ONC The Voyager
November 2019
2019 年 11 月

Cover Story

What is the Hong Kong Court's approach in determining whether a proceeding should be stayed based on forum non-conveniens?

Introduction

In September 2019, the Hong Kong Court of Appeal released a judgment (*Bright Shipping Ltd v Changhong Group (HK) Ltd* CACV 102/2019) (the "**Hong Kong Action**") which sheds light on the approach taken by the Hong Kong Court in deciding whether an action should be stayed based on the ground of *forum non-conveniens* where there are parallel proceedings in different jurisdictions.

Case background

On 6 January 2018, a collision at sea occurred between a cargo vessel, CF Crystal ("**Crystal**") owned by the Defendant ("**Changhong**") and a tanker, SANCHI ("**Sanchi**") owned by the Plaintiff ("**Bright Shipping**"). Sanchi exploded immediately upon collision and both vessels caught fire. Crystal managed to escape the fire yet Sanchi sunk on 14 January 2018. The collision resulted in pollution due to the split bunkers of both vessels and natural gas condensate from Sanchi.

The collision took place at about 125 nautical miles from Changjiang Kou Light Ship in the East China Sea, outside of the PRC's territorial waters but within the PRC's exclusive economic zone ("**EEZ**"). Article 3 of the United Nations Convention on the Law of the Sea ("**UNCLOS**") provides that the breadth of the territorial sea does not exceed 12 nautical miles. Article 55 of UNCLOS defines the EEZ as an area beyond and adjacent to the territorial sea. Article 57 provides that the breadth of the EEZ shall not extend beyond 200 nautical miles. The point of collision appears to lie within the EEZ of Korea

and Japan.

Procedural History in Hong Kong and Shanghai

The collision was followed in the *personam* collision action brought by Bright Shipping against Changhong in Hong Kong on 9 January 2019 and a number of legal actions in the Shanghai Maritime Court ("**SMC**"), including the constitution of two limitation funds by Changhong in SMC on 9 January 2019.

The Hong Kong Action was an appeal brought by the defendant, Changhong against the decision of Anthony Chan J on 15 November 2018 dismissing its application to stay an action brought in Hong Kong by Bright Shipping on the ground of *forum non-conveniens*. The Court of Appeal ("**CA**") was invited to decide the correct approach to be taken in an application for stay of an action on the ground of *forum non-conveniens* when there are parallel proceedings in different jurisdictions.

Legal principles governing application for stay of proceedings for *forum non-conveniens*

The CA referred to *SPH v SA* (2014) 17 HKCFAR 364 which summarized the principles governing the application for stay of proceedings for *forum non-conveniens* in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and held that:

1. The single question to be decided is whether there is other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action, i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
2. The applicant must establish two elements: first, Hong Kong is not the natural or appropriate forum, i.e. the forum has the most real and substantial connection with the action; and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong ("**Stage 1 Analysis**").

3. After the applicant establishes the two elements, the respondent must show that he will be deprived of a legitimate personal or judicial advantage if the action is tried in a forum other than Hong Kong ("**Stage 2 Analysis**").
4. The Court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum.

The CA further held that it may only interfere with an application for a stay for *forum non-conveniens* which involves the exercise of discretion in three circumstances:

1. The judge misdirected himself with regard to the principles in accordance with which

his discretion had to be exercised;

2. The judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or

3. The judge's decision is plainly wrong.

It was also held by the CA that "*the fact that an appellate court would have given more weight than the judge to one of the many factors to be taken into account in exercising the discretion is not a ground for interfering with the exercise of his discretion*".

Issue

The major issue face by the CA is whether Changhong can satisfy the second question of the Stage 1 Analysis, i.e. whether SMC is clearly and distinctly more appropriate than Hong Kong as the forum for the trial of the inter-ship action.

To satisfy the requirement, Counsel for Changhong submitted two arguments in relation to two fundamental errors made by the Judge:

1. The judge's use of the term "international waters" as the location of the collision is inapt in the context of an EEZ. He failed to appreciate the link between the collision and the claims for incident response costs and environmental damage (for greater amounts than the inter-ship losses as claimed) brought in the SMC, which has exclusive jurisdiction over those claims and in which Changhong has established two limitation funds to avail itself of its rights of limitation, hence making the SMC clearly and distinctly more appropriate than Hong Kong as the forum for the inter-ship action. He made no reference to the national laws relating to the exercise of the sovereignty of the PRC over the EEZ which apply in Hong Kong.

2. The judge's analysis in respect of *lis alibi pendens* (i.e. parallel proceedings in different jurisdictions) is wrong in law in that he applied the test that proceedings abroad involving the same issue are not of itself a material factor for the consideration of *forum non-conveniens* and where there are such proceedings the defendant must show unusual hardship to achieve a stay of proceedings.

Decision

The CA held that both arguments submitted by the Defendant cannot stand and the judge's approach remains correct.

Regarding the first argument, CA held that the focus is on the appropriateness of the forum from the point of view of the trial of the action and on that basis considered the primary issues for trial, namely, the inter-ship apportionment of liability and the assessment of the respective quantum of loss, from the angle of the evidence likely to be adduced for those issues. The claims for incident response costs and environmental damage brought in the SMC do not make the SMC more appropriate forum for the trial of the inter-ship claim in the present action.

It was held that the Constitution of limitation funds in the SMC is not a legal bar to bringing proceedings in Hong Kong in the present case. Hong Kong is a state party to the Convention on Limitation of Liability for Maritime Claims ("**LLMC**"). Article 13 of the LLMC provides for

the barring of other actions but this is expressly predicated on there being a fund constituted in accordance with Article 11 in any state party in which legal proceedings are instituted. Since China is not a state party to the LLMC, there is no statutory bar on Bright Shipping bringing any action against Changhong in Hong Kong, notwithstanding the constitution of the limitation funds by Changhong in the SMC.

Regarding the second argument, CA ruled that since Bright Shipping has never submitted itself to the jurisdiction of the SMC, the possibility of conflicting decisions and the problem relating to estoppel per *rem judicatam* and issue estoppel will not arise. The mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales; but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so. The judge was correct in applying the test of undue hardship that must be shown to achieve a stay of proceedings, i.e. the general rule that a multiplicity of proceedings is insufficient to stay an action may be departed from in exceptional cases where the bringing of the home action while the foreign action was processing might cause an unusual hardship to a particular defendant.

In the end, the CA dismissed the appeal and held that there was no basis to interfere with the judge's assessment that *lis alibi pendens* and related proceedings do not tip the balance in the Stage 1 Analysis.

Conclusion

Due to the inherent cross border nature of the shipping business, disputes in the shipping industry often involve multiple jurisdictions. The Court of Appeal decision in the Hong Kong Action provides clear guidance on the approach taken by the Hong Kong Court in deciding whether an action should be stayed on the ground of *forum non-conveniens* where there are parallel proceedings in different jurisdictions. In particular, the fact that the limitation funds are set up in another non-LLMC jurisdiction would not bar any legal proceedings in Hong Kong. Therefore, it is of pivotal importance that parties to shipping disputes, in deciding its choice of jurisdiction to set up any limitation funds, to check whether the jurisdiction is a state party to the LLMC so as to enable the constitution of the limitation funds to achieve its purpose of limiting liabilities.

UK to uphold Maritime Labour Convention after EU exit

The government of the United Kingdom has pledged the Maritime Labour Convention (the "**Convention**") into the European Union (Withdrawal Agreement) Bill (the "Bill") and listed it as "workers' retained EU rights". It means that the Convention will remain in effect after Brexit by virtue of the Bill passing into law.

