on the bow during transit

Part III

Pilots with local knowledge of different sea and river ports are employed on board ships to guide vessels into or out of port. In addition to local knowledge and expertise, pilots are able to provide effective communication with the shore and with tugs, often in the local language.

As for Suez Canal Port Areas, pilotage is compulsory for all vessels entering or leaving Egyptian ports and for vessels transiting the Suez Canal. At the time of grounding, two Suez Canal Pilots were onboard onboard M.V. "Ever Given" giving advices to the ship for the canal transit.

The presence of a pilot on board does not relieve the master or officer in charge of the navigational watch from their duties and obligations for the safety of the ship. Despite a pilot being on board, the master is always in command. The master and officers are under a duty to provide the pilot the fullest assistance including all navigational duties.

Like any ports in the world, pilots will give navigation advices to the ship but

they will bear no financial liability in case of collision or grounding accidents even if caused by the fault of the pilot. This exemption applies to all ship pilotages, with the only exception being the Panama Canal.

As to the responsibilities of Suez Canal Pilot, Article 4 of the Rules of Navigation in the Suez Canal states that the duties of their pilots commence and cease at the entrance buoys of the Port Said and the Port of Suez. They only provide advice on maneuvering the vessel, the course to steer, etc. They put at the disposal of the Master their experience and practical knowledge of the Canal, but as they cannot know the maneuverability characteristics for every vessel, the responsibility falls completely upon the Master.

When in the Suez Canal or at its ports or roads, owners, operators, and/or charterers of any vessel are responsible for any damage and consequential loss caused either directly or indirectly to the vessel or to Suez Canal Authorities properties or personnel or to obstruct navigation in the Canal.

In Hong Kong a similar clause can be found in the Laws of Hong Kong under section 24A of the Pilotage Ordinance (Cap 84): "a licensed pilot shall not be liable in damages for neglect or want of skill on his part while piloting a ship for any amount exceeding in the aggregate the sum of HK\$1,000 and the amount of pilotage dues payable in respect of pilotage services rendered by him for that ship". Thus, in a situation where an accident is caused by

pilot error the owner or Master remains responsible for any loss or damage, the pilots will have very limited financial liability since the liability of the licensed pilot concerned is HK\$ 1,000. This means, effectively, that the pilot is immune from financial liability.

The only exception is Panama Canal pilots. Pilotage through the Panama Canal is compulsory and is carried out exclusively by Panama Canal Commission pilots. Unlike all other ports in the world, Panama Canal pilots do not act in an advisory capacity but take command over the vessel. It is possible to hold the Panama Canal Commission liable for accidents which occur during Canal transit and which can

be attributed to actions of Canal pilots in command of the vessel. Claims procedures are ruled by the Panama Canal Act of 1979.

The seminar ended with a slide showing a possible alternative of the Israel canal plan near the Gulf of Aqaba. Although still under planning and open to Israel-Egypt competition, it would certainly benefit the shipping community through a second alternative in the Far-East Europe trade route.

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國際海上運輸合同的承運人及托運人很可能位處不同的國家或地區，一旦合同發生糾紛，而合同的其中一方需要提起訴訟時，就會產生哪一國家或地區有司法管轄權的問題。除了根據國際私法去判定管轄權外，合同雙方也可以預先以協議方式，在合同中以管轄權條款訂定協議有司法管轄權的法院。

根據《中華人民共和國民事訴訟法》第三十四條規定：「合同或者其他財產權益糾紛的當事人可以書面協議選擇被告住所地、合同履行地、合同簽訂地、原告住所地、標的物所在地等與爭議有實際聯繫的地點的人民法院管轄，但不得違反本法對級別管轄和專屬管轄的規定。」

換言之，在一般的情況下，國際海上運輸合同的雙方可以以書面，協議自由約定司法管轄權，但是所選擇的地點所在的法院，應與爭議的情況有實際聯繫。而且，約定的司法管轄權，不得違反關於級別管轄和專屬管轄的規定。級別管轄是指按照法院組織系統，劃分上下級法院之間審理第一審民事案件、經濟糾紛案件的分工和權限。專屬管轄是地域管轄的一種。法律規定某些案件必須由特定地域的法院管理，當事人不能以協議的方式加以變更，例如因港口作業發生糾紛提起訴訟，由港口作業地法院管轄。

上述《民事訴訟法》第三十四條應如何理解，可參考「吉林新元木業有限公司與歐航（上海）國際貨運代理有限公司」一案，最高人民法院於 2013 年的判決。（(2013)民提字第 243 號）

新元木業案的托運人，有木質地板一批，需由大連港經海運到鹿特丹港。托運人經由物流公司向承運公司訂艙，並取得由歐航公司簽發的提單。該提單的抬頭載明中航公司為涉案運輸的承運人，但提單右下角承運人簽章處則由歐航公司蓋章，並明確寫明「作為承運人」(as carrier) 蓋章。因此，大連海事法院裁定中航公司並非該運輸合同的承運人。從提單簽章處的簽章情況裁定，歐航公司才是該運輸合同的承運人。換言之，歐航公司要負無船承運人的責任。

