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To enhance Hong Kong's status as an International Shipping Centre

疫情影響下的貨櫃滯期費與滯留費負擔標準




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To enhance Hong Kong's status as an International Shipping Centre

Edward Liu

Since the quarantine arrangement upon arrival at Hong Kong was adjusted to "0+3", i.e. no compulsory quarantine would be required, Hong Kong has resumed to its normality and a series of international activities in Hong Kong have returned in full swing. The 6th Hong Kong Maritime Week ("HKMW") is one of the recent campaigns that "tell the world the good stories of Hong Kong". From 20th to 26th November 2022, more than 40 online and physical events have been held, covering different topics such as ship management and operation, shipping finance, maritime insurance, shipping law and arbitration, shipping technology and green development, shipping industry training and employment. The stakeholders of the Hong Kong shipping industry generally anticipate that the maritime week would enhance Hong Kong's image as the international shipping centre, and showcase the vitality of Hong Kong's shipping industry cluster to the global shipping market. My colleagues at the International Chamber of Shipping (ICS), including the Secretary-General and the Deputy Secretary-General, have also attended the events of the HKMW in person since their last visit three years ago.

As pinpointed under the Hong Kong section in the report of the 20th National Congress of the Chinese Communist Party, in President Xi Jinping's speech during his visit to Hong Kong on the 1st July 2022, as well as in the speeches by Vice Premier Han Zheng and Minister of Commerce Wang Wentao during the Hong Kong "Belt and Road" Summit held in September 2022, China expressly supports Hong Kong to consolidate and enhance its position as an international shipping centre. These supports come down in one continuous line with the National 14th Five-year Plan and the Development Plan of the Guangdong Hong Kong Macao Greater Bay Area.

In fact, Hong Kong's name in Chinese was originated from sea port, and its prosperity was largely related to the sea. One may thought the sea is far away from the life of ordinary citizens, but in fact, the shipping industry is closely related to all walks of life in Hong Kong. 80% - 90% of the goods in the global trade are transported by sea, which means that the clothing, food, housing and transportation of the general public are realized and operated by this traditional mode of

transportation. It is indeed the foundation of Hong Kong's status as an international trade centre. Financing and insurance are both important components of Hong Kong's international financial centre. With the introduction of tax incentives for ship leasing and maritime insurance business by the HKSAR government in 2020, Hong Kong can play a bigger role in the field of shipping finance.

In 2020, the Baltic and International Maritime Council (BIMCO), a renowned international institution that creates and promote standardised maritime contracts, announced the inclusion of Hong Kong as one of the four designated arbitration venues in the new BIMCO Law & Arbitration Clause. This had strengthened Hong Kong's position as a centre for legal service and dispute resolution. In addition, in 2019, the ICS established its first overseas office (i.e. the China Liaison Office) in Hong Kong (where the author is the current principal representative). This highlights the great recognition and strong confidence of global ship owners and ship managers in Hong Kong's "one country, two systems", common law system and Hong Kong's leadership role in international shipping. In addition, in July this year, the HKSAR government introduced new tax incentives for ship agents, ship managers and ship brokers, creating a favourable tax environment for the maritime industry chain cluster.

However, we should face the issue squarely that Hong Kong's ranking in international shipping in recent years has been far from satisfactory. In the "*Leading Maritime Cities of the World 2022*" published in January this year, Hong Kong has fallen to 6th place among the top maritime cities of the world, where Hong Kong was previously placed 4th in the overall ranking in the 2019 report. In the 2021 Xinhua Baltic International Shipping Centre Development Index Report released in 2021, Hong Kong's ranking declined from the second place in 2018 and 2019, and ranked fourth in 2020 and 2021. There are various contributing factors for the decline of Hong Kong's ranking, but in my opinion, the most important are two problems: the lack of long-term planning, and the lack of enterprises and talents.

Singapore's recent development in the financial sector is unparalleled, which even attracted the Hong Kong's Financial Secretary to write a blog article in response, setting out Hong Kong's efforts in maintaining its competitiveness as an international financial centre. In fact, Singapore has been the "first-mover" in building itself as the world's leading shipping hub.

The shipping industry ultimately serves the international trade of goods. As such, back in 20 years ago, Singapore began to focus on the bulk commodity industry. To date, it has become one of the world's three major refining centres, the world's most important oil trading centre, the world's most important supplier of marine fuel oil, the price centre of Asian oil and petroleum products, and has a discourse power in the metal, mineral, agricultural and other bulk commodity markets. As shippers gradually select Singapore as their headquarters in the Asia Pacific region, it naturally attracts global shipping enterprises, including the one from Hong Kong and China, to move to Singapore. Once the business clients reach the scale effect, high-end shipping service providers will naturally gather in Singapore. Singapore's achievements so far are mainly due to its government's long-term and comprehensive planning for shipping development.

In contrast, although the former term of the HKSAR government proposed in its 2017 Policy Address to work with the maritime industry to formulate a long-term plan for its development, such long-term plan is still lacking. As mentioned above, shipping development is a large and complicated project. From bulk cargo transactions related to the International Trade Centre, to the core of the marine industry cluster of traditional shipping and port business, to high-end shipping service industry, it requires systematic, comprehensive and long-term planning and coordination to achieve. At the same time, in order to attract shipping-related enterprises to Hong Kong, and then build nests to attract overseas talents and train local talents, the industry also needs to know the overall strategic framework of the HKSAR government for the future long-term development of the industry.

The new term of the HKSAR government advocates the adoption of "result-oriented approach". Various strategies that aims to attract investment and talents have been proposed in its new Policy Address.