The Convention is an International Labour Organization convention adopted in 2006 and is widely known as "the seafarers' bill of rights". It sets out the minimum rights and requirements of seafarers for most aspects of working and living conditions such as recruitment practices, occupational safety and social protection etc.

The inclusion of the Convention is interpreted as an attempt of the government to secure a parliamentary majority for the measure. Nonetheless, the decision also gained much support from a number of organizations such as Chamber of Shipping and Human Rights at Sea as it would provide continued protection on the labour rights of seafarers.

Baltic Exchange eyes new revenue model

The Singapore Exchange purchased the Baltic Exchange in November 2016, together with a three-year deal with the shipbrokers for free membership and exclusive indices distribution rights in exchange for provision of assessments.

Three years after the purchase, the Baltic Exchange is re-evaluating its position in the global shopping and revenue model. The centuries-old practice that shipbrokers supplied the data as part of membership of the London Bourse for free may be coming to an end. Recently, the Baltic Exchange is negotiating on the renewal of the agreements and seeking a deal with more than 30 shipbrokers. It is prepared to give remuneration to brokers for the provision of freight and time-charter assessments. Eleven of the world's largest shipbrokers have formed lobby group, Competitive ShipBrokers Ltd, and currently negotiate with the Baltic Exchange on the proposed changes such as the element of remuneration, and introduction of new indices for ship operating costs and shipping emissions.

US-sanctioned Cosco tankers unit gets two months' grace period to complete voyages

On 25 September 2019, the US government announced sanctions against Chinese tanker companies, including Cosco Shipping Tanker (Dalian), a subsidiary of China's shipping group Cosco.

Cosco is the second-largest owner in the VLCC segment, owning around 6% of the global VLCC fleet with 50 VLCCs.

Subsequently, on 24 October 2019, the US Treasury Department issued a sanctions waiver which allowed Cosco Shipping Tanker (Dalian) to wind down the transactions in relation to Iranian oil under the US sanctions until 20 December this year. However, this notice is not applicable to Cosco's other sanctioned affiliate, Cosco Shipping Tanker (Dalian) Seaman and Ship Management.

The sanctions imposed by the US government has driven up the freight rate as charterers had to replace vessels on short notice. The share prices of the tanker companies also decreased significantly, by around 2% to 10%, after the release of the notice issued by the US Treasury Department.

Ships will be fined for non-compliance with IMO 2020

The rules of International Maritime Organizations ("IMO") on low sulphur will come into effect on 1 January 2020. In a fuels symposium, attendees were told that ships or those responsible for ships will be fined for any non-compliance with the IMO rules, subject to further determination on the amount of the penalty and depending on different port states.

A few countries including Denmark, Japan and Singapore have started taking actions to be prepared for the IMO 2020 rules. Whilst Denmark started using sulphur-sniffing drones to detect sulphur compliance in April, Japan started supplying compliant fuels in October. In Singapore, an approved list of bunker suppliers would be available. It would also offer compliant fuels, test compatibility and arrange inspectors carrying portable sulphur test kits to ensure the ships comply with the rules before arrival.

Harmony Innovation Shipping PTE Ltd v Caravel Shipping Inc

[2019] EWHC 1037 (Comm)

* *

This case involved a chain of charterparties from the owners Tulip Finance Corporation ("**Tulip**") to the charterer Asuca Shipping HK Ltd ("**Ausca**"), to the sub-charterer Harmony Innovation Shipping Ltd ("**Harmony**") and to the sub-sub-charterer Caravel Shipping Inc ("**CSI**").

A cargo of coal was discharged at Navlakhi in Gujarat, India in around February 2018. A bank based in the Gulf presented a demand to Tulip claiming to be the lawful holder of the original bills of lading and demanded deliver up of the coal in late November 2018. However, the cargo of coal was no longer available for deliver up and the bank brought a claim for misdelivery which led to the arrest of a vessel, The Universal Premen ("**Vessel**"), in Singapore.

There were letters of indemnity issued by Harmony to Ausca and by CSI to Harmony, and the relevant part of the opening paragraph stipulated that in the absence of the bill of lading, the charterers: "...hereby request you to deliver the said cargo to Pangea Shipping Agencies Pvt Ltd, Mumbai or to such party as believed to be or to represent Pangea Shipping Agencies Pvt Ltd, Mumbai or to be acting on behalf of Pangea Shipping Agencies Pvt Ltd, Mumbai at Navlakhi Port India without production of the original bill of lading." Clause 1 continued by saying that in consideration of the complying with the request, "we have agreed…to indemnity you…in respect of any liability, loss, damage or expense of whatever nature which you may sustain by reason of delivering cargo in accordance with our request." Clause 3 stipulated, that "If in connection with the delivery of the cargo as aforesaid the ship…shall be arrested or detained…to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship…"

Harmony obtained a mandatory injunction against CSI ordering CSI to provide such security and/or bail and/or take all necessary steps required to secure the release of the Vessel. One of the applications before the court was an application by CSI to discharge the mandatory injunction.

The incidents leading up to the arrest of the Vessel are as follows:

The cargo had been loaded in Indonesia in early January 2018, and the bills of lading were issued on 8 January 2018. There was an email containing the draft bills of lading which stated that the notified party was to be Fortune Coal but the notified party in the bills of lading was eventually Kartik Industries.

On 19 January 2018, the master of the Vessel was notified that CSI had nominated Pangea as their agents at the port of Navlahki while Harmony had appointed GAC shipping (India) Pvt Ltd ("**GAC**") as their protective agent at the port and GAC had in turn appointed Arnav Shipping Pvt Ltd

("**Arnav**") as their sub-agent. Also, Shreeji Shipping Jamagar was appointed on behalf of the receivers.

Arnav signed a delivery order which stated that the cargo was to be delivered to Shreeji for the account of Fortune Coal, and a custom cargo declaration which stated that the goods had been sold on high seas and were to be delivered to Fortune Coal. When the Vessel arrived at Navlakhi, a Notice of Readiness was tendered and accepted by Pangea and signed by a Mr Ratheesh. Mr Ratheesh went on the Vessel on 25 January 2018 and 4 February 2018 by presenting an official Pangea identification pass and as representative of Arnav respectively.

The cargo was discharged and the master reported the discharge by way of email with a Discharged Completion Certificate signed by Mr Ratheesh on behalf of Arnav and by a representative of Shreeji. Pangea was one the recipients of the email.

The main issue before the Court was whether it had a high degree of assurance that the indemnified parties will succeed at the trial in relation to actual delivery.

The Court held that there was a high degree of assurance. The Court was of the view that although Mr Ratheesh had acted in different capacities, he represented Pangea on several occasions. The fact that CSI was aware of the bank's claim since early December 2018 and yet no evidence was presented as to the relationship between Pangea and Arnav or Mr Ratheesh led the court to conclude that it was inherently unlikely that the cargo was discharged without Pangea's knowledge.

CSI submitted that damages would be an adequate remedy, but the Court held that it would undermine the purpose of the letters of indemnity and that was to ensure that security would be advanced so that the Vessel which was arrested could be released to continue trading.