提單背面的法律和管轄權條款規定：「由本提單證明的或包含在本提單項下的合同應適用香港特別行政區法律，任何由此生或與之相關的索賠或爭議應無條件受香港特別行政區法院管轄。」

貨物到達目的港後，承運人在未收到正本提單的情況下，將貨物交給收貨人，致使托運人無法通過控制提單的方式收回貨物尾款，因而在大連海事法院提出訴訟，向承運人索償。

對提單中約定的司法管轄權條款是否有效，大連海事法院指出，托運人的住所地 中國吉林，承運人的住所地 中國上海，涉案提單的簽發地、起運地 大連。綜觀與案相關的各種情況，香港與涉案運輸完全沒有實際聯繫。因此，沒有法律依據以香港法院來管轄此案。法院裁定該約定的司法管轄權條款無效。

另外，《民事訴訟法》第二十七條規定，「因鐵路、公路、水上、航空運輸和聯合運輸合同糾紛提起的訴訟，由運輸始發地、目的地或者被告住所地人民法院管轄。」在本案的運輸合同中，大連是該海運的始發地，因此，大連海事法院對該案有專屬管轄權。這項管轄權的規定，是不容許約定的管轄權條款予以改變。

上述大連海事法院的裁決，最終也獲得最高人民法院的支持。

因此，在海上運輸合同協議司法管轄權時，一定要注意所選擇的法院，是否在某方面與該運輸有實際聯繫。另外，所選擇的法院也不得違反級別管轄及專屬管轄的規定。

(戴錫崑：中國珠海市北京師範大學—香港浸會大學聯合國際學院工商管理學部副教授

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HULL INSURANCE CLAUSES - Notice of Claims and Tenders Clause

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.)

Clause 10 NOTICE OF CLAIMS AND TENDERS

10.1 In the event of accident whereby loss or damage may result in a claim under this insurance, notice shall be given to the Underwriters prior to survey and also, if the Vessel is abroad, to the nearest Lloyd's Agent so that a surveyor may be appointed to represent the Underwriters should they so desire.

10.2 The Underwriters shall be entitled to decide the port to which the Vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with the Underwriters' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a repairing firm.

10.3 The Underwriters may also take tenders or may require further tenders to be taken for the repair of the Vessel. Where such a tender has been

taken and a tender is accepted with the approval of the Underwriters, an allowance shall be made at the rate of 30% per annum on the insured value for time lost between the despatch of the invitations to tender required by Underwriters and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of the Underwriters' approval. Due credit shall be given against the allowance as above for any amounts recovered in respect of fuel and stores and wages and maintenance of the Master Officers and Crew or any member thereof, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, for the period covered by the tender allowance or any part thereof. Where a part of the cost of the repair of damage other than a fixed deductible is not recoverable from the Underwriters the allowance shall be reduced by a similar proportion.

10.4 In the event of failure to comply with the conditions of this Clause 10 a deduction of 15% shall be made from the amount of the ascertained claim.

When a vessel sustains damage by an insured peril, Section 69 of the Marine Insurance Act 1906 provides that: “. . . The assured is entitled to the reasonable cost of repairs . . .”. On the broad question of “reasonable cost of repairs”, it is obvious that the interests of Underwriters and Assured may often be in opposition. Apart from any special considerations, the Underwriters would want repairs to be carried out as economically as possible. The Assured, whose vessel is of use only when it is fit to carry cargo and earn freight, would naturally require the period laid up under repairs to be as short as possible. The purpose of this Clause 10 is to ensure that, as far as is possible, the cost of repairs shall be reasonable, and that Underwriters shall have the opportunity of sighting the damage and some say in the decision as to the port at which the repairs shall be carried out, and by whom.

Underwriters place considerable importance on this Clause and, if the Assured fails to comply with its provisions, 15% shall be deducted from the amount of the ascertained claim.

Clause 10.1 stipulates that, prior to the survey and/or repair of any damage which may give rise to a claim upon the policy, the Assured is required to give notice to Underwriters or, where (rarely these days) appropriate, to the local Lloyd’s Agent in order that a surveyor can be appointed to represent the underwriters to examine the damage.

Under Clause 10.2 although the Assured generally selects the port of repair and

the particular repair yard, Underwriters here reserve to themselves the right to veto the Assured’s choice and make their own selection. If Underwriters do decide that the ship shall be repaired at some alternative port, they pay the additional voyage expenses of proceeding to that port.

Clause 10.3 allows Underwriters to take tenders or to require further tenders to be taken for the damage repair.

When a vessel sustains a very substantial damage, it is customary to draw up a specification of the known repairs required, and to submit this to numerous repair yards in various suitable ports and invite competitive tenders for the repairs. As a reasonable and prudent man, the Shipowner is expected to do this as a matter of course for any substantial repairs, and no allowance is paid to him for the time lost by the ship awaiting tenders, even if the Underwriters’ surveyor assisted with the preparation of the repair specification. Though debateable, it is probable that no allowance is payable in practice even where it is necessary for the Underwriters’ surveyor to prompt the Assured into taking tenders.