As the shipping industry is one of the industries that closely linked to the GBA development, the Belt and Road Initiative and other national policies, it is important for Hong Kong shipping to strive its best and contribute to the motherland's needs. Therefore, the shipping industry truly hopes that the HKSAR government can take advantage of the opportunity of this Maritime Week to return to the world shipping stage, make early plans for the shipping industry to bring together key enterprises, attract talents at home

and abroad, and attract local youth, and take multiple measures to complete the economic and political mission of consolidating and upgrading Hong Kong as an international shipping centre.

Edward Liu:
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疫情影響下的貨櫃滯期費與滯留費負擔標準

鄧志豪 / 戴錫崑

自 2020 年出現新冠肺炎疫情後，各港口都採取各種不同的防控措施，因而造成運輸停滯、港口貨物大量囤積、貨物無法及時抵達目的地等問題，承運人與收貨人之間就會因此產生較多爭議。爭議中，亦包括貨櫃滯期費的問題，由於處理此類糾紛的方法和觀點無法達成共識，導致相應爭議始終存在。

首先要瞭解因貨櫃的延滯所產生的費用有那些？從英文理解，有 Demurrage (DM) 和 Detention (DT) 兩類。相對的中文名詞則沒有統一，DM 有稱為滯期費、延滯費等，而 DT 有稱為滯留費、留滯費等。本文採用比較流行的滯期費及滯留費代表 DM 和 DT。

這兩個與貨櫃有關的費用，產生的情況如下：

滯期費是指承運人把出口貨櫃運到卸貨港，並堆放在堆場內，超過一定時間，該貨櫃仍未由收貨人提離港區，港口當局向承運人所收取的費用，或承運人向收貨人收取的費用。

滯留費是指收貨人在借用承運人的貨櫃的情況下，收貨人在清關後，把貨櫃拖離港區，但超過一定時間仍未把空櫃交還承運人。因此，承運人向收貨人收取的費用。

對於承運人及收貨人之間，應如何計算貨櫃的滯期費，最高人民法院 2021 年的一宗典型案例 [(2021) 閩 72 民初 165 號]，作出了一個清楚的判決，可供航運界參考。

在一份貨物運輸合同中，馬士基公司是承運人，而貨物是一批以貨櫃運輸的冷凍魷魚，由阿根廷運到目的港是福建的馬尾港，收貨人是百鮮公司。

中國大陸自 2020 年初開始有新冠肺炎的傳播，自該年年中開始，對從境外進口運到馬尾港的冷鏈貨物，均要實行新冠病毒檢疫措施。因此，馬士基無法履行原定的運輸合同，無法把貨物直接運到目的港，而要將案涉貨物先行運到附近的中轉港，乃於 2020 年 11 月 6 日運抵廈門港，並把相關的貨櫃卸下。承運人等待目的港具備卸貨條件時，即直至 2020 年 12 月 21 日才將貨物由中轉港運抵目的港馬尾港。此中轉期間長達 39 天，承運人對卸下的相關貨櫃，因一直未有被提離廈門港港區，而要向該港務局支付額外的滯期費。

最後，承運人要求收貨人支付就中轉期間額外產生的貨櫃滯期費。雙方對此滯期費的負擔發生糾紛，無法協議解決後，馬士基向廈門海事法院提起訴訟，要求收貨人承擔全部滯期費。

這宗運輸合同，根據《最高人民法院關於依法妥善審理涉新冠肺炎疫情民事案件若干問題的指導意見（三）》第 13 條的規定：

「目的港具有因疫情或者疫情防控措施被限制靠泊卸貨等情形，導致承運人在目的港鄰近的安全港口或者地點卸貨，除合同另有約定外，托運人或者收貨人請求承運人承擔違約責任的，人民法院不予支持。

承運人卸貨後未就貨物保管作出妥善安排並及時通知托運人或者收貨人，托運人或者收貨人請求承運人承擔相應責任的，人民法院依法予以支持。」

依此《指導意見》的規定，馬士基本來可以把涉案貨物卸在安全港口的廈門港後，即屬於已完成履行該運輸合同，不會被認為是違約行為。但是馬士基採取負責任的態度，在適當的時間，仍然把貨物由中轉港運到合同所約定的目的港。法院稱廈門海事法院在判決時，綜合考慮了疫情防控措施對貨櫃內的貨物，中轉滯留的影響，以及雙方當事人就合同履行的受益情況等因素。亦考慮了《指導意見》第 14 條的規定：「因疫情或者疫情防控措施導致集裝箱超期使用，收貨人或者托運人請求調減集裝箱超期使用費的，人民法院應盡可能引導當事人協商解決。協商不成的，人民法院可以結合案件實際情況酌情予以調減，一般應以一個同類集裝箱重置價格作為認定滯箱費數額的上限。」

最後，法院根據公平原則，酌定收貨人應補償承運人的中轉港貨櫃滯留費用的 50%。對此判決，雙方均沒有上訴。

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Endorsement on B/L - All you need to know

Edward Cheng

Under normal circumstances, a consignee has to present the original bill of lading (B/L) to the port agent at discharging port to exchange for the delivery order (D/O) before they can get the cargo. The port agent cannot simply release the D/O against the original B/L only. One of the matters they have to do is to make sure the chain of endorsement（背書）is complete. Let's try tackle the following questions relating to endorsement on B/L:

1. Why we have to endorse the B/L when the consignee is 'To order' or 'To order of xxx'?

When the consignee is 'To order' or 'To order of xxx', it means the consignee has not been identified. We have to properly endorse the original B/L to make it transferrable and let the holder of B/L be entitled to the cargo.