Eleni Shipping Ltd v Transgrain Shipping BV

[2019] 2 All ER (Comm) 667

* *

On 8 September 2009, the claimant ("Owners") time chartered their bulk carrier "ELENI P" ("Vessel") to Deiulemar Shipping SpA ("Deiulemar"). On 15 October 2009, Deiulemar sub-chartered the Vessel to the defendants ("Charterers") by a time charter on an amended NYPE 1946 form ("Charterparty"), and the Vessel was delivered on 29 October 2009 and was due for redelivery between 20 June 2010 and 20 August 2010. On 20 April 2010, the Charterers sub-sub-chartered the Vessel to Vista Shipping Ltd ("Vista"). On 29 April 2010, Vista gave voyage orders for the Vessel to load a cargo of iron ore in Ukraine for discharge in China. The Vessel was routed via the Suez Canal and the Gulf of Aden, and on 12 May 2010 the Vessel was attacked and subsequently captured by pirates at the Arabian Sea after sailing through the Gulf of Aden. On 11 December 2010, the Vessel was released, and the Vessel underwent repairs and cleaning etc. before embarking on her journey to discharge the cargo in China. On 18 January 2011, the Vessel was redelivered under the Charterparty.

The Owners claimed for an amount totaling US$5.6m, most of which accounted for hire from the time of the Vessel being seized until 25 December 2010 when the Vessel was back on the point where she was captured. The Owners' claim was rejected by the arbitral tribunal ("Tribunal") and the Owners appealed to the English Commercial Court under section 69 of the Arbitration Act 1996.

The relevant terms of the Charterparty are as follows:

Clause 15:

> "15. That in the event of the loss of time from deficiency and/or default of Owners' men or deficiency of stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost and bunker consumed during the period of suspended hire for the Owners' account (except when caused by the actions of Charterers or their Agents / servants); and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses directly related to loading and discharging and bunkering shall be deducted from the hire. Only amounts not in dispute are allowed to be deducted from the hire. (See clause 49)."

Clause 49:

> "Clause 49 – Capture, Seizure and Arrest

Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners' account.

Should the vessel be arrested during the currency of this Charter Party at the suit of any party having or purporting to have a claim against or any interest in the vessel, hire under this Charter Party shall not be payable in respect of any period during which the vessel is not fully at Charterers' disposal, and any directly related / proven expenses shall be for Owners' account, unless such arrest is due to action against Charterers or sub-Charterers or their Agents or the Contractors or the cargo Shippers or Consignees, thence hire is payable and Charterers undertake the responsibility to release the vessel by taking appropriate and required measures (issuance of security / etc) as the case maybe or arise."

Clause 101:

"Clause 101 – Piracy Clause

Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound."

The issue before the court was one of interpretation of the clauses 49 and 101:

With regard to clause 49, the Owners submitted that "capture[d]", "seized", "detained" and "arrested" were all qualified by "by any authority or any legal process" ("**Qualification**") while the Charterer and the majority of the Tribunal were of the view that "captured" was not subject to the Qualification and it was a freestanding word that covered capture by any cause including capture by pirates.

As for clause 101, the Owners submitted that the clause only covered piracy that took place during the transit of the Gulf of Aden but the Charterers and the Tribunal was of the view that the clause

covered piracy which was an immediate consequence of the Vessel being required to transit the Gulf of Aden.

The Court held that the Owners' interpretation was to be preferred. The words "capture[d]", "seized", "detained" and "arrested" were separated by the conjunction "or", and that means one could not tell whether the Qualification qualified all the four words or just the last one. However, there was no doubt that the following words "during the currency of this charterparty" governed all the four words and that would suggest that the same also applied to the words sandwiched between them. Also, since the last word "arrest" denoted actions by authority or under legal process, if the Qualification were to qualify "arrest" only, it would be redundant.

Further, as clause 15 specifically covered "detention by average accidents to ship or cargo", if clause 49 was intended to cover detention of any cause, clause 15 would be useless. Having said that, the word "captured" must also be intended to be qualified by "by any authority or any legal process".

From the commercial point of view, parties must have intended word "detained" be subject to the Qualification, otherwise detention could include a situation where the Vessel was being detained at a berth due to bad weather conditions or congestion. If the words "detained" and "arrested" were qualified by the Qualification, it would be unnatural for "captured" and "seized" alone be free-standing words.

The Court upheld the interpretation of the Tribunal. The Tribunal found that Gulf of Aden could not be defined geographically, and this was a finding of fact that the Court would not disturb. The Court was of the view that clause 101 was as a whole concerned with voyages through the Gulf of Aden. The purpose of the third sentence of the clause was to allocate the risk of loss of time from piracy putting the Vessel off-hire to the Owners and it made commercial sense for the Owners to agree to the Gulf of Aden transit in exchange for the commercial advantage of making the Vessel more commercially attractive to potential charterers. Therefore, the natural construction of the clause was that the Vessel should be off hire if she was detained by reason of piracy which was as an immediate consequence of the transit.

In sum, the Owners succeeded on the appeal in relation to clause 49 but fail on that in relation to clause 101.

Overseas-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"

[2019] SGHC 106

* *

The Defendant is the owner of the vessel, Yue You 902 ("**Vessel**"). The Plaintiff bank claimed against the Defendant a cargo of palm oil to which 14 bills of lading in the Plaintiff's possession.

A FGV Trading Sdn Bhd ("**FGV**") sold the cargo of palm oil to Aavanti Industries Pte Ltd ("**Aavanti**") who in turn sold it to Ruchi Soya Industries Ltd ("**Ruchi**"). The Defendant received instructions for the Vessel to transport the cargo of palm oil and 14 bills of lading were issued on behalf of the Defendant for the carriage of the palm oil. Aavanti requested a loan from the Plaintiff for the purchase price of the cargo and took the bills of ladings as security for the loan. When the Plaintiff received the 14 bills of lading from FGV, it informed Aavanti and requested payment instructions from Aavanti. Aavanti requested the financing by way of a trust receipt loan and the Plaintiff advanced the loan with a tenor of 21 days. However, by the time the Plaintiff remitted the requested loan amount to the designated bank, the cargo had already been discharged. Aavanti failed to repay the loan after the Plaintiff had granted an extension of time, so the Plaintiff proceeded to enforce its security over the bills of lading by demanding delivery of the cargo from the Defendant. The Defendant failed to deliver the cargo and the Plaintiff commenced proceedings against the Defendant for breach of contract of carriage, breach of contract of bailment, conversion and detinue.

One of the main issues of the case was whether the bills of lading were spent before the Plaintiff became their holder, and relevant parts of the section in the Bills of Lading Act reads:

2. (1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

…

shall (by virtue of becoming the holders of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party of that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach

to possession of the bill;

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

The Defendant argued that because the Plaintiff became the holder of the bills of lading after the Defendant had completely delivery of the cargo, the bills have become spent before the Plaintiff became their holder, so section 2(2) applied. However, the Plaintiff's situation did not fall within section 2(2)(a) because the "relevant contractual and other arrangements" was the granting of the loan by the Plaintiff to Aavanti and since it took place after the Defendant had completed delivery of the cargo, it is not a contractual or other arrangement made before the bills became spent. In order to simplify the proceedings, the Plaintiff conceded that it became holder of the bills of lading only after the Defendant had completely discharged the cargo and delivered it to Ruchi. Then, the Defendant submitted that if a bill of lading is spent when the goods covered by it have been delivered to the person entitled to delivery under the bill, then FGV was a person so entitled because it was still the holder of the bills of lading at the time the cargo was being discharged. In the alternative, the Defendant submitted that section 2(2) should be given a wider interpretation that it applies once the carrier has parted with possession of the cargo irrespective of whether delivery was made to a person entitled or not.

The Court held that the bills of lading were not spent by the time the Plaintiff became holder of the bills. It did not matter that neither the Plaintiff nor Aavanti had yet become persons entitled to delivery under the bill of lading, and the fact that the Plaintiff had not yet become entitled to delivery under the bill did not necessary mean the FGV continued to remain a person entitled. Whether FGV was entitled to delivery under the bill of lading would depend on whether the bill was endorsed to it or was blank endorsed and whether it had possession of the bill of lading such that it was a position to present the bill of lading to the carrier in exchange for delivery of the cargo. FGV did not have possession of the bill of lading such that it was in a position to present the bill of lading to the carrier in exchange for delivery of the cargo.