However, there is no doubt that where Underwriters require tenders to be taken, or – if the initial tenders taken are thought to be unsatisfactory – further tenders, Underwriters make an allowance at the rate of 30% per annum of the insured value (e. g. \$822 per day on a ship insured for \$1,000,000) for time lost between dispatch of the invitation to tender required

by Underwriters and acceptance of such a tender “to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without undue delay after receipt of Underwriters’ approval”.

It will very occasionally happen that the Assured takes tenders of his own accord, that Underwriters will later require further tenders to be taken, but the most favourable tender proves to be one of those initially taken by the assured. It has been publicly stated by Underwriters that the present clause permits the 30% allowance from the time of the dispatch of the invitation to tender required by Underwriters and the acceptance of the earlier tender.

On many of those occasions when substantial damage has been sustained and tenders are invited, a general average situation will exist and the Shipowner be entitled to allowances in general average for wages and maintenance of crew, and for fuel and stores consumed during the same detention awaiting tenders. In such general average situations, credit must be given against the 30% allowance for any crew wages etc. and fuel and stores allowed in general average.

In similar fashion, if the original accident was a collision, or one for which some third party was responsible, if any recovery is made from them in respect of loss of profit and/or running expenses during the period covered by the 30% allowance, credit must also be given to Underwriters.

The final paragraph of Clause 10.3 provides that where part of the cost of the repair of damage is not recoverable (other than a Clause 12 policy deductible), the 30% allowance shall be reduced by a similar proportion.

For instance, if substantial damage to the main engine was caused by the breakage of the crankshaft due to a latent defect in the crankshaft, the 30% allowance would need to be apportioned over the cost of making good the:

- a) Damage to the crankshaft
- b) Consequential damage to the main engine and only the proportion attaching to b) allowed.

It has been suggested in comments by another author that if the tender includes repairs on owners account, the 30% allowance is similarly reduced. This might appear logical, perhaps, but if the owners repairs do not constitute “damage”, in our view the owner is entitled to the full 30% allowance and can take the opportunity to carry out any other work he wishes.

Under Clause 10.4, as mentioned in the early comments on this Clause 10, 15% is to be deducted from the amount of the ascertained claim if the assured fails to comply with the provisions of the Clause. It is submitted that the ascertained claim is the net claim after applying the policy deductible.

AAA RULES OF PRACTICE

At the Annual General Meeting of the UK Association of Average Adjusters, amendments to Rule B-26 were proposed and approved, which has now become a probationary rule. Reference is requested to Seaview 111 Issue Autumn 2015 wherein the Editor has shared his experience in dealing with General Average on a vessel in ballast under English law and practice.

Probationary Rule of Practice B26 Vessel in ballast and under Charter: Contributing Interests

For the purpose of ascertaining the liability of Underwriters on policies of insurance that are subject to English law and practice, the following provisions shall apply:

1. In applying the following Rules, and when the charter to which the Shipowners are a party provides for York-Antwerp Rules, the general average shall be adjusted in accordance with those Rules and English law and practice and without regard to the law and practice of any foreign port at which the adventure may terminate.
2. When a vessel is proceeding in ballast to load under a voyage charter entered into by the Shipowners before the general average act:
 - a) The interests contributing to the general average shall be the vessel, such items of bunkers, stores and equipment as belong
3. When a vessel is proceeding in ballast under a time charter alone or a time charter and a voyage charter entered into by the Time Charterer:
 - a) The general average shall attach to the vessel and such items of bunkers, stores and equipment as belong to parties other than the Owners of the vessel. Failing a prior termination of the time charter, values for the purposes of contribution shall be those pertaining at the time the ship is, or should have been, made ready to depart from the port of refuge.
 - b) Failing a prior termination of the adventure, the place where the adventure shall be deemed to end and at which the values for contribution to general average shall be calculated is the final port of discharge of the cargo carried under the charter but in the event of the prior loss of the vessel and freight, or either of them, the general average shall attach to any surviving interest or interests including freight advanced at the loading port deducting therefrom contingent expenses subsequent to the general average act.

to parties other than the Owners of the vessel and the freight earned under the voyage charter computed in the usual way after deduction of contingent expenses subsequent to the general average act.

- b) Failing a prior termination of the time charter, the voyage shall be deemed to end at the first port of discharge of cargo at which the vessel arrived after the general average act.
4. It shall be immaterial whether the extra period of detention takes place at a port of loading, call or refuge, provided that the period of detention in consequence of accident, sacrifice or other extraordinary circumstance occurring whilst the vessel is in ballast is reasonable.
5. In practice, neither time charter hire, as such, nor Time Charterers' voyage freight shall contribute to general average.

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The third series will be co-organized by The Hong Kong Logistics Management

Staff Association (HKLMSA) and C.Y. Tung International Centre for Maritime Studies, PolyU (ICMS), in a webinar format due to the pandemic, and will focus on a live open forum discussion of case studies with a panel of experts. The first (1st) Session is planned for mid-August 2021, with the ongoing M/V Ever Given Suez Canal blockage case used to illustrate the application of IDL/ILI in IMP.

(Raymond T C Wong: Average Adjuster)



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