2. How to properly endorse the original B/L?

As per international practice, endorsement should be made on the back page of the original B/L with both the signature and stamp. However, in China, most of the consignee will make the endorsement with the stamp only (sometimes the company name of the stamp is in Chinese) without the signature. Some may even make the endorsement on the front page of the original B/L instead. Somehow, it is the usual practice in China.

3. How many types of endorsement do we have?

In general, we have two types of endorsement. One is called blank endorsement（空白背書）, while the other is specific endorsement（記名背書）.

Blank endorsement is less safe but more common in use. It means the party endorses the original B/L without specifying to whom the cargo to be transferred. Any party can further endorse the original B/L and then can get the rights to the cargo.

Specific endorsement is safer but less common in use. It means the party endorses the original B/L and specifies to whom the cargo to be transferred (you may simply put the statement beside the endorsement, even by handwriting). For example, if specific endorsement has been made on the original B/L and the cargo has been designated to be transferred to Alpha Company, then it is a must for Alpha Company to endorse the original B/L before the B/L can be further transferred.

It is not surprising to find four to five parties endorsed on the B/L.

4. Under what circumstances do a shipper have to endorse the original B/L?

If the consignee on the B/L stated 'To order' or 'To order of shipper', then it is a must for the shipper to endorse the original B/L.

5. If the consignee is 'To order', who should endorse the original B/L if the shipper is 'Bravo Company o/b Charlie Company'?

As 'o/b' means 'on behalf of', Bravo Company should be responsible for endorsing the original B/L.

6. If the consignee is 'To order', who should endorse the original B/L if the shipper is 'Delta Company c/o Echo Company'?

As 'c/o' stands for 'care of', Echo Company should be responsible for endorsing the original B/L.

7. Who should endorse the original B/L if the consignee is 'To order of Foxtrot Bank'?

Apparently, we have to follow the order of Foxtrot Bank and thus Foxtrot Bank is the one to endorse the original B/L. In this case, endorsement from the shipper is not required.

8. Is it a must for the notify party to endorse the original B/L?

No. It is not a must for the notify party to endorse the original B/L under any circumstances unless the cargo right is transferred to them. The notify party only has the right to know the ETA of the vessel, and it does not have the cargo right. Proper endorsements have to be made so that the notify party can have the cargo right. In fact, we can have more then one notify party on B/L.

9. If the consignee on B/L stated 'To order', is it OK to release the D/O against 1/3 original B/L with endorsement by the notify party but without endorsement by the shipper?

No. As mentioned before, the notify party has no cargo right without the proper endorsement on B/L. On the next day, if there is another company presenting another 1/3 original B/L to you with the shipper's endorsement and endorsement of that company, you will be in trouble. The notify party has not been identified as the consignee through proper endorsement on B/L and thus is not entitled to the cargo.

10. If the consignee on B/L stated 'To order', D/O has been released against 1/3 original B/L properly endorsed by the shipper and Sierra Company (this company is not the notify party). Is there any problem if the notify party on B/L presents another 1/3 original B/L which is also properly endorsed by the shipper and the notify party, and the notify party asked for the D/O later?

No. You can always find a statement or similar statement on B/L (you may refer to the statement on the Congen B/L edition 1994 issued by BIMCO) saying '.....any one of which being accomplished, the others shall be void'. The B/L will be considered as accomplished after exchanged for D/O. You just have to make the sure the former 1/3 original B/L has been properly endorsed and the chain of endorsement is complete.

That is the reason why the cargo interests have to obtain the full set of original B/L when transferring the cargo right thru B/L.

If you are interested to know more about 'full set of original B/L', you may refer to my previous article '5 commonly misunderstood concepts in shipping' in SEAVIEW 133 Issue Spring, 2021 Journal of the Institute of Seatransport.

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(1) 有見日漸對衛星導航的倚重，而對其他可用手段的忽略，忘記，擱置不用，不學，不練習，不要。如果只用衛星導航，那麼，航海家 NAVIGATOR 只能是位駕駛員 DRIVER。

下述的所有非衛星導航手段，全是法定考試範圍內的，但很多現在船上的從業員，有些掌握不足，有些根本不會正確地使用。如果沒有了衛星導航，那麼，幾十萬噸的油輪，幾千人的客輪就會失去位置，航行不知方向，擱淺很易發生，後果不堪設想。單單這個原因，政府就不可能把傳統的定位要求，由專業考試範圍中抹去。事實上，我們又不能否認，無論在教學上及考核上，已傳統定位的重要性有嚴重的忽略。

(2) 下列各項定義，有助讀者更容易理解本文：

1. 衛星定位，用北斗，GPS, 伽利略 (歐洲), GLONASS 等定位。

2. 自主定位，由本船自主，不依賴外面。

3. 位置線，由自主定位得出的一直線或曲線，船的位置在線上的某一點。

4. 磁羅經 MAGNETIC COMPASS, 基於中國古代指南針而設計的現代航海羅經 (也叫羅盤), 有指向地球磁北的方向盤，但船是鐵造有磁氣，船上磁氣會影響所的方向，但可以修正。

5. 電羅經 GYRO COMPASS, 利用高速旋轉的陀螺，其維持方向的特性而製造的指向儀器，指示地球正北，但也有誤差需要修正 (船的方向，速度，緯度修正)。

6. 方向，由本船望向目標的方向，由北為 0000, 東為 0900, 南為 1800, 西為 2700, 一圈為 3600, 方位可由羅經觀察到。

7. 六分儀，SEXTANT, 用來量度二物體間的夾角，主要是日、月、星同水平之夾角，叫天體高度。

(3) 定位原理

利用任何由自主定位方法取得的二條位置線，其相交點，即為船位。簡單而言，如果你看到青馬橋在北 (0000), 坪洲在西 (2700)，則其交點應在交椅洲附近。你可想像現代的航海者有了衛星定位後，會忘了這基本的手藝嗎？