With regard to the alternative submission, the Court held that section 2(1) does not merely transfer the right to sue, but also the contractual rights generally under the contract of carriage, including the contractual right to possession. Since section 2(1) would transfer the contractual right to possession, and the phrase "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" determines whether section 2(1) applies, it would be circular to read the phrase as also referring to the contractual right to possession, as opposed to referring to constructive possession pursuant to the bill of lading's function as a document of title. The Court held that the phrase ought to be interpreted as covering the situation where a bill of lading would at

common law be regarded as spent and it is well established that delivery to a person not entitled does not cause a bill of lading to be spent.

In sum, the bills of lading were not spent by the time the Plaintiff become holders of the bills.

Can marine insurances fully protect against your risk and losses?

It is well known that Somali pirates are still active in the Gulf of Aden. Over the years, many vessels were taken by Somali pirates. One vessel, the Brillante Virtuoso, alleged to be extensively damaged under Somali pirate attack and was ultimately scrapped. The vessel was insured for US$77 million. The owner's claim was dismissed when it failed to comply with disclosure orders, leaving the mortgagee bank as sole claimant against war risks underwriters.

The Admiralty Judge and Judge in Charge of the Commercial Court, Mr Justice Teare, found that the constructive total loss of Brillante Virtuoso was caused by the wilful misconduct of the owner. Since the claimant could not establish that the loss was caused by an insured peril, the claim was dismissed (*Suez Fortune Investments Ltd & Another v Talbot Underwriting Ltd and Others (Brillante Virtuoso)* [2019] EWHC 2599 (Comm)) (the "**Brillante Virtuoso**" case). Against this background, this Q&A discusses the features of marine insurance as well as its concept of insured peril.

What is marine insurance?

Marine insurance is a centuries-old aid to the conduct of sea trade. The purpose of marine insurance has been to enable the shipowner and the buyer and seller of goods to operate their respective businesses while relieving themselves of the burdensome financial consequences of their properties being lost or damaged as a result of the various risks of the high sea. In the maritime industry, the risk is high as there is the potential risk of losing expensive cargo or valuable ships as well as the risk of losing seafarer lives due to accidents.

What types of insurances does a vessel require?

There are three types of insurances which are usually considered standard and invariably arranged for a vessel, and mortgagees would require the purchase of all three insurances: Hull & Machinery Insurance covers the vessel against total loss and partial damage, Protection and Indemnity Insurance covers shipowners' operators' and charterers' liability towards third parties and War Risks Insurance covers damage due to acts of war.

What information has to be provided when purchasing marine insurance?

Purchasers of marine insurance are usually shipowners (or sometimes their mortgagees desiring to obtain direct cover for their financial interest in the vessel) or cargo owners. In order to be able to obtain insurance cover, the

assured must give a full description of the risk – what it is (i.e. vessel or cargo), its value, where it is going etc. – which will be considered by potential insurers in deciding whether or not to accept the risk and at what premium rate. The insurer can decline to pay a claim based on the insured's non-disclosure or misrepresentation of material information. Thus, the disclosures and representations made by the assured concerning the risk must be accurate.

What are marine perils and insured perils?

Marine perils mean the perils consequent on, or incidental to the navigation of the sea. Insured perils are events that can cause damage or loss to property but are covered by an insurance policy that pays for the loss or damage. The different types of insured perils include:

1. Perils of the sea – fortuitous accidents or casualties of the sea but does not include ordinary action of the wind and waves;
2. Fire – i.e. fire losses caused by negligence of the crew;
3. Pirates and thieves – "pirates" is defined as including "passengers on the insured ship who mutiny and persons who attack the ship from land"; "thieves" is defined as not including "person who commit a clandestine theft or passengers, officers or members of the crew of the insured ship who commit a theft";
4. Captures, seizures and restraints – arrests etc. of kings, princes, and people is defined as including "political or executive acts, but does not include riot or ordinary judicial process";
5. Jettisons – the act of throwing goods or equipment overboard to save life or the maritime adventure;
6. Barratry – every wrongful act wilfully committed by the master or crew of the insured ship to the prejudice of the owner or charterer of the ship.

How to establish a claim that damage or loss was caused by insured peril?

When the perils insured against are mentioned in the marine insurance policy, the underwriters shall be liable for damages caused by the insured perils. The onus of proof under a policy of marine insurance is upon the insured to establish that the loss was proximate and caused by an insured peril. It is rare for insurers to succeed in refusing to pay out because the insured ship was scuttled. The Brillante Virtuoso case is one of those rare cases.

Why mortgagee bank can't establish its claim in the Brillante Virtuoso case?

When the owner's claim was barred due to wilful misconduct, the mortgagee bank can still claim as a co-assured. It is then for the mortgaging bank to show that the loss was caused by an insured peril. However, given that the group of armed men who set fire on the vessel were not pirates, did not intend to steal or ransom the vessel or steal from the crew, and there is no capture or seizure within the meaning of the

peril, the mortgagee bank could not establish an insured peril of “piracy”, “malicious mischief”, “persons acting maliciously” or any other insured perils. Accordingly, the war risk underwriters succeeded in rejecting the mortgagee bank’s claim.

Is marine insurance always a good way to protect one from risk and loss?

From the Brillante Virtuoso case we can see that even if the mortgagee bank’s original interest is ascertained, its cover may still be jeopardized by the shipowner’s acts or omissions. However, the adverse decision made against the mortgagee bank did not really affect the mortgagee bank financially. The mortgagee bank have been careful enough to get itself indemnified under a Mortgage Interest Insurance policy, so it was the insurers of that policy as subrogees who lost out in the litigation against the war risk insurers. Hence, taking out comprehensive insurance might be one of the most effective ways to guard against risk and business loss as insurance reduces risk by transferring it to the company that issues the policy.

For enquiries, please contact our Litigation & Dispute Resolution Department:

E: shipping@onc.hk
T: (852) 2810 1212
W: www.onc.hk
F: (852) 2804 6311
19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

本期專題

香港法院如何決定應否以非合適訴訟地為由而擱置法律程序？

2019 年 9 月，香港上訴法庭就 *Bright Shipping Ltd v Changhong Group (HK) Ltd* CACV 102/2019 一案（「**香港訟案**」）頒下判詞，說明了在不同的司法管轄區有並存法律程序進行的情況下，香港法院如何決定應否以非合適訴訟地（forum non-conveniens）為由而擱置訴訟。

案件背景

2018 年 1 月 6 日，長宏集團（「**被告人**」）擁有的「CF Crystal」號貨船與 Bright Shipping Ltd（「**原告人**」）擁有的「桑吉」號油輪在海上相撞。撞船後，油輪隨即爆炸，兩艘船隻均起火。貨船逃出火海，但油輪最終在 2018 年 1 月 14 日沉沒。兩船洩漏的燃油及桑吉號洩漏的凝析油造成嚴重污染。

兩船在距離東海長江口燈塔船大約 125 海里的位置相撞，該處並非中國水域，但位於中國專屬經濟區的範圍。《聯合國海洋法公約》第 3 條規定，領海的寬度不超過 12 海里；第 55 條將專屬經濟區定義為領海以外並鄰接領海的區域；第 57 條規定，專屬經濟區的寬度不得超過 200 海里。因此，撞船地點看來亦位於韓國和日本的專屬經濟區內。