(4) 位置線的種類

羅經方法，岸上或海上的固定目標，如燈塔、山頂、大橋、浮標等，不勝其數，其他海上船隻 (如果知其位置), 也可作為目標。

技術要求，知道修正羅經差 (一般為加減多少度)。使用方位儀，其實不過是一套在羅經表面上的，可以瞄定讀出羅經度數的簡單裝置，也可用 SHADOW PIN (一枝鉛筆芯粗針) 放在羅經中心去觀察目標方位。

1. 方向盤應保持水平 , 這裝置船上已有 , 注意保養就可以。

   如果不清楚羅經的誤差 , 或未啟動 (電羅經), 則仍可用二目標之夾 角 , (HORIZONTAL ANGLE) 作一圓型位置線 , 三目標有二條位置線 , 從而得到船位。

2. 雷達的測距及方位 , 相對簡單 , 就在雷達屏上測量技術要求 : 雷達調校的技術掌握 , 尤其是海浪 , 雨抑制的調校。自動調校不是萬靈丹 , 有時對弱回波的目標 , 例如航道上的浮標 , 要特別調校海浪抑制才能顯示。

   雷達回波視覺不一樣 , 大小關係不大，而雷達波之反射 (物料及角度) 有關 , 例如大大的風帆 , 往往不及有雷達反射器的浮筒來得清楚。雷達圖同海圖的地型，也會有很大的出入 , 小心別誤認目標。

3. 測深儀 , 當然在沒有其它手段 , 用測探繩也可行 , 探測本船位置的水深 , 由船底計 . 例如測得水深為 76 米 , 則本船在水深 76 米處。在測量點密佈的海圖上 , 可能 有很多 76 米的水深點 , 如果另有一位置線 , 則查看這位置線穿過 76 米處 , 就是 船位。海圖上有等深線 , 如地圖上的等高線 , 可以利用插法 , 自己建立一條 76 米的等深線 , 這就是一條位置線。

4. 六分儀 , 量度目標之間之夾角 , 例如燈塔到水面 , 故可計算得距離 , 二橋墩之間的夾角 , 故可得一圓型位置線 , 但六分儀主要用作測量天體、日、月、星的高度 , 從而計出位置線。

   技術要求 , 第一 , 先掌握了在船舶靜止時的操作 , 再熟習船舶搖擺時的操作 . 要些時間 , 但一般航海的多能應付 , 定位精確度在一浬之內。

   六分儀乃機械構造 , 所以有誤差要修正 , 測量時也必須對眼距水平面高作修正 , 光線折射修正等。在未有電子導航前 , 六分儀是船上最重要的儀器 , 我們航海的年代， 有船員是用私家六分儀的 , 即自備上船。

5. 其他

   a 方向探測 (x9 綺) DIRECTION FINDER, 由於這也是倚賴外界發放信號 , 不能算自主定位 , 但這是相當簡單的設備 , 可以探測至發射台 (船) 的方向 , 在某些特定條件下可能很有用 , 例如搜救。

   b 雷射測距器 , 筆者以四百元人民幣從淘寶買了一個 , 只可測距 400 米 , 對船舶定位而言，此距離太短。見網絡上有介紹可測距 75 公里的 , 應該可以用在船上。

   c 慣性導航系統 , 筆者在四十年前就有接觸這方面的資料 , 但應該是軍事用途 , 應用在潛艇 , 導彈方面 , 商船上未有使用。未知今日發展情況。

(5) 應用

1. 任何二條位置線的交點 , 就是位置 , 就是船位。由於手段很多 , 所以在時 , 絕對可以不必要用衛星定位。

2. 實際操作中 , 單一目標的方位線也可分別相隔半小時或一小時再測量 , 用船速及航向把一小時前的位置線向前推移 , 令其與一小時後的位置線相交，而獲得一個船位 . 準確性當然是基於船的實在航速及航向。

3. 目測目標往往只能在日間進行 , 但燈塔、大橋墩、電站、煙通等，夜間也可進行測量。月亮在夜間有時也可利用看到山的黑影 . 在什麼目標也沒有的時間 , 行雷、閃電的光 , 會給你一個絕佳機會 , 這是我的是個人經驗。

(6) 衛星定位之不足及其他

1. 最初有衛星定位時未有電子海圖 , 所以 , 每次取得衛星定位後 , 必須用其經緯度加上紙海圖上的比較 , 在操作過程中 , 起碼比雷達上對單一目標 , 例如燈塔的方位及距離測量來得費時 , 而且在察看經緯度時的誤讀比較容易犯錯。這些問題在有了電子海圖後 , 船的位置就直接展現在海圖上。但功效仍有些細微之分別 , 這些細微的分別 , 有可能變為造成海難或避免海難的成因。我主觀分析 (未有實驗証明) 是相對船位及絕對船位的分別。絕對船位就是衛星定位的那個組無意思的經緯度 , 相對船位在近海航行中是我船相對目標 (燈塔) 的方位及距離 , 其中距離往往是提示船舶安危的一個絕佳警號 ,
衛星定位少了這個。

2. 雷達屏上的可轉動平行線 , 往往是可以利用監測船有否偏離航線的指標 , 也 可用於介定有否進入危險區的一種警號。

3. 二個目視目標的重疊 , IN TRANSIT, 是一個很好用的工具 , 例如在拋錨時監察本船有沒有向危險區走錨。

試用下圖說明 , S 為拋錨船 , 錨區為本港西錨區 , AB 為錨區東限 , 出了就是航道 , CD 為錨區南限 , 出了是淺水區 , XKYC 為小交椅州 , KYC 為交椅洲。不用看衛星定位 , 只要目視如船過了 AB 線 , 你就知船走錨入了航道。所以 , 只要你監察交椅洲及南丫島的定點線有否越過。

其他危險區 , 也可因地貌用重疊線去規劃。

朱志統
2022.11.08

AA Talk

Notes on General Average (2)

Raymond Wong

Editor's Note: -

As noted in Issue 139, notes on "General Average in relation to Marine Insurance" which were compiled by the Editor and published in the Seaview in 1985/6, are now being revised and expanded.