在香港及上海的法律程序

撞船事件發生後，原告人於 2019 年 1 月 9 日在香港就船隻碰撞對被告人提出訴訟，被告人亦就此事件在上海海事法院提出多宗訴訟，包括於 2019 年 1 月 9 日在上海海事法院設立兩項限制基金。

被告人以香港並非合適訴訟地為理由，申請擱置原告人在香港提出的訴訟，但申請於 2018 年 11

月 15 日被陳健強法官駁回，被告人遂於香港訟案中提出上訴。被告人請求上訴法庭裁定，在不同的司法管轄區有並存法律程序進行的情況下，法院應採取甚麼方式處理以非合適訴訟地為由而提出的擱置訴訟申請。

處理以非合適訴訟地為由

擱置訴訟申請的法律原則

上訴法庭引用 *SPH v SA* (2014) 17 HKCFAR 364 一案所歸納在 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 訂下以非合適訴訟地為由擱置訴訟申請的法律原則，並裁定：

1. 唯一需要裁定的問題是：有沒有其他可供選擇、具有司法管轄權而適合審理有關案件的訴訟地，即是就所有當事人利益及達致公義而言更適合進行審訊的地點？

2. 申請人必須證明兩項元素，才符合擱置香港訴訟的基本要求：第一，香港並非自然或合適的訴訟地（即與訟案有著最真實和重要關連的訴訟地）；及第二，有另一個明顯或顯然比香港更為適合的訴訟地（「**第一階段分析**」）。

3. 若申請人能證明上述兩項元素，答辯人則須證明假如案件在香港以外的訴訟地審理，答辯人將被剝奪合法的個人或司法利益，才可阻止擱置香港訴訟的申請（「**第二階段分析**」）。

4. 法院需要在其他可選訴訟地的優點與原告人可能蒙受的損害之間取得平衡。即使原告人被剝奪某些個人利益，只要申請人能令法院信納在另一合適訴訟地審理案件能達致實質公義，擱置訴訟的申請未必會失敗。

上訴法庭進一步表明，法庭只會在三種情況下，干預以非合適訴訟地為由擱置訴訟的申請，並涉及行使酌情權的裁決：

1. 原審法官在行使其酌情權時所倚賴的原則有誤；

2. 原審法官在行使其酌情權時考慮了不應考慮的事宜，或沒有考慮應該考慮的事宜；或

3. 原審法官的決定顯然是錯誤的。

上訴法庭亦指出，「即使上訴法院在比原審法官對某項在行使酌情權時所需考慮的因素給予較大比重，也並非干預原審法官行使酌情權的理由。」

爭議

上訴法庭需要審理的主要爭議是被告人能否符合第一階段分析的第二項條件，即證明上海海事法院是否明顯或顯然比香港更適合作為審理船隻碰撞訴訟的地點。

為符合這項條件，被告人的大律師提出了兩個論點，指出原審法官所犯的兩項基本錯誤：

1. 撞船地點為專屬經濟區，原審法官稱之為「公海」並不恰當。法官未有重視撞船事件與在上海海事法院就事故應變費用及環境損害提出的申索（金額高於船隻間損失的索償）之間的關連。上海海事法院對上述申索具有專屬司法管轄權，而且被告人在上海海事法院設立了兩項限制基金，從而享有限制責任的權利，上海海事法院明顯及顯然地比香港更

適合成為審理船隻間訴訟的地點。原審法官未有參照關於中國對專屬經濟區行使主權並且適用於香港的國家法律。

2. 法官對於在不同司法管轄區進行的並存訴訟（lis alibi pendens）的分析存有法理上的謬誤，因為他運用的測試是：「涉及相同爭論點的外地法律程序」本身並非關於非合適訴訟地的重要考慮因素，被告人必須證明在有外地法律程序的情況下，自己將面對不尋常的困難，才能擱置香港訴訟。

裁決

上訴法庭裁定，被告人提出的兩個論點均不成立，原審法官的處理方式是正確的。

關於第一個論點，上訴法庭裁定，審理擱置訴訟申請的重點，是從審訊的角度來判斷訴訟地合適與否，並在此基礎上考量主要爭議（即兩船的責任攤分，以及評估各自的損失金額）所需援引的證據。被告人在上海海事法院就事故應變費用及環境損害提出申索，並不會令上海海事法院變為更適合審理本案的船間申索的地點。

上訴法庭裁定，被告人在上海海事法院設立限制基金並不妨礙原告人在香港就本案提出法律程序。香港是《海事索賠責任限制公約》(「該公約」) 的締約國，該公約第 13 條明確訂明，在已按照第 11 條在有任何訴訟被提起的締約國設立了限制基金的前提下，禁止作其他訴訟。但由於中國並非該公約的締約國，因此即使被告人在上海海事法院設立了限制基金，原告人仍可在香港對被告人提出任何訴訟。

至於第二個論點，上訴法庭認為由於原告人從未接受上海海事法院的司法管轄權，因此不會發生衝突裁決及紀錄不容自駁（estoppel per rem judicatam）或爭論點不容自駁（issue estoppel）的問題。單是在多個司法管轄區重複訴訟的缺點並不會有決定性的影響；但如果重複訴訟會造成有關支出或其他方面的嚴重後果，情況卻可能有所不同。法官正確地運用了「不尋常困難測試」，要求被告人證明自己將面對不尋常困難，才批准擱置法律程序。換言之，假如當正在進行外地訴訟時，在香港提出訴訟可能對某被告人造成不尋常的困難，在此特殊情況下，法院可以偏離關於重複訴訟不足以擱置訴訟的一般規則。

最後，上訴法庭駁回上訴，表示法院並無理據干預原審法官的評估，認為在不同司法管轄區進行的並存訴訟及相關法律程序並不影響第一階段分析的結果。

總結

鑒於航運業務固有的跨境性質，航運業界的爭議往往涉及多個不同的司法管轄區。上訴法庭在香港訟案的裁決提供了清晰的指引，說明在有並存法律程序在不同司法管轄區進行的情況下，香港法院如何決定應否以非合適訴訟地為由而擱置訴訟。假若當事人已在一個非該公約締約國設立了限制基金，此限制基金並不能阻止其他人在香港提出任何法律訴訟。因此，牽涉航運糾紛的當事人在選擇司法管轄區設立限制基金時，必須先檢查有關司法管轄區是否該公約的締約國，以確保該限制基金能夠達到限制法律責任的目的。

英國脫歐後將繼續遵守《海事勞工公約》

英國政府承諾將《海事勞工公約》(「**該公約**」) 納入《退出歐盟協議法案》(「**脫歐法案**」)，並將該公約列為「工人保留的歐盟權利」。這意味著在脫歐法案通過成為法例後，該公約在英國脫歐後將繼續有效。

該公約於 2006 年獲國際勞工組織採納，素有「海員權利法案」之稱。該公約載列關乎海員工作及生活條件眾多方面（如招聘、職業安全及社會保障等）的最低權利及規定。

外界認為，英國政府納入該公約是為了爭取大多數國會議員支持脫歐法案。不過，因此項決定將令海員的勞工權益繼續獲得保障，所以亦獲得航運商會（Chamber of Shipping）及海上人權組織（Human Rights at Sea）等多個機構大力支持。

波羅的海交易所放眼新的收益模式

2016 年 11 月，新加坡交易所收購了波羅的海交易所 (「**波交所**」)，並與多家船舶經紀商訂立一項為期三年的交易，為該等船舶經紀商提供免費會籍及獨家指數發布權利，以換取他們提供多項評估。