Part I - **Introduction and Outline of the Discipline of General Average** (continued)

To recognise a General Average

For a sacrifice or expenditure to be the subject of general average contributions in terms of York-Antwerp Rules, the following requirements must be met:

1. Common maritime adventure
2. Peril to the whole adventure
3. Extraordinary sacrifice or expenditure
4. Intentional or voluntary act
5. Reasonably made or incurred
6. Direct consequence of the general average act
7. Adventure or some part thereof must be saved

COMMON MARITIME ADVENTURE

It is the essence of a general average act that more than one interest must be engaged in the maritime adventure in the nature of commercial voyage.

There is no theoretical limit to the nature of an interest for the purpose of general average provided that it has value, the most obvious ones being ships and cargoes, and others including time charterers' bunkers, containers, bill of lading freight at risk, anticipated voyage (charter) freight and catch on a fishing vessel.

The interests involved do not have to be in separate ownership – see *Montgomery v. Indemnity Mutual Insurance Co.* (1902) where it was held that the cutting away the mast for the common safety was a general average act even though the Shipowner was also the owner of the cargo on board at the time, and the judge said, "… a general average act is not affected by the consideration whether there will be a contribution or not.".

Where the parties to general average involve a ship and cargo onboard, the common maritime adventure begins when the ship commences loading cargo and ends when she completes discharging cargo at the end of the voyage.

Tugs and tows, as provided by Rule B incorporated in the York-Antwerp Rules since 1994, are considered to be part of the common maritime adventure "when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation".

General average would not apply where there is no voyage or (commercial) maritime adventure being involved, e.g.:

(a) a hulk used as floating warehouse,

(b) aircraft, or goods being transported on land,

(c) a fixed off-shore oil production platform, and

(d) a pleasure yacht.

PERIL

The general average act must be for the COMMON SAFETY, or put another way, the common adventure (i.e., more interests than one) must be IN PERIL.

A summary of the legal position as to whether a common adventure is in peril can be found in the leading case of *Vlassopoulos v. British & Foreign Marine Insurance Co. ("The Makis")* – 1929, wherein Mr. Justice Roche (later Lord Roche) said:

"It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act…

…that "peril" which means the same thing as "danger" is the word used … The word is not "immediate peril or danger". It is sufficient to say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary. It means that it must be substantial and not merely slight or nugatory. It must be a danger. This is a matter of fact."

The judge made four points:

1. The peril (common to all) need not be immediate.

2. It must be real and not imaginary.

3. It must be substantial and not merely slight or nugatory.

4. It is a question of fact in each case.

It is believed that the test as stated above has been adopted in all cases since 1929 on the question of peril.

In a recent case, *Tankschiffahrts GMBH & Co KG v. Ping An Property and Casualty Insurance Company of China Ltd. ("The Cape Bonny")* – 2017, it was held that a vessel immobilized at sea (due to

machinery breakdown) without immediate risk of drifting aground was nevertheless in peril, not least because of a typhoon in the vicinity (off Japan). Mr. Justice Teare went on to say that in general terms:

"Immobilization is a peril or danger because without assistance neither ship or cargo can be used. They are worthless unless and until assistance is procured to bring them to a port of refuge where the vessel can be repaired and continue her voyage."

Few noteworthy examples:

- If a ship loses her propeller at sea, she may not be in immediate danger of disaster with her cargo but the peril is obviously sufficiently imminent to make efforts to salve her a general average act.

- If, on the other hand, she is beset by heavy weather which causes her, though unharmed and still perfectly efficient, to run for shelter, the putting into, say, an anchorage is not a general average act because there is only fear of danger and not a real and imminent peril operating upon her.

- In *Joseph Watson v. Firemen's Fund* – 1922 the master poured water into the hold of his ship when he saw what he thought to be smoke coming from the ventilators. On arrival at destination, it was found that there had never been a fire and, since there could obviously have been no danger, the damage to the cargo by water could not be admitted as general average.

- A meat ship carrying refrigerated cargo sustains damage to her refrigerating machinery whilst proceeding through the Tropics, making it imperative for her to put into a port to carry out repairs. Clearly, the meat cargo is in danger of going rotten. However, the ship is in no danger and any extra expenses incurred will not be for the joint benefit of both ship and cargo, but solely to preserve the cargo. In these circumstances, the extra expenses cannot be general average.

- In *Royal Mail Steam Packet v. English Bank of Rio* – 1877 a small but valuable parcel of specie was, soon after the ship stranded and before salvage operations, first taken out and then landed for its own benefit and not in order to save the common adventure. The expense of landing such cargo was not admissible as general average.

- A vessel with a cargo of "seized coal" is seized by pirates off the coast of Somalia. It is believed that whilst the ship and cargo are under the control of pirates they are in a position of peril. The immediate threat is to the safety of the crew but there are also threats to "break" the vessel". In the circumstances, these are considered to be a real threat. Furthermore, there is an additional element to the

peril in that during this period the cargo of coal would begin to heat and give off methane gas, as the voyage is longer than anticipated with the vessel being moored in the lee of the coast with ambient temperature being much hotter than would have been experienced to the vessel that is proceeding normally on its voyage. It is therefore possible that there would be threat of extraordinary heating/ fire and or explosion while the vessel is under the control of the pirates affected the ship and cargo.

- A vessel grounds in an estuary in calm weather and likely to refloat within a short time with a change of wind or tide is not in danger.

Ships grounding in more protected waters and or on flat soft bottoms are often borderline cases, there being indeed litigated cases, namely, *Trafalgar Steamship Co. v. British & Foreign Marine Insurance Co. ("The Rodney")* - 1904, *Charter Shipping Co. v. Bowring Jones & Tidy* – 1930 and *Daniolos v. Bunge & Co.* – 1937, where some guidance can be adduced.

To help form an opinion whether or not the ship aground with cargo onboard is in position of peril or not, it is suggested that the following questions be raised and considered:

1. Was the position in which the vessel grounded a sheltered one, or was it exposed and open to strong winds, etc.?

2. Was the bottom even and of soft mud, or were rocks beneath on which the vessel might sustain damage?

3. Is there any great range of tide?

4. Could it have been predicted when the water level might rise sufficiently for the vessel to refloat without assistance?

5. If a storm or hurricane were to occur, could this cause damage to the vessel or would it first raise the level of the water sufficient for the vessel to float off?

6. What would have happened to the vessel and cargo if nothing had been done about the condition which gave rise to the course adopted, or what alternative existed to the course adopted?

Repairs necessary for the safe prosecution of the voyage - As noted earlier, repairs of accidental damage effected at a port of refuge (where the vessel is within a comparative safety) can give rise to allowance for general average detention expenses in terms of certain numbered Rules (which by virtue of the Rule of Interpretation, override the lettered Rules). The extent of damage to the vessel, necessary to meet the requirement of being "necessary for the safe prosecution of the voyage" is, if unrepaired, would give rise to a position of peril at sea.

EXTRAORDINARY

The sacrifice or expenditure must be EXTRAORDINARY in kind and not one which the cargo owner has a right to expect the shipowner to bear under the contract of affreightment.

Rule VII of the York – Antwerp Rules 2016 illustrates this principle:

"Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be allowed as general average."

Under the rule a distinction is drawn between damage to machinery where the vessel is aground and in peril and damage which occurs when the vessel is afloat. Working the engines of a ship ashore is considered to be an "abuse" of the machinery and therefore extraordinary, whereas working the engines when the vessel is afloat, however much the adventure may have been in peril and ship and cargo may have received benefit from the action taken, is considered as part of the normal function of the machinery and any resultant damage is not allowed as general average.

In an old law case, *Harrison v. Bank of Australasia* – 1872, a sailing ship sprang a leak in a storm and could only keep afloat by continuous use of a pump worked by a small engine. In consequence, the normal supply of coal on board was soon used up and spare wooden spars and other ship's stores had to be burnt to keep the pumps going. Later, a supply of coal was purchased from a passing ship. The shipowner endeavoured to obtain a contribution from the cargo towards the cost of the extra bunkers and the cost of replacing the spars and stores. It was held that the expenditure on coal though extraordinarily heavy, was not extraordinary in kind, and the shipowner was under a duty to the cargo to provide such coal if it was needed. The burning of the spars and stores was quite a different matter however. This was an extraordinary sacrifice and the cargo had to contribute to the cost of their replacement.

INTENTIONAL OR VOLUNTARY

The sacrifice or expenditure must be VOLUNTARILY or INTENTIONALLY made. The real importance of these words is to distinguish between accidental losses, which are borne by those who suffer them, and deliberate losses, which are shared by all those who benefitted. An easy example may help:

A ship runs aground and tears a hole in her bottom and seawater damages the cargo. All these damages are accidental and the shipowner pays the whole cost of repairing the ship and the owner of the cargo bears the damage sustained by cargo.

Alternatively, if, in order to refloat, cargo is thrown overboard to lighten the ship, this loss of cargo is deliberate, and will be shared by both ship and cargo.

It is worth mentioning that property cannot in reality be said to have been "sacrificed" if it was already effectively lost at the time of the so-called sacrifice - see Rule IV of York Antwerp Rules 2016:

"Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be allowed as general average."

REASONABLENESS

The extraordinary sacrifice or expenditure must be REASONABLY made.

In practice a very great deal of discretion is left to the man on the spot, and it is seldom that it is suggested that the course adopted by the master to save the adventure was extravagant or unreasonable. When there is time to consider the course to be taken, for example, when a vessel is hard aground or is detained in port after a fire, modern communications make it possible for consultations to be held with experts on salvage, or with men well versed in dealing with damaged cargo in order to mitigate loss, and it is unlikely that the expert advice given would not be taken.

Imagine a ship carrying a bulk cargo of coal and also some valuable pieces of machinery. If a jettison needed to be made for the common safety, one would hope that master would jettison the low-valued coal, rather than the valuable machinery.

In *Corfu Navigation v. Mobil Shipping ("The Alpha")* – 1991 the grounded vessel and cargo onboard were in position of peril but the efforts made to refloat the vessel using her engines had been remarkably unskilful and unreasonable, resulting in substantial damage to her machinery. It was held that the damage sustained was allowed in general average in terms of the numbered Rule VII which does not use the word "reasonably" and which, by virtue of the Rule of Interpretation, overrides the lettered Rule A.

The Rule Paramount being conceived in direct reaction to the decision in "The Alpha" was introduced in 1994:

"In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred."

Following the introduction of the Rule Paramount, any claim, whether under the lettered or numbered rules will be subject to the identical test of reasonableness.