上述收購完成至今已有三年，波交所現正重新評估其在全球航運業界的位置及收益模式，過去數百年來船舶經紀商提供數據以換取倫敦交易所免費會籍這個慣例可能即將劃上句號。最近，波交所正與 30 多家船舶經紀商磋商重續協議及尋求達成交易，並樂意就經紀商提供的貨運及期租評估支付酬金。全球最大的 11 家船舶經紀商已組成名為 Competitive ShipBrokers Ltd 的游說組織，目前正與波交所就各項建議修訂作出協商，例如酬金問題及就船隻經營成本及航運排放量推出新的指數。

被美國制裁的中遠油輪獲兩個月寬限期以完成航程

2019 年 9 月 25 日，美國政府宣佈對中國多家油輪公司實施制裁，當中包括中遠集團的附屬公司大連中遠海運油品運輸。中遠是超大型油輪行業的第二大船東，旗下擁有 50 艘超大型油輪，約佔全球超大型油輪數目的 6%。

美國財政部其後於 2019 年 10 月 24 日發出臨時制裁豁免，允許大連中遠海運油品運輸逐步結束被美國制裁的與伊朗石油有關之交易，有效期直至本年 12 月 20 日，惟此項寬限不適用於中遠另一家被制裁的聯屬公司──大連中遠海運油運船員船舶管理。

美國政府實施的制裁導致租船人須於短時間內更換船隻，造成運費上升。在美國財政部發出制裁通知後，涉事油輪公司的股價大跌約 2%至 10%。

船隻違反《2020 年國際海事組織條例》將被罰款

國際海事組織將於 2020 年 1 月 1 日實施低硫燃油規定。近日一個燃油研討會提到，船隻或其負責人若違反國際海事組織的任何規定，將被處以罰款，罰款金額有待釐定，並取決於不同的港口國。

丹麥、日本及新加坡等國家已開始採取行動，為《2020 年國際海事組織條例》作好準備。其中，丹麥於 4 月開始使用無人駕駛的硫磺探測機，偵查船隻使用含硫燃油是否符合標準，而日本亦於 10 月開始供應合規燃油。至於新加坡，當局除了會發布核准燃油船供應商的名單外，亦將為船隻提供合規燃油、兼容性測試，並安排檢查人員帶備流動裝置測試含硫量，以確保船隻抵港前遵守規則。

Harmony Innovation Shipping PTE Ltd v Caravel Shipping Inc

[2019] EWHC 1037 (Comm)

* *

此案涉及 Tulip Finance Corporation (「**船東**」)、Ausca Shipping HK Ltd (「**租船人**」)、Harmony Innovation Shipping Ltd (「**轉租船人**」) 及 Caravel Shipping Inc (「**次轉租船人**」) 之間訂立的連串租船合同。

2018 年 2 月左右，一批煤炭在印度古吉拉特邦的瑙勒基港卸載。海灣地區的一家銀行向船東發出要求償債書，聲稱是提單正本的合法持有人，要求船東在 2018 年 11 月尾交付煤炭，但船東無法交貨，銀行因此提出錯誤交貨申索，導致「The Universal Premen」號 (「**該船隻**」) 在新加坡被扣押。

轉租船人向租船人發出了彌償保證書，而次轉租船人亦向轉租船人發出了彌償保證書，當中首段的相關部分訂明，在沒有提單的情況下，租船人：「......謹此要求閣下在無須出示提單正本的情況下，在印度的瑙勒基港將上述貨物交付予孟買的 Pangea Shipping Agencies Pvt Ltd 或相信是或代表該公司或代該公司行事的有關人士。」第 1 條續指，鑒於上述要求獲遵從，「吾等同意......就閣下因按照吾等的要求交付貨物而可能遭受的任何性質的責任、損失、損害或費用......向閣下作出彌償。」第 3 條則訂明：「若由於交付上述貨物而導致船隻......被扣押或扣留......將提供可能所需的保釋金或其他抵押，以避免船隻被扣押或滯留或促使船隻獲釋......」

轉租船人成功向法院申請對次轉租船人發出強制令，命令次轉租船人提供抵押及 / 或保釋金及 / 或採取一切必需步驟，以促使該船隻獲釋。次轉租船人及後向法院申請解除強制令。

在該船隻被扣押前發生的事件如下：

涉案貨物於 2018 年 1 月初在印尼裝船，而提單則於 2018 年 1 月 8 日發出。載有提單草稿的電郵指明被通知人應是 Fortune Coal，但提單內的被通知人最終卻是 Kartik Industries。

2018 年 1 月 19 日，該船隻的船長接獲通知，次轉租船人提名 Pangea 為其在瑙勒基港的代理人，而轉租船人委任 GAC shipping (India) Pvt Ltd (「**GAC**」) 為其在瑙勒基港的保護代理人，GAC 則再委任 Arnav Shipping Pvt Ltd(「**Arnav**」)為其次代理人。此外，Shreeji Shipping Jamagar (「**Shreeji**」) 亦獲委任為收貨人的代表。

Arnav 簽署了一份提貨單，當中指明 Shreeji 為 Fortune Coal 提貨，而貨物報關單上亦指明有關貨物已在公海出售，並將交付予 Fortune Coal。該船隻在抵達瑙勒基港後發出裝卸準備就緒通知書，獲 Pangea 接納及由 Ratheesh 先生簽署。2018 年 1 月 25 日及 2 月 4 日，Ratheesh 先生分別透過出示 Pangea 的官方身份證明文件及以 Arnav 代表身份，兩度登上該船隻。

卸貨後，船長以電郵作出匯報，並附上經 Ratheesh 先生（Arnav 代表）及 Shreeji 代表簽署的完成卸貨證明書。Pangea 是該郵件的收件人之一。

法院需審理的主要爭論點是：法院是否可以非常肯定獲彌償一方（即轉租船人）將在關於實際交付的審訊中勝訴？

法院認為非常肯定。法院認為，儘管 Ratheesh 先生以不同的身份行事，但他曾多次代表 Pangea。事實上，次轉租船人自 2018 年 12 月初已知悉銀行的申索，但沒有就 Pangea 與 Arnav 或 Ratheesh 先生的關係提出任何證據，這令法院裁定涉案貨物是不大可能在 Pangea 不知情下卸載的。

次轉租船人認為，作出損害賠償將是足夠的補救方法，但法院裁定這樣會削弱彌償保證書的目的──就是確保獲提供抵押，從而使被扣押的該船隻可獲釋以繼續經營。

Eleni Shipping Ltd v Transgrain Shipping BV

[2019] 2 All ER (Comm) 667

* *

2009 年 9 月 8 日，索償人（「**船東**」）將其散裝貨船「ELENI P」號（「**該船隻**」）以期租方式出租予 Deiulemar Shipping SpA（「**Deiulemar**」）。2009 年 10 月 15 日，Deiulemar 以經修訂的 NYPE 1946 租船合同格式（「**該租船合同**」）將該船隻以期租方式轉租予被告人（「**租船人**」）。船東於 2009 年 10 月 29 日交船予 Deiulemar，而 Deiulemar 應於 2010 年 6 月 20 日至 8 月 20 日交船予租船人。2010 年 4 月 20 日，租船人再將該船隻轉租予 Vista Shipping Ltd（「**Vista**」）。2010 年 4 月 29 日，Vista 指示該船隻由烏克蘭運載一批鐵礦到中國卸貨。該船隻取道蘇彝士運河及亞丁灣，但在駛越亞丁灣後，於 2010 年 5 月 12 日在阿拉伯海被海盜襲擊並俘虜。該船隻於 2010 年 12 月 11 日獲釋，並於維修及收拾後重新出發前往中國卸貨。2011 年 1 月 18 日，該船隻根據該租船合同交還。