In *"The Cape Bony",* the vessel chose and engaged the tug which was the most expensive option, seemingly because the

tug could reach faster than the other two, among others, the vessel being immobilised and adrift at sea with a typhoon in the vicinity. Mr. Justice Teare found that the engagement of the more expensive tug was reasonable in the circumstances that would need to be dealt with without delay. His Lordship considered that:

"… the burden of proving that the expenditure was reasonably incurred lies upon the Owners. That is the effect of Rule E and of the Rule Paramount. Rule E does not expressly deal with the question of reasonableness but states a general rule which must encompass that question. The Rule Paramount makes clear that the person claiming a contribution to general average must allege and therefore prove that the expenditure or sacrifice was reasonably made…

With improved communications the position now is that, whereas in the past the master took the necessary decision to incur, for example, towage assistance, today the master is able to communicate with his owners and it is they, rather than the master, who take the relevant decision. But owners and managers when taking such decisions are also entitled to the benefit of the doubt if the circumstances are such that a prompt decision to obtain towage assistance is required. There is no reason why in such circumstances hindsight should be taken into account."

DIRECT CONSEQUENCE

The loss or damage must be DIRECTLY CONSEQUENTIAL upon the general average act, demurrage, loss of market loss by delay being excluded by Rule C which, since 1994, also excludes losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances.

In marine insurance we apply the maxim of "causa proxima", but not in general average because the law of general average belongs to the law of affreightment. In marine insurance, we look to the cause which is proximate in efficiency; in general average we can look behind the immediate cause.

A loss can be regarded as general average if it is one which the master might reasonably have anticipated or taken into account when he executed the general average act. For instance, where in an emergency cargo has to be forcibly discharged at a port of refuge for the common safety and the discharge continues during rain and it is known that the port has no sheds suitable for storing cargo and tarpaulins are hard to come by, the damage to cargo can be allowed as general average.

If, however, the cargo is damaged by a sudden and unexpected storm, or by fire, or by earthquake, that damage is not of a kind which the master ought to have taken account of.

Few other examples from actual law cases:

- *Anglo-Argentine Live Stock Agency v. Temperley S.S. Co.* – 1899.
  Some cattle and sheep were shipped from Buenos Aires to the U.K. under contracts of affreightment providing that the vessel should on no account call at Brazilian or Continental ports, the reason being that if the vessel did, the cattle would not be allowed to land in the U.K. owing to anti-disease regulations. Owing to accidental damage, the vessel had to put into Bahia in Brazil for the common safety. In consequence, the cattle had to be taken to Antwerp and sold at a loss.

  It was held that the loss on sale was allowable as general average on the basis that it was or should have been contemplated by the master when he decided to put into Bahia. It was not akin to a loss of market: It did not result from fluctuations in prices independent of the general average act. The instant the vessel reached a Brazilian port, the loss took place.

- *"The Leitrim"* – 1902.
  The shipowner claimed in general average the loss of time hired resulting from detention for general average damage repairs, but the court decided against the claim on the grounds that:

  a. This loss arose out of the contract between the shipowner and time charterer and is not concerned.

  b. Where loss of time is common to all parties and all suffer damage thereby; such damage may for practical purposes be considered proportionate to the interests and therefore left out of consideration.

- *Austin Friars SS Co. v. Spillers & Bakers* – 1915
  Vessel stranded in river and refloated; as a result, she was leaking badly. The master and pilot ran her into port, both expecting her to strike against a pier in view of the ebb tide and contemplating that damage would be done. The vessel did strike the pier and caused damage to it. It was held that the liability of the shipowner in tort to the owners of the pier was allowed in general average, as well as the damage sustained by the vessel.

- *Poole Shipping Co. Ltd. v. Northern Maritime Insurance Co. Ltd. ("The Seapool")* – 1934
  The vessel was at anchor near a pier when a gale caused her to drag her anchors and she might have gone ashore and broken her back. The master decided to let the vessel drift down on to the end of the pier and use it as a lever to turn the vessel's head and then steam to the sea. The damage to the vessel and the pier sustained was held to be intentional in terms of Rule A and admissible as general average.

- *Australian Coastal Shipping Commission v. Green* – 1971
  This concerned two cases where tugs were employed in the UK Standard Towage Conditions to assist the vessel in distress:

  1) During the general average towage operation, the tow rope parted and fouled the tug's propeller. The tug grounded and became a total loss. The tug's claim against the vessel was dismissed on account of the damage having been caused by the tug's unseaworthiness. The vessel, however, incurred costs in defending the tug's claim.

  2) The tug was hired at fixed rate to tow the vessel off ground. The tow rope parted and fouled the tug's propeller and the tug then needed salvage services. The grounded vessel had to pay the tug's damage, salvage and costs.

In both cases, these liabilities under the UK Standard Towage Conditions were held to be direct consequence of general average act within Rule C:

– That in each case, the contract made by the shipowner with the tug was a reasonable general average act;

– That the making of a contract on the UK Standard Towage Conditions was reasonable;

– That the breaking of the tow line and the fouling of the propeller did not break the chain of causation, because this was foreseeable as a distinct possibility when the contract for the tow was made;

– That the amounts that the shipowner would have to pay under the indemnity required by the contract flowed in unbroken sequence from the general average act.

Per Lord Denning M.R.:

"… In these cases the master gave, for the sake of all, his agreement to a towage contract containing an indemnity to the tug-owner in case the tug was lost or damaged. He must be taken to have realized that there was a distinct possibility that the tow line might part and that the tug would be lost or damaged; and that, if that happened, the tug-owner would be entitled to an indemnity. Such an expenditure was the direct consequence of his act in hiring the tug on those terms. It is, therefore, general average loss."

"… if the indemnity clause had been unreasonable and such that the master ought never, in justice to the cargo owners, to have to agree to it, then I think that the expenditure would not flow from the general average act."

SUCCESS

The adventure or some part thereof must be SAVED. The contribution is assessed on the values at the termination of the adventure.

In *Chellew v. Royal Commission on the Sugar Supply ("The Penlee")* – 1922, a ship, during the course of a voyage from Cuba to Europe, encountered a hurricane and sustained damage which obliged her to put into Horta as general average act. Upon completion of repairs, the vessel resumed her voyage from Horta but a few days later she and her cargo of sugar were totally destroyed by fire. The shipowner sought to recover from the cargo interest their proportion of the general average expenses incurred at Horta but this claim was denied by the Court of Appeal on the grounds that as the values of the property at the termination of the adventure were nil, no contribution could be levied.

It is true that expenditure may have been incurred which cannot be recovered, but general average expenditure can be insured against the non-arrival of ship and cargo by a special policy on Average Disbursements.

Examples of general average Losses

– Jettison of cargo is the original and best example of a general average sacrifice. (Rule I)

– Damage done to a Ship or Cargo during Jettison

If the hatches are open to make a jettison and waves break over the ship and damage the cargo in the open hold, such damage is allowed as part of the jettison damage. Similarly, if jettisoned cargo – e.g. a log of wood – fouled and damaged the ship's propeller. This damage would also be allowed as general average (Rule II).

– Damage done to Extinguish a Fire

If fire breaks out on board, the damage by fire and smoke to the ship and cargo is accidental and not allowed as general average. But damage done to ship or cargo by water used to extinguish the fire is a voluntary sacrifice and is allowed as general average. (Rule III)

– Damage Caused by a Voluntary Stranding

On occasion, a ship will be involved in a collision, or strike a rock and spring a leak which is too great for the pumps to cope with. If the ship is near land, she may run straight for the shore and beach herself to prevent sinking. The damage to the ship or cargo caused by such voluntary stranding is treated as general average. (Rule V)

– Damage to Machinery and Boilers when Aground

When a ship is aground and in a position of peril, the ship's engine will sometimes be used in order to refloat. It is probable that the engines will be strained by such extraordinary use; the propeller may strike rocks and sand may be sucked into the valves and engines. All damage so caused by working the engine when aground is allowed as general average (Rule A & VII)

– Salvage Remuneration

Expenses for salvage services are, in principle, allowable as general average provided that such expenses were incurred for the common safety. (Rule VI)

– Expenses of Lightening a Ship Aground

The cost of labour and the hire of lighters employed to discharge cargo from a ship aground an any damage sustained by ship or cargo during such operations, are all allowable as general average. (Rules VIII & XII)

– Expenses at a port of Refuge

By far the most common and frequent source of general average is where the ship sustains some accident at sea and is obliged to put into the nearest port in order to carry out repairs to enable her to continue the voyage in safety. The cost of pilots., tugs and boatmen etc. for entering and leaving the port of refuge, also the port charges, are all admissible as general average. (Rules X &XI)

– Discharging Cargo for Repairs

If, in order to carry out repairs at the port of refuge necessary for the safe prosecution of the voyage, it is necessary to put the ship in drydock, it will usually be necessary first to discharge the cargo. The cost of discharging such cargo, warehousing it and reloading, are all allowed as general average, as is any damage caused to the cargo during the discharging and reloading operations. (Rules X & XII)

– Wages and Maintenance of Crew

When a vessel deviates from her voyage and puts into a port of refuge, the wages and maintenance of the crew during the extra time spent on the voyage, (i.e. at sea and in port), are allowable as general average. The cost of replacing the extra bunkers used in the engine during the same period are also allowed. (Rule XI)

– Temporary Repairs

It may sometimes be possible to save a great deal of time and money, if, instead of carrying out full permanent repairs at the port of refuge, only temporary repairs are carried out there. If, for instance, the cost of discharging the cargo is avoided by carrying out temporary repairs afloat, the cost of the temporary repairs can be allowed as a substituted expense for and up to the estimated cost of discharging, storing and reloading the cargo which has been saved. (Rule XIV)

THE HK MARITIME WEEK 2022

Many thanks to participants for sparing the precious weekend (family) time joining, in person or online, the 1-day course (on Total Loss and Sue & Labour Charges) jointly presented on Saturday 26th November, closing day of HK Maritime Week 2022, by the Institute of Seatransport [IoS] 海運學會 together with Asia Maritime Adjusting [AMAdj] 亞理海損理算事務所 .

The overall feedback collected are positive and constructive. The presentations were well received as being informative and useful. The case study workshop was conducted in accordance to the meticulously prepared questions covering all the presentations, with interactive discussions between participants, the speakers included.

MATF Refund is available for eligible participants, and 6 CPD points have been awarded by the Law Society of HK.

Raymond T C Wong: Average Adjuster

歡 迎 來 稿
Articles Welcome

為了將本季刊辦得更好，內容更豐富，歡迎各位會員來稿，談談你們對海運業的所見所聞，親身經歷和感受，讓大家能分享你們的經驗和心得。

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我們感謝大家的熱忱支持。

We aim to expand and enrich the contents of "Seaview". If you would like to share your thoughts or experiences with other members, please feel free to submit an article to the Editorial Board for consideration for publication. Articles and materials in connection with all aspects of sea transportation are welcome from members.

The number of words in an article should be around 1000, with soft copy in .doc format. Please mail to:
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Guideline of Articles for Seaview

文章應：
1. 與海運有關；
2. 內容與題目相符；
3. 沒有政治色彩。

Article(s) submitted for Seaview should be:
1. Related to sea transportation;
2. Contents to meet with the theme;
3. No politics.

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