船東追討合共 560 萬美元賠償，主要是由該船隻被扣押起至其於 2010 年 12 月 25 日返回被俘虜位置期間的船租損失。仲裁庭駁回船東的申索，船東於是根據英國《1996 年仲裁法》第 69 條向英國商事法庭上訴。

該租船合同的相關條款如下：

第 15 條：

> 「15.假如由於：船東員工的不足及／或失責；倉儲不足；火災；船體、機械或設備故障或損壞；擱淺；船隻或貨物因海事意外被扣留；為船檢或船底髹漆而進入乾船塢；或因任何其他令船隻無法全面運作的原因，而損失時間，則須停止就因此損失的時間收取船租，而在暫停收取船租期間使用的燃油應由船東負擔（除非是因租船人或其代理人／傭工的行為造成，則屬例外）；而假如在航程中由於船體、機械或設備的任何部分缺陷或故障以致航速降低，所損失的時間、因此耗用額外燃油的成本以及與燃油裝卸直接有關的所有額外開支，均須從船租中扣除。只有無爭議的金額可從船租中扣除（見第 49 條）。」

第 49 條：

> 「第 49 條 – 俘虜、扣押及逮捕
>
> 如船隻在本租船合同期間被任何有關當局或在任何法律程序中被俘虜或扣押或扣留或逮捕（be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party），則須就實際損失的時間暫停收取船租，除非上述俘虜、扣押、扣留

或逮捕是由租船人或其代理人的任何個人行為、不作為或失責造成，則屬例外。由於及 / 或在上述俘虜、扣押、扣留或逮捕期間招致的任何額外開支，須由船東承擔。

如船隻在本租船合同期間因任何對其享有或宣稱享有申索或權益的人士提出訴訟而被逮捕，則無須就船隻並非完全由租船人處置的任何期間支付本租船合同下的船租，而任何直接有關 / 經證實的開支須由船東負擔，除非上述逮捕是由於針對租船人、轉租船人或彼等的代理人或承判商或託運人或收貨人的訴訟而導致，則須支付船租，而租船人承諾負責採取適當及所須的措施（提供抵押等，視情況而定）令船隻獲釋。」

第 101 條：

「第 101 條 – 海盜條款

租船人可以在任何時間駛經亞丁灣，而船隻承保人報價的所有額外戰爭風險保費及 / 或劫持及贖金（如有）將由租船人付還。同樣，任何額外的船員戰爭花紅（如適用）將由租船人在收到有關的真實票據後向船東付還。假如船隻因海盜活動而受到威脅 / 劫持，則須暫停收取船租。雙方明白，在駛經亞丁灣時，船隻將遵守駛經亞丁灣所須的一切程序，包括但不限於該區巡航小隊關於安全地西行或東行所收到的指示。」

法院須審理的問題是第 49 及 101 條的詮釋：

就第 49 條而言，船東認為在英文原文中，(被)「俘虜」、「扣押」、「扣留」及「逮捕」均屬「被任何有關當局或在任何法律程序中」(「**該修飾語**」) 所修飾的對象；但租船人及仲裁庭的大多數仲裁員認為，

（被)「俘虜」並非該修飾語所修飾的對象，而是單獨存在的字詞，涵蓋因任何原因（包括海盜）而被俘虜的情況。

至於第 101 條，船東認為該條只涵蓋在駛經亞丁灣期間遇到海盜的情況，但船租人及仲裁庭則認為該條應涵蓋該船隻直接由於須駛經亞丁灣而遇到海盜的情況。

就第 49 條，法院認為應採用船東的解釋。「俘虜」、「扣押」、「扣留」及「逮捕」四個之間均以「或」這個連接詞連接，因此無法知道該修飾語是修飾全部四個詞語，還是只修飾最後一個。但無庸置疑的是，「在本租船合同期間」一句適用於全部四個詞語，這亦顯示該句亦適用於夾在兩者之間的字詞。而且，由於最後一詞「逮捕」的意思正是被有關當局或在法律程序中採取行動，假如該修飾語只是用來修飾「逮捕」一詞，便屬冗餘。

此外，由於第 15 條明確涵蓋「船隻或貨物因海事意外被扣留」的情況，假如第 49 條的用意是包括因

任何原因導致的扣留，第 15 條便屬多餘。故此，「俘虜」一詞必定也應受到「被任何有關當局或在任何法律程序中」所修飾。

從商業角度來看，雙方必然是希望「扣留」一詞受到該修飾語所修飾，否則「扣留」便會涵蓋該船隻因惡劣天氣或擠塞而滯留在泊位的情況。若「扣留」和「逮捕」均受該修飾語所修飾，「俘虜」及「扣押」自成一詞則便十分不自然。

至於第 101 條，法院確認仲裁庭的詮釋。仲裁庭認為亞丁灣無法在地理上定義，而法院不會干預此項事實裁決。法院認為，第 101 條整體上是關於駛經亞丁灣的航程，該條款第三句的目的是將海盜造成該船隻解租的時間損失風險歸於船東。在商言商，船東同意讓該船隻駛經亞丁灣，提高該船隻對潛在租船人的吸引力，是合理的做法。因此，該條款的自然解釋是：假如該船隻直接由於駛經亞丁灣而被海盜扣留，則應解租。

總括而言，船東就第 49 條上訴得直，但就第 101 條上訴失敗。

Overseas-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"

[2019] SGHC 106

* *

被告人是「粵油 902」號（「**該船隻**」）的船東。原告銀行（「**原告人**」）就其管有的 14 份提單向被告人追討一批棕櫚油。

Aavanti Industries Pte Ltd（「**Aavanti**」）先向 A FGV Trading Sdn Bhd （「**FGV**」）購買一批棕櫚油，然後轉售予 Ruchi Soya Industries Ltd（「**Ruchi**」）。被告人收到指示以該船隻運載棕櫚油（「**貨物**」），被告人的代表發出了 14 份有關運輸貨物的提單。Aavanti 要求原告人就貨物的售價借出貸款外，並以上述提單作為貸款的抵押品。原告人從 FGV 收到 14 份提單後便通知 Aavanti，要求 Aavanti 發出付款指示。Aavanti 要求原告人以信託收據貸款方式借出款項，原告人其後提供為期 21 日的貸款。但是，在原告人將 Aavanti 要求的貸款款項匯付到指定銀行前，貨物經已卸載。由於 Aavanti 在原告人批准延長的期限後仍未能償還貸款，故此原告人行使其對提單的抵押權，要求被告人交付貨物。被告人無法交付貨物，原告人因而提出訴訟控告被告人違反運輸合約、違反委託保管合約、侵佔及扣押他人財物。

本案的其中一個主要爭論點是：在原告人成為提單的持有人前，提單是否經已失效。英國《提單法》的相關章節部分規定：

2. (1) 除本節以下條文另有規定外，任何人若成為──

(a) 提單的合法持有人；

...

則該運輸合約下的一切訴訟權利，即因該人成為提單的合法持有人或獲交付貨物的人（視屬何情況而定）而轉讓予及歸屬該人，猶如該人是該合約的訂約方一樣。

(2) 凡任何人在成為提單的合法持有人之時，管有該提單不再賦予該提單所涉貨物（針對承運人來說）的管有權，則該人不得憑藉第 (1) 款獲轉讓任何權利，除非該人是──

(a) 憑藉任何依據合約安排或其他安排所進行的交易而成為該提單的持有人，而該等安排是在管有該提單不再賦予貨物管有權之前所作出的；

(b) 因被另一人拒絕接收並退回依據任何該等安排所交付的貨物或單據，而成為該提單的持

有人。

被告人辯稱，因為原告人是在被告人完成交付貨物後才成為提單的持有人，所以提單在原告人成為其持有人前經已失效，第 2(2) 條因此適用。但是，原告人的狀況並不屬於第 2(2)(a) 條指明的範圍以內，因為「有關合約安排及其他安排」是原告人向 Aavanti 授出貸款，而由於此事是在被告人已完成交付貨物後才發生的，故此並非提單失效前訂立的合約安排或其他安排。為了簡化訴訟程序，原告人承認，他是在被告人完成卸載貨物並將貨物交付予 Ruchi 後才成為提單的持有人。其後，被告人陳詞指，若在提單所指的貨物已交付予根據提單有權提取貨物的人士時，提單已失去時效，則 FGV 才是有權提取貨物的人士，因為 FGV 於貨物卸載期間仍然持有提單。被告人亦作出交替陳詞，指第 2(2) 條在應用時應作較廣義的解釋，即不論有權或無權提取貨物的人士是否已獲交付貨物，一旦承運人放棄管有貨物，該條文便應適用。

法院認為，提單在原告人成為其持有人前並未失效。即使原告人或 Aavanti 並未成為提單下有權提取貨物的人士也沒關係，原告人並未成為提單下有權提取貨物的人士，亦不代表 FGV 仍然有權提取貨物。FGV 是否有權根據提單提取貨物，是取決於提單是否背書予 FGV 還是作空白背書，以及 FGV 是否管有提單而因此有能力向承運人出示提單以換取交付貨物的。FGV 並無管有提單，因此沒有能力向承運人出示提單以換取交付貨物。

至於交替陳詞方面，法院認為第 2(1) 條不只限於轉讓訴訟權利，亦包括運輸合約下的一般合約權利，例如管有合約權利。由於第 2(1) 條會將合約下的管有權利轉讓，而且「管有該提單不再賦予該提單所涉貨物（針對承運人來說）的管有權」一句將決定第 2(1) 條是否適用，故此將此句理解為亦指合約下的管有權利而非根據提單（作為所有權文件）的功能所指的推定管有，將屬循環論證而無效的。法院裁定，此句應解釋為涵蓋提單在普通法下被視為失效的情況，而法律上早已確立將貨物交付予無權收取的人士並不會導致提單失效。

總括而言，提單在原告人成為其持有人前並未失效。

海上保險能就風險及損失提供全面保障嗎？

索馬里海盜一直活躍於亞丁灣一帶，多年來俘虜了不少船隻。一艘名為「Brillante Virtuoso」號的船隻據稱遭索馬里海盜襲擊而嚴重受損，最終報廢。該船隻的保額為 7,700 萬美元，但船東由於沒有遵循披露命令而被駁回申索，於是承按銀行以唯一索償人身份對戰爭風險承保人提出申索。

海事法官及商事法庭專責法官 Teare 法官裁斷，「Brillante Virtuoso」號的推定全損是由於船東的故意不當行為造成。由於承按銀行未能證明損失是由受保危險造成，故此其申索亦被駁回（*Suez Fortune Investments Ltd & Another v Talbot Underwriting Ltd and Others (Brillante Virtuoso)* [2019] EWHC 2599 (Comm)）（「**Brillante Virtuoso** 案」）。本文將以上述案件為例，探討海上保險的特點以及受保危險的概念。

甚麼是海上保險？

數百年來，海上保險（又稱海運保險或水險）一直是進行海上貿易的輔助工具。海上保險的目的是讓船東及貨物的買賣雙方能夠各自經營業務，同時在他們的財產因公海的各種風險遭受損失或損壞的情況下減輕其財政負擔。航運業屬高風險行業，貨主或船東在運輸途中可能因意外失去貴重的貨物或價值不菲的船隻，甚或令海員喪命。

船隻需要甚麼類別的保險？

船隻通常必須投購三類標準保險，而承按人亦會要求船東投購全部三類保險：船體及機械保險（承保船隻的全損及部分損壞）、保障及彌償保險（承保船隻擁有人、管理人、租用人對第三方承擔的責任）及戰爭風險保險（承保由於戰爭行為造成的損壞）。

投購海上保險時須提供甚麼資料？

投購海上保險的人通常是船東（有時是船東的承按人，因為他們希望就其於船隻的財務權益獲得直接保障）或貨主。為了獲得保險保障，受保人必須完整說明風險，例如受保對象（即船隻或貨物）、其價值及目的地等，保險公司在決定是否承保風險及保費金額時將考慮以上各點。若受保人沒有披露重大資料或就此作出失實陳述，保險公司可拒絕賠償。因此，受保人必須就有關風險作出準確的披露及陳述。

甚麼是海上危險及受保危險？

海上危險是指由於在海上航行而導致或附帶引起的危險。受保危險是指可造成財產損壞或損失，但獲保險賠償上述損失或損壞的事件。不同類別的受保危險包括：

1. 海險：海上發生的偶然意外或災害事故，但不包括一般風浪的影響；
2. 火災：因船員疏忽而造成的火災損失；
3. 海盜及盜賊：「海盜」的定義包括「在受保船隻上叛變的乘客以及從岸上襲擊該船的人」；

「盜賊」的定義不包括「在受保船隻上犯下暗竊的人，或犯下盜竊的乘客、高級人員或船員」；

4. 掠獲、扣押及限制：君王、君主及人民所作的拘禁等，其定義包括「政治或行政方面的作為，但不包括暴動或一般司法程序」；
5. 投棄：將船上的貨物或設備扔到海裡，以拯救人命或保留航程的作為；
6. 船員不法行為：受保船隻的船長或船員所作出各項損害船東或租船人利益的故意不當行為。

如何確立損壞或損失乃由受保危險造成的申索？

若海運保單內提及某危險事項受保，承保人便須對該受保危險造成的損害負責。海運保單的受保人負有舉證責任，須證明受保危險是造成損失的近因。保險公司甚少因受保船隻沉沒而成功獲法院批准不用支付賠款，Brillante Virtuoso 案是其中一個罕見例子。

為甚麼承按銀行未能在 Brillante Virtuoso 案中確立其申索？

雖然船東的申索因故意失當行為而被駁回，但承按銀行仍可以共同受保人的身份提出申索。承按銀行須證明案中的損失是由受保危險造成。但是，由於對涉事船隻縱火的武裝份子並非海盜，他們無意奪取或綁架該船隻或偷取船員的財物，而且並無發生屬危險事項範圍以內的掠獲或扣押，故此承按銀行無法證明有關「海盜」、「惡意傷害」、「有人作出惡意行動」的受保危險或任何其他受保危險。因此，戰爭風險承保人成功向法院申請駁回承按銀行的申索。

海上保險必定是否確保受保人免受風險及損失的有效方法？

從 Brillante Virtuoso 案可見，儘管承按銀行的原有權益獲確定，但其應有的保障仍可能因船東的作為或不作為而受到損害。承按銀行雖被法院判處敗訴，但其財政並無真的受到影響，因為承按銀行已設想周全，另行訂立了按揭權益保單以獲得彌償，故此實情是按揭權益保單承保人在與戰爭風險承保人的訴訟中敗訴。因此，購買全保將風險轉嫁予保險公司，可能是最有效降低風險及避免商業損失的方法。

如有查詢，請聯絡我們的訴訟及調解爭議部門：

E: shipping@onc.hk
T: (852) 2810 1212
W: www.onc.hk
F: (852) 2804 6311
香港中環康樂廣場 8 號交易廣場第三期 19 樓